

THE HIGH COURT
CIRCUIT COURT APPEAL

[2014 No. 226 CA]

BETWEEN**ANTHONY DIGNAM****RESPONDENT/PLAINTIFF****AND****THE HEALTH SERVICE EXECUTIVE****AND****LIAM DUFFY****APPELLANTS/DEFENDANTS****JUDGMENT of Mr. Justice McDermott delivered on the 11th day of May, 2015**

1. This is an appeal from an order of the Circuit Court (Her Honour Judge Linane) on 24th November, 2014, rejecting the defendant's claim that the plaintiff's case was statute barred by virtue of the provisions of the Statute of Limitations Act 1957 – 1991.

The History of the Proceedings

2. The plaintiff issued a personal injury summons on 7th August, 2012, against the defendants. The first defendant is the statutory body having control of Beaumont Hospital and the second defendant is sued in the capacity of the Chief Executive Officer of Beaumont Hospital, Beaumont, Dublin. The proceedings were later discontinued against the first defendant on 2nd November, 2012. The plaintiff's claim is for damages for "upset, distress, psychological upset and injury" alleged to have been caused to him by reason of the negligence and breach of duty and statutory duty of the defendant, his servants or agents in and about the management of the Accident and Emergency Department of Beaumont Hospital and the care of his late wife, Mrs. Mary Dignam, following her transfer from St. Patrick's University Hospital, Dublin to Beaumont Hospital. Mrs. Dignam was transferred on 11th June, 2010, and between 11th and 14th June was not provided with a hospital bed and spent three days or more sitting in a chair in the Accident and Emergency Department of Beaumont Hospital. She was then provided with a bed and treated in Beaumont Hospital, but unfortunately died on 20th June, 2010.

3. In the particulars of personal injuries set out in the summons, the plaintiff outlines in detail how upset and distressed he became at the sight of his late wife, who was extremely ill, as she was left to sit in a chair in the Accident and Emergency Department. The situation was allowed to continue despite numerous complaints to the hospital staff and authorities. The plaintiff contends that the hospital was fully aware of her deteriorating condition which had resulted in her transfer from St. Patrick's Hospital to Beaumont Hospital in consultation with the gastroenterology team at Beaumont Hospital.

4. The plaintiff bases his claim on alleged negligence and breach of duty on the part of the second defendant, his servants or agents in that they (*inter alia*):-

- (a) Failed to inform his late wife's consultant at St. Patrick's University Hospital that a bed would not be available at Beaumont Hospital for upwards of three days.
- (b) Failed to ensure that his late wife was provided with a bed when admitted to Beaumont Hospital.
- (c) Failed to properly assess his late wife.
- (d) Failed to provide her with an appropriate level of comfort.
- (e) Failed to anticipate that leaving his late wife in a chair for up to three days would cause psychological upset and distress to the plaintiff:
- (f) Failed to have any or any adequate or appropriately trained management or supervisory staff in place at the emergency department at Beaumont Hospital to ensure that the plaintiff's deceased wife did not remain in a chair for upwards of three days:
- (g) Failed to provide any effective care and support to the plaintiff's deceased wife.

5. Letters seeking and furnishing particulars were exchanged on 5th October, 2012 and 26th November, 2013. Further particulars of personal injury were supplied on 4th July, 2014.

6. A defence was delivered on 29th April, 2014, in which it was pleaded as a "preliminary objection" that any claim brought by the plaintiff was statute barred because the personal injuries summons was issued after the two year period contained in the Statute of Limitations. The summons issued on 7th August, 2012, and the facts complained of occurred on or before 14th June, 2010. The defendant contends that a hospital bed was provided on 14th June.

7. The matter was determined before Her Honour Judge Linane on the basis of two affidavits of Ms. Katie McAuliffe sworn 31st July, 2014, on behalf of the defendant, and a replying affidavit of Mr. John Hennessey, Solicitor, sworn 7th October, 2014, together with discovery documentation furnished with an affidavit of discovery sworn on 16th October, 2014.

8. Following the order made by the Circuit Court on 24th November, a notice of appeal issued on 1st December, 2014, and the matter was heard by this Court on 20th April, 2015. The matter proceeded in the Circuit Court as an issue concerning the interpretation of s. 3(d) of the Personal Injuries Assessment Board Act 2003. However, the defendants on the appeal wished to rely upon two further grounds related to the processing of the application by the Personal Injuries Assessment Board. For that purpose, a supplemental

affidavit was sworn by Ms. McAuliffe on 15th April, and Mr. John Hennessey on 20th April, 2015.

