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Judgment: approved by the Court for handing down | *Delivered:* **30/01/2015**
*(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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RICHARD WILLIAM McVICKER

Plaintiff:

-and-

RICHARD HARKNESS, ADRIAN BARKLEY and EAMON BARKLEY

Defendants:

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STEPHENS J

Introduction

[1] Pursuant to Order 62, Rule 35 of the Rules of the Court of Judicature (Northern Ireland) 1980 this matter comes before me on the application of the defendants to review a decision of the taxing master assessing the brief fees of the plaintiff's senior and junior counsel. The question that arises on this application is what the appropriate brief fee is where there has been a substantial reduction on the true or real value of the case.

[2] Mr Good QC and Mr Gowdy appeared on behalf of the defendant in relation to this application though defence counsel at trial were Mr Ringland QC and Mr Maxwell. The plaintiff's solicitors at trial did not appear on the hearing of this application. In order to facilitate an adversarial hearing I permitted Mr Simpson QC to intervene to make both written and oral submissions on behalf of Mr Hunter QC and Mr Neeson who were counsel for the plaintiff at the trial and whose fees were in dispute in this application. I am indebted to counsel for their thoughtful and persuasive submissions.

Factual background in relation to the road traffic collision, the action and the negotiated settlement

[3] On 21 May 2008 at 8.00 a.m. the plaintiff, Richard William McVicker, then 26 (DOB: 30 June 1981) was involved in a road traffic collision on the Garryduff

Road, Ballymoney, County Antrim. He was riding a Honda motorcycle wearing a helmet along a straight section of the Garryduff Road which has a single lane in each direction. The first defendant, Richard Harkness, a construction industry quantity surveyor, was driving a grey Vauxhall Astra in front of the plaintiff and in the same direction as the plaintiff but with the intention of turning right into the private driveway which formed the entrance to his place of work, known as "Leck Scaffolding." As the first defendant's motor vehicle turned right the plaintiff was in the process of overtaking and a collision occurred between the motorcycle and front driver's door.

[4] The plaintiff, a married man with young children and with an impeccable pre-action employment history, sustained horrific catastrophic injuries which rendered him unemployable and permanently wheelchair bound. He was rendered paraplegic below level T8/T9. He suffered from recurrent urinary tract infections. In February 2012 he required surgical removal of multiple bladder stones. There were on-going bladder spasms with an increased likelihood of the bladder becoming more spastic which raised the risk of significant impairment of renal function. In addition the plaintiff was rendered unconscious in the collision and suffered a traumatic brain injury with cerebral contusions, the after effects of which included cognitive difficulties with reduced memory functions, mood alteration and irritability. The plaintiff also suffered significant pelvic fractures, a fracture of the right ninth rib, splenic contusion and a left sided pneumothorax. He also developed a high pitched breathing sound resulting from turbulent air flow in the larynx or lower in the bronchial tree which required a number of tracheal dilations. He has impairment of sexual function and depression. In short the plaintiff's life has been devastated and the devastation is long term affecting not only him but also, in particular, his most intimate family members.

[5] In addition to the physical consequences there were severe financial consequences for the plaintiff. The accountant retained on behalf of the plaintiff calculated special damages at £1.2 million though this figure was subsequently reduced to £1.148 million.

[6] It was asserted by the plaintiff's advisers in negotiations that the potential value of the case to include both general and special damages was £1.6 million. I accept that the case had such a potential value.

[7] In relation to liability the plaintiff had no memory of the accident and there was no independent witness. Indeed the only person who could recount what had occurred was the first defendant. He did not make a statement to the police but rather on 19 June 2008 he was interviewed under caution on suspicion of the offence of dangerous driving causing grievous bodily injury. There is a transcript of the interview from which it appears that the first defendant stated that:-

(a) He had been travelling at 55 mph but had slowed down to a speed of 15 mph before turning right.

(b) He had slowed down gradually over an appreciable distance.

(c) He had braked during this process of slowing down.

(d) He had indicated his intention to turn right by putting on his right hand indicator some 100-150 metres before the point at which he made the right turn.

