Neutral Citation Number: [2007] IEHC 419

THE HIGH COURT

RECORD No. 2007 No. 8942 P

BETWEEN

MOIRÍN CALLANAN

PLAINTIFF

AND
KIERAN GERAGHTY

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 5th December, 2007.

1. The plaintiff, who is 88 years of age, is the widow of Maurice Callanan (the Deceased) who died on 27th November, 2007. The defendant is the Coroner for Dublin County. On this application the plaintiff seeks an interlocutory injunction restraining the defendant from having a post mortem carried out on the body of the Deceased. On 30th November, 2007, when the interlocutory application was first listed, the defendant gave an undertaking not to have a post mortem carried out pending the court's decision on the interlocutory application. The plaintiff's application is grounded on an affidavit sworn by her on 29th November, 2007. Although no medical reports are exhibited in that affidavit, it does contain a considerable amount of detail in relation to the state of health of the Deceased in recent years and the circumstances of his death.

2. The Deceased was 87 years of age when he died. For the previous six years he had suffered from rheumatoid arthritis. The plaintiff has deposed that she had been advised that he suffered from "cardiac difficulties".

3. The Deceased was hospitalised on three occasions during 2007.

4. First, he spent six days in St. Columcille's Hospital, Loughlinstown during April, 2007, having been admitted complaining of pains in his thigh. The plaintiff has deposed that he was discharged on 10th April, 2007 with prescriptions for both his heart condition and his rheumatoid arthritis.

5. Secondly, having fractured his pelvis when he fell getting out of bed on 25th July, 2007, the plaintiff spent three weeks in St. Vincent's Hospital, following which he spent another three weeks in St. Columcille's Hospital. Thereafter he was transferred to the Rheumatology Unit in Our Lady's Hospice for rehabilitation care. He was discharged on 4th October, 2007.

6. The Deceased's third and final hospitalisation commenced at 8 a.m. on 23rd November, 2007 when he was brought to St. Columcille's Hospital by ambulance on the advice of his General Practitioner. Later that day, at 5 p.m., the Deceased was admitted to the Intensive Care Unit. The plaintiff has averred that pneumonia had been diagnosed and that clinical tests showed that the Deceased was very anaemic and that his haemoglobin levels were very low. On the following day, the plaintiff arranged to have the Last Rites administered to the Deceased. On the evening of 26th November, 2007 the plaintiff was informed by the Deceased's General Practitioner that the Deceased's condition was deteriorating. He died peacefully at 5 p.m. the following day. The plaintiff was present when he died. She has averred that she was informed by a senior Staff Nurse that his death was due to a combination of old age, anaemia, underlying heart condition and pneumonia.

7. It was the plaintiff's understanding when she swore the grounding affidavit, on the basis of a conversation between her solicitor and the post mortem co-ordinator of St. Columcille's Hospital, that the sole basis on which the defendant had decided that a post mortem should be carried out on the Deceased was that the plaintiff had made a complaint to St. Columcille's Hospital about the treatment the Deceased received while in the Accident & Emergency Department of St. Columcille's Hospital on 23rd November, 2007. In the affidavit she expressed regret for making the complaint and stated that the complaint was unfounded and she would not be taking any steps, including legal proceedings, against St. Columcille's Hospital arising out of the treatment of the Deceased.

8. In essence, the basis on which the plaintiff seeks to restrain the carrying out of an autopsy on the Deceased is that the defendant has exceeded his statutory powers in directing that a post mortem be carried out, in that the death of the Deceased was neither sudden nor from unknown causes and, consequently, an autopsy is not necessary. She has averred that she is extremely concerned about the prospect of the Deceased's body being interfered with and that she is "at the point of collapse". Her perception is that an autopsy is a "gruesome procedure". She has suggested that an autopsy would in some way be contrary to the religious beliefs of the Deceased and herself, both being devout Catholics, although the basis of this contention has not been set out.

