Neutral Citation no [2004] NIQB 18 | *Ref:* **WEIC4129**

Judgment: approved by the Court for handing down | *Delivered:* **22/03/04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

DAVID WILLIAM JAMES CROZIER BY JOHN DAVID CROZIER HIS NEXT FRIEND

Plaintiff

and

DEREK LYONS

Defendant

WEIR J

[1] This is an application on behalf of the Defendant made under Order 62 rule 35 of the Rules of the Supreme Court (Northern Ireland) 1980 for the review by a Judge of the decision of Master Napier on a review by him under rule 33 of that Order of his earlier decision relating to several items of disbursement disputed between the parties in the costs of this action.

[2] As appears from the Statement of Claim the Plaintiff sustained severe injuries as a result of an accident at the Defendant's premises where he was employed as a farm labourer. The Defendant's son was engaged in inflating a large tyre when it exploded and the Plaintiff was thrown to the ground against a girder. As a result he suffered serious brain injuries with very considerable permanent physical and mental dysfunction. He is unable to care for himself, is severely disabled and dependent. He will require lifetime nursing and other care, needs purpose-built accommodation and is permanently disabled from any form of employment.

[3] Liability was denied in the Defence and never formally admitted although I was informed that the action was settled on a full liability basis. There was some confusion at the hearing before me, and also before the Taxing Master, as to the stage the action had reached when settlement was agreed but I subsequently received a joint memorandum signed by both solicitors in the following terms:

> "It is hereby agreed by the parties hereto that the within case was settled after pleadings closed, but before setting down, at a joint consultation after both the Plaintiff and the Defendant had received their respective Care Reports and Forensic Accountants' Reports in respect of future care costs. When settlement terms were reached the case was set down and the settlement listed for approval on 8 January 2001, as the Plaintiff was under a disability. Both Senior and Junior Counsel for the Plaintiff were present when Senior Counsel opened the case and the settlement was approved by the Court."

[4] The action was settled for £1,728,000 together with a payment of £20,000 for the benefit of the Plaintiff's father and mother. The Plaintiff's solicitor's professional fees were agreed at £40,000.

[5] The two areas of challenge to the decision of the Master were, firstly, to the amount of the brief fee of £36,000 marked by Senior Counsel and, secondly, to the award to Junior Counsel of a brief fee of 66.66% of that of Senior Counsel rather than 60%. At review, the Master dismissed the objections to his decision in relation to Senior Counsel's fee brief and declined to reconsider his decision on the question of the appropriate percentage of Junior Counsel's fees on the ground that that issue was not raised in the objections delivered to his decision as is required by Order 62 rule 33(3).

[6] In relation to the amount of Senior Counsel's fee, Mr Mark Orr QC on behalf of the Defendant submitted that the fee marked was not fair and reasonable and drew particular attention to the facts that the case was settled without the need for a trial and that, while liability was not formally admitted, the case was settled on full liability showing, he said, that it was never seriously in issue. He indicated that Senior Counsel for the Defendant had marked a fee of £40,000 but that that fee has not yet been paid and is "disputed". When asked whether that Counsel was aware of the dispute he said, somewhat to my surprise, that he had not been told of the dispute and that ultimately it might or might not continue to be disputed depending on the outcome of the present application. I was further told that, in the event that the award of £36,000 was not disturbed, the Defendant's Senior Counsel would probably receive the fee that he had marked. Mr Orr also indicated that Junior Counsel for the Defendant had marked a fee of £26,000 being 65% of Senior Counsel's fee and I was not informed that the Defendant had or was contemplating disputing that percentage. Nonetheless Mr Orr submitted on the authority of the observation of Campbell LJ in *Re Kennedy's and others' Application [2000] NIJB 84 at 87j* that to seek to elevate into a statement of legal principle that two thirds is the starting point unless displaced under a heavy

onus is wrong. In his submission the correct percentage was 60% based upon a practice of some insurers. That there is such a practice appears from evidence received on affidavit from Mr E A Comerton QC, the Chairman of the Bar Fees' Committee in *Re Kennedy's Application (see 87d).*

[7] Mr Morgan QC for the Plaintiff submitted firstly that liability in the action was very much in issue and that had it proceeded to a hearing there would have been difficulties of proof. With regard to the general approach to the question of the assessment of fees he relied upon Order 62, r17 RSC and Appendix 2 of that Order which identify matters to which particular regard is to be had in assessing the amount of costs. He focused upon the following:

> "(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved.
>
> (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, … counsel.
>
> (e) the importance of the cause or matter to the client.
>
> (f) where money … is involved, its amount …"

Applying these considerations to the present case, Mr Morgan submitted that, apart from the potential liability problems, this was a difficult, high value case involving complex issues relating inter alia to future care, future loss of earnings and life expectancy. The Plaintiff's interests had to be most carefully considered and advice given to his family in view of the fact that this was a case of catastrophic injury where a once and for all settlement was to be effected. Accordingly the case involved a very high degree of specialised knowledge, skill and responsibility.