Those points were all matters which, *if accepted at trial*, were in aid of the first defendant in relation to the issue of liability as the plaintiff who was travelling behind the first defendant's motor vehicle had a clear and unobstructed view over some 200-300 metres as he approached the first defendant's motor vehicle. Accordingly the plaintiff would have had ample opportunity to see and assess that the car in front was slowing down, to see the brake lights illuminating on the first defendant's vehicle and to see the right hand indicator. In such circumstances he should not have been overtaking the first defendant's motor vehicle.

[8] The issue for the first defendant in relation to liability was whether he had checked his rear view mirror or driver's wing mirror or whether he had looked over his right shoulder before turning right. If he did any of these then what he saw. The plaintiff's case in relation to liability was improved by some of the answers given by the first defendant during his police interview. The first defendant accepted that:-

(a) He last checked his mirror some 100-150 metres prior to turning right though there was some evocation about distances.

(b) There was a gap of some 8 seconds between last checking his mirrors and turning right.

(c) He did not see the plaintiff's motorcycle at any time until the collision occurred.

[9] On 19 March 2010 the plaintiff commenced this action seeking damages. The statement of claim was served on 26 November 2010. The defendants denied liability and alleged contributory negligence. That denial of liability was maintained throughout the proceedings. Both the plaintiff and the defendant retained consulting engineers to examine the scene of the accident and to report. Extensive medical reports were obtained together with reports from forensic accountants. The action was listed for trial commencing on 14 May 2013. It was suggested by Mr Hunter and Mr Neeson, which suggestion has not been contradicted, that the trial would have lasted some 5-6 days. Negotiations began between counsel 10 days before the trial date and they concluded the day before the trial was due to commence. Those negotiations first addressed the amount of damages and then when the amount of damages were agreed for the purposes of negotiations there were further negotiations in relation to the issues of liability and contributory

negligence. There were in effect two compromises made by the plaintiff and by the defendants. The first was in relation to value. The second was in relation to liability and/or contributory negligence. In the first the real/true value was agreed between counsel for the purposes of negotiations at £1,250,000. In the second the eventual negotiated settlement figure arrived at was £600,000 plus the recoupment figure of some £51,000 a total of some £651,000. That settlement was on the basis of some 50% of the real/true value of £1,250,000.

[10] On 14 May 2013 judgment was entered in favour of the plaintiff against the defendants in the amount of £600,000 together with costs to be agreed or taxed in default of agreement. In addition the defendants agreed to pay the recoupment of £51,000.

Legal principles

[11] Order 62, Rule 3(4)(a) provides that where the court orders that one party to the proceedings shall pay the costs of another party, they are to be taxed on the standard basis as defined in Order 62, Rule 12(1). Accordingly there should be allowed a reasonable amount in respect of all costs reasonably incurred and any doubt which the taxing master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party. Order 62 Appendix 2 provides that in exercising his discretion the taxing master shall have regard to all the relevant circumstances and in particular to:-

(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, the solicitor or counsel;

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value;

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

[12] Accordingly one of the circumstances to which the taxing master is to have particular regard is value. That in turn raises the issue as to how the taxing master should approach a case which has a very high potential value but which has settled on the basis of a substantial reduction. The leading authority in this area is the decision of Carswell LJ in *Carr v Poots* [1995] NI 420 in which he stated that:-

> "In my view it would be wrong to attempt to assess the brief fee in such cases by reference purely to value. I consider that it would be equally wrong to have regard only to the full value or to assess the fee on the knock-down settlement value. Both figures are factors which the taxing master should bear in mind, but it would be undesirably mechanistic and productive of unreasonableness to plump for one or the other. … In my opinion the correct approach would be to place less emphasis on these figures and to take a broader view of what is a reasonable fee for counsel to be paid on undertaking such a case. In assessing this both the full value figure and the settlement figure should be taken into account, but neither should be the main determinant of the amount of the fee."

