

THE HIGH COURT

[2017 No. 11129 P.]

BETWEEN

MARGARET KEATING

PLAINTIFF

AND

MARTIN MULLIGAN

DEFENDANT

JUDGMENT of Mr. Justice Cross delivered on the 24th day of January, 2020

1. The plaintiff is a housewife born on 19th June, 1955, she was a passenger on the Luas on 15th June, 2016, heading towards town when near Heuston Station the defendant's taxi collided with the tram and the plaintiff sustained injuries. The defendant did not deny liability for the accident. The case was scheduled to last two days.
2. The plaintiff's claim is that in the collision she struck her shoulder against the bar and was shaken, she had to assist elderly passengers and felt somewhat trapped in the tram that she sat down on a seat and was told to get on another tram heading to town as she did not think she was significantly injured at the time she went to the Jervis Shopping Centre, got off the tram, was nauseous, nearly fell and vomited a number of times, was given a glass of water, decided to return home on a tram heading the other way but on that tram fell ill and went off to St. James' Hospital complaining of soft tissue injuries.
3. The plaintiff was shocked, felt nauseous and weak and somewhat dizzy, had pain in her right shoulder and neck and weakness and numbness in her right arm. She went to the Emergency Department of St. James' Hospital complaining of pain in her cervical spine and of pins and needles and numbness in her right upper limb, it was noted that she had hit her right subclavicular area against the bar in the accident and there was swelling in that particular area. She also complains of weakness and paraesthesia, at C6/C7. X-rays and studies were performed on her chest, right elbow, right hand, right wrist, right shoulder, cervical spine and thoracic spine which were all normal and a CT scan of her brain and cervical spine was normal also. She attended accident and emergency in St. James' Hospital on a number of occasions and was given medication. She underwent a course of physiotherapy which were of little benefit for her. On 20th June and MRI scan was undertaken which showed multilevel degenerative changes. She had difficulty in sleeping and her physical injuries are continuing and she also suffered psychological injuries and depression.
4. Initially the plaintiff's credibility as to the accident was questioned by the defendant. The defendant's suggested that the CCTV did not show a significant impact but the plaintiff was not clearly visible in the CCTV film as she was at the rear of the tram and she was the last person leaving the tram with two elderly passengers. The injuries that she has complained of were supported by Mr. Paul Nicholson, surgeon from St. James'.
5. The plaintiff was also questioned on what I believe to be some small irrelevant discrepancies between her evidence and the account in some of the medical notes of the circumstances of the accident. Medical notes do not have as their purpose a forensic

account of accidents but record in general terms how injuries accrued. Any such discrepancies are usually irrelevant and in this case the plaintiff's account of the accident is almost exactly mirrored by her GP's records. Whether she fell or stumbled and almost fell is of no significance.

6. I form the view that the plaintiff was entirely truthful person in relation to the circumstance of the accident. She did not exaggerate her symptoms. At the time of the original hearing dates on 28th, 29th and 30th May, 2019, the plaintiff appeared in some considerable emotional distress. When the case resumed in January 2020 the plaintiff was to external appearances much more robust and as she said herself had turned a corner.
7. The plaintiff's past history is of relevance. The plaintiff was involved in an accident in the United Kingdom when she suffered injuries to her lower back following a slip and fall and underwent surgery, the case was settled in 2002 for the sum of £400,000.
8. The plaintiff was also involved in a road traffic accident, some years ago, when she was rear ended and suffered some bruising but no claim was made in relation to the matter. She was treated by Dr. Fitzgerald in Ireland in respect of her lower back injuries. The plaintiff said that at the time of this accident her back was only giving her trouble occasionally.
9. After the accident the subject matter of these proceedings the plaintiff became very agitated and vigilant, she ceased driving a car and her mood became low as she lost interest in her usual affairs and became more irritable and had little patience with her family and was irritable with her sons and grandchildren and had difficulty in sleeping.
10. The plaintiff had a number of tragic incidents in her life. A son died by suicide in November 2004 at the age of 21 and a nephew was mugged and murdered some 15 years ago and after that another nephew began to get into trouble and the plaintiff's sister asked her to take him in which she did and he lived with her family for some three years however he caused further trouble and later this nephew also committed suicide one month after her son and she was grieving for these losses. The plaintiff was treated by her GP for depression. One of her sisters was admitted to St. Loman's Hospital following the murder of her son. Then another son passed away in March of 2015 from cancer and a further sister passed away from lung cancer later in 2015. Clearly the plaintiff was a poor candidate in relation to any psychological sequelae and in September 2017 having returned from a wedding in Portugal she was in low mood and had suicidal ideations herself.
11. Professor Thakore, the psychiatrist, gave evidence that the plaintiff fulfils the DSM-V criteria for major depressive disorder with an index of moderate severity and he of the opinion that stressor for his diagnosis was the accident subject matter of these proceedings. I find that the other incidents as described must have contributed to her mood disorder as well. Accordingly, the depressive disorder must be counted as multifactorial.

