THE COURT OF APPEAL

UNAPPROVED

Record Number: 2020/48
High Court Record Number: 2017/11129P

Whelan J. **Neutral Citation Number [2022] IECA 257**

Noonan J.

Binchy J.

BETWEEN/

MARGARET KEATING

PLAINTIFF/RESPONDENT

-AND-

MARTIN MULLIGAN

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 9th day of November, 2022

1. In these personal injuries proceedings, the primary issue arising on this appeal is whether the trial judge (Cross J.) should have acceded to an application by the appellant, to whom I shall refer for convenience as the defendant, pursuant to s. 26 of the Civil Liability and Courts Act, 2004. This section empowers the court to dismiss a personal injuries action essentially on the basis that it is fraudulent.

Facts

2. The claim of the respondent (the plaintiff) arises out of an incident that occurred on a LUAS tram on the 15th June, 2016. On that date, the plaintiff was travelling as a passenger on the LUAS when it collided with the defendant's taxi in what appears to have been a relatively minor accident. The plaintiff claims to have suffered injuries as a result of striking her shoulder on one of the upright bars on the tram. Her principal injury was to her right shoulder although she also suffered injury to her neck. The defendant delivered his defence in the normal form admitting negligence and putting the plaintiff's injuries in issue. Beyond that however, no specific plea on causation was advanced.

3. Although the plaintiff initially also had complaints of low back pain, her right shoulder and neck continued to be symptomatic, more particularly the shoulder. The symptoms in her shoulder and neck appeared to plateau after a period of time. An MRI scan of her right shoulder showed mild age-related changes. When reviewed by Mr. Nicholson, a consultant orthopaedic surgeon at about 27 months post-accident, he was of the view that the plaintiff's symptoms had become permanent. She underwent two trigger point injections into the right trapezius by Dr. Das, a consultant pain specialist, with poor results.

4. It is relevant to note that the plaintiff's doctors gave *viva voce* evidence, while the defendant called no medical evidence, despite listing a medical consultant in their SI 391 disclosure schedule, nor were any of the medical reports agreed.

5. In the course of the trial and after two days at hearing, the plaintiff's solicitors sought an up to date medical report from her General Practitioner, Dr. Sayed. A report was prepared by Dr. Sayed dated the 12th June, 2019, now three years post-accident, which was received by the plaintiff's solicitors on the 17th June, 2019. The plaintiff's solicitors on the same date served the report on the defendant's solicitors. This report disclosed for the first time that

the plaintiff had been involved in a second accident on the LUAS on the 28th August, 2017, some 14 months after the accident the subject matter of these proceedings. That fact had never previously been disclosed to the defendant's solicitors, notwithstanding a notice for particulars which sought details of any accidents or injuries, either pre or post the accident in issue herein. Further, an affidavit of verification was sworn by the plaintiff in relation, *inter alia*, to her replies to particulars dated the 29th January, 2018 in response to a notice for particulars of the 11th January, 2018.

6. It further emerged during the course of the hearing that the plaintiff's solicitors wrote a letter of claim dated the 3rd October, 2017 in relation to this subsequent accident to the operators of the LUAS and followed it up with a reminder on the 11th December, 2017, a little more than a month prior to drafting the replies to particulars in the present case. Between the dates of those two letters, the personal injuries summons in these proceedings issued on 7th December, 2017.

7. I should note that during the first hearing before the High Court, when the fact of the second LUAS accident emerged, the defendant made an application to dismiss the case pursuant to s. 26. The judge refused that on the basis that he could not decide the application without hearing further from the plaintiff and her being cross-examined about the non-disclosure. The defendant then sought and was granted an order for further discovery of the plaintiff's medical records in relation to this later accident. This resulted in an adjournment of the trial for several months and when it resumed, the plaintiff was re-called to be cross examined about her failure to disclose the subsequent accident.

Evidence in the High Court

8. In the course of her cross examination on the first day of the trial, the plaintiff was asked about other accidents (Day 1, Page 40 – 41):

"170 Q. Mr. McDonagh: and the defendants in this case, Ms. Keating, they raised a notice for particulars dated 11th January, 2017 [it was in fact 2018] and you were specifically asked whether you had ever been in an accident or suffered any injuries in an accident either prior to or subsequent to the alleged accident referred to in the personal injury summons/indorsement of claim. And the only accident, Ms. Keating, that you refer to is the injury that you suffered in November 1996?

A. Yeah.

Mr. McGrath: That is not true.

Mr. Justice Cross: If you go on, Mr. McDonagh, to the next paragraph:

Mr. McDonagh:

> '*The plaintiff was involved in a previous accident which occurred in November 1996 while she was residing in the UK. 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.*'

Mr. Justice Cross: '*The plaintiff was also involved in a road traffic accident approximately five years ago when she was rear ended and suffered bruising. No claim was made.*'

Mr. McDonagh:

> '*No claim was made in respect of personal injuries in this matter.*'

A. That is true.

171 Q. Mr. McGrath in his opening referred to another accident in 2002. Can you enlighten us, did you suffer any injuries in 2002?

