

TRENDS AND ISSUES IN PERSONAL INJURY LITIGATION¹

Abstract: In this article the emerging trends in the trial and conduct of Personal Injury litigation in Ireland is examined. This will be through analysis of the role of the judge in these cases and an exploration of developments in statute and case law, with a particular focus on false and exaggerated claims and on s. 26 of the Civil Liability Act and Courts Act 2004. There is also a focus on debates surrounding damages and costs in this area.

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The Role of the Judge in Personal Injury Litigation

Posner has written that 'the main purpose of the Separation of Powers is, in economic terms, to prevent the monopolisation of the coercive power of the State ...'²

A key question when examining issues in this area is the role the legislative and judicial branches of state should have with regard to personal injury. The importance of an independent judiciary cannot be overstated – and accordingly this has been given great significance in our laws. Per Article 35.2^o of the Constitution, 'All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law'. Every person appointed to be a judge must take the oath set out in Article 34.6.1^o of the Constitution the wording of which includes the phrase 'without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws'.

This constitutional oath is taken very seriously by all members of the judiciary, and this pledge of independence guides all decision making. A judge in personal injury actions can no more have a policy of being in favour of insurance companies than they can be in favour of plaintiffs for example.

In examining the Constitutional role of the judge, the Irish Supreme Court in *O'Byrne v Minister for Finance*³ endorsed heavily the words of Dr Schwartz in *American Constitutional Law*,⁴ when he wrote:

Ever since de Tocqueville, outside observers have emphasised the primordial role of the judge in American society... Because of this high responsibility the independence of the judiciary from both the legislative and executive branches is the keystone of American constitutional government.⁵

Maguire CJ in *O'Byrne* held that in the Irish context 'these words can be applied without alteration to the position of the Judges under our Constitution'.⁶

¹ This article is based on a lecture given by Ms. Justice Bronagh O'Hanlon entitled 'The Trial and Conduct of Personal Injury Litigation' presented at the annual Adrian Hardiman Memorial Lecture Series, 2 July 2019.

² Richard A Posner, *Economic Analysis of the Law*, (6th edn, Aspen Law and Business 2002) 894.

³ [1960] 94 ILTR 11.

⁴ Bernard Schwartz, *American Constitutional Law* (1st edn, ABC-CLIO 1969).

⁵ [1960] 94 ILTR 11 [43].

⁶ [1960] 94 ILTR 11 [43]-[44].

It is imperative that the Courts retain discretion in any given action to ensure constitutional rights are vindicated and fair procedures are followed.

At one time, juries in Ireland were also used in many civil cases, including in personal injuries actions,⁷ and therefore held the role of finder-of-fact. However, the Courts Act 1988 abolished a plaintiff's right to have High Court personal injuries actions decided by a jury.⁸ Nowadays, in such actions, the judge is both the finder of fact and applies the law; an important dual function relying on the experience and expertise of the Judge.

It is important to highlight the point that Ireland is in marked contrast to many other common law jurisdictions, in that it does not have juries in personal injury cases. As Cross J and Gelfrand explain 'the assessment of the amount of damages involves the judge's subjective view of what is reasonable. In other words, since the abolition of juries in 1988, a judge has to decide upon a figure to compensate the injured party'.⁹

As will be discussed, the Civil Liability and Courts Act 2004, at the time of its introduction, was heralded as tackling what has popularly become known as 'compensation culture'. Even today, there is still a substantial question around this issue and it has been a topic of significant debate within both the legal and media communities in this jurisdiction. As Fleming points out in his renowned work, *The American Tort Process*:

Tort and criminal law not only claim the vast bulk of all litigation but also share a high level of public attention due to widespread disagreement about social purposes and means. This conscientiousness in the case of Torts is fanned by special interest groups: the plaintiffs' bar and consumer organizations on the one hand and a combination of target defendants (business and professions) and the insurance industry on the other.¹⁰

A huge amount of this discussion has focussed on the size and sum of damages awarded, resulting in the recent publication of the Civil Liability (Capping of General Damages) Bill 2019 which has recently passed the second reading in the Seanad or Irish Senate. This Bill, as the name suggests, seeks to cap personal injury awards with the stated aim of lowering insurance premiums.

This Bill of course is a political matter and therefore I will not pass comment or debate it, as that is an issue for the Oireachtas. However, what I would like to examine is the more general issue what is the role of statute and what is the role of a judge in this context? Does the current legal system utilise both sources in personal injury litigation and does this result in a fair and just adjudication?

Firstly, we begin by assessing what exactly should be the aims of personal injury law. Daniels, an American scholar states that the system should have two principal aims: (1) to

⁷ Law Reform Commission, *Jury Service* (LRC 107-2013) 5.

⁸ Section 1, discussed by Barton J in *B.D. v Minister for Health and Children* [2019] IEHC 173 [68].

