

## THE HIGH COURT

2007 No. 7423 P

BETWEEN

MARIA GUNNING

PLAINTIFF

AND

NATIONAL MATERNITY HOSPITAL AND EUROSURGICAL LIMITED AND RICHARD WOLF GMBH

DEFENDANTS

**Judgment of Mr. Justice O'Neill delivered on the 11th day of November, 2008**

1. By its Notice of Motion dated 10th June, 2008, the first named defendant seeks an Order pursuant to O.19, r. 28 of the Rules of the Superior Courts, 1986 striking out these proceedings against it for the failure on the part of the plaintiff to disclose a reasonable cause of action or alternatively for being frivolous or vexatious or alternatively an order pursuant to the inherent jurisdiction of the High Court dismissing the plaintiff's action against it for failing to obtain an authorisation from the Personal Injuries Assessment Board (the P.I.A.B.) prior to the institution of these proceedings as required by Part 2 of the Personal Injuries Assessment Board Act 2003, (the Act of 2003). In her Notice of Motion dated 16th July, 2008, the plaintiff applied for a declaration that the proceedings are excluded from the provisions of the Act of 2003 and that the authorisation dated 28th April, 2008, issued pursuant to s.46 of the Act of 2003, is null and void and of no application to the within proceedings.

**Facts**

2. On the 10th October, 2005, the plaintiff was undergoing a laparoscopic right ovarian cystectomy at the first named defendant hospital. During the course of this surgical procedure a portion of a forceps broke and lodged in the plaintiff's abdomen. The procedure was converted into a laparotomy to retrieve the piece of metal. The plaintiff instituted proceedings in respect of the personal injuries she suffered as a result of this mishap against the first named defendant hospital, the second named defendant supplier and the third named defendant manufacturer on 9th October, 2007. She also made an application to the P.I.A.B. on the same date, which accepted her application in respect of the second and third named respondents by letter of the same date. The letter contained the following paragraph in respect of the application regarding the first named respondent:

*"Insofar as the first named respondent, National Maternity Hospital, is concerned, if it is the case that the claim arose out of the provision of any health service, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person, as set out in section 3(d) of the PIAB Act 2003, then the Board does not consider that the claim is one that requires Ms. Gunning to make an application to the Board for an Authorisation."*

**Issue**

3. The central issue which falls to be determined is whether the applicant's claim against the first named respondent falls within the ambit of s.3 (d) of the Act of 2003, thereby obviating the need to obtain an authorisation under the Act of 2003 to institute court proceedings. The Act of 2003 provides as follows:

"3.— This Act applies to the following civil actions—

(a) .....

(b) ... ..

(c) .....

*(d) a civil action not falling within any of the preceding paragraphs (other than one arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person)."*

**Counsels' Submissions**

4. Counsel for the first named defendant, Mr. Meenan S.C., submitted that as the plaintiff failed to obtain an authorisation in respect of the first named defendant from the P.I.A.B. that she was precluded from instituting proceedings against it. He submitted that the plaintiff's claim was a defective product claim and not a medical negligence type claim. If he was right in saying that, he continued, the plaintiff would have been obliged to have sought and obtained an authorisation from the P.I.A.B. He submitted that the negligence the plaintiff complained of arose out of a defect in the forceps and not the correctness or otherwise of the surgical procedure being carried out. Referring to the letter of the 9th October, 2007, from the P.I.A.B. to the plaintiff, Mr. Meenan noted that P.I.A.B. prefaced their remarks in respect of the purported non application of s. 3(d) of the Act of 2003, with the words "if it is the case" which, in his submission, could not mean that the P.I.A.B. had declined jurisdiction. He argued that if it was accepted that the P.I.A.B. had declined jurisdiction, it had done so wrongfully and that this wrong could not be visited on the first named defendant.

5. Counsel for the plaintiff, Mr. Antoniotti S.C., contended that the proceedings against the first named defendant came within the wording of s. 3(d) of the Act of 2003. He submitted that the injury the plaintiff sustained arose in circumstances as described in s. 3 (d) of the Act of 2003, and that the precise cause of the injury, whether because of a defect in the forceps or negligence in the use of the forceps was not determinative. He argued that the P.I.A.B. had clearly reached the conclusion in their letter of 9th October, 2007, that the plaintiff's application did not come within the terms of the Act of 2003, thereby declining jurisdiction of the complaint against the first named defendant. He submitted that lest there was any doubt about this, the terms of its subsequent letter of 17th July, 2008, to the plaintiffs' solicitors made its position clear. The relevant paragraphs read as follows:

*"...in relation to the first respondent, National Maternity Hospital, if it were the case that Ms. Gunning's claim arose out of the provision of any health service, the carrying out of a medical or surgical procedure or the provision of any medical advice or treatment, as set out in section 3(d) of the PIAB Act 2003, then the Board did not consider that the claim was one that required Ms. Gunning to make an application to the Board for an Authorisation to enable her to bring proceedings to resolve her claim."*

