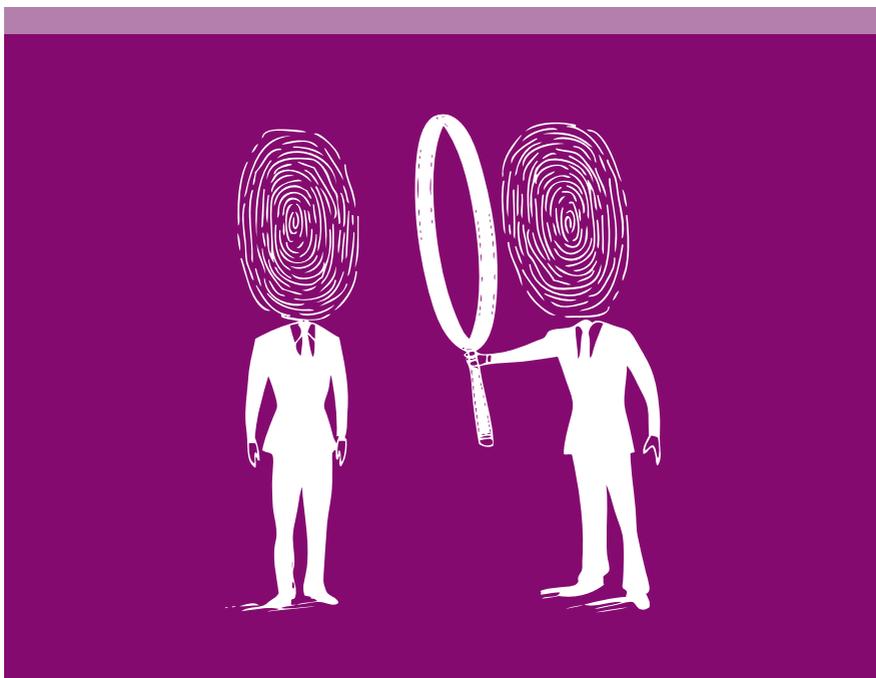


Guide to Fraudulent & Exaggerated Claims

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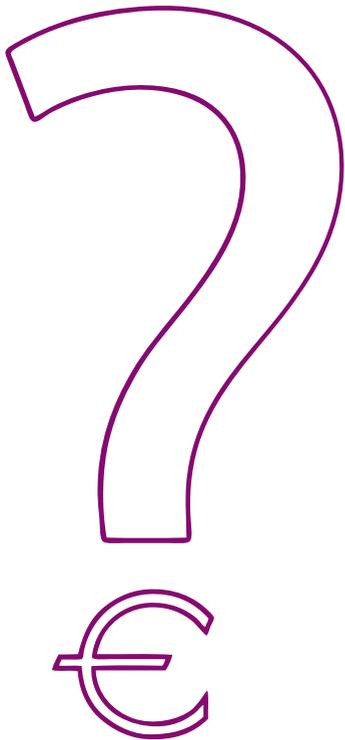


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1. Section 26 – Key Components

Background

Sections 25 and 26 of the Civil Liability and Courts Act 2004 (the “2004 Act”) were introduced by the Oireachtas as one of a number of measures to tackle what had become known as the ‘compensation culture’. The legislation introduced new penalties for fraudulent and exaggerated claims.

The Law

Section 25 (“s.25”) of the 2004 Act makes it an offence for a Plaintiff to knowingly give evidence which is false or misleading in any material respect. Section 26 (“s.26”) of the 2004 Act further empowers the Court to dismiss proceedings in these circumstances unless it would result in an injustice.

S.26 Applications

If a Defendant forms the view that a Plaintiff has given false or misleading evidence, a s.26 application can be made to have the proceedings struck out.

Key Components of a S.26 Application

The legislation sets out the two components which must be in place in order to trigger an application.

1. The Plaintiff must have brought a personal injury action
2. The Plaintiff must have given or put forward or dishonestly* caused to be given or put forward, false or misleading evidence* knowing it to be false or misleading; or have sworn affidavit evidence, knowing that it was false or misleading.

If these components are present then a claim can be dismissed by the Court **provided that it would not lead to an injustice.**

S.26 specifies that:

* a dishonest act is an act done with the intention of misleading the Court (s.26(3)).

* evidence which is false or misleading **in any material respect** is relevant (s.26(1)(a) and (1)(b)).

