B e f o r e Lord Justice Stuart-Smith, Lord Justice Aldous, Lrd Justice Ward. 11th December 1996

JUDGMENT LORD JUSTICE STUART-SMITH:

This appeal raises a point of general importance in relation to the exercise of a judge's discretion on costs where there is a payment into court of a sum of £2,500 or less, which does not attract the provisions of the Social Security Administration Act 1992 (The Act).

The case was one involving personal injury. By his judgment given on 30 March 1995 the Judge found in favour of the Plaintiff, but held that she was one third to blame for the accident. This Court dismissed the Plaintiff's appeal against the finding of contributory negligence. The Judge had assessed the total damages at £33,560, which after deduction of one third resulted in judgment being entered for the Plaintiff for £22,373.33. On 21 April 1993 the Defendants paid into Court the sum of £2,500. The notice of payment into Court made no reference to any sum repayable to the Compensation Recovery Unit. The up-to-date certificate issued by that unit showed that the amount repayable to that Unit in the event of a "compensation payment" as defined in the Act being made, was £25,419.26.

After judgment Mr. Prynne QC on behalf of the Plaintiff asked for an order for the costs of the action, on the basis that the amount of the judgement exceeded the payment into Court. At first sight this would seem to be the usual order and the inevitable consequence but Mr. Jeffreys QC for the Defendants opposed this application, and submitted that on the contrary the Defendants should be awarded the costs of the action after the date of payment into Court. The basis of this submission was that since, under the provisions of the Act the entire sum received by the Plaintiff had to be paid by the Defendants to the Compensation Recovery Unit, the Plaintiff had gained nothing by the litigation, she was not therefore the successful party.

On 30 August 1994, some 16 months after the payment into Court, the Defendant's solicitors wrote a letter headed "*Without prejudice save as to costs*", the following:

"We enclose herewith CRU Certificate. In the light of the payments due to the Compensation Recovery Unit who will have first call on any damages awarded to your client we submit that you client's claim will be extinguished. We therefore invite you to withdraw your client's claim but should this matter proceed then we reserve the right to draw the Court's attention to the contents of this letter in respect of costs.

We reserve the right to submit to the Court that your client cannot recover any costs from the date of payment in, that is 21st April 1993 and that the Defendants should be entitled to be paid their costs by the Plaintiff from that date. In the alternative we reserve the right to request the Court to make an Order in respect of costs to run from the date of this letter.

Upon confirmation that you will withdraw your client's claim we would be happy to discuss a suitable payment to be made to the Compensation Recovery Unit."

In the course of argument before the Judge, Mr. Prynne accepted that the Plaintiff's advisers understood the effect of the payment-into-court to be that the Defendant's were alleging that the Plaintiff would recover no more than £2,500 once liability to the Compensation Recovery Unit had been discharged. In fact the Plaintiff had contended, for reasons which are no longer relevant, that the quantum of damage should be substantially more than assessed by the Judge, and that the Plaintiff was not guilty of contributory negligence.

The Judge acceded to the Defendant's submission. The kernel of his reasoning is at p.66 G.

"The Plaintiff failed to recover that sum (£25,419.26), and therefore will receive nothing in practice. In those circumstances, it seems to me that the Plaintiff's position was akin to that of someone who had decided to continue with the action when there had been a payment into Court in April of 1993 of the sum of £25,419 - odd. Having failed to recover more than that sum and having incurred costs on her own behalf and having caused the Defendants to incur those costs, the question is who should be paying the costs of the action from the date of the payment in April 1993.

It is agreed that I have a discretion in this matter, and had the Defendants written the letter at the time they made the payment into Court explaining to the Plaintiff precisely why they had paid the sum of £2,500 into Court, that would have been a matter which I could have taken into account in considering what order to make with regard to costs. In reality, it was unnecessary for them to have written such a letter, because the Plaintiff's advisers appreciated the significance of that payment into Court."

In order to understand the reasoning, and Mr. Prynne's submission that it is erroneous, it is necessary to refer to the scheme of the Act and certain of its provisions, together with the relevant rules of Court. Prior to the Social Security Act 1989 (the relevant provisions of which are re-enacted in the Act), a tortfeasor was entitled to deduct 50% of the statutory benefits received by the Plaintiff or to be received for a period of 5 years after the accident. The tortfeasor was not required to account to the state for this credit. After the 1989 Act, where the tortfeasor makes a "compensation payment", he is required to withhold from the victim the amount of the statutory benefits and account for them to the Compensation Recovery Unit.

