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THE COURT OF APPEAL

Appeal Number: 2020/122

Neutral Citation Number: [2022] IECA 163

Whelan J.

Faherty J.

Collins J.

BETWEEN

JOANNE O'SULLIVAN

Plaintiff/Respondent

AND

AGNIESZKA BROZDA, MARY COUGHLAN

AND JASON COUGHLAN

Defendants/Appellants

Judgment of Mr Justice Maurice Collins delivered on 14 July 2022

PRELIMINARY

1. The background to this appeal, and the issues and arguments arising in it, are fully

set out in the judgment of Faherty J. As she explains, the appeal essentially involves two issues. The first is whether the High Court Judge (Barr J) was wrong not to dismiss the Plaintiff's claim pursuant to section 26(2) of the Civil Liability and Courts Act 2004 ("*the 2004 Act").* The second issue relates to the Judge's assessment of *quantum*. No issue of liability arises. For the reasons that she gives in her judgment, Faherty J concludes that the appeal on *quantum* fails. I agree fully with her analysis and conclusions and have nothing to add to her judgment on that issue. This judgment addresses the other issue on the appeal, concerning section 26(2) of the 2004 Act. For the reasons that I shall set out, I conclude that the Judge made no error in his assessment of that issue and there is no basis for interfering with this conclusions. Accordingly, this ground of appeal also fails.

2. For the purposes of this judgment, I gratefully adopt the factual narrative in the judgment of Faherty J and her account of the course of the proceedings and the evidence given in the High Court. It will, however, be necessary to refer to certain aspects of the High Court proceedings in more detail in due course.

SECTION 26

3. So far as material, Section 26 is in the following terms:

> *"(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—*
>
> *(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. Section 14 of the 2004 Act requires the plaintiff in a personal injuries action to swear an affidavit verifying any "*assertions or allegations*" made in any pleading served on and/or "*further information*" provided to the defendant in the action (section 14(1). The defendant or third party is similarly obliged to verify "*assertions or allegations*" made in any pleading served on any other party (section 14(2)). It is an offence to make a statement in a section 14 affidavit that is false or misleading in any material respect and is known to be false and misleading (section 14(5)). Separately, section 25 of the 2004 Act makes it an offence for "*a person"* to give or dishonestly cause to be given, or adduces to or dishonestly causes to be adduced, evidence in a personal injuries action that is false or misleading in any material respect and which that person knows to be false or misleading (section 25(1)). It is also an offence for a person to give, or dishonestly cause to be given, *"an instruction or information, in relation to a personal injuries action, to a solicitor, or person acting on behalf of a solicitor, or an expert*" that is false or misleading in any material respect and which that person knows to be false or misleading (section 25(2)).

5. Sections 14 and 25 operate symmetrically, applying to plaintiffs and defendants (and, where applicable, third parties) in personal injuries actions (Part 2 of the 2004 Act is, or course, applicable only to such actions). However, section 26 is asymmetric in its operation, applying as it does only to personal injuries *plaintiffs*. A defendant who knowingly makes a false and misleading statement in a section 14 affidavit of verification, or who gives or causes to be given false or misleading evidence at trial, may commit an offence under section 14 and section 25

respectively but does not – at least under the provisions of Part 2 of the 2004 Act - face the risk of having their defence struck out or suffering judgment against them even where they may otherwise have had a good defence in law. [1]

6. There is by now a good deal of authority on the interpretation and application of section 26, including a number of decisions of this Court which have comprehensively identified the appropriate approach to the section, namely *Nolan v O' Neill* [2016] IECA 298, *McLaughlin v Motor Insurers Bureau of Ireland* [2018] IECA 5, and *Platt v OBH Luxury Accommodation Limited* [2017] IECA 221, [2017] 2 IR 382, in which Irvine J (as she then was) gave the judgment of the Court and *Browne v Van Geene* [2020] IECA 253, in which Noonan J gave the only judgment.

7. So far as appears to me, the following are the main points to emerge from the terms of section 26 itself and the authorities which have addressed it:

- The onus of establishing that evidence given in an action and/or in a section 14 affidavit is "*false and misleading in any material respect"* is on the defendant. The requirement of materiality appears to have two aspects. First, the evidence at issue must be material to the claim advanced (as to which see *Nolan v O' Neill*, at para 43, citing the observations of Fennelly J for the Supreme Court in *Goodwin v Bus Éireann* [2012] IESC 9, at para

[1] It is unnecessary here to explore whether, in such circumstances, there might be a common law power to make such an order.

62 of his judgment). In *Nolan v O' Neill,* Irvine J considered that the High Court was wrong to rely on what she considered to be false and misleading evidence as to the inability of the plaintiff to engage in "*car drifting*" due to his injuries, on the basis that such evidence was not material in circumstances where no claim for general or special damages had been made based on his inability to engage in that activity (at paras 58-60). Second, the evidence must be false and misleading to a material degree. That does not mean that a defendant must establish that the entirety of the claim is false or misleading in order to succeed (*Nolan*, para 44) but the false or misleading evidence must nonetheless "*be sufficiently substantial or significant in the context of a claim that it can be said to render the claim itself fraudulent*" (*Nolan*, at para 43, again citing the judgment of Fennelly J in *Goodwin*).

- Similarly, the onus of establishing that the plaintiff *knew* that the evidence given and/or that any section 14 affidavit sworn was false or misleading is on the defendant. The test of knowledge in this context is subjective: *Ahern v Bus Éireann* [2011] IESC 44, per Denham CJ at para 34. Actual, rather than constructive, knowledge/dishonesty must therefore be established. Where section 26(2) is relied on, the defendant "*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*" (*McLaughlin*, at para 33)

- Where those two threshold requirements are established, the court is <u>*obliged*</u> to dismiss the action unless doing so "*would result in injustice being done".* Section 26 does not allow the court to excise from the claim only that part or those parts that have been contaminated by the false or misleading evidence. As Irvine J put it in *Platt*, the court "*cannot proceed to award damages for that part of a claim which is not infected by the misleading evidence. The legitimate parts of the claim cannot survive*" (para 74, citing Ryan J in *Meehan v BKNS Curtain Walling Systems Ltd* [2012] IEHC 441, at page 13).

- That being so, it is unsurprising that section 26 has been described as "*draconian*" (per Peart J in *Carmello v Casey* [2007] IEHC 362, [2008] 3 IR 524, at para 57; *Nolan*, at para 35).

- In light of the significant adverse consequences for a plaintiff of the making of an order under section 26, both in terms of the potential loss of a legitimate claim for damages arising from injury sustained in an accident caused by the negligence of the defendant *and* the reputational impact of a finding that the plaintiff knowingly gave false or misleading evidence (in essence, a finding of civil fraud), the threshold requirements must be clearly established. The applicant "*undertakes a significant burden of proof*" (per Quirke J in *Farrell v Dublin Bus* [2010] IEHC 327, at page 6) and, while the standard of proof is the civil standard of the balance of probabilities, the application of that standard should "*be proportionate to the nature and*

gravity of the issue to be investigated" (*ibid*, citing *Georgopoulos v Beaumont Hospital Board* [1998] 3 IR 132, per Hamilton CJ at 149-150). Accordingly, the defendant must discharge the onus of "*proving, as a matter of high probability, that the evidence which has been given or adduced by the plaintiff has been false or misleading in a material respect*" (*ibid*). The analysis in *Farrell* was referred to with evident approval by Irvine J in *Nolan*. In her view, it led to the conclusion that the trial judge "*should be absolutely satisfied in his or her own mind that the defendant has discharged the requisite burden of proof*" before making a section 26 order (*Nolan*, at para 42).

