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Judgment: approved by the Court for handing down | *Delivered:* **25/05/2006**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

JACQUELINE STEWART

Plaintiff/Respondent

and

NICHOLAS WRIGHT

Defendant/Appellant

Before Kerr LCJ, McLaughlin J and Weir J

KERR LCJ

Introduction

[1] This is an appeal from a decision of Hart J awarding compensation to the respondent (whom we shall refer to as the plaintiff) against the defendant, Nicholas Wright, a dentist. The plaintiff had sued the defendant for damages for personal injuries loss and damage which, she claimed, arose as a result of an operation that he performed to remove an impacted wisdom tooth from her right lower jaw. The plaintiff alleged that she had not been warned about the risks associated with this surgery. As a consequence of the operation she now suffers numbness of her chin on the right side and of the lower lip, also on the right. This was caused by damage to the inferior dental nerve and the lingual nerve during surgery. No criticism is made of the way that the surgery was carried out. The sole case made against the defendant was that he failed to give the plaintiff a warning about the risks of the surgery.

[2] It was agreed by the parties that a warning sufficient to properly inform the plaintiff of the risks associated with the surgery was required. The issue before the trial judge, therefore, was whether such a warning had in fact been

given. The plaintiff claimed that none had been given. The defendant and his dental nurse, Mrs Johnston, asserted that the plaintiff had been warned.

[3] For some years before she consulted the defendant the plaintiff had suffered from impacted wisdom teeth in both jaws. It is accepted that, before the operation took place, Mr Wright warned her about the danger of numbness arising from the surgery in relation to the left side. It is not in dispute that the risk of this occurring on the left side was significantly greater than on the right. As a result Mrs Stewart was advised not to proceed with surgery on the left side and she accepted that advice. It is also agreed that, before proceeding with surgery, the defendant consulted a colleague, Mr Duncan. He confirmed that surgery should not be undertaken on the tooth in the left jaw.

The judge's findings

[4] On Friday 17 May 2002, the plaintiff was seen, on referral from her general dental practitioner, by the defendant, Mr Wright. She had been suffering pain in two wisdom teeth on either side of her lower jaw for some time. After discussion it was agreed that the tooth on the right side would be extracted but that the tooth on the left side should not be removed. Following the surgery Mrs Stewart developed numbness in her right chin and the lower part of her right lip and this has persisted to the present time. It is now unlikely that the affected nerve will recover fully.

[5] The learned judge discussed, in paragraph [10] of his judgment, the competing claims as to whether a warning had been given, observing that it was somewhat surprising that, having warned Mrs Stewart about the risks of numbness to the left side if the wisdom tooth from that part of the jaw was removed, the defendant should fail to give a similar warning in relation to the right side. He then continued: -

> "One might accept that there was such a failure on the basis that Mr Wright concentrated solely on the risks created by the position of the left tooth, however there are two factors which militate against such a conclusion. The first is that having taken so much trouble to explain the reasons for the risk in relation to the left it would be simple to explain that there was a risk for the same reasons in relation to the right, but it was not as great a risk. The second factor is that there was evidence that Mr Wright did consider the implications of the removal of the right tooth because his then colleague, Mr Duncan, confirmed Mr Wright sought his opinion about the risks involved in

> extracting both teeth. As I shall explain, I accept that Mr Wright did consult Mr Duncan about both teeth."

[6] One of the central issues in the case was the failure of Mr Wright to have the plaintiff complete a consent form. Although the dental practice where the defendant worked maintained a stock of these forms designed for patients undergoing operations to remove wisdom teeth, they were rarely used by Mr Wright. He explained that it was the practice policy only to use written consent forms in what he described as "high risk" cases. One of the expert witnesses, Mr Quayle, who was described by the judge as a very experienced consultant oral and maxillo-facial surgeon with considerable experience of hospital and university teaching, gave evidence that he had used such forms since 1963. He accepted that they were not always used in dental practices, although the desirability of their use was emphasised in undergraduate teaching. Another expert witness, Mr David Ryan, a consultant oral and maxillo-facial surgeon to the Mater and Dublin Dental Hospitals in Dublin, and senior lecturer at Trinity College expressed surprise that the use of consent forms was confined to exceptional circumstances. He considered that this was very unusual. The judge found Mr Wright's attitude to the completion of consent forms to be "somewhat cavalier". In light of the evidence of Mr Ryan and Mr Quayle he concluded that, although a failure to use a consent form did not amount to negligence, it represented a failure to follow best practice.

