THE HIGH COURT

Record No. 2003 No 4682 P

BETWEEN

THOMAS PURCELL

PLAINTIFF

AND

ALAN CLELAND, HUGH CURRAN AND KAREN MARY McNALLY

DEFENDANTS

Judgment of Ms. Justice Irvine delivered on 18th day of December, 2007

1. The plaintiff in this action was born on 26th June, 1975 and is a single man.

2. By plenary summons dated 10th April, 2003 the plaintiff instituted proceedings contending for professional negligence on the part of the defendants, a firm of Solicitors, who were instructed to act on his behalf in relation to injuries the plaintiff contended he sustained in a road traffic accident on 28th January, 1993.

3. The statement of claim delivered on 31st July, 2003 pleaded that "the plaintiff while in the process of exiting and removing a coat from his father's car sustained severe personal injury, loss and damage when his father commenced to drive before the plaintiff's arm cleared the car door." The plaintiff further alleged that as a result of this event he sustained significant injuries to his left elbow and in particular a fracture to the left medial epicondyle of the humerus which required reduction and fixation with kirschner wires. Those wires were later removed under two separate surgical procedures.

4. The allegation of negligence made by the plaintiff is that his solicitor, Mr. Cleland failed to institute proceedings on his behalf within the period provided for by the statute of limitations. Given that the plaintiff was a minor at the time he sustained his injuries on 28th January, 1993 he alleges that it was incumbent upon Mr. Cleland to issue a writ on his behalf prior to 26th June, 1996 that being the date upon which three years expired after the attainment by him of his majority.

5. A defence was delivered to the action on 19th February, 2004 wherein the defendants denied every aspect of the plaintiff's claim including the plaintiff's account of how he sustained his injuries on 28th January, 1993.

6. In the course of the proceedings between these parties the defendants raised a notice of particulars on 2nd July, 2004, sought discovery by notice of motion dated 11th March, 2005 and by notice of motion dated 14th May, 2007 brought a motion pursuant to s. 62(2) of the Civil Liability and Courts Act, 2004 seeking to dismiss the plaintiff's claim or in the alternative an order dismissing the claim as unsustainable and as an abuse of process of the courts. The court will refer to the significance of these procedural steps later in this judgment.

7. The court commenced the hearing of the within action on 28th November, 2007. On that date the court heard evidence from the plaintiff, Mr. Purcell, the plaintiff's mother, Mrs. Purcell and also evidence from Mr. McCullough, Mrs. Purcell's insurance broker. On the morning of the second day of the hearing i.e. the 29th November, the court was advised that the plaintiff had discharged his legal team. An order was made permitting Ralph McMahon solicitors to come off record on the plaintiff's behalf. The action was then adjourned for a period of one week to permit the plaintiff to adduce whatever additional evidence he wished to put before the court, his counsel on 28th November, 2007 having indicated that only one further witness would be called namely Mr. John Purcell the plaintiff's father. Mr. Purcell advised the court that having regard to the fact that the defendants were relying upon the hospital records to establish that the injuries he sustained on 28th January, 1993 arose as a result of a fall from his bicycle he wished to call as a witness, his sister Theresa whom he contended took him into the hospital and gave any details as may have been contained in the records to the administrative staff.

8. In the aforegoing circumstances the plaintiff was advised that the court would resume the hearing on 7th December, 2007 but that in circumstances where the action was being aborted as a result of his actions of dismissing his legal team that the court would not grant any further application for an adjournment.

9. On 7th December, 2007 the plaintiff indeed sought a further adjournment on the basis that his sister Theresa had not been in a position to leave the United States to come back to give evidence on his behalf. The plaintiff further relied upon a letter from the Legal Aid Board indicating his circumstances were such that he was an individual who would qualify for legal aid subject to a decision which would have to be made as to whether or not in the circumstances of his case a certificate would be granted.

10. The court refused an adjournment on the basis that at all times since the defendants brought their motion pursuant to s. 26(2) of the Civil Liability and Courts Act, 2004 in June 2007 that the plaintiff was on notice of the importance of being in a position to contest the contents of the medical records. Notwithstanding this fact the plaintiff's sister had not been produced as a witness for the hearing on 28th November, 2007. Neither had she been mentioned as a potential witness in the two replying affidavits filed by the plaintiff and his father when defending the defendant's motion to dismiss the plaintiff's claim as an abuse of process. There was no mention in either affidavit that the plaintiff was brought to the hospital by his sister or that she was the person responsible for giving the information to the hospital which ultimately made its way into the hospital records. In addition, in the light of the fact that the hospital records were admitted into evidence without the necessity for formal proof with the consent of the plaintiff's solicitors by letter dated 5th November, 2007 the court also concluded that the evidence of the plaintiff's sister was unlikely to materially effect the outcome of the proceedings. Finally, the plaintiff was not in a position to indicate when his sister would be in a position to give evidence or precisely what evidence she would give if the case were further adjourned.