Accordingly where there is a substantial reduction on the true value one bears in mind the full value and the settlement value but one takes a broader view looking at all the relevant circumstances and all the particular circumstances set out in Appendix 2. Furthermore as stated in the headnote to *Carr v Poots*:-

> "The basic principle was that the master should allow a reasonable amount for the fee. That reasonable amount was the figure for which a suitably able and experienced member of the Bar would undertake the case, knowing that it had a very large potential value, but that if the plaintiff won (his) damages would be substantially reduced for contributory negligence, and that it might be compromised for a fraction of full value; knowing also the level of difficulty of preparation and presentation of the particular case and of the issues involved."

[13] Carswell LJ also stated in *Carr v Poots* that there is a justified reluctance to interfere with assessments made by the taxing master in matters where he possesses particular expertise.

The sequence in relation to taxation

[14] Mr Hunter marked a brief fee of £30,000 plus VAT and Mr Neeson marked a brief fee of £20,000 plus VAT. The defendants offered respectively £17,500 and £10,500 plus VAT which offer was rejected and the matter went to taxation.

[15] The taxation was heard by Master Wells on 24 January 2014. A memorandum prepared by Mr Hunter was made available to the Master in which Mr Hunter in effect reduced the amount of his brief fee to £28,500 plus VAT and explained the basis upon which he calculated that reduced brief fee. That memorandum set out that the then current Comerton Scale dated 12 January 2011 provided for fees for damages in various brackets but that the top bracket was for damages up to £500,000. The suggested brief fee in that bracket was £13,850. Mr Hunter had then taken the difference between £500,000 and the full/real value of this case of £1,250,000 of £750,000 and applied a percentage of 2% to that further amount to give an additional fee of £15,000. He then added the amounts of £13,850 and £15,000 to give a brief fee of £28,500. In addition to providing that calculation based on value two further documents were made available to the taxing master by counsel. The first was a report of counsel dated 9 December 2013 and the second was an "Addendum to Report of Counsel" dated 21 January 2014. Both the report of counsel and the addendum to report of counsel referred not only to value but difficulty, complexity and responsibility together with the importance of the case to the plaintiff. In the event the taxing master allowed the suggested brief fee of £28,500 to senior counsel with two thirds to junior counsel.

[16] The original senior brief fee of £30,000 and also the taxing master's assessment of senior counsel's brief fee at £28,850 were not in accordance with the principles set out in *Carr v Poots* as:-

(a) the original brief fee and the reduced brief fee plumped for a fee solely assessed on the basis of the potential value (the original brief fee) or the real value of the case (the reduced brief fee) disregarding the settlement value; and

(b) both fees were assessed without taking a broader view of what is a reasonable fee.

The original brief fee was not appropriate. That was recognised by the reduction indicated by counsel to the taxing master. Senior counsel's brief fee should not have been assessed by the taxing master at £28,850.

[17] The defendants were dissatisfied with the taxing master's decision and sought a review. They contended that a practice had developed of taking an amount half way between the settlement amount and the potential of the case against which counsel should mark their brief fees. By a further documentary submission on 22 January 2014 Mr Hunter and Mr Neeson again referred to weight, difficulties,

responsibilities and real value. In arriving at his decision dated 19 May 2014 the taxing master took into account all the particular circumstances set out in Appendix 2 and cautioned himself not to be overly mechanistic. He stated that this case was the very case where it was not appropriate to run a slide rule over the Comerton Scale. On review the Master reduced senior counsel's brief fee which he assessed at £25,000 with two thirds to junior counsel.

The defendants' submissions

[18] For the purposes of this application only and not otherwise the defendants do not challenge Mr Hunter's use of 2% in relation to any figure in excess of £500,000. On the same basis they also do not challenge junior counsel's brief fee being two thirds of senior counsel's brief fee and they do not challenge the inclusion of the recoupment figure of £51,000 when calculating an appropriate fee. None of these matters were in issue. I heard no submissions in relation to them. I do not express any conclusions in relation to any of them.

