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*(subject to editorial corrections)**

T/HC/10/00799

TAXING OFFICE

COURT OF JUDICATURE OF NORTHERN IRELAND

BETWEEN

DONNA MARIE MULLAN

AND

TESCO STORES LIMITED

MASTER BAILIE

1. This has been a protracted taxation of costs on the standard basis pursuant to Order 62 of the Rules of the Court of Judicature (NI) 1980. It is grounded on a court order made on consent by the High Court on 11th December 2007. That order reflected the settlement of the action at an advanced stage through discussions between counsel for the parties. The plaintiff accepted £40,000 damages, plus CRU and her costs, to be taxed in default of agreement.

2. In due course the agreed damages were paid over and out to the plaintiff. Thereafter, the solicitors for the respective parties were able to reach agreement on the bulk of the costs, including the solicitors professional costs and counsels fees. However a dispute remained over the fees of two expert witnesses commissioned by the solicitors for the plaintiff. These were:

(a) fees of a forensic accountant [Falconer Stewart] in a total of £4,800 plus VAT

(b) fees of an occupational therapist [Breda Jamison] who had prepared advice and costings on the long term care needs of the plaintiff. These were in a total of £2153.20

The outlays [presumably the reasonably extensive medical reports and counsels fees] were apparently agreed at £8030.11 and the solicitors costs at £6,750. The two disputed items were brought in for taxation but not until July 2010.

3. The expert witness fees in question were incurred by the plaintiff's solicitors [Wilson Nesbitt], on the direction of senior counsel [Mr Kevin Conlon QC]. For purposes of the taxation proceedings the solicitors had engaged the assistance of Mr Paul Kerr (Costs Consultant) who prepared and submitted the necessary initial bill and taxation papers. The defendant [insurers] were represented in the action, including the taxation proceedings, by Johnsons Solicitors [Ms S.Loughran].

4. Following an initial hearing in October 2010 and adjourned pending the supply of certain key documents as agreed or on my direction, there have been several direction and review hearings thereafter, in the course of which the additional documentation has been produced. I have received no direct evidence from the parties, their legal or other advisers, with the parties content to refer me to the arguments made on the taxation hearings and the file papers. In due course on my direction I have received all of the medical reports, the two expert reports under dispute, the pleadings and eventually the plaintiff's solicitors file notes and correspondence.

5. Because of the nature and perceived importance of the emerging points at issue, at the request of Ms Loughran and the agreement of Mr Kerr, I allowed an opportunity for written submissions. These have been useful and I confirm that I have considered those submissions [submission of defendants of 15th February 2013 and response by Mr Kerr of 11th March.]

6. The position of the defence can be summarised broadly as a challenge to the recoverability of these two disbursements as between party and party. Insofar as the Falconer Stewart account is concerned, if I consider it should be allowed, the defendant argues also against the level of charges made. In respect of the Breda Jamison account, if this is allowed, then there is no dispute as to the reasonableness per se of the amount of the fees claimed.

7. As to disallowance the defendant puts the objection thus:

"The first and principal argument is that the plaintiff grossly exaggerated the extent of her injuries and without that exaggeration there would have been no question of the instruction of either expert. The second argument is that the submission advanced by the costs drawer for

the plaintiff that the costs of the experts must be paid because the instruction of the experts was directed by counsel cannot be sustained"

8. The defendant reviews the medical evidence gathered by both parties as regards physical injury, a pre-existing back problem and the psychiatric effects as asserted by the plaintiff. They comment, I think accurately, that the "tenor of the medical evidence served on behalf of the plaintiff, including her GP Notes and records, was that the plaintiff was grossly disabled as a result of her injuries in the subject incident and that she required daily care from family members, was unable to dress herself, required a stick or crutches to walk and was significantly restricted in her daily independent activities.

9. As against the case made by the plaintiff, the defendants seek now in the context of taxation to challenge her credibility in two respects. First by identifying various places in the medical and care evidence which were either puzzling or suggest that there may have been a "prolonged adjustment reaction" [Dr Curran, Consultant Psychiatrist for plaintiff] and "an overlay of illness behaviour which does not indicate underlying mental illness".

10. The defendants seek at this stage on taxation of the costs to raise also, by way of allegations against the plaintiff personally, surveillance evidence gathered in the course of the proceedings by the defendants [in Nov/Dec 2005 and then in July/August 2007.] On the defendant's submission I am invited to find that the plaintiff did not have the care needs as identified by the Care Consultant at the relevant time and indeed that, on the defendant's contention, she was "to all intents and purposes living an entirely normal life".

