THE HIGH COURT

[2012 No. 3367 P.]

BETWEEN

MARGARET BROWNE

PLAINTIFF

AND

PETER VAN GEENE AND MOUNT CARMEL MEDICAL GROUP (KILKENNY) LIMITED TRADING AS AUT EVEN HOSPITAL

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 24th day of January, 2018

Introduction

1. The plaintiff in these proceedings claimed damages in respect of personal injuries suffered by her due to the alleged negligence of the first and second named defendants, in and about the medical care given to her when she had a hysterectomy and oopherectomy operation, carried out by the first named defendant at the hospital run by the second named defendant on 6th April, 2010. In essence, the plaintiff claimed that due to negligence on the part of the first named defendant when carrying out the operation, sutures were inserted into the ureter leading from her bladder into her left kidney. As a result of this she suffered injury to her bladder and damage to her left kidney, which resulted in that kidney having to be removed some years later in 2013. The plaintiff alleged that she had suffered severe personal injury, together with extensive loss of earnings and other items of special damage as a result of the injuries sustained by her.

2. Prior to the trial of the action, the defendants conceded liability and the action proceeded as an assessment of damages only. After a hearing, which lasted some eleven days, judgment was reserved and the plaintiff was awarded damages against the defendants in the sum of €260,111.25.

3. This judgment deals with an application for costs made on behalf of the defendants on the following basis: having regard to the fact that on 27th September, 2016, the defendants had made a lodgement in the sum of €280,000, which had subsequently been increased pursuant to Order of the High Court on 23rd January, 2017, to €450,000, neither of which had been accepted by the plaintiff, it was submitted on behalf of the defendants that the plaintiff was entitled to her costs up to 27th September, 2016, but that as she had not beaten the amount initially lodged by the defendants, they were entitled to their costs from that date onwards.

4. The plaintiff resisted that application on a number of grounds. Firstly, it was submitted that the awarding of costs was always within the discretion of the court. It was submitted that in this case, the defendants had initially agreed to submit the matter to mediation, but had subsequently refused to attend at the scheduled mediation meeting and had refused to nominate any alternative date for the mediation. In these circumstances, the court was entitled to have regard to the refusal of the defendants to engage in mediation when considering the issue of costs. It was submitted that having regard to their refusal to engage in mediation, the defendants should not be awarded any of their costs.

5. Secondly, the plaintiff submitted that because the defendants had been given liberty to increase their lodgement by virtue of the Order of Cross J. dated 20th January, 2017, it was a pre-condition of being given liberty to do so, that the defendants should pay to the plaintiff all her costs up to the date of the increased lodgement. It was submitted that this liberty to pay costs arose once the defendants in fact increased their lodgement and continued irrespective of whether the plaintiff ultimately failed to beat either the initial lodgement or the increased lodgement.

6. Thirdly, it was submitted that as a number of scheduled hearing dates for the trial of the action had to be vacated, due to the fact that the defendants were not in a position to proceed for one reason or another, the plaintiff should be awarded her costs in respect of the dates which had to be vacated.

7. Fourthly it was submitted that O. 22, r. 6 provided that even where a plaintiff did not beat a lodgement, he or she was still entitled to the costs of any issue on which they were successful at the trial of the action. In this case, the defendants had withdrawn the issue of liability, but had specifically kept in issue the question of causation. In particular, the defendants strongly denied that as a result of the negligence of the defendants, any injury had been occasioned to the plaintiff's bladder. That issue had been fully fought at the trial. The judgment of the court had been with the plaintiff on this issue; which held that there had, in fact, been an injury to her bladder. Accordingly, it was submitted that the plaintiff was entitled to the costs of establishing that issue at the trial of the action.

8. Fifthly, at the conclusion of the hearing the defendants had made an application that the entire of the plaintiff's claim should be dismissed pursuant to s. 26 of the Civil Liability and Courts Act 2004, on account of the plaintiff allegedly having given false and misleading evidence in relation to her ability to engage in gainful employment and in relation to her past and future loss of earnings. In its judgment, the court had rejected that application. It was submitted that this finding of the court was a sufficient reason to enable the court to depart from the general rule in relation to costs and the failure of a plaintiff to beat a lodgement. It was submitted that by defeating the s. 26 application, the plaintiff had shown "*special cause*" to justify a departure from the normal rule in relation to costs and lodgements.

9. Sixthly, it was submitted that in view of the fact that the lodgement and offers, which had been made subsequent thereto by the defendants, were no longer "*on the table*" for acceptance by the plaintiff during the trial, the defendants had effectively withdrawn the lodgement. In such circumstances they should not be allowed to rely on the lodgement as a means of denying the plaintiff her costs.

10. As the plaintiff has set out a number of grounds on which she submits that the normal rules in relation to costs and the failure of a plaintiff to beat a lodgement, should not apply, it is necessary to set out the matter in some detail.

The Applicable Rules of Court

11. Order 22 of the Rules of the Superior Courts is headed "*Payment Into and Out of Court and Tender*". This order sets out the time periods within which a defendant may make a lodgement or tender in different types of actions. As there is no issue in this case as to whether the lodgement, or the increase of the lodgement, were validly and properly made, it is not necessary to set out the

provisions which apply in relation to the time periods within which a defendant may make a lodgement or increase a lodgement in a personal injuries action.

12. The relevant rule in relation to this application, is set out in O. 22, r. 6 which is in the following terms:-

> *"6. If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into Court has been made, the sum so paid in but proceeds with the action in respect of such claim or cause of action, or any part thereof, and is not awarded more than the amount paid into Court, then, unless the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct, the following provisions shall apply:*
>
> > *(1) If the amount paid into Court exceeds the amount awarded to the plaintiff, the excess shall be repaid to the defendant and the balance shall be retained in Court.*
> >
> > *(2) The plaintiff shall be entitled to the costs of the action up to the time when such payment into Court was made and of the issues or issue, if any, upon which he shall have succeeded.*
> >
> > *(3) The defendant shall be entitled to the costs of the action from the time such payment into Court was made other than such issues or issue as aforesaid.*
> >
> > *(4) The costs mention in paragraphs (2) and (3) hereof shall be set off against each other; and if the balance shall be in favour of the defendant, the amount thereof shall be satisfied pro tanto out of the money remaining in Court and, in so far as the money remaining in Court is not sufficient to satisfy the same, shall be recoverable from the plaintiff; or if the balance shall be in favour of the plaintiff, the amount thereof shall be recoverable from the defendant.*
> >
> > *(5) Any money remaining in Court after satisfying the balance (if any) due to the defendant for costs as aforesaid shall be paid out to the plaintiff.*
> >
> > *(6) If in any case the Court is of the opinion that for the purposes of the preceding paragraphs of this rule it is not necessary to retain in Court the whole of the balance referred to in paragraph (1) it may order the payment out to the plaintiff of so much thereof as it deems proper.*
> >
> > *(7) The amount awarded to the plaintiff shall be deemed to be satisfied by the application in manner aforesaid of the moneys paid into Court."*

Chronology

13. In view of the submissions made on behalf of the plaintiff, it is necessary to set out a detailed chronology of the relevant dates in the course of the proceedings.

