THE HIGH COURT

[2006 No. 3200 P]

BETWEEN

NOELLE MCGOWAN

PLAINTIFF

AND

KIERAN O'ROURKE

DEFENDANT

JUDGMENT of Mr. Justice John Quirke delivered on the 23rd day of February, 2012

The plaintiff was born on 10th December, 1941, and is now seventy years old. She lives at number 27, Joyce Avenue, Foxrock, in County Dublin.

In these proceedings, she is claiming damages for personal injuries, loss and damage which she says she has sustained as a result of negligence and breach of duty on the part of the defendant who is a consultant orthopaedic surgeon.

She claims that on 22nd July, 2003, the defendant performed a left hip replacement surgery upon her and that, as a result of the negligent manner in which he performed that surgery, she has suffered ongoing personal injures and has sustained and will continue to sustain ongoing loss and damage.

The Personal Injuries Summons in these proceedings was issued on 13th July, 2006, and was apparently delivered on the same day to the defendant's solicitors.

The fundamental allegation of negligence alleged within the Indorsement of Claim within the Summons is that the defendant caused the plaintiff's left hip arthroplasty "to be placed in an ecotopic or laterally displaced position and ... to be pushed too far laterally to allow her to walk normally".

It has been pleaded that the left shaft of the plaintiff's femur was displaced laterally because the left hip arthroplasty was performed negligently causing it to be "vastly" displaced.

In Replies to Particulars dated the 20th April, 2007, the plea that the hip was "vastly" displaced was repeated and it was alleged that "Shenton's Line" in the plaintiff's hip was broken and that, consequently, the plaintiff was (and remains), unable to walk properly because one of her legs is now shorter than the other.

A document described as an "Undated amalgamated Notice for Particulars and Replies" was delivered to the defendant's solicitors which repeated the same allegations of negligence.

The defendant denies that he was guilty of any negligence or breach of his duty to the plaintiff. He contends that he exercised reasonable and appropriate care and skill in performing the relevant surgery and complied with the general and approved medical practice then applied by consultant orthopaedic surgeons of like specialisation and skill.

RELEVANT EVIDENCE

The plaintiff was 61 years old when she underwent her left hip replacement surgery. She had a history of back pain and neck pain at that time and had been treated by a number of medical practitioners, including the defendant, for different complaints.

She suffered soft tissue injuries to her neck and back arising from a road traffic accident in 1982, required arthroscopic procedures to both shoulders in 1995 and 1998 and later had successful surgery to her left wrist. Additionally and in particular, she injured her neck, her shoulder and her low back area when she suffered a fall in a supermarket in October 1995.

Her symptoms arising from that injury were attributed to arthritic changes in both hips, and in particular, her left hip, which, it was indicated, had been aggravated by the fall.

She required pain therapy, including facet joint injections in her back and neck arising out of that incident and her symptoms were diagnosed as a reactivation of the pre-existing and previously asymptomatic arthritis in her neck and her lower back.

She recovered substantial damages from the relevant supermarket to compensate her for those injuries.

She did not complain of symptoms between 1998 and the 23rd April 2002 when she attended Dr. Declan O'Keeffe who is a consultant pain specialist. She complained of symptoms in her hip and groin.

Dr. O'Keeffe concluded that her symptoms resulted from arthritic changes in her hip, and in particular in her left hip. He was of the opinion that she required a left hip replacement and referred her to the defendant for review and assessment.

When she attended the defendant on the 3rd September 2002 he was uncertain as to whether her symptoms were directly related to the arthritic changes disclosed on X-rays of her hips, and he referred her for diagnostic joint injections. Those diagnostic injections were not undertaken for reasons which are unclear, but I am attaching no particular significance to that fact.

Because she had a fungal infection of the left foot, the defendant referred her to a dermatologist for treatment because hip surgery is contra-indicated where fungal infection is present or proximate.

On 22nd July, 2003 she was admitted to Cappagh Hospital for hip replacement surgery which was undertaken on the following day.

The femoral component used in the replacement was known as a Charnley flanged 40mm implant made from stainless steel. A similar implant was produced in evidence.

On 30th July, 2003, one week following the surgery, the plaintiff complained to the defendant of leg length discrepancy.

In a discharge letter sent by the defendant to the plaintiff's General Practitioner, Dr. Rice, the defendant advised, *inter alia*, that "she has tolerated the procedure well. She finds that her replaced hip is overlong but this should improve when she gets accustomed to it. I have arranged to see her in six weeks".

The Cappagh Hospital notes dated 30th July, 2003, recorded that the plaintiff "complains left leg is long- reassured by Mr. O'Rourke".

