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Judgment: approved by the Court for handing down | *Delivered:* **18/10/02**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

ALISON THERESE McARDLE

(Plaintiff) Respondent

and

KIERAN O'NEILL

(Defendant) Appellant

Before: Carswell LCJ, Nicholson LJ and Weatherup J

CARSWELL LCJ

[1] This is an appeal from a judgment given in favour of the respondent by Higgins J in the Queen's Bench Division on 14 December 2001, whereby he awarded to her the sum of £8000 and costs. The respondent, who is now aged 21 years, was at all material times a patient of the appellant, a dental surgeon practising in Newry, and received restorative dental treatment from him in 1998 which involved, amongst other work, filling cavities in her upper central incisors. The judge upheld her claim in respect of one of the teeth, holding that by reason of the negligence and breach of contract of the appellant in carrying out this work that tooth became non-vital and required to be repaired by the fitting of veneers. The measure of damages was not in dispute and the appeal was confined to the issue of liability.

[2] On 15 April 1998 the respondent attended the appellant by appointment, to have four fillings carried out. Three were occlusal amalgams to teeth in her upper jaw towards the back. The fourth filling was to the upper left central incisor (denoted on the dental chart as UL1). It was a mesial filling, ie on the

side towards the midline of the jaw, and at the back of the tooth. It was carried out under local anaesthetic.

[3] At the time of carrying out this work the appellant noted signs of early demineralisation of UR1, the upper right central incisor, and recommended a check in six months. Before the elapse of that period the respondent returned on 2 June 1998 complaining of pain in her teeth. The appellant replaced the filling in UL7 and applied a desensitising agent to UL1 and UR1. The respondent again returned on 4 June, complaining of pain. The appellant determined that UL1 was the seat of the respondent's pain and took an X-ray. He concluded that the nerve was the cause of the pain and instituted open root treatment to remove it.

[4] In the course of this attendance the appellant examined UR1 again and formed a clinical judgment that there was a small cavity, which he decided to fill. From his examination of the X-ray he knew that extra care was required to avoid damage to the pulp in the inner part of the tooth. He carried out this filling, but the respondent soon began to experience pain also in this tooth. On 9 July 1998 she attended another dentist in the practice, who took a further X-ray and found an abscess. Open root treatment was carried out to this tooth also, but both UL1 and UR1 subsequently darkened and required the fitting of veneers.

[5] The component parts of a tooth and the method of treatment of a cavity caused by caries were described by the judge at pages 2 to 4 of his judgment, in a passage which we gratefully adopt:

> "The human tooth comprises three separate components. The enamel is the hard outer surface. Beneath the enamel is the dentine, which is also hard. The central area is called the pulp and consists of arteries, veins and nerves. The pulp descends from the gum and gives the tooth its vitality. It runs roughly through the middle of the tooth and then bifurcates into two horns one to each side of the tooth and these are known as the mesial and distal horns respectively. Mesial describes something which is towards the midline and distal something which is away from the midline. Decay in a tooth commences as a process of demineralisation and leads to caries in the dentine, which can spread to and infect the pulp and ultimately lead to the tooth becoming non-viable. Caries can present in different ways depending on the stage of decay. From a shadow on the tooth, to a lesion or a cavity in the tooth

itself. When caries is detected it requires to be remedied immediately otherwise it will spread and the patient may lose the tooth. The normal remedy is to remove the carious part of the tooth and fill the cavity with a filling which may be a composite or an amalgam filling, depending on the substance used. First the area around the tooth is desensitised using a local anaesthetic administered by an injection into the gum. Then the enamel is removed using a high speed drill which is water cooled. Then the carious material is removed using a slow speed drill. A slow speed drill is sufficient as the carious material is soft by comparison with the hard enamel and dentine. Then, if necessary, a hand tool, known as an excavator, is used to remove any carious material not already removed by the slow speed drill. Once all the carious material is removed then usually the cavity is lined with a special cavity liner called Dycal (calcium hydroxide) and then filled with either composite or amalgam filling. Once carried out fillings are described according to their location. Thus a mesial filling is one that is towards the midline, and a distal filling is one that is away from the midline. While the dentine part of the tooth is hard it is not non-porous and material may leach through it to the pulp. Pulpitis is an inflammation of the pulp that can develop to a point when the pulp becomes non-viable."

[6] Expert evidence was given on behalf of the respondent by Dr Edgar Gordon, a consultant from London, who had examined the records and X-rays and reviewed the case. In addition to the appellant's own evidence, expert evidence was given on his behalf by Dr JG Kennedy, a consultant in dentistry of Queen's University, Belfast and Dr Keith Horner, a consultant in dental and maxillofacial radiology from the University of Manchester.

