



**Sophie Dorfner v Ranjan Vhadra**  
Royal Court  
22<sup>ND</sup> March 2016

**JUDGMENT**  
**11/2016**

Application for an order awarding full or partial indemnity costs

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

**Between:** **SOPHIE DORFNER** (“the Plaintiff”)

-v-

**RANJAN KUMAR VHADRA** (“the Defendant”)

**APPLICATION FOR COSTS**

**Judgment handed down: 22 March 2016**

**Before: Sir Richard Collas, Bailiff**

**Advocate for the Plaintiff: Advocate M G A Dunster**

**Advocate for the Defendants: Advocate G S K Dawes**

**Cases, legislation and references referred to:**

*The Royal Court Civil Rules 2007*

*Hulme v Matheson Securities (Channel Islands Limited) No. 2 (1997) Civ. App. No 234 GLJ 47*

*Disney v Plummer* [1991] Fleet Street Rep 165

*Investec Trust (Guernsey) Limited & Bayeux Trustees Limited and Others v Glenalla Properties Limited and Others* (Guernsey Court of Appeal unreported judgment 4/2015)

*Court of Appeal (Guernsey) Law, 1961, section 18*

*C v P-S 2010 JLR 645 at [11]*

*Leeds v Weston and Levi* [2012] JCA 088

*Federal Republic of Brazil v Durant Intl Corp* [2012] JCA 160

*Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582

1. The Defendant has applied (“the Application”) for an order awarding full or partial indemnity costs against the Plaintiff following a judgment issued by me on 20 November 2015 subsequent to a trial on the question of liability heard over two days, 16 and 17 November. In the judgment I found in favour of the Defendant and dismissed the Plaintiff’s clinical negligence claim on the ground that the Plaintiff had failed to establish any breach of the duty of care owed to her by the Defendant.
2. I have before me the Defendant’s skeleton argument in support of the Application, the Plaintiff’s skeleton argument in reply and a response to the Plaintiff’s skeleton submitted by the Defendant. With the consent of counsel, I have dealt with the Application “on the papers” without an oral hearing.

## The Law

3. The Court's power to order indemnity costs derives from Rule 83 of the Royal Court Civil Rules 2007 ("RCCR"). The Defendant relies on Rule 83(2) (b) and claims that the Plaintiff pursued her case unreasonably after the disclosure by the Defendant of his expert report.
4. I have been referred to many decisions in which the courts both here and in England and Wales have had to consider when it is appropriate to award indemnity costs. Locally the line of authoritative cases starts with the Court of Appeal in Hulme v Matheson Securities (Channel Islands Limited) No. 2 (1997) Civ. App. No 234 GLJ 47 where the main principle was expressed by Southwell J.A. at page 7 of his judgment:

*"It is apparent from the English decisions that the discretion to order costs to be taxed on an indemnity basis is regarded as one not to be fettered or circumscribed beyond the requirement that exercise of the discretion must be 'appropriate'."*

5. After referring to the English Court of Appeal's decision in Disney v Plummer noted at [1991] Fleet Street Rep 165, he said at page 8:

*"This court is here concerned with the application of Royal Court Rule 48 [as it then was]. The discretion under this Rule is also not to be fettered or circumscribed, and is to be exercised judicially in the light of the particular facts of each case."*

6. In the period following the decision in Hulme there have been numerous cases here and elsewhere on the same issue. The learned guidance accrued over the years has been successively distilled by appellate courts. The most recent such decision in Guernsey is that of the Court of Appeal in Investec Trust (Guernsey) Limited & Bayeux Trustees Limited and Others v Glenalla Properties Limited and Others (Guernsey Court of Appeal unreported judgment 4/2015) delivered on 21 January 2015.
7. The latter decision merely consolidates the principles laid down in earlier cases without establishing any new jurisprudence and it is of course binding on me. For those reasons, I will refer to it even though it was not cited to me by either of the parties.

"15. There is no dispute as to the relevant principles. They may be summarised as follows.

(a) All questions of costs are in the discretion of the court: Court of Appeal (Guernsey) Law, 1961, section 18.