[8] Mr Morgan further submitted that the following matters are of assistance in confirming the correctness of the Taxing Master's assessment:

> (a) the fact that the fee claimed and allowed had been marked by responsible and experienced senior counsel was itself some evidence that it was reasonable.
>
> (b) the fact that senior counsel for the defendant had marked a comparable if slightly higher fee was a useful guide both as to the appropriate level of fee and as tending to eliminate any point the defendant was seeking to make about the absence of a real liability

issue or early settlement since, if there were substance in either point, no doubt the defendant's senior counsel reflected it in his fee.

(c) if anything a plaintiff's counsel in such a case has a more onerous and responsible task than defendant's counsel.

(d) there was evidence of fees marked in other large value settlements which, while they were not on all fours, indicated that the present fee was not disproportionate. (A schedule of those cases and fees was handed in by agreement).

[9] In relation to the argument sought to be raised by Mr Orr regarding the percentage of junior counsel's fees, Mr Morgan indicated that he was standing upon the technicality that the written objections delivered to the Taxing Master as required by Order 62 rule 33(3) had not raised an objection to the Master's decision in the taxation on this issue whereby he had allowed 66.66% as claimed. In those circumstances the Master had been right to decline to review that issue and he submitted that I in turn should also decline to revisit it as rule 35(4) provides that no ground of objection shall be raised on a review by a judge which was not raised on the review by the Taxing Master. In reply to the technical point Mr Orr pointed out that the sub-rule preserves in the judge a discretion to admit such an objection and stated that he had in fact argued the matter on the review before the Master although the Master had in the result decided not to deal with it. Mr Morgan could not recall whether or not he had argued the merits of the matter before the Master. His subsidiary submission on the merits was that Carswell LJ (as he then was) in *Adair v Lord Chancellor* [1996] NIJB 237 at 253 b to g had upheld the general principle that the regular ratio (of two thirds) should be maintained in respect of brief fee and refreshers. While admittedly *Adair* had been a criminal case, in *Carr v Poots* [1995] NI 420 at 431a, a civil action for damages, the same judge treated two thirds as being reasonable for junior's brief fee. Therefore he submitted that the Master's decision in the present case was in accordance with general principle.

[10] The principles governing the proper approach to the assessment of Senior Counsel's brief fee have been the subject of much judicial consideration in this jurisdiction and elsewhere. I consider it to be now well established that a fair and reasonable brief fee should be taxed as that which a hypothetical counsel of appropriate ability and experience would properly agree with the solicitor at the time of delivery of the brief for a matter of that nature, difficulty, complexity, responsibility and value. See *Simpsons Motor Sales (London) Ltd v Hendon Corp* [1964] 3 All ER 833 at 838 quoted with approval by Carswell LJ in *Carr v Poots* at 428d .

[11] In the courts of Ireland the law has evolved along parallel lines. See *Commissioners of Irish Lights v Maxwell and ors* [1997] 3 IR 474 and *Smyth v Tunney* [1993] 1 IR 451 at 463 where Murphy J said:

> "I believe that the whole line of authorities since *Dunne v O'Neill* [1974] IR 180 have established unequivocally first the negative proposition that it is no part of the duty of the Taxing Master (or the High Court on appeal from his decision) to make a value judgment as to what the fees of counsel should be. Secondly there is the positive function in relation to the taxation of party and party costs to review items claimed in respect of fees paid to counsel by reference to what a reasonably careful and reasonably prudent solicitor would offer to counsel based on his experience in the course of his practice and imputing to that solicitor a knowledge of fees charged and paid in respect of cases of a similar nature, the practice of barristers as to marking fees insofar as accepted by solicitors in practice, fees paid to the opposing counsel in the same matter and the depreciation in the value of money."

[12] There was some difference between the parties as to whether there was any real liability difficulty in the case but in my view it is of little practical importance since, as Mr Morgan pointed out, we know that the Defendant's Senior Counsel marked a fee some 10% higher than that claimed by his opposite number who is indistinguishable in terms of ability and experience. We also know that that fee marked by the Defendant's Senior Counsel is not a fee that was agreed with his solicitor but one that he must have marked based upon his own considerable experience of the factors identified above. It therefore provides an independent check on the reasonableness of the similar if somewhat lower fee marked by and allowed by the Taxing Master to the Plaintiff's Senior Counsel.

