Neutral Citation Number: [2013] IEHC 191

THE HIGH COURT

[2003 No. 8027P]

BETWEEN/

MICHAEL ADAMSON

PLAINTIFF

AND

NORTH EASTERN HEALTH BOARD,

TOM O'CALLAGHAN AND, BY ORDER,

KEVIN O'CONNOR

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 19th April, 2013

1. In July, 2003 the plaintiff, Mr. Adamson, issued the present medical negligence proceedings arising from what he maintains were the deficiencies in treatment he received when he presented at Louth County Hospital ("the Hospital") in the early days of January, 2000. The plaintiff, who at the time was aged 45, contends that the first two defendants failed to provide appropriate clinical care and failed to make a timely or proper diagnosis of an inter-cranial abscess or otherwise to make appropriate arrangements for the plaintiff's clinical management. It is accordingly alleged that as a result of negligent diagnoses and treatment, Mr. Adamson suffered severe neurological injuries. The second defendant is a consultant physician attached to the hospital.

2. The present application concerns the joinder of the third defendant, Kieran O'Connor, by order made *ex parte* of this Court (O'Neill J.) on 23rd April, 2012. Mr. O'Connor was, at the material time, a consultant physician employed by the Hospital. Mr. O'Connor now moves this Court to have this *ex parte* order set aside on the ground that the delay in joining him has been inordinate and inexcusable and, furthermore, that the claim is also statute-barred.

3. One of the difficulties for all the parties is that the reconstruction of the precise sequence of facts on the days in question is, at this remove, no easy task. Allowance must naturally be made for the fact that since this incident Mr. Adamson speech and general recollection have been impaired. Nor could the plaintiff be expected to recall the precise identity of the various clinicians who treated him at the Hospital on the days in question. It is, however, necessary to endeavour to assemble the relevant undisputed facts before examining the relevant legal principles.

4. The plaintiff first presented to the Hospital on 1st January, 2000, suffering from headaches and a swollen face. It appears that influenza and an eye infection was suspected and Mr. Adamson was sent home. Mr. Adamson seems to have encountered difficulties with speech on 2nd January. He attended his general practitioner on the following day, whereupon he was referred immediately to the Hospital's Accident and Emergency Department. Mr. Adamson was ultimately transferred to Beaumont Hospital in the afternoon of 4th January, 2000, where he underwent emergency surgery to remove pus which was placing pressure on his brain.

5. The Hospital's clinical notes for the 3rd January, 2000, suggest that Mr. Adamson had woken up that morning unable to speak and that he had felt ill on the previous day. The entry for 8.15pm that evening contains a note to the effect that the treating clinician had discussed the case with Dr. O'Connor. The entry in nursing notes for 5pm on the same day record that Mr. Adamson "appears very ill" and that "Dr. O'Connor [has been] informed".

6. It is important to stress that the clinical notes were first supplied by the Hospital to the plaintiff's solicitors in October, 2003 following a request in that behalf in August, 2003. There were further requests for medical records between then and the delivery of the statement of claim in February, 2009. At that point, the plaintiff's solicitor issued a motion for discovery and in June, 2009 the Hospital supplied the accident and emergency chart for 1st January, 2000, and the nursing notes for 3rd January, 2000.

7. Further requests for discovery were issued by the plaintiff's solicitors in January, 2011. The object of these requests was to identify the casualty doctor who treated Mr. Adamson on 1st January 2000 and the duty roster for the medical staff at the Accident and Emergency Unit at the Hospital for the period from 1st January, 2000, to the 4th January, 2000.

8. A further affidavit of discovery was sworn on behalf of the Hospital in April, 2011. This affidavit identifies the Duty Registrar who treated Mr. Adamson on 1st January, 2000. The duty roster disclosed by this affidavit suggests that Dr. O'Connor was the consultant physician on duty on 1st, 2nd and 4th January, 2000.

