

THE HIGH COURT

[2022] IEHC 351

[Record No. 2020/1743 P]

BETWEEN

SEAN FOXE

PLAINTIFF

AND

IAN CODD

DEFENDANT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 10th day of June, 2022

Introduction

1. This matter, which was heard at a sitting of the High Court in Waterford in March 2022, relates to a road traffic accident which took place on 21st February, 2017 at Finchogue Cross, County Wexford. The plaintiff was waiting in a Ford Kuga vehicle in traffic stopped at roadworks when his car was struck from behind by another car. It is clear from a photo of the damage to the defendant's car that the impact of the collision was very heavy, as the front of that car was destroyed.

2. The pleadings were initiated on 4th March, 2020. The defendant admits liability, and the only issue between the parties is quantum. However, at the conclusion of the plaintiff's case, the defendant declined to go into evidence, and made an application pursuant to s.26 of the Civil Liability and Courts Act 2004 seeking a dismissal of the plaintiff's action on the basis that evidence tendered by the plaintiff was false or

misleading in a material respect, and that the plaintiff knew such evidence to be false or misleading. I refer in some detail to the section, the jurisprudence surrounding it, and the submissions of the parties below.

The accident and its aftermath

3. The plaintiff is now 45 years of age, and at the time of the accident was almost 40. He is a plumber by trade but has risen to a management position with his employer, a substantial mechanical contracting company. His role nowadays is to supervise the carrying out of works and projects all over Ireland. He estimates that he travels approximately three days a week.

4. The plaintiff has been devoted to sport all his life. He played hurling and football to the age of 37 to 38 at a high level, and played junior club rugby until he was 35 or 36. He ran marathons for charity, and was an avid cyclist. On his retirement from hurling, he became very interested in coaching, and at the time of the incident was coaching the senior hurling team Buffers Alley in Co. Wexford. He was also actively involved in coaching in his local club in Dunamaggin, Co. Kilkenny, and had been head coach with his daughter's camogie team in that club. The plaintiff referred to having had minor injuries during the course of his sporting career, but that his attitude had always been to shrug them off and get back to playing as soon as possible.

5. The plaintiff was on his way to Buffers Alley on the day of the accident. He was stopped at roadworks when his car was struck hard from behind. He said that his initial reaction was to "make sure that I was okay and...to get out and prove that I was fine". He remained at the site until the gardaí came and eventually left, and he rang his boss, who arrived at the scene and provided him with a van and towed the plaintiff's own car away.

6. While the plaintiff was able to drive, he decided that he should attend Caredoc, an out of hours medical facility, later that evening. This appears to have been a spur of the moment decision as he was travelling towards Kilkenny: as he expressed it “I just said I better go to the doctor and tick the box”. The defendant obtained on discovery the clinical notes taken by the attending doctor, who recorded that the plaintiff now has “neck pain and a bit of a headache at the back...he does not feel pain anywhere else at the moment”. There was no “neck stiffness and no other obvious injury”. The notes made no reference to back injury. On cross-examination, the plaintiff did not attempt to gainsay what the attending doctor in Caredoc had recorded, and accepted that what was recorded must have been what he said at the time, although he could not remember what he had said.

7. The plaintiff said that he wanted to get back to normal, and tried to recommence coaching, and appears to have persevered for several months with the assistance of the physiotherapists of the clubs where he was coaching. However, he experienced particular difficulty in March 2018 with spasms in his lower back which caused him to be “in agony”, which he treated with medication and hot water bottles. He had an injection of Difene, but unfortunately had an anaphylactic reaction to this medication which necessitated treatment in the emergency ward of St. Luke’s Hospital in Kilkenny.

8. The plaintiff states that he suffers from severe low back pain. This is not constant; he says that he might have it for two to three weeks and then not again for a few months. His back is stiff, but generally loosens after 10-15 seconds. He has been getting treatment from a chiropractor, Mr. Kieran Power, in Wexford which has given him considerable relief, although he anticipates having to return to Mr. Power every few months for the foreseeable future.

9. The plaintiff contends that he has had considerable problems with his neck/shoulder. A holiday in Kerry with his family in July 2019 was “ruined”, as the plaintiff couldn’t sleep although he tried his best to cope. At the All Ireland Hurling Final of 2019, the plaintiff says that he at one point lost consciousness briefly with the pain in his neck, and “went over on the aisle”. However, a series of pain injections from Mr. Brendan Long, an orthopaedic surgeon, has brought about a considerable improvement. He maintains that he still suffers from stiffness and pain in his neck and shoulder, and has to stop frequently when driving, although he gets relief from stretching.

10. The plaintiff, when asked in examination in chief how he was now, said that he was “very happy”, and that he was healthy and strong. There had been a major improvement in his neck pain since receiving injections from Mr. Long. He says that he still suffers from acute lower back pain at times, although presently his back was not causing problems, other than some stiffness. He said however that he “really missed the coaching”. He cannot cycle or run anything like to the pre-accident level. He feels that his quality of life has been curtailed by his ongoing symptoms, and in particular his inability to coach at even a junior level. He said that he takes care of his injuries, and is conscious of the need to stretch and keep his weight down. He does not take strong painkillers or opiates as they do not agree with him.

