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Judgment: approved by the Court for handing down | *Delivered:* **03/12/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

JAYNE McCLEAVE

Plaintiff;

-and-

THE CLOUGHFERN ARMS

Defendant.

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GILLEN J

[1] This is an appeal from a judgment given in favour of the defendant by Master McCorry on 20 June 2008 whereby it was ordered that the defendant be granted leave to make a late lodgement in this action.

[2] The case arises out of a claim in negligence and breach of statutory duty by the plaintiff against the defendant. The plaintiff received an injury when, allegedly due to the effective condition of a window and a floor at premises owned and occupied by the defendant, glass shattered over her . The injury she sustained was a laceration to the right wrist and thumb which had occasioned significant scarring and damage to the flexion of the thumb.

[3] As is customary in these matters, on 15 January 2008, a joint consultation had been arranged between the parties and settlement discussions had taken place. At that consultation, the defendant's counsel and solicitor were permitted to view the plaintiff's scarring.

[4] Subsequent to the consultation, counsel for the defendant wrote to the plaintiff's counsel recommending a figure by way of settlement which, when refused, became the subject of the current application.

[5] In an affidavit of 5 June 2008, sworn by Betty O'Rawe partner in the firm of Murphy & O'Rawe the solicitors on record for the defendant, the deponent asserted, inter alia, that investigating liability issues in the case had proved difficult. Problems regarding the nature and strength of the glass pane concerned as well as its installation had occasioned delay. It was necessary to spend time trying to track down those who may have been in or about the public house on the night in question where the accident occurred to see what they knew about the plaintiff's injury. In particular Ms O'Rawe indicates that she was concerned as to whether the plaintiff had sustained the injury accidentally or deliberately. She deposes that she had only recently come to the conclusion that unless something happened in the meantime she had taken her enquiries as far as she could go. At paragraphs 4 and 5 of the affidavit she recorded as follows:

> "Whilst I am not authorised to admit liability I have received instructions to apply to the Court to lodge money into court under Order 22, Rule 1, Rules of the Supreme Court (NI) 1980 without admission. I now make the application.
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> 5. I realise that the primary time limit for making a lodgement is past but, given that the overriding objective in the Rules of the Supreme Court is to deal with cases justly, and this involved inter alia saving expense, dealing with the matter proportionately, expeditiously and fairly, ever mindful of the resources of the Court, I believe this case could be focused and advanced short of a trial by allowing my application.
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> 6. Additionally the recent introduction of the pre-action protocol for personal injury litigation suggested to me that it would be worthwhile making this present application. The protocol, whilst reiterating the overriding objective, also indicates that it aims to achieve settlement of cases early without litigation, to make necessary litigation proceed efficiently and to reduce the amount invested by the participants in the case in terms of money, time, anxiety and stress."

[6] In an affidavit of 18 June 2008, made by Edward Dougan, solicitor on record for the plaintiff, he deposed to the following at paragraph 8:

> "I advised by counsel and believe that it is recognised by practitioners at the Bar that where they have been given an opportunity to view scarring, they will not subsequently make a lodgement in court in the event of negotiations breaking down. I am further advised by Counsel and believe that to the best of his recollection, in 25 years of practice, he has never encountered a case where a defendant made a lodgement after having been given the opportunity to view scarring."

[7] Mr Ferrity, who appeared on behalf of the defendant, accepted that the practice in Northern Ireland had been that lodgements were not made in scarring cases after a viewing, but it was his submission that the context had now changed in light of the advent of Order 1, Rule 1A of the Rules of the Supreme Court ,which lays out the overriding objectives of the Rules, and the pre-action protocol.

[8] Mr Ferrity's argument was that it was not the intention of the defendant to lodge any more than they already had offered and that they had commenced to negotiate once it was clear in the aftermath of their investigations that the defendant was likely to attract liability. The action had been slow moving. Reasons for delay included a failure to properly plead the special damage initially, a failure on the part of the plaintiff to attend a medical examination, and subsequent amendment to the pleadings .

[9] Mr Gillespie, who appeared on behalf of the plaintiff, countered this by arguing that the practice was not to allow late lodgements where negotiations were taking place particularly in scarring cases, that this was a relatively straightforward case, the difficulties of investigation were illusory and that there was nothing new about Order 1, Rule 1A which had been in force since June 2007. Moreover he urged that the pre-action protocol was just that a pre-action protocol and was irrelevant to this stage of proceedings.

The regulatory context

[10] Order 1 Rule 1A of the RSC (Northern Ireland) 1980 provides as follows:

> "1A.-(1) The overriding objective of the Rules is to enable the Court to deal with cases justly.
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> (2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate to –

(i) the amount of money involved;
(ii) the importance of the case;
(iii) the complexity of the issues;
(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the Courts resources, while taking into account the need to allot resources to other cases.