⁹ Kevin Cross and Dmitriy Gelfrand, 'The hidden persuaders and the inner nature of the tort action' (2017) 22(5) *The Bar Review* 133, 134.

¹⁰ John G Fleming, *The American Tort Process* (Oxford University Press 1990) 36. See also: S Hedley, 'The Rise and Rise of Personal Injury Liability – A Temporary Difficulty or a Permanent Crisis?' in Ciaran Craven and William Binchy (eds), *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (First Law 2005) and R Ryan, 'Impact of the Act on the "Compensation Culture": Big or Small?' in Ciaran Craven and William Binchy (eds), *Civil Liability and Courts Act 2004: Implications for Personal Injuries Litigation* (First Law 2005).

put the plaintiff in the same financial condition he would have been in had he not been injured, and (2) award him sums of money as ‘compensation’ for his (or her) past and future medical pain and suffering.¹¹

One of the greatest difficulties for judges and for the law of torts in general is how can issues such as a non-economic loss be measured in economic terms. How is this challenging task set about by a judge and what steps ought to be taken? As Sugarman points out:

One might start by trying to establish how much people would pay to avoid having these losses. But this approach is quite problematic. First, because many individual victims are of modest means, even if they would have been willing to give up all or almost all of their possessions and savings to avoid a serious disabling condition, that almost would still be very little. Would it then follow that those with modest means would be entitled to less money from their injurers relative to their wealth? That would seem unjust.¹²

In Ireland this dilemma of quantifying damages is at least partially addressed by the Book of Quantum, a set of guidelines first introduced by the Personal Injuries Board in 2004 which sets down suggested amounts for injuries sustained. These guidelines have subsequently been revised most recently in 2016 and are useful in providing range of damages which might be indicative of a suitable award of damages for certain injuries, always allowing for the final decision to rest with the judge who can award damages depending on the facts and the circumstances in any given case, this is after all the defining characteristic of the judicial function. I will discuss the Book of Quantum in more detail later in this paper. Of course such an approach has not been without its critics, particularly in the United States. As Foutty made clear: ‘As one cannot tell a claimant that his injury, pain and suffering and disability are worth exactly so much, neither more nor less, any attempt to make settlement evaluation an exact science would be arbitrary’.¹³

The role of the Court in assessing a claim for personal injury is vital and a key part of the process. As Cross J and Gelfand describe the process:

Plaintiffs are obliged to verify their claim by affidavit, and are routinely subjected to line by line cross examination as to the contents of their pleadings with a view to exposing any inconsistencies or exaggerations. If exaggeration is found, the penalties are severe. Defendants are also obliged to verify their claims. The court should, if requested, insist that the person swearing the defendant’s affidavit is, like the Plaintiff, someone who can be brought to account in the event of inaccuracies.¹⁴

This summarisation highlights the key role which the Court has and the difficult and probing process undertaken to examine and test the strength of any personal injury.

¹¹ Carroll Samuel Daniels, ‘Measure of Damages in Personal Injury Cases’ (1953) 7 *Miami Law Quarterly* 171.

¹² Stephen D Sugarman, ‘Tort damages for non-economic losses: Personal Injury’ in Bussani and Sebok (eds), *Comparative Tort Law* (Elgar 2015) 323 [330].

¹³ John R Foutty, ‘The Evaluation and Settlement of Personal Injury Claims’ (1964) *Insurance Law Journal* 5, 6.

¹⁴ Cross and Gelfand (n 9), 133-134.

Books of Quantum

Section 54 (b) of the Personal Injuries Assessment Board Act 2003 (as amended) finds that one of the functions of the Personal Injury Assessment Board (PIAB) is ‘to prepare and publish a document (which shall be known as the ‘Book of Quantum’) containing general guidelines as to the amounts which may be awarded or assessed in respect of specified types of injury’ and ‘to review from time to time the Book of Quantum and at least once every 3 years to prepare and publish a revised Book of Quantum’. It is vital to note that these amounts are only general guidelines to judges as to the value of certain injuries.¹⁵

The forward to the 2016 version of the Book of Quantum notes that the Guidelines are intended to provide an indication ‘as to the potential range of compensation for a particular injury. It is expected that every claim will continue to be dealt with on its individual merits’.¹⁶ When one takes a comparative approach to the subject, the Northern Irish equivalent to the Book of Quantum takes a similar approach. The Fifth Edition (February 2019) of the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (“The Green Book”) marks in strong terms that their guidelines must not be applied mechanically but that it ought to be used with close attention to the individual characteristics of a case.¹⁷ MacDermott LJ points to the importance of ‘a fair assessment by the Judge applying his training, experience and innate sense of fairness to the individual case which he is trying and which he will approach both sensibly and with sensitivity’.¹⁸

In the introduction to the second edition of the Green Book, Liam McCollum QC emphasised that assessing damages is ultimately the responsibility of a judge who is not constrained by the Guidelines. In fact, in the original Green Book, MacDermott LJ cautioned that the use of a book of quantum and establishing general guidelines for general damages in personal injury cases, ‘there is a real argument that ‘guidelines’ will become ‘norms’ and that the existence of a book of this nature will depersonalise the assessment of damages’.¹⁹ While the Committee decided nonetheless to produce the Guidelines, this reservation is noted. The role of a Judge is of great significance and cannot and should not be underestimated, and judges are well-placed to provide a meaningful valuation of general damages for each personal injury claim taking into account the individual details of each particular case and factual matrix.

