[2009] IEHC 563

THE HIGH COURT

2007 3158 P

BETWEEN

SHEILA O'DONNELL

PLAINTIFF

AND

GERARD MCENTEE

AND

SEAN TIERNEY

DEFENDANTS

JUDGMENT of Mr. Justice Kearns, President of the High Court, delivered on the 18th day of December, 2009

This case raises a point of considerable importance to legal practitioners who practice in the field of personal injuries. It arises from conflicting interpretations of the respective obligations of both plaintiffs and defendants arising under the provisions of s. 17 of the Civil Liability and Courts Act, 2004 (hereinafter "the Act").

Section 17 of the Act provides as follows: -

> *"(1) The plaintiff in a personal injuries action shall, after the prescribed date, serve a notice in writing of an offer of terms of settlement on the defendant.*
>
> *(2) The defendant in a personal injuries action shall, after the prescribed date, serve a notice in writing on the plaintiff—*
>
> (a) of an offer of terms of settlement, or
>
> (b) stating that he or she is not prepared to pay any sum of money to the plaintiff in settlement of the action.
>
> *(3) A copy of a formal offer shall, after the expiration of the prescribed period be lodged in court by, or on behalf of, the plaintiff or defendant, as the case may be.*
>
> *(4) The terms of a formal offer shall not be communicated to the judge in the trial of a personal injuries action until after he or she has delivered judgment in the action.*
>
> *(5) The court shall, when considering the making of an order as to the payment of the costs in a personal injuries action have regard to—*
>
> *(a) the terms of a formal offer, and*
>
> *(b) the reasonableness of the conduct of the parties in making their formal offers.*
>
> *(6) This section is in addition to and not in substitution for any rule of court providing for the payment into court of a sum of money in satisfaction of a cause of action or the making of an offer of tender of payment to the other party or parties to an action.*
>
> *7) In this section—*
>
> *"formal offer" means an offer under subsection (1) or (2)(a), or a statement under subsection (2)(b);"prescribed date" means such date before the date of the commencement of the trial of the personal injuries action concerned as is prescribed by order of the Minister;*
>
> *"prescribed period" means such period commencing on the prescribed date as is prescribed by order of the Minister."*

By Statutory Instrument dated 31st March, 2005 (S.I. No: 169 of 2005) it was provided:-

> *"3. For the purposes of section 17 of the Act of 2004, the prescribed date is the date upon which the personal injuries summons is served on the defendant.*
>
> *4. (1) For the purposes of section 17 of the Act of 2004, the prescribed period shall, in the case of proceedings in the Circuit Court or the High Court, be the period commencing on the prescribed date and ending on the expiration of 14 days after the service of the notice of trial in those proceedings.*
>
> *(2) For the purposes of section 17 of the Act of 2004, the prescribed period shall, in the case of proceedings in the District Court, be the period commencing on the prescribed date and ending on the expiration of 4 days after the delivery of the defence in those proceedings."*

In this case the plaintiff, having served notice of trial, has failed to make an offer. The defendants, by notice of motion dated 9th November, 2009, have sought an order directing that the plaintiff comply with the provisions of s. 17(1) of the Civil Liability and Courts Act, 2004 by serving a notice of writing of an offer on the defendants. The defendants further seek an order that the plaintiff comply with the provisions of s. 17(3) of the Act by forthwith lodging a copy of such formal offer in court.

The proceedings concern a medical negligence action arising in respect of injuries sustained by the plaintiff during an elective laparoscopic operation carried out on 25th April, 2005 at the Mater Private Hospital. It is alleged that as a direct consequence of the negligence of the defendants or either of them, the plaintiff suffered catastrophic injuries. The personal injuries summons was issued on 25th April, 2007. The solicitors then acting on behalf of the second named defendant delivered a defence on 5th February, 2008 and a defence was delivered on behalf of the first named defendant on 11th June, 2008. On 11th February, 2009, the same firm of solicitors came to be on record for both defendants. Notice of Trial of the action was served by the plaintiff's solicitors on 26th September, 2008. However, as already noted, this was not followed by the making of any offer of terms of settlement by either party.

However, there has been an exchange of correspondence between the parties which illustrates the difficulties which have arisen because of the conflicting interpretations attached by the respective parties to the statutory provisions.