[7] The judge found, after examination of the evidence given by expert witnesses on either side, that the pulp horns in both UL1 and UR1 were abnormally long for a girl of the respondent's age. They are normally of the same length, but the X-ray taken on 4 June 1998 showed that there was an unusually long distal pulp horn in UR1, whereas no mesial pulp horn was visible at all. Later X-rays established that it must have been obscured and that a mesial pulp horn was present. Both Dr Kennedy and Dr Horner expressed the opinion, which the judge accepted, that the pulp horns were

abnormally long, but Dr Gordon did not agree with this, and adhered to his view that they were not.

[8] Dr Gordon based the case on behalf of the respondent squarely on the proposition, from which he did not resile, that the appellant had traumatically exposed the pulps in both teeth, ie he had drilled through the dentine into the central pulp in each case. Both expert witnesses for the appellant disputed that traumatic exposure had occurred. After considering the expert evidence the judge declined to accept Dr Gordon's view and held at page 11 of his judgment that there had not been traumatic exposure of the pulp in respect of either tooth. The respondent did not seek on appeal to challenge this finding.

[9] Mr Bentley QC on behalf of the respondent advanced an alternative argument, based on the evidence given for the appellant, if the judge were not satisfied that traumatic exposure had occurred. If this had not been the cause of the damage to the teeth, then it must have occurred by reason of chemical irritation of the pulp, due to the absence of a liner, or mechanical irritation caused by drilling very close to the pulp. He submitted that in either case the appellant was negligent.

[10] Mr Stitt QC for the appellant objected that this alternative argument should not be entertained by the court, basing his submission on the decision of this court in *Graham v E & A Dunlop Ltd* [1977] 1 NIJB. In that case the appellant had put forward and persisted in a claim that when he stepped on to the platform of a hoist at third floor level of a building under construction it fell to the ground, taking him with it. It was put to him in cross-examination that the accident had not happened in this way at all, but that he had in fact travelled on the hoist when it was in motion, contrary to his employer's instructions. The appellant denied that he had done so and no evidence was adduced to establish that the accident happened in this way. The judge declined an application from the appellant's counsel to leave to the jury an alternative case based on this version of the facts, which could have involved a breach of statutory duty. The Court of Appeal upheld the judge's ruling, on the ground that the appellant could not put forward an alternative case based on a version of the facts which was at complete variance with that which he had advanced and of which there was no evidence before the court.

[11] The judge rejected Mr Stitt's submission and gave his reasons at pages 13-14 of his judgment. In our opinion he was entitled so to rule. The respondent's case was that the treatment carried out resulted in the loss of vitality of the teeth filled by the appellant. Her expert witness expressed the opinion that this occurred because he traumatically exposed the pulp in each tooth. The appellant's defence was that he did not expose the pulp in either tooth, and accordingly the damage must have occurred either by chemical or mechanical irritation, which could be caused without negligence on his part. The respondent was not in our view advancing an inconsistent version of the

case by submitting that if the appellant was right in his suggestion as to how the damage occurred, that was nevertheless a failure to exercise due care and skill. The particulars of negligence were not sufficient to cover this alternative case and in our view they should have been amended. The judge was, nevertheless, prepared to consider the case and the appellant cannot complain that he was taken by surprise by it.

[12] The appellant accepted in the course of his evidence that he had been put on notice from the loss of vitality in UL1 and the appearance on X-ray of an unusually shaped pulp horn that he ought to take particular care when filling UR1. The judge stated at pages 15-16 of his judgment:

> "Dr Kennedy's evidence was that every due care required to be taken to avoid mechanical trauma, which might be caused by drilling too far or too much. The closer the cavity is to the pulp, the greater the risk of damage. What step could the defendant have taken which might have avoided mechanical irritation? He could have taken a further X-ray that might have demonstrated the location of the mesial horn and its position in relation to the carious material that required to be removed. He could then have carried out the essential restoration in that knowledge, which might not have led to pulpitis in that tooth. In failing to confront the issue in that manner he was not exercising the ordinary skill of an ordinary competent dentist in that regard."

Mr Stitt challenged the validity of this conclusion, which was not very clearly based on any specific expression of opinion by any of the expert witnesses. Mr Bentley submitted that the judge was entitled to draw a sufficient inference from the expert evidence that a further X-ray should have been taken. It was accepted that the appellant had the responsibility to take particular care in approaching the filling of UR1, and that one of the steps which he could have taken in discharge of his duty of care was to take another X-ray. He therefore argued that unless there was evidence that a responsible body of practitioners would not have regarded it as necessary, it was open to the judge to conclude that he was at fault in failing to do so.