Medical evidence

11. On cross-examination there was a major issue in relation to treatment the plaintiff had received from his general practitioner, Dr. John Gillman, in February 2016. In his report of 25th February, 2022, Dr. Gillman recorded that the plaintiff attended him in 2016 with “a muscular back complaint but also pain in scrotum”. The doctor states that he referred the plaintiff for an MRI scan “to exclude a lumbar disc prolapse”.

The MRI scan showed degenerative disc disease. Dr. Gillman expressed the view, following an examination of the plaintiff in February 2022, that “this has become more symptomatic following this road traffic accident and this would be consistent with the history given of a high impact collision”.

12. The plaintiff readily conceded that he had attended his GP in 2016, but said that his concern was the pain in the scrotum. As far as he was concerned, this was the issue, and there was no follow up or physio in relation to any back difficulty, so he did not mention it in the context of the road traffic accident. Dr. Gillman, when pressed about this in cross-examination, asserted that the major concern in 2016 was the pain in the scrotum, and that he was concerned that the plaintiff might have had a lumbar disc impingement on the nerves which supply the testicular sac. Dr. Gillman maintains that the plaintiff was referred for an MRI scan for this reason. Although his report appeared to suggest there was a back problem, he is adamant that this was in fact part of the investigation of the testicular problem; there had been no attendance before him in relation to back pain prior to or subsequent to 2016, until the recent attendance in February 2022.

13. The plaintiff under cross-examination accepted that he did not tell Caredoc that he was suffering from any back pain. It was put to the plaintiff that this conflicted with para. 5 of the indorsement of claim on the personal injuries summons. This paragraph states, *inter alia*, that the plaintiff “sustained injuries to his neck, back and shoulder and attended with Caredoc on the evening of the collision complaining of pain and stiffness. He was found to have significant spasm in muscles of the cervical area and lower lumbar spine and was commenced medication”. At the hearing, there were submissions in the absence of the plaintiff as to the significance to be attached to this part of para. 5. The second sentence (“He was found...”) was in fact on the top of the following page

to the previous sentence, and it was suggested on behalf of the plaintiff that it was possible to interpret the sentence as not referring specifically to the attendance at Caredoc, but to be a freestanding paragraph referring generally to the fact that the plaintiff experienced back pain and commenced to take medication. It was also suggested by counsel for the plaintiff that this passage might be due to an unconscious conflation of the attendance at Caredoc with symptoms subsequently experienced. The plaintiff simply said that he could not remember whether he had told Caredoc that he had back problems, and that he had been in a “state of shock going to...Caredoc”.

14. Counsel for the defendant in cross-examination pointed out that the plaintiff had sworn the usual “affidavit of verification”, in which he swore that the contents of the personal injuries summons were true. It was specifically suggested by counsel to the plaintiff that he had “given a false and misleading account of [your] dealings in Caredoc in the summons and on affidavit in these proceedings”. The plaintiff replied “...I don’t know what to say. I made mistakes if that’s the case but I haven’t lied about anything with the accident or the pain I have had after it. If I have got my details wrong I apologise...”.

15. A number of matters were put to the plaintiff arising out of a medical report of an examination by the plaintiff’s general practitioner in 2018, Dr. Frank Chambers. It was suggested that a report from Dr. Chambers on 5th July 2018 showed that:

- The plaintiff had by that time had no GP visits;
- he had had no specialist visits;
- Dr. Chambers described the back pain as “mild in nature”;
- Dr. Chambers stated that the plaintiff at that time is “involved in hurling training”.

16. It should be said however that the report also stated that the plaintiff “sustained myofascial soft tissue lower back pain secondary to the accident which has interfered on his quality of life and activities of daily living...we would hope in the medium to long term that he may make a recovery but the prognosis is guarded at present”.

17. It was put to the plaintiff that he advanced no claim to recover the cost of medication or general practitioner visits. The plaintiff readily conceded that he had neglected to do so. He said that he had ready access to physios due to his involvement in sport, and generally availed of their help and advice as needed. He agreed that he had only taken one day off work, but attributed that to his determination to get on with his life as much as possible. It was put to the plaintiff that any problems he was suffering “really relate to the degenerative condition which on [Dr.] Gillman’s report has actually got worse”. The plaintiff disagreed “one hundred percent” with any suggestion that his low back symptoms caused him problems before the accident.

18. The plaintiff was referred by the Personal Injuries Assessment Board to Mr. Robert Din, Consultant Orthopaedic Surgeon at Tralee General Hospital. In a medico/legal report on 30th March, 2019, reference is made by Mr. Din to the plaintiff having “significant spasm in the muscles of the cervical spine area and lower lumbar pain, radiating into both the right and left buttock areas”. On cross-examination, the plaintiff said he did not remember exactly when this referred pain started, but thought that it would have become significant in February/March 2018. He acknowledged that the pain was intermittent, but that it “came to a head” about that time. It was suggested that the relatively benign symptoms observed by Dr. Chambers in July 2018 had worsened by the time he saw Mr. Din in March 2019, at a time when there should have been an improvement.