By letter dated 4th February, 2009, the defendant's solicitors wrote to the plaintiff's solicitors in the following terms:-

> *"We now call on you to furnish your formal offer of terms of settlement, as prescribed by s.17 of the Civil Liability and Courts Act, 2004 by return and without delay"*

A reminder to the same effect was sent on 9th April, 2009. By letter dated 21st April, 2009 the plaintiff's solicitors indicated that the papers were with counsel for the purpose of considering the matter. The plaintiff's solicitor pointed out that "we would expect you to be in a position to have simultaneous exchange of formal offers in accordance with the legislation."

By letter dated 24th April, 2009 the defendant's solicitors replied stating that "simultaneous exchange" is not referred to in any part of s.17 of the Civil Liability and Courts Act, 2004. In reply the plaintiff's solicitors wrote:-

> *"You will be aware from previous dealings with our office that it is our firm's position that there is to be a simultaneous exchange of s.17 offers. This view is based on the legislation (you will also doubtless be aware of the Statutory Instrument 169/05 in addition to the 2004 Act), the Oireachtas debates concerning the passing of the Civil Liability and Courts Bill and Senior Counsel's Opinion. We do not intend to depart from this practice"*

When in September, 2009 the defendant's solicitors threatened a motion to seek to compel the plaintiff's advisors to deliver a formal offer, the plaintiff's solicitors indicated that they were willing to do so, but only on the basis that a contemporaneous exchange of offers would take place.

This proposition was declined by the defendant's solicitors who by letter dated 9th October, 2009 pointed out that a simultaneous exchange of offers could pose "real difficulties such as both offers being simultaneously accepted by the Plaintiff and the Defendant. The only approach to take is that the Plaintiff should make the offer first."

By letter dated 9th October, 2009, the plaintiff's solicitors set out their position more fully as follows:-

> *"Firstly, we are awaiting receipt of a care report and until such time as we have received this report we are not in a position to finalise the sums claimed on behalf of the plaintiff in relation to special damages….*
>
> *Arising out of the second point you are clearly not in a position to determine what experts you intend calling at the hearing of this action. We are aware that you have also not arranged for any assessments of the plaintiff in respect of the heads of specials damage claimed such as aids and appliances, nursing care or alterations to the family home. In those circumstances we fail to see how you would expect to be in a position to exchange a Formal Offer with us whether by way of simultaneous exchange as advocated by us or by way of a staggered exchange as suggested by you. We do not see the point of on the one hand calling for "compliance" with legislation and on the other being prepared to default on your own obligations.*
>
> *Furthermore we would point out that your interpretation of the wording of section 17 does not appear to be correct. Section 17 does not require the plaintiff to serve a notice of offer within 14 days of the date of service of the Notice of Trial, it requires that the Plaintiff serve a notice of offer after the prescribed date (the date of service of the summons as defined by SI 169/05). It also requires that the Defendant serve a notice of offer after the prescribed date, or in the alternative, notice that it is not prepared to pay anything at all. The prescribed period (the period between the date of service of the summons and 14 days after service of the notice of trial) is only relevant for the lodgement of the notice of offers with the Court on behalf of either Plaintiff or Defendant.*
>
> *Our position is that a simultaneous exchange of offers should take place and that this is what was envisaged by the legislation. There do not appear to be any rules of court on the issue and we are not aware of any judgments either. If you wish to pursue the matter further that is a matter for yourselves but we shall rely upon the contents of our correspondence on this issue in support of our position."*

The defendant's solicitors replied as follows on 23rd October, 2009:-

> *"We refer to your letter of 9 October 2009 in respect of our Schedule of Witnesses and Expert Reports pursuant to Statutory Instrument 391/1998, details of your client's Special Damages Claim and your Formal Offer.*
>
> *With regard to our Schedule, we served same on 16 October 2009 and look forward to receipt of your reports on*

or before 23 October 2009

Secondly, in relation to our request for Special Damages, we note that you are awaiting receipt of a Care Report and, until such time as you have received same you have indicated that you are not in a position to finalise the sums claimed on behalf of the Plaintiff in relation to Special Damages. Clearly this report will also be included in your list of expert reports; however from the Schedule you have provided there is no mention of an awaited Care Report.

