Neutral Citation: [2013] IEHC 363

THE HIGH COURT

[2007 No. 9362 P]

BETWEEN

MADELINE WRIGHT

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE AND

MATER MISERICORDIAE UNIVERSITY HOSPITAL LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Irvine delivered on the 19th July, 2013

1. This judgment deals solely with the issue of the costs of the within clinical negligence proceedings which were heard over a period of 21 days and culminated in a judgment delivered on 7th June, 2013.

Background

2. As a result of toppling from her husband's stationary motor scooter at the end of November, 2005, the plaintiff developed back problems for which she was ultimately treated at Sligo General Hospital ("Sligo General") and the Mater Misericordiae University Hospital ("the Mater"). In these proceedings the plaintiff maintained that as a result of the negligence on the part of the clinicians at these hospitals that she went on to develop very significant personal injuries for which she was entitled to maintain a claim for substantial damages.

3. It should be readily apparent from my judgment that the plaintiff's claim related to the care afforded to her over very specific periods of time at each of the aforementioned hospitals. In respect of each such period the plaintiff made specific allegations of negligence that her clinicians delayed in investigating, diagnosing and treating her condition. The first period which I considered in any detail in my judgment was that which dealt with her care at Sligo General between the 10th and 26th February, 2006. I then considered the care afforded to the plaintiff when in the Mater between the 28th February, 2006, and the 3rd March, 2006. The last period of care scrutinised in the course of my judgment was that afforded to the plaintiff at Sligo General between the 12th and the 16th March, 2006, when her care was managed in conjunction with advices received from the Mater.

4. The plaintiff also made a number of specific allegations against her Orthopaedic Surgeon, Mr. Keith Synott, to the effect that the approach he adopted to her surgery in March, 2006 was fundamentally flawed and that the operation he carried out was not of an acceptable standard due his alleged failure to remove the entirety of the disc for which the surgery was performed.

5. In my judgment I concluded that the only negligence on the part of the defendants was in respect of a delay in investigating and treating the plaintiff's symptoms when she returned to Sligo General on the 12th March, 2006 and for which delay both defendants were liable.

6. Following the delivery of my judgment I postponed dealing with the costs of the proceeding to allow the parties make submissions as to what might be an appropriate costs order in light of the fact that the plaintiff had failed to establish negligence in all but one aspect of her claim.

Submissions

7. Mr. O'Neill, S.C., on the plaintiff's behalf submitted that the within proceedings should be considered to be straightforward litigation rather than the type of complex litigation that had led to Clarke J. to scrutinise with a greater intensity, the court's approach to the issue of costs in *Veolia Water UK Plc v. Fingal County Council* [2006] IEHC 240 [2007] 2 I.R. 81. He submitted that the case made by the plaintiff was simple, namely whether the defendants had been negligent in relation to the standard of clinical care they had provided for the plaintiff. This, he urged, was a single issue which at the end of the extensive hearing had been resolved in the plaintiff's favour given that I had made a finding of negligence against the defendants. The fact that the Court had rejected the plaintiff's expert opinion on certain aspects of the case was not, he submitted, a ground which would justify the Court departing from the normal rule, namely that costs should follow the event. Putting it in less legal terms, counsel submitted that it was not a balancing exercise as to who won the most points in the match but rather who won the game.

8. Mr. O'Neill submitted that it was reasonable for the plaintiff to pursue all of the allegations of negligence canvassed in the course of the proceedings and that these had only been put forward because the plaintiff's experts had advised that they were meritorious. He submitted that it was only in a case where a party had pursued an argument which was unsustainable on the basis of their expert evidence that the Court should isolate that issue and penalise them for adopting such an approach. However, this is not what had occurred in the present case and the plaintiff's experts had given strong evidence supporting the alleged deficiencies in all aspects of the plaintiff's care even though these were not upheld by the Court. Further, Mr. O'Neill argued that regardless of the outcome, the Court would in any event have had to embark upon a complete forensic examination of the plaintiff's treatment at Sligo General and the Mater over the earlier periods of care in order to be in a position to deal with the aspect of her claim in respect of which she was successful as her medical condition was a continuum from the time she first presented at Sligo General in December, 2005 until the events in respect of which negligence was found commencing the 12th March, 2006. It would have been impossible, he submitted, to have dealt with negligence during this last period of the plaintiff's care without visiting *in extenso* the earlier periods.

