Neutral Citation Number: [2006] IEHC 453

THE HIGH COURT
DUBLIN

1992 4486 P

BETWEEN

CHERYL JOHNSON

APPLICANT

AND
NORTH WESTERN HEALTH BOARD,
JOSEPH HANLEY, EMAD MOUSSAD,
JAMES McDAID, AND BHARET SAWHNEY

RESPONDENTS

Action heard before Mr. Justice O'Neill on Thursday, 6th April, 2006.

1. This is an application by the first- and second-named defendants to strike out these proceedings for want of prosecution on the grounds of excessive or inordinate delay.

2. The plaintiff, who is a young woman, and a photographer by occupation, attended the fourth-named defendant, a general practitioner, in late August of 1989 with a complaint concerning a large lump in her right armpit.

3. The fourth-named defendant promptly referred the plaintiff to the second-named defendant who was a general surgeon, and was the county surgeon for the County of Donegal at the time in question. The plaintiff was seen quickly by the second-named defendant and he recommended the removal of the lump being unable to diagnose its precise nature without surgical intervention.

4. The plaintiff had the lump removed in an operation which took place, or was carried out, by the second-named defendant, perhaps with some assistance from the third-named defendant and this was done on 21st September 1989. The lump in question was successfully removed and it was sent for testing and, in due course, it transpired the lump was of a non-malignant nature. The plaintiff attended the second-named defendant presumably for post-operative review on 27th November 1989, and the notes of that attendance or consultation disclose that a complaint of anaesthesia on the inner side of the right upper arm was made, but the notes do not disclose any complaint of weakness in the arm.

5. The plaintiff, it would appear, next attended the second-named defendant on 13th July 1990, at which stage she was complaining of anaesthesia on the outer side of the right forearm and inner side of the arm and of wasting in the biceps. It would appear on the examination that up to an inch of wasting was noted in the right upper arm. From the notes which were made, it would appear, Mr. Hanley queried why this wasting was there and queried something about the anaesthetic position, and also queried a traction lesion.

6. Thereafter, the plaintiff who was living in Belfast attended her general practitioner and also a neurosurgeon in the North of Ireland, in Belfast. It became clear that she had a very serious problem with her right upper arm which was manifested by wasting, and ultimately, complete disuse of the bicep, and also anaesthesia there, indicating a very significant neurological mishap of some sort or another.

7. In due course she went to a solicitor in the North of Ireland who referred her to the South as it were, and she obtained the approval of the Legal Aid Board to bring proceedings, and was assigned a Legal Aid Board solicitor. The plenary summons was issued in July 1992 against the defendants named therein.

8. As I have said, this application is brought to strike out these proceedings for want of prosecution, and the legal principles which apply to an application of this kind are now well settled. They may be summarised, as follows, that is to say that in an application of this kind the party seeking the strike-out must show that there has been inordinate and inexcusable, or unexcused, delay on the part of the plaintiff, and if the Court is satisfied that there is inordinate delay, and that the delay is neither adequately explained, or justified, or excused, then the proceedings can be halted, but that is not the end of the matter either because then the Court must consider whether or not, having regard to the lapse of time, a fair trial can take place, and must weigh up whatever prejudice has resulted as consequence of the delay.

9. Then, finally, the Court must consider whether or not there has been delay on the part of the parties seeking relief or whether there has been acquiescence by that party in the delay of the other party.

10. I have had the benefit of reading the medical reports that have been given to me by the plaintiff, the correspondence, and they have been listed for the benefit of the defendants, but needless to say they cannot see them and should not see them, and therefore, I have to be very careful of what I say. I have also seen the correspondence between the plaintiff's solicitor and these various doctors. I have also seen counsels' opinion that were obtained, and I have also seen correspondence between the solicitor for the plaintiff and counsel.

11. First of all, it is conceded in my view, rightly by Mr. Barton S.C., that there has been inordinate delay. This is not a very complicated case as medical negligence cases go. One would have to say that this is on the lesser complex end of the range, if one may so describe it.

12. The proceedings were commenced, in July of 1992, and as of early 2004 there was, as yet, no statement of claim. Eventually during the course of 2004 a statement of claim was sought to be delivered, but its delivery was resisted rightly on the basis that the preliminary step of a notice to proceed had not been taken. But that is really a minor and, indeed, insignificant issue. The real issue is whether or not the delay involved is of an inordinate nature which it clearly is, and therefore, whether it has been adequately explained and excused.