9. The plaintiff's say that they only learnt directly of Dr. O'Connor's involvement following the supplemental discovery made in April, 2011. It was at the point they inquired whether the Hospital's solicitors were representing his interests and whether he would be covered by the Hospital's clinical indemnity scheme. Upon learning from the Hospital's solicitors by letter dated 8th June, 2011, that he was not so represented by them and nor was he so indemnified, the plaintiff's solicitors then applied to have Dr. O'Connor joined. It is only fair to record that the plaintiff's solicitors had previously canvassed the possibility of joining Dr. O'Connor in August, 2010 in the course of correspondence addressed to Dr. O'Callaghan's solicitors.

Whether the claim is statute-barred?

10. In considering this general question it is necessary first to bear certain considerations in mind so far as the plaintiff's case is concerned. It is true that the proceedings are, in one sense, prima facie statute-barred in that they were issued several months after the (then applicable) time limit had expired. Yet there are several extenuating features of the plaintiff's case. His ability to give instructions has been undoubtedly compromised by his illness. It may also be accepted that his general recall of this events and his ability to articulate what occurred also been diminished – perhaps considerably – as a result.

11. There is equally no doubt but that his legal team have represented him with great diligence and they have sought to explore every relevant dimension of these crucial four days from 1st January to 4th January, 2000. In this respect, the contention which has been advanced that time did not run against the plaintiff either by reason of his disability or by reason of the late discovery of the identity of Dr. O'Connor so that the operation of the Statute of Limitations has been thereby arrested cannot be regarded as insubstantial. The Supreme Court has made it perfectly clear that limitation issues should not properly be raised to defeat the joinder of a new party save where this would be "futile or manifestly ill-founded": *O'Connell v. Building and Allied Trade Union* [2012] IESC 36, per MacMenamin J.

12. It is accordingly clear from *O'Connell* that, save in such clear-cut cases, questions of whether a particular claim is statute-barred should not be resolved in the course of a preliminary motion of this kind where the question of adding a new party is the sole issue under consideration. As MacMenamin J. noted in *O'Connell*, it would be different, of course, if the Court was hearing a motion directed exclusively to the question of whether the action is, in fact, statute-barred. For these reasons, therefore, it sufficient to say that the question of whether this claim is, in fact, statute-barred is not clear-cut and would be required to be separately adjudicated upon. I would accordingly decline to set aside the joinder of Dr. O'Connor on this specific ground.

Whether the delay in joining Dr. O'Connor has prejudiced his entitlement to a fair hearing

13. In truth, however, the principal issue in this case is not as such whether the claim is statute-barred, but rather whether the delay in joining Dr. O'Connor has appreciably jeopardised his right to secure a fair hearing. Here it is necessary to look at the matter from Dr. O'Connor's perspective as well as that of Mr. Adamson. Even if it is accepted that no personal blame whatever can be imputed to the plaintiff for these delays, the plain fact of the matter is that the first notice which Dr. O'Connor received of such a joinder was in June 2011, over eleven years since the events giving rise to the present proceedings first occurred.

14. It is not disputed that Dr. O'Connor has no recollection of treating this particular patient. Accordingly, if he were obliged to defend these proceedings, he would be required to rely on the clinical and nursing notes. It appears that he would have been responsible for the patient on 1st January, 2000 as the consultant on duty according to the roster if the plaintiff had been admitted to the ward from the accident and emergency department or, alternatively, if he were called to treat the patient in accident and emergency.

15. There is, however, nothing in these notes to suggest that this was the case on that day. The clinical and nursing notes do both make a passing reference to Dr. O'Connor on 3rd January, 2000, but it is not possible to gauge from these notes the extent – if it at all – he was involved in the active management and treatment of the patient. The plain fact of the matter, nevertheless, is that if Dr. O'Connor were now forced to defend the allegations of personal negligence in these proceedings, he would be obliged to do so in circumstances where through no fault of his, the first notification of this came after eleven years and where he could not realistically be expected to defend the negligence claim on its merits.

