

THE HIGH COURT

Record Number: 2010 No. 10190P

Between:

Adjoua Salako

Plaintiff

And

Stephen O'Carroll

Defendant

Judgment of Mr Justice Michael Peart delivered on the 25th day of January 2013:

1. Having heard all the evidence in this personal injury action over about ten days, it came as no surprise that the defendant made an application to the Court to have the entire proceedings dismissed pursuant to the provisions of Section 26 of the Civil Liability and Courts Act, 2004 which provides:

"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." (emphasis added)

2. It is doubtless a draconian section to be used only in a clear case in which a plaintiff is shown on the balance of probabilities to have intended deliberately to mislead the Court in relation to a material matter by either giving false evidence himself/herself, or by deliberately causing some other person to give false or misleading evidence on her behalf. The section is not intended to deprive a person of damages because the evidence has established that the plaintiff in some unintended way has given evidence which is wrong, or even where it establishes that the plaintiff deliberately gave false or misleading evidence but only in relation to some immaterial matter. While in relation to the latter a Court will not allow the plaintiff to benefit by reference to the mistaken evidence, it would be unjust to dismiss the entirety of the claim. Section 26 makes it clear that an action must be dismissed *"unless for reasons which the Court shall state in its decision, the dismissal of the action would result in injustice being done"*.

But the section mandates the dismissal of the entirety of the plaintiff's claim if the evidence establishes that the plaintiff has deliberately misled the Court in a material way or has intentionally caused some other witness to give false or misleading evidence. Put very plainly, the section is intended to prevent a plaintiff succeeding in recovering damages from a defendant where he/she gives evidence which he/she knows is untrue or has exaggerated in some material respect, or where he/she causes some other person to do so. Of particular relevance in the present case will be whether this plaintiff on one or even more occasions deliberately gave a false and/or exaggerated account of and presentation of her symptoms and complaints when she attended certain medical consultants so that those consultants would then give evidence which she knew was false and/or exaggerated. While the defendant has pointed to a great number of occasions on which it is alleged that a false or exaggerated account and presentation of symptoms and complaints was given to consultants, it suffices in my view for her to be shown to have done so even once, since even that one occasion is sufficient to trigger the section and mandate a dismissal of the entire case. For that reason it may not be necessary to examine each and every instance upon which the defendant is relying.

3. Before addressing the particular aspects of the plaintiff's case to which the defendant points in support of this application to

dismiss her claim in its entirety, I wish to make some general remarks.

4. The plaintiff is not an Irish national. She has said that she is from Togo, and came to this country as a refugee and claimed asylum here.. French is her first language. She speaks English fluently but for obvious reasons with a pronounced accent which, it must be accepted, can on occasion make her difficult to understand and follow. That feature has itself added greatly to the length of this case because it frequently occurred during the course of her evidence that either she had not understood or followed a question which was being asked by Counsel, or Counsel, or indeed myself, could not fully understand the answer she was giving. This frequently meant that a question or answer had to be repeated.

5. These will undoubtedly have been present also for any medical expert she attended for the purpose of her treatment and for the purpose of this case. Equally, I am sure that her solicitors and Counsel will have encountered these difficulties in their dealings with her also. I mention her solicitors and counsel in particular because complaint is made by the defendant that the manner in which the case was opened to this Court and the way in which pleadings have been drafted has not always been consistent with the evidence which the plaintiff has given. To take a simple and straightforward example, it is pleaded in the Personal Injury Summons that immediately after this accident the plaintiff was taken by ambulance to James Connolly Memorial Hospital in Blanchardstown. That was explained by Counsel on the basis of an error by her solicitor. On the other hand, it is clear that she stated also to a Dr. Nasim that she had gone by ambulance, yet her own very clear and unequivocal oral evidence has been that she was driven to hospital by a friend. She has seemed to say different things to different people not only in that respect but in other matters too. But I refer to this matter as just one example of the sort of difficulty which may have been encountered by persons interacting with the plaintiff, and perhaps because of her difficulties with communication on account of her accent and the fact that English is not her first language. While I may be being over-indulgent to the plaintiff in this regard, I am giving her the benefit of the doubt in view of the difficulties under which she labours due to her foreign nationality.

6. The ambulance issue is not of course a material issue, and, even if for some unknown reason she had deliberately given false evidence in that regard, it would not be a matter of such materiality to the overall claim as to warrant a dismissal of the entire action under s. 26(1) of the Act of 2006, since her evidence would not have been *"false or misleading, in any material respect"*. There have been a number of instances where her evidence in some immaterial respects has not been accurate. It is unnecessary to set them all out in detail. I will not be taking such matters into account in reaching my overall conclusion on this application. The reason for that is firstly that I am making all due and reasonable allowance for the fact that the plaintiff, for the reason stated, has difficulties in communication which are not faced by those whose first language is English. It would be unjust not to make full allowance for that, and I do so.

7. Another difficulty which is present occasionally is that she appears to be taking an inordinate amount of medication at times. These medications have all been prescribed for all her various complaints and conditions, but some of the medication is very strong, and in particular I refer to her frequent use of a painkiller drug known as DF 118. It contains the opiate 'dihydrocodeine', and is a very strong painkiller. It can also apparently result in dependency. It can cause the sort of drowsiness which affected the plaintiff to such an extent on the very first day on which this case was called on that the plaintiff was unable to usefully instruct her solicitors and give evidence. For that reason the case was adjourned to the following day. It may be that on occasion that a combination of medication taken and her accent exacerbates further her difficulties with communication. It may lead to her not being fully or properly understood. It cannot of course account for deliberate falsehood, and I am not for one moment suggesting that the Court should consider this factor in its assessment of her honesty. But it would help to explain some of the less material inaccuracies which have become apparent during her evidence or indeed her complete lack of recollection of things which one would ordinarily expect would be easily remembered.

8. The plaintiff has appeared to me to be as a very poor historian. Whether at times this is deliberate, I will not decide, simply because it is unnecessary to do so. But it has appeared to be the case that when faced with a question the likely correct answer to which may not help her case she seeks refuge in a difficulty of recollection, or a difficulty with language. A simple and straightforward example of this can be found in her evidence of the accident itself and its immediate aftermath. The plaintiff's case was opened by Counsel on the basis that the impact to the rear of her vehicle by the defendant's vehicle was "very severe" and "with some velocity". In her evidence however the best she could do was to say that she heard a noise and then had what she called 'a blackout'. She did not in her direct examination describe the impact as very severe or speak of the velocity or speed of the defendant's car. She was cross-examined about this naturally, but stated during her questioning that she did not remember the impact. There has been evidence from Garda Reynolds who attended at the scene and he has stated that from his examination of the vehicles at the scene he would describe the accident as minor in nature, and that neither vehicle would have been travelling at an excessive speed. He went on to say that from his experience of road accidents he would say that the extent of the damage in this case would indicate that there was no speed involved. Indeed, that is consistent with the defendant's own evidence. He stated that the impact was "very minimal". He stated that he was just taking off from a stationary position behind the plaintiff's car at a roundabout when the plaintiff's car suddenly stopped and he hit the rear of her vehicle. He said he was still in first gear. He thought he may have been doing about 5 or 6 mph at the time of the impact. Photographs of both vehicles disclose hardly any damage at all to the defendant's vehicle, and the damage to the rear of the plaintiff's vehicle certainly looks 'minimal'. There is no evidence given in this case to support the contention that this was a severe impact or that the plaintiff's vehicle was hit with "some velocity". I presume that in her instructions to her lawyers the plaintiff told them that there had been a severe impact, or had described what happened in some way which suggested a severe impact. If she did so she was certainly misleading them. But, again, I am not deciding this case on the basis of that aspect of the case. Misleading her lawyers might not of itself justify a dismissal under section 26. It is her actual evidence or the evidence which she enabled others to give which is more relevant. In relation to the impact itself, her own evidence has been ultimately that she has no recollection of the accident. She did not describe the accident falsely in her evidence as "very severe". But I point to this aspect of the case to support my view, from seeing and hearing her giving her evidence, that when faced with difficult questions she can escape discomfort by a lack of recall.

