Neutral Citation Number: [2020] EWHC 1987 (QB)

Claim No. QB-2018-001602

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2020

Before:

RICHARD HERMER QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

JONES	**Claimant**
- and -	
MINISTRY OF DEFENCE	**Defendant**

- -
- -

Simon Wheatley (instructed by **Russell-Cooke LLP**) for the **Claimant**
Russell Fortt (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 12-20 May 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 24 July 2020.

Richard Hermer QC:

1. On 22 June 2020, judgment was handed down in this clinical negligence claim with the consequential issue of costs agreed to be determined on the basis of written submissions.

2. I received submissions from the Defendant dated 29 June 2020 and from the Claimant dated 6 July 2020.

3. The costs of the claim can be conveniently divided into two periods of time:

   i) First, the period of time from the inception of the claim until 6 May 2020, being the point at which it is agreed that the Defendant's Part 36 Offer of £60,000 became effective:

   ii) Second, the period from 7 May 2020 onwards.

4. The parties are agreed that the Defendant is entitled to its costs in respect of the second period. The Part 36 Offer was considerably in excess of the damages awarded by the Court and the Claimant accepts that he must bear the consequences provided for by the rules. As the Claimant is in receipt of insurance which covers the adverse costs of not beating the Part 36 Offer, the Defendant does not seek to offset the costs against the award of damages.

5. Accordingly, the only outstanding issue is in respect of the cost liability for the first period.

6. Both parties have served detailed written arguments setting out their respective positions on costs. I mean no disservice to counsels' helpful submissions if I sketch out their arguments in summary terms.

The Defendant's Argument in a Nutshell

7. The Defendant contends that it was the successful party and accordingly it should recover the substantial majority of its costs.

8. The Defendant premises this argument upon the fact that (i) the Claimant only recovered a small percentage of the damages claimed and (ii) this was because the Court overwhelmingly preferred its evidence to that advanced by the Defendant.

9. The Defendant presses this argument by reliance on the approach adopted by the Court of Appeal in *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750, a clinical negligence case in which the claimant only recovered a small fraction of the damages claimed, in consequence of which, he was ordered to pay 75% of the Defendant's costs.

10. The Defendant submits that the application of these principles to the facts of this case should result in the Court making an order that the Claimant pay 90% of its costs. In the alternative, the Defendant submits that the Court should make an 'issue based' costs order.

The Claimant's Argument in a Nutshell

11. The Claimant contends that he was the successful party. His skeleton argument sets out in considerable detail the relevant history of the litigation and seeks to give emphasis to (i) the fact that whilst he recovered less money than claimed, it was still a significant amount and certainly one justifying the continuation of proceedings in the absence of any offers (ii) the Defendant did not admit that the 20 November 2012 medical appointment would have led to earlier diagnosis until shortly before trial, (iii) pursuing this issue was reasonable and led to considerable further expense and (iv) the Defendant failed to engage with settlement discussions until close to the commencement of trial. The Claimant opposes the making of an issues-based cost order and contends that he should receive the entirety of his costs pre-dating the coming into effect of the Part 36 Offer.

Discussion

12. The cost dispute can be resolved by asking three sequential questions.

    i) Firstly, who was the successful party for the purpose of the 'general rule' provided in CPR 44.2(2) (namely, that the unsuccessful party will be ordered to pay the costs of the successful party)?

    ii) Secondly, is there a reason why the successful party should not recover all of his/its costs (subject to assessment)?

    iii) Thirdly, if so, what is the appropriate order to make?

Who was the successful party?

13. The starting point for assessing cost liability following a hearing is to ask who is the successful party? The general rule provided by CPR 44.2(2)(a) is that the successful party is entitled to be paid their costs by the unsuccessful party.

14. The test for identifying who was successful was described by Sir Thomas Bingham MR in *Roache v Newsgroup Newspapers Ltd* [1998] EMLR 161:

    > "The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

15. There will be many cases in which the answer to this question is clear and obvious. This is not such a case. As the Defendant correctly points out, the Court overwhelmingly preferred the evidence of Professor Ross to Dr Croft and this had a profound impact on my findings on causation and consequently on quantum. In effect, the Defendant's position is that the judgment 'substantially denied' the claimant the large damages that he fought the action to win.

16. On balance however I conclude that neither quantum nor the outcome of discrete issues are the deciding reference points for the assessment of 'success' in this

particular case. In my view the Claimant should be deemed to have succeeded in his claim in substance and reality. The claim sought compensation for the failure to timeously diagnose his HIV and the trial resulted in receipt of an award for precisely that omission. It was not in my view unreasonable for the Claimant to have pursued the claim even for the more modest consequences of a late diagnosis. It was of course a far lower award than that sought but prior to the making of the Part 36 Offer the Claimant faced a choice of either dropping his claim or pursuing it. It cannot be said that pursuing a medical negligence claim for the limited impact (as found) of the delayed diagnosis was unreasonable. As set out in the substantive judgment, the short terms consequences for the Claimant were profound including not simply very serious acute diarrhoea but two admissions to hospital. Absent any offer, it was reasonable to bring the case to trial.