In evidence, the plaintiff stated that she had considerable pain and discomfort during the period immediately after the surgery and whilst she was recovering in the Caritas Nursing Home in Blackrock.

She said that she had been discharged from Caritas after two weeks rehabilitation, and thereafter was treated by physiotherapy which, she said, she undertook diligently. However the physiotherapy did not improve her pain which increased in intensity and was the same groin pain which had earlier caused her to consult Dr. O'Keeffe.

She said that she has endured continuing and worsening pain since the date of the surgery and has gained three stone in weight because she is unable to undertake the athletic pursuits which she enjoyed before her surgery.

I did not find the plaintiff to be a reliable witness and I found much of her testimony inconsistent. However, I am satisfied that, within seven days of the surgery, she complained of leg length discrepancy and she continued to make that complaint at all material times thereafter.

I am also satisfied on the evidence that after her rehabilitation and physiotherapy she continued to complain of the same groin pain which she had endured prior to the relevant surgery.

Mr. Kevin Hardinge, who is a consultant orthopaedic surgeon testified in support of the plaintiff's claim. He practiced in the United Kingdom for 30 years but has now retired from active practice.

The commencement of these proceedings was based upon the views and opinions contained within Mr. Hardinge's report dated 4th July, 2006 wherein he concluded, *inter alia*, that "the left hip arthroplasty is vastly laterally displaced.

He reported that he left hip arthroplasty has been performed in an unacceptable manner in that it is displaced laterally".

He reported further that the plaintiff was "not able to walk normally because the left hip arthroplasty has been placed in an ectopic or laterally displaced position" and he concluded that the plaintiff would be left with considerable difficulty walking and carrying out normal activities because of the "mal-placed left total hip arthroplasty".

Finally he repeated that "the claimant's present predicament is due to the faulty left hip replacement ... she will unfortunately be considerably disabled until this is revised into a proper position with regard to the pelvis".

His report did not suggest that the prosthesis used by the defendant was in any way inappropriate in the circumstances.

The plaintiff's claim against the defendant, therefore, was initially confined within the pleadings to the contention that the hip arthroplasty had been performed in an unacceptable manner because it had been displaced laterally.

That claim was based upon the contention that an imaginary line formed by the upper lines of the obturator foramen and the inner margin of the neck of the femur, (known as 'Shenton's Line'), had been displaced during the surgery in a manner which comprised negligence by the defendant and resulted in the lateral displacement of the left hip.

In his report dated 12th February, 2009, Mr. Hardinge had noted that "the left hip replacement that has been performed has been displaced laterally so that the Shenton's Line is displaced by up to 2cms ... the effect of the operation has been to displace the lesser trochanter laterally in relation to the greater trochanter and this is obvious on the x-rays. This claimant has a completely altered bio-mechanics as a result of this negligent operation and will never be able to walk normally".

When challenged in cross-examination, however, Mr. Hardinge re-examined the relevant x-rays and conceded that this conclusion within his report was "wrong". He agreed that the relevant x-ray disclosed that the plaintiff's hip was not laterally displaced by 2cm and that the lateral displacement, in fact, measured no more than 4mm which could not be accurately described as "vast".

He further agreed that lateral displacement of the hip by 4mm would not, by itself. indicate negligence or negligent surgery and he expressly withdrew his contention that, because the plaintiff's hip has been displaced laterally by 4mm as a result of the surgery, the defendant had been negligent.

He also acknowledged that he had not, in fact, clinically examined the plaintiff when he wrote his report dated 4th July, 2006.

In reports dated, respectively, 12th February, 2009, 25th March, 2009, 9th June, 2009 and 10th June, 2009, Mr. Hardinge repeatedly expressed the view that the defendant had negligently performed the left total hip replacement for the plaintiff.

He emphasized that his opinion was influenced by his view that "to enable a patient to walk normally after a total hip replacement, Shenton's Line must be restored as this will ensure that leg length discrepancy is minimised and also that the offset of the femur in relation to the pelvis is minimised".

When challenged in cross-examination, Mr. Hardinge insisted that the objective of total hip replacement surgery was the maintenance of 'Shenton's Line" in order to ensure that the patient had the greatest chance of walking normally.

He expressed surprise that evidence would be adduced on behalf of the defendant contending that the concept of 'Shenton's Line' was irrelevant to total hip replacement surgery and was never relied upon or used to assist or facilitate such surgery.