[7] Another significant issue related to the completion of medical notes. The judge dealt with this at paragraphs 11 and 12 of his judgment as follows: -

> "[11] This brings me to the evidence about the discussion with Mr Duncan and the issue as to when Mr Wright made the entry in his notes about the verbal warning he said he gave to Mrs Stewart. As can be seen from the colour of the ink used, the relevant entries in the clinical note section, although written in the same hand, were written by 2 different pens. Adopting the expansion and explanation of terminology in plaintiff's exhibit 10 the transcript of Mr Wright's dental notes, what I shall call entry A consists of 2 entries with a space between them. At the top is written "tablets, blood pressure" and at the bottom "4mg Hypnovel IV, [right] arm". In the space has been written entry B, "History pericoronitis LR8 and pain LL8 after discussion leave [extract] LL8, Verbal warning re damage [inferior dental nerve] seen [with] Hal Duncan".

> [12] Mr Wright's evidence was that he wrote entry A before he left the room to speak to Mr Duncan and that he wrote entry B before he discussed Mrs Stewart's teeth with Mr Duncan. However I am satisfied that it cannot be correct that, as Mr Wright asserted in both his evidence in chief and in cross-examination that he wrote entry B before he had the discussion with Mr Duncan. I have reached this conclusion for the following reasons. (1) The natural meaning of entry B is that it was written after the discussion with Mr Duncan. (2) How could Mr Wright know before he discussed the problem what Mr Duncan's view would be? (3) Mr Duncan' s note includes the phrase "leave LL8", which corroborates part of entry B. (4) The more natural construction of "seen with Hal Duncan" is that it was written after the discussion. I therefore conclude that Mr Wright's evidence is unreliable as to when he inserted entry B in the clinical note section of the notes. When, therefore, did he write entry B? Mr Duncan was unable to say whether Mr Wright made any notes. I have given this very careful consideration. I have no doubt that it records a discussion that took place between Mr Wright and Mr Duncan. I accept that Mr Duncan's own note was made that day and it confirms not only that there was a discussion but the opinion Mr Duncan says he gave, and that in turn is consistent with Mr Wright's evidence that he did give Mrs Stewart a warning as to the risks involved in removing the right lower wisdom tooth. Nevertheless I have considerable reservations as to whether it was compiled and inserted on Friday afternoon and not on some later occasion …"

[8] It is important to note the various phrases used by the judge in relation to Mr Wright's evidence about these entries. He said firstly that he was satisfied that the evidence "cannot be correct". He then stated that the evidence on this point was "unreliable". Finally, he said that he had "considerable reservations" as to whether entry B was made on Friday afternoon or at some later time. By any standard, these observations must be judged to be an outright rejection of the defendant's evidence that he had made the notes at the time he claimed to have done. This conclusion we find entirely unsurprising. There is no satisfactory explanation for making an entry in a space between other records and the claim that this was made before the defendant spoke to Mr Duncan cannot easily be reconciled with its content. The judge's finding that the defendant had given evidence on this point

which was, at best, inaccurate is, for reasons that we will discuss presently, of critical importance to the outcome of this appeal.

[9] As we have said, Mr Wright was supported by his dental nurse, Mrs Johnston, in his claim that he warned Mrs Stewart about the risk of numbness in relation to the removal of the right tooth. The judge dealt with her evidence at paragraph [12] of his judgment in the following passage: -

> "Mr Wright's account of what he said to Mrs Stewart after he returned from his discussion with Mr Duncan was confirmed by Mrs Johnston, the dental nurse who was present throughout Mr Wright's dealings with Mrs Stewart. She had worked with Mr Wright in the practice from 1993 until he left in 2003. I have borne in mind that she may be sympathetic towards Mr Wright because of their long working relationship, and that this may have affected her recollection."