- The serious consequences of a section 26 order also require procedural safeguards for the plaintiff. Any assertion that a plaintiff has given or caused to be given false or misleading evidence (or sworn a false or misleading section 14 affidavit) must be put squarely and directly to them so as to give them an opportunity to be heard: "*it is not open to a defendant to make an application under s.26 of the 2004 Act unless the plaintiff in the course of the hearing is 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*" (*Platt*, at para 69). In *Nolan*, this Court regarded it as "*fundamentally unfair*" for the defendants to have made an application under section 26 in circumstances where they "*did not take the risk of challenging [the plaintiff] as someone intent on*

fraud" and where "*he was given no opportunity to protect his reputation*" (at para 55).

- Where the threshold requirements of section 26 are established, the court must proceed to consider whether *"the dismissal of the action would result in injustice being done."* The onus in this respect would appear to be on the defendant. In this context, the fact that "*the dismissal of an action will deprive the plaintiff of damages which he or she would otherwise be entitled cannot, by itself, be considered unjust"* (per Quirke J in *Higgins Caldark Limited* [2010] IEHC 527, at para 87 (my emphasis)). That is clearly so. Otherwise, only actions that would have failed in any event would be liable to dismissal under section 26, a restriction that would entirely frustrate its purpose. However, as Irvine J explained in *Platt*, it does not follow that "*the court should ignore the consequences for the plaintiff of having their action dismissed as part of its overall assessment*" (at para 78). To do so would, in her view, "*offend the court's obligation to construe the section in accordance with the constitutional principles of fairness and proportionality*" (at para 79). I agree. In this jurisdiction, the right to bring an action to recover damages for personal injuries caused by the negligence of another has a constitutional underpinning in the provisions of Article 40.3 of the Constitution, as Irvine J recognised in *Nolan*, at para 39. Clearly, that right is qualified by section 26 (*Platt*, at para 96). But section 26 must operate within proper constitutional parameters. In that context, the fact that "*the sanction if imposed has the effect of denying a plaintiff his/her*

constitutional right to bodily integrity as protected by Art 40.3 of the Constitution" (*Nolan*, at para 39) must surely be a factor to be taken into account when the court comes to assess the issue of whether dismissal of the action would cause injustice. That is not to suggest that Article 40.3 is a bar to making an order under section 26 (*Platt*, at para 96) but simply that is a factor in the overall assessment of whether dismissal would result in injustice. That assessment will of course depend on all of the individual circumstances of the particular case and it would be "*inadvisable .. to attempt to set out an exhaustive list of all of the factors which might be material to a court's consideration*" in this context (*Platt*, at para 94).

- Just as the court should be careful and cautious about making a section 26 order, defendants ought to exercise caution in seeking such an order. "*It behoves defendants to use prudent discernment before taking the very serious step of making a s. 26 application"* (per O' Neill J in *Smith v Health Service Executive* [2013] IECA 360, at para 92). Section 26 is there to deter and disallow fraudulent claims. It "*should not be seen as an opportunity to prey on the frailty of human recollection or the accidental mishaps that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of the award of compensation to which they are rightly entitled"* (per O' Neill J in *Smith v HSE*, at para 92, cited with approval in *Platt*, at para 67). Neither is it intended to be used to deny a plaintiff their lawful entitlement to compensation "*because they have taken an overly*

optimistic view as to the earnings they might have enjoyed but for their injuries". Future loss of earnings claims "*are always a matter of some speculation and … this is why actuaries, when they prepare their reports, often offer a range of options to a court as to the level of earnings which a plaintiff might have expected to earn had they not been injured"* (*Nolan*, at para 56).

- A number of judgments have canvassed the possibility that a defendant that makes an application under section 26 without an appropriate basis could have an award of aggravated damages made against them as a mark of the court's disapproval: see, for example, *Nolan*, at para 55. In fact an award of aggravated damages has been made on at least one occasion: *Keating v Mulligan* [2020] IEHC 47, where the High Court (Cross J) awarded €10,000 in aggravated damages where "*the defendant went far beyond either what was required for an application under s.26 or indeed what was supported by any evidence*" (at para 32).

8. An issue which does not appear to have been considered in the authorities, and which was not debated before us, is whether section 26 requires to be pleaded by a defendant or whether, even if not required to be formally pleaded, some form of written notice of an intention to rely on the section ought to be given.[2]

[2] Ordinarily, a party alleging fraud is required to plead it expressly and with particularity: see Order 19, Rule 5(2) RSC as interpreted and applied in decisions such as that of the High Court (Finlay Geoghegan J) in *Keaney v Sullivan* [2007] IEHC 8. The purpose to that rule is to ensure that the other party is given adequate

9. That issue has been considered in England and Wales in a similar context. Section 57 of the Criminal Justice and Courts Act 2015 requires a court to dismiss a personal injury claim where the claimant has been *"fundamentally dishonest*", unless the court is satisfied that the claimant would suffer *"substantial injustice*" were the claim to be dismissed. It appears that a failure to plead dishonesty will not necessarily exclude the defendant from relying on the section at trial or bar the court from dismissing the claim: *Howlett v Davies* [2017] EWCA 1969, [2018] 1 WLR 948, at paras 31-32.[3] As here, however, the courts have emphasised the requirement that the claimant should have adequate warning of, and a proper opportunity to deal with, any allegation of dishonesty and it has been said that *"[o]rdinarily, the allegations will be either pleaded or set out in writing, but there may be cases where that is not necessary":* per Choudury J in *Jenkinson v Robinson* [2022] EWHC 791 (QB) at para 32.

10. There may be an argument to be made that a defendant should be required to plead section 26(2), or at least to give written notice of their intention to rely on it, in

notice of any allegation of fraud and the basis for it and has an opportunity to defend themselves against it. In addition, particular requirements apply to barristers as regards the pleading of fraud. Rule 5.8 of the Code of Conduct for the Bar of Ireland provides that a barrister "*shall not settle a pleading claiming fraud without express instructions and without having satisfied himself that there is or will be available at the trial of the action evidence to support such a claim."* Rule 4.48 of the Draft Code of Practice for Practising Barristers published by the Legal Services Regulatory Authority is in identical terms.

