**THE COURT OF APPEAL**

Neutral Citation Number [2020] IECA 253
**Record Number: 2018/181**
**High Court Record Number: 2012/3367P**

**Noonan J.**
**Power J.**
**Binchy J.**

**BETWEEN/**

**MARGARET BROWNE**

**PLAINTIFF/APPELLANT**

**- AND -**

**PETER VAN GEENE AND MOUNT CARMEL MEDICAL GROUP (KILKENNY) LIMITED TRADING AS AUT EVEN HOSPITAL**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT of Mr. Justice Noonan delivered on the 24th day of September, 2020**

**Introduction**

1. In this action for medical negligence, the issue of liability was withdrawn by the respondents and the case proceeded as an assessment of damages, in which ultimately the appellant (to whom I will refer as "the plaintiff") failed to beat the lodgment. The plaintiff's appeal concerns the quantum of the award by the High Court (Barr J.) and the proper allocation of costs following that award. The respondents have cross-appealed against the refusal by the trial judge of their application to have the plaintiff's claim dismissed pursuant to s. 26 of the Civil Liability and Courts Act 2004.

**Background**

2. The plaintiff was born on the 28th September, 1975 and had complaints in her early thirties which were ultimately diagnosed as arising from endometriosis and cysts on her ovaries. She was advised that the appropriate treatment was a hysterectomy and removal of the ovaries. Accordingly, on the 6th April, 2010 when the plaintiff was 34 years old, the first respondent ("Dr. Van Geene"), a consultant gynaecologist, carried out a total abdominal hysterectomy and oophorectomy at the Aut Even Hospital in Waterford, the second respondent. In the course of this procedure, Dr. Van Geene negligently sutured the plaintiff's left ureter leaving her with very significant symptoms on post-operative discharge from hospital. It took several weeks for this to be identified as the cause of the plaintiff's symptoms and a month later, on the 6th May 2010, she underwent further surgery with a different consultant.

3. This involved bypassing the original ureter by means of a Boari flap. Notwithstanding this procedure, the plaintiff continued to have symptoms of severe pain and discomfort in the

following three years and ultimately it was determined that the plaintiff's left kidney was functioning at such a low level that it required surgical removal. Accordingly, she underwent a left nephrectomy in April of 2013. Although she made a reasonable recovery from this surgery, she claims to have significant ongoing symptoms, particularly in relation to her bladder function, which gives rise to urinary frequency and urgency and these symptoms in turn have compromised her life and her ability to work. The extent of her symptoms and their effects were in very considerable controversy at the trial. She also claims to have suffered psychiatric and psychological sequelae which are continuing.

**Procedural History**

4. The proceedings commenced by the issuing of a personal injuries summons on the 2nd April, 2012. Initially a defence denying liability on behalf of both respondents was delivered but ultimately, the issue of liability was conceded. On the 27th September, 2016, the respondents paid a sum of €280,000 into court by way of lodgment with a denial of liability. Within a week, the plaintiff delivered updated particulars of loss and damage together with a schedule of special damages on the 4th October, 2016. As will subsequently become apparent, it is relevant to set out precisely what the plaintiff said in that document: -

> "A. Loss of earnings.
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> The plaintiff's potential for employment was seriously compromised as a result of the personal injuries sustained. The plaintiff now has severe physical limitations and has a history of inability to attend work, as a result of over five years of having to attend hospital for treatment. She has reduced capacity for prolonged standing and walking. She has difficulty bending, lifting and driving long distances. She has diminished capacity in terms of performing the duties required in previous employment, in which she has experience. If the plaintiff returns to employment, she will only obtain part time, or casual work at the lower quality end of the market. The plaintiff could work short hours as a counter assistant.
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> The plaintiff was earning circa €26,000 in her last job and is in receipt of Disability Benefit in the sum of €188 per week. The plaintiff could obtain part time or casual employment at a rate of circa €9.15 per hour. If the plaintiff worked twenty hours per week, she would therefore earn €183.00 per week.
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> If the accident had not occurred, the plaintiff would have earned circa €461.00, net of deductions. As the plaintiff is unfit to work fulltime in her previous employment, or alternative work, she will have a net weekly loss of €278.00…"

5. Although a calculated claim for past loss of earnings was not at that stage advanced, the plaintiff claimed future loss of earnings on an actuarialised basis at sums varying from €266,324 to €340,272 depending on an assumed retirement age of either 65 or 68 and a real rate of return on a 1% or 2.5% basis. It is clear that the delivery of these particulars had a significant impact on the respondents' assessment of the case and its value, because thereafter, in January 2017 the respondents sought to increase the lodgment to

€450,000. A motion was issued in that regard by the respondents for liberty to top up the lodgment and that came on for hearing before Cross J. on the 20th January, 2017. In the same motion, the respondents sought an order directing the plaintiff to deliver a notice of an offer of terms of settlement pursuant to s.17 of the Civil Liability and Courts Act 2004. Ultimately, the parties came to terms in relation to this motion and a consent order was made by Cross J. giving the respondents liberty to increase the lodgment, directing the plaintiff to deliver a notice of an offer of terms of settlement and finally, it was, by consent, ordered that the plaintiff pay the costs of the motion.

6. Shortly following the making of this order, the plaintiff delivered updated particulars of loss and damage/schedule of special damages on the 30th January, 2017. Updated particulars of personal injuries were furnished followed by a claim for loss of earnings. Under this heading, the plaintiff repeated *verbatim* the particulars I have quoted above but this time with the addition of a calculation of past loss of earnings as follows: -

> "The plaintiff's past loss of earnings are estimated at €111,490.66 (namely €26,000 per annum for a period of six years and ten months less weekly Disability Benefit of €188.00 x 52 x 6 years 10 months)."

7. Accordingly, as of the 30th January 2017, the plaintiff was advancing a claim for both past and future loss of earnings on the basis, first, that she had been earning €26,000 per annum in her previous employment and, secondly, she had earned no income from the date of the surgery complained of to the present time, save for Disability Benefit. A week later, on the 6th February, 2017, the plaintiff swore an affidavit of verification in relation to both sets of particulars to which I have referred, averring as follows in the second paragraph: -

> "2. I wish to make one correction in respect of the particulars delivered on the 30th January 2017. The statement that I had not worked since the accident was taken from a previous report and added in error. In fact, I made an attempt to sell celebrity dresses, following the operation. I did this as a self-employed person. I rented a premises and I tried to operate the business online. Unfortunately, due to the injuries sustained in the operations subject to these proceedings, the business was unsuccessful, and I had to close same."

8. She went on to aver that save for this correction, all of the particulars previously given were true. Accordingly, the plaintiff in this affidavit continued to maintain the full amount of her claim for both past and future loss of earnings on the basis previously indicated.

9. Shortly before that affidavit was sworn, on the 31st January, 2017 the respondents brought a motion seeking to strike out the plaintiff's claim for loss of earnings on the basis that she had agreed to make voluntary discovery of all documents relating to her loss of earnings claim but had failed to do so. In response to this application, the plaintiff swore a replying affidavit on the 10th February, 2017 giving details, *inter alia*, of her employment history prior to the surgery complained of. She provided details of a variety of employments between 1991 and 2008, after which she worked for a company,

Swimworld (Waterford) Leisure Limited T/A Kingfisher. At para. 11 of her affidavit, the plaintiff avers: -

> "Although it may not be entirely accurate, I estimate that my annual income would have equated to a salary of about €25,000 per annum. I was paid mostly in cash…"

10. She then exhibited a bank statement on a single page showing that on the 11th June 2009, a credit transfer in the amount of €961.00 was paid into her account by Swimworld Limited.

11. At para. 12, the plaintiff refers to the clothing business mentioned in her previous affidavit of verification, which was known as "Sparkle Closet", and says: -

> "I tried to start a business selling party type dresses following the surgery, but I had to close it down. I admit that with my symptoms, it was a bad choice at the time. If I was otherwise well, I believe it would have attracted more customers. My efforts were thwarted, however, by the surgery and the business failed due to my ongoing symptoms."

12. At para. 13, the plaintiff reaffirmed that she has a claim for past and future loss of earnings which she had previously particularised and sworn to. Accordingly, in this affidavit she swears to the truth of a number of matters. First, she had an annual income of about €25,000 per annum from Kingfisher. Secondly, she was paid mostly in cash, with the apparent exception of a single payment in June 2009 of €961.00. Thirdly, she tried to start a business but that business failed due to the sequelae of the surgery carried out by Dr. Van Geene. Fourthly, her claim for past and future loss of earnings stood. It must therefore be assumed that the plaintiff's failed business, of which she gives no details, yielded her no net income.

13. In the same affidavit, the plaintiff refers to the fact that the respondents' solicitors had recently admitted liability in a letter of the 1st February, 2017. It is relevant in the context of the issues that arise in this appeal to quote its terms: -

> "In order to narrow the issues for determination during the trial commencing on 03 February 2017, the first defendant is prepared to make an admission regarding breach of duty in respect of the procedure on 06 April 2010. The first name defendant is also prepared to admit that the plaintiff's ureter was damaged and that she suffered damage to her kidney as a result.
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> Please note that these are limited admissions which the first named defendant is making and we do not admit any other aspect of the plaintiff's claim including the injuries suffered by the plaintiff and the quantum aspect of this claim."

14. The trial commenced on the 23rd May, 2017 when the plaintiff's case was opened to the trial judge by her counsel. In the opening, counsel pulled back somewhat from the mathematical claim for past and future loss of earnings that had up to that point in time

been advanced in both the pleadings and affidavits. In referring to the plaintiff's employment with Kingfisher, counsel said (Day 1, p. 31): -

> "Now she said that that lasted for about a year and that she was paid cash every time that she was successful, and indeed regularly, on a weekly basis, and she estimates, and it is only an estimate because it was cash payments, that she would have earned between I think €20,000 and €25,000 during that year."

