THE HIGH COURT

[2020] IEHC 641

[Record No. 2011/ 1351 P]

BETWEEN

VICTOR OLARU

PLAINTIFF

AND

THE MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANT

AND

[Record No. 2012/7831P]

VICTOR OLARU

PLAINTIFF

AND

YAROSLAV BOGOYSKY AND THE MOTOR INSURERS' BUREAU OF IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the day of 19th day of November, 2020.

Introduction

1. These proceedings arise as a result of a road traffic accident which occurred on the 10th April 2009 on the Manorfield Estate roundabout, Clonee Co. Dublin. Plaintiff brings the proceedings against the first Defendant in negligence and for breach of statutory duty and as against the second Defendant pursuant to the provisions of the Motor Insurers Bureau Agreement, 2009, (the 2009 Agreement). The defence delivered on behalf of the second Defendant puts the Plaintiff on full proof of all material allegations pleaded in the summons. On the 24th March 2014 an order was made for substituted service of the proceedings on the first Defendant by advertisement in a national newspaper; he did not appear. No motion for judgement in default of appearance or defence was brought; the action proceeded against the second Defendant alone.

2. On the face of the summons, the Plaintiff's case is a straightforward road traffic collision between two vehicles on a roundabout which occurred when the one vehicle, driven by the first Defendant, failed to yield right of way to the other, driven by the Plaintiff; the first Defendant fled the scene. In brief, the Plaintiff claims he was the victim of a 'hit and run' accident, hence the involvement of the second Defendant (the MIBI/ the Bureau). However, for reasons with which this judgement is concerned, the circumstances are anything but straightforward. At trial the Plaintiff advanced the proposition that the collision was an attempted murder whereas the case made by the Bureau was that the collision had been staged and was a 'set up' designed to wrongfully extract compensation from the MIBI.

3. In this context the following matters in respect of which the Plaintiff is on proof merit express mention:

   (i) that the first Defendant was the owner of the Mitsubishi Pajero (Shogun), registration number TBZ 6287, (the Mitsubishi) which the Plaintiff alleges collided with his vehicle;

(ii) that there was a valid policy of motor insurance in respect of the use of the Mitsubishi or alternatively that there was no such policy in place at the material time;

(iii) that an accident occurred in the way manner and circumstances alleged;

(iv) that the first Defendant, or his servant or agent with his consent, was the driver of the said vehicle;

(v) that the Plaintiff used his best endeavours to ascertain whether the first Defendant his servant or agent was the driver of the said vehicle;

(vi) that on the occasion of the alleged accident the Plaintiff was driving a Grand Cherokee Jeep registered letters 00-D-111230 (the Cherokee);

(vii) whether the Plaintiff had any dealings with or knew the first Defendant prior to or at the time of the accident, the driver having allegedly fled the scene.

4. The liability of the MIBI to meet unsatisfied judgements under the 2009 Agreement in cases arising from the negligent use of uninsured vehicles is subject to compliance by the claimant with certain conditions precedent, amongst which the following are relevant, namely:

(i) the requirement to furnish information relating to the relevant accident,

(ii) full cooperation with An Garda Síochana or any other authorised person in their investigation of the circumstances giving rise to the claim,

(iii) the furnishing of relevant correspondence and documentation in relation to the accident and any proceedings,

(iv) the use of best endeavours to establish if an approved policy of insurance covering the use of any vehicle involved in the accident exists by making a demand for insurance particulars in accordance with the provisions of s. 73 of the Road Traffic Act, 1961 as amended,

(v) where a claim pursuant to the agreement arises from an accident caused or contributed by an untraced motorist making oneself available for interview by the MIBI or its authorised agents, and

(vi) the furnishing of answers to all reasonable questions relating to the circumstances of the accident.

5. Apart altogether from the assertion at trial that the collision was a murder attempt by the first Defendant, there were other circumstances, highlighted by what follows, which border on the bizarre. The Plaintiff initially maintained to the police, his solicitors, the Bureau and the Injuries Board that he did not know the identity, and thus the gender, of the other driver; he caused proceedings to be issued against the Bureau on that premise.

However, it subsequently transpired that not only did he have business dealings with the first Defendant, the alleged driver of the Mitsubishi, in 2008, he also had details of his motor insurance which begs the question as to how he came to be in possession of this information, particularly given his assertions that he had been knocked unconscious and the other driver had fled.

6. Notwithstanding, a few days post-accident he not only reported the occurrence accident to the first Defendant's Insurer, the Aviva, (formally the Hibernian), but also named him as the driver of the vehicle involved in the collision. Nevertheless, as mentioned above, he subsequently caused his solicitors to issue proceedings against the Bureau on the 11th February 2011, upon the premise that the owner and driver of the Mitsubishi were *unidentified and/or untraced*. [emphasis added] when at the time he clearly knew the allegation was not only misleading but was also untrue. However, in these proceedings, which were issued on the 7th August 2012, the driver of the other vehicle is named as the first Defendant. For reasons which will become apparent, the allegations and assertions in the pleadings and the particulars of claim together with the averments contained in the affidavits of verification sworn by the Plaintiff in the first set of proceedings are relevant to the issues which have arisen in these proceedings.

7. On the 9th August 2009, two days after the issue of these proceedings, the Plaintiff swore an affidavit of verification of the summons issued in the first set of proceedings. Replies to particulars followed on the 3rd May 2011 and the 12th July 2012. A full defence was delivered thereafter on the 23rd March 2013, naming the first Defendant herein as the driver of the other car. Finally, an affidavit of verification of the replies was sworn on the 29th June 2018. It was stated in the replies dated 12th July 2012 that the Plaintiff had purchased the Cherokee for €12,000 six weeks prior to the accident. Although transfer of ownership was registered to him on the 10th March 2009, it transpired in evidence that the Plaintiff had previously purchased the vehicle in Northern Ireland before importing and registering it in the State on the 27th May 2007.