11. The defendants point also to the discrepancy between the very modest special damages assessment made by their own expert accountants [under £2,000] and the sums calculated by the plaintiff's experts. They also point to the apparent abandonment by the plaintiff of the future earnings and care needs elements of her claim, implicit, or in the defendant's submission self-evident, in the plaintiff having agreed a settlement at £40,000. On this basis I am invited to infer and conclude first that the plaintiff has been fraudulent and culpable by her exaggeration of the symptoms. Secondly, that the solicitors and/or counsel for the plaintiff have been careless or derelict in their decision to commission the relevant expert evidence in the circumstances of the case. On either argument it would be "unjust" for the defendants to have to bear this element of the outlays in this instance.

12. In response on behalf of the plaintiff, Mr Kerr explained the development of the medical evidence, particularly the updated medical review evidence obtained shortly before settlement. This is done by way of countering the defendant's reading

of the medical evidence, and of putting forward an alternative explanation for the decision of the plaintiff to settle for £40,000, at a late stage. It is not accepted that the special damages claim was abandoned on the basis of any recognition or acceptance of dishonesty or gross exaggeration on the part of the plaintiff. I return to this alternative explanation in due course. Mr Kerr points out, I think accurately, that there is no explicit allegation within the medical and other papers (other than the surveillance evidence which I have not seen) of dishonesty or exaggeration by the plaintiff.

13. At paragraph 3.05 of his submission the following principles are conceded by Mr Kerr:

"The plaintiff accepts that it is a correct principle of law that a paying party should not have to bear the costs incurred unreasonably by the receiving party, including the retention of an expert witness, in pursuing a claim for personal injuries which ***she knows or ought to have known have not been suffered****. She also accepts that a Taxing Master may disallow any costs of any expert who has been unreasonably retained. The facts of this case however do not merit the application of this principle to it or the disallowance of the experts fees"* [paragraph 3.05, my emphasis]

14. I set out my conclusions arising from my review of the medical evidence and other relevant file papers below. I will deal first with the concerns of the defendants, expressed in their secondary argument, that the costs of the experts will be allowed as a matter of course merely because their retention was directed by counsel.

15. It is of course correct that there is a line of well-known Northern Ireland and other authorities which emphasise the due weight which should attach to directions given by experienced counsel properly instructed, taken together with warnings as to the need to avoid a judgment as to the reasonableness of that direction only with the benefit of hindsight (see Antoinette Carr v Margaret Poots [1995] NI 428; Francis v Francis and Dickerson [1956] 3 ALL ER 836). It is not in fact contended on behalf of the plaintiff that the directions of counsel trump all other considerations, or that such directions absolve both counsel and the instructing solicitors concerned of responsibility to exercise an appropriate degree of their own professional judgment.

16. The defendants draw attention, rightly, to the extent to which those authorities are to be read and applied in light of more recent analyses and comments on the "wind of change", by reference in particular to the judgment of Gillen J in McLaughlin v Hutchinson and Anor. It is worth setting out the relevant passages as cited by the defendants:

"In modern litigation, with the emphasis on proportionality, a very careful assessment needs to be made by the lawyers in all such cases as to whether or not experts are needed. There will

be an increasing tendency for taxing masters to give anxious scrutiny to the concept of proportionality in the employment of such experts. Senior and junior counsel as well as solicitors need to have this drawn to their attention so as to ensure that the wind of change blowing through Queens Bench actions does not proceed unheeded."

While acknowledging the established principles as to the weight to be attached to counsels directions, Gillen J commented:

"These principles … must however now be read in light of the factors set out in Order 1 R 1A of the Rules. In exercising his wide discretion the Taxing Master shall have regard to the factors set out therein. The overriding objectives in interpreting the rules are now that courts should ensure cases are dealt with expeditiously and fairly, avoiding expense and dealing with cases proportionately bearing in mind the resources available to the court. Accordingly litigants need to be encouraged to be selective as to the points they take and the extent of costs recovered may well be an incentive in that direction. It is the duty of the lawyers involved in the case to further the overriding objective in Order 1, R1A" And further:

"... nonetheless the excessive or inappropriate use of expert evidence is a matter that should be to the fore in current litigation"

together with the judges observation that: *"Experience in the Queen's Bench Division has revealed to me that in some instances there is an unnecessary rush to invoke for example the assistance of forensic accountants . . . and the Taxing Masters will be scrutinising the exercise of such options"*

with the judge concluding: *"In appropriate cases therefore the Taxing Master has a wide discretion to refuse such unnecessary expenditure even in some case where it has been directed by counsel"*

(McLaughlin v Hutchinson and Anor.[2012 NIQB 21])

17. These passages should be read in conjunction with the useful remarks of the same judge in the case of Fennell as referred to by Mr Kerr, as regards the respective responsibilities of counsel and solicitor [Fennell v Leitch and Others [2007] NIQB 72].