15. Counsel proceeded to deal with the claim that was now being advanced by the plaintiff and referred to her Sparkle Closet business (Day 1, pp 31-32): -

> "She started in desperation an online ladies' fashion business from home in 2013. It never made money and it folded… but anyway, because of the problems in this case, she was suffering from fatigue and all the other problems that we describe but it never really got off the ground…
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> Now, whilst in that document that I have just opened to you, we make claims for finance for some of her loss of earnings, I don't for a minute say that we can sustain that claim in full but what I can say is that she had the animus to look for and find work if that first operation had not been done negligently."

16. Counsel then went on to invite the court to award damages in this regard to the plaintiff for future loss of earnings on a loss of opportunity basis, rather than the basis that had been advanced up to that point in time.

17. In the context of the issues arising, it is relevant also to refer to the submission of counsel for the respondents concerning the issues in the case following the opening and before the plaintiff commenced her evidence on day 2 (Day 2, p. 4): -

> "No, I think I can indicate the following. In relation to investigations arising out of the surgery of April 2010, the defendant admits that those investigations, the various cystoscopies and other procedures that were carried out in 2010 and in 2011 and in 2012 did arise as a consequence of the surgery of April 2010 insofar as the question of a nephrectomy arises, it is accepted that the nephrectomy also arose from the complications of the injury caused to the plaintiff's left ureter in April 2010, with this caveat, which is that the evidence will show that ultimately the plaintiff was offered a number of alternatives in relation to her treatment through 2011, 2012 and into early 2013 action and while it is accepted that the left nephrectomy arose as a complication of the procedure in April 2010, it would be a matter for the court as to what weight, if any, and the court may attach no weight to it, there is to be attached to the fact that it was a procedure that the plaintiff elected to undergo from among a number of alternatives that were presented to her. That is the limit of the admissions that I am in a position to make. I know that Mr. Reidy adverted to persistent bladder problems and there will be a significant contest on the question of whether or not the surgery carried out on her could have been expected to give rise to significant bladder dysfunction and there

will be a significant contest on the question of whether or not she does have significant ongoing problems in that part."

**Judgment of the High Court of the 20th October, 2017**

18. In a judgment running to some 150 pages, the trial judge set out in painstaking detail the background to the case, the relevant evidence of each of the witnesses and his conclusions thereon. In dealing with the plaintiff's evidence concerning her prior employment, the judge noted (at para. 69): -

> "In 2012 in her personal injury summons, she had said that she was claiming loss of earnings. She stated that her job was to sell insurance. She could not recall if she had mentioned the Kingfisher Club in these pleadings. She could not explain why she had not mentioned the Kingfisher Club until October 2016. It was put to her that she was claiming €120,000 for past loss of earnings based on her earnings from the Kingfisher Club. The plaintiff stated that she did not know about that claim. It was put to her that she knew she had not earned €26,000 from Kingfisher. The plaintiff accepted that that was correct, but stated that she did have a contract for €26,000 per annum with them. The plaintiff was asked, why it was not made clear that she was not pursuing a claim for €26,000 per year. The plaintiff stated that she did not know why that had not been made clear, she was relying on the advice of her legal advisors."

19. From para. 297 onwards, the trial judge dealt with the plaintiff's claim for special damages and the case now being made by the plaintiff. He said (at para. 299): -

> "In closing submissions on behalf of the plaintiff, Mr. Reidy, S.C., conceded that the question of the plaintiff's past loss of earnings was a difficult one. This was due to the fact that prior to the time of her husband's incapacity in 2007, she had not been needed as a bread winner for the family. Thereafter, her situation had changed, but it was accepted that her pre-operative work history was somewhat lacking. He stated that if she had managed to work a full year with The Kingfisher Club, or somebody else, the plaintiff anticipated that she would have been earning somewhere in the region of €26,000. It was submitted that that was reasonable given the fact that the minimum wage would have given her an annual salary of approximately €20,000. So it could not be said that her figures constituted any form of exaggeration. Counsel noted that in opening the case, the comment had been made to the court that given her work history and all relevant factors, the plaintiff's legal advisers did not think that the court could possibly give her full loss of earnings to date. He repeated that assertion in his closing remarks. Instead, he invited the court to make an award of general damages, to compensate her for loss of opportunity on the job market. He put that submission in the following terms: -
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> > 'What I do say, judge, and I think this is the best way of approaching this case is that insofar as a loss of earnings to date is concerned, there must be a factor of loss of job opportunity up till the present time, which I would ask

the court under a separate heading to give a small figure under that heading.'

300. The plaintiff's claim in respect of future special damages was set out in the schedule prepared by the plaintiff's actuary, Mr. Tennant. In that schedule he gave a capital value of a future net weekly loss of €279, up to the age of 65 years of €286,812. Up to the age of 68 years, it amounted to €314,991. Alternatively, the capital value of the loss of Disability Allowance for the plaintiff for life, amounted to €213,265."

20. The trial judge summarised the plaintiff's case in relation to future loss of earnings at para. 302-303, saying: -

" ... In relation to the loss of earnings into the future, counsel stated as follows:

'The position of loss of earnings part time loss of earnings, given that she has ongoing, for the next number of years ongoing symptoms that should somewhat abate, I think some figure over and above that should be allowed for the next five years, or so, in relation to earnings. This is a matter that the court traditionally always, because it is difficult to assess doesn't make impossible to assess but the court would have to use its experience in this regard.'

303. While the court is slightly unclear as to the exact case being put forward by the plaintiff in this regard, it would appear that she is seeking full loss of earnings for the next five years, based on an earning capacity of €26,000 per annum, less any Disability Allowance that would have been paid in that period. Secondly, the plaintiff appears to be seeking loss of earnings thereafter, measured as the difference between the earnings that she will obtain on a part time basis and the earnings which she would have earned on a full time basis, again assuming an earning capacity of €26,000 per annum."

21. The court then proceeded to set out its conclusions. The court dealt first with the respondents' application pursuant to s. 26 of the Civil Liability and Courts Act 2004. At the conclusion of the evidence, counsel for the respondents applied to have the claim dismissed pursuant to s. 26 on the basis that, both in relation to the claim advanced for past and future loss of earnings, the plaintiff gave evidence that was false and misleading in material respects and was known by her to be false or misleading. The judge set out the basis upon which this application was made at para. 305 onwards: -

"305. At the conclusion of the trial, counsel for the defendant submitted that the plaintiff had put forward a fraudulent claim in relation to both her past and future loss of earnings. In essence, he submitted that the plaintiff had put forward a past loss of earnings claim in the order of €111,490.66. This was apparently based upon pre-accident earnings of €26,000 per annum for a period of six years and ten months, less weekly disability benefit of €188 for the same period. In relation to her future loss of earnings, the plaintiff had pleaded, by means of a notice of further particulars dated 30th January, 2017, that based on an earning capacity of €26,000

per annum, this gave her a net weekly wage of €461. Allowing for disability benefit of €183 per week, that gave rise to an ongoing net weekly loss of €278. On the basis of a 1% real rate of return, the capital value of the plaintiff's future loss of earnings was pleaded as €309,136 (to age 65) or €340,272 (to age 68). On a real rate of return of 2.5%, her loss was pleaded at €266,324 (to age 65) or €288,286 (to age 68).

306. The defendant submitted that the plaintiff's claim to both past and future loss of earnings was based on an entirely fraudulent premise. It had been based on an assertion that the plaintiff had pre-accident earnings of €26,000 per year. However, after discovery of documents had been obtained, it transpired that the plaintiff had in fact only worked for a number of months in 2009, with The Kingfisher Club with whom she alleged that she had a contract under which she would be paid €26,000 per annum. Discovery of her bank accounts had revealed that, in fact, there had only been one payment from this company to the plaintiff in June 2009 in the sum of €961. The plaintiff had never produced any copy of this contract. At the opening of the action, counsel for the plaintiff conceded that having regard to the very short duration of her employment with The Kingfisher Club, while the plaintiff remained adamant that she had had a contract with them under which she was to be paid €26,000 per annum, the plaintiff was withdrawing her specific claim to past loss of earnings and would instead invite the court to make an award of general damages to compensate her for loss of opportunity on the job market during the years 2010 to 2017. Counsel for the defendant submitted that this concession was only made by the plaintiff, when, having regard to the matters disclosed on discovery, she realised that 'the game was up' and she elected not to proceed with her fraudulent claim in relation to past loss of earnings.

307. Counsel for the defendant further submitted that notwithstanding the fact that, on her own evidence the plaintiff had only worked with this company for a number of months, possibly as little as three or four months, she had not been able to produce any contract from the company, she had not called any witness from the company to prove the terms of the contract, and had not been able to explain why there was only one lodgment to her bank account in June 2009, yet she persisted in formulating her claim for future loss of earnings on the basis of the difference between what she was likely to earn in the future on a part time basis and the amount which she claimed she would have earned under the contract with The Kingfisher Club."

22. The court then outlined the plaintiff's response to this submission at para. 311: -

"311. In response to these submissions, counsel for the plaintiff stated that the plaintiff had not given any false or misleading evidence in relation to her earnings with The Kingfisher Club. While the plaintiff had withdrawn her claim to past loss of earnings as pleaded on 30th January, 2017, she had not done so due to any realisation on her part that any fraudulent claim had been exposed by the defendants. Rather,

taking a realistic view of the totality of her pre-operative work history and in particular the short duration of her employment with The Kingfisher Club, a decision was made that it would not be realistic to pursue a past loss of earnings claim on the basis of such a short period of pre-operative employment with that company. Instead, while the plaintiff always maintained that she had in fact had a contract for €26,000 with The Kingfisher Club, she would instead invite the court to make an award of general damages under the heading of 'loss of opportunity' in respect of her loss of earnings for the period 2010 to the trial of the action."

