

THE HIGH COURT**[2000 No. 8232P]****BETWEEN****PADRAIC KEANE
(AS PERSONAL REPRESENTATIVE OF THE LATE MRS. AGNES KEANE)****PLAINTIFF****AND
THE WESTERN HEALTH BOARD AND MRS. ANN MEEHAN****DEFENDANTS****Judgment of the Hon. Mr. Justice Quirke delivered the 2nd day of October 2006.**

The plaintiff's substantive claim in these proceedings is brought pursuant to the provisions of Part IV of the Civil Liability Act, 1961 of his own behalf and on behalf of all of the statutory dependents of the late Agnes Keane, deceased, who was the plaintiff's wife and who died on the 9th July 2002.

The late Mrs. Keane was admitted to the Regional Hospital in Galway on 29th June, 1983, at the request of Dr. F.B. Meehan who was a consultant obstetrician at the Hospital. The plaintiff claims that his wife's death was caused by reason of his negligence and breach of duty on the part of the Regional Hospital and on the part of Dr. Meehan.

The first defendant (hereafter "the Board") is sued as the Body responsible for the Regional Hospital. The second defendant is the widow and the personal representative of the late Dr. Meehan who died on 25th February, 1991.

Issues

The following issues are before this court for determination:

1. A preliminary issue pursuant to an Order of the High Court (Johnson J.) dated 5th December, 2005, requiring this court to determine questions in the following terms:
 - (i) Whether these proceedings are maintainable against the second named defendant as the personal representative of the late Dr. Fergus Meehan having regard to s. 9(2) of the Civil Liability Act, 1961 as pleaded in paragraph 1 of the Defence of the second named defendant delivered on the 11th day of October, 2005 and
 - (ii) Whether the court, pursuant to its inherent jurisdiction, should dismiss these proceedings against the second-named defendant, having regard to the matters identified in paragraph 2 of the Defence of the second named defendant delivered on the 11th day of October, 2005 and
2. An application on foot of a notice of motion dated 6th February, 2006 on behalf of the Board for an order dismissing the plaintiff's claim against the Board on the grounds of alleged inordinate and inexcusable delay on the part of the plaintiff in commencing and prosecuting his claim against the Board and
3. Consequent upon the delivery by the Board of a notice claiming contribution and indemnity from the second named defendant in respect of the plaintiff's claim against the Board this court has, on the application of the parties, agreed to determine the issue whether the Board's claim for indemnity and contribution against the second named defendant is maintainable having regard to the provisions of s. 9(2)(b) of the Civil Liability Act, 1961.

Relevant Facts

1. The late Mrs. Agnes Keane, who was then pregnant and expecting twins, was admitted to the Galway Regional Hospital on 29th June, 1983, on the instructions of the hospital's Consultant Obstetrician and Gynaecologist Dr. Fergus B. Meehan. She was believed to be suffering from pre-eclampsia. Pre-eclampsia is a serious condition associated with pregnancy which, if untreated, can lead to the development of convulsions and fits.

She was detained in hospital on admission. On 9th July, she developed fits and a convulsion and lapsed into a coma. Her twins were successfully delivered by Caesarean section. They were healthy and well on birth and are now in their early 20's.

Tragically Mrs. Keane remained in a coma for 19 years. She died on 9th July, 2002 without having regained consciousness.

2. On 25th February, 1991, whilst the late Mrs. Agnes Keane was still comatose and in a vegetative condition Dr. Fergus Meehan died.

A Grant of Probate to the estate of the late Dr. Meehan was extracted by his widow Ann Meehan on the 9th day of April, 1992.

3. During the 19 year period between 1983 and the date of Mrs Keane's death in 2002 the plaintiff retained the hope and belief that his wife would recover from her condition and regain consciousness. He was in constant attendance upon her during that time. Concurrently he discharged his parental responsibility towards the twin children of the marriage conscientiously and reared them in a careful and devoted manner. He is a storeman by occupation.

4. In late 1995 or early 1996 the plaintiff's solicitors corresponded with the Board and with the second named defendant seeking to investigate the circumstances surrounding the late Mrs. Keane's admission to and treatment in the Regional Hospital in 1983 and the circumstances surrounding her subsequent catastrophic deterioration and eventual death.

A detailed and careful investigation by the plaintiff's solicitors into those matters continued for a number of years. The evidence adduced in these proceedings has established that the investigation was conducted as expeditiously as was reasonably possible in the circumstances.

5. On 14th July, 2000, a Plenary Summons was issued on behalf of the late Mrs. Keane seeking damages for personal injuries sustained by the late Mrs. Keane arising out of alleged negligence on the part of the Board and of Dr. Meehan.

The proceedings were served upon the Board and upon the second named defendant as personal representative of the late Dr. Keane.

On the 10th December, 2001, a Statement of Claim was delivered on behalf of the late Mrs. Keane.

On the 8th July, 2002, the late Mrs. Keane died.

