THE HIGH COURT

BETWEEN

[2021] IEHC 154

2017/1896P

TREVOR MURPHY

PLAINTIFF

AND

HELEN PALMER

DEFENDANT

Judgment of Mr. Justice Bernard Barton delivered on the 4th day of March, 2021.

Introduction

1. The Plaintiff is a HR director of the Irish division of DHL, the well-known international courier. He was born on the 28th March, 1974 and is married with three grown-up children. He resides with his family at 12 Pineview Drive, Dublin 24. These proceedings are brought in negligence to recover damages for personal injuries and loss suffered and sustained by the Plaintiff as a result of a road traffic accident, which occurred on the 6th October, 2013 near Tallaght Stadium, Tallaght, Co. Dublin. The accident circumstances may be summarised as follows. The Plaintiff was driving a car owned by his employer and had stopped behind another car in a stationary line of traffic when the Defendant's car, which was travelling behind the Plaintiff, collided therewith. The collision impact forces shunted the Plaintiff's car into a further collision with the rear of the car behind which it had stopped.

2. The Pleadings delivered in this suit set out the accident circumstances and particularise the injuries and loss suffered by the Plaintiff, and the impact which these have had on his enjoyment of the amenities of life. While the Defence, delivered the 31st October, 2018, admitted liability and put the Plaintiff on proof of his injuries and loss, his claim was otherwise met with a plea that the impacts involved in the collisions were minimal and incapable of causing injury. When photographs of the damage caused to the vehicles were produced before the commencement of the trial, the plea was quite correctly withdrawn; significant impact damage to the vehicles was evident.

3. It transpired that the plea had been based on the content of a vehicle assessor's report prepared following a forensic examination of the vehicles, but no explanation was offered for the conclusion drawn that the impacts involved between the vehicles were minimal; what's more, the plea had been verified on affidavit by the Defendant who had been scheduled as a witness to fact. It follows that until the trial commenced, the Plaintiff faced a plea which, if sustained, had serious implications for his credibility, carrying with it the dire consequence that his claim would be dismissed. This circumstance merits specific mention at the outset because even though the plea was withdrawn, the Defendant thereafter set about mounting a full frontal assault on the veracity of the Plaintiff and the claim he made, the object of which was to achieve the same result by having his claim dismissed.

4. On the face of it, the case proceeded as an assessment of damages. The Plaintiff and his wife gave evidence in relation to his injuries, the effect that these have had on him and the impact thereof on his enjoyment of life, particularly his recreational and sporting life.

In addition to a claim for general damages, the Plaintiff made a claim for special damages totalling €10,612.72, of which the sum of € 4,712. 72 was agreed. This head of claim covered loss of earnings, GP visits, X-rays and an MRI scan. The balance of the claim in the sum of €5,900 consisted of €1,350 in respect of gym membership and €4,550 in respect of physiotherapy and physical therapy. The amount was agreed but not the Defendant's liability therefor. The cost of remedial works to the car damage at €4,513.00 had been agreed by the Defendant's insurer and had been paid to the owner prior to trial.

Injuries

5. The Plaintiff suffered soft tissue injuries to his neck and mid/lower back; the lower back injuries resolving relatively quickly, within approximately six months of the accident. However, the upper back/neck injury failed to resolve and remains problematic. The sequelae of this injury are pain and referred headaches. Depending on the activity/ movement/ posture undertaken, pain radiates from the left trapezius muscle up into the forehead as a result of which the Plaintiff suffers headaches, on average three to four times per week. Moreover, the headaches can on occasion be severe and require treatment with painkilling medication, usually Ibuprofen.

6. The medical evidence adduced in respect of the Plaintiff's injuries consists of the testimony of several of the treating and/or examining physicians, together with the content of several medical reports commissioned by the parties that were admitted in evidence. The reports set out the diagnosis, treatment and prognosis for the injuries. It is not insignificant in the context of the first issue which the Court has to address that the opinions of the Orthopaedic experts contained in their initial reports were broadly similar; namely, that the Plaintiff had sustained soft tissue injuries as a result of the accident and that it was likely he would continue to be troubled thereby at some level into the future. However, the Defendant's expert resiled from this opinion when he was sent a series of publicly available photographs taken of the Plaintiff participating in his pre-accident sporting pursuits.

7. At the conclusion of the evidence an application was made pursuant to s. 26 of the Civil Liability and Courts Act, 2004 (the 2004 Act) to have the Plaintiff's claim dismissed on the grounds that he had knowingly given evidence or had dishonestly caused evidence to be given which was false or misleading. The question which arises is best placed in context against the background from which it emerged.

Background

8. In the years leading up to and at the time of the accident, the Plaintiff had become an 'uber' fit triathlete and mountain bike rider. Amongst the many pre-accident athletic achievements were his participation in 3 national Sprint and 2 Olympic triathlons. For the benefit of the uninitiated, triathlons involve three disciplines: long-distance swimming, cycling and running. The distances involved in the disciplines vary and are material to the issues which have arisen. The Sprint triathlon distances are a 750-metre swim, a 20-kilometre road cycle and a 5-kilometre run, whereas the Olympic triathlon distances are 1500 metres, 40-kilometres and 10-kilometres respectively. The so-called mid-distance triathlon, better known as a 'half Ironman', consists of a 1900 metre swim, a 90-

kilometre road cycle and a 21.5 kilometre run. The long-distance triathlon, or 'full Ironman', involves a 3,800 metre swim, a 180-kilometre road cycle and a 42.5 kilometre run.

Plaintiff's Sporting Profile

9. From an early age the Plaintiff developed a keen interest in cycling and running but only took up swimming out of necessity in 2010, the purpose being to enable him to participate in triathlons. He was altogether the epitome of the super-fit athlete and competed in these activities at the highest level nationally, an achievement assessable only to the few whose dedication and perseverance with the required training programmes is unrelenting. The Plaintiff's ultimate ambition was to become 'an Ironman' and though so described by Mr Byrne in the course of the opening, he had yet to reach that goal, the prerequisite for which is the completion of the most gruelling triathlon of them all, 'the full Ironman'. Prior to the accident, the Plaintiff had been training to take part in this event for two years. In that regard he had recently competed in a triathlon known as 'the Hell of the West', finishing in three hours five minutes and 46 seconds, and had also completed an around-Ireland 3,500-4,000-kilometre cycle road race.

10. In addition to competing in triathlons, the Plaintiff's favourite pastime was mountain bike riding, a sport in which he also competed nationally at the highest level with the Irish Mountain Bike Racing Club. Competitive participation in each of the triathlon disciplines and in mountain bike racing requires endurance, stamina and strength at the very upper end of the performance spectrum which, when taken together with the training programme involved, consumed almost all of the Plaintiff's free time; indeed, besides family and work commitments, he described his preparation for and participation in these activities as 'his life' and unquestionably so it was, a conclusion not the subject of controversy between the parties. Of all these pursuits, the Plaintiff's evidence was that mountain bike riding at an elite level was the toughest of all.

The Plaintiff's Case; Impact of Injuries on Sports and Hobbies

11. Against this background it is hardly surprising that the impact of the accident on the Plaintiff's capacity to return to these activities became the central feature in the case, the kernel of which, encapsulated in the opening by Mr Byrne, is that the Plaintiff was never able to compete competitively at the performance levels he had enjoyed prior to the accident. His focus after the accident was to recover from his injuries as quickly as he could; his goal was to get back to where had been competitively before the accident occurred. I pause here to observe that one of the features which arose from the medical evidence is that, if anything, the Plaintiff's training regime and determination to achieve his rehabilitation goal accentuated and prolonged the course of his injuries. Ironically, had he adopted a considerably less demanding physical exercise routine usually pursued by ordinary mortals it is likely he would have made a full recovery. He is not in any way to be blamed for this, especially as apart from his own ambition he was medically advised to rehabilitate himself as best he could.