[10] The plaintiff gave evidence that she had contacted Mr Wright on Monday, 20 May and that he told her that he knew that something was wrong when he removed the tooth because he found a "dry socket". This was contradicted by the defendant who gave unchallenged evidence that this condition can only develop a few days after extraction of the tooth. The judge accepted that Mr Wright could not have said that he found a dry socket when he removed the tooth but observed that "no doubt he said something about a dry socket, but at that time Mrs Stewart was in a good deal of pain and I am satisfied that she misunderstood what was said".

[11] On the resolution of the competing claims on whether a warning in relation to the removal of the right tooth was given, Hart J said this at paragraph [4] of his judgment: -

> "It is common case that a patient must give his or her informed consent to the operation before it is carried out, and it follows that it is for the Defendant to prove that the plaintiff was given the necessary information to enable her to make an informed decision as to whether she would give her consent and that she then gave her consent to the extraction of this tooth."

[12] The judge returned to this theme at paragraph [14] when he said: -

> "… when it comes to a decision as to whether Mr Wright, supported as he is by the evidence of Mrs Johnston, is a more credible witness than Mrs Stewart I have given considerable weight to the reservations I

> have as to when entry B was inserted into the clinical notes. Taking the evidence as a whole, the defendant has failed to persuade me that he explained the risks involved in the extraction of the right hand lower wisdom tooth to Mrs Stewart, and she was therefore prevented from making an informed decision as to whether she would undergo this procedure. That being so, I conclude that the plaintiff is entitled to succeed against the defendant."

The appeal

[13] For the appellant, Mr Wright, Mr Stitt QC made two principal submissions. He suggested that the learned trial judge had reached insupportable conclusions on the evidence. The finding that the defendant had failed to persuade the judge that he had explained the risks associated with the extraction of the right tooth was one that no reasonable tribunal could make, Mr Stitt claimed. The second submission that Mr Stitt advanced was that the judge had wrongly reversed the onus of proof on the issue of whether a warning had been given. The burden lay throughout on the plaintiff to prove that a warning had not been given, he argued. It was wrong to make a finding in the plaintiff's favour solely because of the defendant's avowed failure to discharge an onus which was not his to bear.

[14] For the plaintiff, Mr Conlon QC accepted that the correct incidence of the burden of proof required the plaintiff to establish that the defendant had not given the necessary warning. He suggested, however, that, although the judge had expressed himself in terms of the defendant having failed to persuade him that a warning had been given, the effect of the judge's findings on the evidence was that the plaintiff had in fact discharged the burden of showing that no warning had been given.

The approach to be taken on an appeal against a decision on the facts

[15] In *Murray v Royal County Down Golf Club* [2005] NICA 52, this court reviewed the authorities on this question in the following passages: -

> "[11] On an appeal in an action tried by a judge sitting alone the burden of showing that the judge was wrong in his decision as to the facts lies on the appellant and if the Court of Appeal is not satisfied that he was wrong the appeal will be dismissed – *Savage v Adam* [1895] W. N. (95) 109 (11). But the court's duty is to rehear the case and in order to do so properly it must consider the material that was before the trial judge and not shrink from overruling the

judge's findings where it concludes that he was wrong – *Coghlan v Cumberland* [1898] 1 Ch 704.

[12] In *Lofthouse v Leicester Corporation* (1948) 64 T.L.R. 604 Goddard LCJ described the approach that an appellate court should take thus: -

> 'Although I do not intend to lay down anything which is necessarily exhaustive, I would say that the Court ought not to interfere where the question is a pure question of fact, and where the only matter for decision is whether the Judge has come to a right conclusion on the facts, unless it can be shown clearly that he did not take all the circumstances and evidence into account, or that he has misapprehended certain of the evidence, or that he has drawn an inference which there is no evidence to support.'

[13] And in this jurisdiction Lord Lowry CJ outlined a similar approach in *Northern Ireland Railways v Tweed* [1982] NIJB where he said: -

> '… while the jurisdiction of the Court of Appeal is unrestricted when hearing appeals from the decision of a judge sitting without a jury, the trial judge was in a better position to assess the credibility of the witnesses and his decision should not be disturbed if there was evidence to support it'."

