

THE HIGH COURT

[2015 No. 6867 P.]

BETWEEN

ANN-MARIE FLANNERY

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 13th day of March, 2018**Introduction**

1. This action is concerned only with the assessment of damages arising out of the fact that a swab was left in the plaintiff's vaginal area after the ventuse delivery with an episiotomy, of the plaintiff's second son on 30th August, 2013. The swab remained in situ, until it was removed by a consultant in the course of an internal examination carried out on 8th September, 2013. It is the plaintiff's case that as a result of that sequence of events, she has been caused to suffer physical and psychiatric injuries.

The Evidence

2. The plaintiff is 40 years of age having been born on 19th April, 1977. She is a married lady and lives with her husband in Co. Cavan. Her first son was born in 2008. In 2012, she became pregnant with her second son. She described how her contractions started on 29th August, 2013. That night she went to Cavan General Hospital. On the following day, she went into the second stage of labour. As the baby's head was turned the wrong way around for delivery, she was told that she would require an episiotomy for a ventuse delivery. This was done and her son was born at 15:40hrs that day.

3. The plaintiff recalled that the consultant gave the assisting registrar instructions to stem the bleeding and suture the site of the episiotomy. The doctor found it difficult to stem the bleeding. He sent for the consultant and the midwife came back with two other doctors. They were able to stitch the area and inserted a vaginal pack and catheter. These were removed after 24 hours and the plaintiff was discharged home on 1st September, 2013.

4. The plaintiff stated that on 2nd September, 2013, she began to experience low back pain. She thought that that had been due to the fact that her legs had been held in stirrups during labour and due to the fact that stitches had been inserted. When reviewed by the public health nurse that day, she complained of lower back pain, together with soreness and tenderness in the vaginal area. The nurse advised her to take analgesics and to bathe regularly. The plaintiff did as advised.

5. On 3rd September, 2013, her pain increased. She had difficulty moving, difficulty going to the toilet and a lot of stinging in the vaginal area when passing urine. She would experience a sharp shooting pain from the lower back into her vaginal area. This occurred whenever she did any movement. At that time, she also began to notice a foul smell when she went to the toilet. As she found it difficult to go to the toilet, her husband was assisting her movements and he too noticed the foul smell.

6. The plaintiff stated that she felt that this state of affairs was due to the fact that she was doing something wrong, e.g. not bathing properly. She used cushions on the chair to ease the pain and also applied ice packs to her vagina, but neither of these helped.

7. By 5th September, 2013, she was unable to move at all, she could not lift her baby. She recalled that a neighbour called in with a gift for the baby, but she could only talk to the neighbour for a very short period of time and then asked them to leave, as she was afraid that they would notice the foul smell, which had become worse by that time, or would see her wince in pain and think that she was not able to cope with looking after her baby. She felt very bad that she had asked the neighbour to leave so quickly.

8. On 6th September, 2013, the plaintiff attended her G.P. complaining of an increase in lower back pain going into her vaginal area. Her vagina was swollen. The foul smell was worse. The doctor diagnosed an infection to the endometrial lining. She referred the plaintiff back to hospital.

9. The plaintiff attended at Cavan Hospital later that day. Examination revealed that her vagina was infected. A swab was taken which confirmed the presence of E. coli. The consultant, Dr. Syed, directed that she should be placed on intravenous antibiotics and be admitted to hospital. On the following morning, a different doctor did an external examination of her. That doctor directed that the antibiotic should be continued. The plaintiff stated that she was trying to keep mobile, but felt very weak at that stage.

10. On Sunday, 8th September, 2013, the same doctor returned. He stated that he wished to contact the consultant. He asked whether the plaintiff had signed the forms stating that she would go privately for treatment. The plaintiff stated that she had signed those forms on admission. The doctor said that he would ring the consultant. Later that day, at approximately 12:30hrs, Mr. Syed attended on the plaintiff. At that time, she was in a three bed ward with an elderly man and a woman in her sixties. Dr. Syed drew the curtains and proceeded to carry out an internal examination. The plaintiff stated that that involved him putting his entire hand into her vaginal area and poking around inside her. She found this very distressing. He retrieved an article from inside her vaginal area, which he later confirmed was a swab, which had been left in situ after the delivery of her son.

11. The plaintiff stated that on removal of the swab, she immediately felt much better. Her back pain eased and the foul smell ceased. She was continued on antibiotics and was allowed home on the following day.

12. On 10th September, 2013, she attended with her G.P., Dr. Jacqueline Ellis-Deering and stated that she was feeling much better. She had been prescribed oral antibiotics for one week.

