Neutral Citation No. [2011] NIQB 14 | *Ref:* **GIL8094**

Judgment: approved by the Court for handing down | *Delivered:* **11/02/11**
*(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:

HANNAH JEAN FORBES BY DEAN FORBES HER SON AND NEXT FRIEND

-and-

THE PERSONAL REPRESENTATIVE OF DAVID GEORGE QUINN DECEASED

Defendant

-and-

SOUTHERN HEALTH AND SOCIAL CARE TRUST – INTERVENER

_____

GILLEN J

[1] In this matter the intervener, Southern Health and Social Care Trust ("the Trust") seeks a declaration from the Court that the defendant is liable to pay for that portion of past and future care of the plaintiff which arises from the personal injuries caused by the negligence of the defendant in this action.

Background

[2] The plaintiff was injured on 3 July 2004 when a passenger in a car driven by the defendant. Her injuries were serious and included a severe brain injury. On 11 October 2010 a figure representing an interim award in relation to the plaintiff's claim for general damages was approved in court and an interim order made pursuant to Order 80 of the Rules of the Court of Judicature dealing with the control of money recovered by a person under a disability. The plaintiff accepted that she had been guilty of contributory

negligence to the extent of 25% in light of her failure to wear a seat belt and the approved figure reflected that deduction.

[3] The Trust has paid and continues to pay the majority of the costs of the plaintiff's care in a private nursing home. Consequently on 11 October 2010, the Trust made submissions that the Trust's claim for the recovery of the costs of care should be determined by the Court. Leave was given to the Trust to intervene on this discrete issue. There is an issue in the case as to the attributability of the care since the plaintiff was already suffering from Huntington's disease prior to the accident. Hence the application by the intervener was couched in terms that the Court should make a declaration that the defendant was liable to pay for that portion of past and future care arising from the personal injuries, the said portion to be determined at a later date.

[4] It was not disputed that under the effective legislation pursuant to the Health and Personal Social Services (Northern Ireland) Order 1972 ("the 1972 Order") the functions of the Department of Health and Social Services are now exercised by the relevant Trust (see Herron v Secretary of State for Northern Ireland (2006) NIQB 11 at paragraphs 6(g) and 7).

The statutory framework

[5] Where relevant, the 1972 Order provides as follows:

> "Article 4
>
> It shall be the duty of the (*the Department*);
>
> (a) To provide or secure the provision of integrated health services in Northern Ireland designed to promote the physical and mental health of the people of Northern Ireland through the prevention, diagnosis and treatment of illness.
>
> (b) To provide or secure the provision of personal social services in Northern Ireland designed to promote the social welfare of the people of Northern Ireland."
>
> "Article 5
>
> (i) The (*Department*) shall provide throughout Northern Ireland to such extent as it considers

necessary accommodation and services of the following descriptions:

(a) Hospital accommodation;

(b) Premises, other than hospitals, at which facilities are available for all or any of the services provided under this Order;

(c) Medical, nursing and other services whether in such accommodation or premises, in the home of the patient or elsewhere;"

"Article 7

(i) The (*Department*) shall make arrangements to such extent as it considers necessary for the purposes of preventing illness the care of persons suffering from illness or the aftercare of such persons.

(ii) The (*Department*) may recover from persons availing themselves of any service provided by the (*Department*) under this Article otherwise than in a hospital, such charges (if any) in respect of the service as the (*Department*) considers appropriate."

"Article 15

(i) In the exercise of its functions under Article 4(b) the (*Department*) shall make available advice, guidance and assistance, to such extent as it considers necessary, and for that purpose shall make such arrangements and provide or secure the provision of such facilities (including the provision or arranging for the provision of residential or other accommodation, home help and laundry facilities) as it considers suitable and adequate.

(ia) Arrangements under paragraph (i) may include arrangements for the provision by any other body or person of any of the personal social services on such terms and conditions as

may be agreed between the Department and that other body or person …

(iv) The (*Department*) may recover in respect of any assistance, help or facilities under this Article such charges, if any, as the Department considers appropriate."