12. The first post-accident goal was to regain his fitness; he returned to running, an activity which would ultimately become his main sport. He found this had the least impact on his

symptoms; he continues to run to this day. Competitively, he participated in a number of mountain running races between 2014 and 2016, and in 2015 and 2016 even ran the Dublin City Marathons, which he completed in 4 hours 7 minutes 12 seconds (placed 6,160th) and 4 hours 5 minutes and 56 seconds (placed 7,545th) respectively. However, he encountered real problems on attempting to return to swimming and riding a road bike. Swimming strokes, the crawl in particular, exacerbated his shoulder/ neck pain, causing it to radiate and refer upwards into his head, a problem that failed to fully resolve. Anything over two lengths of the pool provoked pain in the left trapezius muscle / scapula area; the referred pain ultimately manifested as headaches. While the breast stroke ameliorated this problem to an extent it provoked back pain. It is not that he could not or did not return to swimming, rather the crawl in particular triggered pain after a certain period.

13. So far as cycling on a road race bike was concerned, the stiff suspension and stretch posture involved also provoked painful sequelae. As a consequence, the Plaintiff took up working out in a gym, rather than outdoors as was his preference and practice; he was not a member of a gym prior to the accident. He found that he could use an upright stationary 'spin' bike in the gym because the posture involved did not provoke pain. Though he participated in his chosen sports and hobbies post-accident, he was never able to return to anything like the level of proficiency and performance he had enjoyed pre-accident, either in mountain bike racing or triathlons.

14. He made one attempt to return to competitive triathlons when he participated in a 'half Ironman', held in Dublin in 2015. During the event he had to be pulled from the water at the end of the swim and got sick at the end of the run. This convinced him that he was not going to be able to return to these activities competitively. During the swim he had to adopt different strokes and take rests. He also tried to return to mountain bike racing, his favourite hobby, but ultimately had to give that up as well; he did not renew his club membership when it fell due in 2017. The controversy between the parties centred in particular on the Plaintiff's medical reporting, on the cause, nature and frequency of his headaches and on his evidence in relation to the impact of the injuries on his sports and hobbies.

15. Having heard all of the evidence, read the medical reports and viewed the photographs and race time records made available in the course of the trial, there is no doubt in my mind that in approaching his reporting to doctors in the way he did the Plaintiff created a rod for his own back which was very skilfully wielded by senior counsel for the Defendant, Ms Reilly. Whether that approach was a deliberate attempt to mislead the physicians or arose from the format followed by them in consultation and/or from the Plaintiff's beliefs as to the agendas they might have been following and their capacity to understand the minutiae of what was involved in participation in these activities at an elite level, is at the core of the issue which arises on this application.

The Defendant's Case

16. The essence of the case advanced by the Defendant is that, in addition to making assertions that were misleading, the Plaintiff also omitted information from the pleadings,

the particulars, the reporting to doctors and from his direct evidence which was material to the assessment by the doctors, and ultimately by the Court, of the impact that the accident had on his chosen sports and hobbies, in particular on his capacity to participate therein and on his ability to achieve pre-accident performance levels. It was contended that the withholding of relevant information thereto was intentional and was misleading to the point that the net result amounted to nothing less than an exaggeration of the claim by creating an impression which was not a fair representation or reflection of the reality; the consequential falsity was inexcusable.

17. Accepting that the Plaintiff had been injured and that as a result there had been some negative impact on his pre-accident sporting capabilities and performance levels, the Defendant contended that the injuries were not as serious or as profound, long lasting or as incapacitating as the Plaintiff had made them out to be, a contention well illustrated by the Plaintiff's medical reporting. The assertion in the updated particulars of injury that he had been unable to return to triathlon activities was demonstrably incorrect and was clearly misleading when regard was had to the reality of his post-accident participation therein. By way of specific example, in August 2015, the same year in which he also competed in the Dublin City Marathon, not only did the Plaintiff complete a 'half Ironman' he did so in a time of 6 hours 15 minutes.

18. When cross-examined on his finishing time, his evidence was that he had completed this event in seven hours thirty minutes, one hour fifteen minutes longer than was the case, evidence he cannot but have known was incorrect when he gave it, evidence that was likely to mislead. Significantly in the context of the subject issue, the Plaintiff failed to disclose his participation in and completion of the 'half Ironman' either in the Pleadings, in his reporting to the doctors or to the Court, information material to a fair assessment of his claim and only acknowledged when extracted after a lengthy cross examination. These are all serious assertions which if correct carry very serious consequences for the Plaintiff.

The Law;

19. Section 26 of the Civil Liability and Courts Act, 2004 (the 2004 Act) provides:

"(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."

20. For purposes of the Act an expert is defined in s. 25 (5) as meaning

"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."

For the purposes of s. 25, which creates offences for knowingly giving out causing evidence which is false or misleading to be given, s.25 (3) provides that

"an act is done dishonestly by a person if he or she does the act with the intention of misleading the court."

Onus of proof; subjective test; consequences

21. The general maxim at common law that he who alleges must prove applies to s. 26 applications; the Defendant is required to establish that the Plaintiff gave evidence and/or provided information that was materially false or misleading and that the Plaintiff knew this to be so at the time when the evidence or the information was given and the test to be applied is subjective. If and once the case has been made out, the consequence for the proceedings is mandatory; the court is required to dismiss the action in its entirety unless to do so would result in an injustice being done. A considerable corpus of law on s. 26 has been built up since the provision was enacted in 2004. The Defendant relied upon to *Carmello v Casey & Anor* [2007] IEHC 362, *Gammell v. Doyle T/A Lee's Public House & Anor* [2009] IEHC 416, *Meehan v. BKNS Curtain Walling Systems Ltd & Anor* [2012] IEHC 441, *Lackey v. Kavanagh* [2013] IEHC 341, *Platt v. OBH Luxury Accommodation Ltd & Anor* [2015] IEHC 793 and the decision of the Court of Appeal in the same case upholding the decision of the High Court with neutral citation [2017] IECA 221. In addition, the attention of the Court was drawn to the position at common law set out in the judgments of the Supreme Court in Vesey v. Bus Eireann [2001] 4 I.R. 192 and *Shelly-Morris v. Dublin Bus* [2003] 1 I.R. 232.