(b) The circumstances in which an award of indemnity costs may be made are likely to be those set out in the Royal Court Civil Rules: Hulme v Matheson Securities (Channel Islands) Ltd No 2 [1997] 24 GLJ 80.

(c) Rule 83 of the Royal Court Civil Rules makes provision for an order for costs on a full or partial indemnity basis where either, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the ordinary basis or "where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court".

(d) The court's approach is similar to that adopted in Jersey in relation to similar rules. The Jersey approach is shown by the following two citations from decisions of the Jersey Court of Appeal:

*"The question will always be – is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct*

*deserving of moral condemnation, or malicious or vexatious conduct": C v P-S 2010 JLR 645 at [11] per Beloff JA;*

*"The grounds for considering the making of an award of indemnity costs were most recently considered by this Court in Leeds v Weston and Levi [2012] JCA 088. In reviewing earlier decisions of this Court Jones JA noted that there had to be some special or unusual feature justifying such an award such as culpability, abuse of process, deceit, unreasonable behaviour, abuse of court procedures or the submission of unnecessary evidence; but not necessarily a lack of moral probity, malice or vexatious conduct": Federal Republic of Brazil v Durant Intl Corp [2012] JCA 160 per McNeill JA.*

8. Counsel cited a number of decisions illustrating the application of the principles to the facts of individual cases. I do not need to refer to them all because it is the general principles that I have to apply.

#### **Advocate Dawes' submissions**

9. The Defendant's principal submission was that, at an early stage in the proceedings, his Advocates voluntarily disclosed his expert medical report prepared by Mr Robin L Allum MB, ChB FRCS which showed that a responsible body of medical opinion would support the course of treatment followed by the Defendant. Consequently, the Plaintiff would not be able to satisfy the test for negligence set out on Bolam v Friern Barnet Hospital Management Committee [1957] 1 WLR 582 in that it would be insufficient for her to show merely that there was a body of medical opinion that would criticise the treatment of her by the Defendant. It was therefore clear from the outset of the proceedings that the Plaintiff's case was bound to fail. Hence it was unreasonable of her to have pursued her claim to trial thereby incurring significant costs which could have been avoided.
10. He criticised the Plaintiff for having failed to disclose any medical evidence in support of her case at the time of issuing proceedings. In particular, she has never disclosed an expert report obtained from a Professor King. From that failure, the Defendant drew the inference that the expert advice did not support the claim. In correspondence, the Defendant's Advocates had accused the Plaintiff of "expert shopping to obtain supportive evidence".
11. The Defendant's skeleton argument also makes reference to the fact that the Plaintiff commenced proceedings shortly before the prescription period was due to expire. In my judgment, nothing turns on that point.
12. The crux of the submission is that the Defendant's Advocates warned the Plaintiff in correspondence, at an early stage in the proceedings, that she would not be able to succeed in establishing breach of the duty of care as the Defendant's expert would support his treatment and there was a logical basis for his opinion.
13. As an additional submission, the Defendant relied upon the "drop hands" offer conveyed to the Plaintiff's Advocates in a "without prejudice save as to costs" letter dated 16 October 2015 i.e. two months before trial.

#### **Advocate Dunster's submissions**

14. On behalf of the Plaintiff, Advocate Dunster accepted that the normal rule namely, "costs follow the event", should apply and that there should be an order for costs against the Plaintiff with costs to be assessed on the recoverable basis only. He submitted that it would create an unfortunate precedent if I were to find that the Plaintiff's conduct of the proceedings was such as to justify an order for indemnity costs under Rule 83(2)(b) of the RCCR.
15. Advocate Dunster rebutted the Defendant's principal submission on the ground that it was reasonable for the Plaintiff to go to trial in reliance on the expert report of Mr Robin K Strachan MB, ChB, FRCS Ed who supported her claim. Regarding the earlier expert report which the Plaintiff did not disclose, he described it as a desktop report obtained by the

Plaintiff's previously instructed advocates and cautioned me against drawing any inference as to why it was not relied upon.

16. In summary, his submission was that there was nothing in the Plaintiff's conduct that takes the case out of the norm so as to be considered unreasonable and thereby justify an order for costs on other than the recoverable basis.