12. Doctor Das, the consultant pain physician, is of the opinion that the plaintiff suffers from severe neck and back pain, complex in nature, which has resulted in a number of injections which have provided for some but temporary relief and he intends further injections which he is hopeful might relieve the symptoms by as much as 50%. On his first examination in December 2017 the plaintiff has spasm and tenderness in her trapezius and deltoid muscles on her right side. Whereas the initial soft tissue injury is described as grade 2 by Dr. Das and which he would have hoped would have recovered in a number of months the plain and symptoms are persisting and have become chronic and he cannot say that there will be a complete resolution. The fact that spasm was found on examination is an objective sign and indicates that the plaintiff's complaints cannot be dismissed as merely subjective. Mr. Nicholson is also of the view that it is likely that the plaintiff will be left with residual symptoms that will frustrate herself ongoing into the future and that she has a degeneration of her back which would of course have predated the accident but the view is that it is being made symptomatic by the accident.
13. All of this is well and good. The complication such as it was in this case which resulted in the two-day case stretching over six days is that in addition to the history as above the plaintiff was involved in another accident on the Luas on 22nd August, 2017, when she was travelling with a child in a pram and the Luas suddenly stopped due to, it is understood, a pedestrian coming in front of it. The plaintiff was thrown forward into the railing and hit her right side of her lower chest, she was taken by ambulance to the Emergency Department and was examined and was x-rayed and was discharged. A few days later she coughed at home and collapsed and was taken back to the Emergency Department to have a CT scan and was again discharged home and had difficulty sleeping. The plaintiff suffered a suspected fracture of her ribs in this incident.
14. The defendant by letter of particulars dated 11th January, 2018, asked inter alia "*whether the plaintiff had ever suffered an accident or suffered any injuries in any accident either prior to or subsequent to the alleged accident referred to in the personal injuries summons/endorsement of claim...and requested the usual particulars of any such matters.*" This letter was replied to by the plaintiffs on 29th January, 2018, as follows:
- "The plaintiff was involved in a previous accident which occurred in November 1996 when she was residing in the UK. She suffered injuries to her lower back following a slip and fall accident and underwent surgery. The case was settled in 2002 for the sum of STG 400,000.*
- The plaintiff was also involved in a road traffic accident approximately five years ago when her car was rear ended and she suffered bruising to her front chest from the seatbelt. No claim was made in respect of personal injuries in this matter.*
- The plaintiff continued to suffer from low back pain following her accident in 1996 prior to this accident."*
15. The plaintiff's solicitors in these proceedings wrote two initiating letters to the Luas company in relation to the August 2017 incident and the plaintiff was later advised that

because the incident was caused by a sudden breaking due to a pedestrian suddenly emerging in front of the tram, that she would not have a good chance of recovery and nothing further was done about the case.