22. In reply, the Plaintiff relied upon *Banko Ambrosiano SPA & Ors v. Ansbacher & Co. Ltd & Ors* [1987] ILRM 669; *Ahern v. Bus Eireann* [2011] IESC 44; *Goodwin v. Bus Eireann* [2012] IESC 9; *Smith v. The HSE* [2013] IEHC 360; *Nolan v. O'Neill & Anor* [2016] IECA 298; *Platt v. OBH Luxury Accommodation Ltd & Anor* [2017] IEHC 221 and *Cahill v. Glenpatrick Spring Water Company Ltd* [2018] IEHC 420. The principles arising from

these cases are very usefully collated and set out at para 82 *et seq* in the judgment of O'Hanlon J. in *Cahill v Glenpatrick*, supra and merit repetition in *full*:

"(a) Section 26 requires that the Defendant establish an intention on the part of the Plaintiff to mislead the court and secondly that he or she has adduced or caused to adduce evidence that is misleading in a material respect;

(b) A (sic) false and/or misleading evidence must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim fraudulent;

(c) The Defendant is not required to establish that the entirety of the Plaintiff's claim is false or misleading in order to succeed in such an application. Proof, for example, that the Plaintiff's claim for loss of earnings is false or exaggerated to a significant extent may justify the dismissal in total of an otherwise meritorious claim;

(d) The Defendant in the course of the hearing must afford the Plaintiff an opportunity of counteracting the assertion that he gave false and/or misleading evidence or cause (sic) such evidence to be adduced on his behalf, knowing it to be fraudulent;

(e) The burden of proof initially rests on the Defendant in a section 26 application. The court should not rush to judgment where the court is relying on an inference from a proven or admitted fact. The inference should not be made lightly or without due regard to all the relevant circumstances including the consequences of a finding of fault. But that finding should not be shirked because it is not a conclusion of absolute certainty.

(f) Once the court is satisfied that the Plaintiff has knowingly sought to mislead the court to a material respect, the onus must be on the Plaintiff to then establish by whatever means or argument as may be available to him or her that it would be unjust to dismiss the action.

(g) The provisions of s. 26 are not to be used as an opportunity for allowing a Defendant to escape liability by reason of the frailty of human recollection or the accidental mishaps as so often occur in the process of litigation (O'Neill J. in Smith v. HSE [2013] IEHC 360);

(h) Section 26 is designed to operate as a significant deterrent to claimants who might be minded to achieve an unjust result by misleading the court and/or their component (sic) concerning the truth of their claim in some material respect. Once the court is satisfied that the Plaintiff has given false and/or misleading evidence and the Plaintiff has not adduced evidence that to dismiss the claim would cause an injustice, then the claim as a whole must fail, and the legitimate parts of the claim cannot survive.

(i) When seeking to construe s. 26 of the 2004 Act, in a proportional and fair manner, it is relevant to consider the extent of the falsity of the evidence, what the Plaintiff

hoped to gain from the false and/or misleading evidence tendered and whether the Plaintiff has sought to deceive their own experts as well as those of the Defendant."

Impact on Sporting Activities; The Pleadings.

23. In addition to detailing the physical and psychological sequelae of the accident, the particulars of personal injury contained in the Personal Injuries Summons, dated the 1st March, 2017, allege that the Plaintiff had been 'greatly affected' in his hobbies and pastimes, in particular doing triathlons, cycling and swimming as well as in his general day to day activities and parenting. Paragraph 6 of the Notice for Particulars dated the 20th April, 2017 sought full and detailed particulars of the manner in which the Plaintiff's working, social and sporting life had been seriously affected by the injuries together with details of the working, social and/or sporting activities in which the Plaintiff maintained he could no longer engage as a result of the injuries.

24. The Plaintiff's solicitors replied thereto by referring the Defendant to the particulars set out in the Personal Injury Summons, stating that details of the sequelae were a matter for evidence at trial. There was no rejoinder to this reply nor does it appear from the book of pleadings made available to the Court was the Defendant's request perused, either by way of a motion to compel replies or by way of discovery. Thereafter the Plaintiff's solicitors updated the Plaintiff's claim by serving a Notice of Further Particulars of Personal Injury on the Defendant's solicitors, dated 28th June, 2018.

25. In addition to setting out details of the sequelae of the injuries, it was stated that the Plaintiff "*…reported being unable to return to his triathlete activities*." It was stated that cycling aggravated the Plaintiff's neck pain, and that he continued to be '*greatly affected'* in his day to day activities and hobbies. The assertions and allegations contained in the Personal Injury Summons and the Replies to Particulars were verified by the Plaintiff on affidavit sworn the 3rd May, 2018 and the updated Particulars of Personal Injury by affidavit sworn the 20th March, 2019.

26. In submissions the Defendant laid heavy emphasis on the Plaintiff's verification of the statement contained in the additional particulars that he had not returned to his triathlete activities. This is hardly surprising given the incompatibility of the statement, when read in isolation, with the established facts; however, when read, as it must be, together with the pleadings and particulars as a whole, it is quite clear that the Plaintiff's case is that he had attempted to return to triathlons and gave evidence of his attempt to do so.

27. As mentioned earlier, he participated and completed a 'half Ironman' (triathlon) in 2015, However, this was his only attempt to do so, which is in marked contrast to his pre-accident record in this sport. It is against this background that the pleadings and in particular the medical reporting by the Plaintiff in relation to triathlons- which also featured heavily in the Defendant's submissions- must be viewed. The contrast is all the more significant in the context of this application and in the consequences for the Plaintiff should it be successful. In the event, he made no secret of his pre or post-accident sporting activities.

Social Media Record of Participation

28. In this regard, it is not without some significance to the outcome of the issue in hand that the Plaintiff's pre and post-accident participation in sporting activities, including the 2015 and 2016 Dublin City Marathons as well as his participation in the 2015 'half Ironman' were, at all material times, matters of public knowledge accessible through the Plaintiff's own Facebook page and other non-restricted websites. The Defendant's insurers and/ or her legal advisors accessed the Plaintiff's Facebook page and other websites prior to and /or during the trial; the photographs and finishing time records found therein were legally downloaded and used to cross-examine the Plaintiff, a course of action the Defendant was quite entitled to adopt. It is, I think, also fair to point out in this regard that the Plaintiff made no secret of his Facebook page, on the contrary he maintained that he had hidden nothing and that his pre and post-accident sporting profile was at all times there to be seen by the curious and anyone else who might be interested.

29. In 2018, selected photographs and other documentation obtained in this way relating to the Plaintiff's participation in post-accident sporting activities were sent to Mr Michael Glynn, Orthopaedic Surgeon, who had examined and reported on the Plaintiff for the Defendant in 2017. In his report he had expressed an opinion on prognosis to the effect that while the Plaintiff's symptoms might settle somewhat, in the long term he would have some ongoing symptoms as a result of the injuries. He was requested to revisit and review this opinion and prognosis in light of the information furnished and to provide an addendum to his report; he was not asked to re-examine the Plaintiff, nor did he suggest that he might do so. Instead, having considered the information sent to him, he furnished an addendum in which he reversed his previous opinion and prognosis and concluded that the Plaintiff "…*has fully recovered from any injury he may have sustained*".

30. However, it transpired in the course of the trial that Mr Glynn had not been furnished with the photographs of the Plaintiff's participation and performance times in pre-accident events proved in evidence; these were accessible from the same sources as the photographs and race times taken and made post-accident. In my judgment, particularly in light of the case made by the Defendant, it would have been obvious on any objective assessment of the pre-accident photographs and race time records that the information discernible therefrom was clearly relevant to the task Mr Glynn was requested to undertake, about which more later. Suffice it to say at this juncture that no satisfactory explanation was offered to account for the non-disclosure, the effect of which at the time clearly misled Mr Glynn in the formation of his updated opinion and thus in the preparation of the addendum which was subsequently used to cross examine the Plaintiff with vigour.