19. Counsel suggested that the degenerative change which was apparent on the 2016 pre-accident MRI scan was the likely source of any back pain. The plaintiff denied that he was suffering from back pain in 2016, that his concern was solely in relation to his testicular pain. It was also suggested, as appeared from Mr. Din's report, that the plaintiff told Mr. Din that he had been complaining of lumbar problems to Caredoc on the night of the accident. The plaintiff readily conceded that he must have said this to Mr. Din if it was in his report. He said "I honestly didn't believe it was relevant...I had forgotten about it". He accepted that the MRI scan which revealed degeneration of the spine should have been revealed to the defendant. It was squarely suggested to the plaintiff that he had lied about his symptoms to Mr. Din, and that the failure to tell Mr. Din about the MRI scan in 2016 was part of this lie. The plaintiff conceded that there might be inconsistencies in the pleadings or reports, but firmly denied that he had lied to anyone. As far as he was concerned, the MRI scan in 2016 was in relation to a testicular problem, at a time when he was not suffering from back pain.

20. The plaintiff agreed that, at the time he consulted Dr. Chambers, he still had an involvement in hurling coaching. He said that he had "tried to keep it going", but "couldn't commit at the same level", as he hadn't been able to sustain it. He did not accept the suggestion of counsel for the defendant that the plaintiff's injuries were a "mild soft tissue injury, probably limited to the neck" which resolved in early course, or that any back injuries were due to degenerative changes rather than the accident.

21. Dr. Gillman was examined and cross-examined as to the circumstances in which he referred the plaintiff for an MRI scan in 2016. He said that there was "nothing nasty" in the MRI, just normal wear and tear. He defended his diagnosis that the plaintiff's degenerative back disease "has become more symptomatic following this road traffic accident and this would be consistent with the history given of a high impact collision",

although he readily conceded that he was not an expert. He acknowledged that the purpose of the plaintiff's visit to him on 25th February, 2022 was to get a report, but said that it was also for clinical purposes, in that the plaintiff had been "frustrated" by his ongoing back injuries. Dr. Gillman had been the plaintiff's general practitioner a number of years previously. He said that it would often be the case that patients whom he had not seen for five or six years would still consider him to be their doctor. The plaintiff had said that he was considering moving back to the Mullinahone area where Dr. Gillman practiced. He gave the plaintiff advice with a view to "managing" his condition.

22. Mr. Din was examined in relation to his clinical examination of the plaintiff on 30th March, 2019 and his subsequent report. His "opinion and prognosis" was as follows: -

"The claimant has done poorly following his soft tissue injury/whiplash type injury to his cervical spine. He has residual stiffness in his cervical spine. He will require ongoing cervical spine physiotherapy for the next 3-6 months to improve range of motion.

Lumbar spine this gentleman has significant stiffness and pain in the lower lumbar spine, with evidence of lower limb sciatica, pain radiating into the sacrum and upper thigh areas. He requires an MRI scan of the lumbar spine to exclude an acute lumbar spinal disc prolapse."

23. Mr. Din under examination in chief expressed the view that the plaintiff "no doubt" had degenerative changes in his spine prior to the accident, which "...caused him to become symptomatic...probably accelerated his symptom". Mr. Din stated that he believed that what the plaintiff told him was consistent with Mr. Din's "physical examination and the history of the accident and the circumstances surrounding the

accident”. Mr. Din also referred to his report of 28th September, 2019, which dealt with the outcome of the MRI scan on the plaintiff’s lumbar spine carried out on 11th September, 2019. He said that there was not a “great significant difference” between the pre-accident 2016 MRI scan and the 2019 scan, but that being symptomatic or not depended on matters such as physical stature, the physical or otherwise type of occupation the victim pursued, and so on.

24. On cross-examination, Mr. Din accepted that the consultant radiologist who compared the 2016 and 2019 scans had taken a different view, noting “neural exit foraminal narrowing on the right at L4/L5 and increased when compared to the prior MRI study”. He confirmed his view that the plaintiff was symptomatic “because of the road traffic accident”. Mr. Din accepted that he attached weight, in his assessment, to being told by the plaintiff that he presented at Caredoc with “significant pain in the lower cervical spine and lower lumbar spine”, and that it was surprising and worrying that the plaintiff in fact made no complaint in Caredoc about his lower back. He also accepted that it was of “concern” that the plaintiff in evidence stated that referred symptoms in the buttocks did not develop “until sometime after July 2018”.

25. Mr. Din indicated that his clinical findings did not demonstrate any acute fractures, but rather a soft tissue injury to the lower lumbar spine. He agreed that degenerative change in the spine could become symptomatic of its own accord, but “usually there often is a provoking factor”. He accepted that he “would have also been interested to know that there was some history of low back complaint before this incident”.

26. In response to questions from the court, Mr. Din accepted that it was possible that lumbar spine symptoms might not develop immediately, but in the aftermath of weeks or months after an accident: he commented that the plaintiff “may have been

concentrating on his severe pain in his neck [and] ... may have omitted to tell the doctor that his back was also painful at the time because his neck pain was so bad". He was asked whether, if an accident victim were to have very minor symptoms for some period in the aftermath of the accident that flared up badly a year after the accident, it would be possible or probable that the flare up would be linked to the original accident. He described this as "certainly a possible scenario...it's difficult to say but certainly the immediate trauma would have some bearing on their flare up of symptoms".

The section 26 application

27. At the conclusion of the plaintiff's evidence, counsel for the defendant indicated that the defence would not be proffering evidence, and proceeded with the s.26 application. Given the heavy reliance by counsel for both sides on precedent, and in the absence of copies of the case law, I requested written submissions to supplement the oral submissions, which the parties subsequently furnished, along with transcripts of the hearing.

