

**THE HIGH COURT**

**2003 6265 P**

**BETWEEN:**

**ALVIN REILLY**

**PLAINTIFF**

**AND**

**GRAEME MOIR, PRECISION LASERCARE LIMITED,  
AND CLANE GENERAL HOSPITAL**

**DEFENDANTS**

**AND BY ORDER**

**NIGEL CARVER AND PRIVATE PATIENT SERVICES LIMITED**

**THIRD PARTIES**

**JUDGMENT of Mr Justice Michael Peart delivered on the 3rd day of April 2009:**

The plaintiff is a medical doctor who in 2002 decided to undergo breast enlargement surgery. The negligent manner in which that surgery was conducted has given rise to her claim for damages in these proceedings.

The first named defendant is the surgeon who performed the operation.

The second named defendant is a limited company incorporated in this jurisdiction and whom the plaintiff first consulted in relation to her intended surgery, and who made the arrangements for that surgery to be performed, and which received the agreed fee from the plaintiff for that surgery.

The third named defendant is the hospital at which the surgery was performed.

The first named Third Party is a surgeon in London. At this time he was a senior colleague of the first named defendant at Bart's Hospital, and who the plaintiff believed was going to perform her surgery. He was in fact in attendance at Clane Hospital on the date of the plaintiff's surgery, and available for consultation by the first named defendant at the third named defendant hospital at the time her surgery was performed, if that had been required.

The second named Third Party is a limited company incorporated in the United Kingdom and which provides certain secretarial, management and accountancy services for some surgeons in London, including the first named Third Party and the first named defendant.

**The plaintiff's surgery:**

The plaintiff made a decision in 2000 to undergo breast enlargement surgery. It is unnecessary to set out the reasons given by her for this decision or why she had not made this decision earlier in her life. She was aged fifty four when the operation was performed in July 2000. She is unhappy with the outcome of her surgery which she considers to have been performed negligently, firstly by the implants being placed somewhat higher than they ought to have been, with the result that the scars, which would under normal circumstances be concealed beneath the infra-mammary folds post-operatively, are visible, thereby revealing to anybody who might see them that she has undergone this surgery; and secondly by the left scar being unacceptably, unnecessarily and incorrectly longer than usual, and therefore visible, even if the implants had not been placed somewhat higher than they ought. This was something which she did not want to happen and which she claims ought not to have happened if the surgery had been properly performed by the first named defendant. The scar under her right breast is 6.5 cms in length and is 4cms below the infra-mammary fold, and that on the left is 8cms in length and is 4cms below the infra-mammary fold. The scar on the left side is unacceptably long, and both scars are visible even when wearing a bra or bikini-top. No improvement can be achieved by further surgery or treatment.

Some days after her surgery she experienced pain on her left side and had a high temperature. She rang the third named defendant hospital about this, and later received a telephone call from the first named third party. She had not met him by this date, but he advised her that her pain/infection had nothing to do with the surgery performed and that she should take some pain-killers. After six weeks she attended at Clane Hospital as I have already referred to, and on that occasion she spoke to Mr Moir, the first named defendant, and on this occasion she herself saw her scars for the first time. She stated that the first named defendant had himself been shocked by the appearance of the scars and did not understand how it had occurred.

She was told to leave things be for six months in the hope that at that stage something could be done about her scars. She waited for that period, and received an appointment to attend the hospital again, but that appointment was cancelled. A further appointment was arranged which she attended and on that occasion she met Mr Carver, the first named third party for the first time. He expressed the view that there was nothing which could be done about the scars.

That was her only involvement with Mr Carver.

The first named defendant, Mr Moir, who performed this surgery, was not professionally represented at the hearing before me, but he was in attendance and gave evidence during which he very candidly admitted that the surgery had been performed negligently by him. He chose not to cross-examine any evidence adduced. The Court has heard evidence from Michael J. Earley, Consultant Plastic Surgeon. His opinion is that the visibility of the left scar is unacceptable and resulted from the fact that this scar is unacceptably long and too low, but that it is all the more visible on account of the high placement of the left implant. He has stated that if the right implant was properly placed the right scar itself would be acceptable as to its length. In these circumstances it is clear that the surgery was negligently performed by the first named defendant. His candid admission and apology to the plaintiff in court during his evidence was appropriate and no doubt welcomed by her.

No negligence has been adduced which could implicate the third named defendant hospital in relation to the plaintiff's surgery. It had simply given the first named defendant and the first named Third Party theatre admission rights and had permitted its hospital to be used for this surgery.

The issue principally arising in this proceedings, apart from the assessment of general and other damages to which the plaintiff is entitled, is whether the second named defendant has been negligent, and if so, whether it is entitled to an indemnity in respect thereof from either or both of the Third Parties. I will address these questions after reaching a conclusion as to the amount of damages to which the plaintiff is entitled for the unsatisfactory result which her surgery achieved, and which has disappointed and upset the plaintiff greatly. It has to be borne in mind that even if the surgery had been properly performed the plaintiff would of necessity have two surgical scars, but they would under normal circumstances not have been visible to the extent that they now are.

