Neutral Citation No. [2010] NIQB 2 | *Ref:* **McCL7703**

Judgment: approved by the Court for handing down | *Delivered:* **06/01/10**
*(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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ON APPEAL FROM THE RECORDERS COURT FOR THE DIVISION OF BELFAST

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BETWEEN:

ELLEN KERR

Plaintiff/Respondent:

-and-

ULSTERBUS LIMITED

Defendant/Appellant:

_____

McCLOSKEY J

I THE APPEAL

[1] This is an appeal by the Defendant/Appellant (hereinafter "*the Apellant*") from the deputy County Court Judge for the Division of Belfast. The Plaintiff/Respondent (hereinafter "*the Plaintiff*") brought a claim for damages against the Appellant arising out of a road traffic accident. The substantive determination of her claim consisted of a decree for £7,500 in her favour. There is no appeal against this decree.

[2] The narrow scope of this appeal is apparent from the Notice of Appeal, which recites that the Appellant –

> *"... hereby appeals to the High Court from the whole of the decree made by the County Court in this matter on 21st October 2009* ***whereby it was ordered that the remittal appeal costs be costs in the cause and that the Defendant/Appellant should pay the costs of the application heard by the County Court on 21st October 2009****".*

[Emphasis added].

As the text of the Notice of Appeal discloses, this was a remitted action; the deputy County Court Judge ordered the Appellant to pay the Plaintiff's costs of the remittal appeal; and further ordered the Appellant to pay the Plaintiff's costs of an application heard by him on 21st October 2009, whereby he determined the disputed interlocutory costs issue. Thus the substantive decree for £7,500 damages in favour of the Plaintiff does not feature in this appeal.

II CHRONOLOGY

[3] The material facts can be stated in relatively short compass:

(a) By Writ of Summons issued on 23rd January 2007, the Plaintiff claimed damages from the Defendant for personal injuries, loss and damage arising out of a road traffic accident which occurred on 23rd May 2006.

(b) The Statement of Claim was served on 13th February 2007. This contained no particularised claim for special damage and none materialised subsequently. The Plaintiff's personal injuries were described as a soft tissue straining injury affecting the neck, right trapezius and shoulder area and a capsular strain of the right shoulder.

(c) The Defence served on 20th November 2007 denied liability and pleaded contributory negligence. The terms of this pleading suggest that the Defendant's vehicle collided with the rear of the Plaintiff's stationary vehicle.

(d) On 4th February 2008, the Defendant initiated an application to remit the action to the County Court.

(e) On 1st May 2008, following a contested hearing, the Master ordered that the action be remitted to the County Court.

(f) The Plaintiff appealed, by Notice dated 2nd May 2008.

(g) By Order dated 30th May 2008, the High Court dismissed the Plaintiff's appeal, affirming the order of the Master, including the award of costs

to the Appellant at first instance. However, the costs of the remittal appeal were reserved to the trial judge.

(h) On 18th December 2008, the Plaintiff's case was heard in the County Court. Liability was admitted and the deputy Judge made a decree in her favour for £7,500 plus costs. The issue of the reserved remittal appeal costs was not raised before the judge, by oversight of the parties.

(i) By a motion dated 4th February 2009, the Appellant sought to convene a further hearing on 27th February 2009 "*… for the purpose of hearing an application on the part of the* [Appellant] *for an order in pursuance of Order 9 of the County Court Rules in relation to the costs of a remittal appeal herein …*".

(j) On 27th February 2009, the matter was adjourned by one of the regular County Court Judges, to be listed before the deputy Judge.

(k) On 21st October 2009, there was a further hearing before the deputy Judge, giving rise to the order mentioned above and now under appeal.

(l) On 27th October 2009, the Appellant served Notice of Appeal.