Please also clarify the position with respect to your Formal offer, with respect, we believe that your service of Notice of Trial in this case was premature in circumstances where you are not in a position to serve a Formal Offer after the prescribed date, as outlined in the Civil Liability Act, 2004.

For the avoidance of doubt, Section 17 provides:

> *1. The plaintiff in a personal injuries action shall, after the prescribed date, serve a notice in writing of an offer of terms of settlement on the defendant.*
>
> *2. The defendant in a personal injuries action shall, after the prescribed date, serve a notice in writing on the plaintiff – (1) of an offer of terms of settlement or (2) stating that he or she is not prepared to pay any sum of money to the plaintiff in settlement of the action.*

A sequence of exchange is not provided for, as for example in relation to the Schedule of Witnesses and Expert Reports under S.I. 391/1998. Our client has received Counsel's advises in this regard to the effect that it is the plaintiff that should first serve their formal notice.

With regard to your comments on our interpretation of the limit within which to serve a formal offer, we refer to S.I. 169/2005 which provides that the prescribed date in Section 17 is the date upon which the Personal Injuries Summons is served on the defendant and that the formal offer can be made anytime after this. However, the prescribed period within which a copy of a formal offer shall be lodged commences on the prescribed date and ends 14 days after the service of the Notice of Trial. Clearly, as the case was set down for trial on 30 September 2008, the period allowed to lodge your formal offer has passed. Regarding your suggestion that we are also not in a position to serve our formal offer having not arranged for an assessment of the plaintiff, with respect, the obtaining of expert evidence is a matter for our client and should not impact on your own obligations having brought this case and having issued a notice of trial.

Please note that our instructions are to proceed to issue the necessary Motion."

By affidavit sworn on 27th November, 2009, Mr. James Hart, a solicitor in the firm acting for the plaintiff, provided further additional information. He deposed that as a direct consequence of the alleged negligence of the defendants the plaintiff would require home help/care, aids and appliances so as to enable her to perform activities of daily living, adaptation to her home and she would also incur ongoing medical expenses in addition to those significant expenses already incurred. He stated that he had commissioned a large number of experts to give evidence in respect of liability as well as quantum. He further stated that his preparations were ongoing and continuing and that he had not as yet obtained reports of all experts who would give evidence on the plaintiff's behalf. In particular he was still awaiting receipt of a report from the expert who he had retained to provide evidence in respect of the care which the plaintiff will require for the remainder of her life. That being the case, he was not presently in a position to estimate that sum and was obliged to await receipt of the care report.

He further deposed to his belief that it is an "increasingly common practice" for defendants to serve a Section 17 offer right up to the time of trial of an action and that any other interpretation of the section is "unworkable". In cases such as the present case, Mr. Hart deposed that extensive preparation is required and that a plaintiff quite often is not in a position to properly quantify his claim until quite close to the date of trial. He is only then in a position to furnish a formal offer. He contrasts this state of affairs with that enjoyed by a defendant, arguing that the solicitors who act for defendants in medical negligence actions are usually in a much better position to commission reports and assess the value of a plaintiff's claim and are thus in a better position to serve a formal offer at a time prior to the plaintiff's solicitors doing so. He further deposed that insofar as the present proceedings are concerned he was not in a position to quantify the terms of a formal offer as he has not obtained all the reports upon which the formal offer will be based.

It was submitted on behalf of the plaintiff that while a plaintiff and a defendant must serve a formal offer at a time after the personal injuries summons is served, formal offers which are served cannot be lodged until after the expiration of 14 days after the service of Notice of Trial. There are no other time limits set out in s. 17 and, it was argued, it followed that either the plaintiff or defendant could serve its formal offer at any time thereafter including and up to the date of trial and even during the course of the trial itself. It was contended that, pursuant to the provisions of the section, it is still open to either the plaintiff or the defendant to serve a formal offer and lodge same in court.

It was pointed out that subsection 5 of s. 17 provides for certain sanctions with regard to offers actually made in that the court may have regard to the terms of the formal offer and the reasonableness of the conduct of the parties in making their formal offers when considering the making of an order as to payment of costs. However, it was argued that it is only the plaintiff who may be sanctioned in this context. The only sanction which could be imposed on a defendant would be for the court to make an order that the plaintiff recover from the defendant costs on a solicitor and own client basis. It was submitted that this was a further reason to take the view that it is open to either party to make its offer whenever it is ready.