[16] To this review it is useful to add the words of Lord Hoffmann in *Biogen v Medeva plc* [1996] 38 BMLR 149, 165 where he said: -

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision

> as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* [*Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370] as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved."

[17] Mr Stitt suggested that this was a much less obvious case of requiring to assess the credibility of witnesses than was, for instance, the case of *Tweed* where the judgment at first instance of Kelly LJ was replete with observations as to the reliability of the testimony of various witnesses. He submitted that the present case was one where the judge relied principally for his conclusions on the drawing of inferences from facts and that this court was in as good a position to perform that exercise as was the trial judge. We do not accept these submissions. In our opinion the judge's conclusions depended critically on the view that he formed as to the credibility of the witnesses. In any event the drawing of inferences is no less intrinsically dependent on subjective impression than is the finding of primary facts.

[18] It is clear that the judge brought a critical and meticulous scrutiny to the various factual disputes between the parties. He analysed the inherent likelihood of each version and, in our judgment, reached perfectly tenable conclusions on each. As we have said, we do not find it in the least surprising that he concluded that the defendant's evidence about the time at which he made the crucial entry in the plaintiff's medical records was wrong. Nor do we find it untoward that he disapproved of the attitude of the defendant to the completion of a consent form. These factors were central to his decision on whether a warning had been given. It is clear from the passage of his judgment that we have quoted at [5] above that the judge was properly exercised by the surprising circumstance that a warning was given in relation to one tooth but not in relation to another. Having carefully examined that issue, however, it is clear that the making of the note and the failure to complete a consent form were regarded by him as preponderant on the question of whether a warning had been given. The judge's analysis of these factors cannot, in our judgment, be faulted.

[19] Indeed, we would go so far as to say that, while the failure to mention risk in relation to the right tooth might at first appear surprising, on reflection this may not be entirely unexpected. One can readily imagine that the focus of the discussion initially was on the dangers associated with the removal of the left tooth. When the decision was taken not to extract that tooth, it would

not be difficult to suppose that a warning as to the risks involved in removing the right tooth could be neglected.

[20] In any event, the findings of the judge in relation to the consent form and the timing of entry B on the medical records are not only justified on the evidence, they are, in our view, strongly supportive of the conclusion that a warning was not given in relation to the right tooth. The defendant's evidence that he had made the entry before surgery was performed must be considered in two aspects. Given that the judge found that this evidence could not be accepted, one must first consider why a later entry would have been made. Secondly, and perhaps more importantly, the question arises why the defendant would have given evidence as to the timing of the entry which he must have known was wrong. The making of an entry after surgery had taken place is at least suggestive that the defendant was creating a paper trail in order to support a claim that he had given a warning. While it is not inconceivable that he would have done so even if he had given a verbal warning before surgery, a strong suspicion is aroused that he did so because no warning had in fact been given. That suspicion is reinforced by his adhering in his testimony to a version as to when the entry was made which he knew to be false.

[21] We are therefore satisfied that the findings made by the judge fell squarely within the range of possible conclusions available to him on the evidence. We do not consider that he failed to have regard to any relevant item of evidence. True it is that he did not refer to every matter that was canvassed by counsel nor to every scrap of evidence but, as this court has frequently said, it is not incumbent on a judge to rehearse every single issue that has been raised, much less to record a finding in respect of each of them. Provided he deals with the substantial issues in the case and reaches supportable factual conclusions on them and does not neglect to take account of matters that might affect those conclusions, his findings on disputed facts cannot be disturbed. We consider that the learned trial judge fully complied with those requirements in the present case.

The burden of proof

[22] It was common case on the appeal that, to succeed in her claim against the defendant, the plaintiff must discharge the burden of showing that she had not been warned. We consider that the concession of Mr Conlon on behalf of the plaintiff on this issue was correctly, indeed inevitably, made. Most of the cases that touch on the burden of proof in medical negligence cases are concerned with the requirement that the plaintiff establish that, if he or she had been warned, they would not have undertaken the treatment. The present case deals with the more fundamental, anterior question of whether a warning was given at all. We have no doubt, however, that, just as a plaintiff must show that he would not have undertaken the treatment if he had been

warned, he must also establish that he had not in fact been warned. The legal burden of demonstrating this elementary ingredient of the breach of duty must remain throughout on the plaintiff. If authority for this basic proposition is required it is to be found in *Medical Negligence Case Law* (2nd edition) by Nelson-Jones and Burton where at page 19 it is stated that after establishing a duty of care, *a plaintiff must then demonstrate a breach of that duty*. At page 112 the authors refer to the fact that plaintiffs may face evidential difficulties where there is a factual issue as to whether a warning was given or not, particularly when medical notes indicate that a warning was given.

