THE HIGH COURT

[2021] IEHC 274

[2018/2004P]

BETWEEN

KIM HANRAHAN

PLAINTIFF

AND

JOHN WATERSTONE, DOCTOR JOHN WATERSTONE CONSULTANT OBSTETRICIAN AND GYNACOLOGIST, NATIONAL REPRODUCTION (TRADING AS CORK FERTILITY CENTRE) AND BON SECOURS HEALTH SYSTEM COMPANY LIMITED BY GAURANTEE (TRADING AS BON SECOURS HOSPITAL)

DEFENDANTS

Judgment of Mr. Justice Kevin Cross delivered on the 16th day of April, 2021.
Judgement as to costs

1. The substantial proceedings arose out of fertility treatment provided to the defendant in 2011 and 2012 and the alleged negligence of the defendants in the provision of this treatment. The case proceeded for thirteen days in the High Court from the 15th December, 2010 until the 27th January, 2021. The parties furnished submissions to the court on the 23rd February, 2021 and judgment in the substantive issue was delivered by the court on the 11th March, 2021 in which the plaintiff's case against the defendants was dismissed.

2. The instant judgment relates to the issue of costs in which the defendants sought 50% of their costs and the plaintiff, notwithstanding the result sought an order for the costs of the first ten days of the hearing and of the submissions prepared with no order as to costs for the remainder of the hearing.

3. The history of the substantive dealings in relation to this case is set out in my judgment delivered on the 11th day of March, 2021 and will not be repeated herein save where necessary.

4. The plaintiff's first complaint in the proceedings was that a fibroid was detected in the plaintiff's uterine cavity in June 2012 while the plaintiff was in the course of fertility treatment and this fibroid was undetected by previous films and due to the fact that fibroids are of slow growth it must have been present and ought to have been detected and adversely impacted upon the plaintiff's chance of pregnancy but notwithstanding the presence of this fibroid, the fertility treatment was continued with little or no chance of success. The second ground of complaint was that when the fibroid was ultimately identified it was removed in September 2012 by means of a laparotomy involving invasive surgery as opposed to a hysteroscopic myomectomy which would not have involved any invasive surgery.

5. What brings this case out of the ordinary is that the first named defendant when writing to the plaintiff's GP after the operation in September 2012, referred to the fibroid as "submucus" and that it was "very deep" and "protruding into the uterine cavity". This description on its face, indicates that the fibroid was what is known as a FIGO type 1 or 2 which is the type of fibroid that has the most impact on fertility and the first named defendant's description to the GP of the fibroid in his letter then was interpreted by the

plaintiff and the plaintiff's experts (along with the operation note which described the fibroid as "submucus" and that it was "right on top of the endometrium") as suggestive that it might even have been a type 0 fibroid. A type 0, 1 or 2 fibroid would be likely to have impacted on the plaintiff's fertility.

6. The first named defendant contends that the letter to the GP was a "terrible mistake" for which he apologised, when giving evidence, and for which he has no explanation but said that the description in the letter did not correspond with what he saw at the operation and that when he was referring to the fibroid as being "submucus" he was not utilising the FIGO classifications but was utilising an older form. It was the defendant's case that the fibroid was at all times a type 3 FIGO fibroid which never protruded into or affected the cavity and had little or no impact on fertility and that it was reasonable to proceed with the fertility treatment and ultimately when it was decided to remove the fibroid it was reasonable to do so by conventional surgery.

7. In my judgment in the substantive case I stated:

"7.8 Secondly, in view of the evidence in this case, the letter of the 7th September, 2012 to the GP can only be explained either by Dr. Waterstone deliberately attempting to deceive the court or by the fact that the letter was entirely mistaken and careless. There are indeed great difficulties in accepting that an experienced practitioner such as Dr. Waterstone was careless and mistaken in his correspondence as he now claims however I am not prepared to find deliberate deceit. If I believed there was a third innocent explanation for Dr. Waterstone's testimony as to what he found in the operation, then I may well have come to an entirely different conclusion as to the nature of the fibroid.