*Please note that in the event a claim comes within one of the exemptions contemplated by Section 3(d) of the PIAB Act 2003, the claim will then not come within the Board's remit, therefore an application is not required and in such circumstances we do not have the authority to issue an authorisation to enable the bringing of proceedings."*

6. By way of illustrating the precise nature of the claim made against the first named defendant, Mr. Antoniotti highlighted the particulars of the acts of the first named defendant constituting the wrong, negligence, breach of duty and breach of statutory duty, in paragraphs (a) to (g) in particular, as contained in the Personal Injury Summons dated 9th October, 2007. They are as follows:

*"a. Used or permitted the use of forceps in circumstances where they knew or ought to have known same was defective, unsafe and/or a likely source of danger to the Plaintiff.*

*b. Failed to properly, adequately or sufficiently clean, maintain, repair and/or replace the forceps and/or failed to have in place or to follow any adequate or sufficient system of cleaning, maintenance, repair and replacement of medical equipment, and in particular the forceps, in the Hospital.*

*c. Failed to give any proper or adequate training and/or direction to the medical and/or nursing and/or cleaning staff in relation to the cleaning, maintenance, assembly, disassembly, repair and/or replacement of medical equipment and in particular of the forceps and/or failed to establish or adhere to any or any adequate training protocol in relation to the medical equipment utilised in the course of the surgical procedure, and in particular in relation to the forceps.*

*d. Failed to ensure that any staff engaged in the cleaning, maintenance, assembly, disassembly, repair and/or replacement of the forceps was familiar with and adhered to the manufacturer's recommendations regarding same and instructions for use.*

*e. Failed to properly assemble and/or disassemble the forceps prior to its use in the surgical procedure.*

*f. Failed to establish and adhere to any proper or adequate protocol for the cleaning, maintenance, repair or replacement of medical equipment including the forceps and/or failed to ensure that an appropriate medical equipment management system was instituted and followed.*

*g. Failed to carry out any or adequate preparation, examination, inspection, check or test of medical equipment and in particular of the forceps prior to its use in the surgical procedure."*

7. Mr. Antoniotti also pointed to the authorisation from the P.I.A.B. that was issued on 28th February, 2008, pursuant to s. 46 of the Act of 2003 which, in his submission, had no relevance to these proceedings. He drew the attention of the court to a letter from the P.I.A.B. dated 17th July, 2008, acknowledging this error and stating that the authorisation should have been more properly issued under s. 17(1)(b)(ii)(I) of the Act of 2003. He informed this Court that the second and third named defendants were aware of this lack of valid authorisation but had consented to the proceedings.

#### **Decision**

8. Section 3(d) of the Act of 2003, describes a number of circumstances in civil actions in the medical sphere where the Act of 2003 has no application. In my view, s. 3(d) of the Act of 2003 should be construed as applying to the factual circumstances out of which an action arises, rather than applying to the specific legal causes of action set out in the legal proceedings. I say this because if the latter approach is followed, it would result in some parts of the same grievance or complaint falling within the remit of the P.I.A.B and others falling outside. This would clearly be an undesirable situation, as it could result in two aspects of the same personal injury complaint proceeding in parallel in two jurisdictions, i.e. the Courts and the P.I.A.B.

9. The factual circumstances, out which the plaintiff's personal injury claim arises, in my view, clearly occurred in the course of "...the carrying out of a medical or surgical procedure..." and are well within the provision of s. 3(d) of the Act of 2003. This conclusion would be sufficient to dispose of this application in favour of the plaintiff. Even if one were to adopt the approach of construing s. 3(d) of the Act of 2003, by reference to the specific causes of action pleaded or to looser categorisations such as "product liability claim", "occupiers liability claim" or "employer liability claim", the plaintiff would have to succeed in this application for the following reasons.

10. In this action the plaintiff alleges that the first named defendant was negligent on various grounds as set out in the particulars quoted above. Manifestly these grounds extend far beyond merely alleging that the forceps was a defective product. Even if the Mr. Meenan was correct in his submission that a defective product liability case was not caught by s. 3 (d) of the Act of 2003, this could only result in the striking out of these proceedings of that aspect of the plaintiff's claim against the first named defendant and no more. I was not urged by Mr. Meenan to adopt that approach.

11. In my view, the case as made by the plaintiff in her Personal Injury Summons comfortably falls within the terms of s. 3(d) of the Act of 2003.

12. I am satisfied that there is nothing in the correspondence which could be said to be an abandonment of any aspect of that case nor could any part of the correspondence amount to an estoppel preventing the plaintiff from pursuing the entire case made by her as set out in her summons. Such statements in the correspondence as were relied on by the first named defendant in this regard may have evidential value from the first named defendant's point of view at the hearing of the action, but no more.

13. I am satisfied that I must refuse the relief sought by the first named defendant in its Notice of Motion. It follows that the plaintiff is entitled to succeed in her motion.