

THE HIGH COURT

[2012 No. 3449P]

BETWEEN:

LUKE O'REILLY

PLAINTIFF

AND

NUALA COLLIER

FIRST NAMED DEFENDANT

AND

FINGAL COUNTY COUNCIL

SECOND NAMED DEFENDANT

JUDGMENT of Kearns P. delivered on 20th day of November, 2015

This application is one brought by way of a preliminary issue to determine whether the proceedings against the second named defendant are barred by virtue of the provisions of the Statute of Limitations 1957 to 2001 (as amended).

RELEVANT LEGISLATION

Prior to the enactment of the Statute of Limitations (Amendment) Act 1991 the Statute of Limitations 1957 provided that a plaintiff had three years *simpliciter* within which to bring a claim for damages arising from negligence, nuisance or breach of duty of a defendant.

Section 7 of the Civil Liability and Courts Act 2004 reduced the limitation period for actions claiming damages in respect of personal injuries caused by negligence, nuisance or breach of duty to a period of two years from the date of accrual of the cause of action or date of knowledge of the cause of action (if later).

The 1991 Act introduced the concept of a plaintiff's 'date of knowledge' at section 2 as follows –

"2.—(1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:

(a) that the person alleged to have been injured had been injured,

(b) that the injury in question was significant,

(c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,

(d) the identity of the defendant, and

(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him, or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.

(3) Notwithstanding subsection (2) of this section—

(a) a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and

(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury."

BACKGROUND

The substantive proceedings arise out of a road traffic accident which occurred on 16th February, 2010. On that date the plaintiff

was driving his motor vehicle on the Ballyboughal to Swords road in the Fingal area of North County Dublin when he observed a car coming off the public road and veering into a housing estate.

The plaintiff was concerned for the driver of the other car and so pulled into the estate and parked his own car several metres away. He then went to speak with the driver of the other car, Ms. Lisa Prout, and to attempt to help her restart the car. As the plaintiff was standing and talking with Ms. Prout he observed a car driven by the first named defendant coming towards him along a grass verge. The plaintiff began running towards his own car but was struck by the first named defendant's vehicle and unfortunately suffered very serious injuries which required a below the knee amputation of his left leg by surgeons at Beaumont Hospital.

Emergency services attended the scene and an investigation of the accident was carried out by An Garda Síochána. This included interviewing the relevant motorists and witnesses at the scene and formal statements were provided to Gardaí over the subsequent weeks.

On 24th March 2010 the first named defendant's insurer, Aviva, wrote to the plaintiff's solicitor stating that liability was not in issue in the case. However, on 26th May, 2010 Aviva wrote again stating that *"the second paragraph of our letter was included in error. Therefore please note that liability is not conceded. Our investigations continue and we will revert to you once they are completed."*

On 20th October, 2010 the Garda Abstract Report containing the various witness statements was released to the plaintiff's then solicitor. The content of the report is relied upon by the second named defendant in support of the contention that, for the purposes of the Statute, the time within which to commence proceedings against the second defendant began to run no later than the 20th October, 2010.

The first statement contained in the report is that of the first named defendant which she provided to Gardaí on 1st April, 2010. She outlines her recollection of the accident and states that *"as she approached the bend in the road suddenly the car swung out to the right, then the car suddenly veered to the left. It was as if I was driving on glass. I couldn't notice anything on the road which would have caused me to do this and it baffles me as to why this occurred."* Later, she states that *"...the car went into a skid prior to the collision, it meant that I could not prevent the car from taking the course it did."*

Ms. Lisa Prout provided a statement to Gardaí on 2nd April, 2010. In it she describes how she too lost control of her car near the entrance to the estate. She states that *"I didn't notice anything on the surface of the road which may have caused this accident."* Another witness, Mr. Glen Scheiner, who was driving ahead of the plaintiff when he noticed Ms. Prout's car leave the road told Gardaí that *"The road seemed dry and I remember it was weird because there didn't seem to be anything on the road."*