8. Subsequently, on the 8th December 2008, he transferred ownership of the Mutsubishi to Andrei Motelica who at that time lived at the same address as the Plaintiff. Ownership of the Mitsubishi was re acquired by the Plaintiff four months later, on the 10th March 2009 for €12,000. No documentary evidence for payment of this sum was proved; the unemployed Plaintiff claimed it was a loan from his sister, who lived in Italy. The purpose of this arrangement was explored under cross examination; the Plaintiff ultimately accepted that the object was to obtain cheaper insurance. In the circumstances outlined I am satisfied the arrangement constituted a deception which amounted to a fraud on the insurer.

Affidavit of Verification of Summons in First Proceedings; Conclusion

9. Given his dealings with the first Defendant in 2008, the reporting of the accident to the Aviva and his joinder in these proceedings as the driver of the Mitsubishi, it follows that when the Plaintiff swore the affidavit of verification of the summons in the first set of proceedings, two days after the issue of these proceedings, he verified allegations and assertions therein which he knew to be untrue. On the 12th November 2018, the

Plaintiff's third set of solicitors were given liberty to come off record. They had delivered a schedule of special damages the previous June totalling €10,298.49. At the conclusion of the submissions on the application to dismiss these proceedings, the Plaintiff sought to pursue an updated claim for special damages in the amount of €900,000 which had neither been particularised nor scheduled, the introduction of which the second Defendant objected.

Application to Dismiss the Plaintiff's Claim

10. The trial of the action had been listed for hearing on the 3rd August 2018. It appears from the motion papers, particularly the affidavit and exhibits grounding the application to come off record, that the proceedings were adjourned when the Plaintiff's legal team sought to withdraw from the case on the grounds that evidence had been presented to them on behalf of the Bureau which so contradicted the Plaintiff's version of events that their position as his legal representatives became untenable; it appears the Plaintiff was advised that there were grounds on foot of which it was likely the proceedings would be struck out as a fraudulent claim, grounds which are also at the centre of the controversy with which the Court is now concerned. And so it was that at the conclusion of the trial Senior Counsel acting on behalf of the second Defendant, Mr Nolan, made an application to have the Plaintiff's case dismissed.

11. It should be noted in passing that the Plaintiff was unrepresented, though he was accompanied throughout the trial by a McKenzie friend, Gorge Gulelauri. Although satisfied the Plaintiff had a sufficient comprehension and command of the language to give evidence in English, the Court afforded him the right to have an interpreter present to translate any question or evidence he did not understand, particularly anything of a legal nature. However, at the commencement of the hearing on the third day he chose to proceed without this facility.

12. Four grounds were advanced in support of the application. The first of these was founded on the provisions of Section 26 of the Civil Liability and Courts Act 2004, namely that the Plaintiff had given evidence on matters of substance material to the claim he knew to be false and misleading; Secondly, he had failed to discharge the onus of proof, particularly on the matters in issue referred to above; Thirdly, he had failed to comply with the terms of the MIBI Agreement 2009 and, finally, the proceedings were an abuse of process. Having considered the evidence adduced and the oral submissions made by the parties I am satisfied the Bureau has established the case made in this regard and for the reasons which follow the Court will accede to the application and will dismiss the proceedings.

13. In the interest of completeness, I should observe that if the alleged accident was an attempted murder, as contended by the Plaintiff, the Bureau can have no liability to pay damages/ compensation for an intentional trespass to the person under the terms of the 2009 Agreement, liability arising thereunder being confined to the negligent use of vehicles in a public place. As it is no such cause of action against the first Defendant has been joined in the proceedings. It was agreed between the parties that the Court should give judgement on the application herein before moving on to determine whether the new

and updated claim for special damages ought to be entertained and/or otherwise permitted to proceed.

Legal Principles; the Common Law

14. It is convenient at this juncture to set out the law which governs the application to dismiss the claim encapsulated in the provisions of s.26 of the Civil Liability and Courts Act 2004 (the 2004Act). The jurisdiction to dismiss a claim where a plaintiff has knowingly given or has dishonestly caused evidence to be given which he knows to be false or misleading in any material respect was already vested in the courts by the Common Law prior to the passing of the 2004 Act. The nature and exercise of this jurisdiction has been considered and discussed in a number of decisions delivered prior to the enactment of that legislation. See in particular *Vesey v. Bus Eireann* [2001] 4 I.R. 192 and *Shelley-Morris v. Bus Atha Cliath* [2003] 1 I.R. 232. While the common law in this regard has in large measure been declared by and subsumed into the provisions of s. 26, it has not been extinguished and may thus apply in appropriate circumstances to cases falling outside the strict requirements of the statutory provision.

Role of the Trial Judge; Rationale

15. The role of the trial judge was examined in *Vesey*, where it was held by the Supreme Court that it was not the responsibility of a trial judge to disentangle the plaintiff's case where it had become entangled as a result of lies and misrepresentation systematically made by the plaintiff. The rationale for this approach is that if the trial judge were to embark on the task of doing so it would risk a perception of bias. The court also considered responsibility in such circumstances of the professionals retained by the Plaintiff. Whilst the plaintiff might rely on the advice of his lawyers, doctors, engineers and other professionals in providing particulars of claim, none of these professionals are responsible for the factual contents thereof.

Consequences of Fraud; Abuse of Process; Rationale; Onus of Proof

16. That there could be circumstances in which a court would be entitled to dismiss a claim in its entirety as a result of the prosecution of what in effect amounted to a fraudulent claim is undoubted and was fully recognised in the decision of the Supreme Court in *Shelley-Morris*. In that case, the Court observed that the issue is not a new one; deliberate exaggeration by a plaintiff may arise in different and diverse ways in any case but wherever and however such occurs it has the capacity to be a poison fatal to the claim. Both Denham J. (as she then was) and Hardiman J. observed that the deliberate exaggeration by a plaintiff in the prosecution of a claim could, in an appropriate case, amount to an abuse of the judicial process. The legal rationale being that the courts have a duty to protect their processes from being made a vehicle of unjustified recovery.