14. The plaintiff issued her personal injury summons on 2nd April, 2012. A defence was filed on behalf of both defendants on 28th June, 2013. This put all matters in issue between the parties. A notice of trial was issued on 10th June, 2015.

15. On 18th March, 2016, the parties agreed to refer the dispute to mediation. The defendants agreed to pay the costs of the mediation and agreement was reached between the parties that a particular senior counsel should be appointed as mediator. The mediator scheduled the mediation for 30th May, 2016. From the booklet of correspondence, which has been provided to the court by the plaintiff's solicitor, it appears that by letter dated 28th February, 2016, the defendants' solicitor had informed the plaintiff's solicitor that the first named defendant had become ill and was not in a position to give instructions to his solicitors. In the months between March and May 2016, correspondence passed between the solicitor acting for the defendants and the plaintiff's solicitor concerning the agreed booklet of documents, which would be furnished to the mediator in advance of the mediation. However, on 18th May, 2016, the defendants' solicitor wrote stating that his client would be unable to attend the mediation on 30th May, 2016. He indicated that he would be in contact again as soon as he was in position to propose an alterative date. In the events which transpired, the mediation was not held on 30th May, 2016. By letter of the following day, the defendants' solicitor stated that they were willing to engage in mediation, however, they would only be in a position to do so when their client was well enough. This position was reiterated in a further letter dated 7th June, 2016, wherein the defendants' solicitor pointed out that his client had agreed to mediate, however, no date for the mediation had been agreed by them, due to the fact that their client was unwell. He repeated that they remained willing to engage in mediation, but could not agree a date until his client was well enough. No mediation was ever held between the parties.

16. In the summary of correspondence provided by the plaintiff's solicitor, there is reference to a letter having been written by the defendants' solicitor on 22nd July, 2016, making an offer of settlement in the sum of €180,000. However, this letter was not contained in the booklet of correspondence.

17. On 27th September, 2016, the defendants made a lodgement, with a denial of liability, in the sum of €280,000. On 4th October, 2016, the plaintiff served particulars of her past and future loss of earnings and of other items of special damage.

18. On 20th January, 2017, an Order was made by Cross J. permitting the defendants to increase the lodgement. The order also directed the plaintiff to deliver a notice of an offer of terms of settlement pursuant to s. 17 of the Civil Liability and Courts Act 2004, by 2pm that day. The plaintiff was ordered to pay the defendants' cost of the motion. It is relevant to note that this order was made on consent of the parties.

19. On 23rd January, 2017, the defendants served a notice of additional lodgement in the sum of €170,000, bringing the overall lodgement to €450,000. The plaintiff did not accept either the initial lodgement, or the increased lodgement, within the time prescribed by the rules of court, or at all.

20. On 30th January, 2017, the plaintiff served further particulars of personal injury and further particulars of special damage. On 1st February, 2017, the defendants' solicitor wrote an open letter to the plaintiff's solicitor withdrawing liability. The relevant portion of that letter was in the following terms:-

> *"In order to narrow the issues for determination by the court during the trial commencing on 3rd February, 2017, the*

first named defendant is prepared to make an admission regarding breach of duty in respect of the procedure on 6th April, 2010. The first named defendant is also prepared to admit that the plaintiff's ureter was damaged and that she suffered damage to her kidney as a result.

Please note that these are limited admissions which the first named defendant is making and we do not admit any other aspect of the plaintiff's claim including the injuries suffered by the plaintiff and the quantum aspects of this claim."

21. According to the summary of correspondence provided by the plaintiff's solicitor, the action was listed for hearing on 3rd February, 2017, but was unable to get on due to the unavailability of a judge to hear the case that day. He stated that negotiations were held between the parties, wherein the defendants' counsel indicated that he would recommend to his clients to pay €475,000 to settle the action. However the plaintiff wanted €500,000 to settle her action. It appears that the negotiations broke down at that point.

22. On 7th April, 2017, the defendants' solicitor made an offer which was expressed to be "*Without Prejudice Save as to Taxation of Costs*", whereby the defendants offered the sum of €300,000, plus repayment of the plaintiff's recoverable benefits, plus costs to be taxed in default of agreement, in full and final settlement of the action. On 28th April, 2017, the defendants' solicitor wrote a further letter repeating this offer on the same terms. By further letter of the same date, the defendants' solicitor wrote concerning the necessity to call various witnesses, having regard to the withdrawal of the issue of liability. Towards the end of the letter, he stated "*Although breach of duty has been admitted, causation and the remaining aspects of this case are very much in issue*".

23. On 3rd May, 2017, the plaintiff's solicitor wrote rejecting the offer of €300,000, but asked if the lodgement of €450,000 was still available. It does not appear that the defendants' solicitor specifically responded to this query. However, one can assume that the answer was in the negative, because on 11th May, 2017, he wrote a further Calderbank letter, repeating the offer of €300,000 on the terms previously set out. He stated that the offer would remain open until 5pm on the following day, 12th May, 2017. He stated that if the offer was not accepted by that time, he was instructed to proceed to defend the case at trial. By letter dated 15th May, 2017, the plaintiff's solicitor responded, "*We note that you have withdrawn your tender and substituted the figure of €300,000 which is also, now withdrawn*". There was no further relevant correspondence.

24. The action was heard over eleven days on the following dates: 23rd, 24th, 25th, 26th, 30th and 31st May, 2017, 1st and 16th June, 2017, 4th and 7th July, 2017. At the conclusion of the hearing, judgment was reserved. In a judgment delivered on 20th October, 2017, the plaintiff was awarded damages in the sum of €260,111.25.

The Defendants' Submissions

25. The defendants made two submissions in support of their application for costs. Firstly, counsel submitted that in this case, the defendants had made a lodgement on 27th September, 2016, which was later increased on 23rd January, 2017. The plaintiff had not accepted either the initial lodgement, or the increased lodgement. Having rejected the lodgements, the plaintiff elected to pursue her action to a full hearing. The plaintiff had obtained damages against the defendants, but had not beaten either the initial lodgement, or the increased lodgement. Accordingly, it was submitted that the defendants were entitled to the costs of the action from the date of the first lodgement.

26. Counsel submitted that the provisions of O. 22, r. 6 were very clear in relation to what should happen in relation to the award of costs when a plaintiff did not beat a lodgement. The rules clearly stated that a defendant was entitled to his costs from the date of lodgement onwards. Counsel submitted that there was no reason to depart from that general rule in this case.

