

## THE HIGH COURT

[2008 No. 7571 P]

BETWEEN

AUSTIN CONNOLLY

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE

DEFENDANT

**JUDGMENT of Mr. Justice Gilligan delivered on 22nd day of March, 2013**

1. By notice of motion filed on 25th June, 2012, the defendant seeks "An Order directing that the Defence raised by the Defendant that the Plaintiff's within proceedings are barred pursuant to the Statute of Limitations Acts 1957-1991(as amended) be heard and determined as a preliminary matter in accordance with the directions of this Honourable Court" and also, or alternatively, "an Order striking out the Plaintiff's claim in respect of an alleged trespass to the person in accordance with s.2 of the Civil Liability Act 2004, which precludes relief being sought in proceedings commenced by way of Personal Injuries Summons".

**Background**

2. During 2006 the plaintiff was referred by his GP for review of a keratotic lesion on his right ear to the outpatients department at Tullamore Hospital. On 18th May, 2006, the plaintiff consented to a biopsy procedure which he claims he was told would take a minute or two. It is alleged that contrary to the agreed procedure, the surgeon excised the entire legion by wedge resection without the plaintiffs consent. The plaintiff states that he suffered horrendous pain and that he has been left with a permanent cosmetic defect of which he is extremely conscious and that he has suffered loss and damage as a result. Results of a histology exam showed that the lesion was benign and were sent to the plaintiffs GP on 29th May, 2006.

3. On or about 22nd May, 2006, the plaintiff made a complaint to the Hospital and it is alleged that on 29th May, 2006, the plaintiff was informed by Mr. Ashraf Tawfik, Surgeon, that "All would be ok". In July, 2006 the plaintiff discussed the incident with his solicitor. In September, 2006 the plaintiff met consultant surgeon Mr. Kieran O'Driscoll who apologised for what had occurred.

4. On 15th September, 2008, legal proceedings were commenced by way of Personal Injuries Summons. This summons alleged negligence and breach of duty and trespass to the person against the defendant. The respondents now seek to have these proceedings struck out on the basis that they were commenced outside the time prescribed by the statute of limitations and that the trespass to the person claim was not, as it should have been, commenced by plenary summons. I will now consider each of these matters in turn.

**Statute of Limitations**

5. Section 3 of the Statute of Limitations (Amendment) Act 1991, as amended by section 7 of the Civil Liability and Courts Act 2004, states that an action claiming damages in respect of personal injuries "*shall not be brought after the expiration of two years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured*".

6. In *Bolger v. O'Brien* [1999] 2 ILRM 372, the Supreme Court held that the date of knowledge is the date when the plaintiff first had knowledge that his injury was significant. In *Gough v. Neary* [2003] 21.R. 92 Geoghegan J. cited with approval the following principle set out by Brooke L.J. in *Spargo v. North Essex Health Authority* [1997] 8 Med L.R. 125 –

"...a plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation"

7. In *Cunningham v. Neary & Ors* [2004] IESC 43 the Supreme Court held that the plaintiff's claim was statute barred as she had cause to question the actions of the doctor and had been advised to make a complaint to the Medical Council. McGuinness J. held –

"...even prior to that date however she had reason at least to question the necessity for the removal of her ovary. She had at an early stage queried the need for the operation..."

8. In the present case, it is submitted by the defendant that the plaintiff would have been aware that he underwent an unnecessary procedure when he learned from the results of the histology report that the lesion was benign. In addition, the plaintiff made a complaint on 29th May, 2006, and sought legal advice in July, 2006. Furthermore, the plaintiff also received an apology from Mr. O'Driscoll on 11th September, 2006.

9. I am of the view that the plaintiff's 'date of knowledge' came almost immediately after the procedure on 18th May, 2006, and certainly no later than July, 2006 when the plaintiff, after having made a complaint to the hospital, sought legal advice in relation to the matter. In his oral evidence to the court the plaintiff described the horrendous pain he endured following the procedure and said that when he returned home from the hospital he could see that what had happened was not what was meant to have happened. He described his ear as being "almost folded over" and said that three quarters of an inch of his ear was missing. I am satisfied that at this stage the plaintiff knew he had sustained a significant injury. For that reason, I must hold that the proceedings were not instituted within a period of two years of the date of the cause of action and are statute barred. I consider it appropriate to state that, particularly as the plaintiff sought legal advice so soon after the incident, it was incumbent upon the plaintiff to ensure that proceedings were initiated within the time period prescribed by statute.