The full text of s.25 and s.26 of the 2004 Act are set out on **pages 9 and 10.**

Standard of proof

The onus of proof in a s.26 application is on the Defendant to show that the Plaintiff gave evidence which was **materially false** or **misleading** and that the Plaintiff **knew** it to be so. The standard of proof is that of civil cases which is on the **balance of probabilities**. Refer to case law at 6(A).

2. S.26 - Some Basic Principles

What Constitutes “Knowledge”?

It is a key component of s.26 that the Plaintiff knowingly gives or swears the false and misleading evidence. In considering what constitutes “knowledge”, judges have taken into account factors such as:

- the age of the Plaintiff;
- whether there is a deliberate intention to mislead the Court.

Courts have been lenient on elderly Plaintiffs where deterioration of memory from old age and “understandable exaggeration” can occur. Refer to case law at 6(B).

What Constitutes an “Injustice”?

S.26 states that the section will not be invoked if to do so would lead to an injustice.

In considering whether or not a dismissal would lead to an injustice, the Courts have taken into account whether a claim for loss of earnings has been made. The absence of a claim for loss of earnings has led the Court to infer that a Plaintiff had not sought to profit from his exaggeration and that it would be disproportionate and unjust to dismiss the claim. Other examples of where an injustice might arise include a claim for cost of care for catastrophic injuries, where some perhaps trivial misleading evidence is put forward under another category of damages. Refer to case law at 6(C).

S.26 is Mandatory in Nature

Once a Plaintiff gives false or misleading evidence then all evidence is tainted. It is not possible to separate the good from the bad. The operation of s.26 is mandatory and must always be applied if the Plaintiff has given, or dishonestly caused to be given, or put forward false or misleading evidence, regardless of whether or not liability has been admitted. Therefore, a Defendant may have

admitted liability and the Plaintiff may have been injured but if the Plaintiff has given false or misleading evidence as per s.26 then the Court must dismiss the claim. However, Judges retain a discretion to refuse an application under s.26 where the dismissal of the case would lead to an injustice.

On the other hand, it has been clearly stated that “s.26 should not be used as an opportunity to avoid a just liability”. The section is there to deter and disallow fraudulent claims and should not be seen as an opportunity to seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability. **Refer to case law at 6(D).**

3. Factors To Consider

Interpretation of s.26 is **highly subjective**, which has caused great difficulties for Defendants.

While there are no hard and fast rules on the application of s.26, recent case law shows a number of principles which appear to underpin the Court’s approach:

1. **Was false evidence given before the Court?** If the evidence in question was given before proceedings were initiated, rather than at the trial, it will be difficult to argue that s.26 should apply. **Refer to case law at 6(E).**
2. **The overall truthfulness of the witness** will be taken into account and can weigh heavily in a Plaintiff’s favour, particularly in the case of elderly Plaintiffs. **Refer to case law at 6(F).**
3. **If the overall picture is not one of deliberate falsehood or intention to mislead**, the Courts have been reluctant to apply s.26. **Refer to case law at 6(G).**
4. If there is confusion on the part of the Plaintiff and / or the injuries are difficult to explain, Courts have refused applications by Defendants under s.26. **Refer to case law at 6(H).**
5. **Failure to disclose a previous accident, illness or underlying condition.** If a Plaintiff has been found to distort the facts and concoct injuries that were sustained in a previous accident, the Courts will heavily lean towards dismissal under s.26. **Refer to case law at 6(I).**
6. **Exaggerated claims for loss of earnings.** Exaggerated claims for loss of earnings will invite a dismissal under s.26 as this is clearly evidence that is false and misleading in a material respect. The Courts can infer from surrounding circumstances that evidence is false or misleading. For example, where a claim for future loss of earnings was discontinued without any explanation, it has been inferred that the evidence given was false or misleading. **Refer to case law at 6(J).**

4. Commentary

Remember:

- For a s.26 claim to proceed, every component set out in the legislation must be present;
- Once a Plaintiff gives false or misleading evidence then all evidence is tainted.
- The Court will consider the overall truthfulness of the Plaintiff.