9. The plaintiff has also been inconsistent in her description of the accident and her immediate injuries to various personnel. When she attended at James Connolly Memorial Hospital in the immediate aftermath of the accident, she told A&E that she had hit her head on the steering wheel and that she had a headache. She told them, according to the triage notes that she had not lost consciousness. She also told them that there was "heavy damage" to her car. However, the hospital notes show no mark or bump as a result of doing so. Rather dramatically, she stated in her evidence that the impact was so severe that if she had not been wearing her seatbelt she would have been thrown out of the car [T.1, 67-68]. She could not explain how such a severe impact could fail to leave a mark on her head. She stated: *"How can I explain that. I am not God. I don't know [how] to explain it"* [T1. 68:5]

10. On the other hand, she told Dr McDonald that she hit her head on the steering or on the sun-visor. She told her Consultant Spinal Surgeon, Mr Ashley Poynton that she had been thrown forward and that she hit her head on the steering wheel. She told Mr Brady that she hit the right side of her head and right facial area against the steering wheel. She told Prof. Stassen that her head and face hit the steering wheel. These are not major variations, but they assume some relevance because one of the plaintiff's complaints

which she makes is that she has an ongoing very severe difficulty with her right temporomandibular joint ("TMJ"), and she seeks to attribute this to this minor accident. It is not immediately obvious how a mere impact of a minor nature could cause this particular complaint, though there has been some medical opinion expressed which may suggest the possibility that the TMJ difficulty could have resulted from the back and forward jolting of the head normally associated with this type of impact. But an unresolved curiosity at least in this case is that the photograph of the plaintiff's car after this accident showed not only the some minor damage to the rear of the car, but more significant damage to the driver's side of the car just forward of the door. If that damage was caused by a car colliding with the driver's side of her car on some other occasion while she was driving, it at least has the potential to explain a right-side jaw pain. I expressed interest in that damage while she was giving evidence and she was asked about it in cross-examination. But she was totally incapable of even explaining how that damage occurred. She thought maybe she had bought the car in that condition, but denied categorically that she was ever hit on the driver's door [T.6, 35-36]. However, the defendant called the previous owner of the car and that lady stated that when she sold that car there was no damage to it. The defendant states that in relation to this damage to the plaintiff's car, the plaintiff has given false and misleading evidence.

11. These are simply a few examples of why I say that the plaintiff is a poor historian at the very least. Apart from concluding that she is a poor historian, I am satisfied that she is not at all times credible, and some of her evidence must be viewed with caution, unless supported by objective evidence.

12. The very significant injuries which the plaintiff is claiming she suffered as a result of this minor accident are in marked contrast to what she reported to Garda Reynolds at the scene of the accident itself, and in marked contrast to what she reported to A&E on the morning of the accident. Garda Reynolds's evidence was that he spoke to both drivers and asked if either was injured and he stated that he was not informed of any injuries. The defendant also stated in his evidence that he had spoken to the plaintiff and asked if she was okay and he stated that she told him that she was "fine". Nevertheless, it is not particularly unusual that symptoms can be delayed for a day or so following an accident of this kind, and I am fully conscious of that. Nevertheless it has been necessary to be cautious about accepting at face value the plaintiff's evidence, particularly where her account at various times has been shown to be inconsistent.

13. Thus far I have set out a number of matters which have given cause for concern, in order to give just a flavour of the type of difficulties which the Court has faced in this case. I do not propose to set out each and every instance where problems with veracity, consistency and credibility arise. The transcript is replete with such difficulties for the plaintiff, and by selecting only a small number, I must not be taken to have exonerated the plaintiff in relation to all others. I refrain from a comprehensive setting out of all examples simply because for the purpose of my decision on the application to dismiss pursuant to Section 26 it is unnecessary to do so. I intend to confine myself to a couple of occasions during medical examinations where I am completely satisfied that the plaintiff deliberately gave a false or exaggerated presentation to the consultant examining her, in the hope and with the aim that those consultants would give evidence of such presentation which would support an exaggerated claim for damages.

14. The plaintiff complains of ongoing headaches, neck/shoulder pain, pain in her right temporomandibular joint as well as very severe low back pain. She has complaints also of a psychological nature said to result from the ongoing physical symptoms from which she is suffering and their negative effect on her life generally. There are numerous examples of inconsistency between what the plaintiff has reported to doctors at various times in relation to aspects of all these complaints. I am making considerable allowance for the plaintiff's linguistic difficulties by not relying on each and every instance where the defendant has pointed to inconsistency. The plaintiff can present as a very confused person. That may be at times attributable to her taking a lot of medication. On the other hand it may mean something more sinister. But in relation to much of it I am prepared to extend the benefit of any doubt I have. But there are some instances where it would be over-indulgent and plainly wrong to extend the benefit of the doubt in order to excuse deliberate falsehood in my view.

15. This Court is not concerned so much with the fact, as is undoubtedly the case, that the plaintiff has been inconsistent in her account to various medical personnel both in relation to her account of the accident and its immediate aftermath, and also her injuries and symptoms from time to time since the accident. It is understandable that for some people, and the plaintiff seems to be in this category, the task of recalling accurately what symptoms existed at particular times over perhaps a number of years since an accident, and for how long, can be a difficult task. Indeed it would require the keeping of a diary to be able to do so with great accuracy. The submissions which have been made on the plaintiff's behalf on this application emphasise that that the plaintiff has done her best to recall events and what she may have said to various doctors over the years, and that while clearly there have been inconsistencies, it should not be concluded that she has knowingly and deliberately given false evidence, or knowingly and deliberately procured others to do so. I accept completely that inconsistency and vagueness and even a failure to recollect clearly things the reasonable person would expect would be easily remembered should not of themselves lead to a dismissal of the action. I am satisfied that there must exist evidence or inference of a clear element of deliberateness to mislead on the part of the plaintiff before the Court should dismiss a plaintiff's claim under section 26 of the Act of 2006.

16. It is the alleged injury to her back, and in particular her low back, the time of onset of symptoms, and the difficulties which she says she is suffering from now in that area, and her interaction with medical personnel in relation thereto that I wish to concentrate on for the purpose of this application.