27. Secondly, by way of alternative submission, counsel stated that the rules did not specify whether the costs consequences should take effect from the date of the original lodgement, or from the date of the increased lodgement. He accepted that this was somewhat of a lacuna in O. 22, r. 6. He pointed out that in relation to actions to which s. 1(1) of the Courts Act 1981 did not apply, O. 22, r. 1(2) provided:-

> *"A defendant may once, without leave, and upon notice to the plaintiff, pay into Court an additional sum of money as an increase in a payment made under paragraph (1) hereof. Such notice must be given and payment made at least three months before the date on which the action is first listed for hearing. Such increased lodgement shall thereupon become the sum paid into Court and the date of such increased payment the date of the payment into Court. If such notice is not given, and such payment not made as aforesaid the payment made, under paragraph (1) shall be deemed to be the only payment into Court and this Order shall be construed accordingly."*

28. Counsel submitted that the precise effect of this provision as regards subsequent lodgements was somewhat unclear. However, he pointed out that there was no equivalent provision in O. 22 for actions to which s. 1(1) of the Courts Act 1981 applied. The present case came within that section. He submitted that the absence of such words from the equivalent provision dealing with actions such as the present proceedings was not immaterial. He submitted that it was open to the court to conclude that the correct interpretation of O. 22, r. 6, was that each and every lodgement remained of effect in the case and a plaintiff who rejected all lodgements, proceeded at their peril depending on which lodgement they failed to beat. Counsel accepted that if the court found that the date of lodgement was the date of the increased lodgement, then having regard to its proximity to the date which had been set for the hearing of the action, being 3rd February, 2017, that lodgement would only cover the defendants' costs as and from day 2 of the hearing onwards. However, he reiterated that his primary submission was that as the plaintiff had failed to beat the initial lodgement, the defendants were entitled to their costs from that date onwards.

The Plaintiff's Submissions

29. Counsel for the plaintiff resisted the defendants' application for costs on a number of grounds. Firstly, counsel submitted that the general rule is that costs should follow the event. In this case, the plaintiff had sued the defendants and had succeeded in obtaining judgment against them. However, he conceded that a court had a discretion in relation to an award of costs. It could depart from the general rule outlined above, where it was necessary to do so. However, the court must identify and articulate the reasons for departing from the general rule that costs follow the event. The factors justifying the departure from the general rule must be identified and must justify the departure from the rule and be based on the particular facts of the case, including the conduct of the parties. The decision to depart from the general rule must be exercised judicially, must be done on a reasoned basis, which was clearly explained and must be based on grounds rationally connected to the facts of the case. He submitted that the "*overarching test*" was that described by Laffoy J. in *Fyffes plc v. DCC plc* [2006] IEHC 32, as being one which was justice related.

30. Counsel referred to the following *dicta* from the judgment of McKechnie J. in *Godsil v. Ireland & Anor* [2015] IESC 103, where he stated as follows at para. 24 in relation to whether one had established an exception to the general rule that costs follow the event:-

> *"24. Following recent case law, it has been suggested and indeed it may be possible in certain instances, to loosely group together some cases for the purposes of either the rule or the exceptions, nevertheless it remains very much the situation that one cannot rigidly define or prescriptively describe the type, kind or category of case which by virtue of such classification, will always fall within the rule or within the exception, as the case may be. Cases will inevitably be borderline some of which will sit either side of the rule. To so determine, as Murray C.J. said in Dunne, will require a case by case analysis."*

31. Counsel also referred to para. 53 of the same judgment, wherein McKechnie J. had approved the principles set down by Clarke J. in *Veolia Water Consortium v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 and stated as follows in relation to the general rule that costs follow the event:-

> *"53. For the rule to apply quite evidently there must be an 'event(s)', which is capable of identification. In most cases that will not cause a difficulty, but in some it might. There may be situations which it can be said involve numerous issues, sometimes discreet and sometimes inter-related. The Veolia Water Consortium v. Fingal County Council (No. 2) [2007] 2 I.R. 81, gives assistance in this regard. When a multiple issue case requires assessment in light of the decision, the courts in more recent times have become more discerning and nuanced in their approach, sometimes awarding less than full costs and sometimes determining costs relative to issues which have been won or lost as the case may be. Such an approach, as well as perhaps being fairer can also be considered as part of the court's function to regulate in an expeditious and cost effective manner, complex litigation which ever increasingly now appears before it. Care however, must be taken: not all cases will be suitable for such analysis and even when applied, the overall picture must not be lost sight of."*

32. Turning to the rules in relation to the awarding of costs where a plaintiff has failed to beat a lodgement, counsel for the plaintiff accepted that O. 22, r. 6 provided that where a sum had been paid into court with the defence and the amount awarded to the plaintiff was not more than the sum paid into court, then unless the judge at the trial for special cause shown and mentioned in the order otherwise directs, the excess by which the amount in court exceeds the amount awarded to the plaintiff shall be repaid to the defendant and the balance shall be retained in court. The rules further provided that the plaintiff shall be entitled to the costs of the action up to the time when such payment into court was made and was entitled to the costs *"of the issues or issue, if any, upon which he shall have succeeded"*. The defendant would be entitled to the costs of the action from the time of such payment into court, other than in respect of the issue or issues upon which the plaintiff had succeeded.

33. Counsel submitted that when the court was considering whether the provisions of O. 22, r. 6 should apply in relation to the defendants' costs after the date of lodgement, the court was entitled to have regard to the conduct of the parties, both prior to the hearing of the action and during the trial itself. In this case, the court was entitled to have regard to the fact that while the defendants had agreed to submit the dispute to mediation, their solicitor wrote to the plaintiff's solicitor in the days leading up to the scheduled date for the mediation indicating that his client would not attend the mediation, scheduled for 30th May, 2016. While the court may have some sympathy for the first named defendant, due to his ill health at that time, no effort was made by the defendants to reschedule the mediation for any subsequent time. Counsel submitted that the court should have regard to the analogous position which would apply where an order had been made by the High Court under O. 56A inviting the parties to attend mediation. In such circumstances, O. 99, r. 1B, provided that when considering the awarding of costs of any action, the court may, where it considered it just, have regard to the refusal or failure without good reason of any party to participate in any A.D.R. process.

34. While no such order had been made by the court in these proceedings, the parties had nevertheless indicated to the list judge, when the matter was in the list for mention, that they would submit their dispute to mediation. It was submitted that the court was entitled to have regard to the failure on the part of the defendants to follow through on their agreement and attend a mediation conference. It was further submitted that in such circumstances, the court should refuse the defendants' application for costs.

