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Judgment: approved by the Court for handing down | *Delivered:* **13-02-09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ELAN NEESON AS PERSONAL REPRESENTATIVE OF PATRICIA GARDNER DECEASED

Plaintiff;

-and-

PHYLLIS AGNEW AND OTHERS PRACTISING UNDER THE NAME OF TUGHAN & COMPANY SOLICITORS

Defendants.

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DEENY J

[1] The plaintiff in this action is the personal representative and daughter of Patricia Gardner deceased. She sues her former solicitors. The first defendant was not personally involved in the case. The deceased, who was then about 73 years of age, was referred to the Belfast City Hospital in February of 1998 complaining of a cough, weight loss and weakness. A tender lump was found on her right neck and on 18 February 1998 a fine needle aspiration of the lump disclosed a thyroid carcinoma. The deceased was informed on the 24th of that month that it was intended to carry out a total thyroidectomy to remove this carcinoma. That operation was successfully carried out on 25 March. It is the plaintiff's contention that that operation was an unnecessary trauma to her late mother which ought not to have been carried out.

[2] The reason for that was that in parallel with the treatment of the thyroid lump investigations progressed with regard to the plaintiff's cough. An x-ray on 26 February was recorded as looking normal but she was referred

to a CT scan report which suggested "a focal lung mass". The plaintiff was not referred to a chest physician. A bronchoscopy was carried out on 5 March 1998 but it revealed no malignant cells. The plaintiff was discharged home four days after her thyroid operation but continued to be unwell. She was re-admitted to the City Hospital in late April. Further tests disclosed that she had a well advanced and highly malignant lung cancer. She remained in hospital and died there from this lung cancer which had spread to other parts of her body, on 7 June 1998. The plaintiff's contention is that if she had been properly investigated in February and March 1998 this would have been obvious and she would not have been put through the trauma of the thyroidectomy as her condition was in any event without hope of survival.

[3] The plaintiff, who on her own evidence had a very close relationship with her mother, pursued this matter vigorously. She had a three hour meeting with doctors and representatives of the Eastern Health and Social Services Council and Board. She complained to the Ombudsman who upheld the treatment of the deceased by the hospital. The plaintiff came to accept that nothing the hospital would have done would have prolonged her mother's life in the light of the highly malignant nature of the lung cancer. However she remained aggrieved that her mother had been subjected to an operation which she believed was unnecessary.

[4] In or about May of 2001 the plaintiff consulted the partner in Tughans with the intention of bringing such a claim. I find that at that time and for a considerable time afterwards a claim could have been brought against the Belfast City Hospital or the Trust then responsible for it as it would have been within three years of the date of the plaintiff's state of knowledge. However a writ was not issued by the defendants until 7 February 2002. Nor was the matter pursued with enormous expedition thereafter. The plaintiff consented to remittal of the matter to the court of the Recorder of Belfast. This was heard by Her Honour Judge Kennedy on or about 22 June 2005. The then defendant took the limitation point against the plaintiff and succeeded. She appealed to the High Court and the matter was heard, again on the limitation issue on 4 and 5 May 2006. On that occasion I upheld the decision of Judge Kennedy that the proceedings had been brought more than three years after the plaintiff's date of knowledge of her cause of action within the meaning of the Limitation Order. Like her I considered it was not an appropriate case for the exercise of the court's discretion. I record that neither party felt my decision in that regard inhibited me from hearing this matter in February 2009.

[5] The plaintiff shortly afterwards, having been properly alerted by Tughans, went to her present solicitors and a writ against Tughans was issued on 20 November 2006. No evidence was called by the defendants on the issue of primary liability here. I find they were in breach of their duty of care to the plaintiff and are liable to her in damages.

