THE HIGH COURT

[2015] IEHC 900

[2014 No. 3836 P]

BETWEEN

KAREN LUCEY

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE AND MATHEW HEWITT AND KEVIN MURRAY AND BRIAN WALDRON

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 27th day of October, 2015

1. This is an application for costs in a negligence action brought by the Plaintiff to recover damages in respect of personal injuries and loss arising from the care, management and treatment afforded to her by the Defendants whilst a patient in Kerry General Hospital. At the commencement of the trial the Defendants withdrew liability and the case proceeded as one for an assessment of damages only. After a number of days at hearing the parties settled the issue of quantum on terms agreed between them, the Plaintiff to have the costs of the proceedings. However, agreement could not be reached on the basis for taxation of the costs; accordingly, it was agreed that that matter should be determined by the Court.

2. Whilst one could not but have sympathy for the plight of the Plaintiff, described by her counsel as having been distraught and in floods of tears before the trial was due to begin on Friday, facing as she was a full contest on all issues, the question which falls for determination must, like any other, be decided in accordance with the law. What falls to be decided by the Court is a net issue, namely, whether the Plaintiff's costs from February or, at the latest, March 2015 up until the commencement of the trail on the 21st of October should be taxed on the basis of party and party or solicitor and client.

The Rules.

3. Order. 99 r. 10 (1) and (2) of the Rules of the Superior Courts, as amended, provides for taxation of costs on a party and party basis and that when so taxed all such costs as were necessary or proper for the attainment of justice or for the enforcing or defending of the rights of the party whose costs are being taxed, are to be allowed. Order 99 rules 10 (3) and 11 (1) provide for an award by the Court of costs to be taxed as between solicitor and client and in that regard all such costs are to be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred.

4. Order 99 rule 11 (3) provides taxation of costs as between solicitor and own and where incurred with the express or implied approval of the client evidenced by writing shall be conclusively presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount.

Submissions

5. At the outset it was submitted on behalf of the Defendant that whilst it was accepted that the Plaintiff was entitled to the costs of the proceedings including costs incurred in

relation to the issue of liability and causation up to and including the morning of the hearing, such costs fell to be taxed on a party and party basis and not otherwise. It was also contended on behalf of the Defendants that, given the opinions expressed in the Defendants' expert medical reports, they were entitled to keep liability in issue and to seek an amendment of their defence to incorporate a plea that the Plaintiff's claim or part thereof was statute barred.

6. By solicitors' letter, dated the 27th of July, 2015, sent to the Plaintiff's solicitors, the Defendants sought the Plaintiff's consent to the amendment of the pleadings by raising the plea that her claim was statute barred in whole or in part. The request was refused and in the circumstances of the case was not unreasonable. It appears from the book of pleadings handed into the Court that the Defendants did not pursue the matter by motion to amend the Defence, which was delivered on the 23rd of January, 2015.

7. In the course of the opening, notice was given that at the conclusion of the trial the Court would be invited to award aggravated damages to the Plaintiff for the unnecessary anxiety, stress and suffering caused to the Plaintiff by the Defendants' failure to concede liability when invited to do so by solicitor's letters dated the 5th of February and 16th of March, 2015. The grounds advanced in support were that liability ought to have been conceded in circumstances where it must have been abundantly clear to the Defendants that the action was indefensible; the letters went without reply. Accordingly, it was submitted that the costs incurred from that time, insofar as they concerned liability and causation, ought to be taxed on a client and solicitor basis or an order given for a full indemnity in respect thereof.

8. It was submitted on behalf of the Defendants that it was not until the morning of the hearing, having had the benefit of a consultation with Professor Hyland, that a decision could reasonably have been made to concede liability. It was also submitted that to penalise the Defendant for failing to concede liability in advance of the trial date was not in the particular circumstances of the case factually sound nor in accordance with the law. In that regard the Defendants relied upon the decision of the Supreme Court *in Cooper v. O'Connell (unreported),* Supreme Court, Keane J., June 5th, 1997 and in particular on a statement of the law in relation to the question as to whether or not a decision by a party to put liability in issue could be a ground for an award of aggravated damages.