III THE CONDUCT OF THIS APPEAL AND THE OVER-RIDING OBJECTIVE

[4] In accordance with the recently introduced procedure in the High Court, I conducted a review/directions hearing on 19th November 2009. This elicited that the amount of costs which is the subject matter of this appeal is £542.75 (see the solicitor's Bill of Costs dated 16th December 2008). Bearing in mind the over-riding objective enshrined in Order 1, Rule 1A of the Rules of the Court of Judicature of Northern Ireland, the parties were strongly encouraged to attempt to resolve their differences consensually. The second matter considered at this hearing, also stimulated by the over-riding objective, was that of mode of hearing. It was suggested to the parties that if they were unable to reach a consensus, the court would decide this appeal exclusively on the basis of written submissions. Both parties readily agreed to this course.

[5] Some time later, the court was informed that the parties had been unable to reach agreement. While this is highly regrettable, given the relatively trivial amount in dispute, I have no reason to doubt that genuine efforts were employed and I attribute no fault to either party for the failure which ensued.

IV THE MEDICAL EVIDENCE

[6] Given the history of this litigation and the context of this appeal, it is appropriate to reflect on the medical evidence. I propose to summarise the various medical reports in relatively brief terms. This is a case where each party engaged a consultant orthopaedic surgeon – Mr Wallace FRCS on behalf of the Plaintiff and Mr Yeates FRCS on behalf of the Defendant.

[7] When Mr Wallace first examined the Plaintiff just over six months following the subject accident, he diagnosed a "*soft tissue straining injury affecting the neck, right trapezius and shoulder area*", together with "*a capsular strain to the shoulder*". As regards the former injury, Mr Wallace opined that any persistence of symptoms for a period in excess of eighteen months "*… would more reasonably be explained on the basis of an underlying vulnerability or subnormality*", mentioning degenerative changes in the same passage (the Plaintiff being sixty-three years when the accident occurred). When Mr Wallace re-examined the Plaintiff about a year and a half after the accident, he recorded a history of some improvement in subjective symptoms. His prognosis in respect of both the neck and shoulder injuries was essentially the same viz ultimately the period of recovery could be of approximately two years' duration, though possibly longer. Interestingly, he did not advise that any future persistence of neck symptoms *would* be attributable to the manifestation of age related degenerative changes.

[8] The medical evidence also establishes that the Plaintiff attended her general medical practitioner with some regularity, following the accident, in 2006 and 2007. While she made some apparently unrelated complaints, she also complained about her neck and right shoulder. The Plaintiff's medical evidence was completed by a report of Dr Anderson, a consultant psychiatrist. I interpret this report to convey that although some symptoms of an emotional or psychological nature were suffered by the Plaintiff, these did not constitute a compensatable psychiatric injury. This interpretation appears to be confirmed by the absence of any amended Statement of Claim purporting to enlarge the scope of the personal injuries particularised.

[9] Mr Yeates FRCS, reporting on behalf of the Defendant, examined the Plaintiff on two occasions. His first report focussed mainly on the Plaintiff's neck injury. Although equipped with Mr Wallace's first report, Mr Yeates made no assessment of his professional colleague's diagnosis of a capsular strain of the right shoulder. He questioned whether the full extent of the Plaintiff's subjective complaints was properly referable to the accident. Mr Yeates' second report consists of a commentary on the records of the Plaintiff's general medical practitioner. In it he suggests that the Plaintiff "*… did not hurt her shoulder in the accident and pain in that area was referred from her neck*". While one finds a comparable statement in his first report, once again he does not engage with Mr Wallace's diagnosis in this respect. Having said that, neither of his reports challenges the Plaintiff's complaint of right shoulder symptoms, albeit he expresses certain misgivings. With reference to the records documenting the problem with the Plaintiff's right shoulder in January 2007, including physiotherapy

and steroid injections, Mr Yeates suggests that this "*… does not reasonably relate to the after effects of this incident*". I observe, with due deference, that Mr. Yeates couches this statement in bare terms, without elaboration.