[6] In their helpful submissions, Mr Brian Fee QC for the plaintiff and Mr Patrick Good for the defendants referred to a number of leading text books including Charlesworth and Percy on Negligence, 11th Edition, para. 8-292FF; Jackson and Powell, Professional Negligence, 6th Edition 11-284; Michael Jones, Medical Negligence, 3-144 and Flenley and Leech: Solicitors' Negligence and Liability, 2nd Edition. There is a helpful summary at Charlesworth at para. 8-293 which I quote:

> "The approach to quantifying loss where a solicitor has been negligent in the conduct of a contentious case involves, first, assessing the amount of damages which the claimant would have realised had the lost action been successful; then discounting for the risks that the case would not have succeeded at all. This approach will be applied, for instance, where a solicitor fails to issue proceedings within the limitation period, or having issued them, fails to pursue them timeously so that they are struck out: if the claim enjoyed good prospects of success it may be that no, or only a small, deduction will be made from the damages recovered to take account of litigation risk. Should they have been very poor and the claim for damages may fail altogether, or only a nominal sum be recovered."

Counsel were agreed that although this was a medical negligence case it was not necessary for the court to be satisfied that the estate of the deceased would have had a better than 50-50 chance of recovery in the earlier action.

[7] My first task therefore is to assess what damages would properly have been awarded in the County Court in 2005 if the claim of the estate had not failed on the limitation point. The Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland, 2002, do not seem to expressly attempt evaluation of an unnecessary operation and nor did counsel express a professional opinion about it. Nevertheless the court's attention was drawn to a number of factors in arriving at a valuation. Mr Good relied strongly on the opinion expressed by Mr Colin Russell FRCS, consultant surgeon, in his report of 13 January 2003, which was in evidence. He pointed out that patients following this operation were typically allowed home on the second or third post-operative day and that in the United States some were now treated on a day patient basis. He went on:

> "Whilst I am not personally supportive of this strategy it does, I believe, reflect the relatively minor degree of discomfort experienced by patients

> following the thyroidectomy. The fact that Mrs Gardner was able to be discharged from the surgical ward on the fourth post operative days suggest to me that the pain she experienced following her operation was neither severe nor prolonged."

The plaintiff's other doctor Dr Todd was a physician and less familiar with the patient at the time of surgery than a surgeon would be. He did not directly contradict this view in any way. The plaintiff herself said that her mother was in considerable pain and after initial reluctance resorted to painkillers. She was given morphine overnight after the operation at least once. The staples from the operation were taken out in two different procedures. Although discharged home she said she was in constant pain from the thyroid but also from pain in her clavicle and elsewhere which hindsight shows to have been caused by the other cancer. However her throat was sore specifically following the operation. As mentioned she was re-admitted to hospital on 27 April in what the plaintiff describes as great pain but it is clear that the unfortunate lady was then suffering from her highly advanced lung cancer. (It seems that she had been a life long smoker).

[8] While the plaintiff's then junior counsel rather optimistically mentioned a figure of £20,000 when writing an opinion for the insurer Indemnis, his other valuations internally had a maximum of £10,000. His successor as junior counsel for the plaintiff in the original action thought the value might be as little as £3,500. They were both experienced junior counsel at the time. In the event having refused to make any offer the counsel for the hospital at a late stage was instructed to offer £7,500 and costs in settlement of the action. The plaintiff's solicitor and counsel, and indeed her medical expert Dr Todd, all were in favour of accepting this sum, wisely I consider in the circumstances. However the plaintiff refused it. I cannot disregard this offer but I must not give it undue weight. The Trust would have had some knowledge of the plaintiff's date of knowledge with regard to the limitation point but they would not have full knowledge of what she would say and nor could they safely predict whether the court would exercise its discretion on her behalf. There was an interesting comment by Dr Todd when he gave evidence before me. His attention was being drawn to his evident lack of certainty about the case in correspondence with the solicitors. Although he believed, quite clearly strongly, that the operation should not have been carried out he expressly acknowledged that the resources of the defendants in the original action would be unlimited. An army of witnesses could come from them, he said. It was he that sought support from a surgeon and preferably another chest physician if the case was going on. It was then and still is the position that plaintiffs are not obliged to disclose and exchange their medical reports and this salutary warning from the consultant chest physician, who told me that he appeared for both plaintiffs and defendants and medical negligence is a useful reminder of the wisdom of that rule. In

this particular case it may mean that the defendant thought the plaintiff's case was larger and stronger than it was. Unhappily, I have to say, she rejected the offer of settlement. I acknowledge difficulty in putting any precise valuation on this very unusual heading of damages ie. an unnecessary operation for a dying lady but my assessment is that it would have been in the range of £7,500-£10,000.