[13] The judge went on to consider chemical irritation as a possible cause of the damage to UR1, which he said was the most likely cause if mechanical irritation was not. He did not accept the appellant's evidence that he used Dycal liners in every case. He held at page 17 of his judgment:

> "The presence or suspected presence of abnormally long pulp horns on 4 June should have prompted the use of a liner in UR1. If the pulpitis in this tooth was due to chemical stimuli it was more likely due to the absence of a liner. Therefore if a liner was not used the defendant (who claimed that he did use a liner or would have done so) was not exercising the ordinary skill of an ordinary competent dentist in that regard. Therefore on either basis the plaintiff is entitled to succeed in a claim in negligence."

The factual basis for this finding was strongly challenged by Mr Stitt, but for the reason which we shall set out we do not find it necessary to reach a conclusion on the issue of its correctness or of that relating to the need to take further X-rays or what they might have shown.

[14] The judge's conclusion is accordingly based on a syllogism:

(a) the damage to UR1 was caused either by chemical or mechanical irritation;
(b) on either supposition the appellant was at fault;
(c) therefore whichever was the cause, although that cannot be established, the appellant must have been guilty of negligence.

The validity of this conclusion depends on the validity of the premise that the appellant was at fault in either case, which was strongly assailed by his counsel. Mr Stitt pointed out that there was no evidence to support a finding that if the appellant had taken a further X-ray and was fully aware of the risk of damage to the pulp horn, there was any step that he could and should have taken to prevent the occurrence of the damage. Indeed, the judge had himself said at page 16 of his judgment that if he had had that knowledge it *might* not have led to pulpitis in UR1.

[15] This argument is in our opinion correct. We can find nothing in the evidence to support the proposition that a reasonably skilled dentist, faced with the situation encountered by the appellant, and having armed himself with as much information from X-rays as he required, could have avoided damaging the pulp. No witness has stated what the appellant could have done in that situation or what a reasonably skilled practitioner would have done, and we are left to speculate about possible steps which he might have taken. In those circumstances the syllogism contains a gap which is fatal to its validity and it cannot be sustained. We therefore must reach the conclusion that the learned judge was in error in finding that the appellant was guilty of negligence.

[16] It was then claimed by way of respondent's notice that if the court were to reverse the judge's decision on negligence, it should order a new trial, on the ground that the trial was unfair. The grounds on which this claim was based were the following:

(a) the appellant failed to give appropriate notice, by pleading or otherwise, of the nature of his defence;
(b) the exception contained in RSC (NI) 1980, Order 25, rule 1 operated unfairly to a plaintiff in a medical negligence case and that part of the rule was accordingly incompatible with Article 6 of the European Convention on Human Rights;
(c) even if it was not incompatible, its operation in the present case was unfair and in breach of Article 6.

[17] Counsel for the respondent submitted, in reliance on the decision of McLaughlin J in *Algie v Eastern Health and Social Services Board* [2000] NI 181, that the appellant was obliged to give adequate notice to the respondent that he disputed her claim that he had drilled into the pulp horn of UR1 and that his case was that the damage to the pulp must have been caused by chemical or mechanical irritation. The decision actually concerned the payment of costs thrown away when an action was taken out of the list. The plaintiff claimed that in the course of an abdominal operation damage had occurred to her hepatic duct, due to negligent surgery. Her advisers should have received from the Central Services Agency her X-rays and the results of other specialist investigations, but due to an administrative error they were not produced. The defendant board, which was unaware that the records had not been produced, came to trial to make the case, which emerged in a pre-trial discussion between counsel, that the X-rays showed that the hepatic duct had not been damaged at all, but that the damage had been to the right posterior sectal duct. The plaintiff could not have ascertained this from the pleadings, which only contained a traverse of the plaintiff's averments.

[18] **T**he plaintiff's application to remove the action from the list was not opposed by the defendant, but an issue arose over payment of the costs thrown away. The judge decided that the defendant should pay them, since the plaintiff had been taken by surprise. In view of the fact that essential X-rays had not been furnished, this conclusion was eminently justified. In the course of his reserved judgment, however, McLaughlin J enunciated some propositions concerning pleadings which require further consideration. He referred to RSC (NI) Order 18, rule 8(1), which provides:

> "8.-(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality –

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or
(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c) which raises issues of fact not arising out of the preceding pleaing,

and, where the defendant intends to rely on the defence of inevitable accident or Act of God, he must specifically plead such defence with all necessary particulars, but this requirement shall not transfer to the defendant any burden of proof which relies on the plaintiff."