V THE COURT'S RULING

[10] It was represented to this court on behalf of the Plaintiff that the reason why the High Court judge reserved the costs of the remittal appeal to the County Court trial judge was that the latter "*… would have the benefit of hearing the evidence of the Plaintiff, in relation to valuing the case*" [paragraph 10 of Mr McCollum's skeleton argument]. This is not challenged in the skeleton argument of Mr Spence [representing the Appellant]. It seems clear that the High Court judge was acknowledging the existence of contentious medical issues and the unpredictability of the ultimate outcome in the County Court (which would not of course be bound by its normal jurisdictional limit of £15,000), together with the consideration that only the County Court Judge would have the benefit of hearing the Plaintiff's evidence at first hand and evaluating same accordingly – and, having done so, would be best placed to determine the costs issue. It seems to me that there must have been certain doubts about both quantum and costs in the mind of the judge at this stage. This is reflected in his determination that the remittal appeal hearing costs should be reserved to the trial judge. This further suggests to me that the judge did not consider this to be a clear and obvious case for remittal and, having read all the medical reports, it seems to me appropriate to characterise the judge's approach in this way.

[11] Paragraph 10 of Mr McCollum's skeleton argument contains the following passage:

> *"Deputy Judge McFerran preferred the opinion of Mr Yeates and decided that the pain in the shoulder was referred from the neck, as opposed to a capsular injury to the shoulder. He was therefore of the view that the ongoing symptoms in the Plaintiff's shoulder were not related to the accident and awarded the Plaintiff £7,500."*

This assessment of the approach and reasoning of the deputy Judge is not challenged on behalf of the Appellant.

[12] To begin with, I consider that the deputy Judge had jurisdiction to deal with the discrete issue of the High Court remittal appeal costs. He was bound to give effect to the order of the High Court, which expressly reserved this issue to him. Neither party argued to the contrary. It follows that he was exercising a judicial discretion in this matter and, indeed, this was the basis upon which both parties advanced their respective arguments to him. Properly analysed , the matter probably belonged to the realm of Order 55 , Rule 7 of the County Court Rules, which applies where no specific scale of costs is prescribed . I consider that

Section 59 (2) of the Judicature (NI) Act 1978 was not engaged , as the court granting the "relief " was the County Court .

[13] As emphasized by Carswell LCJ in ***Re Kavanagh's Application*** [1997] NI 368 (at p. 382i), an appellate court must accord appropriate respect to the exercise of a judge's discretion in awarding costs. The Lord Chief Justice quoted with approval the general rule formulated by Atkin LJ in ***Ritter –v- Godfrey*** [1920] 2 KB 47, at p. 60:

> *"In the case of a wholly successful Defendant, in my opinion the judge must give the Defendant his costs unless there is evidence that the Defendant (i) brought about the litigation, or (ii) has done something connected with the institution or conduct of the suit calculated to occasion unnecessary litigation and expense, or (iii) has done some wrongful act in the course of the transaction of which the Plaintiff complains".*

In the present case, the Appellant cannot, of course, claim to have been a wholly successful Defendant. He was, rather, an unsuccessful Defendant against whom a decree was made. I acknowledge that the Appellant achieved partial success, by confining the Plaintiff's award within the jurisdictional limit of the County Court. However, the *event,* which features prominently in the general rule as to costs, can scarcely be said to have been fully, or even substantially, successful from the Appellant's perspective. Thus I reject the submission on behalf of the Appellant which highlights Order 62, Rule 3(3) of the Rules of the Court of Judicature:

> "*If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs*".

This rule, of course, did not in any event apply to the exercise of the deputy County Court Judge's discretion, albeit I accept that, in principle, it would have provided some guidance, but for my analysis of the "*event*" above. It follows that the judicially devised "*general rule*" of Atkin LJ, while a vehicle for some guidance, is not readily applicable to the present context.