The Relevant Dates

9. A "Form A" application for assessment of damages under s. 11 of the Personal Injuries Assessment Board Act 2003, was completed and signed by the plaintiff on 11th June, 2012, and bears a stamp noting its receipt by the Injuries Board on 15th June, 2012. Mr. Hennessey, solicitor to the plaintiff, in his affidavit states that this application was sent by facsimile on 14th June, 2012, and therefore submits that the averment by the defendant's solicitors that no application was made until 15th June, as stamped on the document received, was incorrect. A covering letter to the facsimile of the 14th June states that:-

"This matter is due to become statute barred by 20th June, 2012, therefore it is essential that we receive an immediate acknowledgment of the receipt of this application for the purposes of s. 50 of the Personal Injuries Assessment Board Act 2003."

The letter was also sent by post and enclosed the "Form A" duly completed, a fee payment cheque in the sum of €45.00 and the medical report of Dr. Terence J. Hynes dated 12th June, 2012.

10. Dr. Hynes's report on the plaintiff's condition, having noted that his late wife died on 20th June, 2010, and that he had been depressed and felt traumatised by the circumstances of her death, stated:-

"It seems that Mrs. Dignam was five days on a trolley before she was admitted to a ward. By that time she lasted three days because of oedema of the brain i.e. fluid on the brain. She was in St. Patrick's ten days before as she was very depressed. On 21.5.2010 I spoke with house physician Dr. Farron in St. Patrick's. They decided to send her to Beaumont Hospital mainly because of oedema of lower limbs..."

11. The "Form A" as completed, stated that Mr. Dignam was bringing his application in his own capacity and as the representative of Jonathan Dignam and Caroline Farrell. He states that he is the husband and next friend of the deceased and that he suffered distress in the circumstances surrounding his wife's death on 20th June, 2010 and:-

"The applicant makes the application on behalf of himself and his family."

The brief details of the injury furnished in the appropriate column are "psychological injury-depression".

12. The authorisation issued by the Personal Injuries Assessment Board on 18th June, 2012, under s. 17 of the Personal Injuries Assessment Board Act 2003 and 2007, to bring proceedings in respect of the plaintiff's claim notes the date of the relevant claim to be 20th June, 2010. In a letter to the second defendant's solicitors on 10th April, 2015, PIAB confirmed that "the claim was acknowledged as complete by the Board on 15/6/2012". The defendant contends that the plaintiff's cause of action arises out of the provision of a health service to a person, namely his late wife, when first received as a patient in the Accident and Emergency Department of Beaumont Hospital during the period 11th to 14th June, 2010, and that the cause of action falls outside the scope of the Personal Injuries Assessment Board Act 2003, by reason of the provisions of s. 3(d). Therefore, it is claimed that the application should not have been made to PIAB and should have been initiated within the two year period of limitation on or before 13th June, 2012. The plaintiff submitted in the Circuit Court that the cause of action was for personal injuries and he was obliged to initiate the matter by application to PIAB. Proceedings issued within six months of receipt of the authorisation and it is submitted that proceedings were initiated within the period of limitation as extended by s. 50 of the 2003 Act.

Section 3(d)

13. Section 3 of the Act insofar as it is relevant provides:-

"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 any person, the carrying out of any medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person)."

14. Section 3(1) of the Statutes of Limitation Act 1991, as amended by s. 7A of the Civil Liability and Courts Act 2004, requires that an action for personal injuries should not be brought after the expiration of two years upon which the cause of action accrued or the date of knowledge of same, if later.

15. Section 50 of the 2003 Act provides:-

"50. In reckoning any period of time for the purposes of any limitation period in relation to a relevant claim specified by the Statute of Limitations 1957 or the Statute of Limitations (Amendment) Act 1991, the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of issue of an authorisation under, as appropriate, section...17....shall be disregarded."

16. Under the Personal Injuries Assessment Board Rules 2004 (S.I. No. 219 of 2004) it is provided that in relation to any relevant claim, the date of receipt by the Board of an application under s. 11 of the Act and the making of an application under s. 11 of the Act for the purposes of s. 50, shall be the date on which the application in a Form specified in subrule (1)(a) containing the information specified in subrule(1)(b) is acknowledged in writing as having been received by the Board.

