

THE HIGH COURT**Record No. 1999 No 59 P****BETWEEN****PATRICK EGAN****PLAINTIFF****AND
THE MIDLAND HEALTH BOARD
AND MR. PETER KEOGH****DEFENDANTS****Judgment of Mr. Justice R. Johnson delivered on the 27th day of July, 2006**

1. The plaintiff in this case is a 79 year old man who in December, 1995, underwent a complete hip replacement at the hands of the second named defendant in Tullamore Hospital, a hospital under the control of and owned by the first named defendant.

2. The plaintiff at that time was a gardener and had previously a left hip replacement in 1990. This had been a very successful operation.

3. However the deteriorating condition of his right hip necessitated another operation to replace it. The plaintiff was admitted to hospital under the care of the second named defendant and having been advised, counselled and having signed a consent form for the operation, underwent the operation on 21st December, 1995.

4. The said operation was not conducted under a general aesthetic but under a epidural injection.

5. After the operation the plaintiff was unable to move his right leg and this caused concern to the second named defendant. The second named defendant was hoping that the leg would improve but when it failed to do so realised that some injury to the sciatic nerve must have been caused in the course of the operation and decided to reinvestigate on 23rd December. This was done. However, it was discovered the damage had been done to the sciatic nerve which involved a contusion to that nerve.

6. The operation of replacing a hip requires the placing of the plaintiff in an operating theatre and then opening the hip, removing the acetabulum and replacing it with an artificial prosthesis, namely the cup into which the ball, or head, will go. It is then required that the head of the femur be cut off at a point to suit the surgeon. Then a prosthesis is implanted into the femur, usually this is done by putting a trial prosthesis first of all and when it is ascertained that this fits it is then removed and then the real prosthesis is put in and cemented in place. When the prosthesis is cemented in place all is then placed in the acetabulum and the wound is then closed.

7. In the course of the operation on 21st December in this case in attempting to remove the trial prosthesis it transpired that the fitting was very very tight in the femur and a certain degree of force was required to remove it.

8. Force can be required quite normally and it is not unusual in cases such as this. However, in the course of removing the trial prosthesis a spiral fracture developed in the femur. This in itself is not negligence either and can happen quite regularly in many operations. The operating surgeon, in this case the second named defendant, now had to take the necessary steps to ensure that this spiral fracture would unite in such a fashion as to enable it to hold the final prosthesis. This requires the clamping of the femur in the correct position with a clamp or forceps and then applying what is called partridge bands. Partridge bands are plastic bands which when placed around the femur in its correct position are tightened, holding the femur, and because of their design they are unable to be released. When these partridge bands are in position then the clamp or forceps is removed.

9. The partridge bands are introduced around the femur with the aid of an instrument called the introducer and then tied in position by the operating surgeon. Mr. Keogh did all these things and then completed the operation by inserting the prosthesis and finishing the job.

10. Later that day feeling had not returned to the plaintiff's right leg and Mr. Keogh thought he'd wait another 24 hours before deciding what to do to ascertain whether or not the anaesthetic had worn off. On 22nd it became clear to Mr. Keogh that something was wrong and it would require re-exploration of the operation. On 23rd December, 1995, Mr. Keogh re-explored the operation and discovered that there was damage done to the sciatic nerve in the region of the greater trochanter which the nerve in that area was not conducting.

11. Before embarking on the operation of 23rd December, Mr. Keogh had in his own notes indicated the possibilities of the cause of the injury to the plaintiff's right foot, namely:-

1. That the nerve had been cut,
2. That the nerve had been caught in the partridge bands,
3. That there might be cement burns on the sciatic nerve, or
4. There was possibly a traction injury.

12. The burns referred to can be caused by cement leaking from the femur itself or from holes in the bone through which the pressure of the prosthesis being placed into the cement in the centre of the femur forces the cement.

13. There is nothing which Mr. Keogh could do to repair the damage to the sciatic nerve and therefore the plaintiff has been left in the condition in which he is in at the present moment.

14. The plaintiff has sued the defendant for negligence claiming that the damage to the sciatic nerve was caused through the negligence of the defendant in carrying out the operation and damaging the nerve.