11. The hearing was resumed on 7th December, 2007 and the court heard further evidence from Mr. Purcell's father i.e. Mr. John Purcell and also from Mr. Cleland, the first named defendant who was called on behalf of the plaintiff to give evidence.

12. At the conclusion of the plaintiff's claim, counsel on behalf of the defendants indicated that they would not be going into evidence. It was submitted by counsel on behalf of the defendants that the court had to be satisfied on the balance of probabilities that had personal injuries proceedings been pursed by Mr. Cleland on behalf of the plaintiff arising out of his alleged accident on the 28th January, 1993 that he would have been successful.

13. The onus of proof on the plaintiff in this action is twofold. The plaintiff must establish firstly that Mr. Cleland was in breach of his professional obligations to him. In this case the obligation concerned was his obligation to issue proceedings within the period permitted by statute for the bringing of a claim seeking damages for personal injuries. The second onus upon the plaintiff is to

establish that by reason of a breach of his professional obligations, Mr. Cleland brought about a consequential loss to the plaintiff. In this case the plaintiff's was required to establish to the court, on the balance of probabilities, that had the writ been issued within the statutory period that he would have won his case and recovered compensation.

14. Provided the plaintiff can establish both of the aforementioned prerequisites, he is entitled to be compensated for the injury sustained by him on 28th January, 1993. It was not disputed by the defendants that the plaintiff's mother, Mrs. Purcell, advised her insurance broker, Mr. McCullough of the injury allegedly sustained by the plaintiff her son on 28th January, 1993. Mr. McCullough noted Mrs. Purcell's instructions in this regard in a motor accident report form on 1st September, 1994. It was not disputed that Mr. McCullough advised Mrs. Purcell that she should consult with Mr. Cleland, a solicitor with whom he did regular business, and whom he indicated to Mrs. Purcell would look after the interests of her son. It is further not disputed that Mrs. Purcell attended with Mr. Cleland and that he accepted instructions on behalf of the plaintiff and that he pursued an investigation into the accident as reported to him by Mrs. Purcell as he wrote to both Our Lady of Lourdes Hospital, with the written consent of the plaintiff to access his records. Similar investigations were pursued with St. James' Hospital.

15. There is a professional obligation on any solicitor, whilst investigating a potential claim for personal injuries on behalf of any client, to preserve his clients rights by issuing a writ within the statutory time frame fixed for the bringing of such proceedings. The solicitor owes a duty of care to his client to issue a writ to stop time running against his client even where he may be experiencing difficulties in getting instructions or obtaining medical evidence or records to support such a potential claim.

16. Whilst it is clearly in the client's interest that the client stays in regular contact with his solicitor to make sure his case in progressing, there is no obligation on the client to monitor his solicitors progress so as to make sure the writ gets issued within the time limit provided for by statute.

17. The court is well aware that in certain circumstances a solicitor may have difficulties investigating a clients potential claim and sometimes something such as an incorrect address for a client may lead to difficulties in obtaining records or the evidence necessary to pursue the claim, but such difficulties should not deter a solicitor from issuing proceedings to ensure that the statute of limitations does not defeat any potential claim.

18. Mr. Cleland when called to give evidence on behalf of the plaintiff in this case advised the court that he had been instructed to issue proceedings. He also advised the court that he had grave doubts about the validity of the claim he was asked to make on behalf of Mr. Purcell. He further advised the court that he had difficulty in obtaining a statement from the plaintiff as to precisely how the accident had occurred and also further difficulties in getting information from the various hospitals regarding the incident concerned. Mr. Cleland gave evidence that the plaintiff was involved in a further accident in 1997 and that this was an accident in which the plaintiff was a passenger and had sustained significant injuries. Mr. Cleland viewed that action as being quite straightforward and seemed to conclude that in the light of this later 1997 accident and the potential claim available to his client that his client had abandoned any claim arising out the incident that had occurred on 28th January, 1993.