Tactically, points worth keeping in mind when considering whether to apply to Court under s.26:

- The Personal Injury Summons is verified on affidavit. However, the requirements of section 14 oblige the Plaintiff to verify every pleading containing assertions or allegations, and any further information to the Defendant. Very often, and particularly as details on special damages and further particulars of personal injury are served close to the date of trial, affidavits of verification are not forthcoming and should be insisted upon by the Defendants;
- The importance of pre-trial consultations with medical experts in particular is heightened when considering an application under s.26;
- S.26 is at its most powerful outside Court in settlement negotiations where it can be a very useful tactic;
- The judgment of Mr Justice Cross in *Lackey v Kavanagh* has sounded a warning bell that if s.26 is relied upon in circumstances where it is unreasonable to do so, then the Defendant is exposed to an award of aggravated damages. The utmost care must be taken by Defendants to ensure that there is strong and cogent evidence that can be put forward to support its application. **Refer to case law at 6(K).**
- Defendants considering appealing decisions to the Supreme Court should note that the Supreme Court has been unwilling to interfere with findings of fact made by the High Court on s.26. Two appeals against a refusal to dismiss in accordance with s.26 have found their way to the Supreme Court. In both judgments, the Supreme Court was not willing to overturn the findings by the High Court. **Refer to case law at 6(L).**

5. *Schedule 1 – Legislation*

Section 25 of the Civil Liability and Courts Act 2004

1. If, after the commencement of Section 25 ("s.25"), a person gives or dishonestly causes to be given, or adduces or dishonestly causes to be adduced, evidence in a personal injuries action that:
 - (a) is false or misleading in any material respect; and
 - (b) he or she knows to be false or misleading;he or she shall be guilty of an offence.

2. If, after the commencement of this section, a person gives, or dishonestly causes to be given, an instruction or information in relation to a personal injuries action to a solicitor, or person acting on behalf of a solicitor, or an expert, that:
 - (a) is false or misleading in any material respect; and
 - (b) he or she knows to be false or misleading;he or she shall be guilty of an offence.

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.

5. In this section "expert" means a person who has a special skill or expertise and who:
 - (a) has been engaged by or on behalf of a Plaintiff or Defendant in a personal injuries action to give expert evidence in that action; or
 - (b) for the purposes of, or in contemplation of, a personal injuries action has been requested to carry out an examination or investigation in relation to any matter for which such special skill or expertise is necessary.

S.26 of the Civil Liability and Courts Act 2004

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.

Section 14 of the Civil Liability and Courts Act 2004

1. Where the Plaintiff in a personal injuries action:
 - (a) serves on the Defendant any pleading containing assertions or allegations;
 - or
 - (b) provides further information to the Defendant;the Plaintiff, or in the case of a personal injuries action brought on behalf of an infant or person of unsound mind by a next friend or a committee of the infant or person, the next friend or committee, shall swear an affidavit verifying those assertions or allegations, or that further information.

2. Where the Defendant or a third party in a personal injuries action serves on another party to the action any pleading containing assertions or allegations, the Defendant or third party, as the case may be, shall swear an affidavit verifying those assertions or allegations.
3. Where a personal injuries action is brought on behalf of an infant or a person of unsound mind by a next friend or a committee of the infant or person, an affidavit to which subsection (1) applies sworn by the next friend or committee concerned shall, in respect of assertions, allegations or further information, of which he or she does not have personal knowledge, state that he or she honestly believes the assertions, allegations or further information, to be true.
4. An affidavit under this section shall be lodged in court not later than:
 - (a) 21 days after the service of the pleading concerned or such longer period as the court may direct or the parties may agree; or
 - (b) in the case of a requirement to which subsection (8)(b) applies, 7 days before the date fixed for the trial of the personal injuries action concerned.
5. If a person makes a statement in an affidavit under this section:
 - (a) that is false or misleading in any material respect; and
 - (b) that he or she knows to be false or misleading, he or she shall be guilty of an offence.
6. The reference to court in subsection (4) shall:
 - (a) in the case of a personal injuries action brought in the High Court, include a reference to the Master of the High Court; and
 - (b) in the case of a personal injuries action brought in the Circuit Court, include a reference to the county registrar for the county in which the proceedings concerned were issued.
7. An affidavit sworn under this section shall include a statement by the deponent that he or she is aware that the making of a statement by him or her in the affidavit that is false or misleading in any material respect, and that he or she knows to be false or misleading, is an offence.

8. This section applies to personal injuries actions brought:
 - (a) on or after the commencement of this section; and
 - (b) before such commencement, where a party to the action requires, not later than 21 days before the date fixed for the trial of the action, another party to the action to swear an affidavit in accordance with this section.

6. Schedule 2 – Case Law

A. Case Law - Standard of Proof

In *Mary Farrell v Dublin Bus*¹, Mr Justice Quirke stated that the **burden of proof should be that of the civil standard** “bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated”. Mr Justice Quirke went as far in this judgment as to say that the Defendant must “discharge the onus of proving as a high probability, that the evidence which has been given or adduced by the Plaintiff has been false or misleading in a material respect”.