35. Secondly in relation to the increase of the lodgement in January 2017, counsel submitted that in ordinary circumstances, a defendant seeking liberty to increase the amount of money which he has paid into court with his defence, may properly be required, as a condition of being granted such liberty, to undertake to pay the plaintiff all costs incurred, or ordered to be paid by him since the date of the first payment into court. In support of this contention, counsel referred to the decision in *Ely v. Dargan* [1967] I.R. 89 and in particular, to the following dicta of Ó Dhálaigh C.J. at p. 95:-

> *"Cases may arise in which there are circumstances that require special consideration; but, short of this, my opinion is that in the ordinary case where a defendant wishes to increase the amount of his original lodgment he may properly be required, as a condition of obtaining liberty, to restore the plaintiff to the position in which he would have been if the increased lodgment had been an original lodgment made under the Rules without leave; that is to say, that the defendant should undertake to recoup the plaintiff in respect of all costs already incurred, or ordered to be paid by him, subsequent to the date of the original lodgment."*

36. Counsel submitted that based on this decision, as the defendants had been allowed to increase their original lodgement in January 2017, it followed that they had to undertake to pay all the plaintiff's costs up to the date of the increased lodgement, which would include the brief fees and other costs incurred in preparation for the first day of the hearing of the action. He submitted that this obligation to pay the plaintiff's costs arose by virtue of the fact that the defendants had been allowed to improve their position by increasing the lodgement. Since they increased the lodgement they had to pay the plaintiff's costs up to that date. The plaintiff was entitled to those costs even though she had not beaten the lodgement.

37. Thirdly counsel submitted that the court could have regard to the fact that prior to the actual hearing of the action, the plaintiff had obtained a number of previous hearing dates, which had had to be vacated due to the fact that the defendants were not in a position to proceed on those dates. It was submitted that the plaintiff should be awarded her costs in respect of the dates which had to be vacated.

38. In his fourth submission, counsel submitted that it was clear from the provisions of O. 22, r. 6 that where a defendant had lodged a sum of money in satisfaction of the plaintiff's claim, but continued to contest liability, if the plaintiff succeeded on some issues at trial, he would still be entitled to a portion of his costs after the date of the lodgement, notwithstanding that he may not have beaten the lodgement.

39. In support of this contention, counsel referred to the Supreme Court decision in *Harrison v. Ennis* [1967] I.R. 286. In that case, the plaintiff had been walking across a road at night, when he was struck and injured by a motor vehicle driven by the defendant. The plaintiff brought an action in the High Court claiming damages for the defendant's negligence. In his defence, the defendant denied negligence, pleaded that the plaintiff had been guilty of contributory negligence and denied that he had suffered injury, loss or

damage. The defendant had paid money into court in satisfaction of the plaintiff's claim. Following the hearing, the plaintiff did not beat the lodgement. In the High Court, the judge had held that the plaintiff had succeeded on some issues in respect of liability and was, therefore, entitled to some of his costs after the date of lodgement, which he measured in the same proportion as the jury had done on the finding on liability. On appeal, the Supreme Court held that there had been three main issues in the case; negligence, contributory negligence and quantum. The defendant had succeeded in respect of the issues of contributory negligence and quantum, but the plaintiff had been successful on the issue of negligence, as he had established that there had been negligence on the part of the defendant, which had been denied in his defence. The Supreme Court disagreed with the High Court judge that the amount of the plaintiff's costs post lodgement, should be measured in accordance with the findings on liability which had been made by the jury. Instead, the Supreme Court held that the defendant was entitled to the costs of the action from the date of lodgement, but that the plaintiff was entitled to his costs after the date of lodgement in respect of the issue of negligence.

40. Counsel submitted that in this case, while there had been a withdrawal of the issue of negligence by virtue of the defendants' solicitors letter dated 1st February, 2017, that letter had gone on to make it clear that the defendants were only making "*limited admissions"* and they explicitly stated "*We do not admit any other aspect of the plaintiff's claim including the injuries suffered by the plaintiff and the quantum aspects of this claim".*

41. This stance was further elaborated upon by the clarification which was issued on behalf of the defendants by Mr. Mills, B.L., on day 2 of the hearing:-

> *"I think I can indicate the following: in relation to investigations arising out of the surgery of April 2010, the defendant admits that those investigations, the various cystoscopies and other procedures that were carried out in 2010 and in 2011 and in 2012, did arise as a consequence of the surgery of April 2010. Insofar as the question of a nephrectomy arises, it is accepted that the nephrectomy also arose from the complications of the injury caused to the plaintiff's left ureter in April 2010; with this caveat which is that the evidence will show that ultimately the plaintiff was offered a number of alternatives in relation to her treatment through 2011, 2012 and into early 2013 and while it is accepted that the left nephrectomy arose as a complication of the procedure in April 2010, it will be a matter for the court as to what weight, if any, and the court may attach no weight to it, there is to be attached to the fact that it was a procedure that the plaintiff elected to undergo from among a number of alternatives that were presented to her.*

That is the limit of the admissions that I am in a position to make. I know that Mr. Reidy adverted to persistent bladder problems and there will be a significant contest on the question of whether or not the surgery carried out on her, could have been expected to give rise to significant bladder dysfunction and there will be a significant contest on the question of whether or not she does have significant ongoing problems in that part."

42. Mr. Reidy, S.C., submitted that having regard to the content of those concessions, it was clear that the issue of whether there had been any injury to the plaintiff's bladder was a live issue between the parties at the trial of the action. He submitted that such issue was part of the general issue of liability. As the court in its judgment had accepted the evidence given by the plaintiff and tendered on her behalf by Dr. Miller and had found that there had, in fact, been an injury to her bladder, the plaintiff had, therefore, succeeded on the issue of liability. This was an issue in respect of which she was entitled to recover her costs, even though she had not beaten the lodgement.

43. A further issue on which the plaintiff had succeeded was in relation to the defendants' application pursuant to s. 26 of the Civil Liability and Courts Act 2004. Counsel submitted that in some cases it may be possible to identify with precision a particular area, which can be subjected to a costs order, which is different from the order made in respect of the remainder of the costs of the proceedings. He submitted that the defendants' s. 26 application was one such issue. It was submitted that that application had been founded on the basis that the plaintiff's entire claim was fraudulently conceived and based on deliberately false and misleading evidence. If the court was satisfied that the plaintiff had given false and misleading evidence, it could dismiss the entire claim. It followed that the attack on the plaintiff's credibility and the use of the s. 26 application, had one purpose: to have the plaintiff's entire claim dismissed. That was the only remedy available under that section. If successfully invoked, the court had no discretion (save where injustice would be done) but to dismiss the entire claim. Counsel noted that it had been described as a draconian procedure and was one that should not be likely invoked: see *dicta* of O'Neill J. in *Smith v. HSE* [2013] IEHC 360, at para. 92.

44. Counsel submitted that having regard to the draconian nature of the remedy under s. 26, the procedure could not be described as "*collateral*", nor could it be said that it did not go to the heart of the trial. Counsel submitted that as that application had failed, the question arose as to what sanction should be imposed on the defendants for seeking to undermine the basis of the plaintiff's claim in its entirety and for failing in that regard. It was submitted that there has been no judicial determination of the sanction that should be applied, but it was submitted that it was clear from *dicta* of the Court of Appeal and the Supreme Court, that spurious use of s. 26, was not to be supported. Counsel submitted that the appropriate sanction should be an allowance of aggravated damages and/or full costs to the plaintiff, on the basis of solicitor and own client costs.