### Discussion

17. I agree with Advocate Dunster that there is no reason in this case to depart from the normal rule that costs follow the event. The issue to be decided is whether the basis of assessment of the costs should be the recoverable basis or a full or partial indemnity.
18. The principles to apply in interpreting Rule 83(2)(b) are well established both in this jurisdiction and in England and Wales. The Court of Appeal's decision in *Investec* is binding on me. The question I have to address is whether there is "something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness"?
19. I begin by declaring that I have disregarded the earlier expert report obtained on behalf of the Plaintiff and not relied upon by her. There is no requirement under our rules of procedure that would oblige early disclosure of expert evidence whether in a clinical negligence case or any other matter. This judgment is not the place to discuss whether it would be appropriate to review the rules. I can see advantages and disadvantages in either leaving the rules un-amended or altering them to require some form of disclosure at least in a limited class of cases.
20. The expert upon whom the Plaintiff relied was, as I have said, Mr Strachan. He was appropriately qualified to give evidence. He was a credible witness and there was a logical basis for the evidence he gave. He and the Defendant's expert Mr Allum agreed much of their evidence but disagreed on other aspects. I said the following about the two experts in my judgment (para 21):

*"I wish to say at the outset that I was impressed by the qualifications of both of the experts, each of whom held the other in high regard. I accepted their evidence on that basis and am satisfied that each of them gave evidence to the Court in the manner to be expected of an expert and thus I did not treat Mr Strachan as being any less experienced or credible than Mr Allum."*

21. It follows from my findings that it was not unreasonable for the Plaintiff to have relied upon the evidence of Mr Strachan. The case became a contest between two suitably qualified but equally credible experts – a scenario that is not unusual in professional negligence claims, especially clinical negligence claims. Such a disagreement does not take the case out of the norm to justify an indemnity costs order.
22. The outcome of the case turned on the *Bolam* definition of negligence and my finding that, on the expert evidence of Mr Allum, I was persuaded that a reasonable body of medical opinion supported the Defendant's handling of the Plaintiff's treatment. The Defendant's Advocates voluntarily disclosed Mr Allum's report at a very early stage in the proceedings in an attempt to persuade the Plaintiff that she would be unable to establish a breach of the duty of care. The Plaintiff chose not to give up at that stage but instead to rely upon her expert with a view to testing the Defendant's expert opinion under cross-examination. There were risks attached to that decision, most notably in respect of costs, but I do not see it as a decision that takes the case out of the norm so as to justify an indemnity costs order.
23. I deal next with the Defendant's second submission that the Plaintiff should have accepted the "drop hands" offer made on 16 October 2015 when the trial was due to start on the 16 November. With the benefit of hindsight, the Plaintiff may wish she had accepted the offer but that is not the test to be applied. In my judgment that offer does not alter the situation.

The Plaintiff was relying upon the opinion of her appropriately qualified expert. She was entitled to do so in taking the case to a hearing, as I have said. The rejection by her of that offer one month before trial does not take the case out of the norm.

### **Conclusion**

24. I said at the conclusion of my earlier judgment that this was a difficult case. The Plaintiff feels she was let down by the doctor treating her. She took the decision to pursue her case to trial in the knowledge that each party had instructed an appropriately qualified expert witness with the relevant expertise in the medical specialisation concerned. Her claim failed because having listened to the opinions of both experts, I concluded they were both credible and that there was no single body of medical opinion as to the appropriate course of treatment she should have received. I was persuaded that there was a responsible body of medical opinion that supported the Defendant's conduct. Her case therefore failed on liability for failure to prove any breach of the duty of care. The Defendant's Advocates had alerted her Advocates to that very risk at an early stage in the proceedings and she decided to press on regardless, relying on her own expert's opinion. With hindsight, she now knows that the risk did not pay off but it was not unreasonable to have taken the risk. Her decision to proceed to trial did not take the case out of the norm so as to justify an order for indemnity costs.
25. I order that the Plaintiff shall pay the Defendant's costs to the conclusion of the trial on the recoverable basis. I am minded to make no order in respect of this present costs application but if either party seeks a different order in that regard, they are to apply within fourteen days of this judgment.