In *Mohammed Sameur Rahman v Craigfort Taverns Limited*² Mr Justice O’Neill held that due to the penal nature of s.26, the Court must be satisfied to a **high degree of probability** that the Defendant has discharged the onus of proof on it.

The 2012 cases of *Nolan v Mitchell and O’Neill*³ and *Nolan v Kerry Foods Limited*⁴ are cases where the Courts have reiterated that the standard of proof is on the **balance of probabilities**.

B. Case Law – “Knowledge”

In *Ahern v Bus Eireann*⁵, Mr Justice Feeney in the High Court found that based on medical reports, the Plaintiff was clearly injured in the accident but had linked **deterioration arising from old age** to the accident resulting in an “**understandable exaggeration**” of her condition. He found, however, that there was not a deliberate intention to tell a non-truth or mislead the Court.

1. *Mary Farrell v Dublin Bus/Bus Atha Cliath* [2010] 7 JIC 3001

2. *Mohammed Sameur Rahman v Craigfort Taverns Limited* [2012] IEHC 478

3. *Nolan v Mitchell & Anor* [2012] IEHC 151

4. *Nolan v Kerry Foods Ltd* [2012] IEHC 208

5. *Ahern v Bus Eireann* [2006] 5 JIC 1602

In *Lukasz Waliszewski v McArthur Steel*⁶, the Plaintiff swore an Affidavit of Verification in respect of Replies to Particulars in which he failed to disclose a prior road traffic accident. Justice Barton held that the Plaintiff **had to have known** that the Replies to Particulars were incorrect and that the Affidavit of Verification was being falsely sworn.

C. Case Law – “Injustice”

In *Kerr v Molloy and Sherry (Lough Eglish) Ltd. & Anor*⁷, the Plaintiff alleged that a number of boxes of beef fell on him causing him a foot injury. The Plaintiff claimed that he was unable to return to work after the incident. The Plaintiff was vague when examined and did not answer Counsel’s questions directly. The Judge found that the Plaintiff had seriously exaggerated his injury and that his evidence with regard to his inability to work was false in a material respect. The Judge decided that to dismiss the case would lead to an injustice because:

- no claim was made in the cause of action for loss of earnings. This may have led the Judge to believe that the exaggeration was not done for financial gain; and
- having regard to the medical reports from the doctors, **the Judge believed that it would be disproportionate and unjust to dismiss the Plaintiff’s claim.**

The Judge seems to have refused to dismiss the claim because the Plaintiff had not sought to profit from his exaggeration nor had the Defendant been prejudiced by it.

In *Terence Gammell v Doyle T/A Lee’s Public House and David White*⁸, the Judge noted that the obligation to dismiss a claim in accordance with s.26 was injury neutral and therefore **s.26 can still be applied to a situation where a genuinely injured Plaintiff who grossly exaggerates a claim**, to the extent of giving materially false or misleading evidence, can fall foul of its provisions.

In *Looby v Fatafski and the MIBI*, the Plaintiff lied to his G.P. and in his written evidence, which was verified under oath, in relation to the amount of time he could cycle post-accident. Mr Justice Barr accepted that the Plaintiff had breached s.26 by swearing an affidavit and the Plaintiff admitted he “told lies in order to get more money”. Notwithstanding this, Mr Justice Barr refused to dismiss the Plaintiff’s claim on the basis that the lies he told were not of much significance and **“there would be an injustice if the action were to be dismissed”**.

6. *Lukasz Waliszewski v McArthur Steel* [2015] IEHC 264

7. *Kerr v Molloy and Sherry (Lough Eglish) Ltd. & Anor* [2006] IEHC 364

8. *Terence Gammell v Doyle T/A Lee’s Public House and David White*, [2009] IEHC 416

In *Patrick Higgins v Caldark & Quigley*⁹, Mr Justice Quirke outlined some examples of where an injustice might arise. He stated “*evidence in some proceedings may disclose the likelihood of injustice consequent upon a dismissal. For instance, it may be unjust if the claim of a catastrophically injured claimant for the costs of ongoing care is dismissed because he or she has knowingly adduced some, perhaps trivial, misleading evidence in respect of some other category of damages. Similarly, the dismissal of a fatal injuries claim based upon misleading evidence knowingly adduced by an adult Plaintiff may unjustly penalise infant or incapacitated dependents*”.