17. These decisions are also authority for the proposition that the onus of proof, lying as it does on the plaintiff to establish the case made, is to discharge the onus in a truthful and straightforward manner. Where this requirement is not satisfied a court is not obliged nor is it entitled in the absence of credible evidence to engage in speculation as to do so would be unfair to the defendant. As to what action the court should take when satisfied

that there has been an abuse of process, the court has an inherent jurisdiction, in a proper case, to stay or strike out the plaintiff's proceedings.

18. Where a plaintiff has been found to have engaged in deliberate falsehoods to the point where the issue arises as to whether or not there has been an abuse of process, Hardiman J. observed that a number of corollaries would arise from such a finding namely:

"(a) the plaintiff's credibility in general, and not simply on a particular issue, is undermined to a greater or lesser degree;

(b) in a case, or an aspect of a case, heavily dependent on the plaintiff's own account, the combined effects of the falsehoods and the consequent diminution in credibility mean that the plaintiff may have failed to discharge the onus on him or her either generally or in relation to a particular aspect of the case;

(c) if this occurs, it is not appropriate for a court to engage in speculation or benevolent guesswork in an attempt to rescue the claim, or a particular aspect of it, from the unsatisfactory state in which the plaintiff's falsehoods have left it."

These observations extend with equal force and are applicable to the statutory provisions comprised in s.26 of the 2004 Act which are next considered.

The Civil Liability and Courts Act 2004

19. Section 26 of the Act provides:

"(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that–

(a) is false or misleading, in any material respect, and

(b) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) The court in a personal injuries action shall if satisfied that a person has sworn an affidavit under section 14 that–

(a) is false or misleading in any material respect, and

(b) that he or she knew to be false or misleading when swearing the affidavit,

dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court."

20. An extensive corpus of law has emerged on the meaning and effect of this provision much of which was reviewed by the Court in *Waliszewski v McArthur and Company* [2015] IEHC 264 and in *Platt v OBH Luxury Accommodation Ltd*. *and Ciaran Fitzgerald* [2015] IEHC 793 the latter being subsequently upheld and approved by the Court of Appeal at [2017] IECA 221. The provisions of s. 14 and s. 26 of the Act were in force and governed the proceedings in this case. It is pertinent to observe that the section is by its terms confined to a plaintiff's personal injury action. Commenting on the nature of the provision in *Waliszewski*: I observed:

> *"It is a provision which places in the hands of a defendant a weapon to attack and destroy a plaintiff's case where evidence in any material respect which the plaintiff knows to be false or misleading has been given by the plaintiff, or where the plaintiff dishonestly causes such evidence to be given or adduced."*

Consequences; Onus of Proof on the Defendant

21. It is quite clear from the authorities that when the section is successfully invoked there are very serious and potentially penal consequences for the plaintiff. The court is obliged to dismiss the action altogether unless to do so results in an injustice being done. It is well settled that the burden of proof under the section rests on the defendant who must satisfy the requirements of the section on the balance of probabilities. As Irvine J. (as she then was) observed in *Platt v OBH Luxury Accommodation Ltd. and Ciaran Fitzgerald* [2017] IECA 221 quoting from her own judgment in *Nolan v. O'Neill and Mitchell* [2016] IECA 298:

> *"At paras. 43 and 44 of my judgment in Nolan I stated as follows concerning the proof required to trigger s.26 (1):-*
>
> *'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."*

I am satisfied that the Bureau has met these requirements. For further discussion, see also *Aherne v. Bus Eireann* [2011] IESC 44; *Meehan v. BKNS Curtain Walling Systems Ltd & Anor* [2012] IEHC 441; *Salako v. O'Carroll* [2013] IEHC 17 and *Waliszewski v. McArthur & Company* [2015] supra.

Affidavits of Verification;

22. Section 26 (1) vests in the court a statutory jurisdiction to dismiss proceedings where a plaintiff gives or adduces, or dishonesty causes to be given or adduced, evidence that is false or misleading in any material respect where he or she knows such evidence to be false or misleading. This jurisdiction is extended by s.26 (2) to affidavits of verification sworn by a plaintiff which are false or misleading in any material respect and which the

plaintiff is shown to have known was false or misleading when the affidavit *in quo* was being sworn. It follows that the swearing of an affidavit of verification which is false, or misleading in a material respect is no less significant than knowingly giving false or misleading evidence material to the claim at trial.

Dishonesty; Strict Construction: Limits

23. In either case s. 26(3) provides that an act is done dishonestly by a person if he or she does the act with the intention of misleading the court. It is significant that in the context of applying the provisions of the section with regard to the committal of a dishonest act that the court is concerned with the intention of the person committing that act rather than with whether the court has actually been misled. The draconian effect of the provisions requires that they be construed strictly. As I observed in *Waliszewski*: it is not

> *"…intended to be nor should it be viewed as a vehicle for a defendant to have a plaintiff's claim dismissed in the presence of unexplained circumstances where there are anomalies or inconsistencies in the evidence. See Dunleavy v. Swan Park Ltd [2011] IEHC 232… [and] Nolan v. Mitchell and Anor [2012] IEHC 151."*

Dismissal; Discretion; Qualification; Injustice

24. Where the court finds that a plaintiff has knowingly sworn an affidavit which is false or misleading in any material respect or where a plaintiff has knowingly given evidence or dishonestly caused evidence to be given which is false or misleading in any material respect, the court is required by the provisions of s. 26 to dismiss the claim unless to do so would result in an injustice being done. The question of injustice fell for particular consideration in the case of *Higgins v. Caldark Ltd* [2010] IEHC 527. In that action, the plaintiff suffered very serious injuries which included the necessity of surgically amputating his right thumb. A very substantial claim for special damages was advanced, part of which was abandoned three days prior to the date on which the case was listed for hearing.