17. The position was all the more marked in circumstances in which it was only shortly before trial that the Defendant admitted that he should have been diagnosed in November 2012 not just February 2013. I do not accept the Defendant's submissions that this late admission had no impact on quantum. It is apparent on their own evidence that it meant that the Claimant's CD4 count would have been higher had he been diagnosed in November 2012 and the consequences of that (at least for short term health and speed of recovery) are explained in the substantive judgment. This appears to be reflected the Defendant's Counter Schedule of January 2020, which contended (on the basis of a seven-month delay) that no symptoms were attributable to the negligence after the point of actual diagnosis, nor was care required at all. By the time of trial, and the subsequent admission, it accepted that delay caused the Claimant's stormy recovery post diagnosis, including two periods of hospitalisation.

18. The Defendant chose not to make a Part 36 Offer until very late in the day. This stance is somewhat difficult to understand in circumstances in which they admitted negligence, albeit with limited causal impact, in their Defence of July 2018 and, by August 2018 at the latest, were in receipt of Professor Ross's Opinion. At this stage it is reasonable to assume the costs of the claim would have been modest and a Part 36 Offer would have provided them with very substantial cost protection, even if (as is reasonable to assume from the correspondence I have been shown) it would have been rejected.

19. In my view there is nothing in the Court of Appeal's judgment in the *Medway* case that compels a different outcome. Save that in *Medway* the Claimant received a far lower amount than sought, the facts of the case are very materially different to this one. In particular in *Medway* the main claim (negligence leading to amputation) was deemed to have "*failed entirely*" (per May P at §7) and the very modest award of general damages arose as "*an afterthought*" which was "*first raised [in counsel's] closing address*" (§8). As the President stated (§17):

> "The subject matter of the £2,000 was simply not what the action was about, and, other than technically, that claim was not advanced until the respondent's closing submissions."

20. In such circumstances it is clear why the Court of Appeal concluded that the reality of the position was that the Claimant had lost and also why it held that any criticism of the Defendant for not making a Part 36 Offer in respect of essentially a non-viable claim, would be classified as 'quixotic' (§10). As Tomlinson LJ noted (§49) at no

stage could the Defendants have made a Part 36 offer without incurring a liability in costs wholly disproportionate to the outcome. It is equally clear why the Court concluded that no rational person would launch expensive clinical negligence proceedings for a claim worth only £2,000 (per May P at §16, Tomlinson LJ at §47).

21. As set out above, in contrast to *Medway* the Claimant established his case that the delay in diagnosis from November 2012 onwards caused damage entitling him to compensation. It was reasonable of him to bring proceedings even for the relatively modest amount awarded by the Court.

Should the Claimant recover all his costs?

22. There needs to be a "reason based on justice" to depart from the general rule that the successful party recovers its costs (see *F&C Alternative Investments* [2012] EWCA Civ 843 per Davis LJ at §§47-9) and the mere fact that a successful party has succeeded on some, but not all, issues does not always amount to sufficient justification for departure.

23. Whilst I do not consider that Defendant's arguments were sufficient to demonstrate that it is the successful party, they do demonstrate that it would be unjust if it were to pay for all the Claimant's legal costs. The reason for this conclusion will be obvious from the face of the substantive judgment and do not need to be rehearsed here. In short, I far preferred the relevant expert evidence submitted by the Defendant with the result that the award of damages was very far below that sought. An award of 100% of the Claimant's costs in these circumstances would be unjust and therefore a departure from the general rule is justified.

The appropriate order

24. I decline to make an issue-based cost order pursuant to CPR 44.2(6)(f). Orders of this nature can present an unnecessary and disproportionate burden in Detailed Assessments where many of the issues (here negligence, causation and loss) materially overlap with each other and are difficult to unpick fairly. If the general rule is being departed from, then it is generally preferable to make orders expressed in percentage terms, or references to distinct periods of time (see *Multiplex Constructions* [2008] EWHC (per Jackson J at §72). Indeed, reinforcing this principle, CPR 44.2(7) provides that before considering making an issue-based cost order, the Court should consider whether it would be practicable to make an order for payment of a 'proportion' of costs. I consider that such an approach is practicable here.

25. Having regard to the findings made at trial, the amount of time and costs focussed on the medical dispute and the additional points advanced by the parties in their written submissions (the most pertinent of which have been highlighted above), the appropriate order is that the Claimant shall recover 60% of his costs.