[9] I must then consider the chances of success which the plaintiff enjoyed if her case had been brought timeously. As indicated above Dr Geoffrey Todd, MB, MRC Phys, a chest physician from 1985, was strongly of the opinion that she was not properly assessed in the weeks after she was first seen on the City Hospital. If she had been this well advanced lung cancer would have been detected and no responsible surgeon would have carried out the operation and the operation would not have taken place. Dr Russell disagreed with him but laying the emphasis on the freedom from blame of the surgeon who carried out the thyroidectomy. Dr Todd did not disagree with that in evidence before me but was of the opinion that he has not in full possession of the facts. I must bear in mind in looking at this matter that as the law currently stands the plaintiff would have had to have shown no responsible surgeon, properly advised of the true state of affairs, would have conducted the operation. As Dr Russell says it might well be that he might be criticised for not performing the thyroidectomy rather than the reverse. Dr Todd himself acknowledged that many witnesses may have been called by the Trust to defend their conduct at the time. He also showed reluctance in his written attendances and in evidence to actually use the word negligence or carelessness against those who treated the late Mrs Gardner. It seems to me that those who were advising her then were right in saying that this was a case with considerable difficulties. I would assess her at having a better than 50-50 chance of succeeding, in the light of the strong opinion of Dr Todd, but not at all a certainty.

[10] Taking these two assessments together and viewing the matter in the round, as counsel urged me to, and perhaps a little generously, as one English authority recommends, I consider that the value of the lost chance to the estate of the deceased was £6,000. That represents the compensation for the general damages which the estate could recover.

[11] The case does not end there. In amended and amended amended statements of claim the plaintiff seeks to recover a number of other items. Item 1 at paragraph 15 of her amended statement of claim I will defer for a moment. Items 2 to 8 are actual outlay which she paid for at the request of her solicitors when pursuing the action consisting of fees for the writ, and two medical witnesses, a consultation room, x-ray scans, a Mr Clarke and the fee for remitting to the County Court.

[12] In addition the plaintiff owes her second junior counsel £1,527.50 which has not yet been paid. She owes the defendants, that is the City Hospital, £4,673.70. At first glance it would appear that this estate was fully entitled to recover these wasted costs as they were wasted because the case was being brought out of time. However, with the encouragement of her then solicitors, the present defendants, the plaintiff took out a policy of legal insurance with Indemnis. She paid a premium of £2,140 which earned her cover of £9,000. The defendants have expressly pleaded in their amended defence that she has a duty to mitigate her loss and that the said sum of £9,000 would cover the fees which I have mentioned above. Tughans are very properly not claiming for their own fees, although the amount of those are mentioned in the statement of claim. The defendants are waiving that claim for fees.

[13] After the plaintiff lost in the County Court but before the hearing in the High Court the defendant properly informed Indemnis of what had happened. Indemnis wrote, in two letters from Abbey Legal Protection, a company in the same group apparently, confirming that the plaintiff was covered for a total of £9,000 at that time in respect of the initial action but they would not cover the further costs of the appeal. If, of course, she had won on the appeal and gone on and won the substantive action she would have recovered the costs set out above. It was not therefore right to seek to recover those sums from Indemnis unless and until she failed in the High Court. This happened in May 2006 and as recorded above she then addressed herself to her present solicitors. Quite remarkably, she did not thereafter ask Indemnis for the £9,000 or any part thereof to which she was apparently entitled until a few days before the trial before me. She gave a number of different reasons, in her evidence for this. One reason was that there was a clause in the policy relieving Indemnis of liability if the action failed on a limitation point. However Indemnis knowing that it had failed on that basis nevertheless in the two letters of 5 July 2005 and 13 October 2005 confirmed that the cover was still in place for the costs incurred to date. When pressed with that by Mr Good she then contended that a senior partner in Tughans had told her that they would cover the costs if Indemnis did not and that is why she did not claim it. It was pointed out to her in cross-examination that that promise, if it had been made, which I think was not accepted, was "if Indemnis failed to cover her". Why had she not claimed? It then emerged that she had rung the company the previous Friday and in a telephone call she said that they had indicated that they were unwilling to pay her. Mr Fee's solicitors had been unable to get any firm answer from them from their contacts. She then, said in cross-examination that she did not ask the insurer over the previous two years because the other partner in Tughans had written the following sentence in a letter of 6 July 2005 to her. "The legal expenses insurers have also confirmed that if we win the appeal and continue with the case you will continue to be covered by them up to £9,000." "If we win the appeal" was an error on his part as the insurer had not thus qualified its' undertaking. But