D. Case Law - S.26 is Mandatory

In *Damien Carmello v Terence Casey and Geraldine Casey*¹⁰, Mr Justice Peart opined that the “*provision was of a draconian nature but ... deliberately so in the public interest*”. He held that **dismissal was mandatory once the Court was satisfied on the balance of probability that the Plaintiff had knowingly given false or misleading evidence unless a dismissal would result in injustice.**

***Aileen Dunleavy v Swan Park Ltd t/a Hair Republic*¹¹**

In his judgment, Mr Justice O’Neill stated: -

*“S.26 of the Civil Liability and Court Act 2004 is there to deter and disallow fraudulent claims. It is not and should not be seen as an opportunity to seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability. **Great care should be taken to ensure, in a discriminating way, that clear evidence of fraudulent conduct in a case, exists before a form of defence is launched which could unjustly do grave damage to the good name and reputation of a worthy Plaintiff**”.*

In *Sean Meehan v BKNS Curtain Walling Systems Limited and Michael McNamara and Company*¹², Mr Justice Ryan noted that if s.26 applies to the case, **“the legitimate parts of the claim cannot survive with only the false or misleading elements dismissed... Case law makes it clear that the sanction is to be applied, unless there are quite specific features that would lead to an injustice”.**

9. *Patrick Higgins v Caldark and Quigley* [2010]IEHC 527

10. *Damien Carmello v Terence Casey and Geraldine Casey* [2007] IEHC 362

11. *Aileen Dunleavy v Swan Park Ltd t/a Hair Republic* [2011] IEHC 232

12. *Sean Meehan v BKNS Curtain Walling Systems Limited and Michael McNamara and Company* [2012] IEHC 441

E. Case Law - Liability Test will Supersede the Application of S.26

*Danagher v Glanatine Inns Limited*¹³

The Plaintiff in this case claimed that the Defendant's security staff perpetrated an assault against him during a fight in a pub and as a result he sustained personal injuries. The Plaintiff claimed that he was not involved in the fight, but that he was forcibly removed from the premises by the Defendant's security staff and that as a result he sustained injuries to his neck and back and suffered Post Traumatic Stress Disorder.

The Defendant claimed that the Plaintiff was involved in the fight and denied that excessive force was used. The Defendant claimed that s.26 should apply.

The Judge found that the Defendant had discharged his duty of care and accepted his evidence in relation to the events of the night in question. She found that the Plaintiff had *"sought to mislead the Court and the Defendant by grossly and deliberately exaggerating his claim in a number of respects"*. The Plaintiff's allegations that he was prevented from returning to recreational activities as a result of his injuries was rejected by the Court and the Defendant provided evidence which disproved this such as entries from his social networking space. **As the Plaintiff's claim had failed on liability, the Judge did not have to consider the Plaintiff's evidence in the context of s.26.** She said that even if the claim had not been dismissed on liability grounds, it would have been dismissed due to the falsity of the Plaintiff's evidence on the issue.

F. Case Law - Was False Evidence Given Before the Court?

*Mulkern v Flesk & Flaherty*¹⁴

The Plaintiff in this case had completed a work medical in or around the time of the accident and denied that she had any previous medical problems or accidents. The Defendant used this to undermine her claim for on-going pain or suffering as a result of the accident. Having regard to the s.26 application, the Judge held that *"before the Court could apply the provisions of s.26, it would have to be satisfied that as a matter of probability the evidence given by the Plaintiff was false or misleading in a material respect and that the Plaintiff knew her evidence was false or misleading"*. The Judge found that

13. *Danagher v Glanatine Inns Limited* [2010] IEHC 214

14. *Mulkern v Flesk & Flaherty* [2005] IEHC 48

s.26 did not apply. The Judge opined that once the Plaintiff realised that the Defendant had discovered her untruths, she admitted her wrong doing from the outset in pre-trial correspondence, when her Counsel was opening the case and in her evidence in chief. **The Judge found that she may have given false and misleading information to her employer but she did not do so before the Court** and consequently the provisions of s.26 were found not to apply.

This can be distinguished from the unreported 2016 Circuit Court case involving a Plaintiff named Christian Adekunle, who lied to a medicolegal practitioner on examination. YouTube videos emerged during the course of the hearing which showed the Plaintiff dancing energetically and confirmed he was capable of certain movements he had told the doctor he was not. Judge Groarke dismissed the Plaintiff's claim as a result.

*Lisa Ludlow v Darren Unsworth and Zurich Insurance Plc*¹⁵

The Plaintiff was a passenger in her own vehicle, along with her boyfriend, Mr. Treacy, when her car crashed into a wall. The Plaintiff alleged that her car was being driven by an acquaintance, the First Named Defendant, at the time of the incident as both herself and Mr. Treacy were under the influence of alcohol. Mr Justice Ryan rejected the Plaintiff's evidence as to the driver of the car and found that, in fact, the Plaintiff's boyfriend, Mr. Treacy, had been driving the car and no such person as the First Named Defendant existed.