19. Notwithstanding these facts Mr. Cleland accepted in evidence that in circumstances where he had no instructions to abandon the claim on behalf of his client in relation to the events of 28th January, 1993 that his professional duty to his client was to issue a writ on his behalf so as to ensure that the statute of limitations did not expire. For this reason the court must conclude that Mr. Cleland was in breach of the duty he owed his client, Mr. Purcell, to have a writ issued on his behalf in relation to the events of 28th January, 1993 prior to the to 26th June, 1996.

20. In concluding that Mr. Cleland was in breach of the professional duty he owed to his client Mr. Purcell the court has not based this decision upon any acceptance of the truth of the evidence given to this court by Mrs. Purcell as to the number of times she asserted she gave instructions to Mr. Cleland or other members of his staff, either at his offices or over the telephone. The issue of credibility has no part to play in this element of the courts determination particularly having regard to the concession made by Mr. McClelland himself to the effect that he should have issue a writ pending ongoing investigation of the claim and whilst awaiting further instruction from his client.

21. As to the onus of proof on the plaintiff in relation to the second issue the court is satisfied that even if the writ had been issued and every conceivable step been taken by Mr. Cleland to pursue Mr. Purcell's claim in a professional manner that Mr. Purcell would have lost his case in respect of the elbow injury sustained by him on 28th January, 1993. I have heard all of the evidence on liability that would have been before the court had Mr. Cleland brought the action to trial in early course and I conclude that the injuries which the plaintiff contend occurred whilst he was getting out of his fathers car on that date, did not occur in the manner alleged.

22. In reaching the conclusion that the plaintiff did not sustain the injury to his left elbow when reaching into his fathers car on 28th January, 1993 the court places reliance upon the documentary matters referred to below, but even more importantly relies upon the credibility of the plaintiffs sworn testimony and the testimony of the other witnesses called on his behalf whose demeanour and testimony the court has had the opportunity to assess during the currency of the proceedings.

Documentary matters.

23. By letter dated 17th October, 2007 the defendants solicitors requested the plaintiffs solicitor to admit, without formal proof a booklet of medical records stating that, if necessary, they would prove the relevant records by the issue of the relevant subpoenas. By letter dated 5th November, 2007 the plaintiff's solicitors agreed to the said records being admitted into evidence without the necessity for formal proof.

24. At pp. 53.2 and 53.3 of the booklet of medical records the cause of the plaintiffs presenting injuries when he attended at Crumlin Children's Hospital on 28th January, 1993 was stated to be a fall from the plaintiffs bicycle.

25. By reason of the agreement between the respective solicitors, it is the agreed evidence in the case that the injury concerned was reported to the Hospital as having arisen as a result of a fall by the plaintiff from his bicycle. Notwithstanding this legal position the court did not preclude the plaintiff from an opportunity to dispute the content of the hospital records as to the causation of his injuries. The court did however acknowledge that the agreement between the solicitors regarding the admissibility of these records had placed the defendants in a position where they had no witnesses available to call to counter any evidence given by the plaintiff contending for an alternative account as to how the injuries were sustained.

26. Having heard all of the evidence proffered by and on behalf of the plaintiff the court is not prepared to accept the credibility of such evidence and will prefer, as a matter of probability, the cause for the plaintiff's injury as recorded in the medical records.

27. In coming to its conclusion that the plaintiff did not sustain the injury to his left arm in the course of a road traffic accident on

28th January, 1993 the plaintiff has taken into account the following matters namely:-

1. The plaintiff gave varying accounts, in the course of his oral evidence, as to how he sustained his injury. The plaintiffs account to the court of a wind having slammed the passenger door closed on his left arm is an account which fundamentally differs from the account given on his behalf in a statement of claim.

The plaintiff told the court in his oral evidence that he opened the passenger door which his right hand and held it open whilst he retrieved the coat with his left hand. He stated that a gust of wind then slammed the door on his left arm as his father drove off prematurely not realising his he had not left the vicinity. The plaintiff advised the court that he was right handed and having assessed the plaintiff's demeanour, the court concludes that it is most unlikely that the plaintiff would have reached back into the car with his left hand whilst holding the door open with his right hand. This manoeuvre would have forced the plaintiff to cross his arms over to take the coat out of the car and believes that it is highly unlikely that the plaintiff sustained his injuries in this manner.

2. The plaintiff's father gave evidence that he did not drag his son along the road as had been suggested by the plaintiff in one account of the accident given to the court. Further, Mr. John Purcell never mentioned his son reaching back into the car to collect a coat off the passenger seat as he drove away. He spoke about knocking down his son rather than a door slamming on his son's arm as a result of a gust of wind at the time when he was driving off.