45. Finally, counsel for the plaintiff submitted that it was clear from the defendants' submissions that after the defendants had apparently investigated the plaintiff's claim for loss of earnings, the defendants no longer relied upon the increased lodgement. Counsel submitted that the lodgement was effectively withdrawn following the making of the Calderbank offers in April and May 2017. It was clear from the correspondence and in particular from the letter from the defendants' solicitor dated 7th April, 2017, that the lodgement was no longer operative and that the defendants had instead made an offer of €300,000 on certain terms. In these circumstances, it was submitted that the defendants were not entitled to rely on either or both of the lodgements since they had been withdrawn. The final letter from the plaintiff's solicitor had noted that both the lodgement and the Calderbank offers had been withdrawn. There was no further letter of offer. The defendants did not respond to the letter dated 15th May, 2017. Throughout the trial, there had been no money on the table for the plaintiff to accept. That position continued throughout the trial. It was submitted that in these circumstances, the initial lodgement and the increased lodgement had ceased to be operative.

The Defendants' Submissions in Reply

46. The defendants' counsel made brief submissions in response to the plaintiff's submissions. Firstly, he stated that the lodgement had never been "*withdrawn*" by the defendants. The lodgement was an offer which remained open for a period of fourteen days. If it was not accepted by the plaintiff within that period, it thereafter was a threat, which hung over the plaintiff for the duration of the trial. It was never withdrawn or made ineffective at any stage. Once the lodgement had been properly made it existed for the benefit of the defendants until the end of the trial. The making of subsequent offers, either by way of Calderbank letter, or during negotiations between counsel, did not affect the efficacy of the lodgement.

47. In relation to the lack of any offer during the hearing itself, counsel submitted that the plaintiff had made an extraordinary submission to the effect that she had to be provided with offers throughout the case. That was simply not correct. The defendants

had made an initial lodgement and had then increased it. Both the initial lodgement and the increased lodgement were refused by the plaintiff. The defendants did not have to make any further offers to the plaintiff. The fact that the defendants had made subsequent offers, did not affect the efficacy of the lodgement.

48. In relation to the s. 26 application, it was submitted that this was dealt with in the *dictum* of Finnegan P. in *Grant v. Roche Products* [2005] IEHC 161, where the effect of not beating a lodgement where both liability and quantum were in issue, was explained:-

> *"Thus even if two issues arise in an action, that is liability and quantum, and the Defendant lodges money in court without an admission of liability, if the Plaintiff succeeds on liability but fails to achieve an award in excess of the sum lodged in court in the ordinary case the Plaintiff will not be awarded the costs of the liability issue after the date of lodgement. That is the position within this jurisdiction."*

49. Counsel noted that the judgment of Finnegan P. in the High Court had been upheld on appeal to the Supreme Court. It was submitted that the *dictum* of Finnegan P. was a correct statement of the law. If a lodgement is made without an admission of liability, the plaintiff must do two things: establish liability and beat the lodgement. That remained the case, even if a s. 26 application was made at the conclusion of the hearing.

50. Without prejudice to the generality of that submission, counsel further pointed out that a s. 26 application was collateral to the main issues at the hearing. It was an application which arose at the end of a hearing based on the nature of the evidence given by the plaintiff, or other witnesses on her behalf. No witnesses had been called, nor any evidence submitted on the s. 26 application itself. There was no additional time spent investigating this issue, save for the length of time during which the application itself was made at the conclusion of the hearing. On this basis, there was no justification to support any separate order for costs in favour of the plaintiff due to the fact that she had succeeded in resisting that application.

51. Finally, the plaintiff had submitted on the basis of the Supreme Court decision in *Grant v. Roche Product* [2008] 4 I.R. 679, that because there were issues that required the judgment of the court that, therefore, the lodgement was not effective. That was simply not correct. That case dealt with a separate matter, namely whether the defendant could effectively block the further prosecution of the proceedings by means of its open offer agreeing to pay the plaintiff the totality of the damages which he could obtain under the particular statutory tort. The Supreme Court had held that the award of damages was not the sole benefit of the litigation which might be available to the plaintiff, if he was successful in establishing liability at the trial of the action; in particular, the plaintiff would have the benefit of a finding that the death of his son had been due to the wrongful act of the defendants, rather than being an unexplained suicide. It was held that the plaintiff was entitled to vindicate the right to life which had been held by his son. In these circumstances, the Supreme Court held that it was not an abuse of process for the plaintiff to proceed with the action, notwithstanding that the defendants had made an open offer in respect of the totality of the monetary damages which he could hope to recover in the action. Counsel further submitted that in this case, just because the plaintiff had chosen to litigate her constitutional rights in the face of a lodgement, that did not deprive the defendants of the right to make a lodgement pursuant to the rules of court.

Conclusions

52. The court has been greatly assisted by the written and oral submissions made by Mr. Reidy, S.C., on behalf of the plaintiff and by Mr. Mills, B.L. on behalf of the defendants. In essence, the plaintiff appears to accept that the general rule in a personal injuries action is that where a plaintiff does not beat a lodgement, the plaintiff is liable to pay the defendants' costs from the date of lodgement onwards. However, the plaintiff has submitted that there are a number of grounds on which that general rule should not be applied, or should be ameliorated, in the circumstances of this case. I propose to deal with each of the plaintiff's grounds of objection in turn.

53. The first objection raised by the plaintiff, was to the effect that as the defendants had failed to honour their agreement to submit their dispute to mediation, the defendants should not be awarded any costs. The court was urged to apply the same reasoning as was provided for under O. 99, r. 1B, which applies where an invitation to mediate has been issued by the court pursuant to Order 56A. O. 99, r. 1B provides that the High Court in considering the awarding of costs, may where it considers it just, have regard to the refusal or failure without good reason of any party to participate in any A.D.R process, where an order has been made pursuant to O. 56A in the proceedings. Counsel submitted that while no such order had been made in this case, the court should exercise its overall discretion to refuse the defendants' their costs, due to the fact that they had agreed to send the dispute to mediation, but subsequently repudiated that agreement and never sent the matter to mediation.

54. This submission raises an interesting question, as to whether the pre-trial conduct of a party in refusing to send a matter to mediation, could deprive that party of the benefits of a lodgement which was subsequently properly made pursuant to the rules of court. However, it does not seem to me that it is necessary to resolve that question in this judgment. I am satisfied having regard to the content of the correspondence that passed between the solicitors, that the defendants did have a bona fide intention to participate in a mediation. They had agreed to submit the dispute to mediation; they had agreed to pay the costs of the mediation; and they had agreed to a particular senior counsel being appointed as mediator. It is clear from the correspondence that the only reason why they did not participate in the mediation, which had been scheduled for 30th May, 2016, was due to the fact that the first named defendant had become ill in February 2016 and remained ill down to the month of May, 2016 and beyond. I am satisfied from the correspondence subsequent to that date that the statement made by the defendants' solicitor to the effect that they remained willing to go to mediation as soon as the first named defendant was well enough to do so, was a genuine statement of their intention at that time.