However, the statements of the Gardaí who attended the scene differ from the aforementioned motorists in respect of the road conditions at the time of the accident. Garda Conor Morris and Garda Brendan O'Brien arrived at the scene of the accident O'Brien shortly after it occurred and the plaintiff had been taken to hospital by ambulance. Garda Morris states that *"The collisions occurred in the daytime and the visibility on the road would have been good. The surface of the road was wet and had small bits of dirt and muck on it. Fingal County Council were subsequently notified of the incident and were requested to attend the scene to grit the road as it appeared that the dirt and muck was a contributory factor to the collision which had taken place. They arrived a short time later and coated the surface of the road with grit."*

Sergeant Tom Quinn also attended the scene of the accident and states that - *"I created a detailed sketch of the scene including all relevant measurements and positions of the vehicles involved. I noted that the road appeared to be slippery due to a skim of mud on the road. The road was treated by officials from Fingal County Council."*

Authorisation to issue proceedings against the first named defendant was obtained on 10th August, 2011 and a personal injuries summons issued against the first defendant only on 3rd April, 2012. A full defence was entered by the first defendant on 10th April, 2013.

On 12th March, 2014 Mr. Conor Devally SC, who had been retained on behalf of the plaintiff, wrote to the plaintiff's solicitors and expressed his view that they should write to the defendant indicating that they wished to join Fingal County Council as a co-defendant. On 2nd June 2014 a letter was sent to the first named defendant stating that *"an engineering opinion has now been procured on behalf of our client, which indicates that Fingal County Council may have contributed to the road traffic accident the subject matter of the within proceedings..."* It is further stated that *"it is our intention to bring an application to join Fingal County Council as a co-defendant to the within proceedings."* Authorisation to join Fingal County Council issued from PIAB on 7th July, 2014 and a notice of motion to this effect issued on 16th July, 2014. An order joining Fingal County Council was made by the Master of the High Court on 31st July, 2014.

A defence was delivered on behalf of the second named defendant on 10th December 2014 before a notice of motion seeking to have the Statute of Limitations matter determined as a preliminary issue was issued by the second defendant on 8th January 2015.

SUBMISSIONS OF THE SECOND DEFENDANT

It is accepted by the second named defendant that, in all the circumstances of this case, the plaintiff's date of knowledge was not the date of the accident, i.e. 16th February 2010. However, it is submitted that the date of knowledge can be not later than 20th October, 2010 when the Garda Abstract Report was received by the plaintiff's solicitor. The second named defendant contends that the content of this report, and in particular the statements of the relevant gardaí, can only be interpreted as a suggestion that the accident might have or could have been caused by the condition of the road. It is submitted that upon receipt of this document the plaintiff and his solicitors were put on reasonable inquiry into the second named defendant's possible involvement.

In those circumstances, it is submitted that, taking into account the two year period provided for under statute and the six month hold on time pending the issuing of authorisation by PIAB, the plaintiff's claim was statute barred as against the second named defendant as of 20th April, 2013. However, the second named defendant was not added to the proceedings until 31st July, 2014.

It is submitted that the Supreme Court decision in *Byrne v Hudson* [2008] 3 IR 106 imposes an obligation on this Court to determine whether or not there were facts ascertainable from the Garda Abstract report as of 20th October, 2010 that ought to have put the plaintiff and his solicitors on inquiry. It is submitted that the Court in this context is not exercising any discretionary or interests of justice exercise or engaging in a balance of prejudice test as occurs in the UK, but rather, the Court must be satisfied before allowing the matter to proceed against the second defendant that the date of knowledge brings the plaintiff within the statutory time limit. In *Byrne*, Macken J. dealt with the issue of date of knowledge specifically in relation to whether the plaintiff ought to have ascertained the identity of a particular defendant, namely the third defendant in that instance. Macken J. stated as follows -

"Given the amendment to the Statute of Limitations 1957 by the provisions of s. 2 of the Act of 1991, as set out above, it is appropriate to commence a consideration of the law by seeking to ascertain whether the plaintiff can come within the provisions of s. 2(2)(a) of the Act, and whether the High Court Judge correctly found that he did so. The first "port of call" so to speak in seeking to determine a person's knowledge for the purposes of s. 2(2)(a) is to discover from the evidence adduced in the High Court whether there were facts from which the plaintiff could have "observed" or "ascertained" the identity of the appropriate defendants, in this case the third defendant."