There are differences between the guidelines of awards in the Books of Quantum in Northern Ireland and the Republic of Ireland; for example, for a shoulder dislocation – the range of awards suggested by the Republic of Ireland’s Book of Quantum is between €17,500 to €76,700,²⁰ whereas in Northern Ireland the range of the guide is between £25,000 and £90,000²¹ (which is roughly between €29,000 and €104,900). For injuries to the spleen, the range of awards suggested by the Book of Quantum in Northern Ireland is

¹⁵ Section 22 of the Civil Liability and Courts Act 2004 sets out the statutory obligation of Judges to have regard to the Book of Quantum.

¹⁶ Personal Injuries Assessment Board, ‘General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims: Book of Quantum’ (PIAB 2016), 5.

¹⁷ ‘The Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland’ (5th edn, The Judicial Studies Board for Northern Ireland 2019), iv.

¹⁸ *ibid.*, 1.

¹⁹ ‘The Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland’ (n 17), 3.

²⁰ Book of Quantum (n 16), 38.

²¹ ‘The Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland’ (n 17), 32.

£34,000 to £50,000²² (which is roughly €39,600 to €58,292) whereas in Ireland it is between €21,300 to €73,000.²³

However, it is important to note the different economic contexts of these different jurisdictions and the consequences that this has upon awards, whilst also taking into account the National Health Service operating in the UK. As Kearns P wrote in his role as Chairperson of the Personal Injuries Commission, it is acknowledged that 'Irish payments and awards are higher than those in the UK' crucially however it was beyond the scope of that report to analyse these differences in awards.²⁴ The report by the Personal Injuries Commission last year asserted that compensation awards in Irish courts are four to five times higher than in England and Wales.²⁵ The N.I. Book of Quantum (February, 2019) however includes guiding higher figures than Ireland in many instances, as noted above. In many ways, this goes to heart of the issue, and highlights that damages are something which are hard to compare and vary significantly.

Damages and Personal Injuries

The useful analysis of Barton J in *B.D. v The Minister for Health and Children*²⁶ is particularly instructive, wherein he describes:

damages [as] a descriptive legal term for a sum of money payable by a wrongdoer to the victim of the wrong and when utilised in the context of personal injury actions means the compensation assessed by the court to cover the past, present and prospective losses suffered or likely to be suffered by the Plaintiff as a consequence of the wrong.²⁷

The ability to take action when you have been wronged and to have yourself restored as far as possible to the place you were in prior to the wrongdoing is an integral component of any civil justice system and discussions around this topic often fail to examine this basic point.

Research and analysis however would suggest that the awards are not as high as they were in the past, especially when significant factors such as the cost of living and inflation are taken into account. Cross J and Gelfand in their article, 'The hidden persuaders and the inner nature of the tort action' at page 133, succinctly analyse and debunk many of the myths surrounding compensation culture. Firstly, they note that regarding quantum of damages that general damages have actually decreased substantially throughout the years particularly considering the rise of inflation.²⁸ Secondly, the damages which have actually been increased are actually special damages rather than general damages. These damages are, for example: '...out of pocket expenses, the cost of repair of a motor vehicle, the loss

²² *ibid*, 24.

²³ Book of Quantum (n 16), 79.

²⁴ Personal Injuries Commission, 'Second and Final Report of the Personal Injuries Commission' (Department of Business, Enterprise and Innovation 2018) 4.

²⁵ Kevin Doyle, 'Easy money tempts best of people' - Minister hits out at exaggerated insurance claims' *Irish Independent* (Dublin, 10 June 2019) <<https://www.independent.ie/irish-news/easy-money-tempts-best-of-people-minister-hits-out-at-exaggerated-insurance-claims-38197193.html>> accessed 10 June 2019.

²⁶ [2019] IEHC 173.

²⁷ *ibid* [63].