15. The defendant has filed a defence denying liability and pleading the statute of limitations. I will first of all deal with the statute of limitations.

Statute of Limitations

16. The defendant in this case pleaded the statute of limitations and in particular have indicated that the events which led to this case occurred on 21st December, 1995.

17. The defendant's contention is that the plaintiff was informed by Mr. Keogh that in the course of the operation there had been a spiral fracture of the femur and injury to the sciatic nerve. This was done by 22nd December and the plaintiff went in for further surgery, with his consent, on 23rd December, 1995.

18. The result of the spiral fracture of the femur was that the plaintiff was required to remain in bed until well into February of 1996.

19. The plenary summons in the case was issued on 6th January, 1999.

20. Therefore the relevant date for the purposes of the statute of limitations of 1957 is 6th January, 1996.

21. The defendant's submission is that the statute began to run on 21st December, 1995 and that it expired on 21st December, 1998 and if that submission was accepted then the plaintiff by issuing proceedings on 6th January, 1999, was outside the period limited by the statute.

22. There was a dispute between the plaintiff and defendant as to whether or not the plaintiff had been told about the damage to the nerve on 22nd December, 1995.

23. But the real argument submitted by the plaintiff against the defendant's contention is that the provisions of the Statute of Limitations (Amendment) Act, 1991, s. 2, subs. 1, para.(c) which states:-

"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."

24. The plaintiff submits that this means that until such time as the plaintiff could reasonably have known the actual act of the defendant which caused the injury and which is alleged to constitute negligence that the statute would not run.

25. It is quite clear in this case that the actual replacement was not in itself negligent and it is equally quite clear that between that time of the operation on 21st December, 1995 and 6th January, 1996, that the plaintiff was in hospital in bed and whereas he may have been aware that the condition of his right leg was attributable in general terms to the hip replacement he could not possibly have been aware as to the niceties of the suggestions which were to be made on his behalf regarding the acts which were alleged to constitute negligence on the part of their defendants.

26. In support of his submissions Mr. Finlay, for the plaintiff, relied heavily on the decision of Mr. Justice Geoghegan in the case of *Gough v. Neery* [2003] 3 I.R. pg. 90 and Mr. Justice Geoghegan's judgment at pg. 118.

27. In the course of that judgment the law is clearly set out and it is clear that until such time as the plaintiff was aware his case was based on the allegation that the damage to the sciatic nerve was caused by an instrument, either clamps or bands, could the plaintiff have been in a position to contemplate the institution of proceedings and under those circumstances I find that the plea of the statute in this particular incident does not succeed.

Negligence

28. Mr. Keogh, before embarking on the second operation on 23rd December, 1995, had indicated in his notes first of all that he was aware of the damage having been done to the nerve and in any event from the fracture of the femur it had been necessary to explain to the plaintiff that instead of going home reasonably soon he was going to have to spend another six weeks at least in bed.

29. This was done but as stated Mr. Keogh also wrote that prior to the second operation that he himself considered the possibilities which might have caused the problem, namely:-

1. That the nerve was severed,
2. Cement burns,
3. Partridge bands had trapped the nerve, and
4. Contusion.

30. On exploration it was quite clear that the sciatic nerve had not been severed, there were no cement burns, it had not been trapped by the partridge bands but there was a contusion, or bruise, in the greater trochanter region and it was agreed between the parties that this contusion, or bruise, is a cause of the plaintiff's disability. The plaintiff's claim is that the injury to the sciatic nerve was caused in the course of the operation either by clamping the nerve with a clamp and/or forceps or alternatively damaging the nerve with the introducer whilst placing the partridge bands around the femur or trapping the nerve in the partridge bands.

31. Here are the areas of disagreement between the parties that begin to arise – damage to the sciatic nerve was in or about the region of the greater trochanter, this is high up on the femur.

32. In regard to the disagreement between the parties two experts of great eminence and experience were called, each of whose curriculum vitae is such as to demonstrate that they are each leaders in the field of orthopaedic surgery and in particular in the field of hip replacement.

