

Supreme Court upholds refusal to dismiss Personal Injuries action.

I have written a number of BLOGS on our website www.morganmcmanus.com recently on Accident Claims which have been dismissed by the High Court in circumstances where liability may even have been admitted but the Plaintiff is deemed to have exaggerated his injuries and thus has had his Claim dismissed under Section 26 of the Civil Liability & Courts Act 2004. This has put a huge strain on Plaintiffs who are genuinely seriously injured but who run the risk that an aggressive approach by the Defendant questioning the honesty of the Plaintiff could lead to the dismissal of the Plaintiff's entire Claim with an Order for legal costs against him.

Section 26 of the Civil Liability and Courts Act, 2004 provides, so far as material:

(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.

In an recent Supreme Court Appeal in the Decision of **Goodwin –v- Bus Eireann** [SC Rec No 262/08] delivered on the 23rd February 2012 the Court brought some clarity as to the circumstances in which a Plaintiff should be deemed to have exaggerated his symptoms and the manner in which the Court should address the medical evidence of the Defendant.

The defendant on this appeal sought the radical remedy of the dismissal, in its entirety, of the claim of a plaintiff, who admittedly suffered serious injuries at its hands in a road traffic accident for which it admitted liability. The plaintiff was stopped at a traffic light when a bus operated by the defendant collided with the rear of her car, pushing it across the intersection. It was not disputed that she suffered a soft tissue or whiplash type injury. It was the extent and genuineness of her later complaints that has been hotly disputed by the defendant.

The claim by the defendant was made on the ground that the plaintiff was said to have fraudulently exaggerated her claim and that an order dismissing the action should be made pursuant to s. 26 of the Act.

The grounds of appeal focussed on particular aspects of the issue: firstly, that the evidence of the plaintiff was inconsistent with her appearance on film recordings of her behaviour taken by a private investigator retained by the defendant; secondly, that the learned trial judge misinterpreted the evidence of two medical experts called by the defendant to such an extent as to lead her to discount or disregard the parts of their evidence in which they disputed the genuineness of the plaintiff's complaints. The defendant also claimed that the award was, in any event, excessive having regard to the evidence.

The essence of the evidence of the two medical witnesses was that they did not accept that many of the symptoms of which the plaintiff complained were genuine: they were not consistent from one observation to another; they were not compatible with the absence of any objective evidence of neurological deficit. The defendant relied on the evidence of these experts in support of the case that the plaintiff's evidence was grossly exaggerated and, in that sense, false and misleading. However, neither expert was prepared to go so far as to say that she was deliberately and consciously untruthful. The Defendant's medical expert viewed the DVD covertly taken of the Plaintiff and thought that they showed a completely different person from the one he had seen. She seemed to have a normal gait. Pressed as to whether the inconsistency of the plaintiff's complaints was intentional or unintentional, the expert said he was not clear and that it might be subconscious. He did not think that anyone was clear on that matter. He thought that the plaintiff's symptoms had a major psychological overlay.

Counsel for the defendant submitted to the trial judge that the plaintiff's exaggeration of her case had been so gross that her claim was a fraudulent action.

The Supreme Court noted that the High Court judge declined the defendant's urgings that she should find that the plaintiff had knowingly given false and misleading evidence. Where there appeared to be conflict between statements made or attributed to the plaintiff and objective medical evidence or her appearances as shown on the DVD, the judge found herself able to reconcile them without any adverse reflections on the plaintiff's honesty as a witness. This was despite the fact that she found that there was an element of what the defendant's medical consultant had described as "illness behaviour."

The Supreme Court stated that the defendant had to establish that the plaintiff had given evidence which was false or misleading in a material respect and, most crucially, that she knew it to be false or misleading. The Court commented that it was obvious that the defendant, upon whom the burden lies, faces a daunting task in making its case on appeal in circumstances where the trial judge, invited expressly to do so, declined to make such a finding and expressly said that she was not satisfied that the plaintiff had knowingly given false or misleading evidence.

Referring to the judgment of Denham C.J. of 2nd December 2011 in **Ahern –v- Bus Eireann** [2011] (IESC 44) the Court stated that for section 26 to apply, the defendant must discharge the burden of showing that some material evidence had been given which was false or misleading and that the plaintiff knew that it was false or misleading. Counsel for the defendant accepted that this amounted to an allegation that the claim was fraudulent.

In the absence of a finding from the trial judge that the plaintiff, in this case, had knowingly given false or misleading evidence, it was impossible for the defendant to

succeed. The defendant accepted that it could not go behind the findings of the trial judge. Therefore, it is claimed that the trial judge committed errors in her assessment of the evidence of the medical witnesses called on the part of the defendant to such an extent as to go to the heart of the case and to render her conclusions invalid. It was submitted that the court could itself apply the section or that it could direct a retrial. In the Supreme Court`s opinion, the defendant had failed to establish that the trial judge committed any error in her assessment of the evidence. The Court dismissed the appeal and affirmed the order of the High Court.

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