25. The Court found on the evidence that the claim for future costs advanced in the amount of €137,415 was largely based upon false and misleading information which the plaintiff gave to his experts. It was contended on behalf of the plaintiff that when he swore his affidavit of verification he did not know or was not fully aware that some of the averments within his verifying affidavit were false and misleading. However, the Court found that the averments within the plaintiff's affidavit were materially false and misleading and that the plaintiff was so aware when swearing his affidavit. However, with regard to the evidence given at the trial, the Court found that the defendant had not discharged the onus of proof.

26. With regard to the question as to whether a dismissal would result in an injustice being done the Court found that in his evidence the plaintiff had made no attempt to exaggerate the nature or extent of his injuries or their consequences and that, in common law, he had an entitlement to recover damages from the defendants to compensate him for those injuries and his consequent losses. However, the Court held that that entitlement had been statutorily qualified by the provisions of s. 26 of the 2004 Act. Commenting upon

the draconian nature of the provision and the precise sanction which the court was required to impose where there had been a finding of the type made in that case, Quirke J. stated:

> *"…the imposition of the sanction has the effect of depriving the claimant of damages to which he or she would otherwise be entitled. The court must disallow both that part of the claim which has been based upon materially false and misleading averments and also that part of the claim which would otherwise have been valid and would have resulted in an award of damages. That sanction must be imposed unless its imposition 'would result in an injustice being done."*

The forgoing is the legal framework against which the issues that fall for determination are to be considered. The background from which the issues emerge may be found useful in placing these in context.

Background.

27. The Plaintiff was born on the 5th of May 1979. He is an unemployed truck driver and was married at the time of the alleged accident but has since separated; there are four children of the marriage. The Plaintiff came to Ireland from Moldova as an asylum seeker in 2000. He was granted asylum four years later. He studied English to level 5 and took a course in computers. He worked as a driver between 2005 and 2006 but gave up work to return to studies in an effort to acquire a professional qualification.

28. He has been unemployed from 2006 to date and was in receipt of social welfare at the time of the accident. Quite apart from the arrangement he entered into with Andrei Motelica, whereby he became the 'second driver' on the policy, he represented to the Zurich, the insurer of the Cherokee, that he was employed as a cleaner, although he had never been so employed. The explanation for doing this offered in evidence was the same as the reason given for entering the arrangement with Andrei Motelica, to obtain cheaper motor insurance.

Police Reporting; Accident; Missing Person;

29. Sergeant Thornton, who attended at the accident locus shortly after the occurrence, investigated the accident circumstances and the ownership of the Mitsubishi. He spoke to the Plaintiff at the scene and was given to understand that the driver of the Mitsubishi had fled the scene. In an effort to find the driver a helicopter was called in to carry out an aerial search of the vicinity, but to no avail. On the 14th April 2009, the Plaintiff made a statement at Blanchardstown Garda Station in which he said he did not know identity of the other driver. Sergeant Thornton gave evidence that the Plaintiff appeared to be 'agitated' and that he was 'frustrated' by the failure to identify or locate the other driver.

30. Significantly, the Plaintiff did not disclose his belief to Sergeant Thornton that the driver of the Mitsubishi was the first Defendant, someone with whom he was acquainted and to whom, shortly before the accident, he claimed he had given €20,000 to buy him a new Ford Transit van in Germany or Italy and to bring it back to Ireland. Six days later, on the 20th April, the Plaintiff reported the accident to the first Defendant's insurers, the Aviva.

A number of different explanations were offered by the Plaintiff as to how he came to be in possession of the first Defendant's insurance details, about which more later.

31. From enquiries made with the PNSI, Sergeant Thornton ascertained the ownership history of the Mitsubishi. It had three registered owners, two in the North and one in the South. No evidence was adduced to establish that the first Defendant was the owner at the time of the alleged accident or otherwise. However, there was evidence that in March 2009, an individual using the first Defendant's name attended / contacted the branch office of the Hibernian Insurance Company (Aviva), in Lucan, seeking a quote for motor insurance in respect an Audi A 3 car. Brendan Keane, an insurance investigator and Senior Technical Advisor employed by the Aviva, gave evidence of the proposal and subsequent relevant motor insurance history, including correspondence.

32. The first Defendant, or an individual by that name, completed a proposal form, giving his address as 19 Moyglass Road, Lucan, Co. Dublin, on foot of which a third-party fire and theft motor insurance policy was issued. The proposer elected to pay the annual premium by instalments and paid €75 cash for the first month's cover, accordingly, a certificate of insurance, effective from 18th March to 17th April 2009, duly issued. No further instalments were paid. Five days later, at the request of the same individual, the policy was transferred to the Mitsubishi; cover was upgraded on request to fully comprehensive. On the 6th April 2009, the policy holder requested a replacement insurance certificate and disc to be sent to him at 19 Moyglass Road, Lucan; he claimed he had not received these. For different reasons four insurance certificates were ultimately issued. I accept the evidence of Mr Keane.

Missing Person Report; Lucan Garda Station

33. Four days earlier, on 2nd April 2009, seven days before the accident, the Plaintiff attended Lucan Garda Station to make a missing person report concerning the first Defendant. He gave a prepared statement to Garda Gaffy, who gave evidence, in which he said that on the 15th December 2008 he had paid €20,000 to the first Defendant to acquire a new Mercedes 'Sprinter' or a Ford Transit van from Germany, where these vehicles were much less expensive. Thereafter, according to the statement, the first Defendant purchased a Ford Transit van, which he brought to Ireland and delivered it to the Plaintiff's address.