31. I hasten to add that Mr Glynn is not to be faulted for this state of affairs, rather this obviously arises from the failure to provide him with the full performance data of the Plaintiff so as to include his pre-accident participation and time records in the relevant events. Mr O'Toole, Consultant Orthopaedic Surgeon, who had been called as an expert witness for the Plaintiff, had to be recalled to give evidence because matters relevant to his opinion put to the Plaintiff on cross examination had not been put to him. In fairness

to the Defendant this situation arose because Mr O'Toole had to be interposed in the middle of the Plaintiff's evidence. In the event he was given an opportunity to express an opinion on the Plaintiff's injuries with the benefit of 'the full picture' of the Plaintiff's pre and post-accident participation capacity in his favourite hobby and sports.

32. Mr Glynn was also given the same opportunity and with the benefit of the 'full picture' he very fairly, I thought, accepted that had the Plaintiff fully recovered from his injuries, then he ought to have been able to return to his pre-accident sports and hobbies at the same level enjoyed pre-accident, which was patently not the case. That the Plaintiff tried valiantly to achieve that goal post-accident is as much beyond doubt as the fact that he was ultimately unsuccessful in his efforts.

Impact of Injuries on Sporting Activities; Medical Reporting; Evidence of Dr Simon

33. Sequentially, the first medical report in respect of the injuries was prepared by Dr John Simon following a medical examination of the Plaintiff at the request of the Defendant's insurers on the 1st July, 2014. Dr Simon also gave evidence. The report records the Plaintiff's 'complaints' as being of headaches every few days, "*…becoming less frequent and less intense but are exasperated by prolonged driving and sitting at a computer for an extended period of time*." So far as his sporting and recreational activities are concerned, the Plaintiff is recorded as having said these had been 'adversely affected' and that 'he had only been able to return to swimming'. The Plaintiff took serious issue with the latter statement and was highly critical of the consultation in general which was brief and had the appearance of a box ticking exercise [emphasis added].

34. On clinical examination, Dr Simon found a full range of neck movement with no palpable tenderness or evidence of any neurological deficit. There was also a full range of movement of the lower back, including forward flexion; again no tenderness was elicited. In Dr Simon's opinion, the Plaintiff appeared to have sustained soft tissue injuries to his neck and lower back as a result of the accident, though clinical examination did not reveal any significant findings. He expected the headaches would disappear within three to six months. Under cross-examination the Plaintiff was criticised for failing to disclose to Dr Simon that on the same evening, following the consultation, he was due to participate in a mountain bike league race at Slade Valley, one of three mountain bike league races in which he participated during June/July 2014. The Plaintiff accepted that he had not mentioned that event specifically but he insisted that he had told Dr Simon that he had tried to return to pre accident activities in general, and not just swimming. In fact that was an activity with which he was having most trouble. Under cross-examination Dr Simon accepted that although not expressly mentioned in his report, he assumed the Plaintiff's headaches were due to a neck injury and that the muscles were still in spasm occasionally, though his clinical examination thereof was essentially normal. Although not stated in his report, he understood that the reason the Plaintiff was having physical therapy (he thought it was physiotherapy) was for the neck injury. He did not agree that the consultation was hasty or that his note about the Plaintiff having 'only' returned to swimming was incorrect.

Dr O'Brien's Report

35. Dr William O'Brien prepared two medical reports, the first dated 1st September, 2015 and the second, 19th March, 2019. According to the first report, the Plaintiff's back had improved and was not giving him trouble at the time of his surgery visit on the 18th March, 2015. He was still suffering from 'neck' symptoms, which were triggering headaches two to three times a week [emphasis added]. The problem was not helped by his posture at work – stooped over a computer. He addressed the problem by taking up yoga and gym and was able to do spinning classes (on a gym bike) but still had difficulty on his road bike because this aggravated his upper back pain. Dr O'Brien diagnosed a soft tissue injury to the *mid back and neck* "*…involving tearing and stretching of the muscles and ligaments of (the) spine as a result of the collision in October 2013."* [emphasis added].

36. With regard to the back injury, his opinion was that this had "*…recovered first but his neck has continued to be sore and painful.*" Dr O'Brien suggested an MRI scan be carried out. This was performed on the 26th July, 2015 and was reported as normal. While he thought the headaches were likely to have been triggered by the Plaintiff's neck pain, he also considered the Plaintiff's intake of Nurofen Plus, which included codeine; a component recognised to cause headaches. He also queried why the Plaintiff's neck injury had not completely settled, though he acknowledged a prolonged course was not unusual following road traffic accidents. He prognosticated a full recovery over time.

37. The subsequent report, dated 19th March, 2019, was prepared following a consultation with the Plaintiff on the 18th March, 2019 during which the Plaintiff complained that he was still experiencing pain in his upper left scapula accompanied by neck stiffness and that this was triggering ongoing headaches – two to three times a week-- since the time of the accident for which he was taking Difene or Ibuprofen, also approximately three times per week. He was exercising by hitting a ball against a wall and also by doing strength and conditioning exercises in the gym together with yoga. The Plaintiff reported sleeping well at night since buying a support mattress and pillow.

38. With regard to his sporting activities and hobbies the report states "*he used to compete in triathlons and he tried to go back to this but wasn't able – he experienced special trouble if he tried to swim which would leave him with his scapular pain which in turn would trigger his headaches. He has been able to do weights in the gym increasing on a gradual basis to help recover his muscle strength. He has also had to give up competing in mountain biking which he was doing at a national level because of this pain*." I consider this as good a place as any at which to observe that the reporting time-frame of the reports, a potentially relevant consideration in any case, is in my judgment particularly pertinent to the question under consideration. The instant report well illustrates the point. By the date it was authored, the Plaintiff had given up competitive mountain bike riding and in 2017 had essentially resigned his membership of the mountain bike racing club by not renewing his annual subscription. He had also given up participation of triathlons after completing the half Ironman in 2015. Dr O'Brien did not give evidence.

Dr Callan's Medical Report

39. Dr Richard Callan prepared a report for the Injuries Board dated the 11th December, 2015 in which he refers to a report from the Plaintiff's former GP, Dr Ling, and to the results of X-rays and the MRI scan of the 26th July, 2015. He recorded the complaints made as including "*upper back locks up; left neck pain; headaches which occur when he wakes up; irritable mood swings and stress; he was a keen cyclist before the RTA and did triathlons competitively but while he has now returned to cycling it is at a much lower 'beginner's level'. He takes brufen 600mg every day now. He had a OGD about five months ago for upper stomach complaints which may have been related to his pain killing medications."*

40. In his opinion, the Plaintiff suffered soft tissue injuries affecting his neck, mid back, left brow and left shoulder together with headaches, mood swings with irritability. The Plaintiff's 'active lifestyle' prior to the RTA had been 'badly affected'. With regard to prognosis, his expectation was that the symptoms would resolve over the following six to twelve months approximately and he did not expect any adverse long-term sequelae. The Plaintiff was at pains to explain under cross-examination that his participation in what were handicap mountain bike league races was a far cry from the elite events in which he had participated pre-accident, hence his reference to 'beginner's level' during consultation with Dr Callan. [Emphasis added.] Dr Callan did not give evidence.

Report and evidence of Mr O'Toole

41. Mr Gary O'Toole, Consultant Orthopaedic Surgeon, prepared a report dated the 11th June, 2018 and gave evidence. He understood that as a result of the collision, a substantial amount of damage had been caused to the Plaintiff's car, estimated in the region of €15,000 to €17,000. The Plaintiff had been given this figure by his employer's fleet manager and gave evidence that he only became aware of the substantially lower agreed cost two days before the trial. Mr O'Toole records the Plaintiff as having sustained an injury to his 'lower back' rather than mid back and that this had considerably improved. [Emphasis added.] The Plaintiff gave evidence that he had recovered from the back injury within approximately six months of the accident but that he had ongoing pain in his cervical spine and left trapezius musculature. Although intermittent, the neck pain was the cause of headaches, described as 'severe' and occurring three to four times per week.