Counsel on behalf of the defendants submitted that the words of the statute were quite clear and explicit and could not by any stretch of the imagination be subjected to the elastic interpretation contended for by the plaintiff. It was argued that doing so would have the effect of bypassing the statutory provisions. In particular it was argued that the requirement of s.17(3) that a copy of a formal offer be lodged after the expiration of the prescribed period clearly implied that the prescribed period must end on the expiration of 14 days after the service of notice of trial in the proceedings and that any offer must of necessity be made before that time. It was also contended that the plaintiff must logically be the first party to make a formal offer, particularly in circumstances where the statute and regulation make no provision for a

simultaneous exchange of offers. This requirement is in marked contrast to that arising with regard to the exchange of witness and expert reports under S.I. 391 of 1998. Further, it was in accord with normal practice that a plaintiff should be the first party to nominate a figure at which he or she was prepared to settle a claim. Having done so, a defendant in the ordinary course would then either make an offer or indicate its unwillingness to do so. It was submitted that this was the only logical interpretation to be placed on the relevant provisions, not least because a simultaneous exchange could lead to an absurd outcome whereby mutual acceptance of simultaneous but different offers could occur.

DECISION

It is instructive to look at the overall scheme and purpose of the Civil Liability and Courts Act, 2004, given that an individual section of the Act should be construed by reference to the statute as a whole.

It is difficult to conclude other than that the legislation was intended to circumscribe and attach limitations to the manner in which personal injuries litigation is to be pursued by claimants.

To begin with, the Act provides (s.7) that an action for personal injury shall now not be brought after the expiration of two years from the date of accrual of the cause of action. A plaintiff is obliged (by s.8) to serve a notice in writing within two months from the date of the cause of action on the alleged wrongdoer stating the nature of the wrong, and a failure to do so may result in an award of costs against him. A plaintiff in a personal injuries action is obliged (by s.14) to swear an affidavit verifying the allegations in his pleadings. Any statement, contained in an affidavit, which is false and misleading, shall constitute an offence. The Act further provides that where a plaintiff in a personal injuries action gives false evidence, the court may dismiss the plaintiff's action. The Act further requires (s. 22) that the court shall have regard to the Book of Quantum when assessing damages in a personal injuries action.

It is difficult not to conclude, as indeed certain commentators have concluded, that the Act represents an outright attack on what has been characterised as a "compensation culture". For example Ray Ryan in Civil Liability and Courts Act, 2004: Implications for Personal Injuries Litigation (First Law) 2005 states (at p. 185):-

> *"The 2004 Act is a starting point in a war on the compo culture. It represents the first real legislative hostility to that culture. The battle will not be won overnight. It will fall to society as a whole to carry on the prosecution of a war on our compo culture that has commenced with the enactment of the Civil Liability and Courts Act, 2004.*
>
> *The goal, however, ought to be to prosecute such a "war" whilst simultaneously insuring that the pendulum does not swing too far towards defendants."*

That this is no exaggerated account of the intention of the legislation is evident from the remarks of the Minister for Justice when in launching the Act he said:-

> *"The Civil Liability and Courts, 2004 is a major plank in this government's effort to tackle insurance costs and insurance fraud and I believe that it will dramatically change the way in which personal injury actions are processed. In a very real way the Act tackles the "compensation culture" that has developed in this country."*

As is evident from the same text book (pp 55/6) the Dail debate on the Act, and on s.17 in particular, reveals a consciousness of the practical difficulties which could arise in the operation of the section, including problems arising as to which party should make first offer and the problem arising where offers are exchanged simultaneously. Unfortunately, these difficulties were simply ignored and left unaddressed in the final version of the legislation. However, it is difficult to approach any question of the interpretation of the Act on the basis that an interpretation favourable to a plaintiff is either intended or provided for by the Act.

The problems which arise under s. 17 of the Act include the following: who should go first where the making of an offer is concerned? Should there be simultaneous offers? Are there time limits within which offers must be made, as distinct from the requirement that a copy of a formal offer be lodged in court after the expiration of the 14 days following the making of an offer?

