



THE COURT OF APPEAL

UNAPPROVED

Record Number: 2023/129

High Court Record Number: 2020/5533P

Neutral Citation No: [2024] IECA 281

Noonan J.

Power J.

Binchy J.

BETWEEN/

CATRIONA CRUMLISH

PLAINTIFF/APPELLANT

-AND-

HEALTH SERVICE EXECUTIVE

DEFENDANT/RESPONDENT

COSTS RULING of Mr. Justice Noonan delivered on the 21st day of November, 2024

1. The principal judgment in these proceedings was delivered on the 15th October, 2024 ([2024] IECA 244). This Court dismissed the plaintiff's appeal and, at the conclusion of the judgment, expressed the provisional view that as the defendant had been entirely successful,

it should be entitled to its costs of the appeal. The plaintiff was given liberty to deliver written submissions if she wished to contend for an alternative costs order. The plaintiff has now done so and the defendant has responded. The plaintiff proposes that there should be no order as to the costs of these proceedings either in the High Court or in this Court.

2. The High Court dismissed the plaintiff's claim on the essential basis that she had failed to establish that the lump in her breast with which she presented to the defendant's clinic in May 2017, and which she alleged was a cancerous lesion which the defendant failed to detect, was in fact a tumour rather than a benign cyst. Accordingly, her claim failed on the first causation issue. The High Court thus held, and this Court agreed, that it was unnecessary to consider the question of negligence and breach of duty. That was conceded by the plaintiff.

3. One of the central features of the plaintiff's case was the evidence of her experts to the effect that there was a duty on the defendant to aspirate the lump to conclusively determine whether it was a cyst or a tumour. The plaintiff's experts offered the view that it was a breach of duty not to carry out such aspiration, a proposition with which the defendant's experts fundamentally disagreed. In the event, however, it was unnecessary for the High Court to consider and rule upon this issue for the reason I have explained.

4. The premise of the plaintiff's submission that there should be no order as to costs in this case is that the issue of aspirating breast lumps is one of exceptional public importance and of systemic significance to the State's breast cancer screening programme. The plaintiff says that in circumstances such as the present case, the failure to aspirate is an unsafe practice that is fundamentally wrong.

5. In this case, the plaintiff argues that the alleged non-disclosure, as it is described, by the defendant to her of the importance of aspirating the lump in effect deprived her of the

evidence which could have established whether a detectable cancer was present. However, she submits that her case was dismissed based on this evidential deficit, which the plaintiff says was the fault of the defendant.

6. It seems to me that there are a number of difficulties with these submissions. The first, and most obvious one, is that it ignores the findings of fact of the High Court that the lump was probably a cyst. At para. 97 of the principal judgment, I cited a number of findings of fact made by the High Court, including:

“21. It was more likely that the radiologist’s report was accurate as to what was seen and the 12mm cyst caused the lump which, had it been aspirated, would probably have disappeared – 15.2.

22. Dr. Mac A’Bhaird did not miss a 15mm tumour completely nor did he see an obvious tumour and mistake it for a simple cyst. He probably saw what he described in his report, namely a 12mm cyst – 15.3.”

7. This Court in turn observed at para. 111:

“It follows inexorably from the evidence of Professor McNicholas that, if that evidence is correct, and the trial judge clearly accepted it as such, then the lesion found in October was not in the same position as the lump found in May. It therefore follows as night follows day that the lump in May was a cyst ...”

8. The other fundamental difficulty with the plaintiff’s submissions is that they rely on a contention, namely the necessity for aspiration, that was never the subject of any consideration or determination by the High Court as I have said.

9. As is clear from the terms of s. 169(1) of the Legal Services Regulation Act 2015, the default position is that the party who is entirely successful in civil proceedings is entitled to an award of costs against the party who is unsuccessful, unless the court orders otherwise, having regard to the nature and circumstances of the case and the conduct of the proceedings by the parties, including a non-exhaustive list of factors to which the court may have regard. None of the factors identified in the section appear to be of particular relevance in the context of this case.

10. In my judgment, the plaintiff has advanced no ground which would justify this Court in depriving the defendant of its *prima facie* right to costs as the party who has been entirely successful. Accordingly, I would direct that the costs of the appeal be awarded to the defendant/respondent.

11. As this ruling is delivered electronically, Power and Binchy JJ. have authorised me to record their agreement with it.