Unusually, the reliability of Mr. Hardinge's recollection was robustly challenged in a number of respects including the following:

1. There was conflict between the clinical findings on examination of the plaintiff by Mr. Hardinge and those of, (a), Mr. Fenelon, an orthopaedic surgeon who examined the plaintiff on 29th August, 2006, and, (b), Mr. J.P. McElwain, another consultant orthopaedic surgeon who examined the plaintiff on 10th February, 2010.

In evidence, Mr Hardinge repeatedly challenged the clinical findings of both Mr. Fenelon and Mr. McElwain.

However, in cross-examination Mr. Hardinge stated that he had clinically examined the plaintiff on one occasion but he could not recall when that was. He said that he had furnished the plaintiff's legal advisors with a report arising out that examination, but that report could not be found, either within his records or those of the plaintiff's legal advisers.

He stated that he had retained the notes which recorded his clinical examination of the plaintiff and that they could be found within his consulting rooms.

This case commenced in October 2010 and was adjourned on its fourth day during Mr. Hardinge's cross-examination in order to accommodate another expert witness.

It was expressly pointed out to Mr Hardinge that, since the case would be delayed for some time, it would, therefore, be possible for him to recover the notes concerning his clinical examination of the plaintiff.

Mr Hardinge's cross-examination resumed by videolink on 16th February, 2012, and he was again questioned in relation his clinical examination of the plaintiff.

He was still unable to identify the date or even the month or year when he had clinically examined the plaintiff, hut he stated that, a few days before resuming his testimony, he had refreshed his memory by examining his notes of the clinical examination of the plaintiff. He then adduced precise detailed evidence of the clinical examination.

When further challenged as to his recollection of the examination he stated that because of the proximity of his consulting rooms, he would have no difficulty producing his notes for the benefit of the Court after an adjournment for lunch.

He failed to do and no explanation was offered for his failure.

2. In evidence, Mr. Hardinge repeatedly contended that the maintenance of 'Shenton's Line' was a fundamental prerequisite to a successful and proper total hip replacement. He insisted that total hip replacement surgery conducted by the defendant had failed to restore 'Shenton's Line' for the plaintiff's hip and that this failure was consistent with negligence by the defendant. He said that the failure had been brought about because the defendant had used a 40mm Charnley prosthesis when he ought to have used a three-quarter 35mm Charnley implant.

In cross-examination on 15th October, 2010, Mr. Noonan S.C. on behalf of the defendant challenged Mr. Hardinge's evidence and stated that evidence would be adduced on behalf of the defendant indicating that the concept of 'Shenton's Line' is not now, was not in 2003 and should not in the future be used by way of assistance or otherwise in the course of total hip replacement surgery.

It was stated that evidence would be adduced on behalf of the defendant that no authoritative medical textbook on orthopaedics recommended the use of 'Shenton's Line' in relation to total hip replacement surgery.

Mr. Hardinge was asked would he like the opportunity to produce medical authority which would challenge the defendant's contention and he indicated that he would like such an opportunity.

When he resumed his testimony on 16th February, 2012, (more than 15 months after he had been provided with an opportunity to do so), he did not produce or seek to rely upon any literature or medical authority in support of his reliance upon the concept of 'Shenton's Line' as having important relevance in relation to total hip replacement surgery. He did, however, constantly repeat that this was his own view.

He also repeated the opinion contained in his successive reports, that the plaintiff's left leg had been lengthened by 1 inch, (approximately 2.5cm), as a result of what he described as a negligent manner in which the surgery had been completed.

However, Dr. Rob Bissett, a consultant radiologist at the Trafford General Hospital in Manchester who also testified in support of the plaintiff's claim, stated in evidence that the leg length discrepancy, as measured on a plain radiograph was 1.5cm which, when reduced to take into account magnification, probably resulted in a true leg length inequality of the order of 1.25cms or 1.30cms..

Dr. James Rankine, a consultant musculoskeletal radiologist who testified in support of the defendant agreed that that the leg length discrepancy, as measured on a plain radiograph was 1.5cm which, when reduced to take into account magnification, probably resulted in a true leg length inequality of the order of 1.25cms.

There were some differences between those two expert witnesses in relation to technique and radiological practice. Both were in agreement that measurement by way of CT scanograms was the most accurate method of measurement for leg length discrepancy after total hip replacement surgery. Both agreed that the distances being measured were very small.

Dr. Rankine stated in evidence that a CT scanogram taken on 4th March, 2010, demonstrated that the leg length discrepancy was 6mm with the left leg being longer than the right leg. He said that this was the result of the left femur being 2mm longer than the right and the left tibia being 4mm longer than the right.