42. With regard to sporting and recreational activities, Mr O'Toole noted that the Plaintiff was a high-class national level triathlete and mountain biker, having completed several half ironman events, and that he was training to do a 'full Ironman'. The Plaintiff's evidence was that he had only competed in one 'half Ironman' and that was in 2015, though he had competed in triathlons pre-accident. The conflict on the face of the report is more apparent than real. In evidence Mr O'Toole explained that a 'half Ironman' is a triathlon and that the terms are used interchangeably by triathletes. His report continues *"…he has not been able to rehabilitate himself back into ironman activities as he feels the serving (sic) to be challenging and can aggravate his neck pain as well as the cycling in the triathlon position to be challenging as he tries this the same (sic) for any period of time*." Again, the position of the Plaintiff with regard to his participation in sporting activities at the time of medical examination and report is pertinent.

43. The Plaintiff is recorded as having complained of occasional paraesthesia down his left upper limb and of occasionally waking from his sleep with tension headaches. On examination he had an excellent range of motion of his cervical spine, including full forward flexion, extension, and lateral rotation, both to the right and to the left. Neurological examination of the upper limbs was normal for tone, power sensation and reflexes. The cranial nerves I to XII were normal, functional and intact. There was some pain with deep palpation of the left trapezius musculature. Straight leg raising was to 90 degrees bilaterally. There was an excellent range of motion of the hips and the Plaintiff had no pain with deep palpation of the lumbar spine. Mr O'Toole understood the MRI scan ordered by Dr O'Brien to have been reported as essentially normal for the Plaintiff's age.

44. He expressed the opinion that the Plaintiff had ongoing sequelae in relation to an accident in which there had been a significant amount of damage done to his car, the worst sequelae being ongoing neck pain and headaches associated with the neck pain. With regard to prognosis he considered that, at four and a half years post-accident, he did not expect the Plaintiff's symptoms to improve into the future and that he would be permanently reliant on methods that he had discovered to relieve his tension headaches. In evidence Mr O'Toole confirmed that the history contained in his report had come directly from the Plaintiff. Significantly, he stood over his opinion in evidence.

45. As mentioned above, Mr O'Toole was interposed by agreement during the Plaintiff's evidence. He gave evidence in line with his reports and described the cause of the Plaintiff's intermittent headaches as tension radiating from the injured trapezius muscles into the cervical spine. With regard to the complaint of intermittent paraesthesia in the left arm, Mr O'Toole explained that this was likely due to a trapped nerve or an inflammation within the musculature and/ or the brachial plexus underneath the arm brought about by repetitive strain. The problem was soft tissue in nature rather than a pathological injury, such as a prolapsed disc, for which there was no evidence. Mr O'Toole was recalled so that he could be given an opportunity to comment on a number of matters which had been put to the Plaintiff on cross-examination. He had had an opportunity in the interim to consider the Plaintiff's recorded performance times for his participation in the 'Hell of the West' triathlon in 2013 and the recorded times in the 2015 half 'Ironman'. In his opinion, there was a significant difference in performance split times. Mr O'Toole took the opportunity to correct certain references to the 'Ironman' in his report.

46. The references to having completed a number of 'half Ironman' events before the accident were attributable to the interchangeability of terms; a 'half Ironman' is a triathlon and the Plaintiff had done a number of those pre-accident. His understanding was that the Plaintiff had been training to do a full 'Ironman' prior to the accident rather than a 'half Ironman' and that he had been unable to achieve that goal. He faced a fair but rigorous cross-examination at the conclusion of which he stood over everything he told the Court: the inescapable fact of the matter was that the Plaintiff had at all times maintained that he was unable to achieve the same perfomance levels in his chosen sport

as he had enjoyed pre-accident. In this the pre and post-accident performance times back him up or as Mr O'Toole put it, the 'clock doesn't lie'. The Plaintiff sustained a musculature injury as a result of which he was going to have ongoing sequelae, though he would be less troubled or not at all if he adopted a less active and more sedentary life style.

Reports and Evidence of Mr Glynn

47. Mr Michael Glynn prepared a report dated the 27th July, 2017, and an addendum to the report dated the 28th April, 2018 which has already been mentioned; he also gave evidence. The Plaintiff is recorded as having pain in his upper back when using a road bicycle and that he had stomach upsets post-accident as a result of taking a lot of medication, for which he required an endoscopy as a result of which his stomach upset settled down. On clinical examination the Plaintiff complained of discomfort on the left side of his neck over the left supraspinatus area of the scapula. With regard to the impact of the injuries on his ability to carry out his sporting and recreational activities Mr Glynn records the Plaintiff as stating that "…*he used to do mountain biking and triathlons and has trouble doing this. He persists with exercises and cycling because he feels better but he has pains and aches when he does this. He also finds swimming more difficult*."

48. In his summary, Mr Glynn states "…*this patient was in a car, which does seem to have sustained a significant impact from behind. His car struck the car in front. He states it was a new car and was very severely damaged. He has complained of his neck and back following this. He has had numerous physiotherapy sessions. He is somebody who had a high level of exercise and physical activity before this accident. He still does biking and swimming but he finds that his shoulders are stiffer and also when he is cycling he finds it more difficult around the back of his neck and upper shoulders he states he gets headaches following these activities. As it is now three years after this accident his symptoms may settle somewhat but it does seem that he will have some ongoing symptoms in the long term."*

49. Reference has been made earlier to the readily available photographic and performance time records on social media and that this material was accessed and downloaded by or on behalf of the Defendant. On the 21st March, 2018 the Defendant's solicitors sent Mr Glynn the following documents:

    (i) A copy of the Plaintiff's first medical report from Dr Simon, dated July 1st 2014;

    (ii) A copy of the report from Dr Callan, dated the 11th December, 2015; and

    (iii) The Defendant's Claim Investigation Unit findings on the Plaintiff, which included a reference to mountain bike racing in 2014.

    The documentation included photographs of the Plaintiff taking part in mountain bike competitions in November 2014, December 2015 and January 2016 and in the 'Hellfire Spring' and 'Annagh Hill' mountain running events the same year. Mr Glynn was requested to carry out a review of this documentation and to furnish an addendum to his report of 27th July, 2017; he completed the addendum on the 28th April, 2018.

50. Having reviewed the photographs and race time recordings of the Plaintiff's performance in a number of events between 2014 and 2016, he concluded that the Plaintiff "…*had fully recovered from any injury he may have sustained*" (the opposite to the opinion he expressed in his 2017 report) and that in his opinion the information regarding his ability to return to competitive events given to Dr Simon and Dr Callan as per their reports summarised earlier was not correct. As mentioned previously, Mr Glynn was not made aware of the Plaintiff's participation in pre-accident events nor of his pre-accident performance times, a failure which on my view of the evidence, as mentioned earlier, deprived him of relevant information to enable a fair causal comparison between the Plaintiff's pre-and post-accident sporting capacity and performance levels to be made. In fairness to Mr Glynn, as mentioned earlier, in answer to questions of clarification from the Court and with the benefit of the 'full picture', his opinion was that if the Plaintiff had fully recovered from his injuries then he ought to have been able to return to his pre-accident sports and hobbies at the performance levels enjoyed pre-accident.