[13] The same point applies to the disagreement as to whether the fact that the proposed settlement figure was agreed, subject to approval, prior to setting down should be reflected by a reduction in the fee marked by the Defendant's Senior Counsel. I am doubtful whether any such reduction can be claimed where it is necessary to prepare the matter for hearing in the event that the proposed settlement is not approved by the Court but if any such reduction were merited it may be presumed to have been reflected in the fee marked by the Defendant's Senior Counsel. I therefore consider the point to be of no practical importance in the present case.

[14] In the absence of specific material to ground it I cannot accept Mr Morgan's submission that a plaintiff's counsel in a case such as this has a more onerous and responsible task than has the defendant's counsel. No doubt he does bear a heavy burden and one that will give him cause for anxious reflection as to how he should best advise his clients. However the same may be no less true for counsel seeking to do his best for a Defendant or his insurer. I do not say that there may not be cases where a discrepancy of this sort between the two sides of a case can be shown to exist but in the absence of any such material in the present case I am not willing to assume its existence much less act upon it. Similarly, the schedule of fees marked in other large value cases related to cases too diverse to present any reliable guide.

[15] Accordingly on the first issue, the appropriateness of the fee marked by the Plaintiff's Senior Counsel, I consider that the fee marked was reasonable and appropriate and correctly allowed by the Taxing Master whose approach to the principles governing its assessment seems to me be have been irreproachable and one with which I entirely agree. I accordingly allow the brief fee marked of £36,000.

[16] On the second issue, the correctness of allowing 66.66% of Senior Counsel's fee to Junior Counsel, I propose to consider the issue notwithstanding Mr Morgan's submission that the matter is not properly before me because of its omission from the request for a review of taxation by the Master. It appears that the matter was to some extent before the Master on the review and, if necessary to regularise the matter, I am prepared to accede to Mr Orr's application that I exercise my discretion under Order 62 rule 35(4) to allow the ground of objection to be raised before me.

[17] No justification was advanced for the alternative of 60% contended for on behalf of the Defendant beyond the statement that this is the percentage that some insurers pay to Plaintiffs' junior counsel in certain circumstances and that some such counsel have apparently been willing to accept. However, as Carswell LJ noted in *Adair* at 253b:

> "The taxing master correctly recognised that there has for generations been a firmly established tradition at the Northern Ireland Bar that junior counsel's brief fee would be two thirds of that of his senior counsel."

and at 253 f to h:

> "It is inevitable that in some cases one will have a relatively heavier or lighter burden, but that is part of the roundabouts and swings of the regular

> working relationship between senior and junior counsel and the traditional ratio between their fees. Expressly or impliedly they agree on the division of work between them in any given case, and it may be supposed that over a period of time the disparities even themselves out. I accordingly consider that *unless a strong and clear reason is established* – which in my judgment is not the case here- *the regular ratio should be maintained in respect of brief fees and refreshers." (emphasis supplied)*

[18] It is noteworthy that in *Adair* the fees that certain junior counsel had marked and to some extent been allowed by the Taxing Master were greater than the customary two-thirds and Carswell LJ disallowed the excess as no sufficient reason for it had been established. Likewise in the present case I consider that no sufficient reason has been advanced in support of the percentage of 60%. I have already noted that on the defence side in this case the ratio of the fee marked by Junior counsel to that of his senior and to which no objection has apparently been taken by his solicitor or client computes at 65% yet no explanation was advanced as to why his opposite number for the Plaintiff should have his fee fixed at 60%.

[19} I respectfully accept the view expressed by Campbell LJ in *Re Kennedy's and others' Application* [2000] NIJB 84 at 87j:

> "In a taxation on the standard basis in Queen's Bench and Chancery actions the master has accepted that two-thirds usually represents a fair and reasonable assessment of the relationship between the fees of junior counsel and those of his leader. To attempt to elevate this into a statement of legal principle that two thirds is the starting point *unless displaced under a heavy onus* is in my judgment wrong. (*emphasis supplied)*

Nevertheless, the long established practice of "swings and roundabouts" described by Carswell LJ in the above passage from *Adair* means that some "strong and clear reason" must be advanced to warrant a departure from the "regular ratio". No reason has been advanced in this case other than an apparent desire by some insurers to introduce an arbitrary reduction in the percentage that they pay to Plaintiffs' junior counsel and, in the process, introduce an equally arbitrary disparity between the percentages paid to junior counsel for the Defendant and for the Plaintiff, each of whom endures the same "swings" and enjoys the same "roundabouts". Again I find myself in entire agreement with the Taxing Master in his approach to the question

and in his result and I accordingly allow Junior Counsel two thirds of Senior Counsel's fee or £24,000.

[20] The Defendant will pay the costs of this review.