[3] *Howlett* was in fact concerned with provisions of the CPR relating to qualified one-way costs shifting which are also premised on a finding that a claim was "*fundamentally dishonest"*

advance of trial (the position in relation section 26(1) is clearly different as it is engaged by evidence given at trial). No doubt, there are counterarguments also. But, as I have said, that issue does not arise here. In any event, however, existing authority makes clear that a plaintiff must have an adequate opportunity to counter the suggestion that they have knowingly given false or misleading evidence (whether orally or in the form of a section 14 affidavit). In that context, it appears to me that, before making an application to dismiss a claim pursuant to section 26, a defendant should (i) identify clearly and precisely the evidence (written or oral) given by or at the behest of the plaintiff said to have been false or misleading; (ii) explain the materiality of that evidence; (iii) identify the evidential basis for asserting that such evidence was given in the knowledge that it was false or misleading and (iv) give the plaintiff and, where appropriate, their witnesses, a fair opportunity to address these matters in their evidence. If it appears necessary or appropriate to do so, it is open to the trial judge to require the defendant to set out the grounds for the application in writing. In every case, the trial judge must be careful to ensure fairness, consonant with the gravity of a finding that a plaintiff has made a fraudulent claim.

11. Although every case must be assessed on its own facts, it may nonetheless be of some utility to look at the authorities cited to us (which are but a subset of the wider body of authority on section 26) in order to identify the circumstances in which courts have considered it appropriate to make an order dismissing an action under section 26.

12. In *Carmello v Casey*, the plaintiff had suffered injury in a road traffic accident. Liability was admitted. A significant element of the claim was that the plaintiff was suffering from ongoing facial numbness as a result of striking his face against the dashboard in the accident. It emerged at trial that, in fact, any facial numbness was the consequence of a subsequent accident, involving the plaintiff being struck by the branch of a tree. That subsequent accident had not been disclosed by the plaintiff. In the circumstances, Peart J had little difficulty in concluding that the claim was "s*ubstantially fraudulent*" on the basis that the plaintiff had deliberately set out to attribute the injury arising from the subsequent accident to the earlier road traffic accident (at para 56).

13. *Farrell v Dublin Bus* was another clear case. The plaintiff had made a significant claim for loss of earnings, past and future. The action had been listed for hearing in July 2008 but was adjourned on the application of the defendant in order to allow it to investigate the loss of earnings claim. At that stage, the plaintiff was contending that she had been unable to work, and therefore had no earnings, for the entire period since the accident (in 2004). The action then came on for hearing in July 2010. In the opening, the plaintiff's (substantial) claim for future loss of earnings was simply abandoned and her claim for past loss was confined to the period between the accident and October 2007. However, on the second day of the hearing, the plaintiff purported to re-instate her claim for past loss for the period from the accident in 2004 to the present date (July 2010). It emerged in the course of the hearing that the plaintiff had been involved in a number of previous road traffic accidents for which she had been compensated which had not been disclosed

to her doctors. There was significant evidence that the plaintiff was earning in the period since the accident. For the detailed reasons set out in the judgement of Quirke J, he concluded that the assertion that the plaintiff's injuries had deprived her of any income in the period up to hearing was false or misleading. No credible explanation had been offered for the plaintiff's failure to adduce any documentary or other evidence to support her claim for loss of earnings and there was no evidence to explain the plaintiffs "comfortable lifestyle" since the accident, when she claimed to have been incapable of earning and dependent on social welfare.

14. *Higgins v Caldark Limited* [2010] IEHC 527 is another decision of Quirke J in the High Court. The plaintiff had suffered a severe injury to his right hand and thumb in an accident at work in 2002. The defendant employer (which was owned and controlled by the plaintiff's brother) was found 75% liable for the accident. The plaintiff's claim included a substantial claim for past loss of earnings. The plaintiff acknowledged receiving some payments from the defendant in the period between 2005 and 2008. However, it transpired at the hearing that the plaintiff had been in receipt of significant payments from the defendant in 2002, 2003 and 2004 and had been in a position to provide valuable services for such payments. That had not been disclosed and was inconsistent with the section 14 affidavits sworn by the plaintiff. The plaintiff had also made a substantial claim for future care which, the court found, was "*largely based upon false and misleading information*" which the plaintiff had given to his occupational therapist and vocational rehabilitation consultant. That claim had also purportedly been verified by the plaintiff. Even though the plaintiff had not given any false or misleading evidence, Quirke J

nonetheless considered that he was duty-bound to dismiss the claim pursuant to section 26(2) of the 2004 Act.

15. In *Platt*, the plaintiff had suffered very significant injuries when he fell out of a window from a window seat in his bedroom in the first defendant's hotel. The High Court (Barton J) found that the window was unsafe but that the plaintiff had contributed to his accident to the extent of 40% ([2015] IEHC 793). However, Barton J went to find that the plaintiff's evidence as to the extent of his disabilities and the level of his pain was dishonest, unreliable and lacking in credibility. He had, the judge found, grossly exaggerated his injures both to his own experts and in his evidence to the court. Those findings were based in part on video surveillance footage that had emerged in the course of the hearing. As the judge noted *" the presentation of the plaintiff on the video was in stark contrast to the reporting and presentation made by him to his own experts and to those retained on behalf of the defendant in this case."* (High Court judgment at para 120). For the detailed reasons set out in his judgment, Barton J concluded that grounds for dismissing the claim had been made out both under section 26(1) and section 26(2). As to section 26(2), the judge was satisfied that, when the plaintiff had sworn his affidavits of verification "*he knew what the truth was and that, with particular regard to his affidavit in respect of his claim for special damages, he knew that that claim was based on the presentation of his disabilities made by him to his own experts, that that presentation was grossly exaggerated, and that his intention in doing so was to maximise the damages he sought to recover from these defendants"* (at para 178). He was similarly satisfied that in his oral evidence to the court, the plaintiff *"knew*

his presentation and reporting to be an exaggeration of the truth, and am driven to the conclusion, as a matter of probability, that his intention was to mislead for the purpose of maximising his claim" (at para 184).

16. The High Court's decision in *Platt* was upheld by this Court on appeal, the Court taking the view that Barton J was entitled on the evidence to reach the conclusions that he had and that no basis for interfering with those findings had been established having regard to the approach mandated by *Hay v O' Grady* [1992] 1 IR 210.

17. In all of those cases (and the other cases in which section 26 applications have successfully been made), the plaintiff was found to have engaged in a calculated and conscious attempt to advance a dishonest claim. In each, it could properly be said that the point had clearly been reached "*where dishonesty in the prosecution of a claim can amount to an abuse of the judicial process as well as an attempt to impose upon the other party*" (per Hardiman J in *Vesey v Bus Éireann* [2001] 4 IR 192, at page 202).

18. In contrast to such cases, the Judge here did not make any finding that the Plaintiff was guilty of any dishonesty in the prosecution of her claim. On the contrary, the Judge explicitly found that "*there was no attempt by the plaintiff to make a claim to a level of damages for future loss of earnings to which she was not entitled"* (Judgment, para 159) and concluded in express terms that there was "*basis for the assertion that this plaintiff has attempted to mislead the defendant or the Court.*." (Judgment, para 160). Those findings were made by the Judge on the basis of the

evidence he had heard over 6 hearing days, including the evidence of the Plaintiff herself, both in direct and in cross-examination.