…

7.13 It must also be stated that the plaintiff's sincere views and the understandable opinion of the plaintiff's experts Dr. Papaioannou and Mr. Iskander, the integrity of whose evidence I fully respect, were caused by the circumstances and wording of the letter to the plaintiff's GP of the 7th September, 2012 and the fact that no explanation for what was written was given until Dr. Waterstone himself gave evidence in which he stated that the letter was a mistake and accepted that it was inaccurate. This letter also gives reasonable support to the plaintiff's interpretation as to the contents of the operation note. I do not accept the characterisation of the letter or indeed of the operation notes as being 'subjective' as suggested by the defendant in their submissions. The letter and the reading of the notes as informed by the letter clearly supported the contentions of the plaintiffs that the slides of July 2012 showed encroachment and given the slow nature of the growth of the fibroid this encroachment must also have been there in June of 2012. Accordingly, the plaintiffs mistake which I find to be a mistake was an entirely understandable one.

7.14 I accept on the balance of probabilities Dr. Waterstone's explanation for the letter as being a mistake though had he clearly set out his explanation for the letter and

how the operation note was to be interpreted notwithstanding that letter, these proceedings might well have been avoided. In this regard, the conduct of the defendant was to a significant extent responsible for the bringing of this case."

8. Dr. Waterstone gave his evidence as to the letter to the GP on the 9th and 10th day of the trial and on the 22nd January, 2021 the solicitors for the plaintiff wrote a letter to the defendant's solicitors marked "without prejudice save as to the issue of costs" and stated:

> *"…at the conclusion of his evidence yesterday it is now apparent that Dr. Waterstone is resiling from the contents of the correspondence which was dictated and signed by him which he sent to our client's general practitioner, Dr. Molly Owens on the 7th September, 2012 together with a purported justification for him doing so. It is also clear that no indication was given prior to the commencement of this trial that this was the position being taken by Dr. Waterstone in the defence of this case in relation to this pivotal correspondence. While it was alluded to by counsel for the defendant in the course of the cross examination of Drs. Spyros Papaioannou, consultant obstetrician and gynaecologist, the manner and extent to which Dr. Waterstone is now seeking to abandon the explicit contents of his own correspondence on this date was in no way fully clear until the conclusion of his evidence under cross examination yesterday.*
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> *Accordingly we hereby give notice that pursuant to the provisions of s.169(1) of the Legal Services Regulation Act, 2015 and O.99 r.3(2) of the Rules of the Superior Court, 1986 (as inserted by S.I. 584 of 2019) when the question of the liability for costs of these proceedings is to be determined by Mr. Justice Cross, irrespective of the outcome of these proceedings is separate to any reliance thereon our client will be seeking the full costs of these proceedings up to the conclusion of the hearing of the trial of this action yesterday when the evidence of Dr. Waterstone was completed.*
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> *Furthermore, on behalf of the plaintiff we confirm her willingness to settle this case for the sum of €50,000 together with High Court costs to include costs of discovery and any reserve costs to be taxed in default of agreement. This offer is open for acceptance by the defendants until 12 noon on Monday 25th January, 2021. In the event the defendants do not accept the terms as set out above, the plaintiff reserves the right to make an application to the court in any determination of the issue of costs and reserve the right to bring this offer to the attention of the court in any such application."*

9. Counsel for the plaintiff explained that the request for €50,000 damages was made on the basis that any further days hearing would probably cost more than €50,000 and left open for the defendants to discuss the quantum however the said offer was not accepted.

10. The defendant made the point that no reliance was made by or on the GP's letter in any of the pleadings or particulars and it was further contended that there were aspects of the plaintiff's case upon which the GP letter has no bearing and that even had the GP's letter

been brought to the attention of the plaintiff that the defendants do not accept that the letter would have altered the approach the running or otherwise of the case as demonstrated by the request for 50,000 in damages.

The law

11. Section 169 of the Legal Services Regulation Act, 2015 states insofar as it is relevant:

> *"169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—*
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> *(a) conduct before and during the proceedings,*
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> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
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> *(c) the manner in which the parties conducted all or any part of their case*
>
> *…*
>
> *(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer …"*

Order 99 of the Rules of the Superior Courts as provided by S.I. 584 of 2019 does not alter the situation and provides that subject to the provisions of the 2015 Act costs are at the discretion of the court and in particular at O.99 r.3(1) the court shall have regard to the matter set out in s.169(1) of the 2015 Act and:

> *"(2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs."*

12. It was accepted by counsel on both sides that the 2015 Act does not alter the law that had hitherto prevailed insofar as it applies to this application.