²⁸ See also; *Mullen v Minister for Public Expenditure and Reform* [2016] IEHC 295; *Woods v Tyrell* [2016] IEHC 355.

of earnings in the past and into the future, and in some cases the cost of care in the past and into the future'.²⁹

These damages have obviously increased due to the significant increase in the cost of living in Ireland. Thirdly, contrary to popular belief, 'the number of collisions involving fatalities or injury in 1985 was nearly three times higher as a percentage of all mechanically propelled vehicles than the number of similar collisions compared to the number of all mechanically propelled vehicles in the year 2014'.³⁰

In *B.D.*, Barton J discussed the proposition emanating from *Kampff v Minister for Public Expenditure*³¹ that the maximum amount of damages which may be awarded or should be awarded for general damages in personal injury 'is a figure in or about the 'cap' or limit on general damages in cases involving catastrophic injury where there is a substantial claim for pecuniary loss'.³² Barton J dismisses this proposition as factually erroneous. This proposition would, per Barton J, 'necessitate the exclusion of awards in very serious personal injury cases to which the 'cap' does not apply from the scheme (non 'cap' cases), where, as we shall see, the level of general damages may exceed the 'cap' amount'.³³

Barton J later held that:

there is nothing new about the principles which are to be applied to the assessment of general damage(s) nor is there any basis to suggest that the Court of Appeal has adopted a policy and embarked on a mission, the object of which is a reduction in the level of awards for personal injuries, quite the contrary. In any event, as was made clear by the court in *Russell v HSE* [2015] IECA 236, the jurisprudence on the subject does not admit a public policy approach to damages.³⁴

The judgment of Irvine J from the Court of Appeal, in *Shannon v O'Sullivan*,³⁵ is particularly instructive when considering quantum and the amount of an award for a Trial Judge to grant to a plaintiff. Irvine J held that:

43. Most judges, when it comes to assessing the severity of any given injury and the appropriate sum to be awarded in respect of pain and suffering to date, will be guided by the answers to questions such as the following: - ...³⁶

- (i) Was the incident which caused the injury traumatic, and if so, how much distress did it cause?
- (ii) Did the plaintiff require hospitalisation, and if so, for how long?
- (iii) What did the plaintiff suffer in terms of pain and discomfort or lack of dignity during that period?
- (iv) What type and number of surgical interventions or other treatments did they require during the period of hospitalisation?

²⁹ (No. 14) at 135

³⁰ [Reference] *ibid* at 136.

³¹ [2018] IEHC 371.

³² [2019] IEHC 173 [48].

³³ *B.D. v Minister for Health and Children* [2019] IEHC 173 at [para. 50].

³⁴ [2019] IEHC 173 para. 51.

³⁵ [2016] IECA 93.

³⁶ *ibid* [43]. The importance of the following list of criteria merits re-iterating in its entirety.

- (v) Did the plaintiff need to attend a rehabilitation facility at any stage, and if so, for how long?
- (vi) While recovering in their home, was the plaintiff capable of independent living? Were they, for example, able to dress, toilet themselves and otherwise cater to all of their personal needs or were they dependent in all or some respects, and if so, for how long?
- (vii) If the plaintiff was dependent, why was this so? Were they, for example, wheelchair-bound, on crutches or did they have their arm in a sling? In respect of what activities were they so dependent?
- (viii) What limitations had been imposed on their activities such as leisure or sporting pursuits?
- (ix) For how long was the plaintiff out of work?
- (x) To what extent was their relationship with their family interfered with?
- (xi) Finally, what was the nature and extent of any treatment, therapy or medication required?³⁷

This list of factors is particularly helpful due to the level of detail which it outlines practitioners need to obtain in instructions, what to focus on when presenting to Court.

Irvine J also found in *Shannon* that:

minor injuries should attract appropriately modest damages, middling injuries moderate damages, severe injuries significant damages and extreme or catastrophic injuries damages which are likely to fall somewhere in the region of €450,000', although the Judge emphasised later in her judgment that it is 'not to say that €450,000 is a maximum or that there have not been cases where that sum has been occasionally exceeded.'³⁸

This principle bears repeating, as the idea of proportionality in damages is something which is becoming more and more important.

False and exaggerated claims

Pre Section 26 Case Law

There are two particularly noteworthy decisions of the Supreme Court regarding false and exaggerated claims which predate s. 26 of the Civil Liability and Courts Act 2004.

The starting point for this discussion is *Vesey v Dublin Bus*,³⁹ a decision by Hardiman J (nem. diss.), the factual matrix of which was that the Trial Judge during the proceedings found that the plaintiff was lying in his evidence to the Court. Johnson J said as follows in the High Court:

I am going to say something that I have never said about any Plaintiff in the last thirteen and a half years on the Bench. The plaintiff has lied to me. He has lied to his own doctors and has lied to the Defendant's doctors in a manner, which has rendered the opinions of the doctors almost useless

³⁷ [2016] IECA 93, [43].

³⁸ *ibid*, [36].

³⁹ [2001] 4 IR 196.

because, they admit themselves, they depend on the veracity of the history given to them by the Plaintiff to form their opinions.⁴⁰

Although the Trial Judge found the plaintiff's evidence significantly lacking in credibility, the Judge awarded a sum of £72,000 (to include general damages to date, general damages to the future, and special damages). This award of damages was appealed by the defendant, on the grounds that it was an excessive sum, unsupported by the evidence and that the Trial Judge had erred in law in awarding a sum of damages in circumstances where the plaintiff had not satisfied their burden of proof.