17. This accident happened on the 2nd October 2008. When she went immediately to James Connolly Memorial Hospital she made no complaint of pain in her back. She went back to the hospital on the following day, and she complained only of neck pain. However by the 7th October 2008 she seems to have referred to her back when she saw her GP on that date. However, Dr McCarthy has stated that on the 17th October 2008 when he saw her again she told him that her low back was not troubling her. In her own evidence she had stated that by the 17th October 2008. She was asked at what point between the 7th October 2008 and the 17th October 2008 her back had cleared up, and this is one of those occasions when the plaintiff could not give any helpful answer. I should add at this point that she appears to have informed Mr Ashley Poynton, Consultant Orthopaedic Surgeon, that she felt pain in her back on the day after the accident. In her evidence she stated that throughout November 2008 she continued to have back pain, and that she might lie down for a while to rest her back, and that she would not necessarily rush off to her doctor as soon as she experienced pain in her back. She stated on many occasions during her evidence that the pain would not be present all the time, but would come and go.

18. She stated in her evidence also that she had back pain in January 2009. She was attending a physiotherapist, Ms. Tansey, during this period having been referred to her by Dr McCarthy in relation to her neck problems. She was not referred to the physiotherapist for any back complaint. Ms. Tansey makes no reference to the plaintiff making any reference to back pain while attending for physiotherapy. The plaintiff's explanation for not mentioning her back pain to Ms. Tansey was that she had been referred only in relation to her neck. I do not find it credible I have to say that a person who is referred for physiotherapy for a neck problem only, but who is also suffering back pain of some significance would not mention that fact to the physiotherapist, if only by way of general conversation when describing how she is. The fact that she did not do so, and accepts that she did not, must cast doubt on whether

in truth the plaintiff was having any real problem with her low back over the weeks she was receiving physiotherapy. She attended for ten such sessions.

19. On the 18th November 2008, she lodged an application for compensation with the Personal Injuries Assessment Board. This application was not prepared by her solicitor. In that application she makes no reference to any back pain in that document.

20. The defendant's insurers arranged for the plaintiff to be examined by Mr McQuillan on the 10th February 2009. The plaintiff never made any reference to a back complaint to Mr McQuillan. When asked why this was so she replied "*I didn't know that was very relevant, it was necessary*" [T 2, 44:30]. In his evidence Mr McQuillan stated that it was not until he examined her again for the defendant in January 2012 that she mentioned her back. On that occasion she had attended using a crutch. Mr McQuillan stated in his evidence that because in February 2009 she never mentioned any complaint in relation to her back, it would be difficult to relate any difficulties she is having in that area with this accident [T.9, 93:28-30]

21. When speaking to Dr Mulcahy she told him that she had developed pain in her low back some two months post-accident.

22. All this evidence must be seen against the fact that in her own evidence to this Court she stated that her back difficulties had affected her on and off or intermittently from the date of the accident. But at other times she has, even in direct examination, put the onset of back pain in January 2009 having prompted in that regard by her own counsel. She had at first stated in this regard that she had woken up one day and had pain in back. When her counsel had suggested that this was in January 2009 she agreed with him. She described having pain and weakness, not being able to place her foot on the ground and not being able to walk at all. It was in such circumstances that she says that she rushed to James Connolly Hospital that day. It was on that occasion that she was provided with a crutch, and she was advised to take Diazepam for seven days. She appears to have recovered after about three days, according to her evidence. She agreed, when asked, that having taken the medication the pain and weakness disappeared.

23. Nevertheless, her evidence has been that she uses the crutch intermittently as required whenever she has what she describes as weakness in her back. Indeed it is clear that the use of the crutch is intermittent, because I have been shown video footage of her taken on a number of different days by a private investigator engaged by the defendant's insurers, and it shows her both using a crutch and not using a crutch. The defendant makes much of the fact that the video footage shows her using the crutch only on days when she is attending a medical examination arranged by the insurers. She does not appear to have been using a crutch on any occasion she attended her own GP. Dr McCarthy was unaware that she at times required the assistance of a crutch. He had made no note of the fact, though when pressed he did accept that on one or two occasions she may have been using a crutch but that he had not made paid any particular attention to it.

24. Neither is there any evidence that on any of the 20 or so occasions between April and July 2010 on which she attended her therapist, Donna Shannon. In fact Ms. Shannon stated that she had never seen the plaintiff using a crutch. But the plaintiff is adamant that she uses the crutch whenever she needs to when she is suffering this weakness. When asked if she had used it in 2009 and 2010 she was not clear as to whether or not she had had to. The defendant suggests that her lack of recall as to whether she had used a crutch during such a long period is not credible, and that she has given false and misleading evidence in relation to her use of and need of a crutch, and note that she had no difficulty recalling that for three days after attending James Connolly Hospital in February 2009 she had used the crutch.

25. The plaintiff never mentioned to Mr Poynton that she used a crutch, even intermittently. She could not recall if she had used it during three months prior to seeing Mr Poynton. The defendant suggests that the only period during which the plaintiff has genuinely needed to use the crutch was the period of three days after she attended the hospital in February 2009, and that her need to use it thereafter is not borne out by any medical evidence, and her own evidence of a need to use it intermittently since then is deliberately false and misleading in order to enhance her claim for damages.

26. The defendant has also referred to the plaintiff's evidence as to what if any benefit she got from various injections she has had to ease her back pain, and to what they describe as "spectacularly inconsistent". There is no doubt in my mind that her evidence in that regard is utterly confusing. She blames her inconsistency on a lack of accurate recall about particular dates and times and exactly how long a particular injection may have had a positive effect. I am not going to decide this case on this particular aspect of her evidence, because it is just possible that a person may not be able to recall accurately for how many weeks a particular steroid injection may have benefited her and then worn off. But I have to say that an inability to give any useful evidence in this regard is suspicious, and does her overall credibility no good whatsoever. There is a particularly telling passage of cross-examination on this issue where the plaintiff was sufficiently astute as to realise where counsel was leading her, and to fall back on a lack of recall by way of escape. This occurred on Day 4 and appears in the transcript for that day on pages footnoted in the defendant's submissions. I do not intend to set forth that unsatisfactory evidence (from the point of view of the plaintiff) in any detail.

27. The plaintiff had an appointment to see Mr Ryan on the 14th February 2011. She was videoed that day both in the morning and in the afternoon. Her appointment with Mr Ryan was in the afternoon. The video shows that she attended that appointment using a crutch. However, she had been filmed earlier that day at 8.15am when she exited her house with children in order to bring them to school. She was not using any crutch at that time and neither was she using a crutch when filmed later during the morning while shopping. Mr Ryan has noted that she attended him using a walking stick. She was first asked about why she had needed that assistance. She stated in reply:

"Yeah – I wake up that day – I think I have previously – I can't recall exactly all dates but I think I have some problem because the steroid injection was much far, so I was having a particular difficulty walking and weakness" [T.3, 69:6-10]

She was unable to say how long that weakness had lasted that day, but went on to state that its onset can be sudden. But she could not say if it had been coming on over some days. It was pointed out to her by counsel that her evidence in this regard was inconsistent with what she had told Dr McCarthy only 12 days previously, namely that the steroid injection was of no help at all. She could give no useful or coherent explanation, and was unable to give any assistance as to the length of time she had had to use the crutch prior to the appointment with Mr Ryan. She could not even say whether she had had to use the crutch the day before the appointment with Mr Ryan or even the day after. I am quite satisfied that this particular lack of any useful recollection should be described as a convenient amnesia. The plaintiff was aware that she had been filmed on occasion by the defendants, and in all likelihood in my view was on her guard to be unspecific and vague in recollection lest she be caught out.