13. There had been previous "without prejudice save as to costs" correspondence between the parties in that, towards the start of the trial, the defendants wrote to the plaintiff solicitor by letter dated the 17th December, 2020 stating that they would be prepared to bear their own costs if they received a notice of discontinuance in the matter before 4pm that day otherwise they will seek to recover their full costs.

14. Unfortunately, the said letter was received by Mrs. Hanrahan on the anniversary of the stillborn death of her twin, Oran, which had resulted in previous successful medical negligence action against the first named defendant and the receipt of the said letter on that anniversary caused great distress to Mrs. Hanrahan and resulted in the plaintiff's counsel indicating that they were going to seek aggravated damages which said application was later withdrawn and it was accepted that the letter was sent on the 17th December by way of an oversight without any hostile intention to Mrs. Hanrahan.

The defendant's submissions

15. The defendant submits that they are not seeking their full costs. They recognise that a misunderstanding was caused by Dr. Waterstone's letter to the GP and accordingly submit that they, as being "entirely successful", should in the circumstances be entitled to 50% of the costs. The defendants submit that the plaintiff's expert ought to have consulted with the films and the slides which show the fibroid, whereas Dr. Papaioannou's report was first filed without reference to the films. The defendant's case was always that the films indicated that the fibroid did not encroach and therefore was not of particular danger to the fertility of the plaintiff.

16. The defendant further contends that even if the letter is wrong which they accept that the plaintiff had two aspects to her case namely that the fibroid was protruding and causing damage to her fertility and also that it ought to have been removed without an invasive operation procedure and that the plaintiff ought to have been aware what the defendant's case was.

The plaintiff's case

17. The plaintiff's case is that the letter to the GP was central to their case at all stages. The letter was first alluded to by the plaintiff's expert in the medical negligence trial against the first defendant as a result of the stillborn death of Oran. The expert in that case Dr. Mason referred to the letter and the fact that *"in September 2012 a myomectomy was performed to remove a two centimetre anterior submucus fibroid. During that operation the endometrial cavity was opened*." Dr. Mason clearly got that information from a combination of the GP letter and the operation notes and at the end of his report in the medical negligence case resulting from the death of Oran he stated:

> *"The final point which is of little relevance to the current case, and also outside the area of my expertise, is the question why the myomectomy was felt to be necessary. It is unlikely that a two centimetre fibroid was responsible for this couple's infertility. The removal of a fibroid carried a small risk that the procedure could result in a hysterectomy but more importantly would increase the potential risk of uterine rupture in a subsequent pregnancy and would necessitate delivery by caesarean section. It is likely that a caesarean section would have been needed regardless given the maternal age, the twin pregnancy and the previous caesarean section. In my opinion it is not clear from the notes whether the potential risks and benefits of this procedure were adequately discussed."*

18. Following this report from Dr. Mason in the earlier proceedings, the plaintiffs engaged the expertise of Dr. Papaioannou who advised that this two centimetre fibroid protruding as it was described by Dr. Waterstone ought to have been noticed and the failure to do so was negligent and also that it ought to have been removed other than by an operation.

19. The plaintiff later engaged the services of Mr. Iskander to deal with the films but his interpretation of the films was governed by the description of the fibroid as given by Dr. Waterstone in the GP letter and how this letter affected the interpretation of the wording of the operation note.

20. It is the plaintiffs' submission that, they took the view that the letter was being the basis of the breach of duty and, in Mr. Treacy's words, "the whole basis of the case was on wrong footing and the case proceeded on that basis". The plaintiff submitted that there were three stages of wrongdoing in relation to the GP letter and that it was wrongdoing by a doctor to his own patient and the doctor's duty to a patient, not to deceive, persists after the conclusion of any treatment as demonstrated by the guidelines for professional conduct as set out by the Medical Council.

