Neutral Citation No: [2014] NIQB 89 | *Ref:* **GIL9333**

Judgment: approved by the Court for handing down | *Delivered:* **27/06/14**

*(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:

KEVIN TEER

Plaintiff;

-and-

J KENNEDY AND COMPANY (CONTRACTORS) LIMITED IN ADMINISTRATION

Defendant.

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GILLEN J

Summary

[1] Having heard the evidence in this case where the plaintiff had sustained personal injuries whilst at work, I determined that the plaintiff should be awarded the sum of £7,500 together with £360 special damage and interest thereon in November 2013. On the request of the parties, I left the issue of costs to be determined by agreement between them. Agreement has proved impossible and that is now the issue now before me.

[2] Mr Ringland QC appeared on behalf of the defendant with Mr McCrea. Mr Fee QC appeared on behalf of the plaintiff with Mr Dornan and they supplied helpful skeleton arguments on this issue. It was the contention of the defendant that the appropriate order in relation to costs should be that the plaintiff should discharge the defendant's legal costs due to his dishonesty and the manner in which he had caused the case to be conducted or, alternatively, that the costs awarded to the plaintiff should be on the County Court scale.

[3] It is the contention of the plaintiff that costs should simply follow the event in this case.

Background

[4] On 5 November 2008 this 23 year old plaintiff, whilst working as a labourer on a building site, sustained a head injury when a cable fell on to his head. Liability was not in issue save for a late amendment of contributory negligence based on the plaintiff's failure to seek timely medical advice.

[5] The physical injuries as dealt with in reports from Mr Nolan FRCS, Dr Morrow FRCP and Dr Craig –two consultant neurologists- and Dr Hanley, consultant psychologist were not really in issue in the case as far as the physical injuries were concerned. It was generally agreed that the plaintiff had suffered a head injury, abrasions, injury to the left cheekbone, dizziness and headaches from which he gradually recovered over a period of weeks.

[6] The real issue in the case was whether a depressive condition from which the plaintiff suffered was a sequela of the injury or a freestanding condition.

[7] Dr Mangan, consultant psychiatrist on behalf of the plaintiff, concluded that his post-concussional syndrome had been complicated by the development of a major depressive episode characterised by a depressed mood with no significant improvement thereafter. He had told Dr Mangan that he had not worked since the accident and had been leading a restricted lifestyle.

[8] In evidence before me Dr Mangan indicated that his post-concussional syndrome had been triggered by the accident and would last up to two years but that thereafter other stressors including personality problems unconnected with the accident would be to blame.

[9] On behalf of the defendant Dr Fleming opined that whilst it was reasonable to conclude that he had developed significant mood disturbance in recent years, there was very little evidence in the clinical records to connect his mood disturbance with the incident in November 2008. He drew attention to a suggestion of underlying emotional instability predating the accident.

[10] I preferred the evidence of Dr Fleming and I concluded that there was little or no connection between his disturbed mood/depression and the incident in November 2008. My award of £7,500 reflected this conclusion and the special damage I awarded reflected the fact that a very short period off work was determined by me to be connected with the incident.

[11] The defendant had served an amended defence alleging contributory negligence on the part of the plaintiff (application to amend the defence being made on the morning of trial) in that he did not engage with the Mental Health Services for the purposes of receiving treatment despite having been advised to do so. This was not a proposition that I accepted at the trial largely on the basis that I accepted Dr

Mangan's assertion that it is not at all uncommon for young males to fail to fully engage with medical staff.

Costs and the principles to be applied

[12] In Hazlett v Robinson and Another [2014] NIQB 17, this court dealt with these principles in some detail outlining the relevant authorities. Reference to that authority permits me to revisit the guiding principles in short form:

- Order 62 Rule 3(3) of the Rules of the Court of Judicature (Northern Ireland) 1980 provides that the court should 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.

- It is not unusual for plaintiffs to fail to win every point in a case and that should not deflect a court from awarding costs in the overall situation. If it was not unreasonable for the plaintiff to put forward the unsuccessful ground or the plaintiff has not pursued the point unselectively or his unsuccessful ground is closely related to other successful grounds on which he succeeded, he should be entitled to his full costs (R (On the Application of Cherkley Campaign Limited v Mole Valley District Council (2013) EWHC 3558 (Admin)).