16. The first time the defendants were advised of the accident in 2017 was when on 17th June, 2019, before the proposed fourth day of the hearing they received a medical report from the plaintiff's GP, Dr. Sayed, dated 12th June, 2019.
17. Clearly this accident in 2017 occurred prior to the issue of the summons in these proceedings and prior to the request in replies to particulars.
18. The plaintiff in the normal course swore affidavits of verification in respect to the pleadings and the replies to particulars which were verified did not refer to the August 2017 accident and therefore the affidavit of verification was incorrect.
19. At the conclusion of the plaintiff's case, the defendants applied to have the case dismissed pursuant to the provisions of s. 26 of the Civil Liability and Courts Act 2004. Counsel indicated that the defendant would not be going into evidence.
20. Section 26 of the Act provides as follows:

"26.—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives evidence 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.*"

21. As Irvine J. held in *Nolan v. O'Neill & Or.* [2016] IECA 298 the purpose of the 2004 Act is to abandon "a *cloak and dagger*" approach to litigation in favour of an open and open and transparent scheme in which any false or misleading assertions or information is not lightly to be tolerated. The burden of proof invoking s. 26 lies upon the defendant on the civil standard.
22. In *Nolan* (above) Irvine J. held:
 - "43. *What is clear from the wording of the section is that the defendant must establish firstly an intention on the part of the plaintiff to mislead the court and secondly that he/she adduced or caused to be adduced evidence that was misleading in a material respect. Thus false or misleading evidence even if intentionally advanced if not material to the claim made cannot justify invocation of the section. Further, any such false or misleading evidence must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim itself fraudulent. That this is so would appear to be supported by the following short passage from the decision of Fennelly J. in Goodwin v. Bus Eireann [2012] IESC9 concerning s. 26 and where at para. 62 he stated as follows:*
 - '62. *For this section to apply, the defendant must discharge the burden of showing that some material evidence has been given which is false or misleading and that the plaintiff knew that it was false or misleading. (See the judgment of Denham C.J. of 2nd December 2011 in Ahern v Bus Eireann [2011] IESC 44). Counsel for the defendant correctly accepted that this amounted to an allegation that the claim was fraudulent.'*
 44. *However, this does not mean that a defendant must establish that the entirety of a plaintiff's claim is false or misleading in order to succeed on such an application. It is clear that proof that a plaintiff's claim for loss of earnings was false or exaggerated to a significant extent may justify the dismissal in total of an otherwise meritorious claim."*
23. The decision of *Nolan* (above) was followed by the Court of Appeal (Irvine J.) in *Jason Platt v. OBH Luxury Accommodation Limited & Or.* [2017] IECA 221 and I fully accept and follow that authority as stating the law in relation to s. 26.
24. The defendant submits:
 - a. That the failure of the plaintiff to refer to the 2017 accident in her replies to particulars was a clear breach of her obligations for disclosure and that the swearing of the affidavit of verification in relation to whether therefore the misleading replies in the particulars was improper.
 - b. That her solicitors were clearly aware of the 2017 accident as they had written initiating letters to the Luas tram company in respect thereof.

