THE HIGH COURT
CIRCUIT APPEALS

[2021] IEHC 614
[RECORD NO. 2018/170]

BETWEEN

SCOTT HARDY

PLAINTIFF

AND

BRIDHGE BIBLE AND THE MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANT

THE HIGH COURT
CIRCUIT APPEALS

[RECORD NO. 2017/237]

BETWEEN

DAMIEN HENNESSY

PLAINTIFF

AND

BRIDHGE BIBLE

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 22nd day of June, 2021

SUMMARY

1. This case involves a claim for personal injuries which this Court has found, on the balance of probabilities, to be false. It is important to consider how these false claims were supported by apparently credible medical evidence. The issues which arise from this case therefore can be summarised as follows:

(i) False claims opportunistically made, arising from a genuine accident

As noted in detail below, there was a very minor 'tip' between the defendant's ("Ms. Bible's") car and the first plaintiff's car ("Mr. Hardy") and therefore, technically speaking, there had been a 'car accident'. The matter appears before this Court as an appeal from the Circuit Court. It seems clear that the Circuit Court, based on the evidence heard before that Court, did not believe the extent of the car damage claimed by Mr. Hardy, or the extent of the personal injuries claimed by Mr. Hardy and the second defendant ("Mr. Hennessy"). This is because the Circuit Court gave an order for only €1,250 in respect of the alleged car damage (although as noted below, Mr. Hardy produced a very significant estimate of €7,850 for the damage, considering it was a tip to his tow bar) and the Circuit Court awarded a sum of €5,000 in respect of general damages for personal injuries sustained by both plaintiffs, namely at the District Court level (which is between €0 and €15,000), rather than at the Circuit Court level (€15,001-€60,000). In addition, the Circuit Court only awarded legal costs on the District Court scale to the plaintiffs.

However, based on evidence heard before this Court as outlined below, this Court would go further than the Circuit Court and find that, on the balance of probabilities, there was in fact no damage to the car or any personal injuries to the plaintiffs and so it will dismiss the proceedings. Just because there has been a genuine accident does not give rise to a right on the part of a plaintiff to falsify any part of their claims, which this Court finds has occurred in this case.

This case, where there was a claim of special damages of €7,850 for damage to a car that received just a 'tip' to a tow-bar, is also an example of why, Noonan J. stated in *Daly v. Health Service Executive* [2014] IEHC 560 at para. 43 that it behoves lawyers involved in personal injuries litigation '*to exercise considerable care in the analysis of claims for special damage before advancing them'*. It seems to this Court that part of that reasonable care may be to emphasis to plaintiffs the dangers that their claims, even if they arise from a genuine accident, will be *dismissed in their entirety* if they make any false claims regarding their injuries or damage to property (or indeed if they make any exaggerated claims). There is of course no reason to believe that the lawyers in this case did not do so and of course it is important to emphasise that the lawyers are simply acting on the instructions of their clients and it is not their role, but the role of the Court, to determine the veracity of the claims.

(ii) 'Inappropriate' referral by solicitor of client to consultant

The second issue considered in this case is the fact that in a claim regarding personal injuries, which this Court has found to be false, the referral to the consultant was made, not by the plaintiffs' GPs, but rather by their solicitor. However, it must be emphasised, that it is not being suggested that that solicitor was aware of the fact that the claim was false.

This referral was made despite the fact that the High Court (Barr J.) has described this practice of solicitors referring their clients directly to consultants as 'inappropriate' (*Dardis v. Poplovka* [2017] IEHC 149 at para. 156). As noted below, this practice, it must be assumed, is done for no good medical reason (since solicitors do not have any medical expertise), but rather for legal reasons to support a claim in damages. One of the problems with such referrals is that, because they are made for no good medical reason, such referrals can end up being used to support fraudulent (or exaggerated) claims. Accordingly, the existence of a referral to a consultant, not by a GP, but by a solicitor (and therefore for no good medical reason), can amount to supporting evidence, as in this case, that the claim was false (or indeed exaggerated).

This case is also an example of how a purely *subjective* medical assessment by a consultant of a soft tissue injury (i.e. based on the word of the patient) can appear to be *objective* evidence of injury, in order to support a claim for damages, even though the claim itself has been found by this Court to be false.

(iii) Self-referrals of plaintiffs to a hospital emergency department

This case also considers the fact that both plaintiffs decided not to seek a referral or medical advice from their GP regarding their alleged injuries from what this Court has found to be a 'tip'. Instead they referred themselves to an accident and emergency department of a busy hospital, even though there was absolutely no indication that there was any medical emergency warranting Mr. Hardy and Mr. Hennessy occupying very valuable and scarce medical resources. Quite apart from the waste of valuable tax-payer funded resources, which should be deprecated in the strongest terms, and the delays thereby caused to seriously injured people at that hospital, a more general point can be made. It is that the failure of a plaintiff to seek medical advice from their GP or an opinion

from their GP as to whether their alleged injuries warranted attendance at a busy accident and emergency department, can amount to supporting evidence that the claim was false (or exaggerated). This is because, like the referral by a solicitor, rather than a GP, to a consultant of a client, a self-referral by a client, rather than by a GP, to an accident and emergency department may also be made without objective medical grounds.

(iv) Negative effect of such claims on genuine claims and innocent defendants

This case also raises a fourth issue, namely the fact that there are many people who are injured and deserving of compensation arising from the negligence, or sometimes even the recklessness of others, and are awaiting compensation for many years due to the backlog in the courts. However, false claims brought by plaintiffs, as in this case, only delay those genuine claims being heard in the Irish courts.

Unfortunately, as noted by this Court in *Ronan v. Tipperary County Council* [2021] IEHC 492 and *Hannon v. Tipperary County Council* [2021] IEHC 514, where the plaintiffs are impecunious, as in this case, the prospect of having an order for legal costs made against them is not a sufficient financial disincentive for false or unmeritorious claims to be brought. Such claims may be brought in the hope that the cases will settle as a 'nuisance claim' – see *Condon v. Health Service Executive* [2021] IEHC 474 where this issue was raised. Based on the figures opened to the Court in that case, to settle a High Court nuisance claim (including legal fees), the plaintiffs in this case might have been hoping for a settlement offer of €10,000 to settle their claims, with a figure of €10,000 to their lawyers - thereby saving the defendant from having to expend €50,000 - €100,000 in legal costs to 'win' the case in the High Court.

The absence of any financial disincentive for impecunious plaintiffs to make such claims means that defendants are forced to litigate on the basis of an unlevel playing field as regards legal costs. This is because, as regards legal costs, it is win/lose for the plaintiff but lose/lose for the defendant, since even if the defendant wins the case, he will still have to pay his own legal costs. As such, defendants may feel they have no option but to 'buy-off' an unmeritorious claim, such as this one.

It seems to this Court that so long as this remains the case, the right of litigants, which it is important to remember includes defendants, *'to have litigation fairly conducted'* (per the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 42 at para. 5), is called into question. This is likely to continue in the absence of a financial disincentive for impecunious plaintiffs (while at the same time of course recognising litigants' right of access to the courts), where those plaintiffs take unmeritorious claims without '*any skin in the game'.*

It seems therefore, that in the absence of a sufficient economic disincentive for the bringing of unmeritorious/false/exaggerated/speculative claims, the backlog in court cases and the waiting time for genuine claims is likely to continue.