An interesting factor in the *Vesey* case is that on appeal the defendants also argued the reverse of the principle of exemplary damages. The argument on awarding the reverse of exemplary damages was not accepted in part due to the fact that there were no Irish or English authorities to that effect. Hardiman J felt strongly that the Court was not entitled nor obliged to speculate on damages in the absence of credible evidence and therefore the Supreme Court reduced the award given by the High Court judge. Hardiman J discussed two prominent United States Supreme Court decisions:

It is interesting to note, however, that in the United States there is a well-established jurisprudence on the inherent power of a court to dismiss an action for 'flagrant bad faith': see *National Hockey League v Metropolitan Hockey Club* [Inc.] 427 US639. The power will be exercised in circumstances such as dishonest conduct by a litigant, obstruction of the discovery process, abuse of the judicial process or otherwise seeking to perpetrate a fraud on the Court: see *Link v Wabash Railroad Company* 370 US 626. The rationale is stated in *National Hockey League v Met. Hockey Club* at p. 643 as follows: -

'Here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalise those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent'.⁴¹

The American context is of course rather different from that prevailing here: in particular, the American courts usually lack the power to penalise conduct of the relevant sort by an appropriate order as to costs. But there is plainly a point where dishonesty in the prosecution of a claim can amount to an abuse of the judicial process as well as an attempt to impose upon the other party.⁴²

In the case of *Shelley Morris v Bus Átha Cliath*,⁴³ Hardiman J in the Supreme Court reiterated his comments in *Vesey* and stressed the point that in a civil case the onus of proof lies with the plaintiff who is obliged to discharge that onus truthfully.⁴⁴

⁴⁰ [2001] 4 IR 196 [194].

⁴¹ *ibid.*, [202].

⁴² *ibid.*

⁴³ [2001] 4 IR 196 [196].

⁴⁴ It is worth noting that no actual case has ever been dismissed on foot of this power, for further commentary on this see *Cabill v Glenpatrick Spring Water Company* [2018] IEHC 420.

Section 26

Section 26 of the Civil Liability and Courts Act 2004⁴⁵ was introduced after mounting pressure by the Insurance Industry – a pressure that continues today with the argument that insurance fraud caused by false and duplicitous claims in court is one of the principal reasons that insurance costs are becoming unsustainable for many businesses.⁴⁶

Section 26 of the Civil Liability and Courts Act 2004 was enacted on the 20th September 2004⁴⁷; and heralded in a raft of changes to the conduct of personal injury litigation, including the obligation on the part of the parties to personal injury litigation to swear verifying affidavits. The concept of such verifying affidavit appears to be borrowed from family law procedure and the intent of it seems to be to assist in the prosecution of parties to an action where it is found that they have given false or misleading evidence, as defined by Section 25 and 26 of the Act.⁴⁸ Barr J wrote in 2012 that ‘Section 26 ... provides for a somewhat draconian remedy to be applied where a Plaintiff has been found to have given false or misleading evidence. In short, his claim will be dismissed’.⁴⁹

Quirke J in *Higgins v Caldarek*⁵⁰ described the consequences of s.26 of the Act in more detail when he said:

the imposition of the sanction has the effect of depriving the claimant of damages to which he should or would otherwise be entitled. A Court must disallow both that part of the claim which has been based upon notionally false or misleading averments and also that part of the claim which would otherwise have been valid and would have resulted in an award of damages.

Criticism of Section 26

One of the most prominent critiques of s.26 was given by the former Supreme Court Judge Nial Fennelly. In his *ex tempore* lecture on the subject entitled ‘Lies and the Lying Liars that Tell Them: Section 26 of the Civil Liability and Courts Act, 2004’⁵¹ he described Section 26 as ‘...a novel and draconian measure’.

Fennelly J examined the law’s response to untruthfulness in a civil matter compared with occurrences in criminal law. He stated that in criminal trials for example judges have to give the ‘Lucas Warning’ wherein ensuring the jury are made aware that because the accused lied it does not mean they are guilty of a crime and there might be further explanations for that lie. He noted how within civil law, lying and exaggerated claims have been under examination by the insurance lobby for decades. Fennelly J then examined the law prior to the introduction of Section 26 and he interestingly made the point that judges have examined this issue in England, in particular examining the case of *South Wales Fire Rescue Service v Smith*.⁵² In this case Moses LJ asserted that exaggerated claims degrade the system with considerable effects, stating that:

⁴⁵ S. 26 Civil Liability and Courts Act 2004.

⁴⁶ Dáil Debate, 10 April 2019, vol 981, col 7, available: <<https://www.oireachtas.ie/en/debates/debate/dail/2019-04-10/17/>> accessed 10 June 2019.

⁴⁷ Civil Liability and Courts Act 2004 (Commencement) Order 2004, SI 2004/544. See: <http://www.irishstatutebook.ie/eli/isbc/2004_31.html> accessed 11 June 2019.

