

THE HIGH COURT

2008 5631 P

BETWEEN

LIAM O HAONGHUSA

PLAINTIFF

AND

DCC PLC, DAYS MEDICAL AIDS LIMITED, MURRAY SURGICAL LIMITED AND

DAYS HEALTHCARE LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on July 19th, 2011

1. The net issue before me is whether the plaintiff's action for damages for personal injuries against the first, third and fourth defendants ("the relevant defendants") is statute-barred. As we shall now see, the issue divides into two parts. While it is plain that the plaintiff's negligence action is statute-barred, the question of whether a claim under the Liability for Defective Products Act 1991, is also statute-barred is by no means straightforward and gives to difficult questions of statutory interpretation.

2. The issue arises in the following way. The plaintiff, Mr. O hAonghusa, alleges in his pleadings that in September, 2004 he was travelling in his motorised wheelchair on Milltown Bridge, Clonskeagh, Dublin 14 when the tube in the front right tyre gave out. This caused the wheelchair to topple over and it is contended that as a consequence he suffered severe personal injuries. The wheelchair had been either purchased from or supplied or manufactured by the relevant defendants. I will return presently to the precise date of the accident and the date on which the plaintiff sought medical advice in relation thereto.

3. In September, 2007 Mr. O hAonghusa made an application to the Personal Injuries Assessment Board ("PIAB") for compensation in respect of these injuries. An authorisation was issued by PIAB on 28th January, 2008, and the present proceedings were commenced on 11th July, 2008. As provided by s. 50 of the Personal Injuries Assessment Board Act 2003, this period of time is to be disregarded for the purposes of the application of the Statute of Limitations 1957 ("the 1957 Act").

4. It is probably fair to say that the plaintiff's principal claim as pleaded is for negligence and breach of duty. The endorsement of claim on the personal injuries summons also contends that the relevant defendants were in breach of statutory duty and one of the particulars pleaded is that these defendants were "in breach of the Products Liability Act".

Whether the negligence action is statute-barred?

5. Section 7 of the Civil Liability and Courts Act 2004 ("the 2004 Act") effected a dramatic change to limitations law in that the limitation period for actions for personal injuries was reduced from three years to two years. Section 7(d) provided for the insertion of a new s. 5A to the 1957 Act as follows:-

"5A.—(1) Where the relevant date in respect of a cause of action falls before the commencement of section 7 of the Civil Liability and Courts Act 2004, an action (being an action to which section 3(1), 4(1), 5(1) or 6(1) of this Act applies) in respect of that cause of action shall not be brought after the expiration of—

(a) 2 years from the said commencement, or

(b) 3 years from the relevant date,

whichever occurs first.

(2) In this section 'relevant date' means the date of accrual of the cause of action or the date of knowledge of the person concerned as respects that cause of action whichever occurs later."

6. Section 7 of the 2004 Act was commenced on 31st March, 2005: see Article 3(1) of the Civil Liability and Courts Act 2004 (Commencement) Order 2004 (SI No. 544 of 2004). As the plaintiff's cause of action arose prior to the commencement of s. 7 of the 2004 Act, this meant that the applicable limitation period was two years from that date of commencement: see s. 5A(1)(a) of the 1957 Act (as inserted by s.7 of the 2004 Act). This in turn meant that the plaintiff's action in negligence was statute-barred after 30th March, 2007.

7. While the plaintiff's application to PIAB in September, 2007 would have had the effect of "stopping" time for limitation purposes, by this stage it was already far too late, since the plaintiff's action had become statute-barred some five months previously.

Conclusions on the negligence plea

8. It follows, therefore, that the plaintiff's action in negligence (and all related claims) are plainly statute-barred. While it is true that the invocation of the limitation period is merely a matter of defence and does not go to the jurisdiction of the court, the fact remains that this defence is pleaded by the relevant defendants. In these circumstances, as it is plain that the plaintiff's claim under this heading cannot succeed at hearing, it is appropriate that this claim be struck out at this stage and that it must be dismissed accordingly.

The claim under the Liability for Defective Products Act 1991

9. There remains for consideration a potential liability under the Liability for Defective Products Act 1991 ("the 1991 Act"). While it may be that the claim has been but sparsely pleaded in the endorsement of claim, I consider that the plaintiff has nonetheless sought to rely on the 1991 Act. It follows, therefore, that I must examine the question of whether this claim is statute-barred.

10. The limitation period governing claims of this kind is contained in s. 7 of the 1991 Act which provides:

"(1) An action for the recovery of damages under this Act shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date (if later) on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

(2) (a) A right of action under this Act shall be extinguished upon the expiration of the period of ten years from the date on which the producer put into circulation the actual product which caused the damage unless the injured person has in the meantime instituted proceedings against the producer.

(b) Paragraph (a) of this subsection shall have effect whether or not the right of action accrued or time began to run during the period referred to in subsection (1) of this section.

.....

(4) The Statutes of Limitation, 1957 and 1991, shall apply to an action under this Act subject to the provisions of this section.

(5) For the purposes of subsection (4)—

(a) subsection (1) of this section shall be deemed to be a provision of the Statute of Limitations (Amendment) Act, 1991, of the kind referred to in section 2 (1) of that Act,

(b) "injury" where it occurs in that Act except in section 2 (1) (b) thereof includes damage to property, and "person injured" and "injured" shall be construed accordingly, and

(c) the reference in subsection (1) of this section to the date when the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer shall be construed in accordance with section 2 of that Act, but nothing in this paragraph shall prejudice the application of section 1 (3) of this Act."