However, of perhaps even more significance is that the absence of a sufficient economic disincentive for the bringing of false or exaggerated claims by impecunious plaintiffs

brings personal injuries litigation generally into disrepute. Accordingly, those with genuine personal injury claims may be discouraged from pursuing them, since they may not want to be associated with the negative publicity which attaches to personal injury claims such as this one.

It seems to this Court therefore that it is important that opportunistic, speculative, exaggerated or fraudulent claims are not simply treated as nuisance claims to be bought off for the financial benefit of plaintiffs and their lawyers (who, it must be emphasised, are only acting on instructions from their clients). Settlement of such claims only encourages the taking of them and it seems to this Court that they should be litigated so as to discourage the taking of such claims. However it must be emphasised that this Court is not suggesting that lawyers have any responsibility for these claims, as they are only acting on the instructions of their clients, and just as it is not the role of lawyers to determine the guilt of their criminal law clients, so too it is not their role to determine the veracity of their civil law clients.

Finally, a related issue considered in this case is the very negative effect a nuisance claim, such as this one, can have on an innocent defendant, in this case, Ms. Bible, a middle-aged lady who was the subject of four years of litigation through the Circuit Court and High Court. Unfortunately, this is often forgotten, but so long as there is insufficient financial disincentive to the taking of spurious, opportunistic, exaggerated or false claims, people like her will continue to be the innocent, and sometime forgotten, victims of these types of claims.

BACKGROUND

2. This is a case in which there is a claim for damages for soft tissue injuries by Mr. Hardy and Mr. Hennessy against Ms. Bible. Mr. Hennessy was alleged to be a front seat passenger in Mr. Hardy's car when the alleged 'accident' occurred.

3. Ms. Bible claims that there was minimal impact between her car and Mr. Hardy's car, such that she did not even report it to her insurance company. Yet Mr. Hennessy has a medical report from a consultant rheumatologist, to whom, it is important to note, he was not referred by his GP, but by his solicitor, in which it is stated, *inter alia*, that '*the pain is constant and that it keeps him awake every second night'.*

4. As in a lot of soft tissue injury cases, where the degree, if any, of injury is so subjective, the credibility of the plaintiffs is of considerable importance.

The evidence

5. Ms. Bible was a credible witness. She gave evidence that she left work and was on her way to church on the 22nd July, 2016 in Waterford city when she wrongly assumed that Mr. Hardy, who was in the driver seat of a stationary car in front of her at a set of traffic lights, was going to move off from that position as the cars ahead of him had done.

6. Due to this miscalculation, Ms. Bible braked too late and made contact with the tow bar at the back of Mr. Hardy's car. This led to a crack in her front licence plate, which she duly replaced at a cost of €23, and underneath the licence plate there was a very small crack

in her bumper, which had been caused by the tow bar. Photographic evidence of this hairline, or minor, crack of an inch or so in length was produced to the Court.

7. She gave evidence that due to the presence of the tow bar on Mr. Hardy's car there was absolutely no damage to his bumper, or his car generally (nor did he allege at the scene that there was any damage done to his car) and Ms. Bible gave evidence that she did not suffer any personal injuries as a result of this 'accident'.

8. In support of Ms. Bible's version of events, she pointed out that Mr. Hardy did not seek her insurance details and indeed she did not notify her own insurance company of the incident, since she did not regard herself as having been in an accident, since there was no damage done to Mr. Hardy's car. On her version of events, all that occurred is that her car tipped off Mr. Hardy's tow bar. In addition, it is to be noted that she did not take any photographs of the alleged 'damage' done to Mr. Hardy's car, presumably because, she believe that there was no damage done.

9. Ms. Bible also provided evidence that Mr. Hardy was in the driver seat of his car, but, it is important to note, she gave evidence that Mr. Hennessy was not in the car at all, at the time of the 'accident'.

10. She gave evidence that Ms. Leanne Patterson ("Ms. Patterson") was in the front passenger seat and that she had exited the car from the passenger side, after the accident, to go around the car to sit in the driver seat on two separate occasions. Ms. Bible gave evidence that on both occasions Mr Hardy shouted at her to return to the passenger side.

11. In contradiction to Ms. Bible, the evidence of Mr. Hennessy, Mr. Hardy and Ms. Patterson was to the effect that Mr. Hennessy was in the front passenger seat. However, it is relevant to note that Ms. Patterson was Mr. Hardy's partner at the time and so she is not a completely independent or impartial witness. What is crucial, however, in determining the credibility of the claims of Mr. Hardy and Mr. Hennessy, is the other evidence which they both gave in this case.

12. In this regard, Mr. Hardy gave evidence that the reason Mr. Hennessy did not get out of the passenger side of the car was because the passenger door was damaged as a result of the crash and so would not open. Mr. Hardy and Ms. Patterson both gave evidence to the Court that Ms. Patterson was in the back seat of the car and that she climbed out over the driver seat to get out of the car, which presumably was because Mr. Hennessy was allegedly in the front passenger seat.

13. Despite the minimal damage to Ms. Bible's car and despite the fact that Mr. Hardy's car had a tow bar on his car, only four days after the accident Mr. Hardy procured an estimate dated 26th July, 2016 for the damage to his car of approximately €7,850 for damage and/or replacement of :

    - rear bumper,

- rear differential,
- rear sub frame (x 2),
- rear driver shaft (x 2),
- rear boot lid,
- rear bumper reinforcement,
- rear wheel liners (x 2),
- rear tail light (x 2).

Inconsistencies regarding the claim of damage to the car

14. There are a number of concerning issues about this estimate obtained by Mr. Hardy, quite apart from the fact that it is completely inconsistent with the damage to Ms. Bible's car and her own evidence that there was no damage to Mr. Hardy's car because of the tow bar.

15. Firstly, Mr. Hardy makes no claim in his list of repairs for the repair to the front passenger door, which Mr. Hardy alleges could not open because of the accident and which damaged door was given as apparent justification for why Mr. Hennessy had not exited the car after the incident. Considering how comprehensive the foregoing list of damages is, it is surprising, to say the least, that it would not contain an estimate for the alleged damage to the passenger door, if this door was damaged as alleged.

16. Secondly, this claim of damages of €7,850 resulting from the incident is also inconsistent with the MIBI form completed by Mr. Hardy on the 2nd December, 2016 since in that form in answer to the question of *'Give details of vehicle damage sustained'*, Mr. Hardy states '*estimate awaited'*. Yet, if the estimate of 26th July, 2016 existed at that date, as Mr. Hardy is claiming, this answer is clearly false, since he had an estimate from five months earlier, assuming of course, this is a genuine estimate.

17. In this regard, it is to be noted that Mr. Hardy's car was never made available for inspection by the defendants to enable the estimate to be compared with the alleged damage, as it was impounded because of his failure to pay tax and then dealt with as an end of life vehicle.

18. Thirdly, this claim for damage to the car of €7,850 resulting from the accident is also inconsistent with his application to the Personal Injuries Assessment Board in January 2017, since in that application, Mr. Hardy made no claim for damage to his vehicle. If Mr. Hardy is to be believed that he suffered €7,850 worth of damage to his car as he claims, a very significant sum particularly to someone like Mr. Hardy who was unemployed, it seems inexplicable that he would, in this application to PIAB, make no claim for damage to his car.