⁴⁸ David Nolan, ‘The Civil Liability and Courts Act 2004 (Part II)’ (2005) 10(2) Bar Review 38.

⁴⁹ Anthony Barr, ‘Fraudulent and Exaggerated Personal Injury Claims – A Word of Warning’ (2012) 17(2) Bar Review 26, 26.

⁵⁰ [2010] IEHC 527.

⁵¹ *Ex tempore* speech delivered in Kilkenny, 12th March 2014.

⁵² [2011] EWHC 1749.

They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims understandably those who are liable are required to discern those which are deserving and those which are not.⁵³

Fennelly J also highlighted, what is in his view the dilemma facing judges when it comes to s. 26(1) which states that for a claim to be dismissed due to false and misleading evidence the Plaintiff has to know that the evidence is false or misleading.⁵⁴ He stated that ‘thus the threshold for the application of the section is set high. Nothing less than knowing, deliberate and intentional giving of false or misleading (evidence) will qualify’. Fennelly J elaborated on this point stating that cases ‘...show judges wrestling with the differences between genuine forgetfulness, subjective understanding of the facts, especially medical symptoms, and knowing and deliberate falsehood’.⁵⁵

Fennelly J concluded his argument by delving into what he deemed to be the most draconian features of this statutory provision. Firstly, the obligation that the statute places on judges to dismiss the claim in cases where it is found that false or misleading evidence had been provided, greatly infringes judicial discretion, in his view. Secondly, the power covers the totality of the claim. The Court in question does not have power to dismiss just portions of it; having heard knowingly false/misleading evidence from the plaintiff, the Court does not have the power to dismiss elements of the claim; to use the colloquial phrase it is an ‘all or nothing’ situation. Thirdly, once the plaintiff has deliberately and fraudulently exaggerated his injuries or financial losses the claim in its entirety is dismissed even if they did actually result in substantial injury. Fennelly J also noted the more positive safeguards present in the act for example, the false evidence has to be material, the civil standard burden of proof is placed on the defendant with regard to proving the plaintiff used false or misleading evidence and the ability of the Court to dismiss the claim if they feel that it is in the interests of justice.⁵⁶

It has to be asked whether the s. 26 of the Civil Liability Act 2004 achieved its stated aim of reducing insurance premiums. The possible failure to solve the issue is no fault of the legislation or drafting, but rather it highlights the complexity of the issue. Section 26 though has brought about progress in certain areas and as Fitzgerald states:

there has been quite a number of applications under the provision since it came into force and, while only a small number have been successful, the introduction of a statutory test to determine what constitutes a false or misleading claim and giving a clear power of dismissal to the courts, has resulted in greater clarity in the law in this area.⁵⁷

Post Section 26 Case Law

Irish case law has significantly developed since the enactment of s.26 of the Act. In the case of *Kerr v Molloy & Sherry*⁵⁸ Herbert J came to the conclusion that injustice would be done if

⁵³ *ibid*, [3].

⁵⁴ See footnote 51.

⁵⁵ *ibid*.

⁵⁶ *ibid*.

⁵⁷ Ciara Fitzgerald, ‘The Approach of the Irish Courts to false and Misleading Personal Injury Claims’ (2012) 4(3) *Quarterly Review of Tort Law* 28, 32.

⁵⁸ [2006] IEHC 364.

he acceded to the application under s.26; however, he made a 'Reverse Costs Order' – whereby he deducted from the award the extra costs which the defendant incurred in defending the action in the wrong jurisdiction. This demonstrates a certain reticence on the part of some judges to impose the draconian nature of s. 26.

*Carmello v Casey*⁵⁹ was a monumental case, insofar as it was the first case in which an application under s.26 was successful. It involved a plaintiff who exaggerated his claim, to such an extent that it led Peart J to say, 'It would defy any credibility in a young man such as the Plaintiff, and I simply do not believe him when he says he does not recall it'.⁶⁰ Mr. Carmello in this case had deliberately attributed injuries from one accident to another, and had done so doing so in a false and misleading manner.

Peart J held at para. 71 that:

[s]ection 26 was introduced by the Oireachtas for the very clear purpose of avoiding injustice to, inter alia, defendants against whom false or exaggerated claims are mounted in the hope of recovering damages to which such plaintiffs are not entitled. Such actions are also an abuse of the process of the court. It has always been a very serious criminal offence to give knowingly false evidence under oath. The proof of such an offence is required to be beyond a reasonable doubt. This Court is not so constrained, and makes its finding on the balance of probability. The section is certainly of a draconian nature, but it is deliberately so in the public interest, and is mandatory in its terms, once the Court is so satisfied on the balance of probability, unless to dismiss the action would result in injustice being done. As I have said, I am satisfied in the present case that no injustice will result from a dismissal of the plaintiff's action, and I so order.