28. She was questioned about the footage for the 14th February 2011. It was put to her that during the morning that day she had not used a crutch when leaving her house with children and later while shopping. The plaintiff said that she could not remember. But she remembered going to the appointment. He was asked what had happened between the morning and the afternoon to cause her to have to use a crutch for the appointment. She replied: "*I had a weakness*". She was asked if it had just come on and she replied

"Yeah". She was asked about how long the weakness had lasted that afternoon. Again, she was vague and elusive on any detail in this regard as the transcript shows [T. 3, 81-84]. She thought at first that she could not remember holding the crutch for the whole day. She also referred to having had her TENS machine in her car which helps her to improve. She thought that having seen Mr Ryan she was feeling better again. But it was pointed out to her that on that day she had not gone to Mr Ryan's appointment in her car. She agreed and said it had been by taxi and that she had her TENS machine in the taxi – the taxi driver being a neighbour/friend of hers apparently. However the video footage shows that she returned from this appointment not by taxi but by train. But when it was put to her that it was strange that the neighbour taxi driver would bring her but would not remain while she was at her appointment, she agreed that the likelihood was that she in fact did not go to that appointment by taxi at all. That evidence is very unsatisfactory from the plaintiff's point of view, and is an example of a pathetic failure to explain why she needed a crutch when attending the appointment whereas she had not needed it prior thereto. I do not believe her evidence in that regard.

29. The defendants had arranged to have her examined again three days later on the 17th February 2009 by Mr Fitzpatrick. Despite her having apparently recovered from whatever weakness afflicted her on the 14th February 2009 in the afternoon before she saw Mr Ryan so that she did not use the crutch later that day, it had returned again in time for her to have to use the crutch when attending with Mr Fitzpatrick who notes that she used a crutch when walking. There was a lot of question and answer as to whether she ever told various doctors that her use of the crutch was only intermittent. Her answering on these matters is all conveniently vague and imprecise, and demonstrating a lack of recall to which I have referred. According to Mr Fitzpatrick the plaintiff explained that she had a weakness in her right leg and was unable to put her full weight on it. This he found puzzling because it is apparently an unusual complaint in patients who have a soft tissue injury. He found her use of the crutch to be unusual given that patients with soft tissue injury would not normally use a crutch for prolonged periods. The defendant's submissions draw attention also to the fact that the plaintiff refers to "weakness" all the time, rather than pain. It is weakness which she says requires her to use a crutch. At other times of course she has said that if she takes a pill or uses a patch or her TENS machine, it enables her to cease using the crutch. It is all very confusing. I can only suggest that the transcript be read in detail in relation to these issues. My summary will inevitably leave out much of the evidence upon which the defendant relies, and can give but a flavour of the plaintiff's evidence.

30. The plaintiff was asked how she was before she went to see Mr Fitzpatrick that day. She replied that she thought she may have had some weakness that day but could give no assistance as to when that might have come on. She recalled some pain also. She could not say how long before her appointment with Mr Fitzpatrick the weakness had afflicted her. That question referred to the fact that three days previously after the appointment with Dr Ryan she had been able to dispense with the crutch in the evening. She could not assist with any useful answer. She was able to recall that she was in some pain on the 17th February 2009, and thought she had taken a Difene tablet before she went to see Mr Fitzpatrick, though she was unable to say whether she had seen him in the morning or afternoon. She was asked why if she had taken a tablet her presentation to Mr Fitzpatrick had been so poor. Her answer to that was that she had not worn a patch that day. She could not explain how she could remember that when she was so incapable of remembering so much else. But she reverted to a lack of recall when being unable to say how many days after this visit she had improved to the extent of not using the crutch.

31. The video footage for the 17th February 2009 showed clearly that within a matter of hours after leaving the examination by Mr Fitzpatrick she was walking without a crutch or other assistance, notwithstanding that earlier in the day at the examination she had been unable to weight-bear on the right leg when examined. She explained this by the fact that she had taken a DF118 tablet that day ahead of her appointment. She went on to state that she had taken it while in the taxi which brought her to the appointment. Mr Poynton was asked about this when he gave evidence. His opinion is that if a person is attending a pain clinic, has a Versatis patch on and has taken a DF118 then such a person would not be presenting with normal function, normal flow of movement, normal gait and normal range of motion, and that one would have that medication if significantly disabled by pain. He opined also that it would be very unusual for such a person to be rendered back to normal by the use of a patch and the taking of a DF118 tablet.

32. The examination and findings of Mr Fitzpatrick as reported in his Report dated 17th February 2009 are important especially when read in the light of the video footage of the same day. Having set forth the history as given to him by the plaintiff, he notes her present complaints as pain in the lower back radiating down to the right buttock. She described weakness in the right leg and said that "she was unable to fully weight bear". According to the report she also told him that she used a crutch while walking. The defendant emphasises that there is no reference in this report to her having said that she only uses the crutch occasionally or when she has a weakness. She also complained of neck pain. His report notes that on examination of her back her movements to the left were considerably restricted and that other movements cause discomfort at the extremes of movement. He noted "light downward movement on the head causes pain in the back". He went on to state:

"Ms. Salako walks poorly, limping on one leg. She stands straight but will not bend [my emphasis]. Lateral bending and hyperextension are good but cause discomfort. When lying on the couch Ms. Salako is unable to sit up and put her hands on her knees with legs straight.

Straight leg raising when lying down is 20 degrees on the right. This causes back pain. Back pain is also caused by straight leg raising on the left which is 80 degrees.

When sitting on the edge of the couch straight leg raising is 90 degrees on each side. Reflexes and power are normal."

In the Opinion section of his Report, Mr Fitzpatrick states:

"I understand that no significant abnormality has been found on MRI studies of her spine. The clinical picture is confused and is not consistent with any specific lesion.

I am unable to explain her difficulty weightbearing on the right side nor can I attribute the symptoms that arise on light pressure to her head or the paradoxical straight leg raising with any known clinical condition.

In general patients with these types of soft tissue injuries recover well and in due course I would expect this to occur in this case.

I believe there is an element of functional overlay and I think psychiatric assessment may be of assistance."

33. In his oral evidence Mr Fitzpatrick was asked to comment further on his findings on examination. He stated, inter alia, that there could be no physical explanation for the plaintiff being on the one hand able to sit erect on the couch with her knees straight, yet on the other hand be unable to bend forwards while standing. He stated that a person who is unable to bend forwards at all will have great difficulty in sitting erect on the couch with her knees straight. He was asked also about his note that light pressure downwards on her head caused pain in her back. In that regard he stated that this was a test sometimes done "to determine what emphasis the

patient wishes you to put on her symptoms", and stated also that "if one presses lightly on the head in normal situations such as this where there may be soft tissue injury to the spine, light pressure on the head does not cause pain as a general rule." When asked what emphasis he believed the plaintiff wished that he put on her symptoms he replied: *"It just makes me think how much – how much does she want me to accept her symptomology, I think."*

34. Mr Poynton, who I should remind is the plaintiff's own consultant, was also asked to comment on these findings of Mr Fitzpatrick when he was giving evidence. He was asked about the fact that light pressure on her head caused the plaintiff pain in her back. On the assumption that Mr Fitzpatrick was referring to pain to her lower back Mr Poynton stated that this was not consistent, as that pressure should not cause pain in the lower back. He agreed that such a finding would be one sign that a person was unreliable. He said that it was "an interesting clinical examination to find out how far the patient is cooperating with you", adding that it could not be taken in isolation. He agreed that it was one of the "red flags".