3. The court further finds as a fact that the plaintiff's injuries are much more consistent with a fall from a bicycle. The hospital records did not disclose any bruising or lacerations to the left elbow notwithstanding the fact that the plaintiff contends his arm was sufficiently crushed to cause a fracture of the elbow which he sustained without a coat on when the door banged on his arm.

4. The courts conclusions as to the unreliability of the plaintiffs evidence is borne out by a number of matters canvassed in the course of cross examination. Not only were the plaintiffs replies to questioning as to how the accident occurred inconsistent, but his efforts to explain how the hospital records came to record his injuries as due his fall from a bicycle simply unsustainable. The plaintiff sought to convince the court that the records being relied upon by the defendants and agreed by his solicitors, were in effect not his records because of details in those records which he stated cast doubt upon those records being attributable to him.

5. The plaintiff in his own evidence stated that at all time relevant to this particular event he had resided at The Ward, Ashbourne, Co. Meath. Both the plaintiff and his mother denied knowledge of the address of 21 Labre Park, Ballyfermot, which is referred to at p. 53.3 of the hospital records stating that the only person who they knew that resided in Labre Park was Mr. Purcell's aunt and that she had resided at No. 8 Labre Park. However, Mrs. Purcell's own insurance broker was given the address of 21 Labre Park by her when she reported her son's accident to him as appears from the third page of the accident report form which was completed on her behalf by Mr. McCullough and which is at p. 3 of the defendants discovery.

The agreed medical records disclose at p. 54.1 that as of 1st February, 1993 a mere three days after this alleged road traffic accident that Mr. Purcell's aunt, Brigid Nan Purcell was noted on the hospital records as Mr. Purcell's guardian and that the address given for her was 21 Labre Park being the same address as is on the record which records Mr. Purcell's injury as having occurred when Mr. Purcell fell from a bicycle.

6. The agreed hospital records from St. James' Hospital referred to a further accident sustained by the plaintiff on 19th February, 1993 some three weeks after injury the subject matter of these proceedings. The patient assessment form in respect of this injury which is on p. 68.1 of the records gives two addresses for the plaintiff, one of which is 21 Labre Park, and the other 8 Labre Park albeit that the former address has been amended.

All of the aforementioned documentary evidence from the medical records is in the teeth of the oral evidence given by Mr. Purcell and his mother Mrs. Purcell to the court destined to convince the court that Mr. Purcell was residing at The Ward, Ashbourne, Co. Meath as of 28th January, 1993 so a to permit them to call into question the validity of hospital records noting his residence at Labre Park and recording his injuries as a result of a fall from a bicycle. Mr. Purcell and his mother have been singularly unsuccessful in this regard and the court believes that the evidence given to it regarding their residence was a tissue of lies concocted in an effort to rubbish the account of the incident contained in the hospital records.

7. Apart from the unreliability of the plaintiffs evidence in relation to how he sustained his injury and his place of residence at the times relevant to these proceedings the court concludes that it simply cannot rely upon Mr. Purcell's evidence in any material respect where there is a conflict of evidence. By way of example in the notice for particulars dated 23rd March, 2004, the plaintiff was asked whether or not he had instituted any other legal proceedings at that time in respect of personal injuries. By letter dated 21st April, 2005 the plaintiff's solicitors at para. 6 replied that the plaintiff had not made any other claims for personal injury, loss or damage and in an affidavit of verification dated 19th January, 2006 the plaintiff swore to the truth of this fact. In the course of the trial and consequent upon discovery the court was advised that the plaintiff had instituted proceedings on 8th March, 2000 claiming damages in respect of personal injuries allegedly sustained by him on 28th June, 1997 in a road traffic accident at Newcastle, Co. Dublin at which time it is alleged the plaintiff sustained significant injuries to his head, neck, chest, left shoulder and right elbow.