18. I am not convinced that it was ever the position that on taxation the mere fact of a direction by counsel would be regarded as sacrosanct or unquestionable. Certainly so far as I am concerned that is not the position. Somewhat ironically the issue dealt with by Gillen J in McLaughlin was an appeal against my decision to disallow an experts [engineers] fee notwithstanding it had been expressly directed by senior counsel, which allowance was reversed by the judge on the facts of that case. As propositions taken together in relation to the allowance or disallowance of experts fees, the observations of Gillen J in McLaughlin and in Fennell do highlight

the onus which lies on solicitor and counsel to give proper consideration to the commissioning of substantial expenditure on retention of experts while having proper and due regard to the entitlement of their client to have their case fully and adequately pleaded and pursued. This might be regarded as already engaged in the process of determining the reasonableness of the outlays incurred, as per the test of reasonableness under Order 62, Rule 12, but in any event is certainly reinforced by the emphasis on proportionality provided by the Overriding Objective in Order 1, R1A.

Overview of the case

19. All of this being noted as regards the applicable principles, and as appears from the series of cases cited by the defendants, each case will depend on its particular circumstances and facts. Applying the relevant principles to the facts of this case, and based on my review of the papers, the position is as follows:

(a) The action was for personal injuries sustained by the plaintiff in a fall at work in July 2002. She sustained a crushed vertebrae in the lower back, was off work for an extended period, then her employment was terminated due to her inability to return to work and give effective service. Her recovery was slow, prolonged and uncertain, and she was left with what was asserted by her to be a significant level of care needs and disability.

(b) There was no dispute on liability or allegation of contributory negligence. It is obvious from the file that liability was admitted prior to the issue of proceedings, and confirmed in due course by way of the formal defence. I have read and considered the course of the medical evidence gathered by the parties, from which emerged a number of complications. There was no doubt that the plaintiff had suffered a serious back injury. However there were also live and reasonably complicated issues to do with whether the plaintiff had a previous back problem, probably associated with a road traffic accident some years earlier, and also to do with the extent to which the ongoing and long term disabilities could be attributable to the index incident [fall] as opposed to having exacerbated or accelerated a pre-existing condition. The position was further complicated by the plaintiff's mental health issues, described by the occupational therapist as the psychological overlay associated with the fall and injury. In this respect also there were issues as to the extent to which these could be attributed to the index incident.

(c) At the time of the Statement of Claim [10th June 2003] the medical particulars of injury were stated on the basis that they would require future amendment given the ongoing nature of the injury and the developing prognosis. There was a claim for

ongoing and continuing loss, but at that stage the plaintiff's employment had not been terminated.

(d) Senior counsel directed proofs generally on 15th January 2004. Inter alia these noted the developing state of the medical evidence, and the need for consideration of future amendment of the Statement of Claim depending on the medical evidence and **perhaps** a report from an occupational therapist and a forensic accountant [my emphasis]. It is clear that the decision as to retention of those experts was deferred because of the developing medical position and the uncertainty in determining the necessary connections between the index incident and the extent of the physical injury.

(e) The medical situation continued to be monitored. The plaintiff's employment ceased on 22nd April 2004. The plaintiff's solicitors referred back to senior counsel on 22nd July 2005 by letter **requesting specific direction as to retention of an occupational therapist and forensic accountant** [again my emphasis]. The relevant updated medical reports were enclosed. It is obvious from Mr Conlon's reply by letter of 9th August 2005 that on the basis of his review of the evidence, including the termination of employment and the complications of the previous medical history and earlier accident, he had concluded that it was appropriate to assert a loss of congenial employment by amendment of the pleadings in due course. The particularisation of that loss would be informed by the forensic accountancy evidence and care needs assessment which he explicitly directed at that time. The direction was given 'on balance' and after what was obviously a careful consideration of the difficulties which might be encountered. Even though it was anticipated that it might not be possible to attribute the need for care solely to the plaintiff's physical state, there is no suggestion that it would not be feasible to establish, should the matter come to trial, a connection between the injury and the subsequent loss of employment and enhanced care needs.