34. On the 27th March, two days later, he took the van, with the Plaintiff's consent, ostensibly to have it registered at the vehicle registration office Tallaght. According to his statement this was the last time he saw the van or the first Defendant. In order to assist Garda Gaffy with his enquiries he produced a copy of the first Defendant's Bulgarian Passport and driving licence. In evidence he said he had taken copies of these from the first Defendant at the time he paid the €20,000. When asked to explain where an unemployed person had got €20,000 to buy a van, the Plaintiff's response was that it was a loan from his Mother who lived in Moldova. When asked how that had been transferred having regard to currency exchange regulations in force at the time, he replied that it had been brought from Moldova in cash; no documentary evidence to vouch the transaction was adduced.

35. In a subsequent statement, made the 23rd April, the Plaintiff said the first Defendant was *not missing* [emphasis added] but he wanted to find him because his money and the van had gone. He also said he had met the first Defendant on the 27th March at 19 Moyglass Road to give him the van. Significantly, the Plaintiff did not disclose to Garda Gaffy

(i) the occurrence of a road traffic accident some two weeks earlier;

(ii) his belief that the driver of the vehicle which had collided with him was none other than the person whose whereabouts he was seeking;

(iii) that he had the first Defendant's insurance details;

(iv) that he had reported the accident to the insurer three days earlier.

(v) that he believed the driver of the other car was trying to murder him.

I accept the evidence of Garda Gaffy. With regard to the connection between the reports to Lucan and Blanchardstown garda stations, evidence was given by Sergeant Thornton that it was several years before the connection was made. Although both reports had been uploaded to the Garda PULSE computer system slightly different spellings in the recording of the first letter of the first Defendant' first name and surname meant the records were not automatically cross referenced. I accept the evidence of Sergeant Thornton.

Insurance Reporting; the Accident

36. On the 20th April, the first Defendant phoned the Hibernian Insurance Company and gave an account of the accident. He identified the first Defendant as the driver of the Mitsubishi, describing him as their 'insured'. He did not volunteer to the Hibernian (Aviva) how he had come to be in possession of the insurance policy/certificate details. Ms Emma Lee, a claims advisor with the Aviva gave evidence in relation to the record of the reporting of the accident by the Plaintiff. I accept her evidence. As mentioned earlier, the Plaintiff gave a number of explanations to the Court as to how he had come into possession of this information, none of which, in my judgment, were convincing or satisfactory.

37. After the accident the Mitsubishi and the Cherokee were towed from the scene to Gannon's' garage. The initial explanation advanced by the Plaintiff for possession of the details was that he wanted to collect some clothes from his car and went to Gannons for that purpose. He said he had obtained the details from the insurance disc on the windscreen of the Mitsubishi. However, this explanation was not credible and did not stand up to scrutiny. The Mitsubishi was registered in Northern Ireland. Sergeant Thornton gave evidence that there is no requirement to display an insurance disc on a UK registered vehicle and when he examined the vehicle there were no tax nor insurance discs on the windscreen.

38. The Plaintiff suggested an alternative explanation, namely that he had been given the insurance details by another Garda when he called to the Blanchardstown Garda Station, however, Sergeant Thornton gave evidence that this information would not have been disclosed, particularly by an officer who was not involved in an ongoing investigation, nor had the information been given by him. Irrespective of how he had acquired the details not only did the Plaintiff fail to mention any of this to Garda Gaffy, he did not return to Blanchardstown Garda Station to give the information to Sergeant Thornton whom, for all he knew, was still looking for the driver of the Mitsubishi.

39. As it happens the information was acquired independently by Sergeant Thornton through contact made with the Aviva. When asked why he did not furnish the details he had in his possession to Sergeant Thornton, the Plaintiff's reply in evidence was that it had not occurred to him. He subsequently offered a different and, in my judgment, implausible explanation which surfaced for the first time in evidence, namely, that he wasn't 100 per cent sure if the driver's name was Yaroslav Bogoysky or Ruslan Baciu. If there was any factual basis to that proposition there was no good reason given for not disclosing it at the time, particularly to a police officer whom he knew was investigating the accident circumstances.

40. In the interest of completeness, I should add that two years later, on the 23rd May 2011, shortly after the issue of the first set of proceedings, the Plaintiff was asked by Mr John Rock, an investigator retained by the Bureau, whether he knew the identity of the other driver. Quite apart from his failure to disclose to his then solicitors that he had reported the accident to the Aviva and had identified the first Defendant as the driver, the Plaintiff made a statement, in the presence of his solicitor, in which he said that he did not know the identity of the driver of the other car as that person had fled after the accident.

Conclusion; Statement to John Rock; Knowledge of Identity

41. Particularly given what he had told the Aviva two years earlier, in my judgment there cannot have been any doubt in the Plaintiff's mind that when he made the statement to Mr Rock he knew or believed he knew (i) the identity of the other driver, (ii) the address of the driver,(iii) that the driver was insured and that (iv) the name of the insurer was the Hibernian/Aviva, information the Plaintiff was obliged to furnish to the MIBI under the terms of the 2009 agreement. When making this statement the Plaintiff also made reference to the injuries he sustained as a result of the accident.

42. He said that he had been 'knocked out' and that he had suffered fracture injuries to his neck and chest. I am mindful that though this statement was made in the context of the first set of proceedings and before the issue of these proceedings it contains material information relevant to the claim in both sets of proceedings. For the following reasons I am satisfied and find that when he made the statement to John Rock the Plaintiff knew that not only had he not been rendered unconscious but that he had not suffered any fracture injuries and that the information furnished was misleading.

Loss of Consciousness

43. His claim, repeated in evidence, that he had suffered a considerable period of loss of consciousness was disputed and featured extensively in the course of the trial. Sergeant Thornton gave evidence that the first person with whom he spoke when he arrived at the scene was the Plaintiff, whom he described as being conscious. He said he would produce his insurance and driving licence at Blanchardstown Garda Station, and that he was accompanied in the car at the time by a Sorin Bulat; the driver of the other car had fled. Sergeant Thornton did not notice any cuts or abrasions or bleeding on the Plaintiff's hands of face nor did he recall seeing any pieces of glass on his clothes. This is potentially significant in light of the medical and forensic engineering evidence led by the Bureau. The conversation with the Plaintiff took place in the back of the ambulance which subsequently took him to hospital.