19. In *Goodwin,* Fennelly J observed that it was "*obvious that the defendant, upon whom the burden lies, faces a daunting task in making its case on appeal in circumstances where the trial judge, invited expressly so to do, declined to make such a finding [that the plaintiff had knowingly given false or misleading evidence] and expressly said that she was not satisfied that the plaintiff had knowingly given false or misleading evidence."* In light of the specific findings made by the Judge here, the First Defendant's is perhaps even more daunting than that undertaken – without success - by the appellant in *Goodwin.*

THE APPLICATION TO DISMISS HERE

20. The road traffic accident giving rise to the Plaintiff's action occurred on 27 August 2016. As Faherty J explains in her judgment, the Plaintiff was a very bad candidate for the accident given that she was recovering from significant surgery she had undergone at the start of June 2016 to correct a Chiari 1 malformation. What was involved in that surgery and its immediate aftermath is described in detail by Faherty J. As she explains, the Plaintiff had made considerable progress towards recovery in the period prior to the accident.

21. The Plaintiff's personal injuries summons was issued on 20 December 2017. It set out in some detail the adverse effect of the accident on the Plaintiff. She was, it noted, already in a vulnerable position at the time of the accident having had spinal surgery but had been anticipating getting back to work "*in the ensuing couple of months"*. However, that had not happened and she had in fact remained out of work at the time she was reviewed by her GP in September 2017. The summons included a claim for ongoing loss of earnings.

22. The First Defendant sought further particulars of the claim in February 2018. Replies to those particulars were provided in May 2018. The replies prompted a further request, including a request that the Plaintiff would clarify and quantify what claim was being maintained in respect of loss of earnings (letter of 10 May 2018). Before that further request was replied to, the First Defendant delivered her defence (dated 29 May 2018). It essentially traversed the Plaintiff's claim but one

specific plea is worthy of note, namely that the First Defendant would contend at the hearing of the proceedings that the contact that had taken place between the vehicle in which the Plaintiff had been travelling as a passenger (which was owned by the Second Defendant and driven by the Third Defendant) and the vehicle of the First Defendant *"was minimal and was so minor in nature that the Plaintiff did not suffer injury by reason of the same."* While that plea was ultimately abandoned, it is difficult to avoid the conclusion that the First Defendant, or, more accurately, her insurers, decided – wrongly - at an early stage that the Plaintiff's claim was unmeritorious.

23. On 30 April 2019, the Plaintiff delivered detailed *Supplemental Particulars of Injury*. The particulars stated that the Plaintiff continued to be out of work due to her injuries and referred to a report dated 12 March 2019 which had been prepared by O' Sullivan & Devine Rehabilitation Consultants and which detailed the ongoing vocational effects of the accident based on an assessment that had taken place on 16 February 2019. The particulars referred to the fact that the Plaintiff had proposed a gradual return to work, initially for 8 hours per week (from home) and increasing to 2 days per week (again, working from home) but had not received a response. The particulars recited the advice of the rehabilitation consultants to continue to explore that possibility and stated that, based on the assessment interview and from reports read as part of the assessment process, they believed it "*highly unlikely that the Plaintiff would be in a position to return to full-time employment at that time."* In "*the longer term*", the Plaintiff's vocational future

should be viewed as positive "*if her medical condition settled and if she gained a restoration of her self-confidence and self-esteem."*

24. These particulars were presumably verified by the Plaintiff in accordance with section 14 of the 2004 Act (the affidavit does not appear to be in the papers). In any event, no issue was taken by the First Defendant with them. That is an important point to which I will return.

25. *Supplemental Particulars of Loss* were then delivered on 22 May 2019. These were verified by affidavit sworn by the Plaintiff on 20 September 2019. It is this affidavit that, according to the First Defendant, triggers the application of section 26. The affidavit is the usual form. The Plaintiff states that the "*assertions, allegations and information"* in the Supplemental Particulars of Loss which were within the Plaintiff's own knowledge were true and states she honestly believed that the assertions, allegations and information which were not within her knowledge are true.

26. The *Supplemental Particulars of Loss* dated 22 May 2019 opened by referring back to the assessment carried out by O'Sullivan & Devine Rehabilitation Consultants which had been particularised in the previous Supplemental Particulars and stated that, *"[b]ased on the Vocational and Rehabilitation Assessment"* (my emphasis) the Plaintiff had had the capital value of her future income loss calculated by Nigel Tennant, a Consulting Actuary. Reference was made to an actuarial report dated 20 May 2019 and the remainder of the particulars effectively summarised the contents

of that report (a copy of which was also enclosed). The particulars stated that, based on the findings of O'Sullivan & Devine, the Plaintiff might be able to carry out her HR work for 2 days per week working from home. For the purposes of his report, Mr Tennant had assumed that the Plaintiff would earn 2/5 of her previous salary. He calculated the Plaintiff's net weekly loss in three different scenarios (one involving the Plaintiff continuing in her previous post and the other two assuming that she would have been promoted to Senior Manager, but at different points in the applicable pay scale). Then based on the "*assumption*" that she would work only 2 days per week earning her previous salary and on a 1½% multiplier and a retirement age of 68" and weekly losses as previously set out, Mr Tennant calculated the capital value for the loss of earnings, based on the 3 different earning scenarios. These produced capital figures ranging from €510,468 at the lower end to €1,116,830 at the upper end.

27. On 20 September 2019, further *Supplemental Particulars of Injury* were furnished by the Plaintiff. The particulars set out in considerable detail the Plaintiff's ongoing physical issues and, in the final paragraph, it was stated that in the opinion of Dr Harney (a Consultant Specialist in Pain Medicine who had been treating the Plaintiff) her prognosis was poor in view of ongoing persistent pain and he had advised that she would continue to suffer with ongoing pain in the medium to long term. The Plaintiff had not gone back to work "*and Dr Harney envisaged that she would not be in a position to return to work for some time."* These *Supplemental*

Particulars of Injury were verified by the Plaintiff by affidavit sworn on the same date. No issue was taken with that affidavit by the First Defendant.

28. 20 September 2019 was also the day on which the Plaintiff swore the affidavit verifying the *Supplemental Particulars of Loss* dated 22 May 2019. It is worth observing that, as of then, the Plaintiff had been medically examined by a number of doctors on behalf of the First Defendant. She had been seen by Professor O'Sullivan (Consultant Neurological Surgeon) as early as April 2018. She was seen by Mr Kaar (Consultant Neurosurgeon) in August 2019. A Disclosure Schedule served on 11 June 2019 also indicates that the Plaintiff had been seen by Dr McDonnell and Dr Walshe and, significantly, by a vocational rehabilitation consultant, Ms Coghlan who had apparently provided a report dated 8 January 2019. She was seen by a number of other doctors subsequently, as well as by a physiotherapist and functional capacity assessor. The First Defendant was therefore at all times in a position to form their own view as to the nature and extent of the Plaintiff's injuries (which it did, though it was substantially rejected by the High Court) and if, when and to what extent she would be in a position to return to the workplace.

29. On 3 October 2019, further *Supplemental Particulars of Injury* were furnished by the Plaintiff, based on a report of 27 September 2019 provided by Dr Sean O'Sullivan, a Consultant Neurologist treating the Plaintiff. The particulars recited his view that the Plaintiff's symptoms were having a "*significant impact on her ability to work and perform normal activities of daily living*". He thought it unlikely

that the Plaintiff would make a full recovery but she might make a partial recovery over the following two years but she would be likely to require frequent analgesic use for her headaches and back pain beyond that time. Dr O'Sullivan acknowledged that *"it was difficult to predict the prognosis of post-traumatic headaches with accuracy on an individual basis."* The Plaintiff swore an affidavit of verification in relation to those particulars on 3 October 2019. Again, no issue has been taken with that affidavit.