By S.81(1) of the Act:

" 'Compensation payment' means any payment falling to be made (whether voluntarily, or in pursuance of a court order or an agreement, or otherwise)-

(a) to or in respect of the victim in consequence of the accident, injury or disease in question, and

(b) either-

(i) by or on behalf of a person who is, or is alleged to be, liable to any extent in respect of that accident, injury or disease; or

(ii) in pursuance of a compensation scheme for motor accidents,

but does not include benefit of an exempt payment or so much of any payment as is referable to costs incurred by any person;"

An "exempt payment" includes a small payment as defined by S.85. (S.81(3)a). S.85 enables regulation to be made to prescribe the financial limit of small payments. By regulation 3 of the Social Security (Recoupment) Regulation 1990 the limit of small payments is £2,500.

S.82 of the Act provides for the recoupment of benefits from the amount of damages to the Plaintiff which comes within the definition of "compensation payment", i.e. one that exceeds £2,500. The right of the intended recipient (the Plaintiff) to receive the compensation payment shall be regarded as satisfied to the extent of the amount certified in the Certificate of Deduction which the Defendant is required to furnish to the Plaintiff under S.82(1) after the relevant payment has been made to the Recovery Unit.

S.93, which bears all the hallmarks of the opaque drafting typical of Social Security legislation, and which fortunately it is unnecessary to analyse for the purposes of this judgment, makes certain provisions for the treatment of payments into Court so as to ensure the recoupment of a compensation payment, as defined, and provides for rules of Court to regulate the procedure and practice to be followed in connection with payments into Court. Because the payment-into-Court in this case was an exempt payment, S.93 does not apply to it; and if it had been accepted, S.82 would not have applied either, so that the Defendant would not have had to account to the Compensation Unit for any part of the benefits paid to the Plaintiff.

Turning to the Rules of the Supreme Court, order 22R1(1) enables a Defendant to pay into Court *"a sum of money in satisfaction of the cause of action in respect of which the Plaintiff claims".* Order 22R1(2) requires the Defendant, on making a payment into Court to give notice to the Plaintiff in accordance with the prescribed form No. 23. In that form, after the familiar words are words in square brackets, to be completed if appropriate, as follows:

["The Defendant has withheld from this payment the sum of £--- in accordance with paragraph 12(2)(a)(i) of Schedule 4 to the Social Security Act 1989"].

That paragraph is the equivalent of S.93 of the Act; the form does not yet seem to have been brought up-to-date.

Order 62 r.3(3) provides that:

"if the Court, in the exercise of its discretion, sees fit to make any order as to the costs of any proceedings, it shall order the costs to follow the event except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

Order 62 r.(9) provides that:

"in exercising its discretion as to costs the Court shall take into account inter alia

....

'(b) any payment into Court and the amount of such payment

....

(d) any written offer made under O.22, r.14, provided that except in a case to which paragraph (2) applies the Court shall not take such an offer into account if at the time it is made the party making it could have protected his position as to costs by means of a payment into Court under O.22."

Paragraph (2) of this rule does not apply to this case because the defendant has always had, at material times, a Certificate of Total Benefit.

O.22, r.14 provides that:
*"A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "**without prejudice save as to costs**" and which relates to any issue in the proceedings."*

That is a reference to what is commonly known as a **Calderbank** letter.

A defendant must be entitled to protect himself as to costs. But if he considers that the Plaintiff will not recover more than the amount certified in the "Certificate of Total Benefit", he cannot do so by payment into Court because there will be nothing to pay in.

In the present case by offering the Plaintiff a carrot of £2,500, the Defendants would have saved themselves nearly £20,000, had the money in Court been accepted, since the payment did not attract the provisions of the Act.