21. Counsel for the plaintiff indicated the entire case was opened on the basis of that letter. Counsel for the plaintiff submitted that their case both as to the alleged failure to identify the fibroid in time and the decision to persist with the fertility treatment as well as the decision to operate physically on the fibroid rather than to proceed electronically were all on the basis that the letter to the GP was correct and that the fibroid was protruding into the cavity. It was submitted that it was not until Dr. Waterstone gave evidence that the letter. was abandoned by the defendant. This was ten days into the case and accordingly the plaintiff was seeking the full costs of the first ten days in that the defendants allowed the case to proceed on what they knew to be a total misunderstanding based upon their instructions due to the writings of their client and allowed it to proceed without withdrawing or commenting upon or eluding to the mistakes or errors of that letter from the date it was written on the 7th September, 2012 up to the commencement of proceedings, secondly from the commencement of the proceedings up to the first day of the trial and thirdly from the commencement of the trial up to day 10. It is submitted that to make no order as to costs is in fact a punishment for the plaintiff who did nothing wrong.

Authorities

22. It is accepted by both sides that as defined by the terms of the Legal Services Regulations Act, 2015 or indeed any other definition the defendant was "entirely successful" in the case.

23. It is also accepted that the provisions of the Legal Services Regulations Act do not alter the existing law insofar as applies to this case.

24. Whereas there are a number of cases dealing with a party who is "partially successful" – see *Higgins v. Irish Aviation Authority* [2020] IECA 227 and *Chubb European Group SE v. the Health Insurance Authority* [2020] IECA 183 etc, only one authority was open to me of an entirely unsuccessful plaintiff being awarded full costs (*Mahon v. Keena*, below). The plaintiff relied upon P*epper Finance Corporation (Ireland) Ltd v. Michael Macken and Patricia Watson* [2021] IECA 15 in which the Court of Appeal held that the successful plaintiff in the High Court had only furnished the High Court with a partial account of transactions and referred to para. 12 of the judgment:

> *"12. All members of this Court fully understand how, in the course of preparing affidavits seeking to provide reasonably clear explanations of complex transactions, details can be omitted and that judgments are necessarily made as to what it is, or is not, helpful to record on affidavit. Inevitably it may happen that with hindsight those*

judgments might have been made differently. However, in an application of this kind a partial explanation of a transaction – however complex it may be – should never be tendered, and the Court should be advised properly of all key elements thereof. It is striking that Costello J. went through each of the documents with which she had been provided in some detail, unaware that they disclosed only part of what occurred on December 15. It is not acceptable that the Court should be left with an impression that is false (however irrelevant a party may think the impression to be), it is doubly unacceptable that when it becomes apparent that the Court is under such a false impression that it is not corrected, and it is most surprising that when points of objection of the kind raised by Mr. Macken were presented on affidavit before the High Court and this Court, that they were not properly responded to and the features of the transaction that had not until then been disclosed, were not explained to the Court."

And in that case the Court of Appeal dismissed the appeal but stated at para. 35:

"35. … However, the manner in which information relating to these transactions was disclosed to the High Court was most unsatisfactory, and it was understandable that Mr. Macken sought to pursue an appeal based upon the information he had obtained which was not, but ought to have been, put before the High Court Judge. For this reason, and as a mark of its disapproval of the manner in which this application and the initial hearing of this appeal were addressed by Pepper, it is my view that an Order should be made (i) discharging the order for costs made against Mr. Macken in the High Court and (ii) ordering that Pepper discharge Mr. Macken's costs and expenses incurred in connection with this appeal."

25. The plaintiff also relies on the Supreme Court judgment of the case of *Mahon & Ors v. Keena & Anor* concerning the ultimately successful appeal of the defendants against a High Court order requiring them to comply with an order of the Tribunal of Inquiry into Planning Matters and to appear before the tribunal to answer questions. It transpired that the defendants in order "to protect journalistic sources" had destroyed documents in their possession concerning newspaper story and Murray C.J. on the 26th December, 2009 dealing with costs stated:

"This deliberate act of destruction of evidence, for reasons explained in the judgment of this Court, deprived the Tribunal of the possibility of conducting any meaningful inquiry into the source of the leaked letter. The High Court described this as 'an outstanding and a flagrant disregard of the rule of law.'. It said that: 'In so doing the defendants cast themselves as the adjudicators of the proper balance to be struck between the rights and interests of all concerned.' The High Court added: 'It need hardly be said, that such a manner of proceeding is anathema to the rule of law and an affront to democratic order. If tolerated it is the surest way to anarchy.'"