28. The text of s.26 of the Civil Liability and Courts Act 2004 is as follows: -

"26. - (1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that -

(a) is false or misleading, in any material respect, and

(b) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under section 14 that -

(a) is false or misleading in any material respect, and

(b) that he or she knew to be false or misleading when swearing the affidavit,

dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.

(4) This section applies to personal injuries actions -

(a) brought on or after the commencement of this section, and

(b) pending on the date of such commencement.”

29. Both sides made submissions as to the appropriate principles to be applied when considering whether s.26 is engaged. There was no material difference between the parties in this regard. The principles may be briefly summarised as follows: -

- The burden of proof in a s.26 application lies on the defendant. While the civil standard of proof applies, the court “must have regard to the fact that even though a civil standard of probability applies rather than a criminal standard, regard must be had to the seriousness of the matter being alleged, the gravity of the issue and the consequences in considering the evidence necessary to discharge the onus of proof”. [Feeney J in *Ahern v. Bus Éireann* [2006] IEHC 207, approved by the Court of Appeal in *Platt v. OBH Luxury Accommodation Limited* [2017] 2 IR 382 at 403-4]
- Caution must be exercised, and “the required inference must...not be drawn lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud...” [Henchy J in *Banco*

Ambrosiano v. Ansbacher & Co. [1987] ILRM 669 at 702, cited with approval in *Platt*];

- the defendant “...must establish firstly an intention on the part of the plaintiff to mislead the court and secondly that he/she adduced or caused to be adduced evidence that was misleading in a material respect. Thus false or misleading evidence even if intentionally advanced if not material to the claim made cannot justify invocation of the section. Further, any such false or misleading evidence must be sufficiently substantial or significant in the context of the claim so that it can be said to render the claim itself fraudulent...however, this does not mean that a defendant must establish that the entirety of a plaintiff’s claim is false or misleading in order to succeed on such an application. It is clear that proof that a plaintiff’s claim for loss of earnings was false or exaggerated to a significant extent may justify the dismissal in total of an otherwise meritorious claim...” [Irvine J, *Nolan v. O’Neill* [2016] IECA 298 at paras. 43-44];
- the court in deciding whether the plaintiff has acted knowingly, applies a subjective test [*Platt*, para. 73]. The defendant correctly points out that the subjective state of knowledge of the plaintiff may be deduced by way of inferences from the evidence;
- if the court is satisfied that false and/or misleading evidence has been knowingly given and it is material, the court must consider whether the dismissal of the claim would result in an injustice being done. Unless the court is satisfied in this regard, the court must dismiss the action; the legitimate parts of the claim cannot survive. [Irvine J, *Platt* para. 74].

30. The Court of Appeal in *Nolan v. O'Neill* referred, in considering “what the legislation was not designed to do”, to the decision of O’Neill J in *Smith v. Health Service Executive* [2013] IEHC 360. The plaintiff relies heavily on the passage in *Nolan* which refers to that decision as follows: -

“What the legislation was not designed to do was aptly described by O’Neill J. in his decision in *Smith v. Health Service Executive* [2013] IEHC 360. In that case the plaintiff in her replies to particulars had denied the existence of any prior medical history. She later made discovery of her general practitioner's records which contained an extensive pre-accident medical history. In the course of the trial the plaintiff was rigorously cross-examined and asked to explain how she had failed to disclose the various medical complaints and treatments referred to in her GP's records. The following extracts from the judgment of O’Neill J provide helpful guidance for a court considering a dismissal application under s.26 of the Act:-

‘89. In light of all of the information disclosed to the defendants in the plaintiff's medical records and bearing in mind that there is little or no dispute concerning the injuries suffered by the plaintiff in this accident, save to the relatively minimal extent revealed in the defendants' medical experts reports, the forensic assault on the plaintiff to set up an application under s.26 of the Act of 2004, can only be seen as wholly unjustified and an opportunist attempt to evade their liability to the plaintiff by a misconceived invocation of s.26.

90. It is obvious that reply number 16 to the request for particulars is inaccurate, but I am quite satisfied that this was the result of the plaintiff having completely forgotten about the minor hip and neck complaints

she had in 2004 and 2005, and in believing, in my view, rightly, that her right hip problem and her fibroids problem had no relevance to the claim she was making.

91. I am absolutely satisfied that when this reply to particulars was made, the plaintiff had no intention whatsoever of misleading anybody. I have had the opportunity of listening [to] and observing the plaintiff giving her evidence in the course of a lengthy examination and cross-examination and in the course of the latter, having to endure a searching examination, which clearly impugned her integrity. I am quite satisfied that she gave her evidence, so far as accuracy was concerned, to the best of her ability and recollection and at all times, honestly. I reject the submission or suggestion that she was attempting to mislead the court.

92. I have no hesitation in dismissing the defendants' application under s.26 of the Act of 2004. I would like to add that this section 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'."