19. Fourthly, a further inconsistency is provided by the proceedings in this case, since in the Personal Injury Summons, Mr. Hardy makes no claim for damage to his car, which he now claims came to €7,850.

20. Fifthly, another inconsistency is the fact that the estimated repairs costing €7,850 is inconsistent with Mr. Hardy's evidence to his own GP that there was '*not much damage to the car'* on the 15th September, 2016.

21. In light of these inconsistencies and the evidence of Ms. Bible, this Court prefers Ms. Bible's evidence and it concludes on the balance of probabilities that there was in fact no damage sustained to Mr. Hardy's car.

22. However, this is not the end of the inconsistencies or apparent inconsistencies in relation to both plaintiffs' claims.

Other inconsistencies in the evidence of the plaintiffs

23. In answer to a Notice for Particulars as to how he sustained the soft tissue injuries, Mr. Hardy claimed that he did not move position in the seat of the car as a result of the contact from Ms. Bible's car. Nonetheless, he is claiming significant soft tissue injury and Mr. Darragh Foley-Nolan, Consultant Rheumatologist, to whom he was referred by his solicitor, reports, that:

    - he has '*difficulty sleeping'*,
    - he has a '*severe shooting pain'* in his neck,
    - he finds it difficult '*dealing with feelings of anxiety or being nervous'*,
    - he finds it '*very difficult to work under cars and in confined areas',*
    - *'his symptoms are present continuously all day'*, and,
    - *'pain prevents him from carrying heavy objects'.*

    It is important to bear in mind that this consultant is reporting on this extensive injury all arising from a 'tip' to the tow bar of his car by Ms. Bible's car.

24. Mr. Hardy reports to Mr. Foley-Nolan that he takes pain killers and non-steroidals on a daily basis, yet this is again inconsistent with the fact that there is no claim for any medication purchased by him in these proceedings.

25. It is also to be noted that in his answer to a Notice for Particulars, he stated that he did not move position in the seat of his car, which is inconsistent with his plea in the Personal Injuries Summons, that he was hit with force and that the car was jolted forward.

26. It is also relevant to note that Mr. Hardy gave the consultant, to whom his solicitor referred him, false information since he advised him that his occupation was a car salesman, when in fact Mr. Hardy was, and continues to be, unemployed.

27. He also provided that consultant with false information regarding his attendance at *Care Doc*, which he said he attended on the evening of the accident, when in fact the evidence shows that he did not do so. Indeed, in his Replies to Particulars he confirmed that the alleged soft tissue injuries only manifested themselves over the subsequent weekend and not therefore on the night of the accident.

28. It is not proposed to go through every single inconsistency in Mr. Hardy's evidence, but the foregoing (and the evidence below in relation to Mr. Hennessy) gives a flavour of the level of inconsistency in their claims.

29. In addition, both Mr. Hardy and Mr. Hennessy were evasive and not very credible as witnesses.

30. For these reasons, this Court concludes that, like Ms. Bible, Mr. Hardy and Mr. Hennessy (for the reasons below) did not suffer any personal injuries as a result of the 'tip'.

How these false claims were supported by apparently 'objective' medical evidence

31. This Court notes, having concluded that the plaintiffs have falsely claimed personal injuries, that it is a matter of general concern how the plaintiffs supported this claim by using the services of a Consultant Rheumatologist, to whom they were referred, not by a GP, but by a solicitor, and who produced two reports which were based on the subjective evidence of the plaintiffs. At the outset however, it is important to note that it is not being suggested that the consultant, Mr. Darragh Foley-Nolan, was aware that the claims of soft tissue injuries were false.

32. To a defendant like Ms. Bible (or her insurance company), who has to pay damages to such claims, these consultant reports usually contain several pages of detail regarding the pain and suffering of the plaintiffs for which, in this instance, they were seeking up to €60,000 in damages (since the claims were heard in the Circuit Court and on appeal in the High Court).

33. While the majority of the Consultant's opinion is taken up with repeating subjective information provided by Mr. Hardy e.g. *'**he states** that he would have much difficulty dealing with feelings of anxiety or being nervous'*, the consultant sets out findings which *prima facie* appear to be objective medical evidence, e.g. *'**I find pain** on full abduction and pain in full internal and external rotation in 90 °flexion', '**I find … pain** at the extremes of movement', '**Mr. Hardy is tender** over the left trapezius' etc.* (Emphasis added).

    However, although presented as apparent objective findings by the consultant, it seems clear that these are findings which are based solely and exclusively on the subjective evidence to his consultant by Mr. Hardy, who this Court has found to be an evasive witness.

34. It is in this context therefore, that it is relevant to consider, as a matter of general application, how this consultant was involved in this litigation (since this Court has concluded that Mr. Hardy and Mr. Hennessy did not suffer any personal injuries).

REFERRAL OF CLIENTS BY SOLICITORS TO CONSULTANTS

35. One assumes that the reason Mr. Hardy's solicitor referred him to a consultant was because a court (or in settlement negotiations with the defendant/insurance company) would attach considerable weight to the evidence (and particularly any objective evidence) of a consultant. One should bear in mind also that as over 97% of personal injury cases are settled (see the Statement of the President of the High Court regarding Personal Injuries Claims listed in the Legal Diary for the 23rd, 24th, and 25th of June 2021, published on the Courts Service website on 10th July, 2020), such consultant reports may not be subject to rigorous scrutiny by a court, as in this case (and indeed the plaintiffs, and their lawyers, may have assumed that this claim would be part of the 97% of cases that settle).

36. However, it is crucial to bear in mind that such consultants' reports, where the referral is made by a solicitor, may be of little or no assistance to a court, since there will be no medical reason for the referral. This is particularly so, where the report, as in this case, amounts to, in essence, the consultant simply repeating the *subjective* evidence of the plaintiff i.e. *he* has difficulty sleeping etc., albeit that it is presented in an objective manner ("I find pain"), but which appears to contain no truly objective evidence of the alleged injuries.

37. This subjective evidence, just because it is repeated by a consultant, is still subjective evidence and this Court has been *directed* by the Supreme Court (in *Rosbeg Partners v. LK Shields Solicitors* [2018] 2 I.R. 811 at p. 823) to *'bring an appropriate scepticism'* to all stages of the litigation process, which clearly includes personal injury claims for damages such as this one. This direction has particular resonance to subjective medical evidence, which has come into existence, not for any good medical reason, but for legal reasons, and particularly regarding soft tissue injuries, which are based on the subjective views of the patient (even if presented in an objective manner).

38. Crucially, in this case, neither Mr. Hardy nor Mr. Hennessy were referred to a consultant by their respective GPs for their alleged soft tissue injuries.

39. Instead, both were referred by their solicitor, even though it is not good practice for solicitors to refer clients to consultants, as recognised in a series of High Court judgments noted below (although it should be noted that in relation to the solicitors in this case, the judgments criticising this practice were handed down *after* the referrals were made in this case).

40. However, it should now be clear to solicitors (even if it was not clear beforehand), from an analysis of the caselaw, that it is not generally appropriate for lawyers with no medical expertise to be referring their injured clients to specialist doctors.

41. Before analysing that caselaw, as a preliminary point, it is important to note that what the caselaw is concerned with is, *not* a referral by a defendant insurance company of a plaintiff to a 'reporting' specialist who gives a *second or independent* opinion on the plaintiff's injuries, on behalf of the defendant. Such a referral is clearly not for medical

reasons, but for legal reasons. However, it invariably only occurs *after* the plaintiff has been referred for medical reasons, i.e. by a GP, to his own 'treating' specialist, who would usually then provide a report to the plaintiff's lawyer.