Mr. Jeffreys sought to uphold the Judge's reasoning by reliance of the case of **Alltrans Express Ltd. v. CVA Holdings Ltd .** [1984] 1 W.L.R. 394. In that case the Plaintiff who was seeking substantial damages recovered only nominal damages; there was no payment into Court. Reversing the trial Judge this Court awarded the Defendant the costs; Stephenson LJ said at p.401F: *"But the event of an award of £2 was not the event at which the Plaintiffs were aiming."*

And at p.403B after adopting the reasoning of Devlin J. in **Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Ltd** [1951] 1 All ER 873 he suggested that the test was "who was the successful party" in the litigation? Mr. Jeffreys submits that the Defendants in this case were the successful party because the Plaintiff gained nothing for herself and the event at which she was aiming was not the repayment of benefit to the State, but substantial damages to herself. Although I can see some force in the submission that the Plaintiff has not been successful, at least in obtaining any money for herself, I do not follow how a Defendant, especially one who has denied liability, can be said to be successful when he incurs a liability as a result of the judgment to pay £22,373.33. Moreover if the Defendants' argument is correct, it would apply just as much if there was no payment into Court at all.

Although I do not suggest it was the case here, there are people who are victims of assaults or accidents, who would prefer not to take money from the state, or if they have done so, to see that the tortfeasor makes repayment to the state for what they have received. I suppose,, if the Judge's approach is correct, this might influence the exercise of his discretion. But in my judgment his approach was not correct. The fact that the Defendants must satisfy the judgment in the Plaintiff's favour by making payment to the Compensation Recovery Unit is irrelevant. Although the money never passed through the Plaintiff's hands, it is no different in principle from the case where the Plaintiff brings an action wholly or partly for the benefit of another, for example a subrogated action or a claim for compensation for the care provided by an injured Plaintiff's relatives.

If a Defendant wishes to protect himself as to costs when he considers that the Plaintiff will not recover more than the amount payable to the Compensation Recovery Unit, he must write a **Calderbank** letter. He must offer a specific sum which may be less than, but does not exceed the amount certified by the *"Certificate of Total Benefit"*. He should then point out that if the offer is accepted, the Defendant will pay the amount offered to the CRU and he may add that the Plaintiff will get nothing. If the offer is accepted, the Defendant must pay the amount offered to the CRU pursuant to the Act. If the offer is not accepted and the Plaintiff recovers judgment for less than the offer, the Defendant will rely on the offer on the question of costs. Since the Defendant cannot make a payment into Court, this offer will fall within the provisions of Order 62 r.9 (d).

If the Defendant considers that the Plaintiff will recover more than the amount payable to the CRU then he must make a payment into court adopting form A23 incorporating the words in square brackets. And this is

so, even if the amount by which he considers the damages will exceed the amount payable to the CRU is no more than £2,500.

What he cannot do, at least not so as to afford himself any protection as to costs is to combine a payment into court of £2,500 or less with a Calderbank letter offering to pay the amount certified in the certificate of benefit to the Compensation Recovery Unit. Quite apart from the fact that this would defeat the object of the legislation, it would involve the Defendant in making two inconsistent or alternative offers. Only one offer can be made at a time, though of course it can be increased subsequently. But the offer is made to the Plaintiff and no-one else and is made in satisfaction of his cause of action. The fact that part of that satisfaction involves payment to a Third-party is irrelevant.

If the Defendant chooses to make a payment into Court at all, he cannot rely on the **Calderbank** offer as well or in the alternative because ex hypothesi he could have, and has, made a payment in and therefore he falls foul of the proviso in O.62, r.9(d).

There is of course nothing to stop a Defendant paying into court £2,500 or less, in the hope of tempting a Plaintiff, who considers that even if he is successful he will get no more than the amount payable to the CRU, into accepting it. If he does so the payment is an "exempt payment". But if he does not, and recovers judgment for a sum in excess of the payment into court, he should recover the costs of the action, even though, as in this case the entire amount of the damages must be paid to the Compensation Recovery Unit.

In my opinion the Judge was wrong to consider that the payment into Court in this case of £2,500 was akin to one of £25,419. It was not. I would allow this appeal and vary the Judge's order so as to award the Plaintiff costs of the action.

LORD JUSTICE ALDOUS: I agree.

LORD JUSTICE WARD: I also agree.

Order: Appeal allowed as per judgment.

MR ANDREW PRYNNE QC (instructed by Messrs Taylor Joynson Garrett, London EC4Y 0DX) appeared on behalf of the Appellant (Plaintiff).

MR ALAN JEFFREYS QC (instructed by Messrs Greenwoods, London EC1B 2HL) appeared on behalf of the Respondents (Defendants).