9. In his replying affidavit, the defendant has helpfully explained in general terms his role as Coroner for County Dublin and his experience in dealing with family members who have suffered bereavement, which no doubt he hoped would allay the plaintiff's concerns. The defendant has not disputed any of the factual matters averred to by the plaintiff in relation to the Deceased's medical history. Indeed, he has averred that, on the basis of the plaintiff's affidavit and also from his conversations with the Deceased's treating doctors, his death may have been related to the accident on 25th July, 2007.

10. The defendant has averred that the reason why a post mortem is required in the Deceased's case and why he exercised his judgment to direct that a post mortem be carried out is that the consultant physician who treated the Deceased in St. Columcille's Hospital during his final illness has indicated that she is not in a position to sign the certificate of death as the cause of death has not been identified. The defendant has recorded the views of the consultant and the registrar working under her, with whom he has spoken, as being that, while it is possible to guess at the likely causes of death, it is not possible to say with any degree of certainty what caused the Deceased to die. The defendant has specifically averred that he remains of the view that a post mortem should be carried out notwithstanding that the plaintiff has withdrawn her complaint against the Accident & Emergency Department of St. Columcille's Hospital.

11. Addressing the question of the balance of convenience, the defendant has averred that the post mortem could be finalised without any undue delay. When he swore his replying affidavit on 3rd December, 2007 he averred that it could be finalised by today. Even if that is not now possible, for present purposes I am assuming that, if the plaintiff's application were refused, the Deceased's remains would be released to the plaintiff for burial in the near future. On the other hand, if the carrying out of a post mortem is restrained pending the trial of the action, it is the defendant's opinion that the effectiveness of the post mortem process will be undermined. The defendant has averred that, while in theory the post mortem could be postponed for up to two weeks while the body is in cold storage, even in that period there would be some deterioration in the condition of the body. Embalming would not be a solution to that problem, as it would compromise the effectiveness of the post mortem examination. It is the view of the defendant that, if the effectiveness of the post mortem process is undermined, this may make it more difficult to establish the true cause of death, resulting in further distress and anxiety to the relatives of the Deceased.

12. The powers of a coroner to hold an inquest and direct a post mortem examination are contained in the Coroner's Act, 1962 (the Act of 1962). The general duty of a coroner to hold an inquest is governed by s. 17, which imposes a duty on the coroner to hold an inquest in relation to the death of a person if he is of opinion that the death may have occurred, *inter alia*, "suddenly and from unknown causes". It was accepted by counsel for the defendant that, on the facts of this case, he is not under a duty to hold an inquest. Sub-section (1) of s. 18 gives an optional power to a coroner and provides:

> "Where a coroner is informed that the body of a deceased person is lying within his district and that a medical certificate of the cause of death is not procurable, he may inquire into the circumstances of the death of that person and, if he is unable to ascertain the cause of death, may, if he so thinks proper, hold an inquest in relation to the death."

13. Section 33(1) provides that a coroner may at any time before or during an inquest cause to be made a post mortem examination of the body of any person in relation to whose death an inquest is to be or is being held. As I understand it, the defendant's decision to direct an inquest was made in the exercise of his discretionary power under s. 18(1) in combination with s. 33(1).

14. If this matter were to go to full hearing, in order to succeed in restraining the carrying out of a post mortem perpetually, the plaintiff would have to establish that the defendant's decision should be quashed. Accordingly, even though the plaintiff is proceeding by way of plenary action, rather than by way of application for judicial review, the determination as to whether the decision of the defendant should be quashed falls to be made by the application of ordinary judicial review principles.

15. On this interlocutory application the first issue which arises is whether the plaintiff has shown that there is a fair issue to be tried. Counsel for the plaintiff submitted that, on the facts, there is a fair issue to be tried as to whether a post mortem is necessary. The position adopted by counsel for the defendant is that the case does not disclose a fair issue to be tried because the defendant has formed the opinion, which is shared by the treating consultant, that there is a basis for carrying out a post mortem to identify the cause of the death of the Deceased. In my view, the question for the court is whether the plaintiff has established that there is a fair issue to be tried that the decision of the defendant should be quashed applying ordinary judicial review principles.