44. The Plaintiff's gave evidence that he remembered nothing of this or anything else until he woke up in hospital the next morning, the reason being that he had been knocked out. In the prepared statement dated April 14th, 2009, which he gave to Sergeant Thornton, he said he didn't remember a lot after his car overturned and that the next thing he remembered was waking up in hospital. The medical notes and records of his admission, examination and treatment at James Connolly Memorial Hospital following the accident were admitted in evidence. Apart from the mention of 'a slight head injury' there is no mention of any loss of consciousness or neurological deficit, quite the contrary.

45. There is an express record that the Plaintiff suffered no loss of consciousness and that his Glasgow coma scale on admission was 15, which is normal; when medically examined he was evidently fully conscious. Head palpation on examination was normal and, significantly in the context of the case made by the Bureau, the absence of any wounds was recorded. In the circumstances medical reporting in relation to this issue is relevant and merits examination.

Medical Reporting; Loss of Consciousness

46. On the 28th April 2013, the Plaintiff gave a history of the accident and its consequences to his psychiatrist, Dr Ann Leader, in which he is recorded as saying that his vehicle was hit on the left-hand side, that the emergency services came to the scene and that *"He lost consciousness for a considerable time*". When giving evidence in chief the Plaintiff maintained he had no recollection of what transpired thereafter and that it was not until the next morning that he woke up in James Connolly Hospital. He had no recollection of any conversation at the scene, of freeing himself from the car, or of medical examination afterwards following his admission to hospital; the explanation offered for not remembering the latter was that he must have been asleep.

47. In a report dated 31st May 2010, prepared for the injuries board, Dr Lalloo, stated that the Plaintiff had been admitted to hospital for five days as he had been knocked unconscious following the accident. The Plaintiff told his GP Dr Lavery, whom he started attending in 2015, that he had been knocked unconscious as a result of the accident. Although he told Dr Leader that his memory was unaffected by his loss of consciousness, in evidence he offered his loss of consciousness as an explanation for his repeated

inability to answer the questions which were being put to him, particularly in the course of cross examination.

48. The Plaintiff was seen and examined on a number of occasions by Mr Paddy Kenny, Consultant Orthopaedic Surgeon, who prepared a number of medical reports for the assistance of the Court. He first saw the Plaintiff on the 12th May 2009, shortly after the accident. He saw the Plaintiff again on the 13th March 2012; 30th October 2015; 29th August 2016 and most recently on the 16th May 2019. Loss of consciousness is not mentioned in any of the reports. Mr Kenny gave evidence that the Plaintiff never mentioned having suffered a head injury or a history of loss of consciousness; rather he suffered neck and back injuries.

49. The Plaintiff was examined on behalf of the Bureau in February 2017 and April 2019 by Mr Robert McQuillan, Consultant in Emergency Medicine. He prepared a report on his findings and gave evidence. The Plaintiff made no complaint to him of having suffered a head injury or a loss of consciousness. He is recorded as having told Mr McQuillan that he was 'freed' from the vehicle after the collision by ambulance personnel, a position he maintained in evidence. However, the history recorded in the hospital notes is that he freed himself from the vehicle, a proposition with which he did not agree when it was put to him in cross examination.

28. Mr McQuillan had the benefit of reading the hospital medical notes and records. Accepting it may have been possible the Plaintiff was a bit dazed following the impact, his opinion was that the Plaintiff had not suffered a loss of consciousness. In this regard the nil loss of consciousness history expressly recorded in the admission notes and the normal Glasgow coma scale at 15, were pertinent. Neurological examination was normal; no neurological deficit was noted. Head examination was normal; there were no wounds. The content of the medical notes in this respect are in stark contrast to the history of this complaint recorded/ stated in the reports of Dr Lalloo, Dr Lavery and Dr Leader. The Court accepts the evidence contained in the medical notes and records together with the evidence of Sergeant Thornton, Mr Kenny and Mr McQuillan and finds as a matter of probability that the Plaintiff did suffer a loss of consciousness as a result of the accident and that he knew that to be so when he reported this complaint and when he gave evidence.

Other Sequelae

50. This was not the only sequelae alleged by the Plaintiff for which there is no record or corroboration in the hospital notes. He claims to have suffered a swollen left testicle, but this injury appears not to have been mentioned when examined in hospital, nor did he mention it to Mr Kenny, or to the GP he attended post-accident, Dr Coleman, until January 2011. In fact, the first record of this complaint appears in the medical report of Dr Lalloo, dated 31st May 2010. He subsequently claimed to have developed erectile dysfunction.

51. He claimed he had suffered with this complaint since the time of the accident when he first attended Dr Cheema, Consultant Urologist, on the 3rd of June 2016. In Dr Cheema's

opinion, expressed in a report dated 28 February 2017, the complaint could not be related directly to the accident. Finally, as mentioned earlier, in his statement made to Sergeant Thornton the Plaintiff said he suffered fractured ribs and a fracture to his neck as a result of the accident, complaints for which there is no basis and no medical evidence. In fairness to him, however, these complaints were not made by the Plaintiff in the pleadings.