9. In that case the defendant conceded that he had been negligent and advised the plaintiff to seek legal advice. It was accepted that the manner in which the defence was conducted was determined by the defendant's insurers or defence union. In this regard Keane J., delivering the judgment of the court, at p. 23 stated:

> *"I am also satisfied that their decision initially to put liability in issue could not possibly be a ground for the award of aggravated damages. Under our law of tort, a defendant is entitled to put the plaintiff on proof of his allegation that an actionable civil wrong has been committed. To hold that, because the plaintiff's case appears to be of particular cogency, a defendant who elects to put liability in issue exposes himself to an award of aggravated damages would be to create a*

novel deterrent for defendants which is contrary to fundamental principle and devoid of any support in the decided cases."

10. Professor Hyland was disclosed as the expert witness for the defence. He is a highly qualified and respected general and colorectal surgeon. His reports, both of which were handed into Court, are dated the 14th of August, 2015 and 7th of September, 2015. It is apparent from the reports that he took issue with the allegations of medical negligence made on behalf of the Plaintiff in the pleadings. The Defendant's schedule also disclosed the names of the Defendants involved in the treatment and care of the Plaintiff, whom it was intended to call as witnesses to fact.

11. In the course of the hearing it became apparent that shortly after a medical consultation with the Plaintiff in early September 2014, carried out on behalf of the Defendants by a Mr Drumm, Consultant Urologist, that a medical report prepared by him and received by them had not been disclosed, nor had Mr. Drumm been scheduled as an expert witness. It was submitted on behalf of the Plaintiff that the most likely explanation for this omission was because Mr Drumm had given an opinion which was not supportive of the defence. As to that proposition, the Defendants were invited to produce the report if the position was otherwise. The invitation was declined; accordingly, the Court was entitled to draw its own inferences as to the reason for non-disclosure.

12. Furthermore, as the case had really become one involving urological speciality it ought to have been obvious that without the benefit of a urological expert opinion and witness the case was indefensible, a position which must have been evident at the latest by the Spring of 2015. In those circumstance it was argued that liability ought to have been conceded on receipt of the letters of February and March that year or at the very latest within a reasonable time thereafter.

13. Once a claim for aggravated damages became an issue, the Defendants, in addition to relying on the reports of Prof. Hyland, also sought to rely upon the report, also handed into Court, of Peter Lenehan, Consultant Obstetrician and Gynaecologist, dated the 29th of October 2014 from which, as with Professor Hyland but for his own reasons, he took issue with the allegations of medical negligence against the Defendants and specifically expressed the opinion that on the basis of the medical evidence, including a CT scan, which was then available, there was not at that point in time a requirement to consult a urologist.

14. Following a number of exchanges with regard to the necessity or otherwise of leading certain medical evidence in connection with the Plaintiff's claim for aggravated damages, the Court was informed that the Plaintiff had decided to withdraw the claim but reserved her position in relation to the question of costs which is the subject matter of the within application.

Decision; Rules of Court; Purpose;

15. The purpose and object of the Rules of Court is to facilitate the administration of justice by providing the means for the efficient and effective progress and disposal of litigation

through the Court system. The rules are intended to be utilised by all parties to litigation who have recourse to the courts. Service of the Notice of Trial on the 29th of January, 2015 triggered the provisions of the disclosure rules. However, it appears these were not complied with nor were any motions brought by either party for compliance directions. Instead, it appears that both parties agreed to mutual exchange, firstly of their schedules and subsequently their reports, on the 8th and 13th of October, 2015 respectively.