23. Having referred to some relevant authorities, the judge outlined his conclusions in the following terms (at para. 319): -

> "However, in this case, I do not think it is correct to say that the plaintiff simply abandoned her past loss of earnings claim. What seems to have happened, is that when the case was looked at in depth, a decision was made that it would be unrealistic in the circumstances of this case, for the plaintiff to put forward a claim for past loss of earnings based on the level of earnings under the Kingfisher contract in 2009. The matter had originally been pleaded on that basis, probably due to the fact that the plaintiff's preoperative work history was patchy. She had done a number of short term jobs, some of which were somewhat part time in nature and were paid on a commission basis. She had also worked on a number of community employment schemes. The only normal full time job which she had had, was her period of employment with The Kingfisher Club. It was probably for that reason, that the decision had initially been made to plead her loss of earnings on the basis of her earnings under that contract. As she had only worked for that company for a very limited time period, of possibly two to three months, and as there was only evidence of one payment by the company into her bank account in June 2009, it would have been unrealistic in the light of her other pre-operative work history, to maintain a claim for past loss of earnings on the basis of this contract. By the end of the case, the plaintiff's legal advisers conceded that there was no reality to seeking past loss of earnings on the basis of the Kingfisher contract and instead asked the court to make an award by way of general damages for loss of opportunity on the job market. In so doing, I do not think that the plaintiff was abandoning a fraudulently based claim, but was rather adopting a realistic approach to the issue of her probable loss of earnings in the period 2010 to 2017."

24. The judge further commented at para. 321: -

> " … It seems to me that in these circumstances, the defendant is perfectly entitled to argue that her loss of earnings claim into the future is based on a somewhat unrealistic footing and should not be allowed; but I do not think it is open to the defendants to argue that that claim, or any evidence connected therewith, was fraudulently given by or on behalf of the plaintiff."

25. The respondents' application for a dismissal under s.26 was also based on the allegedly false and misleading evidence given by the plaintiff regarding Sparkle Closet. In that regard, the trial judge said (at para. 323): -

> "… For the reasons set out later in this judgment, the court has come to the view that while the plaintiff was somewhat unforthcoming about her business activity carried on between January 2014 and November 2016, it is not satisfied that the plaintiff has gone as far as giving false and misleading evidence in relation to this business activity, such as to warrant dismissal of her case pursuant to s. 26 of the 2004 Act."

26. In addition to the foregoing matters, the respondents in making the s.26 application relied upon the fact that the plaintiff had complained of multiple symptoms in her pleadings and evidence which were contradicted by the fact that she had entered a dancing competition in 2015, she had participated in a boxing video showing her undertaking vigorous activity, the level of physical activity involved in running the Sparkle Closet business and the fact that she had taken a number of holidays abroad at a time when she claimed to have been dreadfully affected by the consequences of the operation in 2010. The court's conclusion on this aspect of the case was as follows: -

> "326. While these submissions are not without substance, the court is of the view that having regard to the findings which are made later in this judgment as to the plaintiff's mental and physical capacity in the years subsequent to 2010, the court does not find that her evidence as to her physical and mental capacity during the period from 2010 to date, has been false or misleading in a material respect. Accordingly, the court declines to dismiss her case under this heading."

27. The judge then turned his attention to the issue of general damages. He felt it relevant to consider this in relation to three different periods. This was by reference to the fact in particular that the plaintiff had commenced her Sparkle Closet business in January 2014 both by way of opening a small shop and running it online. The physical shop closed on the 31st July 2015 but the plaintiff continued to operate the online sales business until about November 2016. The judge therefore separately considered three periods, first, from April 2010 to the end of 2013, second, the period from January 2014 to December 2016 and finally the present and future. In relation to the first period, he noted that there was very little dispute between the parties and that the plaintiff had suffered a great deal of pain and distress during this time, both physically and mentally. The judge said that he accepted the plaintiff's evidence as to how she was during this period when she had difficulty with frequency and urgency of urination both day and night. She suffered constant and, at times, severe pain in the general area of her abdomen, kidneys and back. The judge also accepted the evidence of Dr. Cryan, a consultant physiatrist called by the plaintiff, that she was suffering from post-traumatic stress disorder and depression during this time. The court further accepted that she was incapable of working during this almost four-year period.

28. The court then turned to the second period of three years which the court recognised would have a profound effect on the award of general damages both to date and into the future and on the loss of earnings claim, both past and future. Unlike the first period, he noted that there was a very significant dispute concerning the second period. He referred to the evidence and submissions of the parties and, in particular, to extensive Facebook postings from the plaintiff of approximately 508 pages between September 2014 and May 2016 which were put in evidence before the court. The judge noted that in relation to the plaintiff's Sparkle Closet business, she had not been able to produce any documentation at all.

29. She claimed it was not really a full-blown business venture but in reality, a hobby. Apart from the plaintiff's oral evidence as to the nature and extent of the business, the only other evidence available to the court was the Facebook postings which the defendants themselves had obtained and relied upon. The judge identified a number of matters that led him to the conclusion that this was a reasonably sophisticated operation. The plaintiff's website showed dresses modelled by professional models with photographs taken by professional photographers. New photographs of products were frequently uploaded onto her Facebook page. Customers could pay by credit card, PayPal or postal order. There were overseas as well as domestic customers.

30. She also had an Instagram account promoting the business. The judge was struck by the fact that the plaintiff showed considerable business acumen in increasing her customer base with regular competitions and other strategies he described as clever. She ran competitions which involved other local businesses. The stock was of a reasonably high quality, changed regularly and the marketing was at a sophisticated level. The judge said that the material on the plaintiff's Facebook page did not indicate that this was a low key operation which was more of a hobby than a business. Commenting on the absence of documentary evidence, the judge said (at para. 358): -

> "358. It is also noteworthy that the plaintiff has not furnished any documentary evidence to show the level of business which she was doing during this period. The court only has her evidence that she earned circa €100/ €150 per week. While one can understand the absence of formal annual trading accounts, it is hard to see why not a shred of documentary evidence, in the form of orders placed, invoices, receipts, bank statements, credit card statements, or any other documents, could not be provided to show the level of turnover which she had at that time. Indeed, had it not been for the ingenuity of the defendants' legal advisors in obtaining the Facebook postings, the court would not have had any objective evidence as to the nature of this business venture.
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> 359. The plaintiff was also somewhat reticent about giving any concrete details in relation to this business activity, either in her dealings with the defendant's vocational assessor, Ms. McMahon, or in her pleadings, or in her affidavits. When she was assessed by Ms. McMahon on 23rd November, 2016, she furnished some fairly vague details in relation to the business. These are summarised at p. 23 of

Ms. McMahon's report. The vocational assessor noted that the plaintiff was unable to provide accurate figures regarding her income from the business. The plaintiff described the business as 'very part-time work' and stated that at times her stock was sold at a loss. She told Ms. McMahon that figures relating to this business were held by her accountant. However, as already noted, she did not produce any such figures to the court."

31. The court also referred to the particulars and affidavits of verification furnished by the plaintiff in relation to her working history and loss of earnings. In summarising his views on the Sparkle Closet business, the judge said (at para. 364): -

"364. Having considered the Facebook postings, the accounts given by the plaintiff as outlined above and the account of the business given by her in her evidence, the court is compelled to draw the conclusion that, while the plaintiff admitted setting up and running this online business, she was careful never to give any concrete details to anyone about the business. The court is of the view that the plaintiff withheld giving such details, due to the fact that she wished to brush aside this period of employment by describing it as merely a part time business, which was more in the nature of a hobby than a full blown business. The court is compelled to draw the conclusion that on this issue, the plaintiff has been less than fully forthcoming. The plaintiff has made the case that this online business was really a hobby or rehabilitative work, rather than a full blown business. The burden of proof rests on her to prove that assertion. She has not established this to the satisfaction of the court."

32. The judge went on to draw the conclusion that based on all the evidence including the fact that the plaintiff was able to enter a dancing competition in 2015 and participate in the organisation of a fashion show, that she was at a reasonably good physical level in early 2015. She had a knee operation in June 2015 shortly before she closed the shop. In the light of all the evidence his view was (at para. 368): -

"368. …I am satisfied that while she did have considerable on-going problems during 2014, by 2015, things seemed to have changed substantially. While the shop premises closed in July 2015, the online business continued for another eighteen months. I am satisfied that the physical shop was merely a small adjunct to the online business, which had been set up in January, 2014. I accept the plaintiff's evidence that it was not so much a shop, as a collection point for customers, who had made purchases online, or were interested in trying on dresses which were shown on the website.

369. I am satisfied that the closure of the online business in November 2016, was not due to any disability on the part of the plaintiff…The plaintiff has not produced sufficient evidence to persuade the court that the closure of her business was due to a disability on her part, rather than due to the vagaries of an extremely competitive market. On the balance of probabilities, I am of opinion that her online

business failed for commercial reasons, namely that her business model was not able to survive in an extremely competitive sector of the clothing market."

33. He reiterated this conclusion at para. 371: -

> "371. In this case, having regard to the factors mentioned above, I am not persuaded that the plaintiff had to close her online clothing business due to her physical difficulties in having to go the toilet frequently and with urgency. As already stated, I am of the view that on the balance of probabilities, the plaintiff's Sparkle Closet online clothing business closed for commercial reasons unconnected with any on-going physical difficulties which the plaintiff may have had in the years 2014 to 2016. I find that by 2015 the plaintiff had made a reasonably good physical recovery. She did have frequency/urgency difficulties, but they did not prevent her doing 'back office' or online work."