13. There is an affidavit of the solicitor for the plaintiff which sets out in considerable detail everything that happened in the course of her dealing with these proceedings. I have no doubt that an enormous effort was put in by the solicitors for the plaintiff to bring these proceedings to fruition. It is quite clear also that her efforts in that regard were complicated by the fact that, being a Legal Aid Board solicitor, she was obliged regularly to look to and seek approval for further steps from the Legal Aid Board. And that, undoubtedly, added significantly to the delay that occurred in the case.

14. However, it is quite clear from having read the papers I have mentioned in my view, that as of March 1994 the plaintiff was in a position to have drafted a statement of claim. It might not have been a perfect statement of claim but it would have been a perfectly

adequate statement of claim.

15. There is no doubt that, thereafter, an enormous effort went into sorting out perceived difficulties, and I suppose trying to enhance various aspects of the case. But unfortunately, in the course of that effort there appears to me to have been no regard for the passage of time. There are alarmingly, it is clear from looking at the papers, very long gaps between, in particular, in the correspondence with the doctors, and one would need only look at the table of the correspondence to see that. I do not think that that has been adequately explained.

16. A plaintiff cannot assume that there is endless time available to sort out what may indeed be real problems in a case. The plaintiff does not have an endless supply of time to deal with these things. In this case it would seem to me that there was no regard for the passage of time, and that is particularly so when one has regard to the status of the second-named defendant who, it must have been known to the plaintiff and her solicitor, was elderly and indeed retired in 1991.

17. So having carefully considered all of the papers and weighed up the time that was involved and what had to be dealt with and so on, I am not satisfied that the delay has been adequately explained or justified.

18. Apart from that, however, if I am wrong in that, I am quite satisfied, that at this stage a fair trial is no longer possible. The second defendant is now wholly incapacitated and cannot give instructions and cannot possibly give evidence.

19. His evidence in my view is essential, quite essential, to two crucial aspects of the case. The first of these is what exactly was done by him in the surgery. The notes are available in copy form and there is no prejudice in my view arising from the availability or non-availability of notes. They are, as medical notes frequently are, sketchy, and indeed, looking at the notes and looking at the correspondence that has occurred between Mr. Hanley to, both to the GP, that is the fourth defendant, and then I think it is Mr. Fannin, it is quite clear to me that the first issue that will arise in this case is exactly what he did, what did he interfere with, what exactly was this lump attached to or out of, and whether or not whatever he did was a breach of the appropriate standard of care.

20. The plaintiff's case is based on the opinion of Mr. Brennan largely, that this nerve was cut and that it was wrongly interfered with. That clearly would be in dispute. I do not see how one could possibly try that issue fairly without the evidence of Mr. Hanley. It is quite clear from his letter to Mr. Fannin that he was somewhat perplexed at this occurrence having regard to the nature of the tumour, or its location, and from that one can readily anticipate that his view was that this should not have happened, that whatever was done did not readily, or at all, explain the ultimate damage. So for that reason it would seem to me that his evidence would be essential to that issue, and were the trial to go on without his evidence it would simply not be a fair trial.

21. The second issue to which his evidence is quite crucial is related to the post-operative care. The plaintiff's case is that she experienced difficulties with her arm and that she reported these to Mr. Hanley, and that he assured her that it would take about a year for everything to sort itself out and not to worry about it. Now, of course, it would appear that had this problem been detected within a period of months following the surgery some corrective surgery could have been attempted, but that opportunity was lost because the problem was not detected within the relevant time period.

22. Of course, what is of critical importance here are the actual complaints that were made by the plaintiff to Mr. Hanley when he attended her on 27th November 1989. His note, as I have mentioned earlier, does not reveal any complaint of weakness, though it does mention anaesthesia. So Mr. Hanley's evidence as to what happened on that occasion and what was reported to him and what opportunity had to reach a conclusion would have been absolutely critical, and a trial which would simply permit the plaintiff, as it were, a free run at that would simply not be a fair trial.

23. All of these problems could have been avoided; all of this potential unfairness could have been avoided if this matter had come on for hearing in a timely fashion. That has not happened and, in my view, cannot happen now. For these reasons I would grant the relief which is sought. What I am going to do is I am going to strike out the proceedings as against the second-named defendant, and I am going to strike out the proceedings as against the first-named defendant insofar as there is any claim in these proceedings in respect of a vicarious liability on the part of the first-named defendant for the actions of the second-named defendant.

24. The hearing then concluded.