31. The defendant acknowledges this passage but submits that the facts in *Smith v. HSE* bear no relationship to those in the present case. It is suggested that the history omitted by the plaintiff in *Smith* was clearly of no relevance to her case and that the s.26 application was misconceived and unsurprisingly and justifiably refused. The defendant contends that the evidence omitted by the plaintiff in the present case was

undoubtedly relevant, and indeed the evidence in relation to his attendance at CareDoc would not have been known to the defendant had his solicitor not insisted on procuring the record of that attendance through discovery.

32. The defendant in written submissions describes accurately the “three broad circumstances” in which the section is engaged:

“(a) Section 26(1): evidence given by a Plaintiff which is false or misleading in any material respect and which the Plaintiff knows to be false or misleading.

(b) Section 26(1): evidence which a Plaintiff dishonestly causes to be given or adduced that is false or misleading in any material respect and that the Plaintiff knows to be false or misleading.

(c) Section 26(2): Affidavit of verification that is false or misleading in any material respect and that the Plaintiff knew to be false or misleading when swearing it. [Paragraph 4 defendant’s submissions, emphasis in original].

33. The defendant submits that, in the present case, these criteria are engaged by the plaintiff claiming in his evidence in chief to have no history of prior back complaint, which the defendant characterises as “untrue and misleading”. The defendant also points to the verification affidavit sworn by the plaintiff which verifies the statement at para. 5 of the personal injuries summons that the plaintiff was found, in CareDoc, “...to have significant spasm in muscles of the cervical area and lower lumbar spine...”.

The plaintiff’s credibility

34. As we can see, all of the circumstances set out in s.26 pursuant to which the plaintiff’s action may be dismissed require the court to be satisfied that the plaintiff was aware (“knows”) that his actions were false or misleading. The test is subjective, and therefore requires an assessment by the court of the credibility of the plaintiff. If the court is satisfied that the plaintiff, on the balance of probabilities, knew that the

evidence given by him was false or misleading in any material respect, or dishonestly caused to be given or adduced such evidence that he knew to be misleading, or swore an affidavit of verification that was false or misleading in any material respect that he knew to be false when swearing it, the court must not flinch from dismissing the action, notwithstanding that the plaintiff's claim may be otherwise meritorious.

35. I observed the plaintiff closely while he was giving evidence as to his demeanour and body language in addition to what he actually said. He was subjected to a bruising cross-examination by counsel for the defendant, and his reaction to the questions posed by her was particularly revealing. I had the benefit of being able to read the transcript of this cross-examination in preparing this judgment in order to consider my contemporaneous impressions.

36. The plaintiff is a skilled tradesman, who has risen through the ranks to a supervisory management position with a substantial employer, a mechanical contractor. In the immediate aftermath of the accident, the plaintiff's boss, although at some distance, offered to collect the plaintiff and drive him home, and when the plaintiff was reluctant to do this, brought a replacement vehicle to the accident site for the plaintiff to drive home himself. The plaintiff has had no significant absence from work after the accident; while the defendant considers this to be supportive of the view that the injuries were insignificant, the plaintiff attributes this to his desire to get on with things, and to minimise the disruption to his life caused by the accident. As Dr. Gillman stated in his evidence, the plaintiff "... is quite matter of fact, but he tends to minimise issues".

37. It is clear that the plaintiff has been consumed by an interest in sport all his life. He played hurling, football and rugby for as long as he possibly could, and when his playing days were over, he immediately sought to get involved in coaching. It is evident that the plaintiff is highly rated as a coach, having at a relatively early stage of his

coaching career secured a coaching role with the senior hurling team in Buffers Alley, a prominent Wexford hurling club. He also gave his time to coaching junior sides in his local club. His own sporting endeavours, after retiring from hurling, football and rugby, were primarily cycling and running. Prior to the accident, he was clearly a very fit active man who was very involved in his work, family and sporting activities.

38. The first serious point of criticism of the plaintiff from the defendant (‘the Caredoc issue’) related to the plaintiff’s failure to reveal that he had not complained of back injury when attending Caredoc, and yet swore an affidavit of verification which endorsed the contents of the personal injuries summons which appeared to suggest that he had done so. The plaintiff did not attempt to dispute what the doctor in Caredoc had recorded, notwithstanding that no evidence from that doctor was presented. The plaintiff readily accepted that, if the record of his visit suggested that he had not said that he had back pain, that must be the case, but he said that he had no recollection of the detail of what he had told Caredoc. His evidence was that he began to experience symptoms of a different order the very next day, which he likened to “maybe being tackled in a rugby match...I had neck, shoulder, lower back, stiffness...”. In describing his attitude to his injuries, he said that “the mindset was...to brush it away and try to say it will pass in a week or two...”.

39. The second point of criticism (‘the pre-existing complaint issue’) related to the plaintiff’s position that he had no back complaint prior to the accident, which was confirmed to Mr. Din and reflected in his report of 30th March, 2019. The plaintiff was asked in examination in chief about his “problems with a testicle” prior to the accident, and replied that “...I’d actually forgotten about it to be honest...”, and insisted that he had been referred for a lower back scan “...just to rule out anything sinister”. He was emphatic in denying that he had any problems with his back at this time. I have referred

above at para. 19 to the manner in which the plaintiff was cross examined about this issue, and bluntly accused of lying to Mr. Din.