The appellant succeeded in their appeal because the Supreme Court held that the High Court had not correctly stuck the balance between journalistic privilege and the public

interest of the tribunal and the appellant sought their costs. The Supreme Court referred to then O.99 r.1(3) and stated:

> *"…Thus, it was the very act of destroying the document that decisively shifted the balance and deprived the Tribunal of any effective power to conduct an inquiry and, by extension, deprived the courts of any power to give effect to any order of the Tribunal. This act was calculated and deliberate and was performed with that clear purpose in mind. That 'reprehensible conduct' determined the course which these proceedings took and was at the root of balancing the issue which the Court had to determine.*
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> *In the view of the Court the deliberate behaviour of the appellants was directly related to and was intended to achieve the outcome of the case, which has in fact occurred.*
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> *As explained in Dunne v Minister for the Environment [2008] I.R. 775 at 780, (per Murray C.J.), there 'has been no fixed rule or principle determining the ambit of [the exercise of the court's] discretion and, in particular, no overriding principle which determines that it must be exercised in favour of an unsuccessful plaintiff in specified circumstances or in a particular class of case.' More generally, it is not in doubt that the Court has jurisdiction, to be exercised in exceptional cases, to order a successful party to pay the costs of the unsuccessful party.*
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> *The behaviour of the appellants was such as to deprive them of their normal expectation that the Court would, in the exercise of its discretion, award costs in their favour in accordance with Order 99. The Tribunal was, on the other hand, fully entitled to conduct its inquiry and to seek the assistance of the High Court. The Court will, in these exceptional circumstances, order that the respondents are entitled to recover the costs of both the High Court and this Court from the appellants"*

26. The defendant submits that this case is entirely different from *Mahon v. Keena* in that the conduct of the defendant was not one of suppression or destroying of the evidence even if a failure to explain the GP letter, which they do not necessarily accept, any breach of duty of care.

Determination

27. I accept that Dr. Waterstone's letter to the GP was central to the plaintiff bringing the case. It alerted the plaintiff to the possibility of error and it informed Dr. Papaioannou that there was a breach of duty.

28. I do not accept the contention by the defendant that irrespective of the letter that the case would have proceeded on the basis of the complaint that the fibroid ought to have been dealt with differently. It was because the fibroid was believed to be a protruding fibroid, and only because it was believed to be a protruding fibroid that the second aspect of the plaintiff's case was sustainable.

29. I do not accept the submission of the defendants that the plaintiff had any duty to explain in the pleadings that they were relying upon a particular letter. There is no such obligation as clearly what the plaintiff was or was not relying upon is a matter of evidence and not suitable for particulars.

30. I accept the view of the Supreme Court in *Mahon v. Keena* that there are no guidelines as to when the court should exercise its discretion and award an unsuccessful party its costs.

31. I accept the submission on the part of the defendants that Dr. Waterstone's conduct was not the same as that of the successful defendants in *Mahon v. Keena* in that the *Mahon* case involved the wilful destruction of the necessary documents. However, I also accept the contention on the part of the plaintiff that Dr. Waterstone had an ongoing duty to his patient and that indeed it ought to have been clear to the defendants that the plaintiffs were relying upon the GP's letter and how this informed the interpretation of the operation notes certainly from the receipt of Dr. Papaioannou's expert report if not before and that the defendants merely let the letter go unexplained until day 10 of the trial.

32. I note that in *Pepper v. Macken* the unsuccessful defendant was awarded his costs of the appeal though not of the original High Court proceedings.