"Article 36(1)

Subject to paragraph (2) arrangements must not be made under Article 15 for the provision of accommodation together with nursing or personal care for persons such as are mentioned in Article 10(1) of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (Residential Care Homes) unless –

(a) The accommodation is to be provided, under the arrangements, in a residential care home or nursing home (within the meaning of that Order);

(b) A person carrying on or managing the home is registered in respect of it under that Order.

…….

(3) Any arrangements made by virtue of this Article shall provide for the making by the Department to the other party thereto of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangement; and, subject to paragraph (7), the Department shall recover from each person for whom accommodation is provided under the arrangements the amount of the refund which he is liable to make in accordance with the following provisions of this article."

[6] The Health and Personal Services (Assessment of Resources) Regulations (Northern Ireland) 1993 and the Health and Personal Social Services (Assessment of Resources) (Amendment) Regulations (Northern Ireland) 1998 ("these Regulations") contained provisions for the assessment of an individual's ability to pay for accommodation provided under the 1972 Order. Under these Regulations and the Income Support (General) Regulations (Northern Ireland) 1987 as amended by the Income Related

Benefits (Miscellaneous Amendments No. 5) Regulations (Northern Ireland) 1994 provision is made to the effect that:

> "Any sum of capital administered on behalf of a person … by the High Court under the provisions of Order 80 or 109 of the Rules of the Supreme Court (Northern Ireland) 1980 … where sums arise from –
>
> (a) An award of damages for a personal injury to that person, are not be to taken into account. (See also paragraph 43 of the Schedule 10 of the 1987 Regulations as amended)."

For completeness sake I indicate that Order 80 of the Rules of the Court of Judicature relates to persons under a disability. In the present action the plaintiff was such a person. The result is that in the present case the Trust is prima facie precluded from seeking recovery of such costs from the plaintiff herself out of the damages.

Relevant authorities

[7] In Firth v Geo. Ackroyd Jnr Ltd & Anor (2001) P.I.Q.R. Q4 p. 27, a seriously disabled claimant was being accommodated and cared for without charge in a residential home for which facility the local authority was paying pursuant to the National Assistance Act 1948. The major issue in the case was as to whether the local authority, which was entitled under the provisions of this Act to require the claimant to pay for the cost of the accommodation and care to the extent of his ability, could require him to pay out of the damages awarded to him. It was held that the local authority could not do so. The Regulations made under the relevant Act specifically provided that any sum of capital administered on behalf of a claimant by the High Court or the Court of Protection where such sum derived from an award of damages for personal injury – and Firth was such a case – was to be disregarded in the assessment of whether the claimant had the means to pay. Accordingly, neither was the claimant entitled to recover for the accommodation and care costs. Leave to appeal was granted but no appeal appears to have been pursued.

[8] The principle in Firth has continued to be followed. A tour d'horizon of the subsequent authorities reveals the following. In B (A Child) v Todd (2002) P.I.Q.R. P. 11 at p. 107 and Ryan v Liverpool Health Authority (2002) Lloyd's Rep. Med. 23, both cases falling under Section 21 of the National Assistance Act 1948, courts concluded that local authorities were not entitled to take income into account any more than capital where the damages were being administered by the High Court or Court of Protection. The Court of Appeal in Crofton v NHS Litigation Authority (2007) 1 W.L.R. 923 affirmed

that position as did Butterfield J in Peters v East Midlands Strategic Health Authority (2008) LS Law Med. 370.

Conclusion

[9] These cases are punctuated with judicial pronouncements criticising the legislation and citing anomalies that arise therefrom. Mr Simpson QC, who appeared on behalf of the interventer with Mr McLaughlin, added to the list of examples of unfortunate consequences in the present instance. A tortfeasor in the position of the defendant would not escape care costs if the plaintiff was either sufficiently wealthy to make the taking into account of the award irrelevant or if the plaintiff had chosen to avail of private care e.g. as in Peters v East Midlands Strategic Health Authority. Mr Simpson posed the question as to why the tortfeasor should be allowed to benefit from a windfall at public expense in the circumstances of this case.