McLaughlin J did not set out the material parts of the statement of claim and defence, but it appears from the terms of his judgment that the latter was a simple traverse of the plaintiff's averments. He held that Order 18, rule 8(1) obliged a defendant to do more than enter a mere denial of the plaintiff's claim and that sufficient facts must be specifically pleaded to prevent the plaintiff from being taken by surprise.

[19] There is force in the proposition that the rules of court ought to make provision for more specific pleading of the essence of a defence than has traditionally been the case. The Civil Procedure Rules adopted in England contain such provision, and the Civil Justice Reform Group in this jurisdiction recommended that a similar requirement be imposed (*Final Report,* paragraph 93). The Supreme Court Rules Committee is due to consider amending the rules along these lines, but until that is done the provisions of Order 18, rule 8(1) have to be applied as they stand. We find ourselves unable to agree that they are to be interpreted as the judge did in *Algie v EHSSB*. It seems to us clear that the matters which rule 8(1) require to be pleaded are those which partake of the nature of special defences such as those enumerated in the text of the rule. We observe that the defence which one defendant failed to plead in *Re Robinson's Settlement* [1912] 1 Ch 717, to which McLaughlin J referred, was that of a moneylending transaction, which obviously required to be specifically averred to give the plaintiff an opportunity to meet it. We do not understand Buckley LJ to have intended, in the passage at pages 727-8 cited by McLaughlin J, to enlarge the class of cases covered by the rule beyond the category of such special defences.

[20] We are reluctant to be too prescriptive about the categories of case covered by Order 18, rule 8(1). We also should make it clear that there are doubtless many cases in which it would be desirable that a defendant should go beyond the formal requirements of pleading, so that the parties can come

to trial properly prepared to deal with the case – indeed, there may well be cases in which a judge would be justified in granting an adjournment and fixing a party with the costs thrown away where it was foreseeable that the other would be taken by surprise, even if the former had complied strictly with the technical pleading rules. Moreover, a certain amount may depend on the way in which the averments in the statement of claim are framed. In paragraph 5 of the amended statement of claim in the present case it is averred merely that the respondent sustained personal injuries, loss and damage by reason of the negligence and breach of contract of the appellant. The particulars of injuries then set out various allegations, including "(b) Drilling into the horns of the pulp of the two upper central incisors" and "(n) Exposing the pulps of both upper central incisors." The defence, which was, perhaps regrettably, in the customary form, simply traversed these allegations by denying that the appellant carried out the alleged or any dental work or that he was guilty of the alleged or any negligence or breach of contract. Those pleas quite correctly covered the necessary traverse to the material facts pleaded by the respondent, though it could not be said that they were at all informative about the appellant's case. The appellant was not under our present rules required to plead to particulars, and even if he had done so he might have done no more than deny that the respondent had drilled into the pulp horns.

[21] We do not consider that the appellant was obliged by the Rules of the Supreme Court to go further than he did. We cannot agree with the reasons given for his decision by McLaughlin J in *Algie v EHSSB,* which in our view were based on an incorrect construction of Order 18, rule 8(1). That case could readily have been decided on his second reason set out at page 188 of the report of his judgment. We also consider that the appellant's plea, abiding strictly by the rules, was not in this case unfair in any respect to the respondent. Dr Gordon espoused very strongly his conclusion that the appellant had drilled into the pulp of each of the teeth and was clearly unwilling to consider any alternative. He must have been aware, however, that two other causes could have been put forward to explain the damage to the teeth, viz chemical and mechanical irritation. He would also have been able to advise the respondent that a case could be made that to allow damage to occur from either of these causes would also be negligent. Moreover, it is apparent from the letter of 21 November 2000 from Dr Kennedy to the appellant's solicitors, which was put in evidence at the hearing of a remittal motion in the action, that he considered that the pulps were unusually large, and the respondent's advisers were made aware that Dr Gordon's thesis was not unchallenged. The appellant's simple denial that he had drilled into the pulps should accordingly not have misled the respondent and she should have been able to meet the case which he made.

[22] These conclusions are sufficient to dispose of grounds (a) and (c) of the alternative case made by the respondent, and we turn finally to consider

ground (b), that RSC (NI) Order 25 operates unfairly to a plaintiff in a medical or surgical negligence case and is therefore incompatible with Article 6(1) of the European Convention on Human Rights. It is not strictly necessary for us to decide this point, since we have already found that no unfairness was caused to the respondent in the circumstances of the case, but since the issue was fully argued by counsel, including Mr Maguire appearing for the Lord Chancellor, we feel that we should express an opinion on it.