17. Insofar as there is a conflict between s. 50 in that it provides that the period of interruption of the running of the limitation period will commence on the making of an application and the statutory rules which state that the period of interruption commences following the acknowledgment of the receipt of "Form A", the provisions of s. 50 must prevail (*Frescati Estates Limited v. Marie Walker* [1975] I.R. 177, per Henchy J. at p. 187 and *Kiernan v. J. Brunkard Electrical Limited* [2011] IEHC 44). In this case, the "Form A" was sent by facsimile to the Board on 14th June, 2012.

18. The defendant submits that the proceedings ought to have been commenced within two years of 14th June, 2010, as the normal period of limitation applied. It is submitted that the cause of action fell outside the scope of the Act by reason of s. 3(d) because it involved the provision of a health service to the plaintiff's late wife and that accordingly, the period of limitation ran and was not interrupted in the manner contemplated by s. 50 in respect of a claim properly submitted to the Board. It is claimed that these proceedings should never have been submitted to the Board because they are exempted under section 3(d). Therefore, the proceedings ought to have been issued on or before 13th June, 2012 but were not issued until 7th August, 2012.

19. The plaintiff submits that the action does not arise out of the "provision of any health service to a person" and is a claim for personal injuries for psychological upset and distress as a result of the plaintiff witnessing his wife's treatment at Beaumont Hospital and the failure to provide her with appropriate medical care and attention. It is submitted that in order for the health service exemption under s. 3(d) to apply, the service must be provided to the claimant. The plaintiff is not a person to whom a health service was being supplied between 11th and 14th June, 2010. Therefore, it is submitted that the plaintiff as a claimant for personal injuries was obliged under the 2003 Act to submit his claim to PIAB since his claim for personal injuries did not arise out of the provision of a health service to him. Consequently, it is submitted that the period of limitation was interrupted once the Form of application was submitted by facsimile on 14th June, 2012.

20. The learned Circuit Judge determined that the ordinary meaning to be given to s. 3(d) was that the plaintiff required a PIAB authorisation in respect of his application for damages for personal injuries as set out in the personal injuries summons dated 7th August, 2012, as his actions did not arise out of the provisions of any health service provided to him.

21. The defendant submits that since relatives of deceased persons are enabled to initiate proceedings and receive damages in fatal injuries cases by reason of negligence and breach of duty in the provision of health services to the deceased, and such claims are exempt from the requirement to obtain an authorisation from PIAB because of the exemption under s. 3(d), it would be illogical if the plaintiff's claim were not to be similarly regarded as arising from a health service provided to a person who is being treated in Accident and Emergency. However, under s. 2 of the Act, "claimant" is defined as including the personal representative of a deceased where death is caused by a wrongful act, neglect or default under s. 48(3) of the Civil Liability Act 1961. It is clear that specific provision was made under s. 2 for persons suing as personal representatives in a fatal injury matter, thereby creating the nexus between the proposed plaintiff in such a case and the deceased patient to whom the health service was provided. No such legal nexus is created in the plaintiff's case in which he initiated proceedings entirely on his own behalf based on his own cause of action in respect of personal injuries caused to him. I am satisfied that the exemption that might apply to the relative of a deceased patient who sues for the death of their relative by reason of negligence and breach of duty, in the provision of a health service is directly related to the treatment and service provided to the deceased patient as a result of which they died.

22. In *Gunning v. National Maternity Hospital & Ors* [2009] 2 I.R. 117, the plaintiff underwent a medical procedure during the course of which a forceps broke and one part of it lodged in her abdomen. The suppliers and the manufacturer of the forceps were sued in respect of a defective product, as was the hospital in which the event occurred. She made an application to PIAB in respect of the suppliers and manufacturers, but not as against the hospital because it was considered that that aspect of the claim was exempt from the PIAB provisions because of s. 3(d). On a motion to strike out the plaintiff's proceedings against the hospital and on the plaintiff's application for a declaration that the proceedings against the hospital were exempted under s. 3(d), O'Neill J., held (granting the plaintiff's declaration) that the subsection described a number of cases in civil actions in the medical sphere to which the 2003 PIAB provisions did not apply. He held that s. 3(d) should be construed as applying to the factual circumstances of the action rather than to the specific legal cause of action. Having examined the facts and pleadings in the case, the learned judge stated:-

"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 counsel for the first defendant 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 counsel for the first defendant 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."

23. In *Carroll v. Mater Misericordiae Hospital*, the plaintiff was an in-patient under medication. She left her hospital bed unaccompanied and went to the bathroom. She became dizzy and fainted, suffering personal injuries. The defendants claimed that her action was statute barred as it should have been brought within two years. She applied to PIAB for authorisation to initiate the proceedings, which was granted. As a result, the proceedings were initiated in excess of two years beyond the date of accrual of the action. The plaintiff claimed that the case was not exempt under s. 3(d) and that she had taken the correct course and was thereby entitled to calculate the limitation period with the benefit of the extension permitted by s. 50.