No Plenary Summons was issued on behalf of the plaintiff by way of initiation of his claim pursuant to provisions of part IV of the Act of 1961.

However, by Order of Master of the High Court dated the 7th July, 2005, made on the application of the plaintiff, it was ordered that "*...pursuant to Order 17 rule 4 of the Rules of the Superior Courts that Patrick Keane as the Personal Representative of the late Agnes Keane be made a party to the proceedings herein.*"

In subsequent correspondence, the solicitors on behalf of the Board and the solicitors on behalf of the second named defendant agreed and expressly or implicitly acknowledged that the personal injuries proceedings which had been commenced on behalf of the late Mrs. Keane have been validly converted into a claim by the plaintiff pursuant to the provisions of part IV of the Civil Liability Act, 1961 on behalf of the plaintiff and on behalf of the statutory dependents of the late Agnes Keane for damages for her wrongful death.

Although this issue was raised and not abandoned by Mr McGrath S.C on behalf of the second named defendant it was not pressed. For the avoidance of doubt I should say that I am satisfied, on the evidence, that the defendants are estopped by their conduct from contending that the plaintiff's claim pursuant to the provisions of part IV of the Act of 1961 was not commenced on the 7th July, 2005. The conversion by agreement is deemed to have been completed on the 7th July, 2005 by the Order of the Master of the High Court of that date.

On the 5th October 2005, an amended Statement of Claim was delivered on behalf of the plaintiff.

Motions to Dismiss

At the conclusion of the evidence adduced in these proceedings 22nd June, 2006, I declined to dismiss the plaintiff's claim against the Board on the ground of inordinate and inexcusable delay by the plaintiff in prosecuting his claim and consequent prejudice to the Board in its capacity to defend the claim. I gave my reasons for that ruling at that time.

I decline also to dismiss the plaintiff's claim against the second named defendant on the grounds of inordinate and inexcusable delay on the part of the plaintiff commencing in prosecuting his claim against the second named defendant.

My reasons are the same of those given in relation to the application made on behalf of the Board. I find that whilst the delay in prosecuting the plaintiff's claim was *prima facie* inordinate it was and remains clearly explicable having regard to the extraordinary circumstances in which the plaintiff found himself immediately after this tragic occurrence. It was perfectly understandable that he should spend the greater part of 19 years during which his wife remained comatose attending his wife's bedside and caring for their twin children.

As I have indicated I do not believe that the absence through decease of Dr. Meehan is alone sufficient to sustain the contention that the claim should be dismissed. Although it will make it more difficult to deal with the claim his death, by itself is not a bar to the claim. There is significant documentation still available in relation to this occurrence including medical, nursing and possibly other notes and records. No evidence has been adduced in support of the contention that there will be significant prejudice resulting from the absence of other relevant witnesses who may have participated in the care and treatment of the late Mrs. Keane at the material time.

In the circumstances, as I have indicated, the court declines to dismiss the plaintiff's claim against the second named defendant on the grounds of delay.

Sections 8 and 9 of the Civil Liability Act 1961

Section 8 of the Civil Liability Act, 1961, provides as follows:

"8.-(1) *On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate.*

(2) *Where damage has been suffered by reason of any act in respect of which a cause of action would have subsisted against any person if he had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of subsection (1) of this section, to have been subsisting against him before his death such cause of action in respect of that act as would have subsisted if he had died after the damage was suffered."*

Section 9 of the Act of the Civil Liability Act, 1961, provides as follows:

"9.-(1) *In this section "the relevant period" means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.*

(2) *No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either-*

(a) *proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or*

(b) *proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."*

Decision

The constitutional validity of s. 9(2) of the Civil Liability Act, 1961, has been expressly upheld by the Supreme Court in *Moynihan v. Greensmyth* [1977] I.R. 55.

In that case the plaintiff claimed damages from the estate of the defendant for personal injuries sustained on 6th August, 1966 when she was aged 16 years. She was a passenger in a motor vehicle then being driven by the defendant which collided with a bridge.

She claimed that her injuries resulted from the negligent driving of the defendant who was killed in the accident. Proceedings were instituted on her behalf on 5th August, 1969 (within the period of three years permitted by the provisions of s. 2(b) of s. 11 of the Statute of Limitations, 1957 which enables a plaintiff to commence proceedings for damages for personal injuries at any time before the expiration of three years after the plaintiff reaches the age of 21 years (see *O'Brien v. Keogh* [1972] I.R. 144).

However the proceedings were commenced outside the period of two years permitted, (by the provisions of s. 9(2) of the Act of 1961), for the commencement of the proceedings against the estate of a deceased person.