40. My impression generally of the plaintiff, on careful observation of his performance in the witness box, was that he was generally an honest and credible witness who gave answers truthfully and to the best of his recollection. He did not try to argue his way out of points which did not suit him. He accepted that he had not told Caredoc he was suffering from back pain, rather than contest what was written in the Caredoc report. He gave evidence frankly and in my view honestly about his attendance with Dr. Gillman in 2016. He did not in any way strike me as a dishonest witness who had fashioned his answers in a manner to suit his case, and indeed his bemusement and upset at being accused of lying seemed to me to be genuine.

The Caredoc issue: findings

41. Paragraph 5 of the indorsement of claim on the personal injuries summons began with the following statement: -

“The Plaintiff’s vehicle was struck with considerable force and the airbag was deployed. He sustained injuries to his neck, back and shoulder and attended with Caredoc on the evening of the collision complaining of pain and stiffness. He was found to have significant spasm in muscles of the cervical area and lower lumbar spine and was commenced medication.”

42. As it happened, the second sentence of this paragraph ran up to the right hand margin at the end of the page, and the third sentence (“He was found...”) began on the next page. As such, the plaintiff submitted that the third sentence could have been intended to be separate from the first and second sentences, so that the reference to findings in the lower lumbar spine was not intended to be a reference to the plaintiff’s attendance at Caredoc. While this interpretation of para. 5 of the summons is possible,

I think that it is more likely that the entire passage is to be read as referring to the Caredoc attendance.

43. In that case, the plaintiff accepts that the paragraph is incorrect in as far as it intimates that the plaintiff told Caredoc that he had “significant spasm” in his lower lumbar spine, and it therefore follows that his affidavit of verification which was sworn on 28th April, 2020 – over three years after the accident – is open to question.

44. The second paragraph of that affidavit is as follows: -

“2. The assertions, allegations and information contained in the said Personal Injuries Summons which are within my own knowledge are true. I honestly believe that the assertions, allegations and information contained in the said Personal Injuries Summons which are not within my own knowledge are true.”

45. It is a pity that the plaintiff does not appear to have seen the Caredoc attendance note before making this averment. However, it appears from his own evidence that he does not recall what he said to Caredoc, and that the day after the accident he began to experience significant back pain. In the circumstances, it may not have been entirely unreasonable for him to assume that he had told Caredoc that he was suffering from the back pain which he experienced the following morning.

46. I do not think that the averments in the affidavit can be considered “false”, in the sense that the plaintiff probably believed them to be true. I do consider that the averments were misleading in a material respect, in that para. 5 of the summons was misleading in relation to the symptoms reported at the plaintiff’s first contact with a doctor after the accident. However, I am not satisfied that the plaintiff knew his comments to be misleading when swearing the affidavit.

The pre-existing complaint issue: findings

47. In a notice for particulars of 12th May, 2020, the defendant raised at para. 22 the following query: -

“Was the Plaintiff suffering from any degenerative condition or from any illness of mind or body or from any illness of any type prior to the accident the subject matter of these proceedings or has the Plaintiff since developed any such illness or degenerative condition and if so furnish full and detailed particulars including:

- (a) Exact nature of the said degenerative condition or illness.
- (b) State when exactly the degenerative condition manifested itself was it before or after the accident the subject matter of these proceedings.
- (c) Did the Plaintiff at anytime prior to the accident the subject matter of these proceedings ever have any medical treatment in respect of the pre-existing degenerative condition?
- (d) Identity of treating doctors.
- (e) The prognosis with regard to the said condition.
- (f) Whether it is alleged that the alleged injuries sustained by the Plaintiff in the alleged accident the subject matter of these proceedings have in anyway exacerbated the pre-accident condition and if so in what way exactly the same has been exaggerated or exacerbated.”

48. The reply to this query, given on 8th July, 2020 and verified on affidavit by the plaintiff, stated: -

“This is overly broad and lacks specificity. Presumably all 43 year olds have an element of degeneration.”

As subsequent events showed, this was an entirely inadequate and, in the circumstances, misleading answer.

49. The defendant also enquired, at paras. 25 and 26, as to the existence *inter alia* of any MRI scans and the results of same. The plaintiff’s solicitors confirmed that the plaintiff had had an MRI scan, and that it was available for inspection. At that stage, the plaintiff had of course had the MRI scan requested by Mr. Din in connection with his accident-related complaints. The report of that scan referred clearly to the MRI scan performed on 25th March, 2016 at the request of Dr. Gillman, and compared the 2019 scan results to the “prior MRI study”. The disclosure notice served by the plaintiff on 25th February, 2022 also referred to Dr. Gillman’s report of that date – which sets out Dr. Gillman’s account of the circumstances in which the MRI scan was procured in 2016 – and to the proposed attendance of Dr. Gillman at the trial.

50. The plaintiff’s evidence is that he had no back pain in 2016 when he attended Dr. Gillman, who was steadfast in his evidence that he ordered the MRI scan to rule out the possibility that the plaintiff’s lumbar disc was impinging on the nerves which supply the testicular sac. He acknowledges in his 2022 report that the plaintiff attended him “with a muscular back complaint but also pain in scrotum”. Dr. Gillman said in examination in chief that the reference to “muscular back complaint” ... “would be more myself...” [*i.e.* rather than anything the plaintiff said] ... “my impression was that it wasn’t a primary testicular problem but actually...some type of referred pain issue...” [transcript day 1, p.105, question 463]. He states in his report of 25th February, 2022 that the referral of the plaintiff in 2016 for an MRI scan was “to exclude a lumbar disc prolapse”.