A. 2002? I can't remember.

Mr. Justice Cross: You had your injury in England in 1996 and it was settled in 2002. You had a road traffic accident. That was approximately, five years ago?

A. With my grandchildren. The car ploughed into the back of me, yeah. I didn't put in any claims. And after that, it was after that I was walking on the Naas Road and two lads on a motorbike came up behind me and caught me in between my legs. I didn't make any claims."

9. Counsel for the defendant then moved to a different topic in the plaintiff's previous medical history. As can be seen from the foregoing exchange, though the question of subsequent accidents was initially raised by counsel, as a result of interventions by the judge and counsel for the plaintiff, the enquiry focused only on prior accidents.

10. Following the adjournment of the case, on its resumption the plaintiff was recalled to be further cross examined arising out of the disclosure of the subsequent accident. The following exchange took place on Day 5 at pages 11-13:

"25 Q. Again, is there any reason why you didn't inform the court of the specific details of this incident which occurred on the 22nd August, 2017, Ms. Keating?

A. Well, I wasn't holding back not telling. I was waiting for you, Mr. McDonagh, to ask me the questions you were to ask and this is one of them. I didn't know that – I was told to answer the questions I am asked.

26 Q. You were specifically asked under cross examination, Ms. Keating, about your subsequent medical history and you refused, you failed to answer or you failed to disclose a relevant incident which occurred on the 22nd August, 2017?

A. No I didn't refuse, Mr. McDonagh.

27 Q. You had every opportunity to tell the court about this incident on the 22nd August 2017 and you failed to do so?

A. No because I was waiting for you to put that to me. I didn't fail. I wasn't hiding anything.

28 Q. I am suggesting to you deliberately misled this court?

A. Well you are wrong, Mr. McDonagh.

29. Q When you failed to disclose –

A. No, no, not at any time.

30. Q When you failed to disclose the existence of a relevant incident which occurred on the 22nd?

A. No, not at any time, Mr. McDonagh. I didn't.

31. Q And secondly, in replies to particulars you again had an opportunity to disclose the existence of the second incident of the 22nd August, 2017 and you failed to disclose them in those replies. In fact, you swore an affidavit of verification in relation to the replies and you failed to disclose this incident?

A. Well, I didn't fail to disclose. I was waiting for you to ask.

32. Q. I see, I see.

A. It wasn't anything I tried to hide, that was already out in the open. I didn't hide that there was an accident on the 22nd August.

33 Q. When was it out in the open, Ms. Keating?

A. It has been since days after it happened.

34. Q. When was it out in the open? When did you tell the defendant about the incident of 22nd August 2017?

A. Well, the solicitor knew.

35. Q. I'm asking you, Ms. Keating?

A. Well, I don't know if I'm allowed to talk to the defendant. All I know is I went through my solicitor.

36. Q. In your replies to particulars you failed to disclose the incident of the 22nd August, 2017. Have you an explanation for that, Ms. Keating?

A. No, I didn't fail. I already told about the incident on the 22nd August. I did tell, I didn't hold nothing back, Mr. McDonagh.

37. Q. The first time the defendant became aware of this incident was on the 17th June when your solicitors furnished a report from Dr. Sayed. That was the first notification to the defendant, Ms. Keating?

A. Well, I was led to believe that the defendant knew. I didn't hold back, Mr. McDonagh, on anything I was asked.

38. Q. You were cross examined at length Ms. Keating –

A. I know, I know.

39. Q. and you failed to disclose to the court the existence of the accident on the 22nd?

A. I have answered that Mr. McDonagh I was waiting for you to ask me. I didn't fail to disclose it. I did disclose it. I told the truth.

40. Q. You deliberately misled this court?

A. I didn't, Mr. McDonagh I did not."

11. It is relevant to note that counsel for the defendant did not confine the deliberate non-disclosure allegation to the plaintiff herself but expanded it to include her solicitors in the following exchange on Day 5 at pages 29 – 30:

"82. Q. I have to suggest to you Ms. Keating, this report was deliberately withheld from the defendant and was only furnished to the defendant on 17th June 2019, and the reason why it was withheld was due to the fact that you had suffered a second incident on the 22nd August 2017 –

Mr. McGrath: Judge, there is an implication in that – well, two implications; one, that this plaintiff gave specific instructions to her legal team to withhold this report, and secondly, that her legal team were involved in a deliberate effort to perpetrate a fraud.

Mr. Justice Cross: One or either, yes.

Mr. McGrath: One or either. So this is a very dangerous ground for everybody at this stage I would have thought.

Mr. Justice Cross: That is what Mr. McDonagh seems to be saying.

Mr. McDonagh: Absolutely, Judge.