The Plaintiff's Conduct and Evidence;

52. The Plaintiff's conduct and demeanour in Court is material to the matter in hand. As mentioned earlier, he attended with a McKenzie friend, Mr Gulelauri, who initially attempted to address the Court on the Plaintiff's behalf. Following Practice Direction CA06 on McKenzie friends, I did not permit him he was not permitted to do so. The terms were explained to the Plaintiff and Mr Gulelauri. Nevertheless, having refused him audience on the first day, he then held up a large piece of paper on which he had written '*I am rejected'*. He also sought to interfere in the Plaintiff's evidence. In this regard, Mr Gulelauri sought to communicate with him by gesticulation, facial signs and by writing on large pieces of paper, this despite repeated direction that he should cease interference in the trial forthwith. By way of example, during cross examination of the Plaintiff he wrote an answer to a question in Russian on an A 4 piece of paper which, when translated, read '*you cannot remember everything after the time of the accident'*. The piece of paper was held up in a manner visible to the Plaintiff. I asked for and obtained an undertaking such impermissible conduct would not be repeated.

53. The Plaintiff was still under cross examination at the end of the hearing on the first day, accordingly, at the request of the Bureau, the Court directed that he should not discuss his evidence with Mr Gulelauri. When the hearing resumed the following day, Mr Nolan brought the attention of the Court to what had appeared to him and to his solicitor to be an animated discussion between the Plaintiff and Mr Gulelauri, immediately after the Court had risen, about the Plaintiff's evidence. Ms Deidre O'Halloran gave evidence in this regard when the hearing resumed. I accept her evidence. Prior to the resumption of the trial the following morning, the Plaintiff applied to Mr Justice Cross to have the case heard by another judge; the application was refused.

54. When the trial recommenced, the Plaintiff refused to give evidence in English and insisted on giving his evidence in Russian. He refused to co-operate with the Court and was ultimately found to be in contempt. Thereafter he was committed to the Bridewell Garda Station. Later that day he subsequently purged his contempt and apologised. The Plaintiff then offered an explanation for the discussion he had had with Mr Gulelauri after the hearing on the first day. He insisted that this was a discussion about an unrelated private matter that did not involve his evidence, however, it appeared to Ms O'Halloran that the subject matter of the discussion was the Plaintiff's evidence.

Conclusion

55. I had the opportunity to observe the Plaintiff's demeanour and behaviour in the courtroom and in the witness box when giving evidence. I was left with the impression that he was trying to work out where questioning was going and what answer he should give to

questions. He habitually responded to questions by asking that these be repeated and otherwise gave contradictory, evasive and inconsistent answers, particularly on cross examination. The transcript of the evidence is 'peppered' with instances of the Plaintiff deflecting or failing to answer even the most straightforward of questions. On several occasions, in particular when he found himself in this position, he sought to disclose to the Court an award purportedly made by the Injuries Board and persisted in mentioning this despite direction that such was impermissible and that he should desist. I found him to be an entirely unreliable witness who gave contradictory, inconsistent, unbelievable and/or untruthful evidence, notwithstanding his numerous assertions to the contrary.

Consequences; No Connection between Reporting to Lucan and Blanchardstown;.

56. Mention has already been made of the fact that despite recording of the respective reports/complaints on the PULSE computer system at Lucan and Blanchardstown Garda Stations no connection was made between the two reports and that it was not until several years later, by which time the trail had gone cold, that Sergeant Thornton became aware of the complaint/reporting which had been made by the Plaintiff to Garda Gaffey. Sergeant Thornton gave evidence of the likely police response had the cross reference connection been made at the time and if he had been made aware by the Plaintiff of the information which subsequently came to light.

57. He also gave evidence that he had never come across a "hit and run" accident where the victim had the name, address and insurance details of the other driver. One of the features which emerged from this evidence was that had Sergeant Thornton been made aware at the time of what he subsequently discovered he would have been deeply suspicious of the accident circumstances and would have carried out an investigation to ascertain whether the collision had been staged. Furthermore, if he had been made aware that the Plaintiff's belief was that the other driver had rammed his car in an attempt to murder him it was highly likely that a criminal investigation with its attendant enquiries would have ensued; I accept his evidence. This brings us back to the accident circumstances.

Accident circumstances

58. While there are a number of very suspicious factors to my mind at play surrounding the circumstances of the accident, suspicion alone, no matter how strong, cannot be the basis on which to found a conclusion on a matter of fact. The old adage that 'truth and suspicion cannot dwell together at the door, where the latter enters the former makes its exit', is apposite. The conclusions of the Court must be based on fact established by the evidence or on inferences which may properly be drawn from the evidence. The Plaintiff's account of what happened has been set out earlier, suffice it to say that he maintained the collision had been a murder attempt by the first Defendant/ Ruslan Baciu.

59. When asked to explain how the other driver would have known his movements in order to time a deliberate collision with the Mitsubishi, the Plaintiff was unable to offer a plausible explanation. The Plaintiff rejected the suggestion that if he had been in the Cherokee at the time of the impact he would have been showered with glass and would have suffered cuts and bruises. The Plaintiff contended that flying glass would have been projected

outwards rather than in on top of the vehicle occupants. It should be noted in passing that Mr. Bulat, whom the Plaintiff said was travelling with him as a passenger and was also injured, was not called to give evidence.

Engineering evidence

60. The Plaintiff did not call an engineer to give expert evidence on his behalf, however, the Court has had the benefit of the expert evidence given by Mr. Tony Kelly, Consultant Forensic Engineer, who was called as a witness by the Bureau. He prepared a report for the assistance of the Court containing his opinion on the collision circumstances. He was duly qualified as an expert witness with a specialist expertise in forensic collision investigation and reconstruction. He had previously served as a senior forensic collision investigator since 2002 whilst a serving officer with An Garda Síochana; he retired from the force in 2015. Mr Kelly also holds national and international forensic engineering qualifications. Although he had not been able to examine the Cherokee he had forensically examined the body panel damage seen in photographs provided to him of the vehicle taken at Gannon's' Garage shortly after the accident. In addition, he had the Plaintiff's pleaded account and statement of the accident.