- c. It was further alleged that the plaintiff deliberately withheld the GP's report from the defendants until 17th June, 2019, after the plaintiff had originally ceased her cross-examination and that the reason why it was withheld was due to the fact that the report disclosed the second incident on 22nd August, 2017, and the defendant agreed that this allegation had two possible implications, either that the plaintiff had given specific instructions to her legal team to withhold the report or that her legal team were involved in a deliberate effort to perpetrate a fraud.
 - d. That the plaintiff cannot distance herself from the actions of her solicitor and is bound by what they have done.
 - e. That the plaintiff was cross-examined about her subsequent medical history and failed when to inform the Court that she was involved in a second accident. It was expressly suggested that the plaintiff was asked under cross-examination about her subsequent medical history and that she "*refused*" and failed to answer or failed to disclose a relevant incident and that in that regard she deliberately misled the Court in her evidence.
 - f. That the plaintiff deliberately included details of her medical examination as a result of the August 2017 instant accident in the discovery in respect of the accident subject matter of these proceedings in order to include those injuries with this claim.
 - g. That the injuries in the 2017 incident are almost identical to the injuries complained of and that the Court was misled.
25. I will deal each of those allegations in turn:
- a. The plaintiff clearly failed to disclose the 2017 accident which ought to have been disclosed by the affidavit of verification.
 - b. Her solicitors clearly knew of the August 2017 accident as they had written two initiating letters and indeed had been advising the plaintiff as to that incident.
 - c. The GP's medical record which was furnished to the defendants dated 17th June, 2019, was not deliberately withheld for the alleged or any purposes. The GP's medical report was dated 12th June, 2019, and had been requested some time relatively recently before. The report was quite properly furnished to the defendant promptly on receipt by the plaintiff's solicitors. There is absolutely no basis of the allegation that either the plaintiff or her solicitors had in any way deliberately withheld the letter or acted improperly as was suggested by the defendants.
 - d. I accept and indeed counsel for the plaintiff accepts that the plaintiff cannot differentiate from any actions of her solicitors and is bound by what they have done.

- e. The plaintiff did not in her evidence mislead the Court or anybody else as to her subsequent medical history. The plaintiff was asked in great detail about the circumstances of the accident and possible discrepancies between the way that she had given her evidence and some of the medical reports or other reports and also the severity of the impact, she was also asked about her pre-accident disabilities. The plaintiff was not asked about her subsequent medical history. Her explanation when later cross-examined as to why she had not in effect volunteered to inform the court about the 2017 incident, was that she was waiting to be asked about it. Of course given the fact that she should have disclosed her medical history in full that is not entirely satisfactory. However, it is not the case that the plaintiff in any way gave false or misleading evidence, in effect perjury, in her testimony to the Court.
 - f. The plaintiff's discovery did include hospital records outlining the fractures to the ribs as seen in imaging taken as a result of the 2017 incident. These injuries were never part of the particulars of injury in relation to this accident. Clearly the plaintiff in this case discovered more material than she was obliged to do so but I do not believe that this disclosure of the x-ray and film reports in relation to the ribs though included with the discovery was in any way an attempt on the behalf of the plaintiff bring her ribcage damage into this case.
 - g. I do not accept that the injuries in the accidents subject matter of these proceedings in any way overlap with the injuries in the August 2017 incident. The injuries in the August 2017 incident were injuries to her ribcage with possible/probable fractures of her ribs as she described them "*floating ribs*". These injuries resolved rapidly. The injuries in this case are soft tissue injuries to her neck and shoulder and psychological sequelae.
26. Taking the above into account, I must now approach the defendant's application in the light of the law as stated by the Court of Appeal in *Nolan* (above), I do not accept that the defendant has established any intention on behalf of the plaintiff or on behalf of the plaintiff's legal advisors to misled the Court or that she adduced evidence or caused to be adduced evidence including the replies to particulars that was misleading in a "*material respect*". The 2017 accident was in fact irrelevant to the injuries the subject matter of this case. Furthermore, insofar as it might arise I do not accept that any evidence incorrectly stated was substantial or significant in the context of the claims so that it could be said to render the claim itself fraudulent.
27. Accordingly, the defendant's application under s. 26 must fail.
28. A further issue arises in that as a result of the defendant's application and the manner in which the application was made, the plaintiff is claiming aggravated damages.
29. Section 26 allows the defendant to make an application which can result in a case, such as the plaintiffs in which liability is not an issue, being dismissed because of dishonesty. It is in my view right and proper that reasonable latitude is allowed to a defendant to

make this case. Were the defendant to have confined the application to the failure of the plaintiff to swear an accurate affidavit of verification and their failure to furnish details of the 2017 accident and allege that the failure was misleading and that there was some overlap in the injuries then though clearly the application would have been dismissed I do not believe an issue of aggravated damages would arise.