**The plaintiff's damages:**

It was not until about six weeks after this surgery that the plaintiff first saw the surgical scars. Prior to this she had been bandaged. The plaintiff was appalled at what she saw. It had been very important to her that nobody, even her immediate family, should become aware that she had undergone this surgery, and she believed, as was confirmed by her surgeon prior to surgery, that her scars would remain concealed beneath the infra-mammary folds. Her decision to have this surgery was made some time after her husband had died. She had never in her life felt able to wear a bikini, and she had undergone this surgery not only to achieve a breast enlargement *per se* but also so that she could, if she so wished, wear a bikini. These matters were of importance to her, and, particularly, that the surgical scars would not be unnecessarily visible.

She is entitled in my view to be compensated for the fact that she now has visible scars, particularly on the left side, and also for the fact that the purpose of the surgery has to a large extent been frustrated by the visibility of these scars. They are permanently visible and this cannot be addressed by further treatment. She has received a permanent disfigurement of a particularly distressing and embarrassing kind.

In my view general damages in the sum of **€75000** are appropriate in the particular circumstances of the plaintiff and her intention when she decided to undergo this surgery. She is also in my view entitled to recover the fee for this surgery since she is now in a worse position than if she had not had the surgery at all. The fee paid by her was £4050, which has been stated to be **€5142.43**, giving a total of **€80142.43**.

**The relationship between the plaintiff and the second named defendant (PLL):**

PLL is a company which advertised its services which included the provision of cosmetic surgery such as breast enlargement. PLL does not itself perform surgery or provide medical care and treatment directly. The plaintiff decided to make contact with PLL in July 2000 in order to make arrangements for this surgery to be performed. Following an initial telephone call to PLL she attended an appointment at Clane Hospital where she had a consultation with the first named defendant. She was content with this consultation and what she was told, and she decided to go ahead with the surgery. She was happy that the first named defendant was suitably qualified, as indeed he was, and she was given a date for her surgery by PLL. In fact she had been expecting that her surgery was to be performed by the first named third party, but nothing turns on the fact that it was in fact the first named defendant who performed her surgery. She had no concerns about the identity of the surgeon or their qualifications. She is a medical doctor herself and assumed, as she was entitled to, that whoever performed her surgery at the hospital would be appropriately qualified.

Prior to her surgery she paid the requested fee to PLL by cheque. She had no involvement in how that fee was divided between the surgeon, the hospital and PLL.

The relationship between PLL and the first defendant, and the first and second named third parties:

PLL submits that in the circumstances where the first named defendant, Mr Moir, was provided to it by or through the second named third party (PPS) for the purpose of the plaintiff's surgery, that entity should indemnify it in respect of any damages arising from the negligence of the first named defendant. I have heard evidence of what the involvement of PPS has been in relation to the first named defendant, and as to the relationship between PLL and PPS.

Put plainly, the business carried on by PLL was to advertise in Ireland for patients wishing to undergo cosmetic surgery of various kinds, and having secured clients so interested, to arrange for them to speak to a suitably qualified surgeon in the hope that this consultation would result in a decision by the patient to undergo the surgery. PPS is company operating in London which provides certain private practice management and administration services to about fourteen surgeons in London. PLL does not itself provide any medical services.

PLL had discussions with PPS in 1998 when setting up its business, and arrangements were put in place whereby if a client contacted PLL expressing an interest in having some cosmetic surgery, PPS would be contacted and it would make arrangements for a qualified surgeon such as Mr Carver or Mr Moir to come over to Dublin to discuss the surgery with the client. In the event that the client made the decision to go ahead with the surgery, PLL would make arrangements with Clane Hospital for surgery to be performed on a particular date. PPS would arrange for the surgeon to travel over from London in order to perform that surgery. This would typically occur at a weekend. The client would pay a composite fee to PLL which would in turn pay the hospital and PPS, keeping a portion of the fee itself. PPS would then pay the surgeon who performed the surgery.

According to Mr Monahan of PLL it is Mr Carver who is the central figure in, and had a 50% shareholding in PPS, with Mr Tony Briggs having the other 50%. He stated also that Mr Carver had what he described as a "very high conversion rate". That is a way of saying that he was very good at turning a consultation with a client into a booking for surgery.

The first named defendant presumed that professional indemnity insurance was in place for this surgery at Clane Hospital, either through PLL or through PPS. It would appear that this in fact was not the case. It would appear that PLL had some form of insurance in place, but that since this claim was not notified in a timely manner to that insurance company by PLL the claim being made by the plaintiff is not being covered.

It appears that Mr Moir's own professional indemnity insurance covers any surgery carried out by him in the United Kingdom and not outside it. That has obviously left the first named defendant exposed to the plaintiff's award of damages personally. When he had originally received a notification of the plaintiff's claim he had presumed that it would be looked after by Mr Carver or Mr Briggs through PPS and that solicitors would be instructed by the insurers. However, as I have said, no insurance was in place for surgery outside the United Kingdom.