16. It might, perhaps, be different if there was objective evidence which would have chronicled his actual involvement in some detail and which allowed for an independent evaluation of the extent to which his clinical performance met appropriate professional standards. There is, however, no such evidence in the present case. Indeed, as we have just noted, it is not even clear that Dr. O'Connor was ever involved in the active treatment or management of Mr. Adamson. All that is known from both the clinical notes and the nursing notes is that in the late afternoon and evening of 3rd January, 2000 Dr. O'Connor was informed of the deterioration in Mr. Adamson's condition and that the treating clinician – probably a hospital registrar – discussed the case with him, even if this fact is taken to suggest that he was the most senior consultant on duty in the hospital on the evening in question

17. In these circumstances, it is all but impossible to see how Dr. O'Connor could fairly defend the claim on the merits. How could a court properly assess whether Dr. O'Connor had properly examined the patient or reached a correct diagnosis? How could the court possibly evaluate whether Dr. O'Connor had recommended the correct course of treatment in this case? These questions effectively answer themselves and show that an assessment of these questions would amount to be little better than pure conjecture or speculation.

18. Here it must also be observed that allegations of professional negligence impact on the good name of the practitioner concerned, which right is, of course, expressly protected by Article 40.3.2 of the Constitution. Even if the allegations do not attain the level of gravity which was at issue in *II v. JJ* [2012] IEHC 327 (where the plaintiff had alleged that she had been sexually abused by a sibling over twenty-five years previously), I venture nonetheless to suggest that the principle I articulated in that case equally applies to the present one:

> "If the State's obligation to defend the defendant's constitutional right to a good name in Article 40.3.2 is to be meaningful, it must in turn imply that the procedures contained and operated in our legal system are framed in such a way such that a claim of this gravity is heard and adjudicated within a reasonable period of time."

19. In the present case it is accordingly unnecessary to rehearse in any detail much of the voluminous jurisprudence which has attended this topic over the last decade or so. It is, perhaps, sufficient to record that in *McBrearty v. North Western Health Board* [2010] IESC 27 the Supreme Court confirmed that, in the words of Geoghegan J., there exists a distinct jurisdiction to strike out for undue delay which can be exercised "even in the absence of fault on the part of the plaintiff".

20. Applying that test here, it is manifest that at this remove it would be grossly unfair to expect Dr. O'Connor to defend these proceedings on the merits and it could be all but impossible for a court to arrive at a fair determination of the case based on objective evidence which lends itself to independent scrutiny. This, of course, is no reflection on Mr. Adamson or, for that matter, his legal team, who have plainly striven so hard on his behalf. It is, rather, a recognition of the fact that by reason of the intervening delay over the last decade or so, Dr. O'Connor is simply in no position to address the contention that he did not properly diagnose or treat Mr. Adamson in the manner which has been alleged.

21. In *Manning v. Benson & Hedges Ltd.* [2004] 3 I.R. 556, 568 Finlay Geoghegan J. observed:

> "The constitutional requirement [in Article 34.1] that the courts administer justice requires that the courts be capable of conducting a fair trial….Accordingly, if a defendant can on the facts establish that having regard to the lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss."

22. As I have indicated, Dr. O'Connor is certainly not to blame for the fact that the lapse of time has greatly complicated the ability of the legal system to provide a hair hearing of the claim against him, since, as we have seen, he was first notified of the fact that he might be joined in the proceedings more than eleven years after the events giving rise to the present action. The risk of an unfair hearing is, moreover, an acute one so far as the claim against him is concerned.

Conclusions
23. It remains to summarise my principal conclusions:

A. The allegations of professional negligence against Dr. O'Connor have the potential to impact on his professional reputation, and, hence, his constitutionally protected good name.

B. The protection of that good name demands that a claim of this nature is heard and determined within a reasonable period of time.

C. It is clear from the Supreme Court's decision in McBrearty that the court retains an inherent jurisdiction to strike out for undue delay, irrespective of the fault of either party.

D. In the present case, the passage of time has greatly hampered the capacity of Dr. O'Connor to defend the case on the merits. He has no recollection of treating the patient and he would then be forced to rely on two passing references to him in the clinical and nursing notes respectively to assist him in determining his defence.

E. In these circumstances, a fair trial would be all but impossible and no fair conclusion could be reached on whether he had (or had not) met appropriate professional standards.

F. As the passage of time has also accordingly compromised the ability of this Court to discharge its constitutional mandate of administering justice and has equally violated Dr. O'Connor's concomitant constitutional right to have a case impacting upon his good name tried and determined within a reasonable time, the Court is left within no option but to set aside the order joining Dr. O'Connor as a party to these proceedings.