61. At the time he prepared his report Mr Kelly was unaware that the airbags in the Cherokee had not deployed. Mr. Kelly very fairly accepted that it would have been preferable if he had been in a position to examine the vehicle physically, however, he was satisfied there was enough evidence of the vehicle panel damage seen in the photographs to enable him form an opinion as to the cause thereof. He gave considered evidence to support his conclusion that whilst the Cherokee had been struck on its nearside and had rolled over as a result of the impact, the nature of the damage visible, in particular the direction of the scrape marking seen on the body panels, was explained by and was only consistent with the vehicle being stationery at the time of impact.

62. Mr. Kelly disagreed with the proposition that in a ramming collision as described the tempered glass in the doors of the car would be projected outwards. He gave evidence that tempered glass is designed to break into small fragments/ beads which essentially go everywhere, including into the driving and passenger compartment, particularly in the case of a vehicle which rolls over. It was difficult to draw any inferences from the amount of glass pieces that could be seen from the photographs inside the car. Not only would glass move inwards and outwards the glass in the car would end up resting on the inside of the roof as a result of the vehicle rolling over, furthermore, the glass would then move again when the vehicle was being re-righted. Although the air bags did not apparently deploy the impact was severe enough to cause the Cherokee to roll over.

63. While medical evidence had been given that cuts and abrasions would have been expected from flying glass, Mr Kelly did not think one could conclude from the absence of cuts and abrasions that the Plaintiff had not been struck in this way or had not been in the car at the time of the collision because tempered glass by its nature is designed to minimise laceration. Finally, while it was possible that the damage to the panels seen in the photographs could have occurred if the Cherokee was not stationary, to be consistent with the panel damage the vehicle speed would have had to have been less than 10 km

per hour, evidence which, if accepted, has significant implications for the case made by the Plaintiff that he was travelling at 20 to 30 km/h when the collision occurred. I accept Mr Kelly's evidence. Accordingly, the Court finds and as a matter of probability that the Cherokee was stationary at the time of collision.

Conclusion

64. While there is no doubt that the Plaintiff's Cherokee was struck by the Mitsubishi at the Manorfield roundabout on April 10th, 2009, there is no credible evidence on foot of which the Court could conclude that the accident was caused by the negligent driving of the first Defendant, his servant or agent, indeed, the case made by the Plaintiff in evidence is that the collision was deliberate, an attempted murder. I accept the proposition that the collision was deliberate, albeit for entirely different reasons. I am satisfied, and the Court finds that the collision was a deliberate event most likely the result of an arrangement between the Plaintiff and an individual whom he variously named as the first Defendant or Ruslan Baciu.

65. The collision damage sustained by the Cherokee, while inconsistent with the Plaintiff's evidence that he was travelling at 20 to 30 kmh when the collision occurred, is consistent with the conclusion that the vehicle was stationary on the roundabout, where it was found by Sergeant Thornton. In circumstances where he had reported the occurrence of the accident to the first Defendant's insurers, no satisfactory / believable explanation was forthcoming from the Plaintiff for causing his solicitors to issue proceedings against the Bureau as sole defendant on the grounds that the driver was unidentified and untraced nor was any satisfactory explanation forthcoming for deposing to that allegation in an affidavit of verification sworn after the issue of these proceedings in which the driver is named and joined as a defendant.

66. The absence of satisfactory explanations does not end there. In circumstances where it was being maintained by the Plaintiff that the other driver fled the scene he failed to provide a convincing reason how he came to be in possession of the details of a motor insurance policy which covered the use of the vehicle at the time of the collision. Nor was a credible explanation given for the failures to disclose this information to Sergeant Thornton, John Rock or his solicitors or why when attending Lucan Garda Station after the accident he failed to mention the occurrence of the accident to Garda Gaffy, particularly in light of his belief that the driver of the other vehicle was the person for whom he was searching.

67. Although the Mitsubishi was comprehensively insured in the first Defendant's name, the vehicle was not only abandoned post-accident, but no claim was made on foot of the policy to recover its value. While the option to pay the premium by instalments via direct debit was selected, no arrangement had been put in place prior to the collision for the payment thereof, over and above the payment of the first month's premium. All correspondence addressed and sent post-accident to the given address for first Defendant went unanswered, furthermore, the Gardaí were unable to ascertain the whereabouts of the first Defendant or whether a person using that name had ever resided at the given address.

68. In addition to the foregoing, the collision occurred shortly after the transfer to and during the period of temporary cover of the Mitsubishi. In circumstances where as here credible explanations are called for it seems reasonable to infer in the absence thereof that the most likely explanation for the Plaintiff's possession and reporting of the first Defendant's insurance details to the Aviva and naming him as the driver of the Mitsubishi is that the details had been given to the Plaintiff by the first Defendant as part of an arrangement, the purpose of which was to make a claim for compensation.

Ruling

69. In respect of the case against the Bureau, the law requires, *inter alia*, the Plaintiff to establish on the balance of probabilities that the alleged collision occurred as a result of negligent driving by the first Defendant, his servant or agent. For all of the foregoing reasons the Court finds that the Plaintiff has failed to discharge the onus of proof placed upon him by the law in this regard. For the reasons stated earlier, the Court also finds that the Plaintiff gave evidence which he knew to be false or misleading in a material respect and that in the particular circumstances of the case the prosecution of the claim amounted to an abuse of the judicial process.

70. I should add that apart from reporting and making a claim in respect of sequelae which did not occur or were not causally related to the events of April 10th, the magnitude of the claim for general and special damages advanced by the Plaintiff to the effect that he will be chronically injured for the rest of his life is wholly disproportionate to and in material respects is unsupported by the available medical evidence, a conclusion which has obvious consequential implications for what, on the face of it, is a grossly exaggerated claim in special damages. Insofar as the application rests on the provisions of s. 26 of the 2004 Act I am satisfied, and the Court finds in all the circumstances outlined that no injustice to the Plaintiff would result from the dismissal of the action. And the court will so order.