33. Professor Bradley, expert witness for the plaintiff, indicated that the clamp should be placed in or about the greater trochanter area for the purposes of clamping the fracture prior to the introduction of the partridge bands and quite clearly Mr. Keogh said he wouldn't put the clamp there and didn't put the clamp there because he couldn't get a grip sufficiently at that point to hold the fracture together and that the clamp would have slid down the shaft of the femur. Mr. O'Byrne supported Mr. Keogh in these contentions.

34. In other words, he did not use any instruments, retractors or otherwise, at the greater trochanter area, in fact the retractor was a suggestion introduced by Professor Bradley but Mr. Keogh categorically denies that this was ever used. Professor Bradley then gave evidence that in order to introduce the partridge bands one has to –

"Pass a hooked instrument around the bone with a slot at the end of it into which one places the tip of this, namely a partridge band, and then it just slides back around the bone, this is normally done by first passing the hooked piece posteriolaterally, that is round the back of the bone and it comes out through the anterior tissues but the problem is that the soft tissues can be damaged during this manoeuvre because of the fixed curvature and the nature of the wound in which one is working".

35. You can also pass the band using a curved forceps. There is a centimetre clearance between the sciatic nerve and the back of the femur.

36. Mr. Keogh demonstrated quite clearly the partridge bands had not been placed near the greater trochanter, neither had the clamp been used near the greater trochanter and therefore the band did not trap the nerve, from that I am satisfied that whatever damage was caused to the sciatic nerve was not caused by the clamping of the fracture or the placing of the partridge bands.

37. The defendant has argued that the damage could have been caused without negligence by traction. Professor Bradley specifically indicated that there had to be contact between the instrument, either the clamp, the introducer or the partridge bands against the sciatic nerve to have produced the effect that was stated to be there. In this he is contradicted by Mr. O'Byrne who is the expert for the defendants. Mr. O'Byrne stated that there was no need to have contact as the injury could have been caused by the traction and his evidence was as follows:-

"I think there are two aspects of what is going on during surgery that are not being taken into account. One is the deformed position of the lower limb, which by definition was twisting the sciatic nerve and putting a little traction on it. This happens normally in hip replacement, when you get into difficulty extracting an implant you have to twist the leg around even further and this is the first situation that is not taken into account. The second thing is that he says about the implant being hammered out of the femur would be true that it would be relaxing the sciatic nerve if it was being hit in the plane of the sciatic nerve but in fact the sciatic nerve is virtually at right angles around the greater trochanter and then you are hammering it towards the sciatic nerve so it is definitely putting the sciatic nerve in jeopardy."

38. In the witness box Mr. O'Byrne demonstrated quite clearly how the sciatic nerve can be draped across the greater trochanter and it has an effect likened by him to a rope being pulled over a wall.

39. Therefore the issues between the parties are quite clearly drawn. The plaintiff says that the damage has to be caused by contact with one of the instruments at in or about the greater trochanter region and the defendant says that no instruments were used at that region. If there was contact between the instruments and the nerve and that caused the damage there is no dispute that that would be negligence on the part of the defendant.

40. However, Mr. O'Byrne said the damage can be caused otherwise and without negligence. The evidence of Mr. Keogh that no contact was made by him with the nerves has been contested by the plaintiff's expert.

41. In this regard I accept the evidence of Mr. Keogh that he did not apply the clamp, introducer or the partridge bands or introduce them near the greater trochanter region but further down the shaft of the femur and under those circumstances I find that damage to the nerve was not caused by any of the instruments as suggested. Therefore applying the principles as laid out by Chief Justice Finlay in the case of *Dunne v. The National Maternity Hospital* [1989] I.R. at pg. 91, they are:-

"The true test for establishing negligence in diagnosis or treatment on the part of a medical practitioner is whether he has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status or skill would be guilty of if acting with ordinary care."

42. Applying those principles I am quite satisfied the plaintiff has failed to establish that the defendants failed to use such care.

43. In fact I am satisfied on the facts as proven and on the evidence that the defendant's account of what took place is in the balance of probabilities much more likely to have occurred having particular regard to the findings of Mr. Keogh that the nerve had not been trapped by the partridge bands and that the damage had taken place to the nerve at a position where he had neither applied the bands, the introducer nor the forceps or clamp.

44. Under those circumstances I dismiss the plaintiff's claim.