Dr Bissett disagreed with Dr Rankine's method and technique in relation to this measurement and remained convinced that the leg length discrepancy was of the order of 1.3cms after allowance for magnification.

Both of these expert witnesses are highly qualified specialist radiologists of considerable skill and experience.

It is not the function of this Court to resolve or reconcile the differences between the evidence of these two expert witnesses. However, I think the Court can conclude that it is probable that the leg length discrepancy between the plaintiff's left leg and right leg was between 6mm and 13mm after her total hip replacement surgery, with the left leg being longer than the right leg.

Professor John. P. McElwain, who is a consultant Orthopaedic Surgeon and a Professor of Trauma and Orthopaedic Surgery in Trinity College Dublin, testified in support of the defendant.

He estimated that he has carried out 6,000 total hip replacement operations during the course of his career as an Orthopaedic Surgeon, which commenced in 1985. He adduced detailed evidence describing the nature and extent of total hip replacement surgery within this jurisdiction during the past 25 years.

In particular, he described the appropriate method of choice of a prosthesis in such surgery and said that he considered that the 40mm Charnley femoral component was appropriate for the plaintiff. He said that the total hip replacement undertaken upon the plaintiff had been very well planned and executed by the defendant.

He said that it is impossible to eliminate leg length discrepancy after total hip replacement surgery and the objective of surgeons was to minimise the discrepancy.

He described his clinical examination of the plaintiff and stated that she did not have the classical symptoms or problems which one would associate with significant leg length discrepancy. He said she had demonstrated a negative Trendelenburg sign and a negative Trendelenburg gait. He said she had no nerve palsy and did not have an antalgic gait.

He concluded that she had symptoms deriving from earlier soft tissue injuries which had not been resolved by the total hip replacement surgery. He believed that the leg length discrepancy between the plaintiff's legs was 6mm.

He was quite emphatic that a Charnley three-quarter size prosthesis with a 35mm offset would have been quite inappropriate for the plaintiff. He said the offset would be inadequate and he believed that if used, the 35mm three-quarter offset Charnley would probably have caused a dislocation of the hip.

He said that he had never used a 35mm three-quarter offset Charnley prosthesis in any of the 6,000 total hip replacement operations which he had performed.

He categorically disagreed with Mr. Hardinge's view that 'Shenton's Line' was a concept relevant to total hip replacement surgery.

He said it was an imaginary line which was impossible to measure because the head and neck were taken away during surgery.

He said he knew of no medical authority which recommended or prescribed the use of 'Shenton's Line' as a concept relevant to total hip replacement surgery.

Mr. Wayne Younge, who is an official with a company called PEI Surgical, stated in evidence that Charnley prostheses have, at all material times, been manufactured by DePuy Johnson & Johnson. PEI Surgical is the sole and exclusive distributor for the Charnley range of prostheses within this jurisdiction. The company supplies all of the orthopaedic hospitals within this jurisdiction.

Mr Younge said that during the ten years ending in 2011, his company supplied approximately 20,000 Charnley prostheses to hospitals within this jurisdiction. Between 2000 and 2008, the company supplied 14,000 prostheses. Eight of those prostheses were 35mm three-quarter offset implants. One of those eight prostheses was returned to his company. Between 2008 and 2011, no 35mm three-quarter offset Charnley prostheses were supplied to hospitals within this jurisdiction.

He said that the most commonly used prostheses were the 40mm or 45mm prostheses. They comprised approximately 90% of the prostheses supplied in Ireland.

In evidence, Mr. Hardinge said that throughout his career he had performed approximately 5,000 surgical hip replacements. He estimated that he had used the Charnley three-quarter offset 35mm prostheses in approximately 750 of those operations.

The defendant, in evidence, stated that he is a practising consultant orthopaedic surgeon who has performed total hip replacement operations for more than twenty years. He has performed more than 3,000 total hip replacements during that time.

He said in evidence that the Charnley 40mm prosthesis with a standard stem was the appropriate size for the plaintiff. He said that a 35mm Charnley prosthesis with a three-quarter offset would have been quite unsuitable and would probably have resulted in dislocation of the plaintiff's hip.

He said it was too small for the plaintiff and could not be adjusted to accommodate her requirements. He described using a template which, he said, was the appropriate means of choosing the correct sized prosthesis.

He also described in detail a trial prosthesis which he used and the reaming of bone in order to accommodate a successful replacement before choosing the final prosthesis and completing the surgery.

The procedure was consistent with the procedures recommended by Mr. Hardinge and by Mr. McElwain.