[10] Mr Simpson's submissions found their echo in a convenient synthesis of the arguments by Dyson LJ in Crofton's case at paragraphs 87-89 where he said:

> "…. There is much to be said to the view that the tortfeasor should pay, and that the State should be relieved of the burden of funding the care of the victims of torts and that its hard pressed resources should be concentrated on the care of those who are not the victims of torts …. It does not seem right, particularly where the care costs are very large, that they should be met from the public purse rather than borne by the tortfeasor. ….. We can only say that we can see no good policy reason why the care costs in a case such as this should fall upon the public purse. We can see no good policy reason why damages which are about to be awarded specifically for the provision of care to the claimant, needed only as a result of the tort, should be reduced, thereby shifting the burden from the tortfeasor to the public purse."

[11] Those trenchant criticisms are illustrative of a number of similar judicial and academic reservations about this genre of legislation well highlighted in McGregor on Damages 18th Edition paragraphs 35-253–35-257.

[12] Little purpose is served by me adding my name to that distinguished roll call of judges who have issued such comments. The fact of the matter is that any change is, as Dyson LJ in Crofton's case made clear, "Essentially a political question and, therefore, a matter for Parliament". (See also H H

Judge Pelling QC in R (On the Application of) Alyson Booker v NHS Oldham (2010) EWHC 2593 (Admin) at paragraph 31).

[13] Mr Simpson challenged the reasoning that this should be left to Parliament invoking in aid the statutory construction against "absurdity". He contended that the court should seek to avoid a construction that produces an absurd result since this is unlikely to have been intended by Parliament. Bennion on Statutory Interpretation at Section 312(1) states:

> "Here (*construction against absurdity*) the courts give a very wide meaning to the concept of 'absurdity' using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of disproportionate counter-mischief."

[14] Counsel advanced the argument that the purpose behind the Assessment of Resources Regulations is to ensure that a person who may have received damages cannot have those damages taken into consideration when assessing ability to pay for care. The mischief against which the regulations are aimed is that such a person should not be deprived of damages for personal injuries to pay for or contribute to the costs of care. That mischief will not subverted by an interpretation of the Regulations designed to ensure that the burden of the cost of care should be borne by the tortfeasor and not by the plaintiff. Hence he contended that a purposive interpretation/analysis of the Regulations giving effect to the tortfeasor bearing the responsibility of the care costs would meet the effect desired by the legislation and would be in line with appropriate public policy.

[15] I am not persuaded by this argument. There is no reason to believe that Parliament is unaware of the consequences of this legislation given the passage of time since its inception and the array of judicial criticism which has lain in the wake of this and other legislation. Judicial activism needs to be tempered by due restraint and the drawing of the boundary is often delicate and sometimes controversial. The legislation in this instance together with other similar legislative provisions in England and Wales have been enacted and amended on a number of occasions to deal with the position of claimants in personal injury cases. Notwithstanding criticism, each change seems to have enhanced and protected the rights of such claimants without shifting the burden of cost onto the tortfeasor. There is no evidence before me of any intention on the part of Government to change this current policy.

[16] Not only are Mr Simpson's arguments lacking in any support derived from the authorities but any proposed change is not without its complexities and unpredictable aspects. These were adverted to in R (In the Application of) Alyson Booker v NHS Oldham (2010) EWHC 2593 where H H Judge

Pelling QC, visiting such difficulties in the context of a claimant's application for judicial review of a decision by a primary care trust to withdraw nursing and social care from the claimant, said of these provisions:

> "If the State is to be relieved of the cost of caring for the victims of torts then the remedy lies in primary legislation which permits that cost to be recovered by NHS … direct from the insurers of the tortfeasor concerned rather than by individual decision-making of the sort that has occurred in this case. The logic of this is obvious: Aside from the risk of different approaches being adopted by different PCTs, decisions such as that under consideration in this case are likely to have a number of startling consequences. First it is likely that no Claimant in the position of the Claimant could safely conclude settlement with such a tortfeasor other than on terms that future care was privately funded and so funded from the date of settlement without the prior consent to the terms of settlement of the PCT concerned (or its statutory replacement). That would necessitate involving the PCT concerned in any settlement negotiations and may mean that any dispute between such a claimant (possibly but not certainly supported by the insurer of the tortfeasor concerned) and the PCT concerned would have to be resolved – presumably ultimately by judicial review proceedings – before a settlement could be concluded or concluded unconditionally. Such an approach would be likely to add significantly both to the delay in resolving such cases and to the cost of resolving them. If and to the extent that the safety net undertakings make a difference to the outcome then insurers would refuse to provide such undertakings which would expose a claimant in the position of this claimant to great risk in the event that, for whatever reason, future care was not provided by the PCT concerned or its statutory replacement. If the PCT is correct in the submission it makes in this case, the likely result will be cost, delay and uncertainty for the profoundly injured as they seek to recover compensation for catastrophic injuries for which by definition they have no responsibility and the possible creation of risk to the future health care needs of such people."

[17] Irrespective of whether or not I agree with the reasoning behind these remarks, they do serve to indicate that there may be a number of reasons why Parliament has plotted the course which it presently follows. I consider there is no basis therefore for arguing that the results are necessarily absurd.

[18] The authors of McGregor on Damages 18th Edition at paragraph 35-255-35-357 also make clear; there are differing solutions which may be considered. Judges themselves in the various cases have suggested different remedial routes thus enhancing the complexity of resolution.

[19] All of this persuades me that as a judge at first instance, I should tread lightly in this area and neither seek to usurp the functions of Parliament nor rewrite legislation. Other than voicing my concerns at an outcome in this case that means the Trust as a public body must bear the cost of care rather than the tortfeasor and to urge that it is a matter which demands further Parliamentary scrutiny, I consider I must follow the well trodden path of the authorities I have already outlined and leave change to primary legislation. In all the circumstances I therefore must dismiss the intervener's application.

Costs

[20] Mr Simpson has argued that I should follow the course I took in the matter of a judicial review by the Northern Ireland Commission for Children and Young People (2008) NIQB 2. In that case I considered that the legality of physical punishment of children was a matter of genuine public interest and notwithstanding the failure of the Children's Commissioner to satisfy me as to her arguments, nevertheless I concluded that it was a case where there should not be an award of costs against the unsuccessful applicant.

[21] There is no doubt that it is not unusual in judicial review for the courts in some instances to hold that it is inappropriate to make a costs order against an applicant even where the judicial review has been wholly unsuccessful. See R (Friends of the Earth and Greenpeace) v Secretary of State for Environment, Food and Rural Affairs (2001) 1 EWCA Civ. 1950 and R v Secretary of State for the Environment, Ex Parte Shelter (1997) COD 49.

[22] I am not persuaded that the present case falls into this genre. Costs are solely within the discretion of the court under Order 62 of the Rules of the Court of Judicature. However the normal, almost invariable rule is that costs should follow the event. In general the burden should be on the unsuccessful party to show why there should be a departure from the general rule.

[23] Given the well trodden path of the authorities that have gone before this hearing, it was a bold step on the part of this intervener to re-open the issue. I consider that sufficient judicial ink has been spilt on this issue to have

deterred another assault upon the various court decisions in the absence of primary legislation. I therefore have come to the conclusion that the defendant in this matter is entitled to its costs.

[24] It only remains for me to compliment both Mr Simpson and Mr Ringland QC, who appeared on behalf of the defendant, on the sharp focus of their skeleton arguments and on the efficient economy of their oral submissions at the hearing of this case which has enabled me to deal with it in short measure.