9. To conclude Mr. O'Neill submitted that the onus was on the defendant to satisfy the Court that it should depart from the well established rule that costs should normally follow the event and that while the Court had a discretion this should only be exercised in a special case and this was not such a case.

10. Mr. Gleeson, S.C., on behalf of the defendant relied upon the fact that it was only in supplemental particulars of negligence

delivered on the 1st February, 2012, that the plaintiff, for the first time had raised the allegations of negligence upon which she ultimately succeeded. In such circumstances, he submitted that the defendants should be awarded the costs of preparing their defence to the proceedings up to that date.

11. Mr. Gleeson submitted that the litigation was of a complex variety and as such would merit the Court scrutinising the proceedings in some detail in terms of the type of costs order that should be made. The case advanced on the plaintiff's behalf was, he contended, not a continuum involving one issue. He referred to the fact that on the opening of the case, counsel for the plaintiff had compartmentalised the proceedings into what might be described as four different legs. As the plaintiff had only been successful in respect of one these legs of claim, this fact ought, he said, be reflected in the Court's costs order.

12. Mr. Gleeson emphasised the amount of time the Court had been asked to spend considering evidence in relation to allegations that were not substantiated. He submitted that the Court had been asked to dedicate considerable time to analysing, on an almost hour by hour basis, the standard of clinical care afforded to the plaintiff over a substantial period of time and in respect of which no fault had been found. This would justify the Court departing from the usual approach to costs and would warrant the exercise of the Court's discretion to reduce the plaintiff's costs to reflect the time and expense so unnecessarily incurred. In urging the Court to approach the issue of costs in this manner, he relied upon the decision of Finlay Geoghegan J. in *Fairfield Sentry Limited & Anor v. Citco Bank Nedeerland NV & Ors* [2012] IEHC 462 (Unreported, High Court, Finlay Geoghegan J., 25th June, 2012).

13. Finally, counsel for the defendants emphasised the fact that very damning allegations of incompetence had been made against Mr. Synott which had been unproven. He argued that when allegations of this nature were not substantiated a plaintiff should not be entitled to the costs of having pursued them. He submitted that there had to be some sanction which would be reflected in the costs order for having adopted such an approach.

Decision

14. The proceedings were heard by the Court over a period of 21 days and it follows that the overall costs of the litigation will be very significant indeed. It is undoubtedly the case that in recent years, clinical negligence litigation has become more complex. Cases are taking longer than ever for a number of reasons. One such reason is the greater use of the discovery procedure which has led to the introduction and reliance upon increased numbers of medical records in the course of proceedings. The fact that such documentation has to be referred to by so many witnesses, both expert and non expert, has significant implications for the duration of such proceedings. The present case is a good example of this development. There were four or five lever arch files of medical records admitted into the evidence by agreement between the parties and each expert witness, as well as some of the non expert witnesses, was led through the relevant extracts in the course of their testimony. Also, in some cases vast amounts of court time is wasted by witnesses trying to decipher swathes of handwritten notes which the solicitors concerned have not taken the trouble to have typed up and agreed for ease of reference. In this regard I want to state that this was not a feature of the present case. Indeed the preparation of the discovery documentation by the plaintiff's solicitor, Mr Roger Murray, was a perfect example of how clinical records should be prepared in this type of litigation. The Court and all witnesses had the benefit of paginated books of typed notes of the relevant clinical records laid out in the same format as the originals and interleaved so that the typed note could be read from the left hand page of the folder with the witness having the benefit of a copy of the hand written note on the opposite page.