35. Mr Poynton agreed also that the inability of the plaintiff to bend forward at all was inconsistent with her ability to sit up and put her hands on her knees with her legs straight, and that this was another "red flag". When asked "is the manifestation of the plaintiff throughout that examination utterly inconsistent with the true clinical presentation?" he answered "yes". When asked if it suggested to him that the patient who is presenting is not cooperating with the examiner, he answered "yes". When asked whether it suggested that the patient was not only not cooperating with the examiner but is endeavouring to fool the examiner, he replied *"if it is done knowingly, yes"*. He was asked further in relation to the inability to bend forwards at all yet being able to sit up on the couch with legs straight at 90 degrees. In that regard he was asked: *"In the absence of some catastrophic intervention there is nothing other than an attempt to mislead or deceive the examiner; isn't that right...?"* Mr Poynton's answer was simply "yes". There has of course been no evidence of any such catastrophic intervention as might explain this inconsistency.

36. Having dealt with his findings during his evidence Mr Fitzpatrick was asked to comment on the video surveillance footage for the day of his examination on the 17th February 2009. He was certainly surprised at what he saw on the footage, and surprised that she was able to abandon the crutch so soon having given him to understand that she needed it for walking. He noted also from what he saw of her in the footage when she was seen actually using it, that the way she used it actually was providing little support for her right leg. He was asked if he could think of an explanation for the improvement in her condition between when he saw her and when she was seen walking without the crutch a couple of hours later. He stated in answer: *"... the only reason I can possibly venture is that she wanted me to think that she was perhaps a bit more disabled than she was in actual fact."* He was asked further whether there is any medical reason that would enable her to cast aside her crutch a number of hours after she was dependent on it on examination by him, to which he replied: *"Without being facetious about I can't actually think of any reason why it should happen"*.

37. Mr Fitzpatrick saw the plaintiff again for the purpose of a report on the 10th May 2012. I will not set out that report in detail, but it indicates that the plaintiff attended without using any crutch. He examined her and again applied light pressure downwards on her head, which she indicated caused her pain in her "neck". He does not report that this caused pain in the low back on this occasion. He also performed a straight leg test on the plaintiff while she was lying on the couch. During same the plaintiff was able to raise her right leg to 30 degrees only, and 80 degrees on the left, whereas while sitting on the edge of the couch she could raise both legs to 90 degrees on each side and pain free. I propose ignoring any reference to the head pressure test on this occasion, as the pain was in the neck area according to the report, and I am concentrating on the back complaints at the moment. But when asked during his oral evidence if there is any physical explanation for the inconsistent straight leg test on this occasion, he said "No". But I should add that he went on to say *"particularly when that's associated with the light pressure on the head as well"* He was asked what conclusion could he draw from a patient who indicates light pressure on the crown of the head causes pain and inconsistent straight leg raising tests, he replied: *"I would conclude that there is a desire to exaggerate the condition."* Given Mr Fitzpatrick's view in relation to the inconsistent straight leg test on the 17th February 2009, I have no reason to consider that his view in relation to that on the 10th May 2012 is any different or to a lesser degree simply because there is that reference to *"particularly when that's associated with the light pressure on the head as well"*. There is no room for any doubt but that he considers the inconsistent straight leg test to be an inconsistent presentation without any physical explanation, and indicates a wish to exaggerate symptoms.

38. Before leaving the reports and examinations by Mr Fitzpatrick I should refer to the fact that during his examination on the 17th February 2009 the plaintiff is noted as being *"unable to raise her arms above 90 degrees in any direction"*. None of the medical personnel in this case have been able to explain that presentation. Even Prof. Stassen, Maxillofacial Consultant confirmed that a TMJ dysfunction would not restrict a patient in raising her arms to 90 degrees.

39. I am completely satisfied even by reference only to the manner in which the plaintiff presented to Mr Fitzpatrick on the 17th February 2009 and again on the 10th May 2012, that on each occasion she knowingly and deliberately attempted to exaggerate her injuries and the sequelae therefrom in order to enhance this claim for damages. There is no possible explanation for the inconsistent straight leg test. None has been given by anybody, even the plaintiff's own doctors. There is no physical explanation for the plaintiff on the 17th February 2009 being unable to bend forwards, yet be able to sit on the couch and put her hands on her knees with her legs straight. That is an inconsistent presentation also, and clear evidence in the absence of any explanation of an attempt to exaggerate her injuries so as to enhance this claim for damages. I only have to decide these matters on a balance of probabilities, but in my view the evidence which I have set forth, and a great deal of other evidence to which attention has been drawn in the defendant's helpful and very detailed submissions, puts the matter even beyond any reasonable doubt, and certainly above the threshold of being "highly probable" as stated by Quirke J. in *Farrell v. Dublin Bus* [2010] IEHC 327.

39. I am satisfied also that on the balance of probabilities the plaintiff used her crutch at any medical examination at which this has been noted only for the purpose of effect – in other words to present as a person in such difficult not just that day but generally that she required assistance with a crutch. Given that she has stated that her use of the crutch is intermittent only, and only when she has a weakness, it is not credible in my view that she has had to use it for any legitimate or genuine reason on each of the occasions on which she was filmed when attending the medical appointments shown in the video footage. There is little if any evidence that on any occasion the plaintiff explained to any doctor that she needed the crutch only occasionally when some weakness came upon her. No doctor appears to have asked her very much about the need for a crutch, and if it were not for all the other overwhelming evidence of exaggeration to which I have referred and to which the defendant has referred in their submissions, I would not regard the use of the crutch alone as sufficient exaggeration or attempt to mislead doctors to justify a dismissal of this case. However, when considered in conjunction with all the other inconsistencies on presentation and inconsistencies in her account generally, I have no hesitation in including the use of the crutch at examination as part of her deliberate attempt to mislead her medical personnel in relation to the extent of her symptoms and her condition generally, so that they would assist her in this exaggerated claim.

40. Such attempt as has been made by the plaintiff to explain away the inconsistencies I reject as devoid of veracity and merit. I do not find the plaintiff's evidence in response to the accusation of exaggeration and inconsistent presentation to be credible or even coherent, and in saying that I am making every possible allowance for the linguistic difficulties which I fully understand she has, and also for the fact that she may understandably have some difficulties recollecting precisely dates and events which have occurred

over the few years since this accident. This Court is well used to hearing plaintiffs whose accidents have occurred many years prior to trial. This plaintiff is unusual in her lack of any useful recall of certain events, especially where, as I have said, a correct answer may be an inconvenient answer. I cannot accept her as a credible and reliable witness, and unless her evidence in relation to contested matters is supported or corroborated by objective or indeed any other evidence, I am slow to accept it and place any meaningful reliance upon it. I have listened to the plaintiff giving her evidence in the witness box of several days. I have carefully observed her demeanour, and making every allowance for the disadvantages under which she labours due to her ethnicity, I still cannot find her to be a reliable and credible witness in many respects. Her credibility is not helped either by her inclination to lapse into obfuscation, incoherence and lack of recall when pressed in relation to difficult aspects of her case.