(f) Acting on this direction, the plaintiff's solicitors commissioned the reports from Breda Jamison and from Falconer Stewart. The Report from Breda Jamison was shared with the defendants on 17th January 2006. The accountants report was not completed for a considerable time, due to a difficulty in obtaining necessary information from the defendants as to the plaintiff's earnings and other employment details. It appears from the file that this had to be pursued by the plaintiff's solicitors to the extent of obtaining an interlocutory order for discovery [with costs against the defendant] and thereafter there was a further lengthy period of non-compliance. Once finalised, the accountants report was provided to the defence.

(g) I have been advised by way of Mr Kerr's written submission that at the time of the obtaining of the discovery order on 2nd February 2006 [unopposed by the

defendant] the defendant was in possession of the medical and surveillance evidence now raised on taxation. I think this is correct as regards some but not all of the medical and surveillance evidence now relied on by the defendant.

(h) I can see no suggestion in the papers I have seen that either counsel or solicitor had identified from the medical evidence available at the relevant time a concern that the plaintiff was grossly exaggerating her symptoms. Nor can I find any subsequent papers, specifically correspondence from the defence solicitors, suggesting to that effect, whether on the basis of the ongoing medical evidence in itself, or taken together with the surveillance evidence obtained by the defence.

(i) I am satisfied that it was apparent to both parties for a considerable time prior to settlement that the occupational therapist's report had been prepared and shared, and that a forensic accountants report was in preparation for purposes of an intended substantial future loss claim, and that an amendment to the Statement of Claim was expected [see letter from Johnsons to Wilson Nesbitt of 17th August 2006 and ensuing course of correspondence]. It is also clear that no objection was raised as to the reasonableness or necessity for that claim and evidence at that stage.

(j) The case appears to have proceeded on the basis that both parties had identified the limited extent to which the medical evidence was agreed or contested, so that by the time of the joint meeting to negotiate without prejudice, the plaintiff was at an advanced state of preparation for trial. As regards amendments to the Statement of Claim, these had in fact been prepared by junior counsel although in the event [as I understand it] because of the settlement the amendment may not have been formally made. As noted the delay in completion of the accountants report arose principally because of the time taken by the defendant to produce some discoverable information, and the pleadings could not be amended until that report had been finalised.

(k) I can find no evidence on the file that prior to the commissioning of the reports or thereafter the defence asserted any dishonesty or gross exaggeration on the part of the plaintiff. These appear to have been articulated only on the day [possibly] or after the date of settlement, but was not raised before the court.

20. As regards the application of the relevant principles , I am satisfied that all reasonable care and attention was taken by solicitor and counsel in this case to ensure that there was no automatic, ill-considered or careless decision to incur the additional costs of the retention of the two experts involved. In fact there is clear evidence on file as to the careful and balanced way in which this was approached by the legal representatives for the plaintiff. Given always the qualification that in this type of case much will ultimately be dependent on the credibility of the plaintiff, it

seems to me that a considered and responsible judgment was made to advance the care needs and future loss claims. Within that context I cannot see that the commissioning of the two expert reports in question can be regarded as premature or unreasonable.

21. In absence of the surveillance evidence and a proven evidential finding adverse to the credibility of the plaintiff, the challenge of the defendant in this case insofar as it is directed at the legal representatives is based on the proposition that the legal representatives failed to identify gross exaggeration and dishonesty on the part of their client, in which case presumably it is suggested they should have declined to put forward the case on the basis directed and/or warned the plaintiff of their concerns. That course of action would in any event always have been proper irrespective of the Overriding Objective, but clearly would now be part of the expectation of the court pursuant to Order 1, Rule 1A as articulated by Gillen J in McLaughlin. Based on my review of the matter as set out above, I do not see that there is any basis for that criticism of the legal representatives in respect of their decision to commission these experts at the relevant time in this case

22. The fact that objection is taken by the defendants to both the Breda Jamison Care Assessment and the Accountants Report demonstrates that **in reality this case is about the personal credibility of the plaintiff**. This is described by the defendants as their "principal argument". It has very little if anything to do with proportionality. The fact that the largely general damages settled at £40,000 demonstrate that this was a substantial case. The potential value of the case if successful on the care and future earnings claims as directed by counsel was up to £700,000. The fees involved in retention of the two experts in question, if reasonably retained, could not be said to be disproportionate to the value and complexities of the issues involved.Credibilty/Estoppel

23. By way of their respective written submissions the parties have helpfully identified a number of authorities and counter authorities for various purposes. I have considered these and set out my conclusions below. For the most part they involve circumstances in which it was accepted that the claimant had been dishonest or had exaggerated the claim, or there had been a proper judicial process by which that dishonesty had been established evidentially and an appropriate costs order penalising the claimant was made by the court.