34. The judge then turned to an analysis of the third period.

35. Having considered that the plaintiff had made a reasonably good physical recovery by 2015, the trial judge accepted her evidence that she continues to experience some frequency/urgency difficulties with her bladder. In this regard, there was a significant difference of opinion between the plaintiff's urologist, Dr. Miller, and the respondents' urologist, Dr. Flood, regarding whether the plaintiff was fully voiding her bladder after micturition. Dr. Miller claimed his tests demonstrated that she did not and this gave rise to a persistent urge to go to the toilet. Dr. Flood disputed this, casting doubts on the tests carried out on behalf of the plaintiff. Dr. Flood's evidence was that the plaintiff appeared to be drinking an enormous quantity of water on a daily basis at some four litres and a reduction in her fluid intake would be reflected in an improvement in her frequency and urgency symptoms, if not their complete elimination. Counsel for the plaintiff pointed to the fact that Dr. Flood's hypothesis had not been put to the plaintiff's doctors and should be disregarded. The trial judge accepted this submission. The judge's conclusion regarding the plaintiff's physical and psychological symptoms appears at para. 389-391: -

> "389. In summary, the court accepts the evidence of Dr. Miller and Dr. Byrne [*The plaintiff's GP*] that the plaintiff has probably reached something approaching her end zone or plateau. However, the court is of the view that with some moderate fluid reduction, there may be room for an improvement in her frequency/ urgency difficulties. In addition, the court notes that the plaintiff has not as yet taken any anti-colinageric medication. The court accepts the view of Dr. Sinanan [*The respondents' expert psychiatrist*] that the drug, Cymbalta, can be beneficial in relation to psychiatric symptoms, and also has an anti-colinageric side effect. The court notes that this drug had, in fact, been recommended by Dr. Byrne in the past. Accordingly, the court is of the view that on the balance of probabilities, it can be expected that the plaintiff will make progress in relation to her frequency/ urgency issues. Obviously if she does so in relation to night time episodes, this will reduce

the level of disturbance of her sleep and will lessen the consequential tiredness she feels on the following day.

390. The court finds that the plaintiff is continuing to experience some symptoms of P.T.S.D. and depression. However, as already noted, this does not appear to affect her from a mental functioning point of view, nor do they affect her capacity to work. The court prefers the views of Dr. Sinanan, to those of Dr. Cryan in relation to her future prognosis. The court accepts his evidence that with the use of appropriate medication, such as Cymbalta, and the use of C.B.T. [*cognitive behaviour therapy*], the plaintiff should go on to make a reasonably good recovery from the psychiatric difficulties which she currently has.

391. Having regard to the evidence of Dr. Miller and Dr. Sinanan, the court finds that within a further one year, the plaintiff will probably make substantial progress with her remaining psychiatric symptoms. She will also make progress with her physical symptoms; though she will be left with some frequency/ urgency issues, but not at a severe level. The court also takes account of the fact that the plaintiff has concerns about her remaining kidney, notwithstanding medical opinion that that kidney is performing perfectly and does not bear any additional risks, other than those applying to a healthy kidney."

36. The trial judge then went on to award damages under various headings. For pain and suffering to date, he assessed damages in the sum of €140,000 and for the future, €45,000. A figure of €3,153.25 was agreed for medical travel and subsistence expenses and additional unvouched travel and subsistence expenses were claimed by the plaintiff at €6,500 and the court allowed €2,500 for these.

37. Turning to the earnings issue, the judge accepted the proposition put forward by counsel for the plaintiff that the court should award general damages for loss of opportunity on the job market in the years between the surgery and the hearing. The judge was satisfied that the plaintiff was rendered totally disabled from work from the date of the surgery until the end of 2013. By 2015 she was not disabled in the work aspects of her life as long as she was doing back office work or working online. He awarded her a sum of €20,000 in this regard.

38. In relation to the future special damages, the judge said that having regard to his findings in relation to the level of business activity carried on by the plaintiff in the years from January 2014 to November 2016, he was not satisfied that she had been rendered totally unfit for work as a result of her injuries. He did however, accept that she was somewhat disabled in her working ability and would remain so until the further treatment outlined in the judgment is carried out. Even then, he accepted her frequency/urgency difficulties would never be completely eradicated. Her requirement to go to the toilet on a frequent basis during the day was accepted by the judge as ruling her out of a number of "front office" jobs such as cashier or receptionist although she would be able to undertake "back office" work where she would not have to deal continuously with members of the public and could go to the toilet as she required.

39. However, he held that there did not appear to be any basis on the medical evidence before the court, for the proposition that, if she should secure "back office" work, she would only be able to manage it part time. He was of the view that if she got such a job, she would then be able to work full time and receive a normal salary for such work. He considered that she was entitled to an award of general damages in respect of the competitive disadvantage she would have in the future on the job market and he therefore awarded a sum of €30,000 for loss of opportunity in that respect. He allowed a further figure of €18,858 in respect of future GP visits for the rest of the plaintiff's life. Adding these sums together, the total award came to €260,111.25.

**Judgment of the High Court of the 24th January, 2018**

40. As is apparent from the foregoing, the award of damages was less than the amount of the first lodgment. This gave rise to an application by the respondents for their costs which was resisted by the plaintiff on a number of grounds. Following the costs hearing, the trial judge delivered a second written judgment on the above date. The court set out and dealt with each of the arguments in turn raised by the plaintiff in resisting the respondents' application. The first was that the plaintiff had offered to go to mediation but the respondents, having initially agreed to mediate and made the appropriate arrangements, subsequently refused to attend the mediation and on that basis, the court in its discretion should decline to award the respondents their costs.

41. Secondly, the plaintiff contended that it was a precondition of being given liberty to increase the lodgment by order of Cross J. on the 20th January, 2017 that they should pay to the plaintiff all her costs up to the date of the increased lodgment which meant that, in view of the imminence of the trial, the plaintiff would be entitled to her costs up to the second day of the trial. Thirdly, the plaintiff contended that a number of scheduled hearing dates for the trial had to be vacated because the respondents were not ready to proceed and the plaintiff should be awarded the costs of each vacated date. Fourthly, the plaintiff submitted that O. 22, r. 6 of the Rules of the Superior Courts provides that even where a plaintiff does not beat a lodgment, he or she is still entitled to the costs of any issue on which they have succeeded and in this case, causation of injury to the plaintiff's bladder had been kept in issue by the respondents and they had lost that issue and costs should follow that event.

42. Fifthly, the respondents had failed in their application pursuant to s. 26 and this entitled the court to depart from the usual rule. The fact that the plaintiff succeeded in defeating this application meant that she had shown "special cause" within the meaning of O. 22, r. 6 to justify a departure from the normal rule in relation to lodgments. Finally, the appellant submitted that a number of offers had been made subsequent to the second increased lodgment, which were of a lesser amount than the topped up lodgment, and they had effectively, therefore, withdrawn the lodgment and should not be allowed to rely upon it. The judge then set out the relevant provisions of O. 22, r. 6 and given that these are material to this appeal, I propose setting them out here: -

> "6. If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in but

proceeds with the action in respect of such claim or cause of action, or any part thereof, and is not awarded more than the amount paid into Court, then, unless the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct, the following provisions shall apply:

(1) If the amount paid into Court exceeds the amount awarded to the plaintiff, the excess shall be repaid to the defendant and the balance shall be retained in Court.

(2) The plaintiff shall be entitled to the costs of the action up to the time when such payment into Court was made and of the issues or issue, if any, upon which he shall have succeeded.

(3) The defendant shall be entitled to the costs of the action from the time such payment into Court was made other than such issues or issue as aforesaid.

(4) The costs mentioned in paragraphs (2) and (3) hereof shall be set off against each other; and if the balance shall be in favour of the defendant, the amount thereof shall be satisfied pro tanto out of the money remaining in Court and, in so far as the money remaining in Court is not sufficient to satisfy the same, shall be recoverable from the plaintiff; or if the balance shall be in favour of the plaintiff, the amount thereof shall be recoverable from the defendant.

(5) Any money remaining in Court after satisfying the balance (if any) due to the defendant for costs as aforesaid shall be paid out to the plaintiff.

(6) If in any case the Court is of the opinion that for the purposes of the preceding paragraphs of this rule it is not necessary to retain in Court the whole of the balance referred to in paragraph (1) it may order the payment out to the plaintiff of so much thereof as it deems proper.

(7) The amount awarded to the plaintiff shall be deemed to be satisfied by the application in manner aforesaid of the moneys paid into Court."

43. The court proceeded to set out a detailed chronology of relevant events for the purposes of the various issues raised on costs. The judge then summarised the respective submissions of the parties.

44. The trial judge's conclusions on each of the issues raised by the plaintiff in turn were as follows. First, on the question of mediation, he noted that while the issue of whether a refusal to attend a mediation could deprive a party of the benefit of a lodgment, he considered that it was not necessary to resolve that issue because he was satisfied that the respondents did in fact have a *bona fide* intention to participate in mediation as was evident from the correspondence. The fact that they did not ultimately do so was

because Dr. Van Geene became ill in February 2016 and remained ill at all relevant times, thereby being unable to attend the mediation as a necessary party. Therefore, it could not be said that the respondents had refused to mediate "without good reason". The judge therefore, rejected this argument.

45. Secondly, as regards the plaintiff's contention that the making of an increased lodgment by the respondents meant they were liable to pay the plaintiff's costs up to that date, the trial judge noted there were two problems with that submission. The first was that no such precondition was contained in the consent order made by Cross J. on the 20th January, 2017. The second reason for rejecting this contention was that once the respondents made an increased lodgment, the plaintiff had the option of accepting it within 14 days and automatically getting her costs up to the date of acceptance. He distinguished the decision in *Ely v Dargan* [1967] IR 89.

46. On the plaintiff's third submission regarding the vacation of hearing dates, the trial judge held that these were properly matters for the judge who dealt with each of those applications.

47. The Court then turned to the plaintiff's submission concerning O. 22, r. 6 and the suggestion that the plaintiff had succeeded on two specific issues, first, in establishing damage to her bladder, and second, in defeating the s. 26 application. He considered the effect of *Harrison v Ennis* [1967] IR 286 and the apparent tension with the decision of Finnegan P. in *Grant v Roche Products (Ireland) Ltd. and Others* [2005] IEHC 161 and felt he was obliged to follow the former.