83. Q. I am suggesting you deliberately withheld this report from a defendant, Ms. Keating?

A. No, Mr. McDonagh no, that didn't happen deliberately. I have been honest from the word since this started out - "

12. Another issue canvassed when the trial resumed was the extent, if any, to which the injuries suffered in the 2017 accident overlapped with those of the 2016 accident, the subject of this claim. Dr. Sayed was asked about this in direct examination (Day 6, Page 6):

"35. Q. Now, she came to you subsequently I think in 2017 and reported the fact that she had another accident on the LUAS; is that right?

A. That's right yes.

36. Q. Did she outline to you on that occasion what injuries she sustained in that accident?

A. She did yes.

37. Q. And were they similar or were they different from the accident in 2016?

A. They were different."

In cross examination, the issue was again raised (Day 6, Page 30):

"137. Q. What I am suggesting to you is that the complaints that you recorded on the 1st September 2017 mirror the complaints you made to the court arising out of the incident the subject matter of these proceedings. She mentioned neck, right arm, shoulder and back. Would you agree that that would fit in with that complaint she made to you on the 1st September, 2017?

A. Her injuries on the 1st September were a different area than the ones in 2016.

138. Q. How do we jump to that conclusion, Doctor?

A. Her injuries in 2016 were much more extensive."

13. In the course of his closing submissions, counsel for the defendant doubled down on the allegation of improper conduct on the part of the plaintiff's solicitors saying (at Day 6, Page 76):

" – So, Judge, what I am suggesting is this; that the plaintiff's solicitors knew about the second claim – or the second accident – it was deliberately withheld from the defendant."

14. It emerged during the course of the evidence that in making discovery of the plaintiff's medical records originally, an X-ray report was included which related to an X-ray of the plaintiff's chest taken on the 23rd August, 2017, the day following the second LUAS accident, which noted under the heading "reason for exam" "Fall onto right side – tender right lower rib cage".

15. While counsel for the defendant sought to portray this as an attempt to make a claim for injuries suffered in the 2017 accident in the context of the claim for the 2016 accident, it is clear that at no time was an allegation made in these proceedings that the plaintiff had

suffered an injury to her right lower ribcage. As noted in Dr. Sayed's medical report, when the plaintiff attended her on the 1st September 2017 in relation to the subsequent accident of the 22nd August 2017, her only complaint appears to have been of right lower anterior chest pain. When Dr. Sayed examined the plaintiff, she found tenderness to be present in this area.

Judgment of the High Court

16. A reserved judgment was delivered by the trial judge on the 24th January, 2020. He described the accident and the plaintiff's injuries. He said (at para. 6) that he had formed the view that the plaintiff was an entirely truthful person in relation to the circumstances of the accident and did not exaggerate her symptoms. Relevant in the context of the defendant's contention that the plaintiff suffered no appreciable injury in the accident, the judge observed that on the plaintiff's initial attendance at St. James' Hospital Emergency Department, it was noted that she had hit her right sub-clavicular area against the bar in the accident and there was swelling in that particular area.

17. He also noted that when a doctor that initially examined the plaintiff in December 2017, she had spasm and tenderness in her trapezius and deltoid muscles on the right side saying (at para. 12):

> "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."

18. The judge first turned his attention to the s. 26 application, referring to the statutory provision and a number of relevant authorities. He summarised the grounds for the defendant's application (at para. 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 the 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 uphold 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 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 accident in the discovery in respect of the accident the 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."

19. The judge then proceeded to set out his views on each of these submissions as follows (at para. 25):

"I will deal (*sic*) 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 the 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 defendant.

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 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 disability. 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, this 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 injuries 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*."

20. The judge went on to say that he did not accept that the defendant had established any intention on the part of the plaintiff or her legal advisers to mislead the court or that she adduced evidence that was misleading in a material respect, the 2017 accident being irrelevant to the injuries in this case. Having dismissed the s. 26 application, the judge turned to his consideration of the plaintiff's application for aggravated damages arising out of the making of the s. 26 application and the manner in which it was pursued, again referring to relevant authority. His conclusion on the plaintiff's application for aggravated damages was as follows (at paras 32 – 35):

> "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 advisers. 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 the 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."

21. In coming to this conclusion, the judge said that had the defendant confined the application to the plaintiff's failures in relation to particulars and affidavits of verification, or that there may have been overlap in the injuries between the 2017 and 2016 accident, a s.26 application, although it would have been dismissed, would not have given rise to an issue of aggravated damages.

22. In the result, the judge assessed the plaintiff's general damages to date at €60,000 and for the future at €10,000. He awarded an additional sum of €10,000 for aggravated damages bringing the total to €80,000.

The Appeal

23. The primary ground of appeal is that the trial judge failed to correctly apply the provisions of s. 26 and had he done so, this ought to have resulted in the dismissal of the action. This in turn is predicated on the essential submission that the judge ought to have concluded that the plaintiff's evidence was deliberately misleading in a material respect. It is said further that the trial judge was in error in failing to adequately consider the causal link between the 2016 and 2017 accidents.