24. At this taxation stage the defendants raise with the court the surveillance evidence [although this has not been seen by me or tendered in evidence] as part of their assertion that the plaintiff should be responsible for part of the costs incurred by her. This is so whether based on a finding of gross exaggeration/dishonesty on her part and/or the asserted failure by the legal advisers, and notwithstanding that

the court has ordered in principle and in fact that her costs are recoverable from the defendant.

25. It is a matter of fact that the case was settled without the allegation of gross exaggeration and dishonesty having been either accepted or established. I have received no direct evidence from any of the solicitors or counsel involved in the settlement, from the plaintiff, from the medical experts, from the care consultant, or the surveillance personnel and it would clearly be disproportionate and invidious to embark on that exercise on taxation, particularly at this interval. This has led Mr Kerr to suggest that the defendant is estopped from raising this on the subsequent taxation. It is certainly the case that, given that the matter was not put formally to the court [or to the plaintiff so far as I can ascertain] given also the delay on the part of either party to submit the issue for taxation, there are obvious difficulties in being satisfied that it would be equitable to expect the plaintiff to have to meet these allegations now at this interval. However I do not consider as a matter of law that the defendant is precluded from raising the issue on taxation. Whether there would be an issue of estoppel which prevented the defendant at this interval from seeking an amendment to the court order for costs is not a matter for me to decide.

26. In fact I have some doubts as to whether, in this jurisdiction, it is within the powers of the Taxing Master (even were this appropriate) to conduct an evidential enquiry with the objective of revising or altering the order already made by the judge.

27. The position in England and Wales is now governed by the Civil Procedure Rules (CPR) 1998, as amended [SI 1998/3132].There is a well-articulated set of principles governing the exercise by the court of its decision **to award costs** which allows account to be taken, inter alia, of exaggeration on the part of the claimant. See Civil Procedure Rule 44, in particular the determination of the conduct of the parties in these terms [Rule 44.3(5)]:

"The conduct of the parties includes

(a) conduct before as well as during the proceedings …

(b) whether it was reasonable for a party to raise pursue or contest a particular allegation or issue

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue

(d) whether a claimant who has succeeded in his claim in whole or in part exaggerated his claim"

Even though these factors have not been given explicit statutory expression in Northern Ireland, they are factors which could and would sensibly be taken into account by the court in exercising its discretion as to the award or disallowance of costs, based as necessary on a proper evidential inquiry into the conduct involved.

28. Prior to the enactment of the CPR the position in that jurisdiction was governed by what was broadly the equivalent of what is still Order 62 in NI. However there was a material difference between the powers exercisable at the post-trial taxation of costs stage. As in NI, Order 62 [England and Wales] provided for liability for costs to be a matter for the court by way of making of an order under Order 62, Rule 3. The courts power to "penalise" was conferred by Rule 10. As regards the re-visiting on taxation of liability for costs, in that jurisdiction Order 62, Rule 28 provided in these terms:

"(1) Where whether or not on a reference by the Court under rule 10(2) it appears to the taxing officer that anything has been done or that any omission has been made unreasonably or improperly by or on behalf of any party in the taxation proceedings ***or in the proceedings which gave rise to the taxation proceedings*** *he may exercise the powers conferred on the court by Rule 10"* [my emphasis].

29. In Northern Ireland the powers exercised by the court in deciding responsibility for costs on the conclusion of the substantive proceedings is a function of section 59 of the Judicature (NI) Act 1978, together with Order 62 , Rule 3 and Rule 10. As regards the powers of the Taxing Master, however, in NI Order 62, Rule 28 is in these terms:

"(1) Where, whether or not on a reference by the court under rule 10(2) it appears to the Taxing Master that anything has been done or that any omission has been made unreasonably or improperly by or on behalf of any party ***in the taxation proceedings*** *he may exercise the powers conferred on the court by Rule 10(1)"* [my emphasis].

Further, [unlike the position in England and Wales] Order 62 Rules 27 and 28 otherwise confer a limited discretion on the Master to award control and penalise in respect of **the costs of taxation.** The general powers to award and penalise are exercisable by the court, and has been exercised by the trial judge in this case, as in Order 62, Rule 3 without invoking Rule 10. It seems to me that rather than inviting me to try the credibility of the plaintiff on taxation it is certainly preferable, and almost certainly required to found jurisdiction in this jurisdiction in the Master, that this should be dealt with as part of determination of costs liability before settlement , or possibly by raising this with the trial judge to allow any express direction as to taxation to be included in the order for taxation. It might also be thought to arise as a matter of fairness to the claimant agreeing the settlement, against whom the allegation is to be raised.

