Neutral Citation no. [2002] NICA 39

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref:	MCCC3742
Delivered:	11/09/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL FROM THE RECORDERS COURT FOR THE DIVISION OF LONDONDERRY

BETWEEN:

PATRICK CHARLES McGOLDRICK (A MINOR), JONATHAN McGOLDRICK (A MINOR) AND KELLY MARIA McGOLDRICK (A MINOR)

Plaintiffs;

and

GAVIN BERNARD McILDOWNEY and BRIAN McILDOWNEY

Defendants.

McCOLLUM LJ

[1] This is an appeal from a decision of District Judge Keegan on the issue of costs arising from settlements of the claims of the minor plaintiffs.

[2] A degree of confusion has developed in this mundane case. However the true issues between the parties have emerged with some degree of clarity.

[3] It appears to me that a difference of interpretation has arisen between solicitors and insurers about the proper way to deal with the issue of costs in cases involving minors which are settled before the issue of the proceedings, and the present case is an example of the nature of the dispute.

[4] The four minor plaintiffs were passengers in a motor vehicle and sustained injuries in a collision. The defendants insurers were prepared to admit liability and in negotiations which preceded the issue of proceedings agreed amounts of compensation with the plaintiffs' solicitors ranging from £1,000 to £3,000 for the respective plaintiffs. However the parties were unable to agree the amount of costs to be paid to the plaintiffs' solicitors.

[5] I have been informed by counsel that when a prospective County Court minor's case has been settled before proceedings the normal arrangement is that costs are agreed between solicitors and insurers at the rate of two-thirds scale fee based on the amount agreed, plus a fee for counsel.

[6] In this case the insurers were prepared to pay only half of the solicitors' costs, with no provision for counsel's fees and the solicitors found this unacceptable.

[7] The plaintiffs' solicitors subsequently issued a civil bill on behalf of each plaintiff. The defendants did not serve notice of intention to defend in any of the cases.

[8] The plaintiffs' solicitors then lodged a certificate of readiness under Order 8 Rule 3 and entered the case for hearing as a defended civil bill.

[9] Defendants' counsel submits that this was not permissible under the rules since the next step by the plaintiffs should have been the entry of interlocutory judgment as authorised by Order 12 Rule 2 of the County Court Rules (Northern Ireland) ("the Rules").

[10] I accept the submissions on this matter made on behalf of the defendants. The County Court is a creature of statute and as such its procedures are confined to those authorised by statute.

[11] The mandatory requirement under Order 8 Rule 3 may be contrasted with the permissive wording of Order 12 Rule 2 but in my view this simply reflects the fact that in the former case the parties have engaged in litigation which requires to be resolved while in the latter the plaintiff has an option whether to proceed in order to have damages assessed. There could well be cases in which it would be regarded as not worthwhile to do so and therefore an absolute requirement to do so would be inappropriate.

[12] The Rules, however, do prescribe different courses to be followed dependent on whether a notice of intention to defend has been served or not.

[13] I do not regard this as a matter which nullifies the proceedings since the judge has a power under Order 9 Rule 1(a) to amend any defects or errors in proceedings.

[14] For present purposes it is immaterial whether this is a power that can be exercised by the District Judge of his own motion or whether the matter would have to be referred to the judge.

[15] The matter now being before me I propose to exercise the power under Order 9 Rule 1(a) to amend such defects or errors as may have occurred so as to enable the matter to be regarded as an assessment of damages under Order 12 Rule 13 in which the amount of damages had been agreed between the parties.

[16] The matter came on for hearing before District Judge Keegan, on 12 April 2001.

[17] The basis on which he proceeded is not clear because, while the cases had not been settled, there appears to have been no dispute about the agreed amounts so he appears to have treated the matter as an application for approval of settlement on the basis of the figures agreed for damages.

[18] Both the plaintiffs and defendants were represented at the hearing and accepted the correctness of the figures which had been agreed.

[19] The issue of costs arose and the District Judge indicated that he would award half costs but would later deliver a written judgment on the issue of the payment of an enhanced fee to the plaintiffs' solicitors for advocacy under Order 55 Rule 2(a) of the Rules.

[20] On 11 June 2001 the plaintiffs' solicitors sent a bill seeking two-thirds costs. On receiving a reply from the defendants' solicitors, pointing out that the District Judge had directed costs on a 50% scale, he sent an amended bill based on 50% costs, which was paid. There was an order of the court on 12 April and the sums agreed as compensation were duly lodged in court so that the plaintiffs have not been at any loss because of the disagreement between the parties' representatives.

[21] The plaintiffs' solicitors wrote on 2 January 2002 informing the defendants' solicitors that the District Judge had increased the award of costs to 75% of scale fee together with counsels' fees. Apparently this had occurred on 7 November 2001.

[22] The matter was referred back to him by the defendants' solicitors and on 1 March 2002 he finally declared that the amount of costs awarded to the plaintiffs' solicitors should be 50% of scale costs.

[23] On 6 March 2002 the plaintiffs' solicitors appealed in the following terms on behalf of each plaintiff:

> "Take notice that I the above named plaintiff and appellant hereby appeal to the High Court against the amended judgment of the District Judge given in this matter on 1 March 2002 whereby he

amended his original judgment under the slip rule to reduce the amount of costs awarded to the plaintiffs' solicitors from 75% of the County Court scale costs to 50% of the County Court scale costs."

[24] On 27 March 2002 the defendants also appealed against that part of the decree (undated) whereby:

(a) the learned Judge held that the court had power to hear the suit despite a non-compliance with the rules of the County Court;

(b) the learned Judge awarded a fee to the plaintiffs' counsel;

(c) the learned Judge awarded 100% scale fee to the plaintiffs' counsel on 7 November 2001.