51. One of the striking features of the medical reporting, which by and large followed the Injuries Board template, is that having regard to the Plaintiff's reported complaints concerning the impact that the injuries had on him and the fact that Mr O'Toole and Mr Glynn were conversant with triathlons (each gave evidence of their own experiences in this sport), there appears at best to have been only a cursory enquiry or, on the face of some reports, none at all to establish the Plaintiff's pre-accident competitive position in his sporting activities by comparison with the position post-accident. On my view of the evidence furnishing the pre and post-accident photographs and race times would have been necessary if a proper evaluation by Mr Glynn of the extent to which the injuries had impacted on the Plaintiff's participation and performance levels was to be made.

52. Both Mr O'Toole and Mr Glynn are experienced sportsmen in their own right. Mr Glynn participated in a very demanding triathlon and had also participated in at least two marathons so was intimately familiar with what was involved. Whether he would have expressed these views he did if he had been furnished with the full picture of the Plaintiff's pre and post-accident performances must be open to serious question, particularly when regard was had to his evidence given once armed with the full picture, and is a matter which is properly to be taken into consideration in the determination of the application.

Role of the Medical Examiner; Scope of Questions

53. A medical expert carrying out an examination of a Plaintiff with whom a professional patient relationship does not exist is just as entitled as the physician who enjoys such a relationship to ask questions pertaining to the injuries and the sequalae thereof which are the subject matter of proceedings and the answers to which may be utilised and relied upon in the conduct of the litigation and in assisting the court in determining medical issues and in reaching conclusions thereon. This dictum is made in the context of the Defendant's assertion on the one hand that the Plaintiff withheld information about his post-accident involvement in sporting activities material to his claim and on the other

hand his evidence that though he hid nothing he was not asked questions relative thereto by the physicians who examined and reported on him.

54. If a medical opinion is to be formed and expressed as to when, where, why, how and to what extent the injuries complained of have affected, inter alia, the Plaintiff's ability to engage in his pre-accident sporting activities, it seems reasonable to conclude that the physicians responsible for giving the opinion would need to establish from the plaintiff the necessary information to enable a fair evaluation to take place and for an objective opinion to be formed. Whatever shortcomings there may be in failing to volunteer information where the circumstances and information provided or otherwise communicated begs a question pertinent to the opinion, then the question should be asked. When cross-examined the Plaintiff was quite candid about his approach to this issue; he did not see it as his role to pre-empt the examiner's questions by volunteering information that was not sought.

55. In my judgment, save in the case of intentional falsity or deliberate/ dishonest intention to mislead on a material matter, the potential consequences of failing to volunteer evidence material to a claim should not, in the absence of appropriate enquiry, be visited upon a Plaintiff particularly where the known circumstances and/ or the information disclosed calls for questions that were not asked but the answers to which may have elicited the appropriate information. Moreover, in considering an application to dismiss a claim and having regard to the onus of proof, reprehensible behaviour on the part of Defendant should be taken into account and in the event that the application is dismissed an award of aggravated damages should, if appropriate and if sought, be made to the Plaintiff.

Conclusion; Duty of The Defendant

56. Given the nature of the application the defendant should be seen to be free of any of the criticisms or such like levelled at the Plaintiff. This is especially so when reliance is placed on the evidence of an expert, retained to examine and report, which is used to cross-examine the Plaintiff, and which forms the ground or grounds on which the application is founded. There is a duty on a Defendant to make sure, in so far as is reasonably possible, that information or other materials provided to an expert in the course of litigation for the purposes of an opinion and for the assistance of the court is not itself misleading or as might otherwise reasonably result in the formation of a biased, insufficiently informed or unbalanced opinion.

57. The Court views with displeasure the Defendant's failure to provide Mr Glynn with the pre and post-accident photographs and performance time records of the Plaintiff's participation in his favourite hobby and sports so as to enable a fair comparison to be made and a balanced opinion to be formed with regard to the impact, if any, the injuries had had and whether or not the Plaintiff had recovered or remained and or was likely to remain affected thereby, particularly when the materials to do so were so readily available.

Defendant's Submissions

58. Written and oral submissions were made on behalf of the parties. These have been considered by the Court. It is not intended to set these out in any detail here, suffice it to say that it was submitted on behalf of the Defendant that the manner in which the Plaintiff gave his evidence in chief and the content thereof could only be categorised as litany of repeated omissions of material information regarding the level of his post-accident sporting activities. In the absence of a reasonable explanation for this behaviour it was submitted that the evidence given amounted to nothing more than a deliberate concealment which he knew to be material to his claim; the factual truth contradicted and was materially different to the Plaintiff's direct evidence. The crucial but by no means only omission from this evidence and from the reporting to the physicians was the failure to disclose to the Court that he had completed a 'half Ironman' in August 2015 and had completed the Dublin City Marathons in October 2015 and October 2016, this notwithstanding ample opportunity having been afforded to him in questioning by his own counsel and by the Court.

59. Given the complete picture of the Plaintiff's sporting participation and the level of his activities, which only emerged late in the course of cross-examination, it was contended in the context of a claim which was so focussed on the impact which the accident had had on his ability to return to and to participate in his chosen sports at an elite level that these were matters which should have been included in the pleadings but were not, that these were matters which should have been articulated by the Plaintiff in direct evidence but were not, and that these were matters which should have been disclosed in response to the direct questioning by the Court but were not, a state of affairs that calls into question the reason for the failures. It was contended that the Plaintiff, as a reasonable person, could not have failed to appreciate the relevance of the information in question and that the detail of his level of activity was material to the consideration by the Court of his claim for damages.

60. Considering the emphasis laid by the Defendant on the Plaintiff's medical reporting and on his evidence in chief as a ground for the dismissal of the proceedings, the evidence in this regard must necessarily be viewed in context. The first observation to be made in this regard is that although referred to in the opening as an 'Ironman' and, after the accident that he had also participated in two Dublin City Marathons, the Plaintiff's participation in these events were not identified by name in direct questioning by his own counsel. This is not intended as a criticism of counsel, rather the impression I had of it was that the purpose of the approach adopted was to highlight the essence of the Plaintiff's claim, namely that as a result of his injuries he was never again able to achieve the activity and performance levels in his chosen sports and hobbies that he had enjoyed prior to the accident.

61. It is clear from his direct evidence that running had become the Plaintiff's main sport, including running in the mountains and that he had engaged in running competitions for fun. The Plaintiff gave evidence concerning his performances and that he had been well outside the first 100 finishers, a fact amply evidenced by his official placings in the 2015 and 2016 Dublin City Marathons. Apart from the failure in his direct evidence to mention

his participation in these events by name, the Defendant contended that the Plaintiff's participation in the 'half Ironman' in August 2015 would have been remained undiscovered were it not for the admission of his participation which had to be extracted during the course of a lengthy cross-examination and then only in circumstances where the Plaintiff feared that the Defendant had access to or had accessed posts in relation to the event on social media. I do not accept this submission. The assertions do not withstand scrutiny

62. While it is certainly the case that in his direct evidence the Plaintiff did not refer to having completed a 'half Ironman' he did give evidence that he had participated in a triathlon event after the accident but had nearly been disqualified. In answer to a question from the Court as to when this event had taken place the Plaintiff replied, "2015". The evidence establishes that the only triathlon event in which the Plaintiff participated post-accident was the 'half Ironman' which for the reasons explained earlier it is also referred to as a particular form of triathlon. His participation in the 'half Ironman' featured prominently in the cross-examination of the Plaintiff. Contrary to the Defendant's submission the Plaintiff's participation in this event emerged not at the end of a lengthy cross-examination but was pointedly referred to by name shortly after the commencement thereof in the course of a questioning by Ms Reilly, when she referred to the Plaintiff as having had a 'half Ironman' "…*under his belt*." His reference later in evidence to possible disqualification from that event relates to a fact not in dispute, namely, that he had to be dragged from the water after his swim in Scotsman's Bay, located just to the east of Dun Laoghaire harbour, Co. Dublin.