48. Counsel for the plaintiff had submitted that the issue of damage to the plaintiff's bladder was part of the liability issue but the judge considered it to be a matter of causation which was part of the quantum issue. It seemed to him that there was only one issue at the trial and it was unrealistic to suggest that the plaintiff should obtain costs due to the fact that she established that there had been an injury to her bladder. That was merely one of multiple parts of her overall claim to damages. These were not separate issues within the meaning of *Harrison v Ennis*. To hold otherwise would effectively make the lodgment procedure almost useless.

49. In relation to the s. 26 application, the judge held that this was in effect an integral part of the case rather than a separate issue to be tried. It arose directly out of the evidence given by and on behalf of the plaintiff at the trial. Even if it were to be regarded as a distinct issue, there was no additional time or expense involved in dealing with it as the same evidence would in any event have been given. Accordingly, it did not give rise to a separate heading of costs for which the respondents should be held responsible, even though the respondents failed in the application. Although counsel for the plaintiff submitted that the application was to the effect that the plaintiff's entire claim was fraudulent, the trial judge disagreed with that proposition, holding that it was necessary for the respondents to establish that the plaintiff had given false or misleading evidence in a material respect, as the section provides. The fact that the court did not hold in favour of the respondents did not imply that the s. 26 application was spurious or totally

unfounded. Accordingly, it did not preclude the respondents from relying on the lodgment.

50. On the final issue with regard to the implicit withdrawal of the lodgment by the making of subsequent offers, the trial judge could see no basis in law for that submission. He accordingly rejected each of the plaintiff's arguments on the effect of the lodgment.

51. This left open the question of whether the operative date for the purposes of costs should be the date of the initial lodgment or the subsequent top up. Since the plaintiff did not beat either lodgment, the trial judge held that the respondents were entitled to their costs from the date of the initial lodgment being the 27th September, 2016 and he proceeded to make orders in accordance with the provisions of O. 22, r. 6.

**Grounds of Appeal**

52. On the issue of general damages, the essential ground of appeal is that the award was not proportionate in relation to the scale of compensation determined by the courts in cases of similar severity and intensity. The judge failed to have proper regard to the likely sequelae of the plaintiff's injuries in assessing future special damages. On the costs issue, the plaintiff's grounds largely replicate the arguments raised in the High Court as I have outlined them. In addition, the plaintiff claims that as the initial lodgment included recoverable benefits of circa €55,000, this amount should be subtracted from the award meaning that the plaintiff had in fact beaten the lodgment.

53. This ground does not appear to have been advanced in the High Court. In the respondents' notice, they cross-appeal the refusal of the trial judge to accede to the s. 26 application on the grounds that the trial judge erred in holding that the plaintiff had not given evidence that was false or misleading in a material respect whether on affidavit or under oath as a witness. It is also said that he erred in failing to attach any or any adequate weight to an alleged failure by the plaintiff to mitigate her loss in failing to comply with medical directions and failing to seek employment.

**General Damages**

54. The principles to be applied to the assessment of general damages in personal injuries actions were most recently discussed by this court in *McKeown v Crosby* [2020] IECA 242. The award must be fair to the plaintiff and to the defendant. It must be proportionate in the context of the cap for general damages for the most serious injuries, now €500,000, and also in the context of awards given by courts for comparable injuries. In cases where it can be said to be relevant, the Book of Quantum may have a role to play in guiding the court's assessment of damages.

55. In order to interfere with an award of damages, the appellate court must be satisfied that no reasonable proportion exists between that award and what the appellate court itself considers appropriate. The appellate court will only interfere if there is an error in the award of damages which is so serious as to amount to an error of law. The fact that the appellate court might be inclined to award a greater or lesser sum is not, without more, sufficient to warrant interference. The appellate court accords particular respect and deference to the views of the trial judge in his or her assessment of the plaintiff and how

the particular injuries have affected the plaintiff. As is well settled since *Hay v O'Grady* [1992] 1 IR 210, findings of primary fact by the trial judge will not be interfered with once they are supported by credible evidence.

56. It is important to recall some of the trial judge's conclusions regarding the plaintiff's injuries. Counsel for the plaintiff suggested that compartmentalising the plaintiff's injuries into time periods led the trial judge into adopting a false picture of the overall position. I cannot accept that submission. A very major issue at the trial was the operation of the plaintiff's Sparkle Closet business, both in terms of the online business and the running of the physical shop. The trial judge's conclusion with regard to the plaintiff's ability to run this business over a three year period cannot in my view be faulted. He recognised the importance of this period, the second period in the context of the overall claim for both general and special damages. It is notable that the judge rejected the plaintiff's evidence on a number of key aspects in relation to the business.

57. The plaintiff sought to portray Sparkle Closet as more of a hobby than a business. The judge squarely rejected this contention and gave clear and compelling reasons why he did so. It is evident that he was unimpressed by the plaintiff's reticence about giving details of the business or producing a single document relating to it, when it is manifest that such documents must have existed. In fact, the only documents that were produced came from the respondents in the form of the plaintiff's extensive Facebook postings. At the hearing of the appeal, counsel for the plaintiff complained that the trial judge carried out his own investigation of these postings in coming to his conclusions and ought not have done so. However, in my view, once those documents were put in evidence without objection, the trial judge was perfectly entitled to have regard to what they showed and the picture they painted of the plaintiff's business.

58. The judge's finding that the plaintiff deliberately withheld giving details of the business and that she was less than forthcoming in this regard is a conclusion that was open on the evidence and cannot be interfered with on appeal. The fact that the plaintiff was able to run an online and physical business at the level of sophistication found by the trial judge was a matter he was entitled to take account of in the context of her complaints of ongoing symptoms, both physical and psychological. It is also relevant to record that in her pleadings, the plaintiff repeatedly made the case that her business failed because she was unable to maintain it due to the sequelae arising from the respondents' negligence.

59. This too was rejected by the trial judge on the basis that the plaintiff's business failed for commercial reasons and indeed, the plaintiff herself in evidence conceded that this was so. Therefore, the judge's conclusion that the closure of the business was not due to any physical difficulties arising from having to go to the toilet frequently and with urgency is unimpeachable. The same is true of his finding that by 2013, the plaintiff had made a reasonably good physical recovery, recognising that she did continue to have frequency/urgency difficulties. Again, the judge's conclusion that the situation in the latter respect could be improved by moderate fluid reduction and anti-colinergic medication was well supported by credible medical evidence.

60. Counsel for the plaintiff submitted that while the award of general damages for both past and future pain and suffering was too low, particular emphasis was placed on the figure of €45,000 for the future on the basis that it was far below what a proportionate award should be. In this regard, it was said that insufficient account was taken by the trial judge of the plaintiff's psychological and psychiatric injuries which were significant and ongoing. In particular, complaint was made of the fact that the judge preferred the evidence of Dr. Sinanan with regard to the plaintiff's prognosis to that of Dr. Cryan and the plaintiff's GP, Dr. Byrne.

61. It was said that the trial judge was obliged to give reasons for preferring Dr. Sinanan's prognosis and he failed to do so contrary to the principles enunciated by this court in *Nolan v Wirenski* [2016] 1 IR 461. Reliance was placed on the following passage in the judgment of Irvine J. (as she then was), with which the other members of the court agreed (at 475): -

> "[48] It is not sufficient for the court simply to declare that it accepts the evidence of the plaintiff or that it is satisfied that he is a truthful witness without saying why that is the case. If the question is raised whether the plaintiff is a credible witness or is exaggerating his injuries or their impact on him, that is a matter that should be resolved by reference to the evidence and not simply by an unsupported assertion based on the impression that he made on the trial judge when giving evidence. Obviously, the judge's view is very important and indeed in that respect puts the trial court in a position superior to that of the appeal court: see *Hay v. O'Grady* [1992] 1 I.R. 210. But for the appeal court to have the full value of the trial judge's superior position, it needs to have available to it the reasoning process whereby the judge arrived at his conclusion."

62. That particular passage has to be seen in the context of the facts of the case. There was a very significant contest concerning the sequelae the plaintiff claimed to have suffered and the extent to which movements of her upper limb were limited as a result of the injuries suffered in the accident. In evidence, the plaintiff claimed that she was unable to lift her right arm and hand above the horizontal. The trial judge accepted this evidence on the basis that the plaintiff was an honest person and had not sought to exaggerate her symptoms. However, there was clear video evidence put before the court of the plaintiff vigorously waving overhead on a number of occasions and carrying out other activities inconsistent with her evidence. It can be readily understood, therefore, that Irvine J. concluded that it was not sufficient for the trial judge to simply accept that the plaintiff was telling the truth without explaining that conclusion in circumstances where there was objective evidence to the contrary. As Irvine J. noted, that was to say no more than the judge should give reasons for his conclusions. Accordingly, the trial judge's finding was held to be unsupported by the evidence.

63. Where clear factual conflicts arise in a case which call for the court to determine where the truth of the matter lies, the court will normally need to give an explanation for its conclusion on the resolution of the conflict, where that is not otherwise evident from the

overall context. The situation is somewhat different where expert evidence is concerned because the court is not adjudicating on a dispute of fact, but rather a difference of expert opinion. The court is entitled to prefer one expert's opinion over another where it finds the former more persuasive. In the present case, the plaintiff had been advised as to the appropriate treatment for her psychiatric symptoms being the use of appropriate medication, such as Cymbalta, and also the use of cognitive behaviour therapy. The plaintiff had declined any treatment in that regard and Dr. Sinanan's opinion was that if she had such treatment, she should ultimately make a reasonably good recovery. Even from the lay perspective, that appears to be a reasonable conclusion to arrive at and one that the trial judge was entitled to accept.

64. Counsel for the plaintiff also contended that the trial judge had fallen into error in that he took no account of the loss of consortium suffered by the plaintiff as a result of her symptoms which rendered sexual relations difficult and unpleasant for her. I think it important to state that the fact that something is not mentioned in the judgment of the trial court does not mean it was not taken into account. Something more is required to demonstrate error on the part of the trial judge.