The Judge held that the evidence the Plaintiff gave as to the driver was material to the case and that the Plaintiff knowingly gave evidence that was false and/or misleading. On this basis, the Judge stated that s.26 mandates the dismissal of the claim unless there is a specific injustice.

G. Case Law - The Overall Truthfulness of the Plaintiff

*Ahern v Bus Eireann*¹⁶

The Plaintiff in this case fell while on the Defendant's bus and the issue was the need for continuing care for the Plaintiff as she was elderly. The Judge found that the overall picture was not one of deliberate falsehood or intention to mislead. **The Judge found the Plaintiff to be an overall truthful witness even if every detail was not precise.** The Judge took the view that the Defendant had not shown that the Plaintiff had given false or misleading evidence that she knew to be false or misleading. The Judge also found that s.26(1) could not apply to information provided outside the Court, and the Court rejected any interpretation to that effect.

15. *Lisa Ludlow v Darren Unsworth and Zurich Insurance Plc* [2013] IEHC 153

16. *Ahern v Bus Eireann* [2006] 5 JIC 1602

*Bertie (Bartley) Folan v Mairtin O Corraoin and Ors*¹⁷

The Plaintiff in this case was a carpenter who fell from scaffolding because there was no ladder available. His fall was not witnessed. He claimed that he fell 18 feet but was not retained in hospital. The Judge said that he had misgivings about the medical history recounted by the Plaintiff to the medical consultants and he was using a crutch that had not been advised by a medical professional. The Defendant put forward evidence that the Plaintiff was taking part in activities such as sailing and taking care of his horse which were inconsistent with the degree of pain that he claimed he was experiencing. **The Judge found that the Plaintiff had exaggerated his symptoms and that he had given evidence which was false or misleading** and that he knew on the balance of probabilities was false and misleading.

H. Case Law - Deliberate Falsehood or Intention to Mislead

*Kerr v Molloy*¹⁸

The Judge, despite finding that the Plaintiff had exaggerated his injuries to the Court, decided that **the Plaintiff's exaggeration was formulaic rather than a considered conscious reply and the Court was not misled by these answers** as the Plaintiff's medical reports accurately described the Plaintiff's injuries.

*Aileen Dunleavy v Swan Park Ltd t/a Hair Republic*¹⁹

The Plaintiff in this case sued the Defendant's hairdressing salon for damage caused to her hair during a routine hairdressing treatment. The treatment damaged the Plaintiff's hair for a significant period of time and affected her artistic career as she became depressed and her artistic creativity was affected. She also claimed that she withdrew from social activities such as golf. The Defendant produced evidence that the Plaintiff was still playing golf and that she had been involved in a road accident that affected her ability to play. The Judge accepted the Plaintiff's explanation in this regard. The Defendant also submitted that the Plaintiff failed to disclose a history of depression to psychiatrists. **The Judge accepted the Plaintiff's explanation that she never considered herself depressed and did not intentionally mislead the doctors in this regard.** The Judge awarded €30,000 in general damages and €15,000 for the loss of the fruits of the Plaintiff's artistic creativity during the period in question.

17. *Bertie (Bartley) Folan v Mairtin O Corraoin and Ors* [2011] IEHC 487

18. *Kerr v Molloy and Sherry (Lough Eglish) Ltd. & Anor* [2006] IEHC 364

19. *Aileen Dunleavy v Swan Park Ltd t/a Hair Republic* [2011] IEHC 232

I. Case Law - Confusion on the Part of the Plaintiff

*Corbett v Quinn Hotels Limited*²⁰

The Plaintiff in this case slipped on the Defendant's premises and liability was admitted. The Plaintiff sustained injuries which were difficult to explain and assess. As a result of this the Defendant made an application in accordance with s.26 contending that the Plaintiff gave evidence that was false or misleading in a material respect which she knew to be false or misleading. The Judge refused the application as **while the Plaintiff's evidence was misleading, he was satisfied that she gave her evidence honestly, believing the same to be true** and she had not intended to mislead the Court in any respect.

In this case, there was a difference of opinion between experts and confusion on the part of the Plaintiff. There was no question of a failure to reveal matters in replies or a deliberate attempt to invent / exaggerate injuries.