In *Farrell v Dublin Bus*⁶¹ the Trial Judge accepted that in applications under s.26 the standard of proof is on the balance of probabilities; but should always be proportionate to the nature and gravity of the issue:

[A]n adverse finding under Section 26 of the Act, has such grave implications and consequences for a Plaintiff that the Court should not make such a finding unless it is satisfied that it is highly probable that the evidence which has been given or adduced by the Plaintiff has been false or misleading in a material respect.⁶²

In particular, in this case, the Court found no legitimate explanation given by the Plaintiff for why she had failed to disclose certain material matters and the Judge therefore dismissed the case. For example, in relation to loss of earnings; documents indicated that the plaintiff had been in receipt of no earnings, (other than social welfare) for a certain number of years. However, the plaintiff had submitted estimates in relation to loss of past and future income. The plaintiff agreed that she had made a claim that was not true.⁶³

⁵⁹ [2007] IEHC 362.

⁶⁰ [2007] IEHC 326 [48].

⁶¹ [2010] IEHC 327.

⁶² *ibid.*

⁶³ [2010] IEHC 327. For a discussion on the related jurisprudence relating to proof of fraud, see *O'Keefe v Ferris* [1997] 3 IR 463.

Hanna J in *Gammell v Doyle*⁶⁴ formed the view that the Plaintiff's account of the altercation in a public house ending in injury was fanciful, self-serving and deliberately so; and therefore dismissed the action. However, as O'Neill J cautioned in *Dunleavy v Swan Park*⁶⁵ that while s. 26 'is there to deter and disallow fraudulent claims',⁶⁶ it should not be 'seen as an opportunity to seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability'.⁶⁷

In *Abern v Bus Eireann*,⁶⁸ the Supreme Court, in regarding s. 26 held that the word 'knowingly' is a matter to which the test is subjective. Judges are slow to impose the provisions of s. 26, and tend only to do so when the evidence given is untruthful or exaggerated, and significant. This case related to the plaintiff being injured while on a bus. The High Court refused to dismiss the claim under s. 26, after the defendant contended that misleading evidence had been tendered by the plaintiff, the Supreme Court dismissed this appeal.

Irvine J in *Platt v OBH Luxury Accommodation*⁶⁹ laid out several general principles which emerge from the prevailing jurisprudence in relation to s. 26 applications; such as the burden of proof resting with the defendant, that caution is required by the Court against rushing to judgment in favour of the Defendant, that it is not for *de minimis* untruths, the evidential burden only relates to the portion of the evidence given. It was also emphasised that the Statute gives the judge a certain discretion in these matters.

Differential Costs Order

Section 17(5) of the Courts Act 1981 (amended by s. 14 Courts Act) allows a Trial Judge who awards damages which are within a lower monetary jurisdiction to measure a sum which the judge considers to be the difference between costs actually incurred and costs that would have been incurred had the action been heard at a lower court. The aim of this legislation is to reduce the legal costs of the defendant in a case which has improperly been brought to a court of higher court jurisdiction. The consequences of plaintiffs improperly bringing actions to the High Court are a high increase in legal costs for both parties involved, and an increase in both delays at Court and a backlog of cases. These differential cost orders act as a penalty to plaintiffs to improperly bring actions to a higher court as these orders require the plaintiff to pay the difference between costs incurred and the appropriate costs which should have been incurred.

These differential costs orders are being looked at with renewed interest following the Court of Appeal decision in *Monin v Sicika and O'Malley v McEvoy*,⁷⁰ wherein the Court of Appeal said the proceedings had been brought incorrectly to the High Court, and that the Trial Judge ought to have made a differential costs order. In the original proceedings, the Trial Judge refused the defendant's application for a differential costs order when the award was well within the jurisdiction of the Circuit Court.

Peart J in the Court of Appeal emphasised the fact that there is an onus upon the plaintiff to commence proceedings in the lowest court that has a jurisdiction to make an award in an amount that is reasonable to expect. The Court held that it is now incumbent upon a Trial

⁶⁴ [2009] IEHC 416.

⁶⁵ [2011] IEHC 232.

⁶⁶ *ibid* [38].

⁶⁷ *ibid*.

⁶⁸ [2011] IESC 44.

⁶⁹ [2017] IECA 221 [61]-[77].

⁷⁰ [2018] IECA 240.