[25] I do not have a copy of any of the District Judge's orders so I am dependent on the contents of the affidavit of Miss Sandra Crothers, solicitor, in the firm of Tughan & Co, solicitors for the defendants and the accounts of counsel to ascertain the sequence of events and the terms of the orders.

[26] I make the following comments which I trust will enable these matters to be satisfactorily resolved in the future:

(1) If in a minor's case an amount of compensation is agreed but there is no agreement as to costs, then with the consent of the defendant the matter may still be dealt with by way of petition under Order 5 Rule 5 leaving it to the judge to fix costs.

There was no argument during the course of the hearing before me about the issue of costs on such a petition and indeed the form prescribed in Form 36 of the forms in Appendix 1 to the County Court Rules does not appear to indicate that a sum for costs requires to be specified in the petition. In those circumstances it would appear that the judge would have a discretion to determine the appropriate amount of costs under Order 55 Rule 7 of County Court rules.

[27] (2) If the matter is proceeded with by way of civil bill to which no notice of intention to defend is served then the matter should be set down for assessment of damages under Order 12 Rule 13. In those circumstances the matter would not be regarded as settled and the judge would assess the appropriate award.

[28] I am unable to accept Mr Spence's submission that in all such cases the District Judge is limited to allowing only half of the solicitors scale fee and may not award counsels fee. The scale of costs for an undefended suit

involving a liquidated amount is that set out in table 3 of part 1 of Appendix 2 of the rules (see Order 55 Rule 14(2)). Under Rule 14(1) half of that sum together with counsel's fee and outlay is payable if payment is made within 21 days of service of the civil bill.

[29] However unliquidated damages are assessed under Order 12 Rule 13 and the costs are to be 50% of the scale fee calculated by reference to Appendix 2, part 1, table 1.

[30] Table 1 includes counsel's fee and it is my view therefore that when counsel appears he is entitled under that rule to half of the scale fee.

[31] Outlays and witnesses' expenses are not specifically provided for in Order 55 Rule 14 and accordingly Order 55 Rule 6 governs that matter and allows witnesses' fees and expenses to be paid in full.

[32] Moreover under Order 55 Rule 14(4) the judge or district judge may in his discretion increase the costs of the solicitor and the fee for counsel to an amount greater than 50% of the scale fee.

[33] I would comment that it is most important that there should be no inhibition to the engagement of counsel in cases involving minor settlements.

[34] There is a limit to the facts and circumstances which a judge at a hearing to approve a settlement may be able to ascertain and under-valuation by a solicitor or some matter overlooked by him may not come to the notice of the court where it may have been readily revealed by a consultation with counsel.

[35] In my experience complaints not made by a minor plaintiff to examining surgeons sometimes emerge in consultation and it was certainly my experience at the Bar that further medical reports sometimes had to be directed, the contents of which had a considerable influence on revaluation of the case.

[36] Because of the rule in Henderson v Henderson the plaintiff could not later recover for some injury undiscovered at the time of the settlement.

[37] I regard the engagement of counsel as an important safeguard for both the court and the minor plaintiff and that his fee should be provided for in a minor settlement where there are injuries of any potential significance.

[38] No provision is made under Order 55 Rule 14 for the enhancement of a solicitor's costs under Rule 2(a), when he acts as advocate.

[39] Since Rule 14(3) provides that the amount paid "shall be 50% of the scale fee calculated by reference to the relevant table" it is my view that the only costs payable are those referred to in table 1 whether it be counsel's fee or solicitor's costs and that no enhanced fee for solicitor advocacy is therefore payable in the case of a minor settlement.

[40] From a practical point of view there is no added safeguard to a minor if the solicitor who settled the case or his associate presents the settlement to the court.

[41] I have been provided with no material which would enable me to determine whether the District Judge should have exercised his discretion to increase the prescribed amount of 50% of the solicitors' costs.

[42] My view would be rather to the contrary. The cases were obviously simple and straightforward having regard to the amounts approved and I cannot see any material that might have existed which would have justified the District Judge exercising his discretion to uplift the half costs prescribed by Order 12 Rule 13(3).

[43] I also dismiss the defendants' appeal insofar as it challenges the jurisdiction of the District Judge to hear the matter. In my view he had jurisdiction either to amend the proceedings or to refer it to the Judge for amendment so as to treat the matter as an undefended assessment of damages. At the hearing the parties did not dispute the amount of damages, and he was entitled to adopt the agreed figures.

[44] No one was disadvantaged by this course and he was able to deal with the matter in a way that properly served the parties' interests.

[45] The District Judge had no power to award an enhanced advocacy fee to the plaintiffs' solicitors in respect of the proceedings on 12 April 2001.

[46] It is not clear to me whether counsel appeared in the proceedings held on 7 November 2001. If so, it was within the jurisdiction of the Judge to allow him a fee if he believed that counsel's presence was helpful to the court and indeed it is apparent that a degree of confusion had arisen by that stage, and that the assistance of counsel would have been helpful.

[47] If counsel appeared therefore it was within the discretion of the Judge to award him his full fee but if only the solicitor appeared then the proceedings still being regarded as undefended the award of a solicitor's advocacy fee was not within the jurisdiction of the court.

[48] Subject to clarification on that matter I would also dismiss the defendants' appeal and in the circumstances I take the view that the

appropriate course would be to make no order for costs of the appeal but I will hear counsel on the matter if they wish to address me.