Plaintiff's Submissions

63. On behalf of the Plaintiff, for reasons set out in submissions it was contended that the Defendant's application was entirely misconceived. At every opportunity the Plaintiff had candidly and overtly accepted all events and activities when questions about these were put to him during his examination in chief and on cross-examination, including all of the information which had been sourced through social media. Indeed, the Plaintiff had on occasion unilaterally proffered further evidence as to what activities and events he was capable of and had done. He had not hidden anything from his legal team, from the physicians whom he attended, from the Defendant or the Defendant's physicians or, for that matter, the Court. He had taken issue with the content of Dr Simon's report from the outset and repeatedly did all of this on cross-examination. In what was a comparatively short consultation, he insisted that he had informed Dr Simon what it was he was able to do in terms of his sport and hobbies.

64. The Plaintiff's evidence was that his participation and performance in triathlon disciplines and mountain bike riding post-accident was taken entirely out of context. There was a failure to appreciate his pre-accident participation and performance levels in these sports and hobbies and to contrast that with what he was capable of achieving post-accident. In essence this was the kernel of his case insofar as it concerned the impact which the injuries had had on that aspect of his life. That is the case he made in pleadings, to the doctors, and to the Court. Significantly when the medical evidence is considered in its

entirety, as it must be, neither Dr Simon nor Mr Glynn substantiated under cross-examination the suggestion that the Plaintiff had intentionally sought to mislead either of them or, for that matter the Court.

65. Furthermore, it was significant that Mr Glynn saw no inconsistency whatsoever in the Plaintiff's presentation Dr Simon and to him, nor was he in any way suspicious of the Plaintiff; indeed, had he had that impression he would have said so in his report and in his evidence but did not do so. Moreover, it transpired in the course of the evidence that information which the Plaintiff had given Mr Glynn which was recorded in notes taken at the time did not find its way into Mr Glynn's original report. Insofar as it may be considered that the Plaintiff had withheld information which he ought otherwise to have furnished for the purposes of the pleadings or medical reporting there was no evidence that any such omission was a deliberate attempt on his part to mislead anyone.

66. He freely admitted to having adopted an approach to medical consultations whereby he did not pre-empt questions by volunteering information but rather answered questions when they were asked. It was also significant that there was objective circumstantial evidence to corroborate the Plaintiff's case: not that he failed to participate in sporting activities and hobbies post-accident, but rather that his participation and performance levels in those activities were significantly affected when compared with his pre-accident participation and performance record in the same activities. This was particularly so when regard was had to independently verifiable race time results, encapsulated in the observation made by Mr. O'Toole, that "the clock doesn't lie".

67. Finally, the Plaintiff had not exaggerated his injuries in any way. If anything, he had frustrated his recovery by his valiant attempts to rehabilitate himself and to do that without beating a path to a doctor's door. The fact that he had not had extensive medical treatment or medical investigation did not mean he had not been injured or that his injury was not serious. He was a super fit athlete whose genuine belief was that he could recover and return to his pre-accident status by taking the measures and doing what he did to keep fit. In effect he did everything he could to minimise his loss. He went back to work as soon as he could and even though he was unable to work the additional hours and at the same level of intensity as he had pre-accident he continued to do his best in the circumstances in which he found himself. To ameliorate symptoms, he took various measures, including adapting his work station and posture. In all these circumstances, the Defendant's application should be dismissed.

Decision

68. I have had the benefit of hearing all of the evidence, of seeing all of the Facebook photographs, of reading the performance time records and medical reports prepared by the physicians. I have also had the benefit of having had the opportunity of assessing the demeanour of the witnesses called to give evidence. With regard to the Plaintiff, whose case this is, I am satisfied that in general he gave his evidence in a straightforward and truthful manner. To the casual observer his reasons for not volunteering information in the absence of questions or going into detail about the differences between his pre and post-accident participation and performance levels might seem unusual. As observed

earlier in my judgment this approach contributed in no small way to creating a suspicion in the mind of the Defendant's advisors that there was something amiss and that this was part of a deliberate attempt by the Plaintiff to mislead both the Defendants and the Court, a submission that, for the reasons given herein, I cannot accept.

69. It is not insignificant in the context of the present application that there is objective circumstantial evidence, mentioned previously, which sustains my view of the Plaintiff's veracity. A considerable period of time elapsed before he turned to the idea of bringing a claim at all; indeed, the summons was not issued until the 1st March, 2017 in respect of an accident which occurred on the 6th October, 2013. Medical reporting proximate to that time and thereafter, not to mention the content of the pleadings and particulars, post-dated a time when the Plaintiff had already given up his attempts to return to competitive mountain bike riding and triathlons. Statements contained in the pleadings and medical reports have to be seen in this context and not taken in isolation. On an application of this sort the issue is not whether the physicians or the Court was actually misled, rather the question at the heart of the matter is whether or not at the material time judged subjectively the Plaintiff intentionally gave information and or evidence which was false and/or misleading in relation to a matter material to the claim.

70. From a very early stage in medical reporting, long before the issue of proceedings, the Plaintiff readily and fairly admitted that his lower back injury had resolved within approximately six months of the accident, a fact which, in my judgment at least, is inconsistent with an intention to mount a claim the purpose of which is to maximise the prospects for recovery of compensation. Indeed, this particular feature impressed Mr O'Toole in his assessment of the Plaintiff as being entirely genuine in his complaints. I was impressed by Mr O'Toole, in particular by the way in which he withstood a vigorous cross-examination and reaffirmed his opinion that the Plaintiff had not only been injured but had not yet recovered from his injuries and could expect to experience ongoing symptomology unless he were to adopt a comparatively sedentary lifestyle. I accept Mr. O'Toole's evidence.

71. Applying the principles which emanate from the jurisprudence that has evolved since s. 26 was enacted to the circumstances and facts of this case I am satisfied and the Court holds that the Defendant has not discharged the onus of proof required to establish, on the balance of probabilities, that the Plaintiff gave evidence or information or caused evidence or information to be given material to the claim which he knew to be false and/or misleading. For all of the reasons which are set out in this judgment, I am satisfied the Plaintiff falls into an entirely different category of claimant than those whose claims were dismissed in the case authorities to which the Court was referred. For example, the comparison between this claim and the claim advanced by the Plaintiff in *Platt* could hardly be more stark.

72. Section 26 is not to be used nor was it intended to be used as a weapon to be deployed at will to meet the claims of plaintiffs which contained ordinary frailties often associated with and seen in litigation, particularly of this type. The intention of the Oireachtas is

clear from the wording of the provision, namely, to discourage and prevent fraudulent claims being prosecuted at all, never mind being brought to conclusion. I am satisfied, and the Court finds that this is not such a claim. As Cross J. observed in *Lackey* the inappropriate use of s. 26 may be met, in an appropriate case, with an award of aggravated damages. For a recent example of the application of this sanction see *Keating v Mulligan* [IEHC] 47.