- Equally the fact that a party succeeds overall is not necessarily sufficient to entitle it to recover all its costs and the courts has to have regard to all the circumstances.

- When a judge has concluded that a plaintiff has been demonstrated e.g. by video evidence, to be a malingerer dishonestly exaggerating symptoms the defendant should not bear any of the costs which the plaintiff has expended in that unreasonable pursuit (Booth v Britannia Hotels Limited (2002) EWCA Civ. 579) at [28]).

- A plaintiff who pursues a grossly exaggerated and inflated claim for damages must expect to bear the consequences when his costs come to assessed (Booth's case at [33]).

- The courts should enquire into the causative effect of the plaintiff's lies and gross exaggeration and ascertain if it caused costs to be incurred and wasted. Fairclough Homes v Summers (2012) UKSC 26.

[13] Courts in Northern Ireland however should be wary of laying undue emphasis on cases decided in England and Wales governed by the provisions of CPR. Thus for example CPR 44.3(2)(a) makes clear that the longstanding presumption that a successful party should get his costs is only the starting point in any decision about costs and that success alone would rarely be the sole determining

factor of liability. The appropriate exercise of the discretion CPR 44.3(2) requires the court to identify what the real issue between the parties has been and reflect that in the costs order which it would make. Part 36 orders are an important aspect of this process. This degree of specificity does not exist under our Orders and Rules and hence the need for caution on the part of Courts in this jurisdiction in invoking English authorities in this area.

Pre-action discovery

[14] Prior to trial a number of applications for specific discovery were brought by the defendant against the plaintiff in respect of medical notes and records. On 11 March 2013, under Section 32(1) of the Administration of Justice Act 1970, the Master had ordered that the plaintiff's general practitioner and the Belfast Health and Social Care Trust should provide various medical notes and records relating to the plaintiff's employability whether pre-dating or post-dating the accident and concerning his mental health.

[15] It was not until 12 days before the hearing of the action, namely on 24 October 2013, that the defendant's solicitor received the plaintiff's clinical notes and records from the Mater Hospital which included entries relating to the plaintiff's attendance on 11 and 12 October 2009. These records had not been provided by the plaintiff's solicitors and had not been initially provided by the Trust.

[16] The entries in the Mater Hospital records and notes were important because they indicated that the plaintiff was working at that time, which was inconsistent with the case he was making.

[17] The explanation provided by the plaintiff's solicitor for non-production of these notes and records from the Mater Hospital dated 2009 was "a mistake" on his part. The relevant entries had been contained within handwritten references to a wholly separate medical condition. The plaintiff's solicitor did have the entirety of the records, made an assessment himself and had simply overlooked the relevant entry about employment. It is not without significance that the Trust made exactly the same mistake because they did not initially provide such records on foot of the order of the Master on 11 March 2013.

[18] At the trial, having seen the location of the handwritten entry almost buried in the midst of a discussion of a separate condition , I accepted that this had been a genuine, albeit avoidable, mistake on the part of the plaintiff's solicitor and that it was no indication of deliberate prevarication or misconduct by him.

[19] In the event the relevant notes and records were provided by the plaintiff's solicitors on the morning of the hearing and were provided by the Mater Hospital Trust 12 days before the hearing on 24 October 2013.

[20] Mr Ringland contended that these records were crucial in disclosing the dishonesty of the plaintiff about his inability to work. Their earlier disclosure would have influenced the course of the unsuccessful negotiations long before the trial, would have facilitated an application for a lodgement/remittal and saved substantial expense.

The defendant's case

[21] Mr Ringland on behalf of the defendant contended:

- The plaintiff should pay the entire costs of the action because essentially the defendant had been successful in determining the real issue of the case which was the extent of the plaintiff's injuries.

- The plaintiff had dishonestly exaggerated the nature and extent of his injuries misleading his lawyers and his doctors.