40. I have been able to reach my conclusions under Section 26 of the Act of 2006 simply by reference to the presentation by the plaintiff to Mr Fitzpatrick on the two dates in question, supported by the comments of Mr Poynton in relation to those presentations and the viewing of the video and the comments of both Mr Fitzpatrick and Mr Poynton in relation thereto, and the comments that have been given in relation to the footage. I have of course also had the benefit of viewing the footage myself. I have added her use of the crutch at examination into the mix as well as explained. Strictly speaking that is sufficient to warrant an order for dismissal under Section 26 of the Act of 2006 without further reference to other examinations which the plaintiff attended and where unexplained inconsistencies have been noted in the plaintiff's presentation. I am satisfied that she presented to Mr Fitzpatrick with a dishonest intention of causing him to give evidence to this Court which she knew would be misleading and false, and with the intention of misleading this Court.

41. But there is other evidence which in my view mandates that this claim be dismissed in its entirety. I refer to the examinations and reports by the plaintiff's own consultant, Mr Poynton, and also to her attendance with the defendant's consultant, Mr Robert McQuillan.

42. Mr Poynton saw the plaintiff first on the 7th July 2010. She had been referred to him by Mr Kenny. On that occasion he took a history from her and his report dated 23rd September 2011 notes that she reported a two year history of back pain and leg pain which had come on after this accident on the 2nd October 2008. According to his report, and confirmed by his oral testimony she told Mr Poynton that she had been a restrained driver of a vehicle and was rare-ended with force. His report notes that in July 2010 when he first saw the plaintiff her complaints were of low back pain, buttock pain, right leg pain radiating to the calf, difficulty walking, sitting and standing. She apparently walked with a slight limp. Straight leg raising was positive on the right side and caused back pain rather than leg pain, and her neurological examination was normal. Mr Poynton notes that at this examination he reviewed an MRI Scan which had been done on the 10th August 2009 which he noted revealed degenerative disc disease at L4/5 and L5/S1 with bulges at both levels and mild lateral recess stenosis. At that stage in July 2010 Mr Poynton referred the plaintiff to Cappagh Hospital for an epidural steroid injection and facet joint injections. These were performed in October 2010, and he notes, presumably because the plaintiff told him so, that these injections gave her one month's relief. Following that he apparently suggested a repeat epidural steroid injection and he notes that this provided some relief, but that her symptoms returned.

43. Mr Poynton was asked by plaintiff's counsel if there is any objective clinical finding to support her complaints of weakness in her leg and leg pain, to which he responded that there were no clinical findings of muscle weakness detected on examination. But in fairness it should be stated also that he went on to state that one could not rule out some subjective pain in the sense that some patients may say their leg is not as good as it should be or gives way. But there was no neurological deficit on examination according to Mr Poynton.

44. When Mr Poynton saw her again on the 14th September 2011 she reported to him that she continued to have significant low back pain and right leg pain. He notes in his report that *"this is problematic with any physical activity and she cannot function"*. Mr Poynton at this stage had of course no knowledge of the fact that there had been video surveillance taken of the plaintiff on the 5th July 2011, 15th July 2011 and also on 2nd August 2011. He examined her on the 14th September 2011 and reports as follows on that examination:

"On date of most recent review when I examined her I found her pain level to be of a high nature. She was using a crutch. She was unable to walk without it. She walked with a limp. She indicated that she had significant right sided low back pain and right leg pain. Straight leg raising was limited to 30 degrees on the right with a positive sciatic stretch test. Range of motion of the cervical spine was also reduced by 20% with right sided neck pain. There is no neurological deficit."

Radiological examination:

This lady's previous MRI scan performed on 8.10.09 shows degenerative disc disease at the two lower lumbar levels with no nerve root compression. This would not explain her current. The cervical spine MRI scan from 4.6. 10 was normal."

45. When giving his direct evidence Mr Poynton was asked about the fact that when the plaintiff saw him first she was not using a crutch but that when he saw her in September 2011 she was. In answer he stated that he concluded from that that the plaintiff's symptoms are variable in nature and intensity. At that point in his evidence he was asked also what he felt the future held for the plaintiff, to which he responded:

"... the concern is that this persistent combination of back pain and leg pain despite physiotherapy, management with medications, management with epidural steroid injection, facet joint injections, she hasn't really responded very well. And the concern is obviously at this stage, given the duration of time she's had the symptoms, that they're going to persist. And once the non-operative measures have been exhausted, one would consider surgery. However, surgery in this type of setting, where there's two degenerative discs, back and leg pain, the results are very variable."

46. He was asked also about whether he was conscious of any psychological issues in relation to the plaintiff and he stated in that regard that when he saw her first he had no such concerns, but that *"with chronic pain, long-term use of a variety of medications and no progress, people do become psychologically affected by it. They become depressed, not necessarily clinically depressed, but it certainly affects their mood..... And then the results of surgery can be very poor."*

47. Mr Poynton was asked by plaintiff's counsel also about how he felt about the plaintiff's genuineness in relation to her back complaints to which he responded: *"... she always struck me as being genuine particularly her initial visit. I didn't pick up anything at all to suggest that she wasn't genuine"*. He said it did not surprise him that there could be days when she had no pain at all since back pain is variable and depends on physical activity, particularly with leg pain. In so far as the MRI scan showed degenerative changes as explained already, Mr Poynton stated in his direct evidence that he agreed that this accident had rendered these changes to be symptomatic.

48. The consistency or otherwise of the plaintiff's complaints was explored extensively during cross-examination. By way of example only, it will be recalled that in his report dated 23rd September 2011 Mr Poynton had noted that when he first saw the plaintiff in July 2010 she gave him a *"two year history of back pain"*. Yet when the plaintiff was examined by Robert McQuillan, Consultant Orthopaedic Surgeon for the defendant on the 10th February 2009 (4 months post-accident) she makes no mention whatsoever of back pain when stating her present complaints. When asked, Mr Poynton stated that he would have thought that she would have mentioned it if she had ongoing symptoms, and that he was under the impression that she had ongoing back pain from shortly after the accident i.e. the 7th October 2008. He agreed that if the plaintiff had mentioned pain in her low back Mr McQuillan would certainly have recorded it given that he was conducting an examination for the defendant.

49. In addition his attention was drawn to the fact that when the plaintiff was seen by her own psychiatrist, Dr Mulcahy, on the 27th June 2011 his history of the case, as given to him by the plaintiff, states that *"two months after the accident she developed pain in low back"*. It goes on to refer to *"one particular morning she woke up and was unable to walk"*. That is a reference to the occasion on the 16th February 2009 (four months post-accident and a few days after she was examined by Mr McQuillan), though she stated in evidence that it was January 2009, when she had pain and weakness on getting out of bed, was unable to put her foot on the ground and was unable to walk, and following which she was taken by ambulance to hospital where nothing of significance was found and she was advised to go home and take Diazepam. I have referred to that incident already in paragraph 22 above.