51. Given that the 2016 MRI scan revealed degenerative disease in the plaintiff's lumbar spine, it should have been disclosed to the defendant much earlier than it was, and Mr. Din should have been told of it by the plaintiff, although he was made aware of it by the 2019 MRI report with which he was furnished prior to his own second report. However, I accept the plaintiff's evidence that he considered the 2016 visit to Dr. Gillman and the subsequent MRI scan as related solely to the pain he was experiencing in his scrotum, and did not appreciate the possible significance of having had an MRI scan prior to the accident. As far as the plaintiff was concerned, he did not experience back pain until the accident.

52. I should also say, to be clear, that I found Dr. Gillman to be an honest witness who gave his evidence in accordance with his professional duty. Although he knew the plaintiff personally as well as professionally – a fact which he readily acknowledged on being questioned about it by counsel for the defendant – I am satisfied that this did not influence in an improper way his evidence or conclusions.

53. In the circumstances, the insistence of the plaintiff, or at least the maintenance by him of the position, that he had no history of prior back complaint was perhaps misleading; however, I am not satisfied that the plaintiff knew it to be misleading, and accept his evidence that he was not in fact suffering from back pain when he attended Dr. Gillman in 2016 for the difficulty he was experiencing with his scrotum. As it happened, Mr. Din, when he completed his second report of 18th September, 2019, was aware of the 2016 MRI scan, and the defendant was aware of it in advance of the trial.

Quantum

54. It follows that I am of the view that the evidence does not warrant the application of s.26, or the dismissal of the plaintiff's action. As this is an assessment-only matter, it therefore falls to me to assess the plaintiff's damages.

55. The defendant justifiably points to the lack of medical evidence from treating doctors, as opposed to those consulted for medico-legal reasons. However, the circumstances are somewhat unusual. The plaintiff was a very active fit sportsman, whose attitude towards his injuries was to play them down and manage them as best he could. He was aware of the extent to which neck and back injuries could hamper him in his day to day activities; he consciously tried to keep fit and live healthily, and he had ready access to physiotherapists in Buffers Alley and his local club who could give him advice. His experience with Difene which ended in hospitalisation increased his desire to avoid strong medication if at all possible.

56. On the one hand, the lack of objective medical reports from a treating doctor creates obvious difficulties for the defendant. On the other hand, I do not believe that the plaintiff did not attend doctors because he was not experiencing symptoms; a more litigation-minded plaintiff might have ensured that a “paper trail” of reports documenting progress – or lack thereof – existed to corroborate his claim. He appears to have accepted at a certain point that the symptoms were persisting, and having submitted his claim to PIAB, was referred to Mr. Din, an independent consultant chosen by PIAB, in March 2019, just over two years after the accident.

57. While Mr. Din understandably acknowledged in cross-examination that he had concerns over not being told by the plaintiff of the 2016 MRI, or of the fact that he did not inform Caredoc of back pain on the night of the accident, I do not consider Mr. Din’s reports, or his evidence to the court, to be of no value or unhelpful. He was, by the time he gave his second report of 28th September, 2019, aware of the MRI scan in 2016, and in a position to evaluate the radiologist’s comparison of the 2016 and 2019 scans. While he ideally would have been told of the correct circumstances of the Caredoc attendance, it is difficult to see how this is significant in terms of his

conclusions, given that the plaintiff experienced significant back symptoms the day after the accident which in my view are unarguably linked to the accident. Mr. Din accepted, in response to the court's question, that lumbar pain might well not develop immediately in the aftermath of the accident. He also accepted that it was possible for minor symptoms to flare up badly a year after the accident, although it would be more normal to become symptomatic "within the first three to six months...".

58. I accept that, at the time the plaintiff attended Mr. Din, he had restricted movement in his lumbar spine with tenderness in the L3/4, L4/5 and L5/1 spinous processes. He had bilateral paraspinal muscle spasm. Although he experienced symptoms in the lumbar area in the aftermath of the accident, he did not experience significant pain until about March 2018, when he began to suffer spasms which caused him to be "in agony". He accepts that he only experienced back problems at this stage from time to time, but says that the bouts which he suffers are "severe", although he acknowledges the relief he gets from a chiropractor.

59. I do not believe that the degenerative changes are the primary cause of the plaintiff's symptoms. Mr. Din, on being invited by counsel for the defendant to agree that degenerative changes could become symptomatic of their own accord, commented that "usually there is a provoking factor". I accept the evidence of the plaintiff that he had no back injury which impinged on his day to day activities until the accident, and that, to the extent that pre-existing degenerative changes may have contributed to the plaintiff's symptoms, they have in all probability done so due to the accident.

60. As regards the plaintiff's neck and shoulder symptoms, Mr. Din was of the view that there was tenderness over C4/5 and C5/6 and no cervical muscle spasm. Flexion and extension were reduced. At the time of his first consultation with Mr. Din, the plaintiff was suffering minor symptoms. However, as we have seen, he suffered severe

symptoms in the summer of 2019, although the plaintiff readily acknowledges that pain injections have since improved his situation.