30. Further *Supplemental Particulars of Injury* were furnished on 7 October 2019, based primarily on reviews carried out by her GP, Dr Ciaran Donovan. He also did not expect the Plaintiff to make a fully recovery and "*felt it was very difficult to be definite about her outcome as it had been over three years since the accident and she continued to be quite symptomatic".* Those particulars were verified by an affidavit of the Plaintiff sworn on 7 October 2019 which was not challenged in any way.

31. Further *Supplemental Particulars of Injury* dated 9 October 2019 were then furnished. These stated as follows:

> *"1) The plaintiff continues to be out of work due to her injuries, indicative values for the capital value of the plaintiff's possible future income losses were previously furnished herein on 22nd May, 2019. The indicative values which were furnished for the assistance of the Court were based on assumptions which may be varied subsequently by medical evidence as*

regards the plaintiff's prognosis and proportion of disability attributable to the accident.

2) A suggestion has been made that the plaintiff may be ready for a graduated return to work in the future with a view to resuming full time work. The plaintiff awaits a final recommendation from her medical advisers in this regard. The issue of the plaintiff's capacity for any graduated return to part time or possible eventual full time work is under consideration and will be subject to medical evidence and advice."

32. The Plaintiff swore an affidavit of verification in respect of those particulars on 10 October 2019. Again, no issue has been taken with that affidavit.

33. On 2 January 2020, the Plaintiff furnished further *Supplemental Particulars of Loss* which indicated that the Plaintiff continued to be out of work due to her injuries and provided an updated figure for net loss of earnings (up to 31 December 2019) of €112,228.80. That figure was repeated in *Supplemental Particulars of Loss* dated 8 January 2020 which also provided an updated figure for medical expenses and counselling of €12,654.48.

34. The action commenced before Barr J on 14 January 2020. Opening the Plaintiff's case, counsel described the consequences of the accident for his client and the difficulties that she had suffered and stated that it was hoped that she would be able to get back to work. That was, as he put it, "*the earnest hope and the preferable*

course for the Plaintiff."[4] He acknowledged that there would be an issue as to what part of her symptomology was attributable to her underlying Chiari malformation and the corrective surgery and what was properly attributable to the road traffic accident. As for the loss of earning claim, counsel made it clear that the figures that had been provided were "*indicative figures only*", that there was no question "*of claiming colossal figures for loss of earnings"* and that the claim would be *"determined on the medical evidence and that will unfold before your lordship and it is on that basis that the claim for loss of earnings will be determined."*[5]

35. At the conclusion of the opening, counsel for the First Defendant interjected to seek clarity as to what case his client was there to meet. He had, he said, been facing a claim "*at its height of over €1 million for future loss of income"* up to 5 minutes before and asked to be told *"precisely the claim that [was] being made*."[6] He also made it clear that the action was an assessment only. In response, counsel for the Plaintiff explained that "*the big figures came from the actuary's report*" and that they should have been tempered by saying that they were indicative figures which would depend on the medical evidence. The Plaintiff was not, he said, "*going down that road"* and he stated that his side would indicate to the other side where they stood in relation to "*the concrete figures*" that evening or the following morning. Counsel for the First Defendant then indicated that he had no problem with that,

[4] Day 1, pages 15-16.

[5] Day 1, page 17.

[6] Day 1, page 18.

adding that he was not making the point "*by reference to section 26 or something like that."*[7]

36. The Plaintiff then went into evidence and was still in direct examination at the conclusion of day 1. She completed her direct evidence the following morning. Toward the conclusion of that evidence she was asked about a possible return to work. She confirmed that she was still employed and that her employer had kept her position open for her. She explained that she discussed the issue of her return to work with Dr O' Sullivan and Dr Harney and said that the "*goal post*" tended to be pushed out each time that she saw them. Dr Harney had told her that the position would be reviewed again in the summer of 2020 but Dr O' Sullivan had told her that it would probably be up to another two years before she would realistically be fit for a phased return to work.[8]

37. The Plaintiff was then cross-examined for most of the remainder of day 2 (her cross-examination was, by agreement, interrupted to facilitate the evidence of Dr O' Sullivan). A number of issues were canvassed by counsel for the First Defendant but for present purposes I shall consider only those parts of the cross-examination that appear relevant to the section 26 issue. Before doing so, however, I should notice that prior to the resumption of the hearing on day 2, further *Supplemental Particulars of Loss* dated 15 January 2020 had been furnished by the Plaintiff. These stated (*inter alia*) that, while there remained the possibility that the Plaintiff

[7] Day 1, page 20.

[8] Day 2, page 7

would not return to work at all, that was "*probably unlikely*". It was reasonable to assume that any return to work would be on a graduated basis, with the Plaintiff working on a 50% basis for the first year. The particulars went on to give two alternative scenarios, the first (said to be "*highly unlikely")* involved a return to work within 6 months. The second scenario involved a return to work 22 months after the date of the particulars. Calculations were given for gross loss of earnings based on these scenarios. The particulars went on to state that the calculations were non-actuarial based and were based "*on the best medical prognoses available at this time".* There remained the very real possibility that the Plaintiff would not be in a position to return to work in the timeframes indicated and the Plaintiff reserved the right to "*rely on the most up to date prognoses provided by her medical attendees at the trial of the action".* Those particulars were verified by a further affidavit of verification sworn by the Plaintiff on 15 January 2020.

38. Armed with these *Supplemental Particulars of Loss* of 15 January 2020, counsel for the First Defendant put to the Plaintiff that while she had previously maintained a claim for in excess of €1.1 million, her claim for loss of earnings had been *"reduced by over 90%".* In response the Plaintiff explained that she was not the actuary and had not completed the actuarial report. She said that she had discussed with her solicitors in October (2019) about reducing the figure down, having spoken with her consultants about when an expected return would be feasible. It was again put to her that she had been maintaining a claim for up to €1.1 million for loss of income which had remained live until the opening of the case (counsel later suggested that "*at the last second*" his client had been told "*Ah, well, it's not*

really that way") and the Plaintiff was asked whether she had any explanation other than she was "*looking for something to which you were not entitled*."[9] The Plaintiff responded that the report was looking at "*worst case scenario*" which she hoped would not be the case. Counsel then suggested that there were only 2 possibilities, a deliberate exaggeration or "*another example of your capacity to catastrophize"* (a significant element of the First Defendant's defence on quantum was that the Plaintiff's symptomology was caused or contributed to by a tendency to "*catastrophize*" – the issue is dealt with in detail in the High Court Judgment). Counsel then moved on to other issues but then came back to ask how a claim for €1.1 million could have been advanced in circumstances where the Plaintiff was seeking to work toward a return to work for 2 days per week. The Plaintiff replied by stating her understanding (a correct understanding) that the actuarial calculations were based on a return to work for 2 days a week.