42. For this reason, it seems clear that these referrals by defendant solicitors/insurance companies do not fall within the category of 'inappropriate' referrals referenced by Barr J., to which reference will now be made. This is because what this caselaw is concerned with, is a situation in which there is usually no 'treating' specialist for the plaintiff and only a 'reporting specialist' and so no medical reason exists for the referral made by the plaintiff's lawyer (as distinct from the defendant's lawyer) to that specialist. Rather there are only legal reasons for such a referral, namely in order to support a claim for damages.

It is 'inappropriate' for solicitors to refer clients to medical specialists

43. It is clear that this practice of solicitors referring clients to medical specialists is not approved by the courts. There have been a number of cases which have considered this issue.

(i) Dardis v. Poplovka

The leading case, which is considered in more detail hereunder, is the High Court case of *Dardis v. Poplovka* [2017] IEHC 149 and at para. 156, Barr J. stated that:

"The first observation concerns medical referrals being made by solicitors. The court is of the view that it **is inappropriate for solicitors to refer clients for specialist [medical] examination."** (Emphasis added)

(ii) Fogarty v. Cox

The decision in *Fogarty v. Cox* [2017] IECA 309 is another case, this time by the Court of Appeal, where the courts cautioned against solicitor referrals. This case considered a situation where the plaintiff's solicitor, rather than his GP, had referred the plaintiff to a specialist in sports injuries. It transpired during cross examination that the specialist was dealing with 30 cases which had been referred directly to him by that solicitor. The Court of Appeal made it clear that it did not approve of this practice. At para. 43 Irvine J, as she then was, stated:

> "[….] I would caution against a practice whereby any solicitor would repeatedly refer clients who have personal injury claims to the same doctor who would then take over the management of their care with a view to later coming to court to give evidence on their behalf. Those are circumstances likely to place the doctor in a conflict of interest situation and are likely to expose them to a risk of being considered less than fully independent when giving their evidence."

(iii) Flannery v. Health Service Executive

In *Flannery v. HSE* [2018] IEHC 127, the High Court sought again to bring an end to this practice whereby some solicitors refer their clients to medical specialists.

In that case, the plaintiff was claiming damages for her alleged depressive illness arising from an incident that occurred during her treatment in hospital. However, the plaintiff's GP, who saw the plaintiff on a monthly basis for her asthma, did not refer the plaintiff to a psychiatrist for her mental health. Barr J. concluded that if her own GP had thought the plaintiff was suffering from clinical depression, the GP would have referred her to a psychiatrist.

Yet the plaintiff's solicitor made a referral to a psychiatrist, which referral was duly accepted by the consultant psychiatrist. Barr J. reiterated once again that it was not good practice for solicitors to refer their clients to medical specialists. He noted at para. 32:

> "The plaintiff was sent to see Dr. McGuire [a consultant psychiatrist] in April 2016, by her solicitor**. The practice of solicitors sending their clients for specialist evaluation by medical personnel, was the subject of criticism by this Court in *Dardis v. Poplovka* [2017] IEHC 249. The Court of Appeal has recently made similar comments in *Fogarty v. Cox* [2017] IECA 309**. A treating doctor's main concern is to care for the wellbeing of his or her patient. The primary doctor is the patient's G.P. If he or she thinks that the patient requires specialist evaluation, it is the G.P. who should refer the patient on for such evaluation. **I do not think that it is good practice for solicitors to take it upon themselves to decide that their client needs evaluation by a particular medical specialist.** That is a medical question which should be decided upon by the G.P., or by another specialist, who may refer the plaintiff to a different specialist for further investigation." (Emphasis added)

(iv) <u>*Daly v. Health Service Executive*</u>

Similarly, in *Daly v. HSE* [2014] IEHC 560, Noonan J. dealt with a case where he found the plaintiff's physical injury to her back and her alleged depression, arising from a slip and fall on a wet floor, to have been exaggerated. Accordingly, although the plaintiff had claimed a sum of €154,000 in special damages (for out of pocket expenses and alleged loss of earnings), Noonan J. awarded her a sum of €1,255 (for one MRI scan and travelling expenses).

In that judgment, in dealing with the fact that the referrals to medical specialists were made by a solicitor, rather than a GP, Noonan J. referenced as relevant in that context the duty of lawyers practising in personal injuries to exercise considerable care to look out for exaggeration when analysing their clients' claims for special damages. At para. 43 he stated:

> **"All lawyers, and particularly those involved in personal injuries litigation** on a regular basis, are perfectly well aware of the potential risks for their clients of mounting exaggerated claims and the draconian sanctions available to the court under s. 26 of the Civil Liability and Courts Act [2004]. Accordingly, **it behoves them to exercise considerable care in the analysis of claims for special damage before advancing them.**" (Emphasis added)

It is of course the case that the lawyer cannot be criticised if the claim turns out to be fraudulent or exaggerated, once he/she has exercised '*considerable care'*. This is because every plaintiff is entitled to legal representation and the truth of a plaintiff's claim is a matter for the Court - it is not a matter for his/her lawyer.

However, a factor for a lawyer in determining whether he has exercised considerable care is for him to consider whether he should be referring clients to specialists where there is no objective medical reason, but only a legal reason, for such a referral, as occurred in the Daly case.

In that case, having referenced the need for lawyers in personal injuries claims to exercise considerable care, Noonan J. went on to consider the fact that the client was sent to a panoply of specialists for medical assessment by her solicitor in pursuit of the damages claim, which claim was found to be wholly exaggerated. The six different specialists to which the plaintiff was sent arising from the solicitor's referral were:

(i) a specialist in sports injuries,

(ii) a rheumatologist,

(iii) a neurosurgeon,

(iv) a psychiatrist,

(v) a radiologist, and,

(vi) a vocational rehabilitation consultant

even though the plaintiff's own GP had felt that no specialist intervention was required.

Noonan J. noted that, most unusually, the defendant called the plaintiff's own GP to give evidence. The defendant undoubtedly felt that the GP's evidence would help it in defending the exaggerated claim, for the reason, presumably, that it was the plaintiff's solicitor, rather than someone who knew something about medicine, who was the starting point for all these specialist referrals.

At para. 4 *et seq*., Noonan J. outlined the precise manner in which these six different specialists ending up seeing the plaintiff, when her own GP did not feel she needed specialist intervention:

> "On the 4th January, 2011 at about 1.30 pm the plaintiff walked into the kitchen carrying a dirty cup in her left hand. Her evidence is that as she approached the sink, her right foot slipped forward and she fell to the ground landing in a twisting fashion on her right hip […]

Immediately after the accident, the plaintiff felt pain in her lower back and shortly thereafter began to develop sciatic type pain down the front of her right leg. She reported

the accident and left work early due to increasing pain in her back and leg. She attended her general practitioner, Dr. Edmond Fitzpatrick the next day."