15. It is also the case that in clinical negligence proceedings greater numbers of expert witnesses than ever before are being retained to deal with the issues of liability and causation. The Court is often overwhelmed with the amount of expert evidence called by the parties. It has become common practice for all parties, and sometimes there are multiple defendants, to engage several witnesses with similar qualifications to give evidence in relation to each such issue As a result, the duration of clinical negligence proceedings has become greatly extended and the costs thereof significantly increased. In this case, the plaintiff retained three experts to advise upon all of the allegations of negligence which she pursued and the defendant did likewise. Accordingly, the Court heard six separate opinions on each aspect of the clinical care provided to the plaintiff between December, 2005 and March, 2006. In other jurisdictions parties are confined to calling one expert witness to deal with any particular issue unless there are special circumstances in which case the Court may permit a second expert to be called. The effect of such rules is that in those jurisdictions cases of this nature are dealt with far more expeditiously and in a less costly manner. Hopefully new procedural rules to this effect will soon be introduced in this jurisdiction and these will bring to end unnecessarily lengthy and costly clinical negligence litigation. At the present time this type of litigation has a stranglehold on the courts' limited resources and while every litigant has a right of access to the court, that right is not unlimited. What a plaintiff is entitled to is proportionate and reasonable access to the court's time having regard to the rights of other litigants in a setting of limited resources.

16. The reason that I asked the parties to make submissions in relation to the costs of these proceedings is that I am satisfied that less than 20% of the 21 days of the hearing were spent dealing with the plaintiff's care between the 12th and 16th March 2006, that being the only period in respect of which I found the defendants to have been negligent. There is now a growing body of case law which suggests that in complex litigation, the court, prior to makings its award of costs, should consider engaging in a more detailed analysis of the precise circumstances which give rise to that order before making its final decision. Whilst much of the relevant case law has emanated from the Commercial Court or from decisions of the High Court on the non jury side, where the court is often engaged in making decisions on a number of discreet issues, I see no reason why the jurisprudence in this area should not in certain circumstances apply to orders for costs at the conclusion of personal injuries actions and in particular clinical negligence proceedings.

The Principles

17. From the available authorities, the following principles seem to emerge, namely:-

(i) The costs of proceedings in any court are ultimately a matter for the discretion of the trial judge.

(ii) In non-complex litigation a successful plaintiff will usually be entitled to an order for the reasonable costs of bringing their case to court to secure their rights. Similarly, a successful defendant will normally be entitled to an order providing for their reasonable costs of defending the action.

(iii) In complex litigation, where there are several events or relatively discrete issues which have not all been resolved in favour of the party who may be considered to have been the successful party in the overall sense, the court should look with greater scrutiny as to how the costs should be treated.

(iv) Where in complex litigation it can be concluded with some degree of certainty that the trial of any discrete issue of law and/or fact which was not resolved in favour of the successful party had the effect of increasing the costs of the proceedings by extending the duration of the hearing then the court should reflect this fact in its order for costs.

(v) Where in complex litigation the party who is in the overall sense considered to have been the successful party has

unsuccessfully litigated an issue requiring evidence to be heard from witnesses directed solely towards that issue, the court should disallow the costs of that party's witnesses and should consider making an order that the party who was successful on the issue be paid their costs which should then be set off against any order for costs made against them.

(vi) In complex litigation the court should seek to fashion an order for costs that will do more than award the costs to the winning side so as to discourage parties from raising additional unmeritorious issues.

18. In their respective submissions counsel did not refer to the approach adopted by the courts of England and Wales when exercising their discretion in cases such as the present one. Since 1999 those courts have been operating under the Civil Procedure Rules which, at R44.2, set out the general principles relevant to the court's discretion on the costs of any proceedings.