39. In re-examination, counsel for the Plaintiff brought her to the *Supplemental Particulars of Injury* of 9 October 2019 (which had not been referred to in cross-examination) and referred to the fact that further medical reports had been furnished after that so as put the Defendants in a position where they could properly understand the claim being made. That led counsel for the First Defendant to submit that a plea had been made for a "*huge sum*" which was never withdrawn.

[9] Day 2, page 125.

40. These exchanges led the Judge to express the view that the questioning of the Plaintiff had been "*particularly unfair*", having regard to what had been set out in the particulars of 9 October 2019. Those particulars had made it clear that the earlier figures were purely indicative and were based on assumptions that may or may not be borne out by the medical evidence. In the circumstances, the Judge considered *"that the case has been both pleaded fairly and was opened very fairly and I think that the questioning of [the Plaintiff] was unfair."*[10]

41. That, it might be thought, was the end of any section 26 point. In any event, the trial proceeded and a number of further doctors and other medical witnesses gave evidence on behalf of the Plaintiff and the First Defendant. Their evidence is set out in detail in the High Court judgment as well as in the judgment of my colleague.

42. On Day 6, the Court was told that the figures for loss of earnings had been agreed. Counsel for the First Defendant then indicated that he had been instructed to make *"an application".* He said that his client had not sought to make the case that the Plaintiff "*was in any way exaggerating her physical injuries or her perception of them and matters of that nature."*[11] He then referred to the Supplemental Particulars of Loss of 22 May 2019 and to (as he characterised them) the "*ameliorating particulars*" dated 9 October 2019, received some 20 days after the Plaintiff's affidavit of verification of 20 September 2019 (which, it will be recalled, related to the particulars of 22 May 2019). He emphasised that the claim in the

[10] Day 2, pages 145-146.

[11] Day 6, page 56.

particulars of 22 May 2019 had not been withdrawn and the reports of the vocational rehabilitation consultants and the actuary had not been withdrawn. He then referenced the particulars delivered on 15 January 2020 which had reduced the claim "*by a factor of ten, at a minimum*." [12] He suggested (incorrectly) that there was an inconsistency between the fact that as of December 2018 the Plaintiff had made inquiries about going back to work part time (which had been referred to in the Plaintiff's further particulars of 30 April 2019) and the claim made in the particulars of 22 May 2019 (as already mentioned, the figures in those particulars were premised on the Plaintiff being able to return to work for 2 days a week). At that point, the Judge intervened to clarify what application was being made and counsel at last made it clear that he had been instructed to make an application to dismiss the Plaintiff's action pursuant to section 26(2) on the basis that her affidavit of 20 September 2019 was *"misleading in a material respect."*[13]

43. In response, counsel for the Plaintiff immediately observed that it had not been put to her that in swearing the affidavit she did (the affidavit of 20 September 2019) she did so dishonestly with the intention of misleading the court. That was, he noted, a requirement under section 26(2)(b) (which he opened). He referred to the fact that the Plaintiff had been sent to a rehabilitation consultant who had advised her to try to get back to work with her existing employer. The figures given by the actuary were indicative figures and were clarified within weeks. The Plaintiff had not given evidence claiming that she would never work again. He repeated that it

[12] Day 6, page 60.

[13] Day 6, page 62.

had not been put to the Plaintiff that she had sworn dishonestly and with any intention to mislead which, he said, ought to have been put to her before such an application was made. In any event, he said, the evidence did not support the application.[14]

44. In reply, counsel for the First Defendant explained that when he cross-examined the Plaintiff his side did not know what her evidence would be and he did not have instructions to make the application at that stage. Those instructions had been given subsequently. He accepted it had not been put to the Plaintiff that she had acted in a fashion that was "*deliberately dishonest."*

45. No issue of aggravated damages was raised with the High Court in submission.

[14] Day 6, page 67.

THE HIGH COURT JUDGMENT

46. As already noted, the Judge was of the view that there was no basis for the section 26 application. He was satisfied that at the time when the Supplemental Particulars of Loss of 22 May 2019 were served, "*there was a basis on which the plaintiff could reasonably put forward the case that she would never be able to work more than two days per week for the rest of her life*", having regard to the report prepared by O'Sullivan & Devine Rehabilitation Consultants. The Supplemental Particulars of Loss of 22 May 2019 had merely set out the capital values of the future loss of earnings scenarios presented by O'Sullivan & Devine. He accepted that it was usual and appropriate practice to deliver particulars of loss on that basis and that it served to put the Defendants on notice "*of the range of figures that may be allowed by the Court, depending on what findings the Court should make in relation to the future earnings capacity of the plaintiff."* (Judgment, para 157). He did not see any basis for the contention that the Plaintiff had sworn an affidavit that was false or misleading in a material respect and that she had done so knowingly. The question of the Plaintiff's future earning capacity and, by extension, her future loss of earnings was "s*omewhat up in the air*" at the time the affidavit had been sworn, given that her future capacity for work was still being clarified as the hearing approached. The Judge went on to observe that, in the event that there was any "*confusion*", the Supplemental Particulars of 9 October 2019 had made it clear to the Defendants that "*this was an evolving situation which had yet to be clarified*." (Judgment , para 159). The Judge was satisfied that there had been no attempt by

the Plaintiff to make a claim to a level of damages for future loss of earnings to which she was not entitled. Rather, she had pleaded her claim at a range of values, including up to its "*high-water mark*" and had made it clear that the ultimate figure would be dependent on the medical evidence given at trial (*ibid*). That position had been made clear in the Supplemental Particulars of 9 October 2019 and was reiterated in counsel's opening at the commencement of the hearing. In the circumstances, there was no basis for the assertion that the Plaintiff had attempted to mislead either the Defendants or the Court and the application was accordingly refused (Judgment, para 160).

47. The Judge made a number of express findings in addressing the issue of *quantum* that are relevant in the context of the section 26 application also. While in any event preferring the evidence of the Plaintiff's medical witnesses (Judgment, para 169; para 179), the Judge noted that Mr Kaar and Professor O'Sullivan (who gave evidence for the First Defendant) had accepted that the plaintiff was suffering the symptoms of which she was complaining ~~of~~ and that there had been "*no suggestion that she has deliberately or consciously sought to exaggerate her symptoms, or fraudulently claim compensation for injuries that are not genuine"* (Judgment, para 173). The Judge was satisfied that the Plaintiff has suffered the pain and disablement as described by her in her evidence and in the evidence of her medical witnesses (Judgment, para 179). The Judge did not think that the Plaintiff was deliberately catastrophizing either her injuries or her symptoms of pain and he accepted the evidence of her GP that she was a genuine and well-motivated person who was keen to get back to a normal life and to return to work (Judgment, para

182). Having watched and listened to the Plaintiff, the Judge was satisfied that she did not attempt to exaggerate her level of disability (Judgment, para 185). Finally, the Court was satisfied that the Plaintiff was not *"deliberately exaggerating or malingering*" (Judgment, para 188)

THE APPEAL

48. In the light of these findings, and having regard to the well-established jurisprudence as to the limited role of this Court in relation to findings of fact made by the High Court based on its assessment of *viva voce* evidence, it might seem surprising that the First Defendant would appeal the High Court's refusal to dismiss the Plaintiff's action. Nonetheless, appeal it has.

