Neutral Citation [2016] IEHC 696

THE HIGH COURT

[2012 No. 11168 P.]

BETWEEN

MARY KENNEDY

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE, MARGARET O'SHEA GREWCOCK AND LEGAL AID BOARD

DEFENDANTS

JUDGMENT of Mr. Justice White delivered on the 2nd of December, 2016

1. This matter comes before the court by way of the order of Barr J. of 29th February, 2016, directing the trial of a preliminary issue on a point of law as follows:-

> "Is the plaintiff in the within proceedings as against the first named Defendant statute barred having regard to the provisions of the Statute of Limitations Act 1957, as amended."

2. The order was granted further to a motion of 21st January, 2016, returnable for 8th February, 2016, grounded on the affidavit of Fergal Dennehy, Solicitor, sworn on 20th January, 2016, and the replying affidavit of Cian O'Carroll, Solicitor on behalf of the Plaintiff sworn on 23rd February, 2016, together with exhibits.

3. The other relevant pleadings are the Personal Injury Summons issued on 5th November, 2012, the first Defendant's defence of 28th November, 2013, a motion of 22nd June, 2014, originally returnable for 28th July, 2014, seeking to join Margaret O'Shea Grewcock and the Legal Aid Board as Defendants to the proceedings and the order of this Court of 28th July, 2014, granting that relief, the defence of the second and third named Defendants of 3rd December, 2015, a notice of further particulars of fact of 23rd February, 2016, and reply to the defence of the first named Defendant dated 5th July, 2016.

4. The proceedings relate to the provision of health services to the Plaintiff by the first Defendant at South Tipperary General Hospital, Clonmel and Waterford Regional Hospital. The Plaintiff alleges there was a delay in diagnosis of cancer from 20th November, 2006 to 16th March, 2007, and that surgery carried out on 16th March, 2007, was excessive and unnecessary.

5. On 20th November, 2006, the Plaintiff had a bilateral mammogram which revealed increased density in one of the modules of the upper outer quadrant of the left breast measuring 1cm in diameter with aspiculated outline on the mammogram. On the same date, the Plaintiff underwent a left breast ultrasound which showed a single focus of density which was 3mm in diameter and which had features surrounding it. The report for that ultrasound was issued on 23rd November, 2016. A further mammogram was carried out on 12th January, 2007, in Waterford Regional Hospital. The ultrasound confirmed a worrying area which was subjected to core biopsy. These three core biopsies were undertaken on 7th February, 2007. This report was issued on 8th February, 2007, and found that there was invasive ductal cancer. The Plaintiff was admitted to hospital on 16th February, 2007, and was investigated for chest pain. On 16th March 2007, the Plaintiff underwent a left mastectomy and axillary node clearance during which a level three axillary, node clearance was performed. Histology showed a grade 2 invasive ductal cancer 1.4cm in size which was completely excised. The cancer was node negative with none of the 34 lymph nodes involved.

6. The Plaintiff was dissatisfied with her treatment and visited the Law Centre in Nenagh on 5th July, 2007. She attended an initial consultation with the second named Defendant on 30th November, 2007. Thereafter, there were four telephone attendance and a further meeting on 19th March, 2009. On that date the Plaintiff was advised by the second Defendant that she did not have a stateable case and was refused legal aid by third named Defendant on 1st April, 2009.

7. In further particulars, of 23rd February, 2016, the Plaintiff states that at the time of receiving this advice, her daughter was terminally ill with breast cancer in the UK and subsequently died in 2010 and it was afterwards that she began to query again her own diagnosis of breast cancer and contacted her present solicitors. They sought an expert medical opinion form Prof. Bundred, a professor of oncology and consultant surgery on 29th September, 2011. He issued a report on 12th July, 2012. On 5th November, 2012, the Personal Injuries Summons was issued and was served on the first Defendant on 14th November, 2012.

8. Prior to the initiation of the motion to direct a preliminary hearing, the Plaintiff had not pleaded any specific date of knowledge.

9. The first Defendant in its defence at para. 2 pleaded

> "The within proceedings are statute barred pursuant to the provisions of the Statute of Limitations 1957, and the Statute of Limitations (Amendment) Act 1991."

Statute of Limitations

10. Section 3 of the Statute of Limitations (Amendment) Act 1991, as amended by s. 7 of the Civil Liability and Courts Act 2004, states

3(1) An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of two years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured.