The first named defendant, Mr Moir, was not party to any of the arrangements entered into between PLL and PPS. He was simply asked by PPS to travel to Clane Hospital on this particular day in order to perform the plaintiff's surgery. He was never quite sure whether it was Mr Monahan of PLL or Mr Carver/Mr Briggs of PPS who were in charge of these arrangements. He knew that there was some arrangement between PLL and PPS, and it was an opportunity for him to earn additional income at the weekends.

The first named defendant, Mr Moir, stated that both he and the first named third party Mr Carver are independent surgeons for whom PPS simply perform some administrative functions, such as controlling their diaries, organising tax returns, collecting fees and suchlike. Neither of them is employed as such by PPS. He stated that in so far as Mr Carver would on occasion be at Clane Hospital in an adjoining operating theatre he was available to him for advice or consultation should that need arise, but he rejected any notion that he was working under the direction as such of Mr Carver.

Mr Monahan of PPS has stated that his understanding was that Mr Carver would be supervising Mr Moir during the surgery being performed at Clane Hospital. It was apparently his understanding that if Mr Carver was unable to do the surgery himself he would supervise whatever surgeon actually did the surgery. He stated also that his principal concern was simply that whatever surgeon was sent over by PPS would be a suitably qualified surgeon and one who would perform the surgery in a non-negligent manner. He described the role of PLL as simply locating the clients, and providing the facilities and some administration in relation to the surgery. PLL had no involvement in the medical aspects of the relationship with the client, that being the responsibility solely of PPS and the surgeon involved. He went on to say that he at all times had confidence in Mr Carver and had a high opinion of his skill and abilities.

Mr Tony Briggs gave evidence and described the services which PPS provides for the fourteen surgeons for whom it provides those services. Those services include administration and management support. These involve managing diaries for operations, issuing invoices and collecting fees. Some accountancy services are also provided. He described how the relationship between PPS and PLL began, and what it entailed as far as making arrangements for a surgeon to travel to Ireland for consultations and surgery for clients who had made initial contact with PLL, who were advertising for persons who might be interested in having cosmetic surgery carried out in Ireland. Any surgeon provided through PPS was a fully qualified surgeon. He stated that before any surgeon could have theatre rights in Clane Hospital his/her qualifications would have to be checked by the hospital, and that was done. He confirmed that neither Mr Moir nor Mr Carver were employed as such by PPS. They simply managed their private practices in the way described, and had no responsibility for how surgery might be carried out in any particular case.

### **Conclusions:**

I am satisfied firstly that when performing surgery in Ireland, Mr Moir did so as an independent contractor. He was not an employee as such of PPS. That company's involvement is confined to the provision of essentially secretarial and administrative services as described. They were the contact point for PLL when arranging for a surgeon to see clients and where necessary to perform the surgery. Their duty obviously involved ensuring that any surgeon so provided was a suitably qualified surgeon, but that is not the same as saying that PPS would be liable for any surgery which was performed negligently, as in this case. Any such negligence is a matter between the patient and that surgeon, and possibly between the patient and PLL with whom the contract for surgery was made. There has been no evidence to even suggest that part of these arrangements involved the giving of an indemnity to PLL in respect of any negligence being found against the surgeon. Those surgeons provided through PPS were not employees of PPS and there is no question of any vicarious liability arising.

The fact that Mr Carver is a 50% shareholder in PPS does not alter his position. He was not in any way negligent in this case. As it happens, Mr Carver was present at Clane Hospital on the day on which the plaintiff underwent her surgery with Mr Moir. He was operating on other patients in an adjoining theatre at the hospital. While it is the case that in such circumstances he was available to be consulted by Mr Moir if that need arose, it cannot be said that Mr Carver was in any supervisory role in relation to the plaintiff's surgery in the sense that he shared the responsibility to ensure that her surgery was properly performed. Mr Moir was the surgeon. He was fully qualified to perform that surgery, and the responsibility for the unsatisfactory outcome is the responsibility of Mr Moir.

I am satisfied therefore that it is the first named defendant who was negligent in relation to the plaintiff's surgery. While the second named defendant owed a duty of care to the plaintiff arising from its relationship with her, there is no evidence that it breached its duty of care to her. It had no direct involvement in the surgery either directly or on the basis of any vicarious liability, since Mr Moir was not its employee, and the surgeon provided by PLL, through PSS was appropriately qualified to carry out this operation on the plaintiff. There is no issue about that.

As I have already stated, there is no case of negligence made out against Clane General Hospital.

In these circumstances, I am satisfied that the plaintiff is entitled to recover her damages from Mr Moir, the first named defendant. No issue arises therefore in relation to any contribution or indemnity by the second and third named defendants who were not guilty of any negligence. Neither therefore does any issue as between the defendants and the third parties arise.

Accordingly, I will give judgment in favour of the plaintiff against the first named defendant in **the sum of €80142.43.**