J. Case Law - Failure to Disclose Previous Accident / Illness / Underlying Condition

*Carmello v Casey*²¹

The Plaintiff in this case exaggerated about suffering numbness in his face as a result of a car accident. He also claimed that he had suffered a fractured nose but this was not supported in the doctor's report. The Defendant contended that the injury was caused by another accident that was not disclosed in the Replies to Particulars. When questioned about this, **the Plaintiff said that he could not remember and that the accident must have slipped his mind. The Judge found that the Plaintiff had been deliberately untruthful in his evidence, pleadings and affidavit.**

In *Carmello v Casey*, Mr Justice Peart, [2007] IEHC 362, the Judge found that:

- the Court must decide on the balance of probability if the Plaintiff had knowingly given false or misleading evidence in a material respect;
- S.26 is mandatory once this threshold has been reached, and the claim must be dismissed;
- false and exaggerated claims are an abuse of the process of the Court; and
- the Court should look at the Plaintiff's evidence, the pleadings and medical reports in arriving at its conclusion.

20. *Corbett v Quinn Hotels Limited* [2006] IEHC 222

21. *Damien Carmello v Terence Casey and Geraldine Casey* [2007] IEHC 362

*Mary Behan v Allied Irish Banks Plc*²²

The Plaintiff in this case sustained injuries when she fell from her chair in a cluttered work area. The issue arose whether the Plaintiff had an underlying illness or previous medical condition which she initially denied. The Plaintiff claimed that the burden of proof was on the Defendant to show an intention to mislead the Court. **The Judge found that the Plaintiff had not given evidence that was false or misleading, however the non-disclosure of relevant illnesses and treatments affected the credibility of the Plaintiff.** The claim was dismissed as it was her responsibility to keep her workplace tidy and since other injuries had befallen the Plaintiff, it was difficult to isolate the incident in question.

*Montgomery v Minister for Justice, Equality and Defence and Eugene McCarthy*²³

In this case, it was argued that the Plaintiff had grossly exaggerated her complaints and engaged in material non-disclosure by failing to disclose to her examining doctors that she had been involved in previous accidents.

Mr Justice O'Neill held that when the Plaintiff was swearing the affidavit of verification, which verified that the Plaintiff had not been involved in any previous accidents, she did not know it to be false and misleading but "*it was more of an oversight*". However, in failing to disclose previous accidents to the examining doctors, **Mr Justice O'Neill held that the Plaintiff had withheld the information "with a view to manipulating the evidence of the doctors"** and the material non-disclosure had caused the medical evidence in the case to be misleading on a material aspect of the case.

K. Case Law - Exaggerated Claims for Loss of Earnings

*Nolan v Mitchell and O'Neill*²⁴

In this case, the Judge dismissed the Plaintiff's claim on the basis of s.26, as he was satisfied that, on the balance of probabilities, the Plaintiff induced or caused to be induced misleading evidence in the form of the schedule incorporated in the Plaintiff's letter of instructions to the forensic accountants and that the Plaintiff's **loss of earnings were deliberately exaggerated.**

22. *Mary Behan v Allied Irish Banks Plc* [2007] IEHC 362

23. *Montgomery v The Minister for Justice, Equality and Defence and Eugene McCarthy* [2012] IEHC 443

24. *Nolan v Mitchell and O'Neill* [2012] IEHC 151

*Sean Meehan v BKNS Curtain Walling Systems Limited and Michael McNamara and Company*²⁵

In this case, the Plaintiff sustained injuries when he fell from scaffolding. The Defendant claimed that he gave untrue statements about what happened, about his work history and his income since the accident. The Judge found that the Plaintiff's **evidence regarding his claim for loss of earnings in the past and the future was knowingly false** and misleading in a material respect.

*Mary Farrell v Dublin Bus*²⁶

In this case, the Judge stated that **the Plaintiff could not simply discontinue a claim for loss of future earnings**, such an action had to be explained to the Court and no credible explanation was forthcoming. The Judge dismissed the Plaintiff's claim on foot of s.26.

L. Case Law – Aggravated Damages

In the case of *Amy Lackey v Patrick Kavanagh*²⁷, Mr Justice Cross stated the following *"I am of the view that since the introduction of the 2004 Act which clearly impacts upon a Plaintiff disproportionately more than on a Defendant, the issue of aggravated/exemplary damages must always be in the mind of a court where it is alleged that the Plaintiff is deliberately exaggerating his or her claim and/or being guilty of fraud or otherwise invokes the provisions of s.26 of the 2004 Act. I think the issue of aggravated/exemplary damages is the only real deterrent to an irresponsible or indeed an overenthusiastic invocation of such a plea. I believe the courts should be at least as rigorous as they were of old when such a defence is maintained"*.