19. There are, as might be expected, a number of English decisions which consider the exercise by the court of its discretion when dealing with the issue of costs in personal injuries and other non commercial litigation and these place significant emphasis on the decision that the court must make as to who it considers was what may be described as the winning party. That done, the relevant jurisprudence suggests that the court should look at all aspects of the proceedings and its own findings to decide if it should modify its costs order in some particular way. The fact that a claimant may win on some issues and lose on others is not normally a reason for depriving the successful claimant in a personal injuries action of an order providing that their costs be paid in full. However, depending on the facts of the case, if the overall successful party has failed on certain issues there is authority to support such failure as constituting good reason for the court to modify the costs order in their favour. Interestingly, I could find no judgment delivered in a personal injuries action or professional negligence action in which the overall successful plaintiff was directed to pay the defendant's costs of any issue on which they were unsuccessful with the court usually confining itself to the imposition of a penalty on the overall winner by directing a percentage reduction in their costs.

20. A number of the relevant decisions of the English courts concerning the issue of the costs in personal injury litigation relate to the claims of plaintiffs who pursued multiple heads of claim relating to the issue of quantum and went on to recover only a tiny fraction of what was claimed. As a result the defendants, aggrieved by the costs incurred in defending such claims, applied to the court, relatively unsuccessfully in most cases, to exercise its discretion and to penalise the plaintiff in terms of costs. The reason why the court did not accede to such a request in most cases was that it was satisfied that the defendant had had available to it a range of procedural mechanisms such as lodgement, tender, Calderbank letter etc. to dissuade a plaintiff from pursuing an inflated claim and if they had not invoked such procedures they had poor grounds for asking the court to exercise its discretion and penalise the plaintiff in terms of costs.

21. The defendants in the types of cases just mentioned were, however, in an entirely different position to that of the defendants in the present case who had no procedural tools available to them to counter the plaintiff's decision to canvass, in terms of negligence, every aspect of her care over a period of several months in two separate hospitals. The defendants had no option but to retain experts to advise on every allegation made by the plaintiff and then to attend to give evidence over several weeks in line with their advices, all at significant expense.

22. Having regard to the English authorities, it appears to me that an additional principle beyond those earlier referred to arises for consideration when a court is asked to scrutinise costs in personal injuries litigation, particularly those cases in which a plaintiff only recovers a fraction of the damages claimed and has thereby significantly increased the costs of the litigation. The court should in such circumstances factor into its decision the extent to which procedural protections were available to the Defendant which could have been utilised in order to dissuade the Plaintiff from embarking upon a grossly inflated or otherwise unsustainable claim.

23. Before applying all of the aforementioned principles to the facts of the present case, it is probably worth stating that at the conclusion of any proceedings, be they complex or straightforward, a court when dealing with the issue of costs has always discretion to take into account a wide range of matters beyond the court's findings on any particular issue or issues. For example, if a court were to come to the view that a medical negligence action took nine days at hearing rather than six due to the failure on the part of the plaintiff's solicitor to prepare proper books of clinical records, I see no reason why the court might not confine the successful plaintiff to six or seven days costs. Likewise if the court were to take the view that there had been an unduly protracted examination of witnesses which unnecessarily increased the costs of the trial, again the court might consider some adjustment to the final costs order. Indeed the decisions of the English courts are good authority in support of the proposition that when dealing with certain types of personal injury litigation, particularly when there is something unusual about the outcome having regard to the claim made, the court should look with greater scrutiny to see if there are reasons to modify the costs order that would otherwise normally follow the event.

21. In considering the plaintiff's application for the costs of the entirety of these proceedings regardless of the fact that she was only successful in establishing negligence in respect of the final period of her care at Sligo General commencing the 12th March and ending on the 16th March, 2006, I have taken into account the submissions of the parties and I have tried, as best I can, to apply the principles earlier referred to the facts and findings of the Court in this case.

22. The first matter that needs to be considered is whether or not the within clinical negligence proceedings may be classified as complex such as to warrant the Court adopting a greater degree of scrutiny when dealing with the issue of costs. In this regard I accept entirely that the vast majority of personal injury cases do not fall into such a category as they usually involve a consideration by the Court of a particular event. That event might be a road traffic accident, an accident in the workplace or an assault, to take but a few common examples of this type of litigation. Invariably in cases of this nature the same event will give rise to a number of different pleas of negligence and the fact that a plaintiff who is ultimately successful may have included a number of pleas of negligence upon which they were unsuccessful will normally not have added to the duration of the trial or required the attendance of additional witnesses. Such cases must be regarded as non-complex and the fact that the plaintiff does not establish every plea of negligence should not, save in special circumstances, affect their entitlement to recover their costs in full once they establish liability.

