THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2024] IECA 189
Record Number: 2023/303
High Court Record Number: 2022/2006P

Noonan J.

Binchy J.

Meenan J.

BETWEEN/

COURTNEY COLLINS

PLAINTIFF/RESPONDENT

-AND-

STEFFAN PARM, ANNELI PARM AND TOOMAS PARM

DEFENDANTS/APPELLANTS

COSTS RULING of Mr. Justice Noonan delivered on the 18th day of July, 2024

1. In the principal judgment herein ([2024] IECA 150), the Court reduced the sum awarded by the High Court from €84,277.00 to €50,287.70. The gross award of the High Court for general damages was €95,0000.00 which this Court reduced to €55,000.00. The agreed special damages were €4,162.00. The full quantum of the damages on appeal was

therefore €59,162.00 but was reduced to the final figure by virtue of an unappealed finding against the plaintiff of contributory negligence in the amount of 15%.

2. As is evident from the principal judgment, this Court found the order of the High Court to be erroneous in that it was made without regard to the Personal Injuries Guidelines and was otherwise disproportionate to the extent of amounting to an error of law.

3. In the course of giving the judgment of this Court with which Binchy and Meenan JJ. agreed, I observed (at para. 20): -

> *".... nowhere in the judgment does the judge actually refer to the Guidelines themselves. That is not only contrary to the legislation and the Guidelines themselves, but to all the authorities that deal with them. It is, however, perhaps a little unfair to be overly critical of the judge in this regard because, unfortunately, he received absolutely no assistance from the parties as to how he should approach this matter. As I have already pointed out, the Guidelines were not once mentioned by anyone. It is perhaps somewhat ironic therefore to find the defendants in their appeal complaining about the fact that the judge had no regard to the Guidelines or to cases about which he was told nothing."*

4. At the conclusion of the judgment, the Court directed that the parties make written submissions in respect of the question of costs, which have now been received by the Court. The defendants' submissions disclose that shortly prior to the service of the notice of appeal, and obviously in anticipation of it, the defendants made a without prejudice save as to costs offer in the sum of €54,538.00 together with one day's costs in the High Court. This was responded to by the plaintiff offering to accept a sum of €75,000.00 together with her costs. In the event, it is clear that the ultimate award of this Court is less than the defendants' *Calderbank* offer. As the well-settled jurisprudence in this area shows, this would in the

normal way entitle the defendants to their costs of the appeal. In addition, the defendants seek an order pursuant to s. 17(5)(a) of the Courts Act, 1981 as substituted by s. 14 of the Courts Act, 1991, more commonly referred to as a costs differential order, as the damages recovered were within the jurisdiction of the Circuit Court.

5. In her responding submissions, the plaintiff complains of the fact that the defendants' appeal focused entirely on the correct approach to assessing quantum and on the Guidelines despite the failure to engage on those issues in the High Court. She places reliance on the well-known judgment in *Lough Swilly Shellfish Growers Co-operative Society Limited & Anor v Bradley & Anor* [2013] IESC 16 and other cases dealing with the raising of new points on appeal not argued at first instance. However, this is an argument which would have been available to the plaintiff, had she wished to pursue it, in the substantive appeal and it is not open to her to raise it now for the first time. She also draws attention to the transcript of the hearing before the High Court and the fact that the court invited counsel for the defendants to address it at the conclusion of the evidence, but counsel declined to do so. Counsel for the plaintiff did make some submissions concerning the identification of a dominant injury but notably made no reference either to the Guidelines.

6. In *Lipinski (a Minor) v Whelan* [2022] IEHC 452, to which reference is made in the principal judgment herein and which predated the hearing in the High Court in this case, the High Court (Coffey J.) at para. 10 sets out the requirements of the Guidelines in terms of the procedure to be adopted in court, saying:

> *"The Guidelines set out a procedure which the trial judge must have regard to before making an award. First, at the conclusion of the hearing of evidence, the trial judge is required to ask each party by reference to the evidence to identify what each party contends to be the plaintiff's dominant injury, to further identify the damages which*

each party contends most 'closely matches' the evidence relating to that injury and further submit where the relevant injury falls on the relevant scale of damages. Secondly, having so engaged with the parties, the trial judge is further required to make his or her findings of fact concerning the plaintiff's dominant injury following which he or she is required to consider how in the light of those findings and the submissions made, the Guidelines should 'impact' on the court's award."

7. Coffey J. went on to deal with the procedure to be adopted by the trial judge in cases involving multiple injuries. While it is correct to say, as the plaintiff submits, that her counsel did make reference to the identification of a dominant injury at the judge's request, nothing further was said about damages within the Guidelines framework.

8. In my view, therefore, the necessity for this appeal arose in significant measure from the failure on the part of the defendants to provide any assistance to the High Court on the correct approach to the assessment of damages under the Guidelines, leaving the judge entirely at large with predictable consequences. Had the judge received the assistance he ought to have, it is more than possible that the necessity for this appeal might have been avoided.

9. Section 169 (1) of the Legal Services Regulation Act 2015 provides that the successful party is entitled to its costs unless the court orders otherwise, having regard to a range of factors identified in the section, and the conduct of the proceedings by the parties including the manner in which they conducted all or any part of their case. Accordingly, in the somewhat unusual circumstances that arise here, in my judgment the justice of the case requires that there should be no order as to the costs of the appeal.

10. With regard to the defendants' application for a differential costs order, it is correct to say, as the plaintiff does, that this is a matter coming clearly within this Court's discretion.

The issue was most recently considered by this Court in *McKeown v Crosby* [2021] IECA 139. There, a judgment in the plaintiff's favour in the High Court of €76,000.00 was reduced on appeal to €41,000.00. This was remarkably similar to the award in the earlier case of *Moin v Sicika* [2018] IECA 240 which was *"characterised there as so far within the jurisdiction of the Circuit Court as to rule out any suggestion of being borderline"* - at para. 19 of *McKeown*.

11. In that case, I expressed the view (at para. 23) that:

> *"There is of course a wide range of circumstances where the court might properly consider exercising its discretion against making a s. 17(5) order where, for example, something unpredictable or uncertain occurs at trial which might not reasonably have been anticipated. Or there might be cases in which it is reasonable to assume that the general and special damages together will fall into the High Court jurisdiction so as to make it appropriate to commence the proceedings there. An apportionment of liability might have the effect of reducing the damages within the jurisdiction of a lower court where the full value was undoubtedly, or at least arguably, within the higher jurisdiction. An item of special damage might be disallowed with the same effect. The plaintiff might have commenced proceedings in the High Court on the basis of medical opinion subsequently determined at trial to have been incorrect. These are all circumstances that may fall to be considered by the court in the exercise of the discretion conferred by the section."*

12. As is apparent in this case, the full value before discount for contributory negligence was so close to the limit of the Circuit Court jurisdiction as to render it reasonable, in my view, to commence proceedings in the High Court within whose jurisdiction the ultimate award might conceivably have fallen. I do not think it can be said in the present case that it

was from the outset so clearly within the jurisdiction of the Circuit Court as to render commencing the case in the High Court unreasonable.

13. In those circumstances, I would decline to make an order pursuant to s. 17(5) in the present appeal. Accordingly, the plaintiff will be entitled to recover her costs in the High Court but on the scale appropriate to a Circuit Court action.

14. As this ruling is delivered electronically, Binchy and Meenan JJ. have authorised me to record their agreement with it.