While the Court has been told that the requirement to make offers within this timeframe is regularly ignored by practitioners, that is a matter which, if true, is unrelated to the issue which the court must decide. While the section makes no provision for any particular sanction for failure to comply with the requirement to make an offer, it is clearly open to either side to make application to the court to direct compliance with the provisions of s. 17 of the Act, as has occurred in this case.

In my view the Act and Regulation clearly require that an offer be made within the prescribed period. That period is specified in S.I. 169 to be the period commencing on the prescribed dated (i.e. the date upon which the summons is served) and ending on the expiration of fourteen days after the service of the Notice of Trial in those proceedings. To my mind there is no ambiguity whatsoever about this provision, notwithstanding the fact that a copy of any offer does not require to be lodged in court within any specified timeframe. I completely reject the view that the statutory provisions themselves leave it open to the parties to make s. 17 offers at any time up to and including the trial itself.

While it may thus follow that a plaintiff should not serve Notice of Trial until such time as the case is actually ready to be heard, that is a practical consequence to which practitioners can easily adjust. It is preferable to a state of affairs whereby notice of trial is served regardless of the state of readiness for trial of the party serving same. This can and does result in frequent applications to adjourn cases which have been given a date for hearing. In this context I understand that, following service of notice of trial, a plaintiff may now both apply for and obtain a date for the hearing of a personal injury case from the presiding judge in charge of that list. On the face of it therefore, a plaintiff is in no way disadvantaged by a requirement to adhere to the provisions of the Act. Furthermore, any inability to be as precise as one might wish in any offer made should not result in an adverse award of costs if the inability to fully quantify the claim is reasonable at the time when the offer is formulated.

The problem of simultaneous offers is not a problem which arises in the instant case, but clearly is one which may arise in future. There is a clear and obvious failure of the legislation to address this particular issue. Insofar as one may adopt a purposive interpretation of the statutory provisions, one can only infer an intention that the statute does not require simultaneous offers, given that such an approach would produce an absurd outcome, a purpose which statutes are generally presumed not to intend.

Much more intractable, however is the issue of which party should first make an offer. There is no easy solution to this problem. Historically, in Round Hall personal injury practice, a plaintiff always opened any negotiations by nominating the figure at which he was prepared to settle the case. A defendant would thereafter respond by making an offer, calculated by reference to full or partial liability, or decline to make any offer at all. It was always unwise for a defendant to initiate an offer, given that he could thereby offer a sum considerably more than a claimant might be prepared to accept. The view that a plaintiff should "set out his stall" by naming his settlement figure is an approach which may be said to arise in business generally. Thus in the sale of livestock, property or works of art, the vendor will normally indicate a figure or at least nominate a reserve in advance of any auction or sale.

On the other hand, one might equally take the view that it is for the tortfeasor, the party who by his wrong has caused the loss and damage, to first make an offer which a plaintiff may accept or reject. Such an approach would mirror and reflect the provisions of the Superior Court Rules, and in particular Order 22 thereof.

That Order provides that a defendant may pay into court a sum of money in satisfaction of a plaintiff's claim. Such provision is not contingent in any way upon the plaintiff having first indicated a figure at which he is prepared to settle his claim and may thus be construed as being consistent with a view that the offending tortfeasor should, in fact, be the party who should make first offer. Similar provisions are contained in r.14 of O.22 with regard to the making of an offer of tender where again it is the defendant who takes the initiative of making what is, in effect, an offer in settlement without any prior requirement on the part of the plaintiff to either nominate a figure at which he might settle the claim or make the kind of offer contemplated by s. 17 of the Act.

It is not as though s. 17 of the Act was specifically designed to reverse or abolish practices which have characterised the settlement of personal injuries litigation for generations. Indeed it will be remembered in this context that subs.6 of s.17 specifically states that the section is "in addition to and not in substitution for any rule of court providing for the payment into court of a sum of money in satisfaction of a cause of action or the making of an offer of tender of payment to the other party or parties to an action."

I am unable to resolve the difficulty of who should go first without rewriting the legislation to specify which party goes first. The only thing that is clear is that both parties must make their offers within the time stipulated. This in turn can only mean that either party can make its offer at the moment of its choosing within the specified period. To the extent that this may produce the oddity of simultaneous offers being made (and accepted) that problem remains a difficulty created by the poor drafting of the legislation in question. However it is not a difficulty which arises in the instant case.

I will therefore grant the Order sought