**Trespass to the person**

10. Having found that the plaintiff's claim of negligence and breach of duty is statute barred, it is necessary to consider the claim in relation to trespass to the person, which was made within the time prescribed by statute, albeit in the Personal Injuries Summons rather than plenary summons as required by the Rules of the Superior Courts.

11. The defendant relies on Section 2(d) of the Civil Liability and Courts Act 2004, which states that personal injuries actions –

*"...shall not include...an action where the damages claimed include damages for...trespass to the person"*

12. It is submitted on behalf of the defendant that O.1, r. 1 of the Superior Court Rules 1986, requires a claim in relation to trespass to the person to be made by plenary summons and for that reason the plaintiff's claim in this regard is misconceived and must be struck out.

13. Counsel for the plaintiff submits that O. 19, r. 26 of the Superior Court Rules provides that no technical objection shall be raised to any pleading on the ground of any want of form. It is submitted that the fact that the trespass to the person claim was made in the Personal Injuries Summons rather than plenary summons is not fatal to the claim and has caused no prejudice to the defendant.

14. The issue of the correct originating procedure has been considered on a number of occasions by the courts. In *Bank of Ireland v. Lady Lisa Ireland Ltd* [1992] 11.R. 404, O'Hanlon J. followed the decision of *Meares v. Connolly* [1930] I.R. 333 and held that the use of the summary summons procedure where it was not available was a fundamental flaw that was fatal to the claim and accordingly the claim was dismissed.

15. However, as set out by Delany and McGrath in *Civil Procedure in the Superior Courts* (3rd Ed.) *"...this strict approach has not been followed in other cases which have, instead, emphasised the wide discretion conferred by Order 124, Rule 1"*. This broad discretion is evident in a number of cases. For example, in *Wicklow County Council v. Fenton* [2002] ILRM 469 the applicant failed to commence proceedings on a particular ground by special summons as required by the relevant legislation. On this basis, the respondents sought to have proceedings struck out. Kelly J. described the objection raised as "unreal" and "academic", particularly in circumstances where there was overlap between the reliefs sought. Also of importance was that no prejudice had been suffered to the respondents.

16. In *Earl v. Cremin* [2007] IEHC 69 the proceedings were commenced by way of plenary summons when O.74, rr. 49 and 136 stipulated that the claims in question should be brought by the originating notice procedure. The defendants sought to strike out proceedings as improperly constituted and prejudicial. Smyth J. held that the adoption of the incorrect originating procedure was due to oversight and that any prejudice suffered could be adequately remedied by the court.

17. The defendant also submits that the point was specifically raised in the defence dated 3rd April, 2012, and that despite this the plaintiff failed to take any steps to remedy the situation. In relation to this point it is important to note that time to deliver the defence was extended by consent for three weeks by Order of this Court on 31st January, 2011. The defence was not delivered until over fourteen months later at which point the plaintiff would have had very little time to take the appropriate steps to remedy the error by way of want of form prior to the expiration of the statutory time limit.

18. It is clear that O. 124 gives the court discretion when deciding whether or not to strike out proceedings due to non-compliance such as a want of form. In the present case, I find that while the plaintiff's claim of trespass to the person was incorrectly pleaded in the Personal Injuries Summons rather than correctly by way of a plenary summons, it is not fatal to the claim. The claim arises out of the same incident and is clearly defined in the Personal Injuries Summons. The defendant has suffered no prejudice as a result of the error and the claim was made within the prescribed limitation period.

## **Conclusion**

19. In light of the foregoing, I will grant an order striking out the plaintiff's claims in respect of damages for negligence and breach of duty as they are statute barred. However, after careful consideration of the facts of the case, I hold in the exercise of my discretion that the plaintiff's claim in relation to damages for trespass to the person should be allowed to proceed in the present proceedings.