Neutral Citation No. [2013] NIQB 134

Ref: **GIL9085**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **18/12/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JOHN SELFRIDGE

Plaintiff;

-and-

THE NORTHERN HEALTH AND SOCIAL SERVICES TRUST

Defendant.

GILLEN J

Introduction

[1] This matter arises out of a hearing on 21 October 2013 when I awarded the plaintiff damages of £14,507.61 on foot of a claim by him for clinical negligence against the defendant.

[2] It had been common case during the course of the trial that the defendant had failed to provide therapeutic intervention to repair a bile leak for the plaintiff in timely fashion in September 2006. Due to the delay in treatment he had suffered pain, suffering and loss of wages and he subsequently underwent invasive operative treatment by way of a laparotomy.

[3] The only issue before me, apart from valuing the quantum in the case, was one of causation. I had to determine what should have occurred in the event that he had been offered treatment at the appropriate stage namely whether the treatment should have been by way of laparoscopy or by way of laparotomy.

[4] On behalf of the plaintiff Mr McCloy FRCS, a distinguished consultant surgeon and endoscopist from England, attended and gave evidence. In essence his

evidence amounted to an assertion that laparoscopy, a much less invasive treatment than laparotomy, ought to have been the treatment of choice in 2006 when the plaintiff should have been first treated. Had that been done he would have been spared a delayed recovery, prolonged pain and suffering and scarring due to the subsequent laparotomy.

[5] On behalf of the defendant Mr Mackle FRCS, also a distinguished consultant in this field, asserted that in 2006 the practice of surgeons in Northern Ireland would have been to carry out the open surgery procedure even had he been treated at the appropriate time.

[6] I determined that I should accept the evidence of Mr Mackle that the laparoscopic approach was not likely to have been invoked at all in 2006 for this plaintiff albeit developments had occurred in the ensuing years which made it currently the treatment of choice.

The issue before me

[7] In this matter I gave an ex tempore judgment on the day of hearing and I indicated that I would set out in rather fuller detail my reasoning in a written judgment. This I now do.

[8] At the conclusion of the case Mr Park, who appeared on behalf of the defendant, drew to my attention a letter sent to the plaintiff's solicitors dated 24 September 2012 (hereinafter referred to as "the Calderbank letter ") offering £20,000 plus reasonable costs if accepted within 21 days. Mr Park asserted that the purpose of the letter had been to try to avoid the costs that would be incurred by two surgeons having to attend court to give evidence. The defendant was particularly mindful that Mr McCloy would have to travel from England with associated expense. The letter concluded:

> "In the event that it proves necessary to have a hearing with both experts being present and the judge determining the award, use of this letter will be made when the judge comes to the exercise of his discretion in respect of the costs incurred by that hearing."

[8] The plaintiff has made an application for the costs in the action and the defendant has resisted that application to the extent that Mr Park asserts that the defendant should not be responsible for the costs of bringing the medical experts to court. He relies upon the Calderbank letter hereinbefore set out.

The Rules of the Court of Judicature (Northern Ireland) 1980 relevant to this matter

[9] Order 62 rule 3(3) of the Rules makes provision that if a court exercises its discretion to make an order as to the costs of the 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."

[10] Order 62 rule 9 sets out two specific matters to be taken into account when exercising discretion namely:

> "(a) An offer of contribution brought to the court's attention in accordance with Order 16 rule 10;
>
> (b) Any payment into court, and the amount of such payment."

[11] In the course of the hearing it also became relevant to consider the rules touching upon payment into court. Order 22 where relevant provides as follows:

> "1.-(1) In any action for debt or damages any defendant may without leave at any time after he has entered an appearance in the action-
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> (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, Rules of the Court of Judicature (Northern Ireland) 60
>
> 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 …"

[12] Order 22 was of course drafted before the advent of the new Order 25 which inter alia makes particular provision for clinical negligence cases. There is no longer an Order 25 rule 3(a) or rule 4(a). Provision in Order 25 rules 12-14 is made for disclosure of medical evidence on the issue of liability 20 weeks from close of pleadings or 21 days after receipt of same and for disclosure of medical evidence by the plaintiff on the issue of damages 10 weeks from close of pleadings etc. and in the case of the defendant not later than 20 weeks from close of pleadings etc.