Her GP did not recommend any specialist referral for the plaintiff's medical condition. At para. 20, Noonan J. notes that a year and a half later, her solicitor refers her to a specialist in sports injuries:

> "In or about July, 2012, **the plaintiff's solicitors referred her to another general practitioner, Dr. Sean McCarthy**, a well-known local politician. Dr. McCarthy retired from general practice in 2006/2007 and **now holds himself out as a specialist in general injuries, sports injuries and exercise medicine** by virtue of having successfully completed a one-year part-time course under the auspices of the RCSI and RCPI. It is fair to say that a significant portion of Dr. McCarthy's practice is devoted to medico-legal work on behalf of plaintiffs. Dr. McCarthy saw the plaintiff on 12 occasions and prepared 6 medical reports. Given that Dr. McCarthy had evidently not administered any treatment to the plaintiff, he was pressed on cross-examination as to what was occurring during all of these consultations and he said that he was having conversations with the plaintiff.
>
> Dr. McCarthy referred the plaintiff to a range of consultants including a rheumatologist, Professor Molloy who did not give evidence, a neurosurgeon, Mr. Kaar and a psychiatrist, Dr. Neville. The point was made by the defendant that the plaintiff's own GP, Dr. Fitzpatrick, had not found it necessary to refer her to anybody. Unusually, although Dr. Fitzpatrick was on the plaintiff's SI 391 schedule and provided a medical report to the plaintiff's solicitors, he was called to give evidence by the defendant. **The plaintiff's solicitors also directly instructed a consultant radiologist, Dr. Murray and referred the plaintiff to a vocational rehabilitation consultant, Ms. Brenda Keenan."** (Emphasis added)

False claims and consultant referrals by solicitors - both without medical grounds?

44. It is important to note that there is no reason to believe that the lawyers in the Daly case knew that the claim was exaggerated.

45. However, it is also true to say that some fraudulent/exaggerated claims and solicitor-referrals to specialists have one thing in common, - a fraudulent claim is usually made without medical grounds and a solicitor referral to a specialist is, by its very nature, always made without any medical grounds.

46. This is not to say that a fraudulent/exaggerated claim cannot arise where a referral is made by a GP to a specialist. However, at least the referral is made for good medical reasons, unlike a referral by a solicitor.

47. It follows that referrals by solicitors, i.e. without any medical basis, to specialists may facilitate the making of fraudulent or exaggerated claims by some plaintiffs (obviously unbeknownst to their solicitors).

48. So it was in the *Daly* case, where the referrals by the solicitor to various specialists (when the plaintiff's own GP had not done so), facilitated the making of the exaggerated claim for loss of earnings (obviously unbeknownst to that solicitor).

49. Based on the foregoing cases and the facts of this case, it seems clear that despite the finding in the *Dardis* case that it is inappropriate for solicitors to be referring clients to medical specialists, there may be a practice among some solicitors of referring their clients to medical specialists and indeed a practice of those specialists accepting such referrals from solicitors, without any medical basis for the referral.

50. However, as was made clear by Barr J. in the *Dardis* case, this practice is inappropriate not just for legal reasons (since it may facilitate fraudulent and exaggerated claims) but also for medical reasons, and these legal and medical reasons will be considered next.

Why it is 'inappropriate' for solicitors to refer clients to medical specialists

51. The Dardis case outlines both the medical reasons and legal reasons why it is generally inappropriate for a solicitor to refer clients to a medical specialist. Since it appears to be a practice of some solicitors to refer clients directly to specialists despite Barr J.'s dicta in Dardis, it is important to set these reasons out:

1. Medical reasons why a solicitor should not refer clients to specialists

52. In *Dardis* the plaintiff's GP had referred him to a consultant for his back injuries and so this referral could be said to be based on medical need, as it was made by a person with medical expertise. However, the plaintiff in his personal injuries action chose not to rely on the evidence of this consultant. Instead, he sought to rely on the evidence of a consultant to whom he was referred by his solicitors. Thus, the plaintiff chose to rely upon medical evidence, which was procured based on a legal need, rather than to rely on medical evidence, which had been procured based on medical need.

53. That case also involved a plaintiff who changed solicitors during the proceedings. As a result, it is an example of a case where not one, but two separate firms of solicitors directly referred the plaintiff to an orthopaedic surgeon, indicating that the first referral was not an isolated incident. In addition, the first firm of solicitors referred him directly to a consultant psychiatrist. All these referrals took place without the involvement of the plaintiff's GP.

54. As is clear from the judgment of Barr J. in Dardis, there are very good medical reasons why GPs, rather than solicitors, should make referrals to medical specialists. At para. 94 he explains these medical reasons:

> "Mr. [Hemant] Thakore [the orthopaedic surgeon] stated that his clinic does not arrange such matters, either the solicitors, or the general practitioner, does so. **He stated that he did not treat patients, he only reported on them**. In this case, there was no reference from the G.P., **it had been made by the plaintiff's solicitor, so it was up to them to arrange for the isokinetic assessment.** [….]" (Emphasis added)

55. At para. 156 *et seq*., he states:

> "Often, the G.P. is the person who is first consulted by the plaintiff in relation to his injuries. He or she deals with the plaintiff on an ongoing basis. **His primary aim is to make the plaintiff better. Accordingly, it is the G.P., who should decide when and to what specialist a patient should be referred.** [….]
>
> As a treating doctor, [the specialist]will also liaise with the plaintiff's G.P. and keep him updated as to the progress of treatment. In this way, **there is continuity and communication between the various medical professionals, who are treating the plaintiff at any given time.**" (Emphasis added)

56. The medical dangers that can arise when a solicitor makes the referral were also highlighted in the case of *Fogarty v. Cox* [2017] IECA 309.

Medical dangers to a client of a referral by a solicitor, rather than a GP

57. The *Fogarty* case involved a plaintiff who had an injured elbow which had been treated by her own GP (Dr. Paul O'Carroll), but then the plaintiff's solicitor referred the plaintiff to another GP, (Dr. Sean McCarthy). Dr. McCarthy had retired from general practice but was continuing to practise as a specialist in sports injuries. In the High Court ([2017] IEHC 114 at para. 56), Barr J. noted that:

> "Dr McCarthy was asked who made the initial appointment for the plaintiff to see him. He stated that Mr Cian O'Carroll, the plaintiff's solicitor, had made the initial appointment on behalf of the plaintiff. It was put to Dr McCarthy that Mr Fitzpatrick, the defendant's solicitor, was dealing with thirty cases brought by Mr O'Carroll and that Dr McCarthy had been retained in all of them. Dr McCarthy admitted that he sees a number of Mr O'Carroll's clients. He accepted that he had not seen the plaintiff before; he was not her GP."

58. On appeal, the Court of Appeal ([2017] IECA 309 at para. 18) noted that Dr. McCarthy had:

> "[…] been "parachuted" into the case by her solicitor to replace her treating G.P. Dr. O'Carroll, in circumstances where **Dr. McCarthy had not consulted with Dr. O'Carroll and in circumstances where Dr. O'Carroll had administered a number of injections to treat Ms. Fogarty's elbow."** (Emphasis added)

59. Thus, the very concern that had been raised by Barr J. in the *Dardis* case regarding solicitors referring clients to specialists, namely the absence of continuity of treatment, occurred in the *Fogarty* case. This was because the plaintiff was receiving injections from a specialist GP, to whom she had been referred by her solicitor, unbeknownst to her own GP. As noted by Barr J. in the *Dardis* case, this absence of continuity of care is not in the best medical interests of the patient/client and accordingly referrals by solicitors to specialists are *'inappropriate'* not just for legal reasons, but also for medical reasons.