73. However, in the circumstances of this case, I do not consider that the Court would be warranted in adopting that approach here. As mentioned earlier, the Plaintiff's approach of not volunteering information unless questioned and the consequential failure to convey to the physicians the niceties of the distinction between his pre and post-accident participation and performance levels in his chosen sports had the effect of creating a rod for his own back which was very skilfully deployed by Ms. Reilly, as was her duty on behalf of the Defendant.

74. In the circumstances, I am satisfied and find that the use of s. 26 by the Defendant to meet the Plaintiff's claim was not inappropriate and does not warrant an award of aggravated damages being made to the Plaintiff. It is enough that the application is dismissed. I should add for completeness that, if I am wrong in coming to the conclusion that I have on the substance of the application, I consider that in the circumstances of this case for all of the reasons set out in this judgment, that an injustice would be done to the Plaintiff by the making the order sought.

Quantum

75. The action otherwise being one for an assessment of damages only, the next issue which the Court is required to address is that of quantum for the Plaintiff's injuries. Apart from the claim for special damages, the amount whereof has been agreed, the Plaintiff is entitled to an award of general damages for "pain and suffering" resulting from the injuries caused by the accident. The legal principles to be applied by the Court in carrying out an assessment of general damages are well settled. For my part the most succinct and comprehensive explanation of 'general damages for pain and suffering' is to be found in the judgment of McCarthy J. in *Reddy v. Bates* [1984] ILRM 197 at 205 where he stated:

> *"Such damages are frequently stated to be for pain and suffering; they would be better described as compensation in money terms for the damage, past and future sustained to the Plaintiff's amenity of life in all its aspects, actual pain and suffering, both physical and mental, both private to the Plaintiff and in the Plaintiff's relationships with family, with friends, in working and social life and in lost opportunity."*

General damages must in all cases be reasonable and fair to the parties and must be proportionate to and commensurate with the injury or injuries suffered or likely to be suffered as a result of the wrong. In carrying out an assessment of general damages the Court must also have regard to the Book of Quantum as required by s. 22 of the Civil Liability in Courts Act, 2004.

76. Accepting as I do the Plaintiff's own evidence, the evidence of Mr. O'Toole, and the evidence of Dr O'Brien contained in his reports as admitted, I am satisfied, and the Court finds that as a result of the accident the Plaintiff suffered soft tissue injuries to his neck/upper back as well as to his lower back, that he was shocked and upset by the accident and that the injuries resulted in sequelae which manifested as pain in the upper back and neck region and in the lower back as well as causing an alteration of mood as well as irritability and consequential disruption of family relationships. The lower back injury cleared up within approximately six months of the accident, however, the injury to the trapezius musculature has persisted. An explanation for this was offered by Mr. O'Toole. Although x-rays and MRI scanning were normal, it did not follow that there was no injury to the soft tissues.

77. In answer to a question from the Court he explained that notwithstanding normal cell rejuvenation, discrete soft tissue scarring resulting from the initial insult will render the muscle more susceptible to triggers caused by movements which manifests in pain receptors, in the Plaintiff's case resulting in radiation of pain upwards into the cervical spine causing tension like headaches. The crawl and head movements for breathing when swimming with this stroke was a perfect example of an activity which triggered pain and consequential headaches. Apart from physio therapy and physical therapy the Plaintiff has not had any significant medical intervention for his injuries. Mr. O'Toole explained that as an orthopaedic surgeon there was nothing he could do for the Plaintiff. The injury was soft tissue in nature. I took this to mean that there was very little by way of medical intervention which could assist the Plaintiff.

78. He took pain killing medication and analgesia when the headaches were bad and, as I understood the evidence, continues to do so when the headaches are in extremis. The Plaintiff was criticised for not having the ongoing headaches investigated by a neurologist. However, he found that the occurrence of these symptoms could be restricted to current levels by the techniques he carried out in the gym, by Yoga and by having ongoing physical therapy initially afforded by Ms. Breda Berry and subsequently by his wife who is also a qualified physical therapist running her own business. She gave evidence in relation to the treatments carried out, the apparent benefits derived by the Plaintiff therefrom and the impact generally which the injuries have had on her husband. I accept her evidence.

79. The fact that the Plaintiff did not beat a path to a doctor's door and did not seek or receive medical intervention of some description for his injuries other than physical therapy and pain-killing medication does not equate with the conclusion nor would it be correct to infer therefrom that the Plaintiff's injuries were essentially minor or at best moderate in degree. The Plaintiff gave evidence that apart from the impact which the injuries have had on his capacity to enjoy his pre-accident sports and hobbies at a level he enjoyed prior to the accident, the consequences impacted on his relationship with his wife and his children. He experienced mood change and irritability and his capacity to participate in and perform in his sports and hobbies as he had pre-accident, a situation

which remains. He has modified his work station and postures in order to try and ameliorate the occurrence of symptoms i.e. pain and headaches. T

80. The Plaintiff also gave evidence that he believed his incapacity to perform his work duties at the high levels which he did pre-accident, the restrictions on his time and the fact that on occasions he has to leave work early when his headaches are extreme have impacted negatively on his career prospects and progression. I have no doubt that he believes this to be so though no evidence was called to corroborate the belief as a fact. However, it is not something about which he was challenged and in fairness to him he did not mount or seek to bring a claim for future loss of earnings or enhanced general damages for loss of opportunity, another aspect of the case which also goes to my assessment of the Plaintiff as a genuinely injured claimant. Moreover, if he had intended to maximise his claim to the point of exaggeration it would have no doubt have been convenient to do so though this avenue but to his credit he chose to otherwise.

81. As mentioned earlier, this is a most unusual case. A normal mortal living a much more sedentary life is likely to have fully recovered from or essentially fully recovered from injuries of the type sustained by the Plaintiff. However, the law of tort in this regard is clear: the wrongdoer must take the victim of the wrong as found. In this instance the victim, the Plaintiff, was a super fit athlete who sustained soft tissue injuries which have had a very significant impact and effect on his enjoyment of the amenities of life, in particular his chosen sports and hobbies, for which he is entitled to be compensated. On the evidence of Mr. O'Toole a choice faces the Plaintiff. He can put up with the intermittent symptoms that he currently experiences and is likely to experience to some extent in the foreseeable future or he can ameliorate these further if not totally abolish the problem by choosing to live a sedentary existence, which is entirely inconsistent with his personality and his lifestyle preferences and experiences to date.

82. Whilst this may resolve the occurrence of future intermittent sequelae it would also involve an immense personal sacrifice for the Plaintiff and is something which must also therefore be taken into the balance in determining fair and reasonable compensation for him. Whatever else, the law does not permit the Plaintiff to be undercompensated, particularly in circumstances where he has done what he perceived to be the best he could to rehabilitate himself and thereby to minimise his loss. The opposite is of course also true, he must not be over compensated since that would be unfair to the Defendant and equally unjust. In the circumstances of his case I consider that the Plaintiff's injuries can fairly be positioned within the higher end of the moderate to severe range of damages prescribed in the Book of Quantum.

Ruling

83. Accordingly, the Court considers that a fair and reasonable sum to compensate the Plaintiff by way of general damages for pain and suffering to date and into the future proportionate to and commensurate with his injuries is € 50,000. I am further satisfied, and the Court finds that the treatments afforded to the Plaintiff for physical therapy to date were appropriate and that the modest claim for special damages in this case should

be allowed and added to the award of general damages making in total the sum of €60, 612.72. And the Court will so order.