65. Unless the contrary is clearly shown, the appellate court is entitled to assume that account was taken by the trial judge of all the relevant evidence in arriving at his or her conclusions. It does not follow that because something is not mentioned, it was not considered. Were that to be the case, it would place an impossible onus on trial courts to slavishly record every conceivable fact, feature and complaint that arose during the course of evidence, lest a failure to do so be construed as a failure to consider it. That cannot be the obligation of a trial judge. As it is, judgments nowadays are sometimes criticised for their length, a perhaps unavoidable consequence of the increasing complexity of modern litigation. To add to it in the manner proposed by the plaintiff would in my opinion be an undesirable development. In any event, while this issue was mentioned by the plaintiff, I think it fair to say that it was not central to the case and indeed, there was a dispute between the parties as to whether it was pleaded or not.

66. In the present case, I am satisfied that there is nothing to suggest that the trial judge failed to properly have regard to all the evidence or reached any conclusions that were not capable of being supported by that evidence. Counsel for the plaintiff referred to a number of cases which he said supported his contention that the trial judge had seriously underestimated the value to be attached to serious psychiatric injury. In *Kearney v McQuillan* [2012] IEHC 127, [2012] IESC 43, the plaintiff was wrongfully subjected to a symphysiotomy at the age of eighteen which gave rise to severe injuries, both physical and mental. The patient was rendered incontinent and suffered from permanent backache. She developed what was described by the High Court judge as a major psychiatric illness which was "grave". She suffered from delusions and obsessional neurosis. This was held to be an extremely severe mental illness that rendered the plaintiff unable to lead an independent life. Damages were assessed in the High Court at the maximum level of €450,000. This was reduced on appeal to €325,000, the Supreme

Court considering that although the injuries were serious, they fell short of the highest category of catastrophic injury.

67. This does not seem to me in any sense comparable to the present case. The High Court here accepted that with appropriate treatment, the plaintiff should go on to make a reasonably good recovery from her psychiatric difficulties and within a year, should make substantial progress with her remaining psychiatric symptoms. The principal physical symptom remaining was found by the trial judge to be one of frequency/urgency but not at a severe level, very much in contrast with the plaintiff in *Kearney*.

68. In *Vernon v Colgan* [2009] IEHC 86, the plaintiff's principal injury was psychiatric. He suffered from severe depression and post-traumatic stress disorder which, despite extensive ongoing treatment, was unlikely to improve. There was no dispute on the evidence and the defence called no psychiatric evidence. Having observed the plaintiff's conduct during the trial, the judge was sufficiently concerned to consider whether the plaintiff had capacity to give instructions to his legal team. The judge described the injury as a very severe life changing injury which resulted in the loss of his partnership of twenty years and the breakup of his family. The sum of €175,000 was awarded for general damages but again, the psychiatric injury in that case was not in my view comparable in any real sense to the present case.

69. In *O'Connor v O'Driscoll* [2004] IEHC 19, the plaintiff was a senior bank executive who suffered relatively minor physical injuries in a car accident but developed a quite dramatic psychiatric reaction to the accident. He developed a very serious post-traumatic stress disorder which was chronic, a major depressive illness and generalised anxiety disorder with a gloomy prognosis. The severity of the illness was shown by the fact that he was described by the trial judge as an ambitious and highly successful bank executive with enormous drive and thirst for success before the accident, but was so badly affected by his injuries that he would never work in banking again. A sum of €150,000 for general damages was awarded but again, I find no useful comparison in this case. These cases show that severe psychiatric injuries can attract damages on a par with severe physical injuries and that cannot be gainsaid. However, the fact remains here that the trial judge held in relation to the plaintiff's psychiatric injury that she should make a reasonably good recovery within a further year of the trial.

70. An award of €140,000 for pain and suffering to date could not be viewed as other than very substantial and recognised the undisputed fact that during the first almost four year period after the index event, the plaintiff suffered very severe pain, discomfort and distress. Thereafter however, her situation improved considerably and the trial judge was of the view that there was significant room for further improvement in terms of both the physical and mental injuries if the plaintiff availed of the treatment she had been advised to have. There is no doubt that her ongoing urinary symptoms, even if improved with treatment, would still amount to a significant ongoing inconvenience for her but account was taken of that by the trial judge in the award of general damages and also in the context of damages for loss of opportunity.

71. As I have noted, the Book of Quantum is of limited value in the present case. It does not cover psychiatric injury. While it provides for contusion/haematoma and laceration of the kidney, it does not mention loss of a kidney. In relation to bladder injuries, where ongoing loss of function is expected, as here, it provides a range of €24,600 to €86,000. An injury to the ureter ranges from €21,400 to €44,500. In the present case, the principal ongoing physical sequel of the injury is a loss of bladder function, but not of the most severe kind which would include total and permanent urinary incontinence. Taking all these matters in the round, it cannot be said that the award of €185,000 for general damages in this case is so disproportionate as to amount to an error of law.

**Loss of earnings**

72. No appeal is taken against the trial judge's award of €20,000 for past loss of earnings in respect of the period between the index surgery and the trial. However, in relation to the sum of €30,000 awarded for loss of opportunity in the future, the plaintiff contends that this sum is too low "by a considerable proportion".

73. The entire issue of loss of earnings, past and future, was a central feature of this case in a number of respects. The case made by the plaintiff in this regard up to the commencement of the trial stood in stark contrast to the case advanced during the trial. The following matters are pertinent in that regard: -

    (a) The plaintiff claimed she was earning €26,000 per annum prior to the surgery. This claim was made on the 4th October, 2016 shortly after the first lodgment. In apparent response to this claim, the respondents topped up the lodgment on the 23rd January, 2017 by €170,000 bringing it to €450,000.

    (b) The plaintiff reiterated the claim that she was earning €26,000 per annum in further particulars on the 30th January, 2017. In addition to the future loss of earnings already claimed, she now claimed a sum of €111,490.66 for past loss of earnings.

    (c) On the 6th February, 2017, the plaintiff swore on affidavit that these claims were true.

    (d) In the same affidavit, the plaintiff disclosed the Sparkle Closet business for the first time but said it failed due to the injuries the subject of these proceedings (an averment that she subsequently disavowed in her own evidence).

    (e) Four days later, on the 10th February, 2017, the plaintiff swore that she had an annual income which she estimated at about €25,000 per annum. She again repeated the claim that Sparkle Closet failed because of her injuries.

74. All of these claims subsequently transpired to be untrue. The plaintiff's sworn statements in this regard were not mere formulaic verifications of the claim. They were considered statements of truth concerning the plaintiff's employment activities before and after the surgery. Claims in her pleadings that her capacity for prolonged standing and walking was reduced and she had difficulty bending, lifting and driving long distances, verified as

true, were quietly dropped as evidence emerged at the trial, to which I have referred, which appeared to significantly undermine these claims.

75. These matters undoubtedly impacted on the trial judge's assessment of the plaintiff as did her deliberate vagueness and reticence about revealing details of her business activities in a way that cannot but have undermined her credibility on all issues to a significant extent. Although the trial judge said that she was "somewhat unforthcoming" about her business activities, that is to put it very mildly indeed.

76. It is difficult to avoid the conclusion that there was no credible evidence before the High Court regarding the plaintiff's prior earnings, a difficulty recognised by the plaintiff's legal team in effectively jettisoning the pleaded case as soon as the trial commenced and instead inviting the judge to award general damages on a loss of opportunity basis, an invitation he accepted. Whilst therefore, it might be said that there is an argument in support of the proposition that nothing should have been awarded for future loss of earnings, the respondents have not cross-appealed in that regard. There was in any event credible evidence which entitled the judge to conclude that the plaintiff would in the future be at a competitive disadvantage by virtue of her sequelae and therefore to award a sum on that account. However, I have no hesitation in unequivocally rejecting the plaintiff's contention that a higher sum should have been awarded under this heading.

**Costs**

77. I have already set out above the various arguments advanced by the plaintiff and considered in the High Court's second judgment and these arguments were largely replicated on appeal. Several of these can be dealt with quite briefly. On the mediation issue, I agree entirely with the trial judge's conclusion. The respondents did not refuse to go to mediation. The correspondence shows, as the trial judge held, that they were perfectly willing to mediate but unfortunately, Dr. Van Geene became ill. While it might be suggested that it was not essential for Dr. Van Geene to attend the mediation, his indemnifiers were perfectly entitled to take the view that his attendance was desirable, if not indeed essential, as the treating surgeon against whom the negligence was alleged.

78. He was reasonably entitled to have an input into the process and not uncommonly in medical negligence cases, his attendance might, if appropriate, have afforded an opportunity for a face to face explanation between the parties or an apology if that were considered appropriate. Such steps not uncommonly facilitate what might loosely be described as "closure" from the plaintiff's point of view and thus assist the mediation process. In any event, the fact of the matter is that Dr. Van Geene unfortunately never recovered sufficiently from his illness to attend the mediation and it therefore did not proceed before the matter came on for trial.

79. With regard to the argument that the respondents should be required as a condition of increasing the lodgment to pay the plaintiff's costs up to that date, the time for making that argument was when the respondent's motion came before the High Court on the 20th January, 2017. Not only did the plaintiff not make this case, but she consented to an order in the terms already set out and consented to paying the respondents' costs of

the motion. The argument now made that the respondents should in fact pay all the plaintiff's costs in the teeth of that order appears to me to be unstateable.

80. The same must necessarily apply to the plaintiff's argument concerning the vacation of various hearing dates. Here again, any argument about the costs of the proceedings when an application to adjourn was made was an argument to be addressed to the judge dealing with that application. It was too late after the event to seek an order from the trial judge.

81. The plaintiff further argues that the respondents should not be entitled to costs based on the lodgment in circumstances where, by the making of subsequent offers before and during the trial, they had in effect withdrawn it. This argument is untenable. Where a lodgment is made, the plaintiff has a defined period of time to accept it. If she does so she is entitled to all of her costs up to that date. If she does not, the lodgment remains valid for the benefit of the defendant until the conclusion of the trial. There is no conceivable basis upon which it can be suggested that the mere making of an offer by the defendant, be it greater or less than the amount of the lodgment, somehow defeats the effect of the original lodgment. There can of course be any number of reasons why an offer might be made by a defendant of a greater or lesser sum, depending on the run of the case and to suggest that such invalidates the lodgment is entirely misconceived.