Medical interests of client should take precedence over legal interests

60. Another reason why solicitors should not refer clients to medical specialists is because, as is clear from *Carey v. Minister for Finance* [2010] IEHC 247, the very act of referring patients to consultants by people with no medical expertise (solicitors), while it might be in the financial/legal interests of the client, may be detrimental to their mental or physical health.

At para. 6.21 of *Carey*, Irvine J. (as she then was) states:

> "My final comment in relation to these proceedings is directed not to the parties themselves but to **those members of the legal profession** who are involved, on a regular basis, in advising members in relation to potential claims under the Act. Over the past three years I have noted the very early involvement of solicitors in claims of the present nature. This is understandable as the Act requires that any claim should be made within three months of the date of the injury the subject matter of the intended claim. However, in relation to any potential claim based upon an alleged fear of infection from HIV or HCV, **my fear is that the health and welfare of the members may become compromised in the pursuit of the evidence necessary to maintain their clients claim for compensation. Members are often sent for a series of examinations by doctors and specialists alike and it has been my experience that these, what would I describe as medical legal consultations, do little to assuage the fears of the members and seem if anything to serve to reinforce their concerns regarding potential infection** at a time when what they desperately need, according to the experts, is an accurate assessment of any real risk of infection from a suitably qualified person and appropriate reassurance as to their true medical status. It must nonetheless be stated that no solicitor can be criticised for pursuing their client's legitimate interests." (Emphasis added)

61. While these comments were made in the context of HIV infections, it seems to this Court that they are of general application, not just to the mental health of a client, but also her physical health. It seems to this Court, that in reliance on this judgment, it can be said that consultant referrals, which are not made holistically by their GP, in light of a patient's mental and physical issues, run the risk of aggravating a patient's mental or physical health.

62. While a solicitor may feel that it is in a client's legal interests to refer him to a psychiatrist (say to support a claim for damages for Post-Traumatic Stress Disorder), after all that is a solicitor's primary concern i.e. his client's legal/financial interests, it is crucial to bear in mind that it is not a matter for a solicitor to determine whether such a referral is *in that person's medical interests*. If such a referral is to be made, it should be done by a GP. The client can then of course ask that psychiatrist, to whom he has been referred by his GP, to provide a report to his solicitor. It is for a GP, and not a solicitor, to determine, in light of their medical expertise and their knowledge of the medical history of their patient, whether it is in that patient's interests to be referred to a psychiatrist or any other specialist. .

The worse the medical position, the stronger the legal position

63. It is one of the ironies of personal injury claims that the worse the medical prognosis, the stronger the legal case for compensation is (assuming the accident arose due to negligence). Understandably solicitors, as legal specialists, have their client's legal interests, rather than their medical interests, in mind, in seeking to present as strong a legal case as possible. However, it is a client's GP who is best positioned to advise as to whether it is in her patient's mental and physical interests to attend medical specialists for tests or examination, even if the patient's solicitor determines that it is in their legal/financial interests.

64. It seems to this Court that a client's medical interests should always take precedence over their legal or financial interests and hence, it fully endorses the comments of Barr J. that referrals by solicitors to medical specialists is 'inappropriate'. In this regard, it is important to bear in mind that in every case, a good medical outcome for the client/patient is, and should always be, the priority over a good legal outcome.

Acceptance of referrals by medical specialists from solicitors

65. In this regard, it is to be noted that it does not appear to be the practice of medical specialists to accept referrals of clients from say an accountant (presumably for the very good reason that an accountant has no medical expertise). Why then, save in exceptional circumstances, would a specialist accept a referral from a solicitor to see a client of that solicitor?

66. Best practice in this regard would appear to this Court to be for consultants to obtain referrals from a GP, rather than a solicitor. This is because a GP (and not a solicitor) is best placed to determine:

    (a) whether there is a medical need for a referral and whether holistically it would be in the interests of patient's physical and mental health to make the referral,

    (b) if so, to *which speciality* the patient should be referred, and

    (c) if so, *which specialist* in that speciality is most appropriate for the medical needs in question, and,

    (d) the best type of continuity of care between the GP and the specialist.

67. There is no reason to believe that solicitors have the expertise to diagnose clients' physical or mental ailments so as to answer any of these questions or to provide continuity of care.

68. Of course, as noted earlier, it is a different matter, in relation to independent opinions on behalf of defendants. Such a referral to a consultant is usually a 'second' or 'independent opinion' from a reporting doctor, and so there will invariably already be a first opinion from the plaintiff's treating consultant, and the second opinion is usually simply procured in order to counter or check that first opinion.

2. Legal reasons for a GP, not a solicitor, referring patients/clients to specialists

69. There are also legal reasons why a GP, and not a solicitor, should make the referral to a specialist. As noted by Barr J. in *Dardis* at para. 156:

> "**A plaintiff's case is much stronger** if the decision to refer him to a specialist is made by the G.P., rather than by the plaintiff's solicitor" (Emphasis added)

70. It is also relevant to note that in *Flannery v. HSE*, at para. 32 Barr J. reiterated for a second time the High Court's view that '*it is the G.P. who should refer the patient'* and in that case one of the apparent legal consequences of the referral by the solicitor, rather than the plaintiff's GP, to a consultant, was that Barr J. preferred the evidence of the defendant's consultant, rather than the plaintiff's.

71. Similarly, in *Carey v. Minister for Finance,* Irvine J. noted at para. 5.15 the reasons why a court should regard solicitor-referred consultant's opinions as weaker than GP referred consultant opinions:

> "Indeed, Dr. Mary McInerney's evidence demonstrates the difficulties identified by the court earlier in this judgment when describing the **difficulty faced by a court when trying to assess the weight to be attached to evidence proffered by a medical expert who did not treat the claimant,** who did not assess them against the backdrop of a general practitioner's referral letter, who had no access to the patient's medical history or records and where the existence of the injury and/or their determination **as to its severity is entirely dependant on the narrative of the patient …**" (Emphasis added)

72. Indeed, the case before this Court illustrates perfectly that point, since Mr. Darragh Foley-Nolan's report in this case is similarly entirely dependent on the narrative of Mr. Hardy and Mr. Hennessy, whose narrative, this Court has concluded, cannot be believed.

73. More generally, the reason a plaintiff's case is *legally stronger* (per Barr J.) if the medical report, tests etc. have been generated for medical reasons (i.e. by a GP), rather than for legal reasons (i.e. by a solicitor) is because a court is likely to treat with considerable caution a medical report that was generated by a solicitor. This is because a solicitor has no medical expertise, and so a medical report generated by a solicitor's referral to a consultant, comes into existence for one reason and one reason only, i.e. *to support a claim for damages.* In such circumstances, it appears to this Court that, while the solicitor may feel that there are very good legal reasons to make the referral, there must be a presumption that there are no good medical reasons for the referral.

74. Clearly, this presumption will not apply if the report is generated on the back of a referral by a GP, since it will be presumed to have been generated for good medical reasons, since why else would a GP refer a patient to a consultant?

Medical report from solicitor referral is much weaker than one from GP referral

75. It follows therefore that if a solicitor seeks a report from a specialist who is treating the client (on the basis of a GP referral and therefore on the basis of medical need), then

such a report can be relied upon without caution by a court to support a claim for damages being brought by that solicitor, unlike a medical report generated solely for legal reasons. Or to adapt Barr J.'s dicta at para. 156 in Dardis, a plaintiff's case is much weaker if the medical report before the Court was generated by a referral by a solicitor, rather than one by a GP.