Upholding the defendant's plea that the plaintiffs claim was barred by s. 9 of the Act of 1961 the Supreme Court, (O'Higgins C.J.), having outlined the historical background in relation to actions alleging torts against the estate of deceased persons and the statutory provisions applicable thereto referred to the earlier decisions of the courts in *Foley v. Irish Land Commission* [1952] I.R. 118 and *Attorney General v. Southern Industrial Trust Limited* [1960] 94 I.L.T.R. 161 and declared that:

"In these cases it was held, in effect, that the property rights guaranteed by Article 40 s. 3 sub-s. 2 of the Constitution are not rights over particular items of property but are the property rights guaranteed by Article 43 namely, "the natural right to the private ownership of external goods and the general right to transfer bequeath and inherit property".

Without conceding that the plaintiff's right to sue was or is a property right which is guaranteed by Article 40 s. 3 sub-s. 2 of the Constitution the court indicated that circumstances could exist in which:

"...the State may have to balance its protection of the right as against other obligations arising from regard for the common good."

O'Higgins. C.J. continued:

"As the law stood, prior to the passing of s. 9 of the Civil Liability Act 1961 an

infant could wait up to three years after attaining majority before suing the personal representative of a deceased motorist in respect of his negligent driving. This could mean that the administration of an estate might be greatly delayed or, alternatively, that after many years those entitled on a death might be subjected to a claim for damages of which there had been no prior notice. Obviously in such circumstances, severe hardship might be caused and injustice done to innocent people.....

When it was decided to provide generally for the survival of causes of action, a general limitation period of two years was provided in the impugned provisions of s. 9 sub-s. 2(b) of the Civil Liability Act 1961. It was conceded in argument that this could not be regarded as an unjust attack on those not suffering from incapacity and in such circumstances, the period was reasonable and fair.

In relation to those (that is the plaintiff) who at the time of the accrual of the cause of action was under 21 years of age, is a two year period from the death of the wrongdoer so unreasonably short as to constitute an unjust attack on their right?

Bearing in mind the State's duty to others – in particular those who represent the estate of the deceased and beneficiaries – some reasonable limitations on actions against the estate was obviously required. If the period of infancy were to form part of the period of limitation, as was formally the case, then the danger of stale claims being brought would be very real and could constitute a serious threat to the rights of beneficiaries of the estate of a deceased. The alternative was to apply a period of limitation which would have general application. It had to be either one or the other and it does not appear that any compromise was possible."

Declaring that the subsection "cannot be regarded as constituting an unjust attack nor can its enactment be a failure to vindicate the alleged property rights of inference" the court upheld the validity of the section.

In this case it is claimed on behalf of the plaintiff that her death resulted from the negligent action, or inaction of the Board and of Dr. Meehan in June of 1983.

On 25th February 1991, Dr. Fergus Meehan died. On the date of his death no proceedings had been commenced on behalf of the late Mrs Keane against the estate of the late Dr. Meehan, within the period of two years after this death.

It has been, (correctly and properly), acknowledged by the parties that, pursuant to the provisions of sub s. (2) of s 8 of the Act of 1961, the plaintiff's "cause of action" against the late Dr Meehan, (pursuant to the provisions of part IV of the Act of 1961), is deemed to have been subsisting against Dr. Meehan before his death.

However, no proceedings had been "commenced within the relevant period" by the plaintiff (or the late Mrs Keane), against Dr Meehan and were "...pending at the date of his death" for the purpose of s9 of the Act of 1961.

Since the constitutional validity of the limitation period imposed by s. 9 of the Act of 1961, has been established and confirmed, it follows that the claim for personal injuries commenced on behalf of the late Mrs. Keane by the issue of a Plenary Summons on 14th July, 2000, was and is not maintainable and was and remains barred by the provisions of s. 9 of the Act of 1961.

It follows further that when those proceedings were converted by agreement into a claim on behalf of the plaintiff pursuant to the provisions of part IV of the Act of 1961 they were not maintainable and were and remain barred by the provisions of s. 9 of the Act of 1961.

The plaintiff's claim against the second named defendant must, therefore, be dismissed.

Indemnity and Contribution

By notice dated the 9th February, 2006, the first named defendant claimed contribution and indemnity from the second named defendant in respect of any damages awarded to the plaintiff in these proceedings on the ground that any personal injuries, loss or

damage suffered by the plaintiff were solely caused or alternatively contributed to by the negligence, breach of duty and breach of statutory duty of the second defendant.

Mr. McGrath SC on behalf of the second named defendant contends that this claim is also barred by the provisions of s. 9 of the Act of 1961 since the claim comprises "*proceedings*" which have not been commenced "*within the period of two years after*" the death of Dr. Meehan.

Mr. Keane SC on behalf of the first named defendant in a submission provided to the court contends that his clients claim against the estate of Dr. Meehan "*...was made within the relevant period or within two years of when it could have been made... the claim for contribution arises, not from the death, but from the claim being made.*"

It would appear *prima facie* that the provisions of s. 31 of the Act of 1961 may be relevant to this issue. S 31 provides as follows:

"An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured persons damages are paid, whichever is the greater."

Since this section was not referred to in argument in the course of these proceedings I think it is appropriate that I should provide Counsel with the opportunity to assist the court before making a final determination on this issue.