24. The trial judge's conclusion that the plaintiff was honest was contradicted by the evidence. It is said further that the trial judge misdirected himself in relation to the conduct of the plaintiff's solicitors, which appears to amount to a suggestion that the judge ought to have concluded that the solicitor's conduct was, like that of the plaintiff, fraudulent. This,

it is claimed, led the judge into error in relation to the appropriate allocation of costs under O. 99. There is a further complaint that the damages were excessive.

Section 26 of the Civil Liability and Courts Act, 2004

25. Section 26, insofar as material, provides:

> "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,
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> 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 …"

26. Section 14 requires the plaintiff in a personal injuries action to swear an affidavit verifying any assertions or allegations made in any pleading or "further information" provided to the defendant, a similar obligation is placed on the defendant. The section makes it an offence to swear an affidavit of verification that is false or misleading in any material respect and is known to be false or misleading. Section 25 makes it an offence for a person to give or dishonestly cause to be given in a personal injures action evidence that is false or misleading in any material respect and which that person knows to be false or misleading.

27. Section 26 has most recently been considered by this court in *O'Sullivan v Brozda & Ors.* [2022] IECA 163 in a judgment of Collins J. with which the other members of the court agreed. In the course of his judgment, Collins J. considers most of the authorities to which we were referred in the course of this appeal and carries out a very comprehensive and helpful analysis of those authorities. The following passages from the judgment are of relevance in this appeal:

> "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 62 of his judgment).… 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).

  …

- 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). …

- 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 [the index case], 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)."

28. Collins J. went on to consider the facts of a number of cases cited in argument which he considered to be of some utility in order to identify the circumstances in which the courts had considered it appropriate to make s. 26 orders. These included *Carmello v Casey*, *Farrell v Dublin Bus* and *Higgins v Caldark Limited* [2010] IEHC 527 and *Platt v OBH Luxury Accommodation Limited & Anor [2017] IECA 221*. Having done so, Collins J. said:

"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 [no] "*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 (*sic*) is perhaps even more daunting than that undertaken – without success — by the appellant in *Goodwin*."

29. In expressing his conclusions, Collins J. made the following observations that are I think pertinent in the present appeal:

> "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.
>
> …
>
> 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."

30. As Collins J. recognised from his analysis of the authorities, it is a fundamental requirement of a s. 26 application that the defendant must establish that the plaintiff has been guilty of dishonesty. Indeed, dishonesty is expressly referred to in the section. While the onus of proof is to the civil standard, the authorities lay emphasis on the need for the trial judge to be "absolutely satisfied" as a matter of "high probability" that this onus has been discharged. The section itself envisages that the giving of evidence that is false or misleading is not sufficient, the plaintiff must be shown to know that it is false or misleading.

31. The test is subjective. In *Ahern v Bus Eireann* [2011] IESC 44, Denham C.J., speaking for the Supreme Court, considered the terms of s. 26 in a case where, as here, the trial judge had found the plaintiff to be an honest witness. Commenting on this, the Chief Justice said (at para. 25):

> "The learned High Court judge, who heard all the evidence and who could see the demeanour of the [plaintiff] held her to be an honest woman. This Court is bound by the well established principles as set out in *Hay v. O'Grady* [1992] 1 I.R. 210 as to the findings of fact of the trial judge"

32. As to the test to be applied, the court said (at para. 34):

> "I am satisfied that the learned trial judge approached this case correctly. He considered the overall evidence and found that the appellant was an honest woman and did not knowingly mislead the Court. 'Knowingly' is a matter to which the test is subjective. On the evidence before the learned High Court judge he was entitled to hold, as he did, that the respondent did not knowingly mislead the Court, or swear an affidavit that is false or misleading in any material respect."

33. As this passage makes clear, a finding of honesty by the trial judge is a finding of fact by which this Court is bound, unless, as in all such cases, the appellant is in a position to demonstrate that there was no credible evidence to support this finding, or it was contrary to the evidence.

34. The defendant here sought to suggest that the facts were such that the trial judge ought not to have accepted that the plaintiff was honest but that argument was essentially based on a rerun of the same points argued by the defendant in the High Court, unsuccessfully. A finding of honesty on the part of a witness is clearly something that is very much within the

province of the trial judge and one that is significantly dependent on his or her observation and consideration of the demeanour of the witness concerned under examination and cross-examination. This Court will naturally be slow to interfere with such a finding by a trial judge absent the defendant being in a position to demonstrate that it cannot be justified in the light of all the evidence before the court.

35. In support of this contention, one of the grounds relied upon by the defendant is that the plaintiff's evidence conflicted with her pleaded case. That really is a fairly commonplace occurrence in any personal injuries action and whilst sometimes providing fertile ground for cross-examination in the hope of undermining the credibility of a plaintiff, is hardly of itself grounds for invoking section 26. It would appear that this contention is primarily posited on the basis that the plaintiff pleaded that she was standing and fell to the ground as a result of the impact whereas her own evidence before the court was that she was in fact sitting and did not fall but struck her shoulder against the bar. The judge was clearly unimpressed by this contention noting that whether the plaintiff fell or stumbled and almost fell was of no significance – para. 5.