82. Another contention of the plaintiff was that the lodgment ought to be treated as including recoverable benefits which, according to the plaintiff, amounted to approximately €55,000 and thus the net lodgment was €225,000, which the plaintiff beat. The respondents say that there was no successful claim for loss of earnings and accordingly no obligation to repay recoverable benefits arises. This seems to be correct in the sense that the sums awarded for loss of opportunity fall to be treated as general damages and no specific loss of earnings was established as already explained. In any event this argument was not made in the High Court and cannot be made for the first time on appeal.

83. Aside from that, I do not think it can be correct to say that the lodgment falls to be analysed by reference to the breakdown of the sums awarded to the plaintiff and whether particular items should be deemed to be included or not included as the case may be. This would potentially give rise to an unworkable situation but is in any event not what the rule provides. It is solely concerned with whether the amount paid into court exceeds the amount awarded to the plaintiff. Therefore, what is, or is not, included in the award is immaterial.

84. With regard to whether the respondents' costs should run from the date of the first or second lodgment, as the trial judge observed, O. 22, r. 6 is silent on this question. There would be a logic to the plaintiff's position if she had beaten the first lodgment but not the second. Where she did not even beat the first lodgment, it is in principle difficult to see why the respondents should be penalised for making a second lodgment in circumstances where had they not done so, they would have been entitled to their costs from the date of the first and only lodgment. Penalising the respondents in this regard would be particularly unfair in circumstances where the second lodgement had been precipitated by

sworn averments made by the plaintiff in relation to her loss of earnings which, it transpired, were untrue.

85. Turning now to the question of whether the plaintiff succeeded on discrete issues that should entitled her to the costs of those issues, this contention is based on O. 22, r. 6 (2) set out above at para. 42. The plaintiff says that the respondents kept alive the issue of liability insofar as the injury to her bladder was concerned. This is evident from the respondents' letter of the 1st February, 2017 quoted at para. 13 above and the statement of their counsel on the second day of the trial quoted at para. 17 above. The plaintiff in that respect relies on the decision of the Supreme Court in *Harrison v Ennis* [1967] IR 286.

86. The plaintiff was a pedestrian who was struck by the defendant's car. The defendant paid money into court with a denial of liability and a plea of contributory negligence. The jury found each party was 50% responsible with the result that the plaintiff failed to beat the lodgment. The Supreme Court identified three issues in the case namely negligence, contributory negligence and damages. The plaintiff had succeeded on negligence but the defendant succeeded on contributory negligence and damages. The court held by a majority that the plaintiff was entitled to all of his costs in respect of the negligence issue, notwithstanding his failure to beat the lodgment, but the defendant was entitled to the costs of the other two issues from the date of the lodgment.

87. This might be viewed as a somewhat surprising outcome and it is notable that Haugh and Fitzgerald JJ. dissented from the majority, holding that the defendant should have been entitled to all his costs from the date of the lodgment. Contrary *dicta* appear in the judgment of Finnegan P. in *Grant v Roche Products* but the trial judge felt understandably obliged to follow *Harrison v. Ennis*. He held however, that there was, in relation to the plaintiff's bladder injury, no true issue of liability arising but rather a causation issue that was part of the quantum/damages issue. Commenting on this, the trial judge said (at para. 71): -

> "That [*the bladder injury*] was merely one of the multiple parts which cumulatively made up her overall claim to damages. They did not constitute separate issues within the meaning of that term as set out in *Harrison v Ennis*. To hold otherwise, would effectively make the lodgment procedure almost useless."

88. I would heartily endorse those sentiments. Sometimes it is possible to separate out in more complex cases clear and distinct issues which might be appropriately described as segments or "modules" of the trial when a nuanced costs order dealing with such discrete issues may be appropriate. This is clear from the judgment of Clarke J. (as he then was) in *Veolia Water UK Plc v Fingal County Council (no. 2)* [2007] 2 IR 81 and *M.D. v N.D.* [2016] 2 IR 438. These judgments were recently considered and applied in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183 where Murray J., delivering a judgment with which the other members of the court agreed, observed (at p. 5): -

"10. As analysed by Clarke J. the first is a case where an '*event'* can be identified and in which all costs of the case follow that event. This is the default position even where the party who succeeds on the '*event'* has not prevailed on every issue in the case or succeeded in every argument it has advanced (see *Veolia* at para. 2.5 and 2.8 and *MD* at para. 9). … A party who has thus succeeded on the '*event*' so understood should normally obtain their costs, even if not successful '*on every point*' for two principal reasons. As a matter of both fairness and of principle, where a party has had to institute legal proceedings in order to obtain relief, the starting point should be that he recovers all of the legal costs in securing that benefit (*Godsil v. Ireland* [2015] IESC 103, [2015] 4 IR 535 at para. 20). Moreover, in many cases the splitting of costs as between different issues and arguments in a case is likely to create satellite applications around costs which will not usually represent an economical use of the time and cost of either the parties or the Court.

11. The second situation arising from *Veolia* is where an '*event*' is identified, but where the party who has prevailed on that event has not been successful on an identifiable issue or issues which have materially increased the costs of the case"

89. Murray J. went on to explain that *Veolia* and *MD* made clear that an order splitting costs in this way is very much the exception and in particular, should only be made where;

(a) the proceedings are complex involving multiple issues, and the raising of issues on which the otherwise successful party failed to prevail could have affected the overall costs of the litigation "*in a material extent*"; and

(b) the court can readily separate and identify the costs so arising.

90. This gives helpful guidance as to how the expression "issues or issue" in O. 22, r. 6 (2) should be construed. Every case, even the most simple, has multiple issues, points and questions arising for determination. For example, in a straightforward road traffic accident, the plaintiff may plead twenty different particulars of negligence, one of them being a failure by the defendant to sound his horn. Of course, it could not realistically be suggested that a failure to establish this particular allegation somehow means that the costs of that issue should be awarded to the defendant. The "issue" in question must be one which is identifiably separate and distinct and more importantly, has materially increased the costs of the case.

91. In the present instance, the respondents admitted negligence and conceded that this negligence had caused damage to the plaintiff. The extent of such damage is of course a matter for the plaintiff to prove, as the trial judge recognised, as part of the quantum and/or causation aspect of the case. It is common for plaintiffs to allege, as here, that they have suffered multiple injuries but are unable to connect all of them with the negligence of the defendant. They may perhaps stem from a pre-existing condition and an issue may arise as to the extent to which that condition was either caused or exacerbated by the accident. That cannot usually be characterised as a separate issue in the proceedings.

92. The contest concerning the plaintiff's bladder injury here revolved around whether there was in fact evidence of such injury. The respondents were not at any stage suggesting that if an injury had in fact been suffered, they were not responsible for it. Rather the evidence from their expert urologist, Dr. Flood, was to the effect that there was no residual injury on the basis that he disagreed with the opinion of Dr. Miller and the test findings relied upon by the plaintiff. To my mind, that cannot be viewed as a separate issue in the case and more significantly, there is nothing to suggest that this dispute materially, or at all, increased the costs of the case. I am therefore satisfied that the trial judge reached the correct conclusion on this point.

93. The respondents complain that the trial judge was wrong to rule out relevant evidence of their expert urologist, Dr. Flood, on the basis that it was not put to the plaintiff's expert, Dr. Miller. They contend that the reason for this was that Dr. Miller was unfairly interposed at an early stage of the trial, depriving them of the opportunity of taking instructions before Dr. Miller was cross-examined. However, I agree with the plaintiff's contention that this complaint is not well founded in circumstances where no application was made to the trial judge to recall Dr. Miller to deal with any outstanding issues.

94. As regard the s. 26 application, the same considerations apply as to the bladder injury issue. This must be viewed as an organic part of the trial, rather than an issue separately pleaded or canvassed from the outset. Section 26 applications are most frequently based on the evidence given by or on behalf of the plaintiff at a trial and whether that evidence ought to be viewed as false and misleading within the meaning of the section. Whether such application arises at all usually depends on the run of the evidence and will normally not add much, if anything, to the costs of the trial. It therefore does not fall to be viewed as a separate issue upon which the plaintiff has succeeded within the meaning of O. 22, r. 6 (2).

**The respondents' cross-appeal**

95. The law in relation to s. 26 was usefully summarised by the judgment of this court in *Platt v OBH Luxury Accommodation Limited* [2017] 2 IR 382. The sole judgment with which the other members of the court agreed was given by Irvine J. She outlined the scheme of the 2004 Act, referencing the earlier judgment of this court in *Nolan v O'Neill* [2016] IECA 298. In dealing with the general principles in relation to s. 26 applications, she considered the burden of proof and noted that an application pursuant to s. 26 is one to be cautiously made, approving the well-known *dicta* of O'Neill J. in *Smith v HSE* [2013] IEHC 360 where he noted in connection with the section (at para. 92): -

> "It should not to be seen as an opportunity to prey on the frailty of human recollection or the accidental mishaps that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of the award of compensation to which they are rightly entitled."