[23] We are therefore of the view that the judge was in error in stating that it was for the defendant to prove that the plaintiff was given the necessary information to enable her to make an informed decision. On the contrary, it was for the plaintiff to show that she had not been given that information. That being so, the question arises as to what effect, if any, this error should have on the judge's verdict in the plaintiff's favour. Although he was at first disposed to argue that the appeal should be allowed and judgment entered for the defendant, Mr Stitt's ultimate position was that this court should order a re-trial. Mr Conlon argued that the factual findings made by the judge were sufficiently clear to allow this court to conclude that, had the proper test been applied by the judge, the plaintiff would have inevitably succeeded. He submitted that the appeal should be dismissed.

[24] Order 59 rule 11 (1) of the rules of the Supreme Court (Northern Ireland) 1980 provides: -

> "11. - (1) On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding or judgment of the court below."

[25] Paragraph (2) of the same rule provides: -

> "The Court of Appeal shall not be bound to order a new trial on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned."

[26] The commentary in the Supreme Court Practice of 1999 on the then equivalent provision in England and Wales (which was in identical terms) contains the following: -

> "If misdirection is established, it is for the party supporting the verdict and the judgment to show that it did not cause a miscarriage of justice – that is to say, did not influence the result – and he must show it by means of the evidence (*Anthony v Halstead* (1877) 37 L.T. 433, approved in *White v Barnes* [1914] W.N. 74, CA, *per* Vaughan Williams LJ)"

[27] This passage reproduces a similar statement to that which appeared in the 1967 Supreme Court Practice. In *Judge v McBrien* [1971] NIQB Lowry J, having considered the commentary in the White Book of 1967, pointed out that the majority view in the English Court of Appeal in *Floyd v Gibson* 100 L.T. 761 placed a different emphasis on the rule which was "more in keeping with its literal construction: that the court has first to find a misdirection and then to form the opinion that 'some substantial wrong or miscarriage has thereby been occasioned'." These references were made in relation to trial by a judge sitting with a jury and were no doubt influenced by the consideration that it was difficult to be certain of the effect of the misdirection on the minds of the jury. The following passage from the 1999 Supreme Court Practice may, therefore, be of greater relevance to the present case: -

> "… where the trial was by judge alone … if, notwithstanding that the judge misdirected himself, his decision of the case was the right one, a new trial will not be ordered."

[28] This appears to us to accord with principle and common sense. A re-trial would serve no useful purpose if the decision was plainly right, although arrived at by an incorrect route. Moreover, it is not in the best interests of justice to have a re-trial where the versions of the parties as to what occurred are sharply conflicting. The re-litigating of those issues against the background of the earlier trial is not conducive to the determination of where the truth lies.

[29] We are satisfied that, if the judge had followed the proper approach to the question of where the burden of proof lay and recognised that it was for the plaintiff to establish that she had not been warned in respect of the proposed surgery to the tooth on the right side, he would inevitably have concluded, in light of the findings that he had made, that no such warning had been given. His conclusions on the timing of entry B on the medical records; on the attitude of the defendant to the giving of a warning, as illustrated by his use of a consent form only for exceptional cases; on the likelihood that Mrs Johnston's support for the defendant's version had been coloured by her long professional association with him; and his view that the single mistake made by Mrs Stewart (in relation to the remark about the dry

socket) could be innocently explained, all pointed clearly to the judge's preference of her version to that of the defendant. On the evidence available to us we consider that he was right to prefer that version and we consider that, if he had properly apprehended the incidence of the burden of proof, he would still have found in her favour. The appeal must therefore be dismissed.