This has sounded a warning bell to Defendants in making applications under s.26. More recently in a case *Daly v HSE*²⁸, Mr Justice Noonan was highly critical of the Plaintiff's claim for special damages. He stated that *"it also seems to me entirely improper that such a large claim for special damages should be advanced without even the most basic attempt at verifying its validity"*. However, the Defendants specifically did not rely on s.26 but claimed that the *"Plaintiff's case was so tainted by lack of credibility and profound non-disclosure that it should be dismissed"*.

25. *Sean Meehan v BKNS Curtain Walling Systems Limited and Michael McNamara and Company* [2012] IEHC 441

26. *Mary Farrell v Dublin Bus/Bus Atha Cliath* [2010] 7 JIC 3001

27. *Lackey v Kavanagh* [2013] IEHC 341

28. *Daly v HSE* [2014] IEHC 560

Mr Justice Noonan observed that s.26 “undoubtedly confers litigation advantage on Defendants and has long been complained of by Plaintiffs’ lawyers as violating the principle of “equality of arms” in personal injury litigation. However, the recent jurisprudence of this court reveals an emerging trend towards a more level playing field by the threat of sanctioning Defendants who invoke the section without just cause by way of aggravated or punitive damages.”

Mr Justice Noonan went on to observe that “the Defendants ..were very conscious of the risk of making a section 26 application were it to prove unsuccessful. Instead they chose to pursue an alternative course which they hoped may achieve the same result without incurring the risk identified. They declined to grasp the nettle”.

M. Case law - The Supreme Court and S.26

The first appeal case was *Ahern v Bus Eireann*²⁹. Here an elderly lady had been accused of giving false and misleading evidence on her ability to travel alone on buses and in relation to her care requirements. Mr Justice Feeney in the High Court found that the Plaintiff was an honest witness. The Defendant appealed stating that the Judge had erred in law in not making a finding under s.26(1) or s.26(2). Mrs Justice Denham in the Supreme Court upheld the findings of Mr Justice Feeney stating the key requirement, that the Plaintiff knowingly misled the Court or swore a false affidavit, had not been made. In addition, the Supreme Court confirmed that the onus of proof in s.26 applications is on the Defendant and the standard of proof is on the balance of probabilities.

The Supreme Court's approach in *Teresa Goodwin v Bus Eireann*³⁰ was similar. Here, the Plaintiff was alleged to have exaggerated her injuries to the Defendant's doctors and a private investigator produced footage which they claimed corroborated this allegation. The High Court Judge found that the Plaintiff was a truthful witness. The Supreme Court agreed that the High Court Judge was in a position to best assess the Plaintiff's evidence and in keeping with the decision in *Hay v O'Grady*³¹ could not interfere with such findings of fact.

29. *Ahern v Bus Eireann* [2011] IESC 44

30. *Teresa Goodwin v Bus Eireann* [2012] IESC 9

31. *Hay v O'Grady* [1992] 1 IR 210

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Our Insurance team specialises in handling large and complex litigation matters for major insurers in the Irish market. The team has a wide range of experience in handling insurance litigation.

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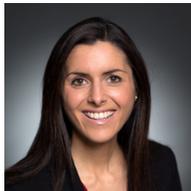
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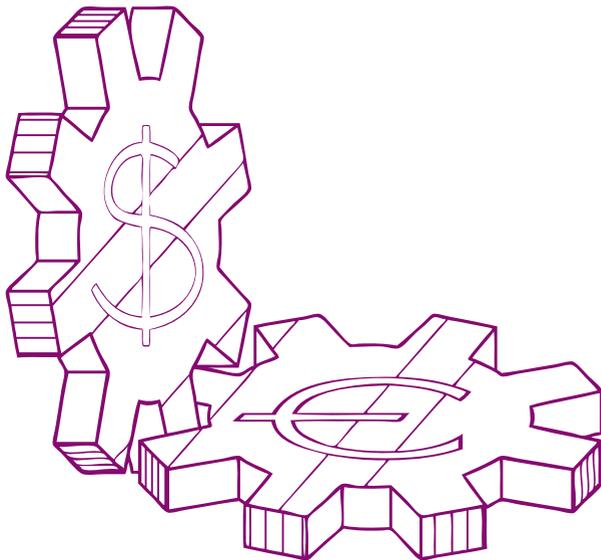
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