30. These jurisdictional and procedural points are neatly illustrated by the judgments in the case of Michelle Feeney v Tyco Healthcare (UK) Manufacturing Limited [2008] NIQB 161 to which I have been referred by the defendants. In terms of its facts that case was remarkably similar to this. Two judgments were delivered by Girvan LJ. Liability for a significant personal injury was admitted at an early stage and the case went to trial on quantum. There were medical complications requiring a range of consultants and a nursing care report [from the same expert as in this case, as it happens]. There was a claim for ongoing care costs and loss of future earnings. It was contested on the plaintiff's credibility with allegations of exaggeration of symptoms, based on variations and inconsistencies in accounts given by the claimant to the medical experts. No mention of surveillance evidence appears from the judgment, although at trial evidence was given on behalf of her employer to contradict her account of how the injury affected her ability to work.

31. In deciding the case the Judge conducted not only a careful analysis of the extensive medical evidence but highlighted the importance which attached to the credibility of the plaintiff in those circumstances. He also had the opportunity to observe the plaintiff, who also it might be assumed had the allegation of exaggeration put to her [see paragraph 13 of the judgment]. On finding against her on credibility, the judge awarded £30,000: see in particular paragraph 16 of the judgment as regards the assessment of future care and loss of earnings claims).

32. The judge also reserved on costs ([2008] NIQB 133) and following argument made a separate order on costs, being an order for costs in favour of the plaintiff but specifically: disallowing the fees charged by the relevant care consultants and forensic accountants; abating the plaintiff's legal costs to reflect the element of the work wasted in pursuit of the exaggerated claims; setting off the additional expenses of the defendant incurred in the 'bogus' element of the claim. This order clearly reflected the Judges' assessment of the credibility of the plaintiff personally, and was punitive as regards the plaintiff personally only after she had had an opportunity to meet the allegations. So far as can be ascertained there was no criticism of the plaintiff's legal representatives, and no order making them responsible for the "wasted" costs. (This decision was followed by Treacy J. in the case of Roberta Ann Young v Andrew Sidney Hamilton and others [2012] NICH 4), again notably only on the basis of a full evidential hearing and trial of the issues as to the conduct of the plaintiff and advisers.

33. By and large the other authorities identified by the defendants relate to circumstances in which there was either a positive finding against the claimant on grounds of exaggeration following trial of that issue, or the allegation was not contested. Of particular interest is the case of Booth v Britannia Hotels Limited [2002 EWCA 579] in which the court was prepared to infer from the "abandonment" of a

substantial special damages claim that the related expense had been unreasonable and susceptible to disallowance as such on a taxation on the standard basis under what was then Order 62 Rule 12. In that case, not only had the allegedly incriminating evidence been disclosed to the plaintiff and had resulted in an abandonment of a very significant part of the claim on counsels advice, but it appears that the taxation proceeded on the basis that the reason for the abandonment was conceded or at least not contested by the plaintiff. It was a case in which the financial facts were considered to speak for themselves, **in the absence of an explanation from the claimant**. The scale of the settlement at a fraction of the amount pursued is a matter which in the submission of the defendant should be regarded as "speaking for itself".

34. In this case the plaintiff, through her solicitors and Mr Kerr, does not accept that the settlement at £40,000 constitutes evidence of acceptance that her claim was unfounded and based upon lies and gross exaggeration. There are of course various reasons why a plaintiff might compromise a claim rather than face the prospect of a trial. In this case the plaintiff's representatives assert an alternative explanation. At paragraph 4.09 of his submission Mr Kerr sets this out in these terms:

"The plaintiff acknowledges that there was some ambiguity not in the fact that the plaintiff suffered from ongoing disability but whether that disability was attributable to the accident which was the subject matter of the action or to some other cause. That ambiguity was not resolved until 4th December 2007 when in a letter of that date Mr Adair categorically stated that he could not support the case that the ongoing degenerative change and disability suffered by the plaintiff was caused by the accident. It is important to note however that further medical investigations carried out in 2007 did establish that the plaintiff suffered from degenerative change to her back and on-going pain and disability. ***Abandoning a claim because one is unable to link the ongoing problems with a given accident is entirely different from abandoning it because it was grossly inflated****"* [my emphasis].