(3) The Court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or
(b) interprets any rule."

[11] Order 22 governs payment into and out of court and where relevant it provides as follows:

"1(a)(i) In any action for … damages any defendant may without leave at any time after he has entered an appearance in the action –

(a) before the closing of pleadings, or
(b) if he has complied with Order 25 Rule 3(a), not later than 14 weeks from the close of pleadings or within 4 weeks of disclosure by the plaintiff of the evidence which it is his duty to disclose under Order 25 Rule 4(a), whichever is the later,

or with leave or on consent at any later time pay into Court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims or, where two or more causes of action are joined in the action, as sums of money in satisfaction of any or all of those causes of action."

Principles to be applied on late payments into court

[12] Neither counsel was able to furnish the court with any helpful authority on this matter. Authorities such as Ely v Dargan (1967) IR 89 – a case where a defendant was permitted to make a late lodgement conditional on paying all costs to date – and Hanley v Rendels (No. 2) (1960) IR Jur R 67 where a late lodgement for the purposes of a new trial was allowed, were not relevant to the present proceedings.

[13] It is impossible to be prescriptive about the categories of case covered by the late lodgement provisions in the Rules. Potential instances might include where there has been a late amendment to the statement of claim affecting value, a late material change in the thrust of the medical or financial evidence, a case where there had been a requirement for an urgent filing of a defence in circumstances where the defendant has been prevented from properly dealing with the case especially where this has been drawn to the attention of the plaintiff, a material amendment to the allegations or the cause of action, late disclosure or misleading information provided by a plaintiff which has recently been uncovered . There is no doubt that in this context the changing climate recognised by Order 1 Rule 1A to ensure that cases are dealt with justly, expeditiously and proportionately will have an influence on such illustrations.

[14] The pre-action protocol for personal injury litigation and the general practice direction for personal injury litigation are both illustrative of this changing climate within the Queen's Bench Division. Emphasis is now on placing the parties in a position where they may be able to settle cases fairly and early without litigation and enabling proceedings to proceed according to the court's timetable in an efficient manner. The promotion of an overall "cards on the table" approach to litigation in the interests of keeping the amount invested by participants in terms of money, time, anxiety and stress to a minimum are all consistent with this new climate.

[15] Equally, however this court is still obliged to comply with the terms of Order 22. This provides that in the first instance lodgements are to be made before the close of pleadings (in this case I understand that date was 27 February 2007) or in the compliance with Order 25 not later than 14 weeks from the close of pleadings (which in this case would have been 5 June 2007).

[16] That the court has a discretion to grant leave for later payment must not ignore the primary wording of Order 22 Rule 1(1)(a) and (b). The discretion must be exercised rationally .It cannot be construed in my view to mean that consent can be given for late lodgement without reference to the spirit and terms of those primary time limits. Hence prima facie it is only where good reason can be given why those primary time limits could not have been complied with that the discretion should be exercised. It seems to

me that the legislative intention was clear. Courts must be careful in pursuing a purposive path to avoid being a policymaker in direct contradiction to the intention of the legislature. There must be limits to the concept of judicial creativity no matter how inviting the prospect may be. The paramount objective must always be to ascertain the intention of the true intent of the legislature.

[17] There may well be force in the proposition that Rules of Court ought to make provision for later lodgements along the lines of the Civil Procedures Rules adopted in England or the use of Calderbank letters which operates so efficiently for example in the Family Division. That is a matter for the Supreme Court Rules Committee. It is not a matter for a Practice Direction or an unlicensed approach to the exercise of discretion. Until such steps are taken, I consider that the provisions of Order 22 must be applied as they stand in their context.

[18] In this instance, I can see no good reason why a lodgement was not made much earlier than proposed. It is particularly inappropriate since it occurred in the immediate aftermath of the defendant having been afforded facilities to view scarring without any prior indication having been given of the intention to lodge thereafter. I am satisfied that previous practice in this regard would have ensured that possibility of same did not occur to the plaintiff. The applicability of that practice may have to be revisited in the future and the possibility of an application of this nature will have to be contemplated by plaintiffs' advisers.
[19] However I am unpersuaded that the difficulties in investigation were sufficient to have deflected an informed lodgement being mad at a much earlier stage. The climate of change brought about by Order 1 Rule 1A and the pre-action protocol/practice direction are in an insufficient basis to alter the applicability of the primary time limits of Order 22

[19] In the circumstances therefore I refuse this application.