Macken J. went on to conclude at paragraph 23 –

"It seems to me rather that the appropriate position first to be considered, at least in the present case, is whether or not the fact that the third defendant was an occupier of the premises in question was something ascertainable or observable by the plaintiff. If it was, then the plaintiff is obliged in the usual way to make this information available to the solicitor he employs for the purposes of enabling that solicitor to reach a view or a conclusion as to the correct defendant to be included in any proceedings commenced on behalf of the plaintiff. I am satisfied that on the uncontroverted evidence adduced before the High Court, on the hearing of the application, the occupancy by the third defendant was fully known to the plaintiff, and was therefore both observable and ascertainable by him, and that without any difficulty whatsoever. Further I am of the view that since the provisions of s. 2 are, in reality, an exception to the normal provisions concerning the obligation to commence proceedings for relief in respect of a tort causing personal injuries within a three year period, it is correct to apply the provisions of the section literally and not benignly or by an unduly lax interpretation. There is no suggestion in the Act of 1991 that a plaintiff is in some way to be forgiven for failing to furnish to his solicitor all of the facts which are within his direct knowledge, as here, so as to enable his solicitor commence proceedings against the correct defendant. It seems clear that, had the plaintiff done so in the present case, the information to enable the solicitor to do just that would have been freely and readily available within days of the incident occurring. It may well be that in certain cases, the ambit or nature of which it is not necessary to speculate upon, it would be appropriate to rely entirely upon a solicitor in respect of matters to be "ascertainable", whatever about "observable", when considering s. 2(2)(a) of the Act. But that is not a position which could apply in the present case."

Counsel for the second defendant submits that the present case is even stronger on the facts as the plaintiff had solicitors acting for her at all relevant times, including on the 20th October, 2010 when those solicitors were in receipt of the Garda Report and statements. Further, even if the Court were to allow the plaintiff an additional period of time following receipt of the Garda report within which to seek an engineering report the plaintiff is still out of time as the commissioning of that report took a further 7 months. The second defendant contends that, as per the decision in Byrne, the relevant statutory provisions are not to be interpreted in a benign or unduly lax way, and there is no persuasive argument before the Court that the plaintiff and his solicitor were not put on reasonable inquiry as and from 20th October, 2010.

SUBMISSIONS OF THE PLAINTIFF

The plaintiff submits that the assertion that the content of the Garda Abstract Report ought to have put the plaintiff or his solicitors on reasonable inquiry as to whether or not the second defendant had any involvement in the accident is misplaced. It is submitted that the statement of Ms. Collier and the Garda sketch of the incident suggests that the first defendant was liable having approached a bend in the road near the locus of the accident at excessive speed and going off the road.

Furthermore, the relevant Gardaí, who it is submitted are more knowledgeable than the other motorists and witnesses in relation to road surfaces, highlight only muck and debris, but do not identify the curvature or camber of the road as a possible contributory factor. The plaintiff was only alerted to the camber issue upon receipt of the engineering report and it came as a surprise. In addition, it is submitted that the mud and debris on the road at the time of the incident was cleared away that evening by the second named respondent and there was nothing for the plaintiff or his solicitor to investigate at that point in time.

The plaintiff submits that another relevant factor in terms of assessing the date of knowledge is that the first named defendant initially conceded liability. While it is accepted that this was done in error and later retracted, the plaintiff submits that for a considerable period of time after the accident there was no indication that the first defendant was not going to concede liability and allow the matter to proceed as an assessment of damages only.

It is submitted that it has been held in several cases that the Statute does not begin to run until a plaintiff to a case has knowledge of attribution i.e. that the injury was caused by the act or omission involved and knowledge that there was a connection between the injury and the matters alleged to have caused the injury. The plaintiff's knowledge of a factual situation is not enough.