23. Coming to the circumstances of this particular case, the first major allegation of negligence maintained by the plaintiff related to her third period of hospitalisation at Sligo General which took place between the 10th and the 26th February, 2006. She made two significant criticisms of her clinicians over this period, namely:-

(i) That they had failed to requisition an urgent MRI scan; and

(ii) had failed to transfer her to the Mater for emergency surgery during this period based on the results of an MRI scan which had been carried out on the 20th February, 2006.

24. The plaintiff's evidence supporting the aforementioned allegations of negligence and my conclusions thereon are summarised at

paras. 26 – 52 of my judgment of the 7th June, 2013. As can be seen therefrom, this aspect of the plaintiff's claim, had it been resolved in her favour which it was not, would have afforded her a remedy in terms of damages. Also in order for her to have been successful in this aspect of her claim, she did not have to pursue any of the other claims which she decided to litigate in respect of her subsequent care.

25. The second of the four major criticisms made by the plaintiff against the defendants centred upon the care afforded to her by different clinicians than those involved in the allegations of negligence last referred to and at a different hospital, i.e. the Mater and in respect of a different period, namely from the 28th February to the 3rd March, 2006. She alleged that they had failed to prioritise her surgery which she maintained should have been carried out at the latest by the 1st March, 2006, an allegation which I rejected.

26. I see this second aspect of the plaintiff's claim as involving different issues than those raised by her in respect of her earlier care in Sligo General. Her allegations of negligence in relation to this period of her care, the evidence of the parties and my conclusions thereon are set out at paras. 53 to 59 of my judgment. While the experts retained by both parties in relation to this period were the same as those retained to advise on the first set of allegations, the Court was dealing with a patient under the care of a new team of clinicians in a different hospital and whose allegations of negligence over this period were separate and distinct from those she had raised against the clinicians at Sligo General. This second tranche of complaints of clinical negligence could well have been litigated by the plaintiff independently of her claim in respect of the earlier period of her care in Sligo General and in this sense could reasonably be described as being discreet. Of course, if she had only advanced allegations of negligence in respect of this period of her care in the Mater, the Court would have had to have heard evidence in respect of her earlier condition and treatment in Sligo General by way of background but this would not have involved the Court in days upon days of a forensic hour by hour analysis of what had happened, as in fact occurred.

27. The third aspect of the plaintiff's claim was in relation to the standard of the surgery performed by Mr. Synott, Consultant Orthopaedic Surgeon on the 3rd March, 2006, and in respect of which she made two complaints. Firstly she maintained that he had used a surgical technique which was contraindicated for a surgeon intending to remove a large prolapsed central disc in the lumbar spine and secondly that he had negligently failed to remove the entire disc in the course of the surgery. Again, as with the earlier issues in the case and perhaps indicative of the relatively standalone nature of these allegations, the plaintiff's complaints, a summary of the evidence and my conclusions thereon are set out in a separate section of my judgment at paras. 60 to 81.

28. As with the earlier two issues to which I have just referred, the plaintiff's complaint as to surgical competence of Mr Synott, which I rejected, was, I believe, a discreet issue. That allegation of negligence could have been litigated on its own and was not dependent on the plaintiff pursuing either of the earlier complaints to which I have just referred. Further, to succeed in that aspect of her claim in which she was successful she did not need to canvass this allegation in any shape or form.