55. In the circumstances, it cannot be said that the defendants had refused or failed to go to mediation "*without good reason*". The ill health of the first named defendant was a good and sufficient reason why they could not proceed to a mediation at that time. Accordingly, this submission on behalf of the plaintiff is not well founded.

56. The plaintiff's second submission was to the effect that as the defendants had increased the lodgement in January 2017, then on the basis of the decision in *Ely v. Dargan*, a pre-condition for the defendant being allowed to make an increased lodgement at that time, would be that they agreed to pay all the plaintiff's costs up to that date. Thus it was submitted that the mere making of an increased lodgement by the defendants, meant that they were liable to pay the plaintiff's costs up to that time, irrespective of whether the plaintiff beat the lodgement or failed to do so.

57. There are two problems with this submission. Firstly, there was no such pre-condition included in the terms of the Order made by Cross J. on 20th January, 2017, which permitted the defendants to increase their lodgement. Secondly, the reason for such absence, was due to the fact that there was no need for any such specific provision. Once the defendants made an increased lodgement, this

automatically had two consequences: firstly, the period for acceptance of the lodgement, which was then an increased lodgement, was reopened for a further period of fourteen days and, secondly, the making of the increased lodgement carried with it the implicit agreement on the part of the defendants to pay all the plaintiff's costs up to the date of the increased lodgement, should the plaintiff elect to accept such lodgement.

58. Those are the provisions which apply in the ordinary course of events where a lodgement is increased prior to the trial of the action. The circumstances in *Ely v. Dargan* were quite different. In that case, the defendant had lodged the sum of £7,000 into court with his defence. In the High Court, a jury awarded the plaintiff £13,000 as damages. The defendant appealed and the Supreme Court set aside the award as being excessive. They directed that there should be a new trial. They ordered the plaintiff to pay the defendant his costs of the appeal and ordered that the costs of the original trial should abide by the result of the new trial. Subsequently, the parties sought to compromise the action, but the High Court refused to rule the amount of the proposed settlement. The defendant then applied to the High Court for liberty to increase the amount of money that he had paid into court. The High Court granted the defendant liberty to do so, but on terms that were not acceptable to him. The defendant appealed to the Supreme Court. That court found that the defendant should be given liberty to make an increased lodgement, but only on terms that he should undertake to pay the plaintiff's costs up to the date of lodgement. This was necessary due to the fact that by that time, the plaintiff had incurred the costs of the original trial, which costs would have to await the outcome of the re-trial. As the defendant was effectively being given the opportunity to mend his hand, or improve his position, in particular in the light of the original trial and the appeal to the Supreme Court, it was felt appropriate that he should only be allowed to do so, if he undertook to pay all the plaintiff's costs up to the date of the increased lodgement, including the costs of the first trial.

59. I do not think that this case is on all fours with the decision in *Ely v. Dargan*. In this case, the plaintiff consented to the High Court giving the defendants liberty to increase their lodgement. They did so in advance of any evidence being heard at the trial of the action. As already noted, by making such increased lodgement, this re-opened the door for the plaintiff to accept the increased sum on offer and carried with it the agreement of the defendants to discharge all the plaintiff's costs up to the date of the increased lodgement. That is the usual consequence of increasing a lodgement. In the absence of any specific provision in the Order of the High Court giving the defendants liberty to increase their lodgement, it is not reasonable to hold that by merely making an increased lodgement, which was refused by the plaintiff, and which she did not beat at the trial, that the defendants should therefore be held to be only entitled to their costs subsequent to the date of the increased lodgement. Accordingly, I do not accept this submission.

60. The third submission on behalf of the plaintiff was, to the effect, that because a number of previous hearing dates had to be vacated on the application of the defendants, that the plaintiff should be awarded the costs in respect of those dates on which the action did not proceed. I have heard no evidence as to when exactly such applications were made, nor as to the precise reasons as to why the defendants were not in a position to proceed on previous occasions. It seems to me that if the plaintiff wished to obtain such an order, she should have sought an order for her costs at the time that the defendants applied to the list judge for an order vacating the hearing dates. In the absence of such an order from the list judge, or in the absence of an order by him reserving the question of the costs of the vacated dates to the hearing of the action, I see no basis on which I could now penalise the defendants by making them liable for any costs incurred by the plaintiff in not being able to take up a hearing on the dates which had been allocated for the hearing of the action. Accordingly, I decline to make any such order for costs against the defendants on this ground.

61. The plaintiff's fourth submission was to the effect that O. 22, r. 6 specifically provides that where a plaintiff fails to beat a lodgement, the plaintiff shall be entitled to the costs of the action up to the time when such payment into court was made and of the issues or issue, if any, upon which he shall have succeeded. The rules also provide that the defendants shall be entitled to the costs of the action from the time such payment into court was made, other than such issue or issues as aforesaid. It was submitted that in this case even though the defendants had conceded the issue of liability in the letter from their solicitor dated 1st February, 2017, and had further clarified their position in the statement of counsel on day 2 of the hearing, it was clear that the issue of causation remained in issue, in particular the issue as to whether any injury had been caused to the plaintiff's bladder as a result of the negligent acts of the first named defendant. In these circumstances, it was submitted that the issue of liability remained in issue in the proceedings. As the plaintiff had been successful in establishing that due to the negligent acts of the first named defendant an injury had been caused to her bladder, she was entitled to recover her costs in respect of this issue.

62. Counsel for the plaintiff relied on the judgment of Walsh J., giving the majority judgment of the Supreme Court in *Harrison v. Ennis* [1967] I.R. 286, and in particular to the following passage:-

> *"The plaintiff was entitled to the costs of the action up to the time of the payment into court. The question then to be considered is whether the plaintiff has succeeded in any issue in the case. The plaintiff, in my view, can be said to have succeeded on the issue of negligence in that he established negligence which had been denied and put in issue by the defendant. He has not succeeded on the contributory negligence issue. Order 22 provides that the plaintiff shall be entitled to the costs of the issue in which he did succeed. It goes on to provide, however, at Rule 6(3) that the defendant is entitled to the costs of the action where the amount awarded against him does not exceed the amount paid into court. In my view, therefore, the proper order in the present case was to award the costs of the action to the defendant as from the time of payment into court, other than the costs of the issue of the defendant's negligence, and to award to the plaintiff the costs of the issue of the defendant's negligence and to set off one against the other and, if the balance be in favour of the defendant, to direct that the amount thereof be satisfied out of the money remaining in court after the payment to the defendant of the difference between the amount lodged and the amount awarded, and to direct that the money remaining in court after satisfying the balance shall be paid out to the plaintiff."*

63. The plaintiff submits that as the question of the causation of any injury to the bladder, was kept in issue by the defendants, and as the plaintiff won on that issue, she is entitled to her costs of establishing that issue, notwithstanding that she did not beat the lodgement.