24. Hedigan J. stated at para. 12:-

"Looking at the context in which "health service" is placed in the Act, whilst it certainly is separated from medical services as specified in the section, does that mean that nursing care is not to be covered by the exclusion clause? For that to be so, nursing care would have to be somewhat artificially excluded from the definition in s. (d) as defined as a service which is neither part of a health service nor the provision of a medical service. I find it difficult to accept such an argument in particular in the context upon which it is based here. As stated by O'Neill J. in *Gunning*...it is to the factual circumstances the court should look and not to any particular label the plaintiff puts upon the legal issues arising. Doing that, I cannot accept the argument of the plaintiff that the claim arises from the management and maintenance of the hospital. It seems apparent looking at the personal injuries summons and the reply to the defence that the plaintiff's claim arises from the actions of the defendants, its servants or agents in prescribing certain medication for her. To succeed she would need to show that it was foreseeable that the affects of this medication would be such as was likely to make her dizzy and likely to faint if she got out of bed and walked, in this case to the bathroom. She would need nursing assistance in such circumstances. Medical evidence would need to be called in this regard...She was being treated for her illness with

certain medication. It was arising from this treatment that, when she went to the bathroom unaccompanied, she felt dizzy and fainted. It seems to me, therefore, that the plaintiff's claim is one that arises from a mix of her nursing care and her medical treatment. As such, it is an action which is covered by the exclusion provided in s. 3(d) and consequently, it is one to which the PIAB Act does not apply."

25. In this case the plaintiff complains about the manner in which his late wife was treated between 11th and 14th June, 2010. The particulars of negligence and breach of duty alleged against the second defendant have already been set out.

26. As appears from the judgments referred to, the court must have regard to the circumstances in which the alleged cause of action is said to have arisen, and the pleadings in the case. I am satisfied that this case is not about any alleged defect in nursing or medical care or treatment to the plaintiff's deceased wife. It concerns allegations of gross mismanagement of the Accident and Emergency Department at Beaumont Hospital in failing to provide a person whose transfer had been arranged with the medical staff of a sister hospital with a service consistent with her dignity and comfort, and which was so far below the level of comfort and dignity necessary to as to give rise to a reasonably foreseeable risk that her husband would be distressed, upset and psychologically disturbed at the condition in which she was kept for a period of in excess of three days. It is clear that the plaintiff does not complain of the care and attention provided by the nursing and medical staff who attended his wife, but of administrative negligence and breach of duty that caused her to be left on a chair for three to four days. Therefore, I am not satisfied that this claim is one which is properly exempted from the requirement to seek authorisation from PIAB under s. 3(d). However, that does not conclude the matter.

The Date of Accrual of the Action

27. It is clear from the facts that emerged in the subsequent affidavits filed on the appeal that the application to PIAB was made on 14th June, 2012, by facsimile. This was one day outside the period of limitation of two years within which an application ought to have been made to PIAB. A bed had been provided to the plaintiff's wife on 14th June, 2010. The last date for making application to PIAB within two years, was 13th June, 2012 (see *McGuinness v. Armstrong Patents Limited* [1980] I.R. 289). Under the 2003 Act, the period of limitation is interrupted on the making of an application to the Board under s. 11. The application was made on 14th, the day after the expiration of the period of limitation and consequently, the plaintiff is not entitled to the benefit of s. 50 of the Act. It follows, therefore, that the plaintiff's action is statute barred.

28. The court also notes that the application form "Form A" states that the relevant event occurred on 20th June, 2010, which was the day upon which the late Mrs. Dignam died. There is nothing in the pleadings or the affidavits submitted on this application to suggest that the plaintiff was unaware of the cause of any medical symptoms from which he claims to have suffered arising out of the events of 11th to 14th June, until 20th June or any date thereafter, and there is no evidence that the severe distress or upset from which he suffered at the time was not clearly apparent at that stage. Moreover, the report of Dr. Hynes does not indicate that the plaintiff suffered a recognisable psychiatric illness as a result of what happened, which gives rise to a difficulty of a different nature with which this judgment is not concerned. (See *Devlin v. The National Maternity Hospital* [2008] 2 I.R. 222.)

29. The defendant is entitled to succeed and the plaintiff's claim must, therefore, be dismissed.