29. It has to be said that the plaintiff's allegations of alleged surgical incompetence were very significant for two reasons. Firstly, they caused six expert witnesses to spend a considerable number of days between them exploring the various surgical approaches that might legitimately have been adopted by a surgeon when faced with a patient with CES symptoms caused by a large central prolapsed disc back in 2007. Then there was the extreme manner in which the surgeon's competence was challenged by Mr. Campbell, Consultant Neurosurgeon, on the defendant's behalf. Once again in respect of this aspect of the plaintiff's claim as in relation to the two earlier issues, I ultimately concluded that her allegations of negligence were unsustainable in the light of the medical literature and the expert evidence.

30. It was only in respect of the plaintiff's care when she returned to Sligo General on the 12th March, 2007, that I concluded that the clinicians in Sligo General and the Mater had been negligent as to the manner in which her condition was then investigated and treated. My conclusions in respect of this leg of her claim are dealt with at paras 82 to 118 of my judgment. In summary, I concluded that the plaintiff's surgery for CES had been inappropriately delayed by approximately 48 hours and that she was entitled to damages to compensate her for the injuries which she had thereby sustained. Once again, while her prior medical history at Sligo General and the Mater were relevant by way of background material to this issue, had the plaintiff only litigated a claim for negligence in respect of this last period of her care, the case would have taken a fraction of the time it actually took.

31. For the aforementioned reasons I am quite satisfied that these proceedings can comfortably be described as complex and fall into the category of case that ought to be subjected to greater scrutiny by the Court when dealing with its final order for costs. I reject the submissions made by Mr. O'Neill that this was non complex litigation and that costs should follow the event. The fact that all of the expert witnesses dealt with all of the negligence issues before the Court does not mean that the proceedings were of the straightforward variety such that once the plaintiff succeeded on one issue she should be awarded the costs of the entire proceedings. The action involved a number of relatively discreet issues in respect of which the plaintiff failed and in light of the Court's findings I believe it behoves the Court to fashion a costs order that will do justice between the parties having regard to those findings.

32. Just because a plaintiff has one good point they should not, to my mind, be permitted to litigate a myriad of others and have the court make an order requiring the successful defendant on such issues to pay for that luxury. There must be some sanction in terms of costs should this occur. Further, in clinical negligence litigation, the career and reputation of the clinician is inevitably attacked and if there be no penalty for making allegations of negligence which fail, unless the plaintiff loses on every point, it seems to me that plaintiffs may be encouraged to pursue any point upon which they can garner even the most modest support and expect the defendant to cover their costs of having done so. It is not beyond the realms of possibility that an unscrupulous solicitor might use the potential costs of litigation as a type of battering ram to achieve a settlement in a case that a defendant might otherwise contest were it not for the exorbitant costs of defending the action.

33. The next issue to be decided is who, for legal purposes, should be considered to be the overall winner in these proceedings. Regardless of the fact that the plaintiff only established negligence in relation to the last leg of her claim, I am satisfied that she must be treated as the successful party overall. She established a right to damages in respect of a liability which the defendant denied and had to come to Court to achieve that end. Nonetheless, I see no justice in an order that would direct the defendants to pay the plaintiff all of her costs of pursuing allegations of professional incompetence in respect of which she was unsuccessful, particularly when those issues were not integral to that aspect of her claim in respect of which she was successful. Even though, by its denial of liability in any proceedings a defendant denies a plaintiff the prize to which they may be entitled and ultimately win, I do not believe that the plaintiff should enjoy absolute immunity in respect of the costs of their pursuit of allegations of negligence in respect of which they are unsuccessful if by pursuing the same they have significantly lengthened the trial or otherwise increased the costs of the proceedings by making their opponent retain additional witnesses in respect of those issues.