64. In response to that submission, counsel for the defendants has argued that the correct statement of the current law in this jurisdiction is as per the *dictum* of Finnegan P. in his judgment in *Grant v. Roche Product* in the High Court. That judgment is somewhat curious in two respects. Firstly, Finnegan P. treated the defendants open offer as a tender, even though it was not expressed as such, nor was it made in the form prescribed by the rules of court as set out in S.I. 328/2000. The defendants in that case had not made any lodgement or tender. This was possibly due to the fact that the making of a lodgement or tender, does not have the effect of blocking the further prosecution of a plaintiff's action. It merely constitutes an offer of a sum of money, which the plaintiff is free to accept or reject. If a plaintiff elects not to accept a lodgement, there are consequences for him if he does not beat the amount of the lodgement following the hearing of the action. However, in Grant, the defendants deliberately made an open offer, offering the plaintiff the entirety of the amount of damages which he could hope to recover under the statutory tort of wrongful death provided for under the Civil Liability Act 1961. The defendants then brought an application seeking to have the plaintiff's action struck out or stayed on the grounds that as they had proffered the entirety of the quantum of damages which the plaintiff could hope

to recover, there was, therefore, no "*tangible benefit*" which could be obtained by the plaintiff in pursuing the action and, therefore, justice and public policy dictated that the plaintiff should be prevented from pursing the action. As already noted, neither the High Court, nor the Supreme Court accepted that argument. However, for present purposes, it was submitted on behalf of the plaintiff, that the dicta of Finnegan P. referred to above, were obiter *dicta* insofar as they related to the effect of making a lodgement where there are multiple issues in a case.

65. The second curious feature is that in the portion of his judgment immediately preceding the portion referred to by counsel for the defendants, Finnegan P. noted that O. 22, r. 6 dealt with the effect of a payment into court on costs. The rule provides that if the amount paid into court exceeds the amount awarded to the plaintiff, the plaintiff is entitled to the costs of the action up to the time when such payment into court was made and of the issues or issue, if any, upon which he shall have succeeded. The judge went on to refer to the decision in *Wilcox v. Kettell* [1937] 1 All E.R. 222, where Clauson J. cited with approval a passage from the Annual Practice 1937 at p. 405:-

> *"If the Defendant in an action for unliquidated damages denies liability but pays money into court, and the Plaintiff proceeds with the action, there are two distinct issues raised, namely*
>
> *(a) Whether the defendant is under any liability to the plaintiff and*
>
> *(b) Whether the sum paid in is sufficient to cover the liability, if any.*
>
> *If the Plaintiff succeeds in recovering from the Defendant an amount which carries costs, even though it is less than the sum paid into court, he succeeds in the first of those issues, and is entitled to the whole costs of the action down to the payment in, and the subsequent costs of the issue on which he has succeeded. The above statement of the Practice was read and adopted in the judgments given in Powell v. Vickers, Sons & Maxim Limited (1907) 1 KB 71."*

66. In *Wilcox v. Kettell* the defendant paid £100 into court with a denial of liability; the plaintiff's claim being in trespass. The plaintiff recovered £31.10 shillings. It was held that the plaintiff should have his costs of the action up to the time of payment in and the subsequent costs of the issue of trespass and the defendant to have his costs since payment in on the issue as to damages. However, Finnegan P. went on to note that the present position in England and Wales was that set out in *Hultquist v. Universal Pattern and Precision Engineering Co. Ltd.* [1960] 2 All E.R. 266. He stated that where there was a payment in with a denial of liability, costs followed the event and it was very rare indeed that a plaintiff was awarded the costs of the issue of liability. He cited the following *dictum* of Sellers L.J. at p. 272:-

> *"The action of tort consists of wrongdoing and damage resulting therefrom: J. R. Munday Ltd. v. London County Council; and the plaintiff must prove both to obtain a judgment. On the face of it there can be no complaint and no ground for an order for costs on the issue of liability because the plaintiff is being called on to prove a case to establish his right to damages and has failed to get more than the amount in court. A payment in to court is an offer to dispose of the action and if accepted prevents all further costs. A plaintiff who continues an action after a payment in takes a risk and cannot normally complain if he has to pay all the costs which his acceptance of an award would have avoided."*

67. Thus, it may be that there is a conflict between the statement of law as set out by Finnegan P. in *Grant v. Roche Products* and the judgment of the Supreme Court in *Harrison v. Ennis*. I think that there is considerable weight to the submission made by counsel for the plaintiff to the effect that the *dicta* of Finnegan P. have to be seen as *obiter dicta*, given that there was no actual lodgement or tender in that case. In the circumstances, I feel that I am bound to follow the decision in *Harrison v. Ennis*, which seems to be in accordance with the terms of the rules themselves.

68. The provision in the rules, that a plaintiff who does not beat a lodgement, may still be awarded the costs of any issue on which he has succeeded at the trial, can give rise to considerable difficulty. Indeed, it has been suggested by certain academic authors, that this provision in the rules considerably dilutes the efficacy of the lodgement procedure; see Delaney and McGrath "*Civil Procedure in the Superior Courts*", 3rd Edition, paras. 18-36 to 18-38.

69. However, I cannot accept the submission made by Mr. Reidy S.C. on behalf of the plaintiff that the issue of causation of an injury is part of the issue of liability and that therefore the issue of liability continued to be live at the trial of the action, notwithstanding the letter issued by the defendant's solicitor on 1st February, 2017 and the concessions made by the defendant's counsel on day 2 of the hearing. It seems to me that in a personal injuries action, causation is always part of the issue of quantum. If one takes, for example, a simple road traffic accident where the defendant's car crashes into the plaintiff's car. If the defendant concedes liability, this relieves the plaintiff of having to establish any negligence on the part of the defendant for causation of the accident. However, the issue of causation of his injuries may remain live as part of the issue of quantum. It often happens that the defendant will concede that he was responsible for causing the accident, but will deny that he was responsible for some or all of the injuries alleged by the plaintiff. He may allege that some of the injuries of which the plaintiff complains, were in fact caused by some extraneous cause, such as the onset of arthritis, or the fact of pre-existing degenerative changes in the plaintiff's spine, which simply became symptomatic with the passage of time. If the plaintiff disagrees with that assertion, there may well be a contest as to whether certain injuries were caused by the accident, or were due to some pre-existing condition, or were due to some extraneous cause. Where such disputes exist, these are part of the overall issue of quantum. The tortfeasor is only liable for the injuries caused by his wrongful act. Therefore, the plaintiff bears the burden of proving that the injuries of which he complains, where caused by the wrongful act of the defendant. Thus, I am satisfied that the issue of causation in relation to injuries, is part of the issue of quantum and is not part of the issue of liability.