35. In this case because, and only because, the defendant has suggested that I should infer gross exaggeration/dishonesty from the fact and amount of the settlement ["it speaks for itself"] I have taken some pains to examine the course of dealings prior to settlement as evidenced on the plaintiff's solicitors file in order to test the alternative explanation put forward by way of Mr Kerr's submission. The sequencing from the receipt of Mr Adair's updating report on 4th December and the settlement arrived at some seven days later has been reviewed in particular. I have seen nothing in the papers which record that the basis of senior counsels advice to the plaintiff, or her consideration of the advice and decision [apparently with considerable reluctance] to accept £40000, was based on any acknowledgment of any anticipated weakness in her claim attributable to her deliberate and dishonest "gross

exaggeration" of her symptoms. The papers are consistent with the explanation given by Mr Kerr, indicating that counsels' advice was that the extensive future loss claim could not be sustained as attributable to the index incident. In these circumstances I do not accept that any inference should be drawn as urged upon me by the defendant.

36. In this case there has been no opportunity before or after settlement to test the plaintiff's credibility or for her to meet the observations and allegations arising from the surveillance evidence. In addition I am informed that the relevant professional costs [solicitors costs and counsels fees] have been agreed without deduction, albeit it may be that counsels fees reflect the lower value of the settlement figure. I can see no indication within the file that any challenge to these particular expert fees was raised before the court at the time of settlement. It appears that the difficulty over these outlays was raised in post settlement correspondence between the solicitors, and only after the damages had been paid over.

37. All of this confirms my view that this taxation presents in part as a critique of the reasonableness of the actions taken by counsel and solicitor grounded, as per Gillen J in McLaughlin, on their responsibilities to contribute to the aims and objectives as set out in Order 1, Rule 1A. However in fact it is an invitation post-settlement to try the issue of the plaintiff's credibility on the basis of an inferred explanation for the settlement of the action at a significantly reduced figure, on the basis that it "speaks for itself" and in face of the alternative account put forward by the plaintiff as supported by the records I have reviewed. On the evidence presented to date I do not consider that the matter speaks for itself, or that I would be justified in finding that the plaintiff knew or ought to have known that she was engaged in the gross exaggeration of her injuries and the extent of their impact on her. For the reasons I have given I consider that the trial of that issue should, and in Northern Ireland, perhaps must be for the Judge disposing of the case, and not an ex post facto re-visiting of liability and incidence of costs. But in any event, by reference to the principles of allowance and disallowance on a taxation on the standard basis pursuant to Order 62, Rule 12 on the evidence as presented I do not consider there is a sufficient basis on which to regard the expert fees as incurred unreasonably.

38. I do not intend to be prescriptive about the future implications of this approach. It may be that the judge in disposing of the case would be content to direct an enquiry or adjudication by the Master before finalising liability for costs. However at a minimum I would have thought that the defendant could normally be expected to have identified to the other party the anticipated costs challenge in advance of the matter coming before the Court; if for some good tactical or other

reason this is not possible then any unresolved and anticipated dispute should be identified to the judge at the time of settlement.

Quantum of Expert Fees

39. It follows from all of this that on the facts of this case and the evidence tendered to me I am allowing the disputed experts fees against the defendant. In respect of Breda Jamison the amount of these is not in dispute, so these are allowed as claimed.

40. As regards the forensic accountants fees the position is somewhat more complicated. The defendant submits that the amount of hours expended [but not the rates charged] are excessive and unreasonable, quite apart from the argument that the work in relation to an allegedly specious claim for future loss and care costs should not be allowed.

41. The difficulty for the defendant is that once it is accepted that the rates charged are not unreasonable [i.e. out of line with the commonly accepted range of market rates for work of this nature] it is for the defendant to offer expert evidence [for example, by the forensic accountants engaged by the defence or other third party experts] on the question , for instance, of the reasonableness or otherwise of the time taken or the over-elaborate nature of the work done. No such evidence has been tendered.

42. In these circumstances the authorities suggest I should be slow to interpose my own judgment without good reason. However there are circumstances in which by reference to a query as to reasonableness raised by the paying party it would be appropriate to do so, such as where it appears to me that the difference between the amount and nature of the work undertaken and the time claimed is so unusual or outside the parameters of what is normally seen as to suggest unreasonableness.

43. In this case the points made by the defendant had some initial resonance. At first blush it did seem to me that the hours as accounted for seemed higher than normal and possibly beyond the parameters of reasonableness. In summary the time claimed was:

A. Partners time at just under 17 hours @£140

B. Qualified Associate time at 25.32 hours @ £110

The defendant expressed particular concern at the extent of the Associate time.