34. I am convinced that, particularly in medical negligence litigation, there are many instances in which the court ought to consider carrying out a slightly more intensive assessment in relation to its final costs order. These might include, for example, a case in which

a claimant sues in respect of negligence relating to a particular procedure and in addition also maintains a claim that they did not give their informed consent to the procedure. Clearly a claimant can contend for negligence in relation to their surgical management without seeking to make any case in respect of the issue of informed consent. Even though the informed consent issue may be dealt with by the same witnesses as those who give evidence in relation to the surgical aspect of the case, I see no reason why, if the trial is substantially extended by the unsuccessful pursuit of an informed consent plea, the costs should not reflect that fact regardless of the fact that the claimant, if successful in establishing negligence in respect of their surgery, must be considered to have been the overall winner. After all, the defendant in such circumstances ended up justifying its refusal to concede liability on that ground. I do not believe it is beyond the competence of a judge when exercising his or her discretion as to costs to assess the time given up to the issue of informed consent and then to either award the costs of that issue to the defendant or disallow some portion of the plaintiff's costs to reflect the fact that the defendant succeeded on this separate issue.

35. I reject the submission made by Mr. O'Neill that the plaintiff should not be penalised for pursuing allegations of negligence which failed on the grounds that she had only pursued allegations of negligence which her experts had advised were sustainable. If this submission was valid, a court would always have to award a plaintiff the entirety of their costs even if they only succeeded on one point because invariably the case advanced is based upon the existence of some expert opinion in support of each issue pursued. I also think that this submission holds less weight than might have been the case prior to the introduction of Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 (S.I. No. 391 of 1998) which gives each party sight of the expert reports of their opponents in advance of trial. A plaintiff now knows the substance of the evidence that will be led by the defendant on every allegation which they make, in advance of the hearing. This gives a plaintiff the opportunity of withdrawing or abandoning any aspect of their claim having considered the weight of the defendant's intended evidence thus reducing their exposure to some penalty in terms of costs should they proceed and lose some particular issue.

Conclusion

36. To conclude, I am satisfied that regardless of the fact that the plaintiff only succeeded on the last of what I consider to have been four separate legs of her claim that she must nonetheless be deemed to be the overall winner of proceedings in which the defendants denied any liability and in the course of which she duly established a right to compensation she would not otherwise have been able to recover. However the proceedings were of a complex variety and warrant the Court applying a greater degree of scrutiny to the order for costs which it now must make but which in the normal circumstances should follow the event in proceedings of this nature. There are, I believe, in the particular circumstances of this case, good grounds for departing from the usual order due to the fact that I am satisfied that the duration of the proceedings was significantly extended due to the pursuit by the plaintiff of allegations of negligence which have not been substantiated and which greatly increased the costs of both parties.

37. Given that I am of the view that no more than 20% of the evidence centred upon the plaintiff's care in Sligo General between the 12th and 16th March, 2007, and that being the only aspect of her claim in respect of which the Court found the defendants negligent, this fact has to be reflected in the costs order. However, given that the plaintiff's medical history and her treatment by the defendants from the time of her accident in November, 2006 was material to the claim made by her in respect of the latter period of care, I believe that it would be unduly harsh to confine her entitlement to costs to 20% or direct that she pay a substantial portion of the defendant's costs. I must take into account the fact that the Court would in any event have had to have heard a good deal of evidence regarding her earlier condition and clinical care by way of background to that portion of her claim in respect of which she was ultimately successful.

38. I am sorely tempted to take a less conciliatory view of the very discreet claim made by the plaintiff that the surgery carried out by Mr Synott on the 3rd March was negligent and as already stated that issue was quite distinct from the other allegations which she made. Her failure to establish this serious aspect of her claim, which probably took up about three days of court time in terms of expert evidence, would I believe justify the Court in making some type of costs order in favour of the defendant and then setting that off against the plaintiff's costs. However, as this practice has not to date been customary in this type of litigation, I have decided against such an approach in the present case and will do no more than reflect in a proportionate way the plaintiff's failure to succeed on this issue when reducing the level of costs to which she is entitled.

39. Having regard to all of the aforementioned matters mentioned in the course of this judgment I intend to award the plaintiff 65% of her costs due to her failure to establish any liability in respect of the allegations forming the basis of first three legs of her claim which had the effect of vastly increasing the duration and costs of the proceedings. Given that she must nonetheless be considered the overall winner in this litigation I think it would not be just, in the context of the factual background to her medical condition, which was after all a continuum, to reduce her costs below that level.