50. Mr Poynton also agreed that where a person is referred for physiotherapy by her GP as in this case for neck pain, it can be presumed that it is only for neck pain and not for neck and back pain that she is being referred.

51. Mr Poynton's conclusion at this point, and one must bear in mind that he had up to this point not seen the video surveillance footage, was that the fact that the plaintiff had not mentioned back pain to Mr McQuillan on the 9th February 2009, nor had mentioned it to Ms. Tansey during all her sessions with Ms. Tansey during those months, and that there is no medical record up to that point where the back is mentioned except for Dr McCarthy's note on the 7th October 2008 *"[implied] that it was not significant enough for Ms. Salako to inform her GP about it"*. He was pressed further in relation to that answer and it was put to him by Counsel that it suggested that she had made no complaint about it during the intervening months, whatever her own subjective views were. Mr Poynton agreed that that would appear to be the case.

52. The evidence of Mr Poynton to which I have been referring was given by him at the end of July 2012. Because of his own holiday commitments Mr Poynton could not complete his evidence until the 9th November 2012 by which time he had had an opportunity to view the video surveillance footage of the plaintiff for the first time. Bearing in mind that Mr Poynton (who it must be remembered is the plaintiff's own consultant) examined the plaintiff on the 14th September 2011, he was referred to footage taken of the plaintiff on 5th July 2011, 15th July 2011 and on the 2nd August 2011. Mr Poynton stated that when he saw her on 14th September 2011 she was a person with a severe disability, using a crutch, having difficulty walking without a crutch, on high levels of medication and reporting a high level of disability and pain, and went on to state that the video footage in question *"would not reflect that situation"*. He asked if the footage in question could be shown to him again in court so that he could be sure in relation to what he had just said, and that was immediately done. He stated that the footage of the plaintiff taken on the 2nd August 2011 where she is seen walking normally to her car in the morning, getting in and out of her car, carrying shopping bags while out shopping, returning home again, pulling a wheelie bin, and bringing all her shopping bags into her house, was activity which he found to be *"quite at variance"* with what he had found at examination and what he had been led to believe by the plaintiff. He described what he saw on the video footage as being *"normal function, normal gait as in walking, normal physical functioning"*. At a further stage of the evidence he stated that the footage manifested no evidence of any restriction and that this was fundamentally different to how the plaintiff presented to him on the 14th September 2011. He agreed that this footage was utterly at odds with the history relayed to him by the plaintiff. He stated that the only explanation would be an acute deterioration such as an acute disc herniation or an acute exacerbation of her pain, but that none such was reported to him. He stated that he was not told that in July and August she had been perfect and that September was significantly different. Indeed it is clear from the plaintiff's own evidence to the court that she has not claimed that there was any particular deterioration in those two months. Mr Poynton stated that the video footage shown was not consistent with the picture given to him at examination by the plaintiff on the 14th September 2011, and that it was not consistent for the plaintiff to have had the level of functioning shown 6 weeks before the examination and yet present to him as she did on the 14th September 2011. He agreed also that without an adequate explanation he would have serious concerns about the plaintiff's presentation to him on that date. He went further when pressed on the point and agreed that in the absence of an explanation the plaintiff had given *"an incorrect and misleading picture"*.

53. It was put to Mr Poynton that in the absence of an explanation of acute deterioration, and in the light of the video footage and the inconsistent presentation on the 14th September 2011 the plaintiff was exaggerating the level of symptoms to him on that date, and he agreed that that was so.

54. There is no doubt in my mind that the evidence given by Mr Poynton, and of which I have set forth only some extracts is sufficient first of all to support and corroborate the conclusion already reached in relation to the evidence relating to the examination of the plaintiff by Mr Fitzpatrick, but would be a stand-alone basis for being satisfied that these proceedings have to be dismissed under the provisions of section 26 of the Act of 2004. No explanation was provided by the plaintiff for the picture painted to Mr Poynton, and none is apparent from any other evidence or any other medical report. In the absence of such an explanation this claim has been grossly exaggerated by the plaintiff and she contrived in my view deliberately to have Mr Poynton give evidence which is false and misleading by exaggerating or even inventing symptoms when she was examined by him.

55. I have referred to the examination of the plaintiff by Mr Robert McQuillan on the 9th February 2009 when he made no record of the plaintiff having reported any history of back pain or having any difficulty in relation to her back. He examined her for the defendant again on the 10th January 2012. Her complaints to him on that date included pain in her low back when sitting and pain in her right leg most of the time radiating to the right foot. He noted that she walks limping heavily on her right foot, that he lumbar spine contour is satisfactory when she sits, that she stands non weight bearing on the right leg, that she manifests no useful back movement and that straight leg raising is resisted at zero degrees on the right side.

56. In his report dated 20th January 2012 he noted that when he examined the plaintiff in February 2009 she had no back pain, and that it has developed since that time. He of course also deals with her neck and jaw difficulties but I am concerned for present purposes only with what is stated in relation to her back. He states in his report in that regard:

"At the time of my examination at four months she had no back pain. The back pain has developed since then. It had been relatively low grade by the time she was seen by the Injuries Board in July 2009 becoming severe with right leg pain becoming increasingly severe. Her MRI scan does not show any significant pathology. There is no doubt that this back pain and leg pain is entirely psychology [sic]. If there is any underlying organic element it is unrelated to her accident."

57. He concluded his report by stating:

"I cannot state whether this lady's symptoms are psychological or malingering. They may well be psychological as there have been a number of stresses in this lady's life. There is absolutely no doubt that all physical treatment should be withheld until she has had adequate psychological evaluation and management. From a physical point of view she suffered minor soft tissue injury and soft tissue damage to her right temporomandibular joint".

58. In addition, Mr McQuillan was called to give evidence to this Court and he did so. In relation to his examination of the plaintiff on the 14th February 2009 he confirmed as appears from his report of that date that the plaintiff on that date made no mention of back pain in the history which she gave, and he confirmed also that if any such mention had been made of back pain, he would have asked her whether she had had any previous back complaints. He gave evidence of his examination of the plaintiff, and stated that he did not examine her back because she made no complaint in relation to her back. He gave evidence of his examination of the plaintiff on the 20th January 2012. He spoke to his report of that date and I will not set that report out in full detail, as I am more concerned for present purposes with what the plaintiff told him were her "present complaints" and his examination of her, and his conclusions in relation to that. I should say that this is a date on which the defendant had arranged for video surveillance of the plaintiff going to and leaving Mr McQuillan's consulting rooms at Blackrock Clinic.