33. I note also that it is accepted on all sides that in order to depart from the normal rule that there must be exceptional reasons. The plaintiff relies upon in particular the circumstances as set out in Section 169(1)(a)(b)(c) and (f) of the Legal Service Regulation Act, 2015 in regards to the conduct of the defendant before and during the proceedings in failing to give their explanation for the letter and in the fact that as a result of their conduct it was reasonable for the plaintiff to pursue the issues in the case and that the defendants failed to conduct their case fairly and that once the defendant's contention about the letter was made apparent, the plaintiff indicated in a letter marked "without prejudice save as to costs" that they were seeking their costs for the first ten days of the proceedings and sought what is described as a moderate amount of damages in total and that the only offers from the defendants were that the plaintiff should end the proceedings with no order as to costs on the basis of accepting that suggestion at very short notice.

34. I accept in this case there are extraordinary circumstances which resulted in the case being taken and which persisted until day 10 of the proceedings and I repeat my words in para. 7.14 of the original judgment to the effect that had Dr. Waterstone set out his explanation for the letter and the operation note these proceedings might well have been avoided and "the conduct of the defendant was to a significant extent responsible for the bringing of this case".

35. Based upon those findings the plaintiff submits that as they had done "nothing wrong" that they should be awarded their costs for the first ten days.

36. While I am sympathetic to the plaintiff's submissions I cannot accept them in full. The fact of the matter is that the plaintiff has been entirely unsuccessful and that the proceedings

were initiated after the report from Dr. Papaioannou without any regard to the scans. It is correct that armed with their interpretation of the GP letter and the findings on operation both Mr. Iskander and Dr. Papaioannou were able to interpret the scans in a way that favour the plaintiff's case. The second scan of which a record was maintained taken on the 18th June, 2012 appears to show what was interpreted by the plaintiff's experts as an incursion into the cavity by the fibroid. To the plaintiff's experts this was confirmation of what was contained in Dr. Waterstone's letter to the GP. It is only if the GP's letter is to be ignored as being a "terrible mistake" that the defendant's expert's interpretation of this scan i.e. that it was taken at a different angle, can be valid. However, some criticism can be levied on the plaintiff for the failure to address the scans until the trial was in progress.

37. I do not accept the proposition that just because the plaintiff "did nothing wrong" that the plaintiff is thereby entitled to the costs order as sought. The issue is whether there are exceptional circumstances justifying a departure from the awarding of costs to the "entirely successful" defendant and if so to what extent.

38. In the circumstances I find that this is indeed an exceptional case in which the normal rules of the cost following the event and being awarded to the entirely successful defendant in justice cannot stand. Neither does the submission from the defendant that they should be awarded 50% of their costs, represent a fair result due to the nature of the misinformation caused.

39. I considered making no order as to costs to either party but I have come to the conclusion that that would be unfair to the plaintiff.

40. I note that in *Pepper v. Macken* the Court of Appeal did not award the unsuccessful defendants the costs in the High Court and I believe that it is undoubtedly the case that due to the letter to the GP proceedings were initiated and the outlays were incurred in particular the expenses of Dr. Papaioannou and Mr. Iskander and it would be unfair therefore to burden the plaintiff with outlay or expenses incurred. Therefore, being fair to the parties in the exceptional circumstances of this case I will make no order as to costs save that I order that the plaintiff is entitled to all the Outlay of the proceedings to include the witness expenses of Dr. Papaioannou and Mr. Iskander and their fees.

41. I am aware that in making such an order that there is in effect a penalty against the plaintiff who has as Mr. Treacy so fairly put it did "nothing wrong" and in particular a penalty against the plaintiff's legal advisors who conducted themselves in a highly professional manner in preparing for the trial throughout the trial, in making and preparing the submissions and over the two days of the hearing as to costs. It may be that as a result of this order it is the plaintiff's legal advisors who will be out of pocket as I have little doubt that they conducted the proceedings on the basis that if costs were not obtained that they would not seek any from their client. This is in the best and honourable tradition of the solicitors and barristers' profession. It is something that is little recognised in public and something that is hardly ever mentioned when the legal system in tort is scrutinised. However, I have come to the conclusion that the conduct of the

defendant is not such or of such deliberate or egregious nature that could justify the award of legal costs to the plaintiffs. Other than the outlay and witnesses' expenses as outlined above.

End.

APPROVED

Mr. Justice Kevin Cross

Dated 16th April, 2021