76. This is because the one and only purpose of the visit of that plaintiff to that consultant is to support his claim for damages. Accordingly, particular caution should be applied, not only to the contents of that report, but also to everything the plaintiff said to his consultant and omitted to say to his consultant, since the sole purpose of that visit was not medical, but rather to support his claim for damages. And so it is in this case, where particular caution has been attached by this Court to the evidence given by Mr. Hardy to Mr. Darragh Foley-Nolan, which consultation was not arranged for medical reasons but solely to support his claim for damages.

Solicitor referral may also be a factor in concluding that claim is exaggerated or false

77. Not only is the plaintiff's case much weaker, but such solicitor referrals may be a factor in a court's consideration of whether a claim is fraudulent or exaggerated, as occurred in the Daly case, but also in the present case before this Court.

78. In *Daly* and in this case, the referrals to specialists were made for no good medical reason (since they were not done by a GP) which meant that in both cases the plaintiffs' cases were weaker. In addition, the solicitor/consultant referrals were evidence in support of the court's finding in the *Daly* case (that the claim was exaggerated) and also evidence to support the conclusion, on the balance of probabilities, in this case that the claims of personal injuries were false.

79. While the lawyers in this case and in the *Daly* case did not, of course, suspect that the claims were exaggerated or false, nonetheless the practice of solicitor-referrals to specialists, which the High Court has held to be '*inappropriate'*, facilitates certain plaintiffs (unbeknownst to those solicitors) in making fraudulent/exaggerated claims.

80. Of course, another, *albeit* minor, reason why it may be contrary to a client's legal interests for his solicitor, rather than his GP, to refer him to a consultant is because an injured plaintiff may not be entitled to the costs of a medical report, tests etc. which were generated without medical need, even if he were to have suffered personal injury.

Conclusion regarding referrals by solicitors to specialists

81. It is, to quote Barr J., '*inappropriate'* for solicitors to refer their clients to medical specialists. This is primarily because it is not in the medical interests of their clients, which interests should always be paramount, since a good medical outcome is always more important than a good legal outcome.

82. In addition, it is not in the legal interests of their clients, since a court may treat with considerable caution the resulting report, tests etc. This would *not* be the case if the report was generated based on medical need, i.e. arising from a GP referral.

83. Furthermore, medical reports which are generated without medical need may indicate a likelihood that the claim was false or exaggerated and thus is likely to be a factor in a court's consideration of whether a claim is fraudulent or exaggerated.

84. Finally, it is important to remember that there is no evidence to suggest the majority of personal injury claims are not genuine or that they are exaggerated. Similarly, there is no reason to believe that the majority of solicitors do not comply with the principle set down in the *Dardis* case (that it is inappropriate for solicitors to refer clients to medical specialists). Of course, as noted above, by far the most important reason that solicitors should comply with the *Dardis* principle is because otherwise they are acting contrary to the medical interests of their clients, which always should take precedence over any other interests.

Conclusion regarding the consultant referrals of Mr. Hardy and Mr. Hennessy

85. In this case, the referral to the consultant was not made by either Mr. Hardy's GP or Mr. Hennessy's GP, but by their solicitor and so prima facie it was done for no good medical reason (since a solicitor has no medical expertise).

86. This *prima facie* presumption is reinforced in this case since Mr. Foley-Nolan saw Mr. Hardy on 25th November, 2016, at which stage Mr. Hardy outlined his serious symptoms, yet his own GP noted on 15th September, 2016 (the accident having occurred on the 22nd July, 2016) that he was completely normal. Indeed, as the GP noted in relation to Mr. Hennessy below, in the days after he saw Mr. Foley-Nolan, he made no complaints to his GP about his soft tissue injuries during two separate visits.

87. Since Mr. Hennessy and Mr. Hardy both saw consultants for no good medical reasons, this provides further evidence to support this Court's conclusion, on the balance of probabilities, that they have made claims for non-existent personal injuries.

MR. HENNESSY

88. Mr. Hennessy also gave evidence regarding in particular his self-referral to the emergency department of a busy hospital.

89. Despite the evidence of Ms. Bible regarding the minimal contact between the two cars, Mr. Foley-Nolan, who saw Mr. Hennessy on 8th September, 2016, states that Mr. Hennessy:

- '*complains of pain every day',*
- complains that '*the pain is constant',*
- that the pain '*keeps him awake every second night',*
- he has '*difficulty walking his dog'*
- he '*stays at home most of the time because of his pain'*, and,
- he '*stays in bed most of the time because of his back'*.

Again, it is important to bear in mind that this consultant is reporting on this apparently extensive and debilitating injury (requiring him to stay in bed *most of the time*), which arose from a 'tip' of his tow bar by Ms. Bible's car.

90. This might be funny, if it were not so serious:

- for Ms. Bible personally who had to endure four years of litigation,
- for Ms. Bible/her insurance company having to spend €50,000 - €100,000 in legal costs, which are unlikely to be recovered from the plaintiffs, and,
- for genuinely injured plaintiffs for whom claims such as these bring personal injuries' litigation into disrepute.

91. Clearly there is a strong financial incentive for claims such as this to be settled by paying €10,000 to a plaintiff and €10,000 to his lawyers (based on the figures in the *Condon* case), in order to save the defendant the €50,000 - €100,000 in irrecoverable legal costs of 'winning' the case.

92. One cannot say what proportion of settled cases fall into this category of speculative, exaggerated or fraudulent claims. However, it remains to be observed that the details of this case only came to light because the defendants sought to litigate rather than settle, even though it appears to have been contrary to their financial interests. This judgment, by highlighting the fact that not all such cases will receive a settlement, may discourage plaintiffs from bringing such claims. However, as noted earlier, this may be a forlorn hope, so long as such plaintiffs are permitted to have little or no 'skin in the game' where the stakes for the defendant are €50,000 - €100,000 in unrecoverable legal costs and so there is a prospect of a €20,000 'buy-off' for the plaintiffs.

Self-referral to a busy Hospital Emergency Department

93. What is particularly curious and concerning about Mr. Hennessy's case and Mr. Hardy's case is that they both decided to self-refer themselves (and not be referred by their GP) to the accident and emergency department of Waterford Hospital four days after the 'accident' on the 26th July, 2016.

94. This is curious to say the least, as there is absolutely no indication that there was any medical emergency, warranting Mr. Hardy and Mr. Hennessy occupying very valuable and scarce medical resources.

95. Yet, Mr. Hardy and Mr. Hennessy felt that it was appropriate to add themselves to the list of patients attending a busy accident and emergency department as a '*medical emergency'.*

96. The conclusion by this Court that this was a complete waste of valuable taxpayer-funded resources, which should be reserved for those in genuine need, is supported by the fact that, in the case of Mr. Hennessy, the hospital discharge note states that he had what

was described by him as '*occasional neck pain'* for which he had taken one pain killer and for which the hospital concluded there was not even a need for an x-ray.

97. The inconsistencies do not end there. Despite this hospital assessment, in his Personal Injuries Summons, which he issued on 9th June, 2017, Mr. Hennessy claims that he *suffered 'severe whiplash type injuries'* and '*severe neck pain'* which were so severe that he attended Waterford Hospital.