counsel pointed out that he wrote that in a letter which enclosed the insurers letter. Furthermore a further letter, as I have said, was written on 13 October 2005. She said she thought it would be stealing to ask Indemnis, a remark I simply cannot understand given that the lady had paid the premium and was entitled to whatever cover was available in return. Listening to her I have to say that I formed the impression that she wanted to punish Tughans by making them pay these costs rather than seeking them from the insurance company. However, she has a duty in law to mitigate her loss. She told me in her sworn testimony that her present solicitors had known about these costs from the time she went to them. I note that the first statement of claim, signed by junior counsel, was served before the primary limitation period regarding a claim under a contract had expired. It may be that period is not applicable in this situation, in any event. She has the insurers' letters. She may well succeed in recovering the amounts from them. Suffice it to say that she had a duty to do so and no satisfactory explanation has been given for her failure to do so. In those circumstances I do not think I can properly visit the defendants with the costs sought in the statement of claim up to that figure of £9,000. As they fall short of that figure therefore she does not recover those special damages.

[14] The court is left with one more decision in relation to the premium she paid. Is she entitled to recover that? The plaintiff's counsel accepted that there appears to be no precedent in this jurisdiction for recovering an insurance premium. Mr Good pointed out that although it did happen in England that was on foot of an express statutory provision at Section 29 of the Administration of Justice Act 1999. In any event he said it would be wrong to order his clients to pay the premium which she had paid for she could then be recovering twice. She had the benefit of the premium in the cover provided by the insurer. If she had not exercised her right to that premium that was her responsibility. She may well succeed in exercising it now.

[15] Mr Fee offered the ingenious solution that the plaintiff would assign her rights to the defendants to the insurance policy. Mr Good rejected that offer and doubted that the court had any power to order such an assignment. He noted that no authority was offered for that proposition nor had it been pleaded. He questioned in the light of the recent history, not unreasonably, whether the plaintiff would co-operate with the defendants in the matter. Finally it might be an unhelpful way to approach the insurers in this position. I am persuaded that he is correct in that regard.

[16] The final aspect of the award of damages is again a somewhat unusual one. Tughans made clear to the plaintiff when she arrived that they had hourly rates when acting for their clients. Even if she succeeded she would have to pay them costs on a solicitor and own client basis because they would not recover their costs in full from the defendant, at the rates which they charged. She accepted that at the time and in her evidence to the court. Over

the luncheon adjournment on the second day the parties agreed that any award for general damages would therefore have to be reduced by a sum of £3,000 on the basis that even if the estate had been successful originally and recovered damages that much would have been deducted on a solicitor and own client costs basis. I am therefore required to deduct the sum of £3,000 from the sum of £6,000 which I assessed earlier leaving an award to the plaintiff of £3,000. Mr Fee submitted that interest in any award should be that of a judgment debt. The authority for that would appear to be Pinnock v Wilkins & Sons The Times, 29 January 1990. However if the plaintiff had won the initial action I have no doubt that the hospital would have paid the damages within the normal period of three weeks stay unless they were appealing, and then the plaintiff would either have invested the money in some way or spent it. I think an estimate of bank interest over the period seems to be a more appropriate way of measuring interest and in the circumstances I will fix that at 6% from the 14th day of July 2005 until the 13th day of February 2009 which gives a figure for interest of £645 and a total award of £3645.