Judge in circumstances where the amount of damages awarded is significantly within the jurisdiction of a lower court to make a differential costs order unless there is a good reason not to do so. Therefore, we can expect the differential costs order to more frequently be used in the Courts as it becomes a weapon in the Court's arsenal to guard against abuse of a good system.⁷¹

Exemplary Damages

To take a comparative approach to damages, I will briefly examine the law regarding punitive damages in the United States. One of the seminal cases in that jurisdiction is *Stenson v Laclede Gas Co.*,⁷² which stated that 'The law with respect to punitive damages is that in order to justify the infliction of punitive damages for the commission of a tort, the act complained of must have been done wantonly or maliciously'. Garner describes the function of punitive damages as to '(1) to punish the defendant and (2) to make an example of the defendant so as to deter others'.⁷³ In the United States these damages are also compensatory in nature for victims of physical pain and suffering there also has to be conditions of aggravation for example insult, malice, evil motive, or wanton or wilful violence on behalf of the defendant.⁷⁴ It is interesting to note that even on this basis the awarding of the such damages is still discretionary on behalf of the jury. Indeed, comment such as Sebok's research suggests in 2006-2007 punitive damages were awarded in around 4% of the trials.⁷⁵

An issue though which has been raised in these cases is the high level of damages which have been awarded. A case which is an excellent example to illustrate this point is the leading case of *BMW of North America Inc. v Gore*.⁷⁶ The Plaintiff concerned bought a brand new BMW car to find out it had been repainted. BMW stated at trial that it was their policy not to inform the purchaser of the damage which occurred prior to delivery if it was not more than 3% of the car's cost. The Plaintiff sued BMW and was granted \$4,000 in general damages and \$4 million in punitive damages by a jury in the Alabama Instant Court. This figure was halved to a still substantial \$2 million by the Alabama Supreme Court.

The US Supreme Court examined the issue of punitive damages awards. The Court cited the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution which was previously used in order to stop a so called 'grossly excessive' punishment on a tortfeasor. The Court also outlined three pronged approach to examining if a punitive damage award is constitutional. These were namely:

- (1) The degree of reprehensibility of the defendant's conduct
- (2) The disparity between the harm or potential harm suffered by the Plaintiff on one hand and his punitive damages on the other hand and
- (3) The difference between this remedy and the civil penalties authorised or imposed in comparable cases.⁷⁷

⁷¹ *ibid.*

⁷² 553 S.W.2d 309, 315 (Mo. Ct. App.1977)

⁷³ Bryan A Garner, *Garner's Dictionary of Legal Usage* (3rd edn, Oxford University Press 2011) 735.

⁷⁴ W Page Keeton, Dan B Dobbs, Robert E Keeton and David G Owen, *Prosser and Keeton on the Law of Torts* (West Publishing Co. 1984) 10-11.

⁷⁵ Anoth J Sebok, 'Punitive Damages. From Myth to Theory' (2006-2007) 92 Iowa Law Review 957, 962-974.

⁷⁶ 517 U.S. 559 (1996).

⁷⁷ 517 U.S. 559, 575 (1996).

Having applied these criteria, the US Supreme Court found that in this case damages of \$2 million were unconstitutional. The issue was returned to the jury who this time awarded the considerably smaller \$50,000 in punitive damages.

This decision was criticised and deemed by some to interfere with something that had previously been under the remit of State and state common law. Indeed, Scalia J in his dissent labelled the decision ‘an unjustified incursion into the province of state governments’.⁷⁸

Despite the controversy which ensued the position by which the state awarded some limits and rules regarding punitive damages was reaffirmed in *State Farms Auto Ins. Co v Campbell*.⁷⁹ This case had punitive damages of \$145 million, despite only having compensatory damages of \$1 million. The US Supreme Court here highlighted that ‘courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered’. The Court failed to designate a *ratio* which punitive damages could not go above. However, it did state ‘few punitive damages awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process’.

Writers such as Sztetek⁸⁰ though have conveyed how such an approach could be problematic, as the easier it is to predict the amounts of damages awarded as punitive damage cases the less likely such an award is going to act as a strong deterrent. It also seems that the Court is clearly stating that any such awards should also be reasonable and proportionate and that is why it has set out in the considered tests.

Conclusion

This innate flexibility in the law of tort is key as it allows the Courts to adapt and respond, resulting in what are called ‘new torts’. Matters such as the independence of the judge, the influence of the Book of Quantum, and how the Courts have responded to false and exaggerated claims are of the utmost importance and it will be interesting to see how these themes will develop within the sphere of Personal Injury Law. The law of torts is itself expanding, and as Keane J elucidated in *McDonnell v Ireland*, the law of torts ‘as a matter of history, demonstrated over the centuries a flexibility and a capacity to adapt to changing social conditions, even without legislative assistance, which made it the obvious instrument for the righting of civil wrongs when the Constitution was enacted in 1937’.⁸¹

The process of further consideration of this area has begun and will continue for some time.

⁷⁸ 517 US. 559, 598 (1996).

⁷⁹ 123 S Ct 1513 (2003). Mr. Campbell caused an accident resulting in one death and one permanent disability. Despite overwhelming evidence, including investigators confirming Campbell’s liability. State Farm (the Insurers) contested liability and declined the proposed settlement offers.

⁸⁰ Martin Sztetek, ‘Punitive Damages-Experience from Common Law: One Piece of the Puzzle in Continental Law Still Missing’ (2017)14 Common Law Review 13.

⁸¹ [1998] 1 IR 134 [156].