36. He was also clearly cognisant of the defendant's suggestion, based on the CCTV footage of the accident, that it was so trivial that it could not possibly have caused the plaintiff's injuries referring, as I have already noted, to two instances which appeared to bear out that she had suffered an injury being, first the swelling in the area of her shoulder where she hit the bar and second, the finding of spasm on examination which is, as the judge said, an objective sign.

37. The defendant was certainly correct in suggesting that the replies to particulars, as subsequently verified on affidavit by the plaintiff, were at the very least inaccurate insofar as the subsequent accident in 2017 was concerned. That again, without more, is plainly

insufficient but the defendant sought to portray the plaintiff's evidence under cross-examination before the discovery of the subsequent accident as a clear misleading of the court. I do not accept this as being an accurate characterisation of the exchange which I have quoted above, and neither did the trial judge.

38. While there was a mention of subsequent accidents in the question posed, it was robbed of any meaningful consequence or impact by the subsequent interventions that occurred and was not further pursued thereafter until the case was resumed after the adjournment. In the subsequent exchange also referred to above, the plaintiff was adamant that she had not failed to disclose the subsequent accident but was in fact waiting to be asked about it. It would appear that the trial judge accepted that explanation which he was perfectly entitled to accept.

39. The defendant accordingly, in my judgment, found himself in the position described by Fennelly J. in *Goodwin v Bus Éireann* [2012] IESC 9 where he said:

> "63. In the absence of a finding from the trial judge that the plaintiff, in this case, had knowingly given false or misleading evidence, it is impossible for the defendant to succeed. She was the judge who heard all the witnesses, apart from those who gave evidence on commission, and, especially, heard the plaintiff whose evidence was at issue. This court cannot substitute itself for the trial judge in the assessment of credibility of witnesses."

40. In his submissions, counsel for the defendant drew attention to the CCTV footage from the relevant LUAS tram which had been shown to the High Court and made the same footage available to this court. However, the basis upon which this was done remained somewhat unclear, despite questions raised by this Court in relation to the appropriateness or otherwise of this Court being invited to view the footage and draw conclusions. It appears to me that

the only conceivable basis upon which this invitation was extended was to suggest that this Court should be at large to view the CCTV footage and come to its own conclusions about the accident, irrespective of what the High Court may have decided. If this was the intention, and as I have said it is not entirely clear, then it would in my view be entirely inappropriate for this Court to embark on that suggested exercise.

41. A not dissimilar invitation was extended to this Court in *Naghten (A Minor) v Cool Running Events Limited* [2021] IECA 17 where a minor suffered an injury while skating at the defendant's ice rink when she fell and another patron skated over her hand. One of the issues in that case was whether the skating rink was overcrowded at the material time and the plaintiff alleged that it was. The incident was captured on CCTV. The defendant invited the court to view to footage and conclude that the ice rink was not in fact overcrowded.

42. In commenting on this proposed course of action suggested by the defendant, I said:

> "43. For the hearing of this appeal, the defendant made available to the members of the court a video recording of the accident which had been shown also in the High Court and commented upon at length by Mr. Carroll and Mr. Tennyson. The court was invited to draw the conclusion from a viewing of the video that there was no overcrowding evident at the locus of the accident. The court was invited to conclude therefore that the evidence of the plaintiff, her mother, her sister and Mr. Carroll should be rejected by this court and the evidence of Mr. Tennyson accepted. I cannot accept that proposition.
>
> 44. The trial judge made clear and sustainable findings of fact on these issues that were supported by credible evidence which, on the basis of *Hay v O'Grady* [1992] 1 I.R. 210, cannot be disturbed by this court. In essence, the defendant's case is that this court should set aside those findings of fact and ignore the evidence of the

witnesses who testified before the High Court simply by viewing the video and drawing conclusions. That is in my view impermissible."

43. It seems to me that precisely the same considerations arise in this case and there is accordingly no basis upon which this Court can or should undertake a viewing of the CCTV footage with a view to revisiting the findings of fact of the High Court.

44. I am accordingly satisfied that the defendant has established no basis for this Court to interfere with the finding of fact by the High Court that the plaintiff's evidence was not dishonest, either on affidavit or *viva voce*, and that being the case, a section 26 application could not succeed.

45. Even were that not the case, the defendant would still face the significant hurdle of establishing that the allegedly deliberately misleading evidence was material to the issues to a sufficiently significant degree as to render the entire claim fraudulent. I cannot see any basis upon which the defendant could hope to establish that. The uncontroverted evidence of Dr. Sayed was that the injuries in the 2016 and 2017 accidents were different and did not overlap. That was Dr. Sayed's direct evidence and she reiterated it under cross examination.

46. Clearly therefore, as the trial judge held, the injuries suffered by the plaintiff in the 2017 accident were entirely irrelevant to the 2016 accident and could not on any view of matters therefore be considered to be material. It follows that even had the trial judge concluded that the plaintiff had given deliberately misleading evidence on this point, it would have been insufficient to ground a s. 26 application – see *Nolan v O'Neill* [2016] IECA 298 *per* Irvine J. at para. 43.