16. Whilst the Plaintiff's solicitors wrote again on the 24th. August 2015 seeking a withdrawal of liability, it is clear from a reading of the agreed correspondence that no further letter seeking the withdrawal of liability was sent to the Defendants' solicitors once it became apparent from disclosure that the Defendants intended to defend the action by seeking to rely only on Prof. Hyland as an expert witness. Although the Defendants were by then also in possession of the Plaintiff's expert medical reports, it is evident from the correspondence that there was an issue concerning discovery which was unresolved as late as October 2015.

Conclusion

17. An order for costs directing taxation on a client and solicitor basis may be made where the Court considers it appropriate that its disapproval of the conduct of the proceedings by a party should be indicated by making such an order including but not limited to cases where there is a failure to comply, or comply properly or in a timely manner, with orders of the court or where there has been otherwise an abuse of process. In my view, it would not be proper to draw any inference from the manner in which the Defendants have conducted the defence of these proceedings or to infer conduct or motives on their part which would merit the disapproval of the Court by the making of an order for the taxation of costs on a client and solicitor basis, particularly where that was an issue in a claim for aggravated damages which had not only not been tested by a trial on oral evidence, but which had also been withdrawn.

18. Neither would it be appropriate to award costs on a client and own solicitor basis which, it seems to me, would be to the same practical effect as an order to provide the Plaintiff with the full indemnity in respect of the costs of the liability witnesses. It is not intended to lay down any hard or fast rule that such an order could not or should not be made in a case where there has been a failure to withdraw liability called for. On the contrary, it is perfectly plain to me that there could well be circumstances in a given case where liability ought properly to have been withdrawn at a certain point in time and that the failure to do so could constitute an abuse of process in the conduct of the proceedings such as would warrant the court in making an order that the unnecessary costs incurred thereby should be taxed on a client and solicitor basis. However, in my judgment, this is not such a case.

19. With regard to the submission made on behalf of the Plaintiff that the case could not be defended in the absence of a urologist that, it again seems to me, is an issue which, to be dealt with properly, would have to be tested under examination and cross examination at trial – especially in circumstances such as those in this case where on the face of the

admitted medical reports there is an apparent conflict of medical opinion which, if accepted by the court, would have afforded a defence to the Plaintiff's claim.

20. Moreover, when the Defendants were invited to concede liability by the Plaintiff in February and March 2015, it is also evident that all of the expert medical evidence on which the Defendant intended to rely in the defence of these proceedings had yet to be received; indeed, it was not fully complete until September 2015. Furthermore, when Prof. Hyland's final report became available it is apparent from the content that it offered the prospect of a successful defence to the claim.

21. A proper assessment of the prospect of success or failure in the defence of the proceedings could not have been made until after the exchange of expert reports at the earliest and which, as happened in this case, would most likely have required a consultation. Whether the consultation could have been arranged earlier than for the morning of the trial was not suggested. As it happens the hearing date in this case came relatively quickly after the exchange of reports on the 13th of October.

22. Suffice it to say that the interests of the administration of justice are served by the timely disposal of litigation. With that object in mind it seems to me to be entirely appropriate and desirable that the holding of a consultation, where necessary, and with expert witnesses in particular, should take place as soon as is reasonably practicable after the exchange of expert reports especially if, as a result of doing so, it could lead to a prompt resolution of the litigation or to the withdrawal of liability before trial or to an agreement on heads of damage or even to the narrowing of issues to be determined by the court

Ruling

29. For these reasons the Court will refuse the Plaintiff's application and will direct that the Plaintiff's costs be taxed on a party and party basis. The costs of the proceedings to which the Plaintiff is entitled shall include all costs incurred by the Plaintiff in connection with the issues of liability and causation up to and including the first day of the trial, together with the costs of and incidental to the hearing on the issue of quantum which required the court attendance of the Plaintiff's medical witness up to and for the 27th of October 2015, together with any standby fees incurred in respect of medical witness intended to be called on Wednesday the 28th. If necessary, both parties shall have liberty to apply.