[14] Ultimately, I consider the real question to be whether there are grounds upon which this court should interfere with the exercise of the deputy County Court Judge's discretion, having regard to the deference with which his ruling on the contested costs issue should be treated. I conclude that no such grounds have been made out. Having regard to my analysis of the medical evidence (in Chapter IV above) and my assessment of the rationale underpinning the determination of the High Court judge to reserve the contested interlocutory costs to the court of trial, I am satisfied that there was sufficient material to justify the impugned order. Whether this court would have exercised its discretion in the same manner is not relevant, as

this is not the barometer against which the disputed exercise of judicial discretion in this matter falls to be evaluated. There is nothing to suggest that the impugned decision is capricious or the product of the intrusion of some extraneous factor. Nor does it bear the stamp of irrationality. In short, I am satisfied that the challenged exercise of discretion lay within the deputy Judge's margin of appreciation

VI COSTS AND SUNDRY ISSUES

[15] Having regard to my conclusion, the second issue raised in the parties' written submissions viz. whether the impugned order properly fell within the "slip" rule [Order 9, Rule 9 of the County Court Rules] does not fall to be determined. It would run contrary to the over-riding objective to embark upon an extensive *obiter* examination and resolution of this separate issue. Furthermore, it is not clear whether it is properly encompassed by the remit of this appeal. I shall confine myself, therefore, to simply expressing certain reservations about whether the overlooked costs issue which ultimately came before the deputy Judge many months following the substantive decree truly fell within the embrace of a clerical mistake or an error arising from an accidental slip or omission, to borrow the language of Rule 9. Further, in expressing this tentative view, I have noted the conclusion reached by Judge Hart in ***Heron –v- Scott*** [unreported, 5th December 1986, 1 BNIL 81].

[16] There is one final matter. I note that the Book of Appeal includes the deputy Judge's order dated 21st October 2009. It does not contain the substantive decree. It is the experience of this court that County Court decrees are not routinely generated and normally come into existence only if specifically bespoken. Notably, when the deputy Judge dealt with the discrete issue of the remittal appeal costs on 21st October 2009 and ruled thereon, the outcome of the hearing was the freestanding order mentioned immediately above. Thus his ruling did not merge with and operate to complete the substantive decree. This seems to me of questionable validity. Given the substance of what the deputy Judge was being requested to do on that date, a further question which this in turn raises – and which this judgment does not determine – is whether the High Court has jurisdiction to entertain an appeal against the costs element only of a County Court decree.

[17] It follows that this appeal must be dismissed. This conclusion raises the issue of how this court should exercise *its discretion* under Section 59(1) of the Judicature (Northern Ireland) Act 1978, having regard also to Order 62, Rule 3(3) of the Rules of the Court of Judicature. I am prepared to hold that, in the unusual circumstances prevailing, the Appellant had sufficient grounds for bringing this appeal, albeit unsuccessfully. Secondly, I consider that the appeal threw up a point of reasonable substance. Thirdly, it is not clear to me that one of the arguments canvassed fully on behalf of the Plaintiff, which centres on Order 9, Rule 9 of the County Court Rules, was ventilated before the deputy Judge. Fourthly, the steps taken by the court have served to ensure that the successful Plaintiff's costs should be of a very modest nature, presumably being confined mainly to the fee incurred in the preparation of Mr. McCollum's skeleton argument. The final factor which I weigh is that, in the

generality of cases where a remitted action results in an award of this order, the Defendant should not be liable for the costs of successful remittal proceedings. Approached in this way, the present case may properly be considered an exception to a general rule. For this combination of reasons, I am minded to make no order as to the costs of this appeal. If the Plaintiff wishes to argue to the contrary, this should be done in the form of a letter within seven days of the date of promulgation of this judgment. The Appellant's solicitors will enjoy a comparable facility, governed by the same time limit, if deemed advisable. Alternatively, since this judgment will, in accordance with established convention, be pronounced in open court, the parties' legal representatives will have the option of dealing with the costs issue in that forum, if considered to be a more efficient alternative.

[18] Finally, reiterating what is said in paragraph [4] above, I commend both parties for their willingness to co-operate in the determination of this appeal through the medium of a paper exercise and I record my gratitude to both counsel for their helpful written submissions.