The defendant's case

[12] In the course of a well-structured skeleton argument augmented by brief oral submissions, Mr Park made the following points:

- The "event" in this judgment was the matter of whether or not the plaintiff should be compensated for a laparotomy as against a laparoscopy. Hence that is the event that the costs should follow.
- The Calderbank order letter was a reasonable course to follow and should be reflected in the exercise of the court's discretion in relation to witness costs.
- The new Order 25 dealing with clinical negligence does not rest easily with Order 22 since the time limits in Order 22 do not cross-refer to the time limits in the new Order 25. Under the latter provisions the sharing of medical evidence is not envisaged before the close of pleadings and accordingly there is no specified time for making a lodgement save for making it before the close of pleadings. At that point there are no disclosed reports upon which the defendant's advisors might make a useful appraisal of its opponent's case.

The plaintiff's case

[13] Mr McCollum QC on behalf of the plaintiff , in the course of an equally well-structured skeleton argument, made the following points:

- The event in this case was the plaintiff's success in the overall action. Costs should follow that success.
- It is not unusual for plaintiffs to fail to win every point in a case but that should not deflect a court from awarding costs in the overall situation.
- The defendant had failed to avail of the opportunity to make a payment into court. Order 62 rule 9 makes express reference to taking into account payments in court but not Calderbank letters.
- The defence case at trial that laparoscopy was a developing technique and was not standard practice in Northern Ireland to repair bile leaks in 2006 had not fully crystallised in the defence, the agreed minute of the experts or even in the Calderbank letter.
- Mr McCloy would have had to attend in any event to deal with issues relevant to quantum. The case was of short duration and excessive court time was not devoted to this point.
- It would create a chill factor for plaintiffs if they were to be deterred from testing points such as occurred in this case if they were to be penalised in costs if unsuccessful.

Conclusion

[14] Generally a successful party should recover its costs. However the court can depart from that rule. When deciding what order to make, the court has to have regard to all the circumstances. The fact that a party succeeded overall is not necessarily sufficient to entitle it to recover all its costs and a court is entitled to take an issue based approach in appropriate instances. (See Cheltenham Borough Council v Laird (2010) All ER (D) 50 (Feb). Thus for example under Order 62 rule 10A where a witness is called to give oral evidence and that evidence could have been put before the court in some other manner or his giving of oral evidence was not reasonably necessary, the costs shall fall on the party calling that unnecessary witness.

[15] A Calderbank letter (Calderbank v Calderbank (1975) 3 All ER 333) leaves costs in the discretion of the court, subject to principles which have developed in relation to the instrument. They developed in claims which did not involve debt or damages and to which Order 22 did not apply but have now been extended to other proceedings that did include debt or damages (see O'Neill v J.Donal Murphy [2004]NI 1 at [9]).

[16] Calderbanks must operate against the background of the court's discretion with regard to the award of costs which is to be exercised, presumptively, in favour of an order that "costs follow the event". Where a party has unreasonably failed to accept such an offer, the letter may be tendered in support of an application for a special order for costs. The decision is in exercise of the court's general discretion as to costs. A Calderbank letter will be taken into account by the court in deciding costs but the court can decide what weight to give to it.

[17] There is no doubt that the emphasis in England and Wales on this issue of costs is somewhat different to that in Northern Ireland. There the law has codified the impact that the rejection of a formal offer to settle can have on costs if the result after trial is similar to the offer in order to encourage settlement of litigation. The provisions of CPRA 44.3(2)(a) have preserved the longstanding presumption that a successful party would get his costs, but the whole tenor of CPRA 44.3 is that this is only the starting point in any decision about costs and that success alone would rarely be the sole determining factor of liability unless there were no countervailing circumstances of the kind specified in CPRA 44.3(4). The appropriate exercise of the discretion under CPRA 44.3(2) requires the court to identify what the real issue between parties has been and reflect that in the costs order which it would make (see Hulloch v East Riding of Yorkshire County Council (2009) EWCA Civ. 1039). Use of Calderbank letters has reduced dramatically in England and Wales since the advent of Part 36 offers. Northern Ireland has not introduced the CPRA Rules and accordingly that is not the approach that has to be adopted in this jurisdiction.