49. Only one of the grounds in the First Defendant's Notice of Appeal addresses the section 26 point. It asserts that the Judge erred in fact and/or law in failing to dismiss the action or otherwise failing to draw an adverse conclusion on credibility given the terms of the affidavit sworn on 20 September 2019 in respect of the Supplemental Particulars of Loss of 22 May 2019, the First Defendant "*specifically alleging that when [the Plaintiff] swore that said Affidavit, the Plaintiff knew or ought to have known that the same was false and misleading in a material respect given her educational qualifications and experience and her ultimate claim for future loss of income"* (my emphasis).

50. It will be seen immediately that this ground does not properly reflect the elements of section 26. Constructive knowledge – "*ought to have known"* – does not suffice for the purposes of the section. The test of knowledge is subjective: *Ahern v Bus Éireann* [2011] IESC 44, per Denham CJ at 34.

51. In her Respondent's Notice, the Plaintiff notes the findings of the Judge and says that his findings were based on a correct interpretation of the statutory provision and a correct assessment and consideration of the evidence. The Plaintiff seeks the dismissal of the appeal and the affirmation of the High Court Order *simpliciter*. The Respondent's Notice does not ask this Court to make an award of aggravated damages against the First Defendant nor could it properly do so given that the possibility of such an award being made was not canvassed before Barr J in the High Court.

52. As to the arguments advanced on appeal, the First Defendant emphasises that the amount that the Plaintiff had ultimately recovered for future loss of earnings was less than 3% of the maximum amount she had claim. That calculation, and the expert reports set out in the Plaintiff's disclosure schedule, had never been withdrawn. The particulars furnished on 9 October 2019 had not withdrawn the claim. It is again suggested – again incorrectly - that the fact that the Plaintiff had been discussing a return to work (on a 1 day or 2 day per week basis) in December 2018 was inconsistent with the Supplemental Particulars of Loss of 22 May 2019 and the verifying affidavit of 20 September 2019.[15]

[15] To repeat, the calculations set out in those particulars (derived from Mr Tennant's actuarial report) were based on the assumption that the Plaintiff would in due course return to employment for 2 days a week and receive 2/5^{ths} of her salary. Furthermore, the fact that the Plaintiff had been seeking to explore a return to work for 1/2 days a week (initially from home) and the fact that her medical and vocational advisors were supportive of her returning to work on that basis, had been disclosed in the Plaintiff's *Supplemental Particulars of Injury* dated 30 April 2019 (which also enclosed the report of 12 March 2019 prepared by O' Sullivan & Devine Rehabilitation Consultants).

53. As will be evident, the First Defendant's major emphasis is on the failure to withdraw the particulars of 22 May 2019. Even though the subsequent particulars of 9 October 2019 sought to suggest that the earlier particulars were indicative figures or estimates, the Defendants "*individually and collectively continued at that time to be exposed to an Order for the full amount of the Claim"*. Reference was again made to the fact that "*the reports on which the claim was based were not withdrawn*" and it was noted that at no stage prior to the trial or indeed until the Plaintiff's case had more or less closed, was it indicated that the Plaintiff would not be calling the vocational rehabilitation consultant and/or the actuary. That was, counsel said, the "*core issue*": the Plaintiff had maintained her claim for future loss of earnings, had said that she was going to call witnesses in support of that claim and then had not done so. That was, he said "*objectionable*" and "*cannot be tolerated"* and, if tolerated, would render section 26 "*meaningless*". Counsel submitted that this was not a "*Hay v O' Grady point"* .

54. Counsel for the Plaintiff was scathing in his characterisation of the section 26 application. Section 26 involved an allegation of fraud. He referred to that as an "*aggravating feature*". The cases illustrated that section 26 applied where a plaintiff had been "*caught out",* such as where undeclared earnings were disclosed or where video footage disclosed that a plaintiff had been working or otherwise active at a time when they claimed to be incapacitated. Here, in contrast, the Judge found the Plaintiff to be honest and straightforward. A full-frontal attack had now been launched on the Plaintiff's credibility which was, he said, "*scandalous*" and

which, if successful, would inhibit any plaintiff from putting their full case. Reference was made in this context to the issue of aggravated damages.

55. In reply, counsel for the First Defendant maintained that it was appropriate to make the application. He accepted that it was an application that should not be made lightly. Initially (so it was said) the First Defendant had taken a "*benign approach*" but that had changed when the Plaintiff gave her evidence and failed to give evidence to support the future loss of earnings claim that she had made. That was, he said, "*not acceptable*".

ASSESSMENT

56. In my view, the First Defendant's appeal from the refusal of its section 26 application simply does not get out of the blocks.

57. The Supreme Court (in *Goodwin* and *Ahern*) and this Court (in *Platt*, *McLaughlin* and *Browne*) have emphasised the high hurdle that the principles in *Hay v O' Grady* present to appellants in this context. As already noted, in *Goodwin* Fennelly J referred to the "*daunting task*" faced by a defendant in seeking to make a case for a section 26 order on appeal in circumstances the High Court had declined to make a finding that the plaintiff had knowingly given false and misleading evidence (*Goodwin*, at para 49).

58. The hurdle here is a particularly high one, in light of the specific findings made by the Judge, as noted in paragraphs 46-47 above. Those findings are wholly at odds with any suggestion that the Plaintiff gave false or misleading evidence at *any* stage of the proceedings, still less that she did so knowingly and deliberately. Unless this court is persuaded that there is a basis on which it could properly interfere with those findings, the First Defendant's appeal cannot succeed. [16]

[16] No suggestion is made that the Judge made any *legal* error in his application of section 26.

59. In truth, the First Defendant failed to engage with the Judge's findings and did not even attempt to discharge the burden of establishing that those findings should be set aside by this Court. Those findings were clearly supported by the evidence heard by him and the basis for them was clearly explained in his Judgment. They were made with the benefit of hearing the evidence of the Plaintiff (including her evidence in cross-examination) and of her principal treating doctors. The Judge also had the evidence of the witnesses called by the First Defendant. The findings made by the Judge were fatal to the section 26 application in the High Court and they are equally fatal to the First Defendant's appeal.

60. I do not overlook the fact that, in argument, counsel for the First Defendant identified as the "*core issue*" an issue which, he said, was not a "*Hay v O' Grady point."* That issue was that the Plaintiff had maintained her claim for future loss of earnings, had not withdrawn that claim at any stage and had then failed to stand that claim up in her evidence and failed to call witnesses in support of it even though she had indicated that she would be doing so. Even if that was a correct characterisation of how matters proceeded in the High Court – and, as I will explain, I do not believe that it is – it fundamentally misses the point. Before any section 26 order could be made here, the First Defendant had to establish that the Plaintiff's affidavit of 20 September 2019 was (i) false and misleading in a material respect and (ii) that when swearing the affidavit the Plaintiff knew it to be false or misleading. Absent both of those two elements being established to the requisite degree, the High Court could not make the order. The High Court found, on the evidence, that neither element had been established. That was the end of the

application. Whatever procedural complaints that the First Defendant may have had were, in this context, *nihil ad rem*. The findings of the High Court dictated that the First Defendant's application be dismissed and those findings can only be reviewed in accordance with *Hay v O' Grady.* For this appeal to succeed, it was essential for the First Defendant to confront those findings but she has elected not to do so.