98. To add to the inconsistencies is the fact that on 19th September, 2016, he attended his GP, where it was noted that he was over the worst of his alleged injuries from the incident, and on 23rd September, 2016, he attended the same GP for ear syringe of his ear and yet there was no mention of any difficulties regarding his neck.

99. It is around this time (his consultation with Mr. Foley-Nolan was on 8th September, 2016) and against this backdrop that Mr. Hennessy's solicitor refers him to a Consultant Rheumatologist, and this highlights perfectly why solicitor referrals to consultants facilitate fraudulent claims (obviously unbeknownst to the solicitors).

Solicitor referrals to consultants facilitate exaggerated/fraudulent claims

100. At that consultation with Mr. Foley-Nolan, only 11 days prior to the first of these two GP consultations, Mr. Hennessy is apparently in constant pain and awake every second night. It is difficult to reconcile his two visits to his GP in September 2016 on the one hand, and, on the other hand, his visit to the consultant in September 2016 and, in particular, his particulars of personal injury, which he issued almost a year after those GP visits, on 9th June, 2017, in which he complains of 'severe' personal injuries from the 'accident'.

101. It becomes clear to this Court from an analysis of Mr. Hennessy's interaction with his GP in the days after his referral to a consultant by a solicitor, how the referral by a solicitor (rather than a GP) to a consultant facilitated the making of this claim for personal injuries, which this Court has concluded, on the balance of probabilities, is false.

102. Obviously, his solicitor would not have been aware of Mr. Hennessy's consultations with this GP and so that solicitor would not have realised that he was facilitating the making of this false claim by his making the referral to a consultant.

103. However, the facts of this case perfectly highlight why it is in *'inappropriate'* for solicitors to make such referrals, which should be left to their client's GP, because, *inter alia,* otherwise solicitors may become unwittingly involved in facilitating exaggerated/fraudulent claims. One thing appears clear to this Court, namely that if solicitors refuse to refer clients seeking damages for personal injuries to consultants, but leave any such referrals to the persons with medical expertise, they will avoid instances where they become unwittingly involved in aiding the making of exaggerated, false and fraudulent personal injury claims.

CONCLUSION

104. In conclusion, the onus is on the plaintiffs to prove on the balance of probabilities that the accident occurred in the manner they described and that they suffered the injuries they claim.

105. This Court has found the plaintiffs not to be credible, but it has found Ms. Bible to be a credible witness and to have provided the court with cogent evidence supporting her claims.

106. In these circumstances, this Court concludes that on the balance of probabilities, while Ms. Bible's car did make minor contact with Mr. Hardy's car, his car suffered no damage and neither he nor Mr. Hennessy suffered any personal injury.

Importance of dismissing claims that involve false or misleading evidence

107. This Court concludes that this is a case in which the plaintiffs have given false or misleading evidence and in reaching this conclusion, this Court has placed reliance on the fact that the plaintiffs sought to rely on a medical report in their claim for damages which was generated for no good medical reasons, but purely to support their claim for damages, since it arose from a referral, not by a GP, but by a solicitor, to a consultant.

108. While it is true that there was a very minor 'tip' between the defendant's car and Mr. Hardy's car and therefore, technically speaking, one could say that there was a 'car accident', the Circuit Court clearly did not believe the plaintiffs regarding the extent of the car damage claimed or the extent of the personal injuries which they had claimed. This is because the Circuit Court gave an order for only €1,250 in respect of the alleged car damage and awarded damages of €5,000 in respect of personal injuries, namely damages at the District Court level (between €0 and €15,000). In addition, the Circuit Court only awarded legal costs on the District Court scale to the plaintiffs.

109. However, while this Court is in agreement with the Circuit Court that it does not believe the extent of the damages claimed by the plaintiffs to the car and themselves, based on the evidence produced to this Court, it would conclude that there was in fact no damage caused to Mr. Hardy's car, nor were any injuries suffered by Mr. Hennessy or Mr. Hardy. For this reason, this Court will go further than the Circuit Court and dismiss the two sets of proceedings. As a result, there will be no order for costs in favour of the plaintiffs (even at the District Court level).

110. In this way, plaintiffs such as Mr. Hardy and Mr. Hennessy know (and their lawyers will be able to advise them in the strongest possible terms) that they will not get any compensation if they falsify their claims (or exaggerate them), even if there has been a genuine 'accident', nor will they receive a court order for legal costs to pay their lawyer's fees, whether at District Court or any other level.

Another case of lose-lose for the 'winning' defendant

111. Finally, this case is another claim for personal injuries where, although the defendant has won, and has had costs awarded in her favour, it is likely that it will have cost her (or her insurance company) to 'win' the case, since both plaintiffs are unemployed. Accordingly, it is likely to have cost the defendant €50,000 or more to win this litigation.

112. In that sense, the plaintiffs had nothing to lose in pursuing this litigation. As long as there are no economic consequences for the plaintiffs in such cases, they are in a position to take '*consequence-free'* litigation against a defendant. As noted by the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 42 at para. 4.12, a plaintiff can use his impecuniosity as '*blackmail*' in order to get the defendant to '*buy off'* his claim. For understandable economic reasons, many defendants will choose to buy-off such claims, although in this instance, the defendants have fought and won the litigation, arguably at a much greater cost than it would have been to settle it.

Importance of litigating 'nuisance claims'

113. In this regard, it seems to this Court that this case falls within the term 'nuisance claim' which was referred to by counsel in *Condon v. HSE* [2021] IEHC 474, which this Court interprets to means cases which have a low probability of success (say 10% or less), but which make economic sense for the defendant to buy-off, particularly where it will cost the defendant more to 'win' the case than it would cost them to settle.

114. However, clearly the more such 'nuisance claims' that settle, rather than are fought, the more incentive there is for them to be brought.

Why a person with even modest income might not make a nuisance claim

115. In this regard, it may be significant that Ms. Patterson, who is in employment and who therefore might have money/income to pay legal costs if she lost, and who was also in the car, did not take a claim for personal injuries against the defendant. This was despite the fact that in her evidence she claimed to also have been injured by Ms. Bible.

116. In this context, it is worth observing that it would not make economic sense for a person who has some money/income to take a speculative or nuisance claim with a 10% chance of success of winning tens of thousands of euro in damages, if there is a 90% chance of them losing and so being subject to an order for costs (of €50,000 or more). It may be telling therefore that in this case, Ms. Patterson, who, it seems, might be in a position to pay the defendant's legal costs, opted not to pursue this nuisance/speculative claim, as opposed to the plaintiffs, who appear not to be in a position to pay the defendant's legal costs, as they are unemployed, and so had no financial disincentive to litigate

117. While the plaintiffs may have expected that they would receive a settlement sum (since over 97% of personal injuries cases settle), in this instance this did not occur as the matter was litigated, albeit at the considerable cost to the defendant, but at no apparent cost to the plaintiffs.

118. Finally, this Court can only offer sympathy to Ms. Bible who has had to endure litigation in the Circuit Court and High Court over a period of four years from two plaintiffs arising from an incident which would cause most individuals to thank their luck that there was no damage or injury, but led them, in this Court's view, to opportunistically make false claims for damage to a car and for personal injuries. In addition to the stress which this must have caused her, it is also to be noted that she will have received no compensation for the considerable amount of time she would have had to incur in defending these proceedings in both courts.