59. The plaintiff told Mr McQuillan in January 2012 that she was using a crutch on an intermittent basis since April 2011 because of weakness in her right leg. In relation to her back she complained of pain in her low back when sitting, and of pain in her right leg almost constantly radiating down to the right foot. He noted also that she was limping heavily on her right leg and was using a crutch on her right arm. Mr McQuillan found that the contour of her spine was normal when she was sitting down. However, when she was standing she was non-weight-bearing on her right leg and "*manifests having no useful back movement*", and he noted also that "*straight leg raising is resisted at 0° on the right side*". He was asked about this unusual presentation and what it meant. Mr McQuillan stated: "Well – she just didn't move. I mean she didn't flex, extend, laterally flex, she didn't move in any direction". He was asked whether if a person has no useful back movement they could sit into a car in a normal manner. He replied: "*I wouldn't be able to do anything. No useful back movement is not a really genuine manifestation. I mean in theory I suppose if you get very, very severe spasm at that moment you might have temporarily no back movement. Nobody can function with no back movement*". He went on to say that even if the back was totally in spasm one would be able to forward flex as that is only a hip movement, and she was unable even to do that. He was asked whether a no useful back movement presentation was something that is quite alarming or significant, to which he responded: "*Well, it's so extreme that it's gone from alarming to not significant, if you understand what I mean*". At that point, the transcript notes that I interjected by saying: "*So extreme as to be unbelievable?*" to which Mr McQuillan stated: "*Unbelievable – that's the point*", and he went on: "*If there was severe pain and limitation of movement and some limitation of straight leg raising, you'd be much more worried. But straight leg raising at zero degrees and no movement at all in the back is not a genuine pathological finding, so I wouldn't be concerned*". He agreed, when asked by Counsel, that such a person would not be able to sit into or get out of a car or taxi on that day.

60. Mr McQuillan explained the significance of the presentation by the plaintiff of resisting straight leg raising at zero degrees as follows:

"That would be very unusual. Essentially, when you do when you are raising the leg, you are stretching the sciatic nerve, and at a certain point when the sciatic nerve reaches a degree of stretch you get pain down the leg. At zero degrees you are obviously not stretching the nerve at all, so there should be no reaction at zero degrees. Quite severe straight leg raising comes in at about 30 to 40 degrees, you know. Anything below 30 degrees is again not very likely."

61. Mr McQuillan also stated in answer to Counsel that a person presenting a straight leg raising resistance at zero degrees is someone who is manifesting as having no movement and that "*it's not a genuine physical finding*".

62. Mr McQuillan had been given the opportunity to view the video footage taken of the plaintiff before he gave his evidence, and he had also been given a transcript of the evidence given by Mr Poynton. He had noted on the video footage that the three occasions when the plaintiff was shown to be using a crutch coincided with days on which she was seeing Dr Ryan, Dr Fitzpatrick and himself for the purpose of examination. What Mr McQuillan noted in particular was the ease with which the plaintiff got in and out of a car on the footage. In that regard, he stated:

"You know, it's very hard to get in and out of a car with back pain. If you think about stooping down and the bending in, all people with back pain have a difficulty getting in and out of a car and when they get out of a car after being in it for a while there is quite a lot of pain and stiffness. She got in and out of the car every time I saw it, with great ease and that's what struck me as one of the main things, besides the running and the general movement, but it's the flexibility and the ability to get in and out of the car was never restricted, as far as I can see."

In relation to the footage taken in July and August 2011, a few weeks before she saw Mr Poynton in September 2011 Mr McQuillan stated that in that footage the plaintiff appeared to move very well and he felt was "*a good fit person moving well*".

63. A very significant part of Mr McQuillan's evidence appears in the transcript for Day 9 at pages 109-112. Therein he touches upon firstly a possibility that there is some psychological explanation for the plaintiff's symptoms as reported by her, or whether she is malingering. He had already ruled out in his own mind any organic reason for the symptoms, as already set forth. However, the video footage of the plaintiff taken on the day he examined her on the 20th January 2012 appears to have assisted him in reaching a conclusion in this regard. He stated that he simply does not believe the presentation (I am presuming that in this regard he is referring to the back complaints). He stated in that regard:

"I don't believe the disability claimed. I don't believe it's related to the accident and I cannot believe that the manifestation she made to me was a genuine manifestation of her disability."

When asked if that suggested that the plaintiff has deliberately sought to mislead, he answered: "*Well, I would believe so, yes*". He had earlier stated that following his examination on that date and having seen the video footage of her on taken on that date, he was forced to say that he would not think that it was a true manifestation or a true representation of her injuries.

64. Counsel for the plaintiff did his best to repair the damage caused by this evidence, as he did when cross-examining the other defendant doctors. He explored a number of aspects of the case in order to try and demonstrate that the plaintiff was quite inconsistent from time to time about the injuries she reported, and that this was uncharacteristic of a malingerer. For example he tried to make headway in this regard by referring to the fact that the plaintiff had not made any complaint of back pain to Mr McQuillan on the 10th February 2009, and he suggested to Mr McQuillan that the fact that she made no mention of back pain is not consistent

with a malingerer who is trying to obtain compensation for her back injury. Mr McQuillan disagreed and stated that what it meant was that she did not have a back injury. Lack of consistency was also relied upon in cross-examination by reference to the use of a crutch sometimes but not always when attending medical examination. Not much headway could be made in that regard for the plaintiff because at the end of the day the use of the crutch was not something on which Mr McQuillan relied at all for his conclusion that the plaintiff was exaggerating. The cross-examination explored a number of other matters also, but I will not set it all out in detail.

65. During Mr Poynton's evidence he was asked to comment on the video footage taken of the plaintiff on the 20th January 2012 in the context of what Mr McQuillan's report stated in relation to his examination of the plaintiff on that date. Without setting out everything that Mr Poynton has stated in this regard, it is clear that he concludes that in the absence of some explanation such as some catastrophic intervention between when the footage was taken and when she was examined by Mr McQuillan, her presentation is inexplicable and an exaggeration. He stated that the straight leg test with resistance at zero degrees was an exaggeration. He stated also in relation to the footage that the plaintiff was seen with restriction of movement only when filmed on days that she was to attend medical examinations. He was greatly concerned also by how the plaintiff presented to him in September 2011 compared to how she appears in the video footage taken in July and August 2011 as I have already set forth. His concern is clearly stated that she has not given him a true account of her symptoms. I refer to his evidence generally on Day 9 in this regard.

66. I indicated that I could conclude that these proceedings should be dismissed even if only the evidence of what occurred with Mr Fitzpatrick in February 2009 and May 2012, and without reference to any other evidence. However, for completeness I should say that even if that evidence was not there, I would make the same order based on the evidence of Mr Poynton. I would make the same order by reference only to the evidence of Mr McQuillan also. Each of these witnesses' evidence is sufficient for me to be satisfied that this plaintiff has deliberately sought to mislead this Court by trying to procure that each of these doctors would give false or misleading evidence to support an exaggerated claim by her. In my view the evidence is very clear in this regard and is not open to a benign interpretation proposed by counsel for the plaintiff, who has sought to minimise the impact of the evidence by referring to depression on the part of the plaintiff or other psychological effects of stress that may be in the plaintiff's life. I have little doubt that the plaintiff, like many people, has significant stress in her life. But in my experience people who are suffering from stress are in general no less truthful than people whose lives are stress-free. In fact, one would have to say that a lack of stress is no guarantee of truthfulness either. I cannot absolve the plaintiff from the accusation of deliberate exaggeration of her symptoms and complaints by any claim being urged that she is suffering from depression or other psychological infirmity.

67. For the reasons set forth, I will dismiss this entire claim pursuant to the provisions of Section 26 of the Act of 2004, and I should add that I am satisfied that in all the facts and circumstances of this case there is no injustice to the plaintiff in so ordering.