16. Counsel for the plaintiff referred the court to a decision of the Court of Appeal of New South Wales in *Abernethy v. Deitz* 39 NSWLR 701, in which it was held that a discretionary statutory power framed in terms very similar to s. 33 to direct a post mortem examination was susceptible to judicial review and that, applying Wednesbury principles, where there was no uncertainty as to the circumstances or cause of the deceased's death, and no further information on these matters would be obtained from a post mortem, a direction for a post mortem was so unreasonable as not to be an exercise of a power and was invalid. Counsel drew the court's attention to a passage from the judgment of Mahoney P. in which it was stated that it is proper for a coroner, in determining whether to direct a post mortem, to take into account the legitimate wishes of the person to whom the body has been committed by law, namely, the legal personal representative and, at least in some cases, the members of the deceased's immediate family, stating (at p. 708):

> "Where, for example, a post mortem would provide only marginal assistance in the discharge of coronial functions, the fact that a post mortem would cause deep distress to the legal personal representative or relevant family members may be sufficient to warrant the coroner not directing a post mortem."

17. I am satisfied that the plaintiff has established that there is a fair issue to be tried that the decision of the defendant to direct a post mortem should be quashed. Being so satisfied, and being satisfied that damages would not be any, not merely an inadequate, remedy for the plaintiff if her application were to be refused and she were to succeed at the trial of the action, the question which remains to be considered is where the balance of convenience lies. On this point, counsel for the defendant submitted that the court should have regard to and follow a line of authority to the effect that where the grant or refusal of an injunction would in effect dispose of the action finally in favour of whichever party is successful, that is a circumstance which must be brought into the assessment of where the balance of convenience lies. Counsel referred to the commentary on the authorities in Delany on Equity and the Law of Trusts in Ireland, which in the most recent edition, the 4th edition, is to be found at p. 538. The genesis of the principle is the decision of the House of Lords in *N.W.L. Ltd. v. Woods* [1979] 3 All E.R. 614, and, in particular, the following passage from the judgment of Lord Diplock at p. 626:

> "Where the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice might result from his deciding the application one way rather than the other."

18. That case concerned a trade dispute. The other United Kingdom cases referred to by Delany concerned respectively the implementation of a merger agreement followed by an allotment of shares before an Annual General Meeting, the broadcast of a television programme, the publication of wedding photographs of celebrities in a magazine, and the enforcement of a competition restraint clause in a contract of employment. The two Irish cases cited in which the principle was considered were passing-off cases.

19. This case, on the facts, differs substantially from the cases cited by Professor Delany in terms of completeness and finality of the process depending on the exercise of the court's discretion. If the injunction is refused in this case, presumably the post mortem will be carried out, which would render it wholly impossible for the plaintiff to pursue the relief she contends she is entitled to, a permanent injunction restraining the carrying out of a post mortem. On the other hand, if the injunction is granted, while, on the evidence, I must accept that the effectiveness of any post mortem which would be carried out if the plaintiff were unsuccessful at the trial of the action would be compromised, I do not accept that the defendant would be wholly unable to perform his discretionary power under s. 18(1) of the Act of 1962. Consideration of those factors alone and without assessing the strength of the plaintiff's case that the decision of the defendant be quashed, it seems to me, complies with Lord Diplock's enjoinder to weigh the risks that injustice may result from deciding the application one way rather than the other. Aside from that, the reality is that, in the absence of medical evidence which could be adduced but was not, presumably because of time constraints, the strength or weakness of the plaintiff's case cannot be assessed.

20. Finally, I have had regard to a matter which the defendant invited the court to consider – the likely impact of granting an injunction in this case on the ability of coroners generally to discharge their statutory functions. It was suggested that a coroner might be placed under pressure to make a decision in a certain way under threat of being named as a respondent in injunction proceedings in this Court. While it is undoubtedly in the public interest that coroners should not be inhibited in the proper exercise of their statutory functions, every case which raises an issue as to the exercise of the function of a coroner must be decided on its own facts as justice requires. Aside from that, I believe the facts of this case to be quite exceptional.

21. There will be an order restraining the defendant from causing a post mortem to be carried out on the body of the Deceased pending the trial of the action.