8. In the present proceedings the plaintiff in his oral evidence alleged that the injury sustained by him in his road traffic accident of 28th January, 1993 had curtailed his work and sporting activities. These assertions were not only given by the plaintiff in his own evidence but are contained in para. 4 of an affidavit sworn by him in these proceedings on 5th December, 2003. A perusal of the medical records discovered in relation to his road traffic accident of 28th June, 1997 demonstrates that the plaintiff told his Consultant Psychiatrist Dr. James Maguire as per his report of 21st November, 2003 that he enjoyed significant earnings before his car crash of June 1997 such statement being in clear conflict with his evidence in this case. The plaintiff also failed to disclose to Dr. Maguire the fact that he had sustained any injuries to his left arm in the accident the subject matter of these proceedings presumably so as to maximise his potential claim for loss of earnings in the latter proceedings. Similarly, the plaintiff told Mrs. Susan Tolan, Vocational Assessor in relation to his 1997 car crash that prior to that accident he was earning for the period, 1992 to 1997 between £700 and £1200 per week. These facts are recorded by Mrs. Tolan in p. 3 of her report dated 22nd May, 2006. Once again, presumably the plaintiff failed to disclose to Mrs. Tolan the injuries allegedly relied upon by him in this case so as to bolster his claim for loss of earnings in the proceedings in respect of the road traffic accident of 28th June, 1997.

28. The pleadings and reports in relation to the plaintiff's proceedings referable to his road traffic accident of 28th June, 1997 are in stark contrast to the assertions in this action that the injury to his left elbow has curtailed every aspect of his life.

29. The aforementioned matters are only some of the factors which lead this court to conclude that it cannot accept as truth any of the plaintiffs evidence either as to how he sustained his injury to his left elbow or as to the extent of that injury. The plaintiff has failed to discharge the onus of proof upon him to show that any loss arises from any default on the part of Mr. Cleland in failing to issue any proceedings in respect of instructions given to him by the plaintiff or his mother in 1994.

30. Lest the impression be created by the earlier part of this judgment that the agreement by the plaintiff solicitors to admit into evidence the plaintiffs medical records has had any significant bearing on the results of his action I would wish to make it perfectly clear that the court determined all of the issues on their merits rather than by application of the strict rules of evidence which might otherwise have precluded the defendants from seeking to advance the cause of the plaintiff's injuries as being the alleged road traffic accident of 28th January, 1993.

31. The court has no doubt that had the plaintiffs solicitors failed to agree the admission into evidence of the medical records that the same would have been proved in due course by the defendants serving subpoenas on the relevant medical witnesses. If the records had not been agreed by the plaintiffs solicitors the defendants advisors would have had to bring doctors, perhaps from outside the jurisdiction, to defend this claim and the costs of the defendants of having to bring such doctors to this jurisdiction to prove the records would have fallen to be paid by Mr. Purcell for failing to agree the admission of the records. The court is satisfied that even without proof by the defendant of the hospital records that the plaintiff would have been unsuccessful in this action. Throughout his own evidence the plaintiff demonstrated a complete disregard for his obligations stemming from the taking of the oath. The court has reached a similar conclusion in relation to the sworn testimony of Mr. Purcell's mother and father. The court is fortified in the view that it is taken in relation to the unreliability of the plaintiff's oral evidence from the dishonest approach he has taken to the preparation of a number of sworn documents in these proceedings. In particular the truth of sworn statements in a number of documents prepared by the plaintiff have been established to be false by the defendants and they are:-

> (a) The verifying affidavit sworn by the plaintiff in these proceedings to the effect that he had not instituted other proceedings for personal injuries as per his affidavit of 19th January, 2006.
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> (b) The plaintiff's affidavit sworn in reply to the defendant's application to dismiss these proceedings wherein the plaintiff at para. 5 of his affidavit made no mention about being brought to the hospital by his sister. Further, at para 5 of his affidavit he accepted that it could only have been himself that gave the account to the administrative staff in Crumlin Hospital that he fell off his bike. In that affidavit the plaintiff stated "I say that the reason for this is that I did not want to blame my father for the injury when reporting it to the doctors in the hospital

32. In all of the foregoing circumstances the court concludes that on the balance of probabilities the plaintiff did not sustain his injuries in the manner alleged in a road traffic accident on 28th January, 1993 and that had proceedings been instituted by Mr. Cleland on his behalf that the plaintiff would have been unsuccessful in convincing the court that he had a *bona fide* claim for compensation for negligence arising out of his father's driving on that date.

33. Finally, lest the court be in error in relation to the aforementioned matter the court further concludes that the within proceedings which were instituted on 10th April, 2003 are statute barred. It is to be noted that the defendants in their defence pleaded that the claim was statute barred. The plaintiff, in accordance with the statute of limitations, had six years from 26th June 1996 to maintain his claim for damages for negligence of breach of contract against his solicitor for failing to institute proceedings on his behalf. According the statute expired on 25th June, 2002 and in circumstances where the proceedings were not instituted until the 10th April, 2003 the within proceedings are also statute barred.