44. I was satisfied that there is sufficient substance to these concerns to merit my evaluation, and to that end I have reviewed the contents of the Report, together with

the supplied time-sheets and notes. I have noted the extent to which, thorough and lengthy though it is, covers first a standard form and well-established basis for calculation of past and future loss. I note secondly the extent to which the Report, as regards future care needs, derives heavily from the costings already prepared by the Occupational Therapist, albeit those figures required updating periodically by the accountants in the course of the litigation.

45. As against those considerations my initial concerns about unnecessary duplication of work, particularly arising from the transfer of supervisory responsibility from one partner to another [the initial partner died prior to the completion of the litigation], was allayed by my review of the papers and correspondence on the file. This review also served to identify the extent to which it was necessary for the accountants' personnel, including the Associate, to return and re-visit and update the material which eventually was presented in the Report while awaiting the supply of missing information. As noted above access to the relevant information was subject to significant delay on the part of the defendant and I am satisfied that to some extent this necessitated a "start and stop" approach by the accountants which inevitably involved an element of refreshing familiarity with the file and issues which justify a longer than normal time commitment.

46. My provisional inclination had been to reduce the bill by an amount to take account in particular of an unreasonable amount of time expended by the Associate in completing the "groundwork " calculation in a relatively straightforward and standard format , bearing in mind the extent of the additional supervisory input and approval apparently required. Informed by my file review and consideration of the course of dealings between the parties, in particular as regards access to relevant and discoverable documentation, I have moderated that initial view. I disallow 5 hours only of the Associate time @ £110 plus VAT. Otherwise the fees are allowed as claimed.

Costs of Taxation

47. Given the course, nature and outcome of the taxation I have allowed the costs of taxation against the defendant, but limited to the sum claimed by the plaintiff's solicitor of the bill as lodged for taxation [£436.50 plus VAT].

Delay and Interest

48. A further concern articulated by the defendant is that the defendant should not be liable for interest on the sums under taxation, pointing out in my view entirely fairly, that the initial delay in submitting the matter for taxation, and indeed thereafter, are not attributable to the defendant or its representative.

49. In response Mr Kerr correctly pointed out that the award or otherwise of interest on a court award, including costs, is not a matter directly within the jurisdiction or competence of the Master on taxation. This is rather a function of the making of an unqualified court order by the court, with interest thereafter attaching at the statutory rate as a function of Article 127 of the Judgments Enforcement (NI) Order 1981, taken together with Order 42, Rule 9 of the rules of the Court of Judicature (NI) 1980.

50. It is also well-settled that the entitlement to interest on costs runs from the date of judgment [unless otherwise provided for by the court order] rather than the date of completion of the taxation. This will in practice prejudice the paying party where, as happens in the case presently, the statutory rate of interest almost certainly exceeds the value of the funds in the hands of the paying party. However the well established but perhaps little understood practice of the Taxing Master [which applies in this case] is to recognise the extent to which an inequity may be created by delay in the submission of the bill for taxation.

51. In order to have the application for taxation accepted out of time [outside the statutory six month time limit in Order 62 Rule 29] it is necessary for a plaintiff/receiving party to be granted an extension of time. Although in absence of objection from the other party the granting of such authority is routine, it is always done on terms the extension is granted subject to the condition that he accepts that his entitlement to interest is excluded by the period of delay prior to submission for taxation. By this means the unfairness arising from delay on part of the plaintiff is at least mitigated. There may of course be particular circumstances which justify the making of some special order at the time granting the extension on argument raised by either party, but otherwise the default order applies [see Drayne v Chiko Food Limited, decision of Master Napier, 31st January 1991]

52. Accordingly in this case, the plaintiffs entitlement to interest on the amount as yet unpaid and now determined on taxation will exclude the period from the date six months after the court order [ie 11th June 2008] up to lodgement of the bill with the Taxing Office on 5th July 2010. This is the extent of what can be achieved by me in relation to interest. As regards the course of taxation proceedings I have reflected responsibility appropriately for this, as between the parties in my allowance of costs as set out at paragraph 47 above.

53. In conclusion it will I hope be clear that the claim by the plaintiff in respect of these expert fees has been subjected to a sufficient degree of anxious scrutiny on my part in order to arrive at conclusions on these interesting points. Given that I am delivering this decision to the parties in writing, I also extend the time for bringing in a review under Order 62, Rule 33 until 15th October 2013.

29th August 2013

JW Bailie

Master