11. On the face of it, the limitation period for such actions by virtue of s. 7(1) is three years. The relevant defendants argue, however, that the effect of s.7(5)(a) is to deem s. 7(1) to be a provision of the Statute of Limitations, so that three year limitation period contained in that sub-section must be deemed also to have been amended by virtue of the amendment of that latter provision. It is contended, in other words, that the principal limitation period for actions arising under the 1991 Act has also been reduced to two years. Of course, if that argument is correct, then this part of the plaintiff's action would also be statute-barred.

12. The first thing to note, however, is that s. 7(5)(a) does not deem s. 7(1) to be a provision of the Statute of Limitations *for all purposes*. It rather deems it "to be a provision of the Statute of Limitations (Amendment) Act 1991 of the kind referred to in s. 2(1) of that Act."

13. This is of some importance, because as Barron J. pointed out for the Supreme Court in *Erin Executor and Trustee Co. Ltd. v. Revenue Commissioners* [1998] 2 I.R. 287 at 302-303 the critical question which arises in the case of a deeming provision of this kind is the extent of that provision:-

"When something is deemed by a statutory provision to be so, it becomes a matter of construction of that provision to determine to what extent it is deemed to be so. Is it deemed to be so for all purposes or only for some purposes? In the present case s. 4(4) [of the Value Added Tax 1972] clearly says that it is to be so deemed for the purposes of s. 3(1)(f). In other words it is deemed to have been supplied so that tax becomes payable in respect of it. It is not deemed to have been supplied for any other purpose. This is in accord with the principle of the strict construction of taxing statutes. If the legislature had intended the result contended for by the respondents, it would have said so in clear terms."

14. Here, then, is the net question of statutory interpretation. Is the deeming provision expressed to be for all purposes or is it rather more confined in its application? It must be borne in mind that such deeming provisions are not some form of legal legerdemain, but represent simply an established drafting technique.

15. As we have just seen, the deeming technique employed here is not expressed to be general and all encompassing. It is rather more specific in its purpose and range. Section 7(1) of the 1991 Act is deemed to be a provision of the Statute of Limitations (Amendment) Act 1991 ("the 1991 Amendment Act") "of the kind referred to in s. 2(1)" of that Act. Section 2(1) of the 1991 Amendment Act provides:-

"For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:

(a) that the person alleged to have been injured had been injured,

(b) that the injury in question was significant,

(c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,

(d) the identity of the defendant, and

(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

16. In effect, therefore, s. 2(1) of the 1991 Amendment Act is a form of *lex specialis* operating within the Statutes of Limitations

dealing with the specific question of the running of time and the plaintiff's knowledge of the date the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. As we have seen, s. 7(1) of the 1991 Act provides for a limitation period of three years from the date of damage or, subject to a 10 years extinguishment provisions, the "date (if later) on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer".

17. It is thus the date of knowledge provisions of s. 7(1) which are deemed by s. 7(5)(a) to be a relevant provision of the Statute of Limitations, precisely because it is these provisions which are the date of knowledge provisions "of the kind referred" to in s. 2(1) of the 1991 Amendment Act. It amounts to saying that the specialised rules as to the date of knowledge and running of time now applied generally to the Statute of Limitations Acts by s. 2(1) of the 1991 Amendment Act are also deemed to apply to the date of knowledge and the running of time rules contained in s. 7(1) of the 1991 Act, a point which is, in any event, underscored by s. 7(5) (c).

18. The deeming provision goes no further than this. It does not deem s. 7(1) of the 1991 Act to be a provision of the Statute of Limitations for all purposes. It follows that the principal limitation period remains that of three years. Any other conclusion would mean that the limitation period contained in one statute (i.e., the 1991 Act) might be taken to have been obliquely and indirectly amended by the amendments effected in respect of another statute (i.e., the Statutes of Limitation Acts), in the absence of a general collective interpretation clause such that deemed the 1991 Act to be part of the Statute of Limitations for all purposes. There is, of course, a presumption against unclear changes in the law (see, e.g., the comments of Henchy J. in *Minister for Industry and Commerce and Hales* [1967] I.R. 65) and it would indeed be surprising if the Oireachtas could have intended that a legal rule as fundamental as a primary limitation period rule could have been amended in this quite oblique fashion.

Conclusions

19. The conclusion that the applicable limitation period for the purposes of the 1991 Act is that contained in s. 7(1) and that this provision remains unaffected by the subsequent amendment of the Statutes of Limitation does not mean that the plaintiff is not statute-barred. More detailed evidence would be required at the hearing as to when the accident occurred and, in the event that the three years had expired, whether the plaintiff can invoke the date of knowledge provisions. Here it may be noted that in an affidavit filed in these proceedings Mr. O hAonghusa says that the injuries were received by him "in and around August 2004 and first identified by Dr. Jennings on or about the 7th day of September, 2004." The plaintiff had previously pleaded that the accident occurred in September, 2004.

20. This is a disputed issue of fact on which oral evidence will be required at trial. There is, accordingly, an antecedent factual issue requiring oral evidence which would be required to be resolved at trial before any final conclusion could be reached on the question of whether the plaintiff's claim under the 1991 Act is, in fact, statute-barred as the relevant defendants claim. It is sufficient for present purposes merely to rule that the limitation period contained in s. 7(1) of the 1991 Act has not been amended by virtue of the fact that the limitation period for personal injuries *simpliciter* was amended by the provisions of s. 7 of the 2004 Act.

21. I will accordingly permit the plaintiff's claim under the 1991 Act to proceed to hearing. This does not mean that the relevant defendants cannot successfully invoke the limitation defence at the hearing, as all that I have decided is that these defendants are not entitled to the equivalent of summary judgment striking out this claim.