70. In the *Harrison* case it was held that there were three issues: negligence, contributory negligence and quantum. In this case, there was only one issue at the trial of the action. It is important to note that the increased lodgement was made on 23rd January, 2017. During the window when this increased offer was available for acceptance by the plaintiff, the defendant's solicitor by letter dated 1st February, 2017, withdrew the issue of liability. Thus, the plaintiff still had time to accept the increased lodgement, when she was notified that liability had been withdrawn. Had she needed extra time to consider the matter, in the light of the defendant's concession, she could have applied to the defendant for an extension of time within which to accept the lodgement, or she could have applied to court for an extension of time to accept the lodgement, had she wished to do so.

71. However the plaintiff elected not to accept the increased lodgement. By that time, there was only one issue which was going to be before the court, namely the issue of quantum. At its simplest, the defendants had offered the sum of €450,000 and indicated that if the plaintiff did not accept that sum, then in order to obtain her full costs, she would have to beat that sum following the trial of the action. The plaintiff elected to take that risk and she was unsuccessful in so doing. It seems to me that there was only one issue

at the trial of the action and it would be unrealistic to suggest that the plaintiff should be awarded any costs beyond the date of the lodgement, due to the fact that she was successful in establishing that there had been an injury to her bladder. That was merely one of the multiple parts which cumulatively made up her overall claim to damages. They did not constitute separate issues within the meaning of that term as set out in *Harrison v. Ennis*. To hold otherwise, would effectively make the lodgement procedure almost useless. While the plaintiff did not lose on the issue of quantum, in that she did indeed establish that she had suffered some injury, loss and damage as a result of the defendant's negligence, she did not beat the lodgement and accordingly she must pay the costs incurred by the defendants due to her election to pursue the action notwithstanding the lodgement that had been made.

72. An allied submission on behalf of the plaintiff was to the effect that because she had been successful in resisting the defendant's application pursuant to s. 26 of the 2004 Act, she should be awarded either aggravated damages and/or her costs. I think the defendants' submissions under this heading are well founded. Firstly, s. 26 was not an issue as such at the trial of the action. It was not something which was pleaded and either proved or disproved by either party. It was an application that arose solely on the basis of the evidence given by the plaintiff, or given on her behalf, at the trial of the action. As such, there was no additional time, nor any additional expense, involved in putting forward an application pursuant to s. 26 of the 2004 Act. Accordingly, even if the plaintiff were to be awarded the costs of that issue as such, it is difficult to see how any additional costs actually arose as a result of a consideration of that application.

73. Secondly, counsel for the plaintiff submitted that an application under s. 26 involved an allegation that the entire of the plaintiff's claim was fraudulent. It does not seem to me that that is a correct assertion. Section 26 provides that an application may be made to dismiss the entire of a plaintiff's claim, where the plaintiff has given, or has caused to be given evidence which he knows to be false or misleading in any material respect. Thus, it is not necessary for the defendant to establish that the entire of the claim is fraudulent; it is only necessary for him to establish that the plaintiff has given false or misleading evidence in a material respect.

74. While it is true to say that there are *dicta* in the Court of Appeal to the effect that spurious applications under s. 26 of the 2004 Act should be frowned upon and discouraged, that is a long way from supporting the proposition that where a defendant makes an unsuccessful application pursuant to s. 26, that they should be thereby disentitled from relying on the benefits of a lodgement made earlier in the case. I am not at all sure that in the absence of express provision, such a remedy would be open to this Court. However, it is not necessary for me to so decide. That the court found in favour of the plaintiff in resisting that application, does not imply that it was therefore a spurious or totally unfounded allegation. Having regard to the finding made in the substantive judgment, I am not satisfied that in making the s. 26 application, the defendants acted in such a way as to disentitle them to their costs, or prevent them from relying on the lodgement made by them in advance of the hearing of the action.

75. Finally, the plaintiff submitted that because the defendants had made offers subsequent to the date of the increased lodgement, they had effectively withdrawn the lodgement and therefore could not rely on it as a basis for seeking their costs. I can see no basis in law for that submission. A defendant is always entitled to use the procedures provided under the rules to protect their position. They did so in this case by making a lodgement in September 2016 and by increasing it in January 2017. The fact that they may have made subsequent offers by way of negotiations between counsel on 3rd February, 2017 and by way of the Calderbank offers made in April and May 2017, did not constitute any withdrawal of the increased lodgement made in January of 2017. Those were simply offers to compromise the action, which were made at the pre-trial stage. The plaintiff was perfectly free to accept or reject those offers. She chose to reject them and chose instead to proceed with her action to a full hearing. That was her entitlement. The making of the offers by the defendants, had no effect on the efficacy of the initial lodgement, or on the increased lodgement, both of which were made in accordance with the rules of court. Accordingly I do not accept the submission that the lodgement was effectively "withdrawn" by any subsequent conduct on the part of the defendants.

76. The decision of the Supreme Court in *Grant v. Roche Products*, does not support the proposition that because a plaintiff exercises her constitutional right to pursue her action to a trial, the defendants should not be entitled to rely on a lodgement properly made pursuant to the rules of court. That proposition is simply untenable.

77. It seems to me that in the circumstances of this case, there is no reason why the provisions of the rules as set out in O. 22, r. 6 of the Rules of the Superior Courts should not be applied. Even leaving aside the subsequent offers, the plaintiff had two opportunities to accept the lodgement and the increased lodgement, both of which were in excess of the sum that was ultimately awarded to her. She chose not to accept either sum. The only remaining question, is that raised by Mr. Mills B.L. as to whether the increase in the lodgement made in January 2017, should constitute the operative date of payment into Court for the purpose of calculating from when the defendants' entitlement to costs should run. While O 22, r. 6 is silent on this precise question, it seems to me that it accords with both logic and justice that the defendants should have the benefit of both the initial lodgement and of the increase thereof made in January 2017. The mere fact that they increased the amount of the lodgement, should not deprive them of the benefit of the fact that they had made an adequate lodgement back in September 2016, which the plaintiff chose to reject. As the plaintiff did not beat either the initial lodgement, or the increased lodgement, she must pay the defendants costs from the date of the initial lodgement on 27th September, 2016 onwards.

78. Accordingly, the court will make the following orders in relation to costs:-

(a) The plaintiff is entitled to her costs up to 27th September, 2016. Such costs to be taxed in default of agreement.

(b) The defendants are entitled to their costs from 28th September, 2016 to date. Such costs to be taxed in default of agreement.

(c) The sum of €260,111.25 is to be retained in court. The balance of the lodgement, together with any interest thereon, is to be returned to the defendants.

(d) When the plaintiff's costs and the defendants' costs have been ascertained, either by agreement or following taxation, they are to be set off one against the other and if there is a balance due in favour of the defendant, that can be satisfied out of the balance remaining in court, with the remainder thereof being paid out to the plaintiff.

(e) In the event that the plaintiff's costs exceed those of the defendants, the amount of such excess is to be paid by the defendants to the plaintiff and the sum of money remaining in court can be paid out to the plaintiff.