- The plaintiff's behaviour had rendered meaningful negotiations impossible and had frustrated a lodgement or remittal application.

- Under Order 62 Rule 11(1) where costs have been incurred unreasonably or wasted by failure to conduct proceeding with reasonable competence and expedition the court may order the solicitor to whom it considers to be responsible to pay to his client the costs which the client has been ordered to pay or order that the solicitor personally indemnify other parties against costs payable by them. In this instance the failure of the plaintiff's solicitor to act competently and to have properly read or obtained legible copies of the notes had resulted in an unnecessary trial.

- Alternatively costs should be on the County Court scale.

The plaintiff's case

[22] Mr Fee contended on behalf of the plaintiff:

- Whilst the court has a wide discretion on costs, the conventional rule is that the successful party is awarded an order for costs.

- Even though these notes were late in arrival, an application could have been made to make a late lodgement or send a Calderbank letter.

- The mistake on the part of the plaintiff's solicitor had not prevented the defendant's advisors reaching their decision that this claim was of very modest value. The note simply provided further ammunition for that point of view. It did not fundamentally change the case being made by the defendant. The wage details were only one element in this whole matter.

- This mistake by the plaintiff's solicitor was understandable in that the relevant entries were contained amongst references to a wholly separate medical condition and, as the trial judge found, were placed in a position of small format with handwritten notes difficult to discern.

Conclusion

[23] I have come to the conclusion that the plaintiff should obtain his costs in this case but that they should be confined to the County Court scale. I have formed this view for the following reasons.

[24] First, the award of damages is clearly within the jurisdiction of the County Court. This was a straightforward uncomplicated personal injuries case which could have been dealt easily by such a jurisdiction .There is no reason to award High Court costs.

[25] As I have earlier indicated, courts in Northern Ireland need to be cautious about deploying the approach adopted in England on CPR which has not yet been implemented in Northern Ireland. That the time may have arrived when this should happen is an entirely separate argument and one that is not for this court to enter into.

[26] I do not consider that this is an appropriate case to invoke Order 62 Rule 11(1). As I indicated at trial, this was not a particularly egregious breach of professional duty by the plaintiff's solicitor. The Trust made exactly the same oversight as he did and the format/location of the notes opened the door for a mistake of the type that was made in this instance. Whilst it should not have occurred, I do not believe that it constitutes the type of unreasonable or improper conduct envisaged by Order 62 Rule 11(1).

[27] In any event, I believe there is merit in Mr Fee's argument that far from being a game changer, the advent of this new information simply added more ammunition to the defendant's case. It had not prevented Dr Fleming forming the view that there was no connection between the plaintiff's depressive condition and the accident. Indeed in the event, Dr Mangan continued to assert that at least for two years there was a connection between the accident and the plaintiff's condition. That I rejected this evidence and preferred the evidence of Dr Fleming must not shield the fact that Dr Mangan continued to assert the connection suggested by the plaintiff.

[28] This was not a case where the plaintiff was manufacturing his depressive condition. It was common case that he suffered from such a state. The issue was whether it was connected to his accident. That in itself dilutes any argument that it was unreasonable to pursue this matter in court and puts this case into a different genre from the typical fabricated case where a plaintiff has no injury at all and is unmasked for example by a private investigator watching his movements. I believe

this case falls into the category of a claim where aspects were exaggerated rather than a wholly concocted one and in measuring how reprehensible the conduct is I must bear in mind the connection made between his condition and the accident by Dr Mangan. All courts must be wary of visiting draconian consequences on a plaintiff who misleads in only a part of his otherwise arguable case.

[29] The defendant had always intended to contest this part of the case and the misleading information about wage loss was but more ammunition. It did have the opportunity upon discovery of this information to have applied to the court to make a late lodgement but chose not to do this. Indeed it is right to say that the defendant had chosen belatedly to introduce an element of contributory negligence which I found to be unsubstantiated on the basis of the medical evidence.

[30] In all the circumstances I consider that the award of County Court costs is sufficient sanction against this plaintiff given the low level of costs that will follow this event. This will lighten the burden on the defendant and in all probability deplete the award to the plaintiff.