61. It seems to me that the plaintiff still suffers significant symptoms in the lumbar spine which are only alleviated by chiropractic treatment. This treatment is ongoing. Although he did not experience significant symptoms in the twelve months after the accident, the plaintiff attributes these symptoms to the accident. On balance, I am inclined to accept this – although it is somewhat unusual – given that the plaintiff did undoubtedly have back symptoms in the aftermath of the accident; it is not as if the severe symptoms appeared “out of the blue” a year after the accident. The plaintiff also continues to suffer with stiffness and pain in his neck and shoulder, although once again, these have been alleviated somewhat by pain injections.

62. The plaintiff therefore has ongoing intermittent problems with his back and neck which persist but which respond to treatment. However, an important factor to be taken into account is the degree of disruption to the lifestyle of the plaintiff. While he may be able to participate in coaching to some degree, it is probable that the extent to which he can do so will be greatly curtailed; it is clear from his evidence in relation to his Buffers Alley involvement that he took great pride in coaching a senior hurling team, referring to it as “an honour”, and that he considers himself unlikely to be able to coach at that level or higher in the future due to his injuries. Running and cycling to the extent that he did prior to the accident will also be unlikely.

63. The defendant must take the plaintiff as he finds him. I am satisfied that the curtailment of the plaintiff’s lifestyle is a significant factor which I should take into account in assessing damages.

64. Having regard to the Book of Quantum, as I must, I consider that the plaintiff’s neck injuries to date are at the lower end of the moderately severe category, and that his

back injuries are at the upper end of the “moderate” category. As regards the neck injuries, I consider that a sum of €35,000 is appropriate. Of this sum, €27,500 is attributable to damages for pain and suffering to date; €7,500 relates to damages for pain and suffering into the future.

65. In relation to the plaintiff’s back injuries, I consider that a sum of €32,500 is appropriate. Of this sum, €25,000 is attributable to damages for pain and suffering to date, and €7,500 relates to damages for pain and suffering into the future.

66. Normally a discount would be applied to situations where multiple injuries would arise from the same incident. I consider that, on this occasion, the discount should be small for two reasons: firstly, although the back and neck injuries suffered by the plaintiff arise from the same incident, they present quite differently and require distinct treatments. Secondly and more importantly, I consider the impact on the plaintiff’s life, consumed as it clearly was by high achievement in sport, to be a significant factor in assessing the damages. I will therefore reduce the general damages from €67,500 to €62,500. To the extent that this amount exceeds the upper limit of the “moderately severe” category for both back and neck injuries, I consider this to be justified in the particular circumstances of the case.

67. I was given a schedule of special damages but not told whether it had been agreed. Hopefully the parties can agree the appropriate amount and inform the court, so that an order with a definitive sum may be drawn up.

Aggravated damages

68. At the conclusion of the s.26 application, counsel for the plaintiff applied for an award of aggravated damages in the event that the s.26 application was unsuccessful. Both sides made oral and written submissions in this regard.

69. The plaintiff quotes a number of cases which suggest that an award of aggravated damages may follow an unsuccessful s.26 application, but fairly summarises the plaintiff's position as follows: -

“26...the Plaintiff accepts that a defendant is to be afforded reasonable latitude and that the unsuccessful invocation of a section 26 application does not automatically give rise to an entitlement to aggravated punitive damages.

27. However, in this case, there is no substance at all to the application made under that section and the authorities establish a clear entitlement on the part of the Plaintiff to aggravated punitive damages in such circumstances.”

70. In the written submissions, the defendant summarises his position as follows: -

“14...The process of discovery in this case proved critical and begs the question as to the course this litigation may have taken absent discovery of the Care-doc note and further how the Plaintiff can contend for any injustice in consequence of the fact that the Defendant has sought to rely upon it and ensure that the Court has a true and honest picture both of his medical history and presentation post incident...

15. The section 26 application in the instant case is well founded, properly made and in the respectful submission of the Defendant the provision is engaged. Even if the Court does not accept the defence position in that regard, there is and can, in the submission of the Defendant, be no suggestion that reliance upon the provision on the particular facts of the case was inappropriate or absent evidential basis. Such an approach would be directly contrary to the requirement of reasonable latitude and have a stultifying effect on the operation of what is a vital provision to the proper, fair and effective operation of the system for personal injuries compensation.”

71. There is no doubt that the plaintiff in this case was cross-examined aggressively, although I do not believe that counsel strayed beyond what was acceptable. The section requires proof of dishonest conduct; counsel could have been criticised for mounting a s.26 application and not putting squarely to the plaintiff that he was lying. On the facts before the court, it is possible that the court could have taken the view that the s.26 application was justified; the circumstances which prompted the application all emanated from the plaintiff's conduct of the case.

72. In the event, I was satisfied that the plaintiff was not lying, and was a fundamentally honest witness who had not contravened s.26. I do not consider however that the application was lightly brought or improperly made, albeit that it was unsuccessful. In the circumstances, an award of aggravated damages is not appropriate.

Conclusion

73. There will be an award to the plaintiff of general damages of €62,500. The parties should indicate to the court within seven days from delivery of this judgment what order they agree in relation to the special damages. In the absence of any written submission on costs within seven days of delivery of this judgment, such submissions not to exceed 750 words, the court will order that costs follow the event in the normal way. Both parties have liberty to apply in the event of any difficulty.