[18] I adopt the observation of Oliver LJ in Cutts v Head (1984) Ch.290 at 312 that whilst a Calderbank letter can be taken into account on the question of costs, it is not a substitute for lodgement

> "I would add only one word of caution. The qualification imposed on the without prejudice nature of the Calderbank letter is, as I have held, sufficient to enable it to be taken into account on the question of costs; but it should not be thought that this involves the consequence that such a letter can now be used as a substitute for a payment into court, where a payment into court is appropriate. In the case of the simple money claim, a defendant who wishes to avail himself of the protection afforded by an offer must, in the ordinary way, back his offer with cash by making a payment in and, speaking for myself, I should not, as at present advised be disposed in such a case to treat a Calderbank offer as carrying the same consequences as payment in."

[19] At p. 371, Fox LJ added at the end of his judgment:

> "I should add that I agree with the concluding observations in (Oliver LJ's) judgment as to attempts to use the Calderbank form as a substitute for payment into court in the case of a simple money claim."

[20] The law requires reassuring clarity. Courts in this jurisdiction should incline to caution before adopting a course which could serve to undermine the Regulatory commitment to the lodgement concept. . The law cannot tolerate pallid substitutions if clarity suffers. It would be wrong to achieve an element of escape velocity for any perceived gap in the rules by permitting Calderbank letters to substitute for lodgements. That is not to dismiss the relevance of Calderbank letters in exercising discretion. However there is neither an algorithmic formula for distilling when they will be appropriate nor is there any easy to apply rule for recognising the need for their use. As in all matters in the law, legal judgment is a matter of argument and discernment.

[21] It may well be that the advent of the new Order 25 does require that further consideration be given to the concept of lodgement in clinical negligence cases. But if the rules do not provide for it, it is not for this court to usurp the function of the Rules Committee by doing without debate and consultation what the Rules of the Court of Judicature have not in fact sought to do. In any event it is likely that any such revision would be consonant with the principles that presently obtain in other personal injury actions. It is unlikely in my view that the current deficit, if such

exists, would be repaired by creating circumstances in which lodgements were to be made in the wake of expert meetings. That is what has happened in this instance. It was the meeting of the experts that triggered the decision to send a Calderbank letter. This was substantially after pleadings had closed and indeed considerably after medical reports had been exchanged. The courts are anxious to encourage the meetings of experts and would be conscious of the chill factor that might be introduced if Calderbank letters, or for that matter applications to extend time for lodgements, were to become peer normalised in the wake of such meetings. In the absence of a change to the Rules I therefore incline to caution in creating a precedent in cases such as the present.

[22] The fact of the matter is that it was open to the defendant to make a late application for a lodgement under the existing rules. That is the orthodox situation in such cases as the present and in my view would have been the appropriate avenue along which to travel.

[23] I consider there was also some strength in Mr McCollum's argument that it may not have been crystal clear to the plaintiff until a late stage that the precise nature of the defence was that the practice in Northern Ireland would have been to invoke laparotomy as a treatment of choice for repair of a bile leak. There may have been a measure of ambiguity in the expert's note and indeed in the Calderbank letter as to the precise defence that was being raised in this case. That ambiguity in itself would constitute a factor pointing towards the plaintiff receiving full costs as a result of the full hearing of the matter. This was a relatively closely contested matter. I do not believe it was unreasonable for the plaintiff to have raised the issue in question since the question as to whether or not a practice which obviously obtained in England and Wales did at the same time apply in Northern Ireland deserved close scrutiny.

[24] A further factor which I have taken into account in the exercise of my discretion to award costs to the plaintiff is that it may well be that in any event Mr McCloy would have been a necessary witness on the other issues of quantum including the pain and suffering which the plaintiff was likely to have endured. The hearing was concluded in the course of a day and so no great time was lost by virtue of his presence at the hearing.

[25] I have therefore concluded that the general rule that costs follow the event should operate in this case and I consider that it would be unjust to deny the plaintiff the witness costs in this case. The plaintiff will therefore be entitled to his full costs to be taxed in default of agreement.