61. In any event, I do not accept the First Defendant's characterisation of the proceedings in the High Court. As the Judge explains in his Judgment, the Supplemental Particulars of Loss of 22 May 2019 were furnished in accordance with the usual and appropriate practice. They served to put the Defendants on notice "*of the range of figures that may be allowed by the Court, depending on what findings the Court should make in relation to the future earnings capacity of the plaintiff."* (Judgment, para 157). The Supplemental Particulars of 9 October 2019 had made it clear to the Defendants that "*this was an evolving situation which had yet to be clarified*." (Judgement, para 159). It was made clear that the ultimate figure would be dependent on the medical evidence given at trial (*ibid*) and that position was reiterated in counsel's opening. As for the alleged failure of the Plaintiff to call her actuary, Mr Tennant, it is not at all clear how he might have been a necessary witness in circumstances where there appears to have been no issue ultimately as to the calculation of future loss of earnings. As regards the Plaintiff's rehabilitation consultant, again it is unclear what her evidence would have added in this context. That is particularly so given it has never been suggested that either the *Supplemental Particulars of Injury* dated 30 April 2019 (which were

based on the report of 12 March 2019 prepared by O' Sullivan & Devine Rehabilitation Consultants) or the affidavit of the Plaintiff verifying those particulars was in any way false or misleading.[17]

62. That is sufficient to dispose of the section 26 appeal. It also disposes of the ground, advanced in the alternative, that the Judge should have drawn some adverse conclusion regarding the Plaintiff's credibility. The Judge heard and saw the Plaintiff. He heard the other evidence. Having assessed that evidence, it was open to him to find that the Plaintiff was a credible witness and that is what he did in fact find. Again, it is not just the case that no basis for interfering with that finding has been established; no attempt has been made to do so.

63. Before concluding, there are some further observations I would make on the section 26 application and on this aspect of the First Defendant's appeal.

64. In the first place, I do not consider that the application here proceeded in a fair manner. The Judge himself observed that the cross-examination of the Plaintiff had been unfair because she was not brought to the Supplemental Particulars of Loss of 9 October 2019. I am quite sure that that was an oversight on part of counsel but it nonetheless significantly affected the fairness of the cross-examination. The Supplemental Particulars of Loss of 9 October 2019 were an essential part of the narrative, as were the Supplemental Particulars of Injury of 30 April 2019. In

[17] As noted previously, no such affidavit appears to be included in the papers but it appears reasonable to assume that such an affidavit was indeed sworn.

addition, the Plaintiff was not given an adequate opportunity to counter the assertion that she had knowingly sworn a materially false or misleading affidavit on 30 September 2019. That was never put to her clearly or directly, as counsel himself accepted when the issue was debated during the closing submissions in the High Court. He explained that instructions to make the section 26 application were only given after the Plaintiff had completed her evidence. That may well explain, but it does not excuse, the failure to put the First Defendant's case to the Plaintiff and to give her an opportunity to respond to it. In light of that failure – and in the absence of any application to have the Plaintiff recalled for that purpose – the application should not have been made. That follows clearly from the decisions of this Court in *Nolan* and *Platt,* both of which were decided prior to the High Court hearing here. Similarly, if it was considered that there was no proper basis for putting to the Plaintiff that she had been deliberately dishonest and had effectively engaged in fraud, then it followed inevitably that there could be no proper basis for the application and it should not have been made.

65. Secondly, and in any event, the precise basis for the application to the High Court remains unclear to me even now. There has never been any suggestion that any of the particulars of injury contained in the Personal Injuries Summons and/or furnished subsequently by way of Supplemental Particulars of Injury (set out in detail above), or any of the affidavits sworn by the Plaintiff from time to time to verify those particulars were false or misleading in any way. As I have already particularly observed, there has never been any suggestion that either the *Supplemental Particulars of Injury* dated 30 April 2019 (which were based on the

report of 12 March 2019 prepared by O' Sullivan & Devine Rehabilitation Consultants) or the affidavit of the Plaintiff verifying those particulars was any way false or misleading.

66. Equally, no issue was ever taken either with the accuracy of the information provided to the actuary, Mr Tennant, relating to the previous earnings of the Plaintiff or the pay scale that would apply in the event of her promotion to Senior Manager. That information was an important input into the calculations set out in Mr Tennant's report which in turn provided the basis for the Supplemental Particulars of 22 May 2019 which were verified by the Plaintiff's affidavit of 20 September 2019.

67. In what respect then are those Supplemental Particulars and/or the verifying affidavit said to be false or misleading? The capital values are simply calculations and it is not suggested that they were calculated incorrectly. Although never clearly articulated in these terms, the First Defendant's complaint must necessarily be that those Particulars impliedly asserted that the Plaintiff would be unable to work for more than 2 days a week for the remainder of her working life and that that assertion was false or misleading and known to be such by the Plaintiff when she swore the section 14 affidavit on 20 September 2019.

68. Of course, the Judge expressly found that when the Supplemental Particulars of Loss of 22 May 2019 were served, "*there was a basis on which the plaintiff could reasonably put forward the case that she would never be able to work more than*

two days per week for the rest of her life" and also found that the Plaintiff had never attempted to make a claim to a level of damages to which she was not entitled. But quite apart from those findings (which, as noted, were fatal to the application in the High Court and fatal to the appeal before this Court) it is very difficult to understand how the First Defendant could properly seek to impugn the integrity of those particulars (and the affidavit verifying them) in circumstances where they follow from earlier particulars – the *Supplemental Particulars of Injury* dated 30 April 2019 – the integrity of which the First Defendant has never challenged.

69. In any event, the First Defendant's appeal fails.

CONCLUSIONS

70. It is important that courts should have the power to dismiss fraudulent personal injuries actions. Such actions amount to an abuse of the court process and also impose significant societal costs. But it is equally important that there should be a high threshold for exercising that power. The proofs required are identified in section 26 and have been explained in the authorities. The authorities emphasise that a court should be careful and cautious about making an order under that section. The authorities also counsel caution on the part of defendants in invoking it.

71. Here, the High Court Judge concluded that there was no basis for the section application made by the First Defendant. That conclusion followed from the Judge's detailed findings on the evidence.

72. No basis whatever for impugning those findings has been identified. It follows that the First Defendant's appeal on the section 26 issue must fail. In my view, there was never any basis for bring that appeal.

73. I am also of the view, for the reasons set out above, that the application in the High Court was made in a manner that was materially unfair to the Plaintiff.

74. No issue of aggravated damages arises on this appeal. But defendants should be mindful that, where an application for a section 26 order is made without any proper

basis, the court may consider it appropriate to mark its disapproval by an award of aggravated damages. If the risk of such an award being made serves to deter the making of marginal applications, that is no bad thing.

75. As I indicated at the start of this judgment, I have read, and fully agree with, the judgment of Faherty J on the *quantum* appeal and I agree with the orders that she proposes be made.

Whelan and Faherty JJ agree with this judgment