He said that he could not ever recall using a size 35mm Charnley prosthesis for a total hip replacement. He said he believed that it was sometimes used for persons with reduced stature or for juveniles with rheumatoid arthritis.

He repeated that he believed it would have been inappropriate to use that prosthesis for the plaintiff.

DECISION
In *Dunne v. National Maternity Hospital* [1989] I.R. 91, the Supreme Court identified the principles applicable where allegations of negligence are made against professional persons, and in particular, medical practitioners.

The Court, (Finlay C.J.), observed, *inter alia*, (at p 109), that:

> *"1. The true test for establishing negligence in diagnosis or treatment on the part of a medical practitioner is whether he has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.*
>
> *2. If the allegation of negligence against a medical practitioner is based on proof that he deviated from a general and*

approved practice, that will not establish negligence unless it is also proved that the course he did take was one which no medical practitioner of like specialisation and skill would have followed had he been taking the ordinary care required from a person of his qualifications.

3. If a medical practitioner charged with negligence defends his conduct by establishing that he followed a practice which was general, and which was approved of by his colleagues of similar specialisation and skill, he cannot escape liability if in reply the plaintiff establishes that such practice has inherent defects which ought to be obvious to any person giving the matter due consideration.

4. An honest difference of opinion between doctors as to which is the better of two ways of treating a patient does not provide any ground for leaving a question to the jury as to whether a person who has followed one course rather than the other has been negligent.

5. It is not for a jury (or for a judge) to decide which of two alternative courses of treatment is in their (or his) opinion preferable, but their (or his) function is merely to decide whether the course of treatment followed, on the evidence, complied with the careful conduct of a medical practitioner of like specialisation and skill to that professed by the defendant . . "

Mr Hardinge, in evidence, criticised the defendant on the following three grounds, (i) he contended the defendant had breached "Shenton's Line" during the surgery and that the breach comprised negligence, (ii), he contended that the defendant had caused or permitted a leg length discrepancy of 2.5cms to result from the surgery by failing to measure or template the plaintiff before surgery and (iii), in particular, he contended that the plaintiff performed the hip replacement surgery upon the plaintiff negligently by inserting a 40mm standard stem Charnley prosthesis within the hip joint during the surgery when he should have inserted a 35mm three quarter offset Charnley prosthesis.

(i), It has not been established on the evidence that the defendant breached "Shenton's Line" during the surgery. More importantly it has not been established on the evidence that "Shenton's Line" has any real or important relevance to the proper performance of total hip replacement surgery.

Mr Me Elwain and the defendant both denied that it had relevance. They challenged Mr Hardinge to produce medical authority in support of his claim, saying that there was none. Mr Hardinge had a period of some 16 months within which to provide authority. He failed to do so and offered no explanation for his failure.

In the circumstances I am not satisfied that the plaintiff has established, on the evidence, that "Shenton's Line" has any important relevance to total hip replacement surgery or that it has been proved that the defendant breached that imaginary line during surgery.

(ii) It has not been established in evidence that the defendant failed to measure the plaintiff's leg lengths appropriately before surgery. I accept his evidence of the measurement techniques and tern plating which he applied. They were accepted as entirely appropriate by Mr Me Elwain and not seriously challenged on behalf of the defendant.

Insofar as there are differences between the evidence of Mr Hardinge and that of Mr Me Elwain in respect of leg measurement techniques I prefer the evidence of Mr Me Elwain.

I also accept the unchallenged evidence of Mr Me Elwain that leg length discrepancy in total hip replacement surgery can only be minimised. It cannot be avoided.

I have found that it is probable that the leg length discrepancy between the plaintiff's left leg and right leg was between 6mm and 13mm after her total hip replacement surgery, with the left leg being longer than the right leg.

No evidence has been adduced in these proceedings which would enable the court to conclude that proof of such a leg length discrepancy must be ascribed to surgical negligence either by alleged inappropriate leg measurement or otherwise.

(iii) It has not been proved on the evidence and as a matter of probability that the defendant deviated from a general and approved practice when he used a Charnley 40mm prosthesis during the plaintiff's total hip replacement surgery.

Indeed, on the evidence, it seems more probable that the defendant would have deviated from general and approved practice if he had failed to do so and instead had used a 35mm three-quarter offset Charnley prosthesis.

In summary it has not been established on the evidence that the defendant in the performance of total hip replacement surgery has been guilty of such surgical or other medical failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.

Neither has it been proved that he has deviated from a general and approved practice in the performance of that surgery upon the plaintiff.

No other allegation of negligence has been alleged against the defendant and none has been proved.

It follows that the plaintiff's claim must be dismissed and I so order.