[23] Order 25, rule 1 defines the ambit of application of the Order:

> "1. This Order applies to all actions for damages in respect of personal injury or death except (while liability remains an issue) actions grounded on an allegation of medical or surgical negligence."

Rule 2 imposes on a plaintiff a requirement that he –

> "… shall serve with his statement of claim `medical evidence' substantiating all the personal injuries alleged in the statement of claim."

Rules 4, 5 and 6 go on to require the disclosure of all medical evidence which a party proposes to adduce at trial and to provide that unless it is disclosed it shall not be adduced without the leave of the court. Rule 11 defines "medical evidence":

> "11. For the purposes of this Order "medical evidence" means –
>
> (a) the evidence contained in any report or other accompanying or supplemental document as specified in rule 9 and includes surgical and radiological evidence and any ancillary expert or technical evidence; and
> (b) any other evidence of a medical, surgical or radiological nature which a party proposes to adduce at the trial by means of oral testimony, and the expressions `medical expert' and `medical examination' shall be construed accordingly."

[24] Mr Bentley submitted that the plaintiff in a medical negligence case is put at a disadvantage, and so there is an infringement of the principle requiring "equality of arms". In other classes of litigation both parties have to disclose medical evidence, but the effect of the exception contained in Order 25, rule 1 is that in a medical negligence case the plaintiff is deprived of the

benefit of disclosure. He has to put his case on paper in his statement of claim and particulars, whereas the defendant does not have to show his hand. Mr Maguire pointed out that the European Court of Human Rights has taken a broad view of the requirement of fairness of a trial, basing it on an examination of the trial as a whole (*Barbera, Messegne and Jabardo v Spain* (1980) 11 EHRR 60 at paragraph 68). It has also afforded a measure of discretion to individual states in the way in which they seek to ensure a fair trial. In our practice, unlike that in England, witness statements do not have to be exchanged as a general rule. The exception in Order 25, rule 1 reflects this, for medical reports in medical negligence cases are frequently directed towards issues of liability as well as damages, while the thrust of Order 25 was to require disclosure of medical evidence relating to the quantum of cases.

[25] In our opinion the argument advanced on behalf of the Lord Chancellor is correct. We do not consider that Order 25 is in breach of Article 6 of the Convention in its exception of medical and surgical negligence cases. That exception was made in order to maintain congruity with the absence of a general requirement to disclose and exchange witness statements. We note that in other professional negligence cases in the Commercial List disclosure is generally required, apparently without injustice, and that the Civil Justice Reform Group favoured the exchange of all reports (*Interim Report*, paragraph 10.62). As in the case of Order 18, rule 8(1), the Supreme Court Rules Committee may decide to amend Order 25 in due course. As it stands, however, we do not consider that it infringes Article 6 of the Convention.

[26] For the reasons which we have given we consider that the appeal should be allowed and the judgment set aside. The respondent's counsel asked the court to order a new trial, rather than giving judgment for the appellant. He submitted that the appeal had succeeded because the judge had failed to deal with the issue of the precautions which the appellant could have taken to prevent mechanical irritation, rather than because his findings were shown to be erroneous. He relied by way of analogy on *Wilsher v Essex Area Health Authority* [1988] AC 1074, in which the House of Lords felt compelled to order a new trial because the judge had left unresolved a conflict of expert evidence which was critical to decision of the case. In the present case, however, the judge reached a conclusion without sufficient evidence, rather than failing to make a finding on controverted evidence which had been given before him. It is not possible for us to tell what evidence could have been given on the issue, but the respondent had had the opportunity to adduce it. In these circumstances we consider that the case falls within the same category as *Maguire v Lagan* [1976] NI 49, where McGonigal LJ said at page 58:

> "The appellant has asked for a new trial but this does not appear to me to be an appropriate case in

> which such an order should be made, since, if the appeal is allowed, it is on the basis that there was no evidence and the respondent failed to establish any right to damages against the appellant. To order a new trial would be to invite the respondent to mend his hand and alter the case he already made on the first trial. In my opinion to order a new trial in such circumstances would be a wrong exercise of the powers of this court, and I would accordingly allow the appeal and direct that judgment be entered for the appellant."

We do not consider that it is an appropriate case in which to order a new trial and we accordingly shall enter judgment for the appellant.