47. It follows therefore that the judge was to my mind perfectly correct to reject the s. 26 application.

Aggravated damages

48. The first basis upon which the defendant made the s. 26 application herein was the failure by the plaintiff to disclose the subsequent accident in the replies to particulars and, allegedly, her oral evidence. As the trial judge found, this might on its own not appear to be an entirely unreasonable basis for making such an application and was one which, the trial judge found, had it been confined to that ground would not likely have given rise to a claim for aggravated damages. The defendant however went considerably further than that as the exchanges above demonstrate.

49. The plaintiff's second accident occurred on the 22nd August, 2017 and she evidently consulted her solicitors about it shortly thereafter because the initial letter of claim arising from that accident was written some six weeks later on the 3rd October, 2017. That in turn preceded the issue of the plenary summons in these proceedings on the 7th December, 2017 by some two months. It is clear therefore that at all material times from the institution of these proceedings, the plaintiff's solicitors were aware of the later accident. Consequently, the solicitor's failure to disclose the subsequent accident in the replies to particulars is at best grossly negligent and at worst, deliberate.

50. There was, however, as the judge pointed out, absolutely no evidence to support the defendant's allegation that it was in fact deliberate, or less still, that the plaintiff instructed her solicitors not to disclose it. It is difficult to conceive of any rationale for such a deliberate course of action on the part of either the plaintiff or her solicitors. The allegedly deliberate non-disclosure, if it was such, was of no benefit to the plaintiff in circumstances where there was, as the evidence clearly established and as the trial judge found, no overlap between the injuries sustained in the two accidents.

51. Further, had the plaintiff and/or her solicitors been motivated to conceal the second accident, for no obvious purpose, it seems very difficult to account for the disclosure of Dr. Sayed's report in circumstances where, had the solicitors wished to perpetrate a fraud, they could simply have withdrawn Dr. Sayed as a witness and any consequent obligation to disclose her report. Viewed in this light, it seems to me that any person giving the matter a moment's thought could not have concluded other than this was simple oversight, albeit one that was extremely and unacceptably careless.

52. More significantly however, there was not a single shred of evidence to support the defendant's hypothesis that the plaintiff or her solicitors had deliberately suppressed the second accident. Undeterred by this, counsel for the defendant accused the plaintiff of perjury, a very serious criminal offence, and her solicitors of fraud, an accusation that could hardly be more serious for an officer of the court and one that would leave the solicitor concerned, were it true, potentially open to the most severe sanctions up to and including the loss of his or her livelihood.

53. The authorities on s. 26 are replete with references to the need for care, or "prudent discernment", to be exercised by a defendant in making a s. 26 application. In the light of that, the application made by the defendant in this case, insofar as premised on deliberate concealment, can only be described as not merely unwarranted, but entirely improper and one that ought never have been advanced by counsel, on instructions or otherwise. It constitutes litigation misconduct in respect of which the court should take a serious view.

54. This litigation misconduct was aggravated and becomes all the more serious when these unwarranted and scandalous allegations are again re-agitated in the notice of appeal herein. While perhaps a less serious view of such conduct by counsel might be taken if it were ascribed to a "heat of battle" moment, it is clear that this was a carefully considered

and premeditated attack on the honesty and integrity of the plaintiff and her solicitors, which, despite clear and unimpeachable findings of fact by the trial judge, are to be found repeated in this appeal. This conduct should be deprecated in the strongest terms. Such gratuitous and sustained impugning of the integrity of a litigant or their legal representatives without valid justification undermines the administration of justice.

55. The trial judge was of the opinion that the appropriate sanction was an award of aggravated damages. His reasoning was as follows:

> "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 (*sic*) 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."

56. In support of his ground of appeal that the trial judge erred in law in making an award of aggravated damages, the defendant places reliance on the judgment of the High Court in *Doyle v Donovan* [2020] IEHC 11, an appeal from the Circuit Court. In that case, the defendant pleaded that the plaintiff was guilty of contributory negligence in "deliberately causing" the road traffic accident the subject of the proceedings. The plaintiff alleged that this was an allegation that she had committed a criminal offence and attempted to defraud the defendant's insurers. However, when the case came before the Circuit Court, this allegation was not pursued nor was it put to the plaintiff in cross-examination. In fact, by the time an appeal was heard, the defendant had conceded liability. The plaintiff sought an award of aggravated damages arising out of these circumstances which the High Court (Simons J.) declined.