In *Boylan v Motor Distributors Ltd* (1994) 1 ILRM 115 the plaintiff, who worked with her husband at a family-run plating firm, had been injured while assisting the driver of a delivery van to unload goods. Her right ring finger was caught in the van door and had to be amputated from its top joint. Proceedings were initially commenced against the driver's employer only. However, following an engineer's report which highlighted a design defect in the hinge mechanism of the van door, the plaintiff sought to join Motor Distributors and Daimler Benz. A preliminary issue arose as to whether the plaintiff was statute-barred in pursuing this claim. Lynch J. held that it was reasonable for the plaintiff's solicitor not to request an inspection of the van and a report by an engineer until requested to do so by senior counsel. It was held that the plaintiff's date of knowledge that her injuries were attributable to the negligence of the defendant only ran from the date her solicitor received the engineer's report.

In *Gough v Neary* [2003] 3 IR 92, the Supreme Court considered s.2 of the 1991 Act in the context of a medical negligence action. Geoghegan J. quoted with approval the observations by Hoffman LJ in the English case of *Hallam-Eames v Merrett Syndicates Ltd* [1996] 7 Med L.R. 122 that –

"It is this idea of causal relevance which various judges of this court have tried to express by saying the plaintiff must know 'the essence of the act or omission to which the injury is attributable' (Purchas L.J. in Nash v. Eli Lilly & Co. [1993] 1 W.L.R. 782, 799) or 'the essential thrust of the case' (Sir Thomas Bingham M.R. in Dobbie v. Medway H. A. [1994] 1 W.L.R. 1234 or that one should '... look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which that complaint is based' (Hoffmann L.J. in Broadley v. Guy Clapham & Co. [1994] 4 All E.R. 439)."

In *Fortune v McLoughlin* [2004] 1 IR 526 it was held that the word "attributable" in s. 2(1)(c) of the Act of 1991 was not satisfied by the plaintiff's knowledge of the factual situation. McCracken J. stated at paragraph 16 –

"I cannot accept the defendant's contention that the word "attributable" in s. 2(1)(c) of the Act of 1991 is satisfied by

the plaintiff's knowledge of the factual situation. The knowledge referred to in that subparagraph is knowledge of attribution, in other words knowledge that there was a connection between the injury and the matters now alleged to have caused the injury. This is a connection which the plaintiff did not make in this case. If a plaintiff is to have knowledge within the meaning of s. 2(1)(c) of the Act of 1991, she must have knowledge at least of a connection between the injury and the matters now complained of to put her on some inquiry as to whether the injury had been caused by the matters complained of. At what stage she is put on inquiry must be a matter to be determined in each case..."

In the present case, it is submitted that the Court must consider the plaintiff's date of knowledge of the five facts set out under s.2(1)(a)-(e) of the 1991 Act. It is clear that the plaintiff suffered a very serious injury and so (a) and (b) do not fall to be considered in any detail. In regard to sub-section (c), it is submitted that the plaintiff did not have any knowledge that his injuries may have been contributed to by the negligence and breach of statutory duty of the second named defendant until the engineer's report was received on 29th August, 2013 and this is the earliest date of knowledge. It is submitted that (d) does not need to be considered in detail in the present case as the plaintiff was at all times aware of the identity of the entity responsible for the public road, while (e) is of no relevance.

In light of the foregoing, it is submitted that the plaintiff's date of knowledge was 29th August, 2013, when the engineering report was received, and the proceedings against the second named defendant are therefore not barred by the Statute.

DISCUSSION

Section 7 of the Civil Liability and Courts Act 2004 prescribes that the limitation period for actions claiming damages in respect of personal injuries caused by negligence, nuisance or breach of duty is two years from the date of accrual of the cause of action or date of knowledge of the cause of action. It is accepted by the parties to the present case that the date of knowledge in relation to the potential involvement of the second named defendant came after the date of the road traffic accident which caused the injuries. The primary question for this Court is to determine the correct date of knowledge which, in law, a plaintiff is deemed to possess.