30. This Court in a number of cases has referred to an award of an aggravated damages as being the only real deterrent to a defendant to make unmeritorious applications in this regard. The statutory remedy to have a defence struck out is usually of no deterrent to a defendant or advance to a plaintiff as a decision on a defendant's application is not going to be made until the end of the case which is too late to afford the plaintiff any advantage in having the defence struck out.

31. In *Nolan* (above) Irvine J. stated:

"I regret to say that I view the application made by the defendants as a somewhat opportunistic one, and one which was made in a manner that was fundamentally unfair. The defendants did not take the risk of challenging Mr. Nolan as someone intent on perpetrating a fraud. Such a challenge might have exposed them to a risk of an award of aggravated damages depending on the manner in which such an application was pursued..."

32. In this case however the defendant went far beyond either what was required for an application under s. 26 or indeed what was supported by any evidence.

33. I have already found that there was absolutely no basis to suggest that the medical report from the General Practitioner was suppressed in order to disguise the August 2017 accident. One look at the dates of the report would clearly have prevented such an attack upon the plaintiff and her legal advisors. Professional misconduct was alleged.

34. Secondly, the plaintiff was never asked in evidence in relation to her subsequent injuries dealing with this accident and accordingly did not swear any false or misleading evidence in that regard. To allege somebody has in fact deliberately sworn false evidence is a serious criminal allegation of perjury. To submit that the plaintiff and/or her legal team were involved in a deliberate effort to perpetrate a fraud and that she deliberately withheld the medical report from the defendant is a very serious allegation, it clearly departs from what is necessary to make submissions pursuant to s. 26. It is not right or proper to make entirely unsubstantiated allegations of professional misconduct against an Officer of the Court or to accuse an innocent plaintiff of in effect perjury or fraud without the slightest evidential basis.

35. For all of these reasons I accede to the plaintiff's counsel's application that in addition to her damages she is entitled to aggravated damages.

Damages

36. When this case was opened it was indicated that there were some small items of special damages, travelling expenses and physiotherapy which it was hoped to be agreed but at

the conclusion of the case counsel for the defendant indicated that no virtues had been furnished, he would not agree any items of special damage and counsel for the plaintiff did not pursue same.

37. Accordingly, the compensatory damages are general damages only.
38. I have outlined the plaintiff's injuries above as indicated I believe the plaintiff to be truthful witness who did not in any way exaggerate her complaints. She was clearly when first giving evidence in a distressed state and I do not believe that this was just because of the nature of the cross-examination. The plaintiff's psychiatrist, Prof. Takore, has given the diagnosis of major depressive disorder but believes that she should take Cognitive Behaviour Therapy or Behaviour Therapy for a number of sessions and also certain antidepressants and believes that she should symptom free within a period of nine months after commencing same. As stated above I believe that the cause of her psychiatric trauma is multifactorial but I accept that the accident triggered these symptoms and that the plaintiff was a bad candidate for any such trauma.
39. The plaintiff's physical injuries are soft tissue in nature which normally would recover in a matter of relatively short time but as Dr. Das has said sometimes they persist and in this case have become chronic. It is clear that the plaintiff's injuries are not just subjective given the medical findings such as spasm. Dr. Das is hopeful of at least a 50% resolution with his new medication but I find that the plaintiff is going to be left with some ongoing symptoms into the future indefinitely.
40. I also accept that the plaintiff has had a nasty time and has had a significant change in her lifestyle.
41. Accordingly, I will assess the plaintiff as being in a moderate rather a severe category though the nature of the injuries has been far longer lasting than had been anticipated.
42. Being fair and reasonable to both plaintiff and defendant I will assess her general damages to date at €60,000 and general damages into the future at €10,000.
43. The total compensatory damages are €70,000 and in addition to that I award a sum of €10,000 for aggravated damages totalling the sum of €80,000.