57. In the course of a written reserved judgment, Simons J. considered the jurisdiction to award aggravated damages saying the following:

> "48. Thirdly, reliance on the jurisdiction to award aggravated damages to sanction litigation misconduct would give rise to an asymmetry as between plaintiffs and defendants. More specifically, the measure could only be used as against a *defendant*. This is because the making of an award of aggravated damages is parasitic on a substantive award of damages. Save in the case of a counterclaim, there will not normally be any basis upon which to make *any* award of damages against a *plaintiff* in personal injuries proceedings, still less an award of aggravated damages. Such a one-way measure is of little practical benefit.
>
> 49. Finally, the more usual measure taken by a court which disapproves of the manner in which litigation has been conducted is to address same by an appropriate costs order. For example, a party who has succeeded in the substance of its case may nevertheless be refused an order for costs in its favour by reference to the conduct of the litigation. It is also open to a court, in principle, to adjust the basis on which costs are to be measured."

58. Simons J. went on to consider that the court could mark its disapproval in various ways which might, for example, involving awarding costs on a "solicitor and client" basis against the responsible party. Accordingly, he was of the following view:

> "54. It seems to me that, in most instances, an award of costs on the 'legal practitioner and client' basis would be sufficient sanction for any litigation misconduct. Reliance on the jurisdiction to award aggravated damages on the basis of litigation misconduct alone should be reserved to exceptional cases."

59. Although Simons J. considered that an award of aggravated damages should be reserved to exceptional cases, other courts appear to have adopted a less restrictive approach. Thus in *Lackey v Kavanagh* [2013] IEHC 341, the High Court (Cross J.) expressed the following opinion:

> "47. I am of the view that since the introduction of the 2004 Act which clearly impacts upon a plaintiff disproportionately more than on a defendant, the issue of aggravated/exemplary damages must always be in the mind of a court where it is alleged that the plaintiff is deliberately exaggerating his or her claim and/or being guilty of fraud or otherwise invokes the provisions of s. 26 of the 2004 Act. I think the issue of aggravated/exemplary damages is the only real deterrent to an irresponsible or indeed an overenthusiastic invocation of such a plea. I believe the courts should be at least as rigorous as they were of old when such a defence is maintained.
>
> …
>
> 49. … I believe the court must be vigilant in not allowing an unwarranted allegation of fraud or any unwarranted invocation of the provisions of the s. 26 of the 2004 Act to go unpunished if the circumstances allow."

60. These observations were held to represent a correct statement of the law by the High Court (Barton J.) in *Waliszewski v McArthur & Company Limited* [2015] IEHC 264.

61. The observations of Cross J. in *Lackey* appear to accord with the views I subsequently expressed in *Daly v HSE* [2014] IEHC 560, a case relied upon here by the defendant in the High Court. In that case, I remarked (at para. 61):

> "[Section 26] was introduced into law not long after the decision of the Supreme Court in *Shelley-Morris* and, as noted above, acts as a very major 'nuclear' deterrent to the mounting of fraudulent and exaggerated claims. It undoubtedly confers litigation advantage on defendants and has long been complained of by plaintiffs' lawyers as violating the principle of 'equality of arms' in personal injury litigation. However, the recent jurisprudence of this court reveals an emerging trend towards a more level playing field by the threat of sanctioning defendants who invoke the section without just cause by way of aggravated or punitive damages."

62. In *Nolan v O'Neill & Mitchell* [2016] IECA 298, Irvine J. (as she then was), speaking for this Court, noted at para. 55:

> "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."

63. The comment of Collins J. at para. 74 of his judgment in *O'Sullivan v Brozda*, already referenced above, appear to me to provide further support for the awarding of aggravated damages in an appropriate case to deter the making of "marginal applications". It is not clear to me therefore that there is widespread support in the jurisprudence for the conclusion that an award of aggravated damages should be reserved for exceptional cases concerning s. 26.

64. The conclusion of Simons J. in that regard appears to have arisen from a perceived asymmetry in an award of aggravated damages which can, in the vast majority of cases, only be made against a defendant. However, as I noted in *Daly*, any potential asymmetry as

between parties seems in the first instance to arise from the terms of s. 26 itself, which provides a "draconian" remedy to defendants only in personal injuries litigation. It seems to me that an award of aggravated damages has the potential to correct that asymmetry, rather than giving rise in itself to a different one.

65. The jurisprudence on aggravated damages, even outside the scope of s. 26, tends to support the notion that outrageous conduct by a defendant should not go unpunished and an award of aggravated damages is seen as an appropriate redress in that regard. It is both punitive and compensatory in the sense of compensating the plaintiff for the additional hurt and upset caused by the high-handed conduct of the defendant, something outside the scope of an enhanced costs order.