13. Unfortunately, in the preceding days and in the days which followed, the plaintiff and her husband noticed that her son was exhibiting some worrying signs in relation to his general colour and breathing patterns. On 19th September, 2013, she returned to her G.P. due to her ongoing concerns about her baby. Having examined the baby, the G.P. advised that he should be taken to Cavan General Hospital. The plaintiff did this. Her baby was examined and the doctors made a decision that he should be transferred to Crumlin Hospital for Sick Children in Dublin. There he was diagnosed as having a hole in his heart. Fortunately, the doctors were of the

view that it could be treated conservatively. Her son was monitored in hospital for a period and thereafter was allowed home, but had to be monitored carefully in relation to fluid intake and maintenance of weight. However, the hole in the heart went on to close spontaneously and he made a full recovery.

14. The plaintiff stated that her mood was affected by the incidents complained of. In particular, she tended to blame herself for the fact that in the days and weeks immediately after the birth of her son, she was unwell and accordingly, was not able to spot the signs of his distress, earlier than had been done. She blamed herself for not having been in a position to properly care for her baby immediately after his birth. She stated that this feeling of guilt and self blame stayed with her for a considerable period. In her evidence, she stated that she had depressive days, but these were not sustained.

15. It appears that the plaintiff re-attended with her G.P. on 26th September, 2013, to inform her about her son's condition and to tell her about his medication. The G.P. checked the plaintiff's blood pressure and pulse for reassurance and both were normal.

16. In cross examination, the plaintiff accepted that almost immediately after the removal of the swab by Dr. Syed on Sunday, 8th September, 2013, her lower back pain resolved and the foul smell disappeared. She confirmed that she had not returned to Dr. Syed's clinic on 20th September, 2013, due to the fact that her son was then in Crumlin Hospital. When questioned about her psychiatric symptoms, she stated that she had been back to her G.P. on a number of occasions when they had discussed whether she would take antidepressant medication. However, the plaintiff had declined to go down that route, as she was fully engaged in looking after her son. This involved careful monitoring of his fluid intake and monitoring of his weight.

17. It was put to the plaintiff that there was no mention in the G.P.'s report, which had been admitted in evidence and had been drawn up on 31st July, 2015, to the plaintiff having suffered any depressive illness. The plaintiff stated that as she had been a life long asthmatic, she saw her G.P. approximately once per month. She stated that on many of these occasions, they had discussed the possibility of her taking antidepressant medication. However, as already stated she did not want to take such medication due to her son being sick and also due to the fact that she became pregnant again in the following year.

18. She accepted that she had told her Consultant Psychiatrist, Dr. Mary McGuire, that she had felt depressed on occasions. She said she had had "bouts of depression". That had been her phrase. She was asked whether she had felt annoyed by the way she had been treated by the hospital. The plaintiff stated that she had been annoyed, due to the fact even though she had elected to go privately, she had not been examined when she had returned to Cavan Hospital on Friday, 6th September, 2013. She felt that she should have been examined on that occasion. If that had been done, the swab would have been found and would have been removed. Instead, in the events which transpired, that had not been done until two days later on 8th September, 2013. The plaintiff confirmed that, with the exception of taking the course of antibiotics, she had not received any further treatment in relation to her physical or psychiatric injuries.

19. Evidence was given by Dr. McGuire, Consultant Psychiatrist, in relation to the plaintiff's psychiatric injuries. She had seen the plaintiff on one occasion on 26th April, 2016. Having taken a detailed history from the plaintiff, she noted that the plaintiff's mood was normal at the time of her examination. However, from what had been recounted to her by the plaintiff, she came to the conclusion that the plaintiff had developed a depressive disorder after the birth of her son, which was distressing for her and had impacted on her ability to look after her newborn baby. She had recovered reasonably well, but continued to have episodes of depression, which were not sustained. She stated that where a person had suffered a traumatic or very difficult event, that can cause distress to such an extent that it can lead to depression.

20. The only evidence called on behalf of the defendant, was that given by Dr. Patrick Devitt, Consultant Psychiatrist, who had seen the plaintiff on 15th March, 2017. He took a detailed history from the plaintiff and carried out a number of tests. These revealed that the plaintiff was not a malingerer and had not engaged in conscious exaggeration of her symptoms. He noted that she was somewhat annoyed and angry by the manner in which she had been treated by the hospital and by the fact that she was not told the result of any internal investigation carried out by the hospital authorities.