[19] The defendants did not contend that *Carr v Poots* was incorrectly decided or that the principles which I have set out were incorrect or required modification or refinement. Rather it was contended on their behalf that:-

(a) *Carr v Poots* was restricted to those cases in which "the plaintiff may lose entirely against the defendant". That in this case, despite the denial of liability, and given the matters conceded by the first defendant during his police interview, the plaintiff was bound to succeed in relation to the issue of liability and accordingly the case should not be approached on the basis of the decision in *Carr v Poots*.

(b) In the alternative it was contended on their behalf that this case was not one in which "the settlement was a compromise" but rather that £651,000 was "full value or worth of the plaintiff's claim". That "the potential of any case is the maximum damages which a plaintiff might receive should his action proceed to trial" and that the maximum that a judge could have awarded was the amount which was in the event agreed between the parties.

(c) In the alternative it was contended that a practice had developed of taking an amount half way between the settlement amount and the potential of the case against which counsel should mark their brief fees and that this was the correct approach to the assessment of the brief fee in this case.

(d) Finally that the principles in *Carr v Poots* had not been correctly applied to the facts of this case.

Conclusions in relation to the points raised by the defendants

[20] I do not consider that *Carr v Poots* is restricted to cases in which the plaintiff may lose entirely against the defendant. I agree that to require a defendant to pay costs on the full value of a case when the plaintiff only succeeds for a proportion is unreasonable but equally to restrict costs where there has been a *substantial compromise* to the amount recovered is also unreasonable especially in complicated actions. The solution in *Carr v Poots* is to bear in mind both full value and settlement value though placing less emphasis on those figures and to take a broader view of what is a reasonable fee for counsel to be paid on undertaking such a case. The question then arises as to what is a *substantial compromise* so that the case falls within the principles set out in *Carr v Poots*. In my view 10% or 20% is not a substantial compromise but rather an illustration of the principle of swings and roundabouts. It is not necessary in this case to decide what the appropriate test is as to when a compromise is substantial and whether that test should be addressed purely as a percentage or whether it also encompasses other issues. I consider that it is not necessary to articulate the appropriate test as on any test a 50% reduction as a compromise on liability or as a reduction for contributory negligence, as in this case, is such a compromise. Accordingly I reject the first contention made on behalf of the defendants.

[21] The defendants' contention in the alternative is that this case was not one in which "the settlement was a compromise." The defendants contend that £651,000 was "full value or worth of the plaintiff's claim." I reject the suggestion on behalf of the defendant that the inevitable result of this action was a finding in favour of the plaintiff with a 50% reduction for contributory negligence and I also reject the suggestion that this in some way meant that inevitably the full value was £651,000. Detailed evidence was to be given at the trial and the outcome in relation to liability and in relation to contributory negligence was far from clear. The assessment of the credibility of the witnesses would have had a major impact on the eventual outcome of the case at trial as would have detailed adversarial analysis of the engineering evidence. The plaintiff could never be absolutely secure in relation to liability and there would have been a close examination of the credibility of the evidence of the first defendant applying the guidance of Gillen J at paragraphs [11] – [13] of *Thornton v Northern Ireland Housing Executive* [2010] NIQB 4. If the plaintiff succeeded in relation to the issue of liability the reduction for contributory negligence would not inevitably be 50%. I consider that factually this case involved two compromises, one in relation to value and the other in relation to liability and/or contributory negligence. So I reject the suggestion that £651,000 was the full value or worth of the plaintiff's claim. The full value or real value was agreed for the purposes of negotiations as being £1,250,000.

[22] I turn to consider the halfway house argument. If that argument is appropriate then it would result in a brief fee of £22,860 applying the 2011 Comerton Scale with 2% on the balance. I consider that the halfway house argument is not supported by the decision in *Carr v Poots* which states that in cases involving a

substantial compromise the taxing master should bear in mind both full value and settlement value though placing less emphasis on those figures but rather taking a broader view of what is a reasonable fee for counsel to be paid on undertaking such a case. It may assist the taxing master in some cases but it is not definitive. Furthermore I accept the evidence of Mr Brian Fee QC, the Chair of the Fees Committee of the Bar of Northern Ireland, that he is not aware of a practice of marking a fee on a notional value equidistant between the settlement value and the full value or of the halfway house figure being taken as the starting point.