66. Having said that, it should be borne in mind that it is by no means axiomatic that the making of a failed s. 26 application ought to result in an award of aggravated damages in favour of a plaintiff. Thus, in the present case, as Cross J. noted, had the defendants stopped short of alleging fraud against the plaintiff and her solicitors in attempting to suppress the subsequent accident, the question of aggravated damages is unlikely to have arisen. I expressed a similar view in *Browne v Van Geene* [2020] IECA 253 where the plaintiff made an application for an award of aggravated damages following an unsuccessful section 26 application by the defence. I said in that respect:

> "108. Having said that, the trial judge did expressly recognise that the s. 26 application made by the respondents was not without substance. Having regard to the matters I have outlined, it was certainly an application that the respondents were entitled to make. Although some of the judicial comments to which I have referred rightly deprecate the unwarranted and speculative use of s. 26 which, in an appropriate case, may result in an award of aggravated damages, in this case there is

> no question of such considerations arising. The plaintiff appears to apprehend that if a s. 26 application is unsuccessful, that should result in either aggravated damages or, in the present case, a refusal to award to the respondents the costs they would otherwise be entitled to by virtue of the lodgements.
>
> 109. There is no merit in that contention …"

67. However, having regard to the manner in which the s. 26 application was advanced in the present case, I have no doubt that the trial judge was entirely justified in making an award of aggravated damages.

General Damages

68. The plaintiff's injuries are set out in detail in the judgment of the High Court so that it is unnecessary to give other than a broad outline here. The plaintiff suffered soft tissue injuries to her neck and shoulder, the shoulder injury being the more serious. She also suffered significant psychiatric complaints arising out of the accident. Mr. Nicholson's evidence was that the plaintiff had a genuine injury to her shoulder that was documented. She had developed a myofascial type syndrome to her neck and shoulder area when he examined her at over two years post-accident, he found that her right neck and shoulder symptoms were largely unchanged and were likely to persist in the future.

69. These symptoms were of sufficient significance for the plaintiff to undergo pain relieving injections into her neck and as these are themselves painful and uncomfortable, Mr. Nicholson considered that it implied that the plaintiff's symptoms were genuine. On examination by Dr. Das at almost three years post-accident, the plaintiff continued to suffer from right neck and shoulder pain despite him having administered two trigger point injections into the right trapezius.

70. With regard to her psychiatric complaints, evidence was given by Professor Jogin Thakore, a Consultant Psychiatrist. He noted that the plaintiff had had a number of tragic events in her life referenced in the judgment and in his view, the accident had acted as a trigger for what he described as a major depressive disorder. He considered it to be of moderate severity and that it should ultimately resolve. However, in relation to her physical symptoms, the judge noted that Dr. Das was of the opinion that these had become chronic and were likely to persist into the future indefinitely. He classed these injuries as being in the moderate rather than severe category.

71. The defendant in his submissions refers to the Book of Quantum wherein a soft tissue whiplash injury to the neck of moderate severity is categorised in the €20,400 to €30,200 range. This however fails to take account of the plaintiff's shoulder injury which was her major injury. A moderate soft tissue injury to the shoulder where a full recovery is expected is classified in the €22,000 to €60,900 range, whereas such a full recovery is not expected here.

72. With regard to the plaintiff's psychiatric injury, the Book of Quantum provides no guidance in relation to such complaints. However, when one takes all matters into account, I do not think it can be said that an overall award of €70,000 is so disproportionate as to amount to an error of law and in those circumstances, I would not interfere with same.

Costs

73. The case was originally called on by the plaintiff, with presumably the defendant's agreement, as being one that should have taken two days at hearing. In the event, it took a total of six. The defendant made complaint of this to the trial judge in relation to the question of costs, suggesting that the trial had been unnecessarily prolonged by the failure of the plaintiff to disclose the subsequent accident. The trial judge accepted that some additional

time had been lost as a result of the necessity to recall the plaintiff to be cross-examined on the non-disclosure issue and in all the circumstances, he awarded the plaintiff costs based on a five day hearing as opposed to the six days the case actually took.

74. In the appeal, the defendant submits that he should not be penalised on costs because the hearing exceeded two days as the culpability for this rests solely with the plaintiff. I am not at all certain that that is the case. The defendant says that no evidence was taken on day three due to the unavailability of the plaintiff's witnesses but if that was a cause for complaint, it ought to have been made to the trial judge at the time. It is certainly true to say that significant delay occurred as a result of the defendant's application for discovery which arguably did not advance their state of knowledge in any meaningful way beyond what it stood at before the adjournment.

75. The recent jurisprudence of this Court indicates that the Court will be slow to interfere with a discretionary costs order made by the High Court which is generally in a much better position to take account of the factors relevant to the making of such an order, absent a clear error or injustice. In this case, the trial judge was best placed to make an assessment of the additional time, if any, taken by the trial as a direct result of the failure of the plaintiff and her solicitors to disclose the subsequent accident. He correctly considered that such gross carelessness should result in a costs penalty for the plaintiff and he considered a proportionate response was the loss of a day's costs to the plaintiff. There is no cross appeal against that finding. I am not persuaded that the defendant has established any error in this approach and accordingly that there is any basis for this court to interfere with the costs order made by the High Court.

Conclusion

76. For the reasons given therefore, I would dismiss this appeal. As the plaintiff has been entirely successful, my provisional view is that the plaintiff should be entitled to the costs of the appeal. If the defendant wishes to contend for an alternative order, he will have liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the plaintiff will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made.

77. As this judgment is delivered electronically, Whelan and Binchy JJ have authorised me to record their agreement with it.