Section 2 of the 1991 Act states that the 'date of knowledge' will be the date on which the plaintiff first had knowledge of the facts as set out at sub-section (1)(a)-(e). Of most significance to the present case is sub-section (c), namely the date the plaintiff knew *"that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty."* The second defendant contends that this was on 20th October, 2010, when the Garda Abstract Report was made available to the plaintiff's solicitor and his action against the second named defendant is therefore statute-barred.

The plaintiff, on the other hand, contends that there is nothing in the Garda Report which ought to have placed him or his solicitor on reasonable inquiry of the second defendant's potential involvement. It is submitted that this only came to light upon receipt of an engineering report which highlighted the curvature and camber of the road as potential contributory factors.

I have carefully considered the submissions of both parties, and in particular the content of the Garda Abstract Report, and am satisfied that the plaintiff's date of knowledge that the injuries he suffered were attributable in whole or in part to the acts or omissions of the second named defendant was no later than when the Garda Report was received on 20th October, 2013. I am satisfied that it is reasonable to expect that the plaintiff and/or his solicitor were aware of the potential involvement of the second defendant as and from this date.

The statements of two gardaí contained in the report raise the issue of the condition of the road as a possible contributory factor to the unfortunate accident which occurred. While the statements of the relevant motorists as to the condition of the road conflict with the garda statements, in my view this controversy as to the state of the road ought in itself to have put the plaintiff or his solicitor on inquiry as to the potential involvement of the second named defendant. Furthermore, this was a highly unusual accident, whereby two cars left the road in unexplained circumstances within a very short space of time, with the drivers contending that they felt they had no control over the vehicles. The Court accepts the submission by counsel for the second defendant that, following an accident of this sort, further inquiries ought to have been carried out by the plaintiff which may have identified any one of a number of factors, such as inadequate lighting, road curvature, camber, or spillage, as a contributory factor. Alternatively, any further inquiries may well have failed to identify any aspect of the road condition or any act or omission of the second named defendant as a contributory factor. Whatever the outcome of any such inquiries, I am satisfied that they ought to have been carried out upon receipt of the Garda Abstract Report in order to assess the potential liability of the second named defendant.

The plaintiff relies on the decision in *Boylan* where Lynch J. held that the date of knowledge in that case was when the engineer's report was received. However, the facts of the *Boylan* case are distinguishable from the within proceedings. There, the court held that the plaintiff did not know and could not reasonably be expected to know that her injury might have been caused by a design defect in the hinge mechanism of the van door in which she trapped her finger. In my view, the potential liability of the party sought to be joined in *Boylan* related to a highly specialised and esoteric area of expertise, namely the design of vehicle door hinges. While road curvature and camber is equally a specialised discipline which would require the input of an engineer, the fundamental questions raised as to road condition by Gardaí, who the plaintiff accepts are experts in road safety matters, ought to have alerted the plaintiff to the potential liability of the second named defendant and prompted further inquiry, particularly having regard to the highly unusual circumstances of the accident.

The plaintiff also referred the Court to a number of English authorities and made reference to section 33 of the UK Limitation Act 1980 which confers on the courts in that jurisdiction a statutory discretion to disapply the relevant limitation periods. The UK courts are required to consider factors such as prejudice caused to the defendant and the equity in allowing or disallowing a party to be joined to a case outside of the time limits. However, as submitted by counsel for the second defendant, no such provision exists in this jurisdiction and, as set out by Macken J. in *Byrne*, the Court is required to apply the relevant statutory provisions *"literally and not benignly or by an unduly lax interpretation"*.

The Court is satisfied in all the circumstances of this case that the plaintiff's date of knowledge as set out in s.2(1) of the 1991 Act was no later than 20th October, 2010. It was at this point that the time limit as set out in the Statute started to run and the plaintiff's proceedings against the second named defendant are therefore statute-barred. The plaintiff's claim against the first named defendant remains extant.

DECISION

For the reasons set out above, the Court directs that the second named defendant be released from the proceedings and the matter should proceed as against the first named defendant only.