21. However, he noted that the plaintiff had received no treatment in respect of any mental issues. While the question of antidepressant medication may have been discussed with her G.P., that doctor had not referred her for psychiatric evaluation, nor had she prescribed any antidepressant medication nor had she sent the plaintiff for counselling.

22. Dr. Devitt accepted that the plaintiff had been subjected to a very unpleasant experience due to the negligence of the defendant, which had occurred at a very distressing time for her, due to the serious illness of her newborn baby. She had had an emotional response to those issues, but he felt that her emotional reaction had been within the normal range. He did not think that she had developed a psychiatric illness.

23. Dr. Devitt stated that in order to reach a diagnosis of clinical depression, the patient would have to exhibit a number of recognised symptoms, above a certain threshold of severity and these symptoms would have to persist for a relatively prolonged period. Normally, one would look for symptoms of inability to eat, inability to concentrate properly, feelings of loss and lack of self worth, a feeling of isolation and hopelessness and in more severe cases these could be accompanied by suicidal ideation. A clinical diagnosis could be made where some or all of these symptoms were present for a prolonged period. They would have to be of sufficient severity that they would adversely affect a person's ability to function. From the history that he had been given, it did not appear that the plaintiff had reached the criteria which would enable one to make a diagnosis of clinical depression.

24. He stated that in summary, the presence of a swab in the plaintiff's vagina had caused her to experience an unpleasant odour, back pain, emotional upset and anger, while the swab was in situ for a period of approximately nine days until it was removed. Thereafter, for some months, she suffered some emotional upset, which was probably also due to her son's illness. He was of opinion that the plaintiff was an honest, genuine and resilient individual who had made an excellent recovery. She had an excellent prognosis for the future.

Conclusions

25. Having considered the evidence given by the plaintiff, together with the evidence given by Dr. McGuire and Dr. Devitt and the content of the plaintiff's G.P.'s report dated 31st July, 2015, I have come to the following conclusions in this matter: firstly, I entirely accept the evidence given by the plaintiff. She gave her evidence in a straightforward manner. I am satisfied that she had not tried to exaggerate either the nature of the incidents in September 2013 giving rise to this action, or her injuries suffered as a result thereof, or of her subsequent recovery down to the present time. This conclusion is supported by the tests which had been carried out by Dr. Devitt, which revealed that the plaintiff was not a malingerer, nor had she exaggerated her symptoms.

26. It is undoubtedly the case that the plaintiff suffered distressing symptoms in the form of increasing back pain and an increasing

foul smell from her vaginal area, in the days immediately after the birth of her son on 30th August, 2013. This continued for approximately nine days until the swab was removed by Dr. Syed on 8th September, 2013. I accept the evidence given by the plaintiff that the intervening days were particularly difficult for her. I accept that she had increasing pain and found it very difficult to care for her baby due to the extent of her pain and disablement. I accept her evidence in relation to the occasion when her neighbour visited with a gift for the baby.

27. The plaintiff has very candidly stated that after the removal of the swab, her back pain and the foul smell were resolved almost immediately. Thereafter, she was required to continue with a course of antibiotic treatment. One has to have regard for the fact that this episode, hit her at a very bad time when her son was exhibiting signs of distress, which were ultimately diagnosed as resulting from a hole in the heart. After receiving that diagnosis in relation to her son, and in the weeks and months thereafter, the plaintiff's primary focus was in relation to securing the wellbeing and recovery of her son. In these circumstances, it is reasonable and understandable, that she would have had feelings of guilt and self blame in relation to the fact that she was not perhaps as attentive as she would have liked to have been of her son in the days immediately after his birth, due to her own difficulties at that time. Thus, one has to take account of the fact that this injury happened to the plaintiff at a very difficult time in her life.

28. The plaintiff also had a complaint in relation to a lump on her perineum. It appears from the report furnished by Dr Ellis-Deering that the plaintiff had attended with her on 19th September, 2013 because of concerns regarding her baby and also mentioned that she had further soreness of her perineum. On examination her posterior suture line appeared to have broken down. The doctor recommended a further course of oral antibiotics. She also advised the plaintiff to return to the casualty department of the hospital, however after her experience of the previous week, the plaintiff was reluctant to do so. She did however agree to attend Dr Syed. When the plaintiff saw Dr McGuire on 26th April, 2016, she was concerned regarding a lump on her perineum, which became sore during sexual intercourse and needed lubrication. She told the doctor that she was too fearful to return for reparative surgery. She said that intimacy with her husband was no longer spontaneous and she was sad about that.