96. In dealing with the evidential proof required for a successful s. 26 application, Irvine J. referred to her earlier comments in *Nolan v O'Neill*: -

"43. What is clear from the wording of the section is that the defendant must establish firstly an intention on the part of the plaintiff to mislead the court and secondly that he/she adduced or caused to be adduced evidence that was misleading in a material respect. Thus, false or misleading evidence even if intentionally advanced if not material to the claim made cannot justify invocation of the section. Further, any such false or misleading evidence must be sufficiently substantial or significant in the context of the claim that it can be said to render the claim itself fraudulent. That this is so would appear to be supported by the following short passage from the decision of Fennelly J. in *Goodwin v. Bus Eireann* [2012] IESC9, (unreported, Supreme Court, 23 February 2012) concerning s. 26 and where at page 20 he stated as follows:-

'62. For this section to apply, the defendant must discharge the burden of showing that some material evidence has been given which is *false or misleading* and that the plaintiff knew that it was *false or misleading*. (See the judgment of Denham C.J. of 2nd December 2011in *Ahern v Bus Eireann* [2011] IESC 44, (unreported, Supreme Court, 2 December 2011)). Counsel for the defendant correctly accepted that this amounted to an allegation that the claim was fraudulent.' (emphasis in original)

44. However, this does not mean that a defendant must establish that the entirety of a plaintiff's claim is false or misleading in order to succeed on such an application. It is clear that proof that a plaintiff's claim for loss of earnings was false or exaggerated to a significant extent may justify the dismissal in total of an otherwise meritorious claim."

97. In this case, the respondents advance a number of matters in support of the contention that the plaintiff's oral evidence was serially misleading in material respects that ought to have led to the dismissal of her claim under s. 26. They place particular emphasis on the pleadings and affidavits prior to the trial in connection with her loss of earnings claim to which I have already referred. The plaintiff counters this by saying that this claim was not pursued at trial when it became clear that her earnings history was "patchy" and counsel expressly drew this to the court's attention, inviting the court, instead of awarding past and future loss of earnings on a mathematical and calculated basis, to make an award on the basis of general damages by way of loss of opportunity.

98. In submissions on this appeal, counsel for the plaintiff submitted that the plaintiff gave no materially misleading oral evidence and the jurisprudence demonstrates that it is ultimately the evidence of the plaintiff given in court which is relevant to s. 26. I cannot accept that as a general proposition and agree with the views expressed *obiter* by Irvine J. in *Platt* in this connection (at p. 412): -

"It should nonetheless be observed that s. 14 of the 2004 Act is one which mandates the plaintiff to swear a verifying affidavit as to the truth of all assertions, allegations and information *provided* to the defendant and this includes the contents of pleadings or schedules of special damages (my emphasis). The

provisions of s. 26 (2) as they refer to s. 14 do not seem to confine the defendant's entitlement to invoke that section to circumstances in which the plaintiff has actually pursued the claim as supported by such an affidavit at the trial. Without wishing to advance any definitive view on the matter, I will do no more that observe that it would undermine the effectiveness of the legislation if a plaintiff, intending to defraud the court and a defendant by making a grossly inflated claim based upon reports contrived for such a purpose, could, on being made aware that the defendant had evidence to undermine that claim, withdraw those reports and proceed to recover damages as if they had done nothing wrong."

99. It is abundantly clear in the present case that the plaintiff in her pleadings made a very substantial claim for past and future loss of earnings on an entirely false premise. That claim was put forward on at least two separate occasions shortly prior to the trial and was sworn by the plaintiff on at least two occasions to be true. To suggest that this alone could not provide a basis for dismissing the claim is manifestly erroneous. The fact that in opening the case, counsel for the plaintiff resiled from that position does not excuse it in any way.

100. As noted by the judge at para. 69 of his judgment, the plaintiff gave evidence that she did not know about the claim of some €120,000 for past loss of earnings. She also claimed not to know why it had not been made clear that she was not in fact earning €26,000 per annum with Kingfisher although she said she had a contract for this amount. Counsel for the respondents contended at the trial that this claim had been abandoned because the plaintiff realised "the game was up". Having heard her evidence however, the trial judge did not accept that contention. Instead, he took a somewhat benign view of this aspect of the case at para. 319 of his judgment which I have set out above at para. 23.

101. Again, the respondents strongly criticise the plaintiff in relation to her evidence concerning Sparkle Closet which was said to be deliberately false and misleading. However, again it is clear that the trial judge did not accept this characterisation. Whilst he said that the plaintiff's evidence about Sparkle Closet was "somewhat unforthcoming", he was not satisfied that she had gone as far as giving false and misleading evidence such as to warrant dismissal of her case pursuant to s. 26. The judge was of a similar view about her complaints both physical and mental and considered (at para. 326) that the plaintiff did not give evidence that was false and misleading in a material respect and therefore declined to dismiss her case under this heading.

102. The trial judge had the opportunity of hearing and observing the plaintiff over a number of days in the witness box. While he expressed certain misgivings about particular aspects of her evidence, especially her reticence about Sparkle Closet, he was clearly of the view that she had not been deliberately dishonest overall in her evidence. If she was bent on advancing a fraudulent claim, it could perhaps be argued that a dishonest plaintiff might have claimed to have earned €26,000 in cash, which would be difficult to disprove, or that she had to give up her business due to the injury complained of when she

conceded that this was not correct. These might be little more than straws in the wind but this court must defer to the trial judge's assessment of the plaintiff's evidence on *Hay v O'Grady* principles.

103. As Fennelly J. observed in *Goodwin* (at p. 20): -

> "63. In the absence of a finding from the trial judge that the plaintiff, in this case, had knowingly given false or misleading evidence, it is impossible for the defendant to succeed. She was the judge who heard all the witnesses, apart from those who gave evidence on commission, and, especially, heard the plaintiff whose evidence was at issue. This court cannot substitute itself for the trial judge in the assessment of the credibility of witnesses."

104. The judge accepted the plaintiff's explanation of the claims made in the pleadings and, although he might have been entitled to view these as dubious, it must be accepted that there was at least a degree of confusion about the length of time the plaintiff worked for Kingfisher and the fact that she had a written contract at a rate of €26,000 per annum. Although, despite searches, she was unable to produce this contract, the judge appears, at least implicitly, to have accepted her evidence concerning Kingfisher to the effect that she had a contract that would have yielded this amount and she worked there for some months. Therefore, while it might be said that considerable suspicion attached to the loss of earnings claim advanced before the trial commenced, the bar for success in a s. 26 application is high.

105. The onus of proof rests upon the defendant and while the civil rather than criminal standard applies, the observations of Feeny J. in *Ahern v Bus Eireann* [2006] IEHC 207 (approved in *Platt*) are noteworthy (at p. 4): -

> "In the light of the approach outlined by the Supreme Court in *Georgopoulus v Beaumont Hospital Board* [1998] 3 IR 132 in the judgment of Hamilton C.J., this court must have regard to the fact that even though a civil standard of probability applies rather than a criminal standard, regard must be had to the seriousness of the matter being alleged, the gravity of the issue and the consequences in considering the evidence necessary to discharge the onus of proof."

106. While caution in the court's approach to a s. 26 application is necessary, once the defendant meets the requisite standard of proof, the onus shifts to the plaintiff to establish that it would be unjust to dismiss the action as the section provides. In the absence of the plaintiff so establishing, the court is mandated to dismiss the action. The authorities are clear that the mere fact that an otherwise meritorious claim will fail cannot alone be regarded as an injustice, as that is precisely what the section contemplates and requires. That is not to say that this consequence, as *Platt* shows, should be ignored by the court as part of its overall assessment of whether a dismissal would result in injustice, bearing in mind the principles of fairness and proportionality.

107. It would be wrong, in my opinion, for this court to substitute its view of the plaintiff's evidence for that of the trial judge. The plaintiff was pressed in cross-examination about why she had claimed to have been earning €26,000 per annum and about the claim for past loss of earnings. These issues were fully ventilated at the trial and the judge concluded that the plaintiff had not abandoned a fraudulently based claim but adopted a realistic approach to her "patchy" work history. It must follow therefore that he was not satisfied that the respondents had discharged the onus of establishing that the plaintiff had given false or misleading evidence in a material respect and that she knew it to be false or misleading. That was a conclusion the judge was entitled to arrive at and one that cannot be interfered with on appeal unless it is shown to be unsupported by the evidence. The respondents have not shown that to be the case and I am therefore satisfied that the trial judge's decision not to accede to the s. 26 application should not be set aside.

108. Having said that, the trial judge did expressly recognise that the s. 26 application made by the respondents was not without substance. Having regard to the matters I have outlined, it was certainly an application that the respondents were entitled to make. Although some of the judicial comments to which I have referred rightly deprecate the unwarranted and speculative use of s. 26 which, in an appropriate case, may result in an award of aggravated damages, in this case there is no question of such considerations arising. The plaintiff appears to apprehend that if a s. 26 application is unsuccessful, that should result in either aggravated damages or, in the present case, a refusal to award to the respondents the costs they would otherwise be entitled to by virtue of the lodgments.

109. There is no merit in that contention. One of the significant ironies of this case is that if the plaintiff had accepted the second lodgment of €450,000, that would have resulted in a clear, but undetected, injustice to the respondents who had made the lodgment in good faith relying on what they had been told by the plaintiff. Section 14 of the 2004 Act concerning verifying affidavits has, as its underlying rationale, the deterrence of false and fraudulent claims being advanced in pleadings without consequence. Not only is the plaintiff liable to have his or her claim dismissed under s. 26, but also to the severe criminal sanctions provided for in s.14. Defendants therefore have a measure of reassurance that they can rely on what they are told by plaintiffs because of the seriousness of the consequences for the plaintiff if what the defendant is told is deliberately untrue. It cannot be doubted that the court has jurisdiction in an appropriate case to dismiss a claim advanced on foot of deliberately false and misleading pleadings, even if the claim is ultimately not pursued at trial.

**Conclusion**

110. For the reasons I have given, I would therefore dismiss both the plaintiff's appeal and the respondents' cross-appeal and affirm the order of the High Court.

111. With regard to costs, my provisional view is that the costs should follow the event in the normal way and the respondents are entitled to the costs of the appeal with the plaintiff being entitled to the costs of the cross appeal. Such costs should be set off against each other and any balance outstanding should be paid to the party entitled thereto. If either

party wishes to contend for an alternative order, they shall have liberty to deliver written submissions not exceeding 2,000 words within 14 days and the other party will have a similar period to respond.

112. As this judgment is being delivered electronically, Power and Binchy JJ. have indicated their agreement with it.