The application of the approach suggested in *Carr v Poots* to the facts of this case

[23] The question remains as to whether the principles in *Carr v Poots* were correctly applied in this case.

[24] Applying the principles in *Carr v Poots* required the taxing master to take into account or bear in mind the full value figure and the settlement figure but neither should be determinative of the amount of the fee it being wrong to "plump" for the fee based on one or other value. The settlement value was £651,000 which applying the 2011 Comerton Scale with 2% on the balance gives a brief fee of £16,870. The full value was £1,125,000 which applying the 2011 Comerton Scale with 2% on the balance gives a brief fee of £28,850. So the range to bear in mind or to take into account is between £16,870 and £28,850 though it would be wrong to plump for one or other of those figures. Accordingly the taxing master was correct on review to move away from the figure of £28,850.

[25] Having borne those figures in mind it is then a matter of taking a broader view of what is reasonable. On that broader view some cases may come close to the fee appropriate on the compromise value; others may come close to the real or potential value. In this case the defendants did not assert that the case lacked complexity or that it did not require specialised knowledge of counsel or that there was not a high degree of responsibility or that commensurate time and labour was not expended by both senior and junior counsel. It was self-evident that this case was of vital importance to the plaintiff. Taking that broader view the taxing master without adopting a mechanistic approach or as he expressed it putting a slide rule over the Comerton scale, in the particular circumstances of this case, fixed a brief fee of £25,000. That brief fee on the spectrum comes closer to the brief fee for the full value of the case than to the settlement value.

[26] I consider that this was a case of quite exceptional importance to the plaintiff. The taxing master's conclusion that the appropriate brief fee came closer to the full value of the case than to the settlement value was in my view justified for that reason and having regard to all the circumstances and in particular to the matters set out in Appendix 2 which circumstances in this case include the following:

a) Liability was denied so that the case was prepared as a contest in relation to both liability and the amount of damages.

b) There was a substantial amount of medical evidence.

c) The case was estimated to last 5 or 6 days which estimate gives an indication of the complexity and detail involved in preparing for trial.

d) The skill and specialised knowledge required of counsel in relation to both the issues of liability, the medical evidence and the accountancy evidence.

e) Negotiations only began 10 days before the trial date and settlement was only achieved on the day before the trial date so that all the work prior to trial had been completed.

f) The potential value of the case was £1.6 million.

g) The difficulties in relation to liability and contributory negligence in that the plaintiff was unable to give any liability evidence and there were no independent witnesses available to assist the plaintiff.

Accordingly I consider that the assessment of senior counsel's brief fee at £25,000 plus VAT with two thirds to junior plus VAT was reasonable and appropriate.

[27] In arriving at that conclusion I emphasise that this decision is not to be taken as a template for assessment of brief fees in all catastrophic injury cases regardless for instance as to the amount for which such cases settle or the amount which is awarded. The reason for bearing in mind the real value and the settlement value is that these are appropriate considerations which should be given weight. If the settlement or award value was less than this case then that factor has to be born in mind and has to result in a lower brief fee. Furthermore the requirement is to give consideration to all the relevant circumstances of the case in which the brief fee is being assessed and to all the particular circumstances in so far as they are relevant to that case. The taxing master should be prepared to recognise that there will be cases in which the brief fee comes far closer to the settlement value than to the real value. That is no more and no less than Mr Brian Fee has stated in his evidence that the application of the principles in *Carr v Poots* to the particular facts of a given case can lead to and has led to the conclusion that the figure for the brief fee has not been too far above the settlement value figure.

Conclusion

[28] I dismiss the defendants' application and affirm the order of the taxing master.

[29] I will hear counsel in relation to the costs of this application and of the taxation process including the costs required of having to go to taxation to reduce

the brief fee from £30,000 and of requiring a review to reduce it again from £28,850 to £25,000.