29. It is clear that the plaintiff had a tear in the perineum as a result of the episiotomy. That had to be sutured following the delivery of her baby. One of the sutures broke down due to infection. While that was an unfortunate consequence of the episiotomy, there is no evidence that the breakdown of the suture line was caused by the fact that a swab had been left in the plaintiff's vaginal area.

30. The only real issue between the parties is as to whether the plaintiff suffered a depressive disorder as a result of the events the subject matter of these proceedings. It is not necessary to set out the evidence of Dr. McGuire and Dr. Devitt on this issue, as that has been set out in the previous section of the judgment. I prefer the opinion of Dr. Devitt, which is to the effect that while the plaintiff certainly suffered emotional distress as a result of the incidents complained of, this was an entirely normal reaction and was within normal limits, rather than constituting a psychiatric illness.

31. In reaching this conclusion, I have had particular regard to the content of the report from the plaintiff's G.P.. This report was issued on 31st July, 2015. The plaintiff has stated in evidence that she had consulted her G.P. on a monthly basis, due to the fact that she is an asthmatic. The plaintiff has stated that she discussed her mood with her G.P. at these visits and they discussed putting her on antidepressant medication, which the plaintiff declined. However, there is no mention at all in the report furnished by Dr. Ellis Deering of the plaintiff suffering from any psychiatric illness or mood disorder. There is no reference to any discussion concerning antidepressant medication. Nor did the G.P. refer the plaintiff on for psychiatric evaluation by a psychiatrist, nor did she recommend counselling. While I can understand that many people hold strong views as to whether or not they wish to go on antidepressant medication, I feel that if there was a serious possibility of the plaintiff's suffering from clinical depression, the G.P. would have mentioned this in her report. The fact that this is not mentioned in a report issued by her in 2015, is most significant. She was the treating doctor, who was seeing the plaintiff on a regular basis. If she had thought that the plaintiff had been suffering from depression at any time up to July 2015, she would have said so in her report.

32. The plaintiff was sent to see Dr. McGuire in April 2016, by her solicitor. The practice of solicitors sending their clients for specialist evaluation by medical personnel, was the subject of criticism by this Court in *Dardis v. Poplovka* [2017] IEHC 249. The Court of Appeal has recently made similar comments in *Fogarty v. Cox* [2017] IECA 309. A treating doctor's main concern is to care for the wellbeing of his or her patient. The primary doctor is the patient's G.P.. If he or she thinks that the patient requires specialist evaluation, it is the G.P. who should refer the patient on for such evaluation. I do not think that it is good practice for solicitors to take it upon themselves to decide that their client needs evaluation by a particular medical specialist. That is a medical question which should be decided upon by the G.P., or by another specialist, who may refer the plaintiff to a different specialist for further investigation.

33. In relation to the diagnosis of psychiatric injury, Dr. McGuire was in a very difficult position. She did not have the opportunity to see the plaintiff at any of the times during which she may have been suffering from what she described as "bouts of depression". The plaintiff's mood was found to be entirely normal when Dr. McGuire saw her in April 2016. Thus, her diagnosis that the plaintiff had suffered from episodes of a depressive disorder, was based entirely on the history which had been recounted to her by the plaintiff. That placed her at a considerable disadvantage.

34. Dr. Devitt was at a similar disadvantage, in that he saw the plaintiff in 2017. However, I prefer his evidence that on the history as recounted by the plaintiff herself, she does not appear to have exhibited the symptoms of depression which have been recounted by Dr. Devitt in his evidence, nor did she have these at a sufficient severity or for a sufficient length of time, to enable a diagnosis of clinical depression to be made. Accordingly, I accept his evidence that the plaintiff suffered an emotional reaction due to the distressing circumstances of the incidents giving rise to this claim which were superimposed upon the very difficult circumstances surrounding the health of her son, but that that emotional reaction of distress was within normal limits, rather than tipping over into a full blown mood disorder or psychiatric illness.

35. In reaching an assessment of the appropriate level of general damages in this case, the court has been greatly assisted by the guidelines set down by the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56, and *Shannon v. O'Sullivan* [2016] IECA 93 and in particular to the criteria set down by Irvine J. at paras. 43 and 44 thereof. The court has also had regard to the dicta of the Court of Appeal in the case of *Fogarty v. Cox* [2017] IECA 309. In the light of these judgments, this Court has had to somewhat recalibrate its approach to the assessment of general damages in personal injury cases.

36. On the basis of the findings set out above, and having regard to the principles set down by the Court of Appeal in the cases cited above, I award the plaintiff the sum of €40,000 for general damages, together with agreed special damages of €160, giving a total award of €40,160.