Section 2 states, Date of knowledge for the purposes of this Act.

(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.

11. The first Defendant alleges that the actual or constructive date of knowledge was as early as the decision of the Plaintiff to visit the Nenagh Law Centre on 5th July, 2007 or at the latest her initial consultation with the second named Defendant on 30th November, 2007, and thus the time for bringing an action would have expired not later than 1st December, 2009. The plaintiff contends that the Plaintiff had no actual or constructive knowledge until the date of the receipt of the expert report on 12th July, 2012.

Legal Principles
12. There are many legal authorities on this issue. The court wishes to rely on the Supreme Court decision of *Gough v. Neary* [2003] 3 I.R. 92, which in turn quoted with approval a number of English decisions, *Halford v. Brookes* [1991] 1 WLR 428; *Spargo v. North Essex Health Authority* [1997] 8 Med L.R. 125; and *Sniezek v Bundy (Letchworth) Limited* (Unreported, Court of Appeal, 7th July, 2000).

13. The headnote in Gough v. Neary states,

Held by the Supreme Court (Geoghegan and McCracken JJ.; Hardiman J. dissenting), in dismissing the appeal on the question of the Statute of Limitations but in reducing the award of general damages into the future by €50,000, 1, that the plaintiff

had neither actual nor constructive notice within the ordinary limitation period that the injury was attributable in whole or in part to the act or omission which was alleged to constitute negligence.

Hallam-Eames v. Merrett Syndicates Ltd. [1996] 7 Med L.R. 122 and *Spargo v. North Essex Health Authority* [1997] 8 Med L.R. 125 approved.

Per Geoghegan J.: That in order for the statute to run, a plaintiff must know enough facts as would be capable of at least, upon further elaboration, establishing a cause of action even if the plaintiff had no idea that those facts of which he or she had knowledge did in fact constitute a cause of action as that particular knowledge was irrelevant under the Act.

14. In the judgment at p126, having reviewed a number of English authorities Geoghegan J stated "It is appropriate to pause at this stage in the review of the English case law and consider those principles in relation to this particular case. While it may not be necessary for the purposes of starting the statute to run to know enough detail to draft a statement of claim, a plaintiff in my opinion must know enough facts as would be capable of at least upon further elaboration of establishing a cause of action even if the plaintiff has no idea that those facts of which he has knowledge do in fact constitute a cause of action as that particular knowledge is irrelevant under the Act. But the adequacy of the knowledge must be related to the context."

At p127 of his judgment he recited with approval the Spargo judgment of the English Court of Appeal. He stated, "Since the hearing of this appeal it has come to my notice via the internet that there are quite a number of later English cases relevant to this limitation provision. As in a broad way they range over the same issues which have been debated at the hearing of this appeal I think that I can safely refer to a few points in them without introducing any new matter that has not been the subject of argument before this court. The principal authority to which I want to refer is *Spargo v. North Essex Health Authority* [1997] 8 Med L.R. 125 and the judgment of the Court of Appeal (Nourse, Brooke and Waller L.JJ.) delivered on the 13th March, 1997. The judgment of the court is the judgment of Brooke L.J. in which he asks himself the rhetorical question, what does the law require in order that actual knowledge is established? He observes at p. 129 that "this branch of the law is already so grossly overloaded with reported cases, … that I see no reason to add to the overload by citation from earlier decisions". He then cites a large number of the reported cases and draws from them certain principles. I think it important to mention this because these principles have ever since been regularly referred to in later English judgments and have almost been interpreted as though they were statutory. As formulated by Brooke L.J. at p. 129, they are as follows:-

"(1) The knowledge required to satisfy s. 14(1)(b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable;

(2) 'attributable' in this context means 'capable of being attributed to', in the sense of being a real possibility;

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

(4) on the other hand, she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree: or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was."

One of the judges in a later case observed that while this summary of the case law by Brooke L.J. was helpful up to a point, the application of the four principles in a given case was by no means easy. Certainly, there is no merit in my view in casting them as stone. But I do think that on the facts of this particular case the first of Brooke L.J.'s principles is relevant. The plaintiff would have to know or be expected to know that the hysterectomy was unnecessary before she could be said to have "a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable". I am, of course, referring to the context in which the hysterectomy was carried out in this case. I am not referring to a situation where a particular operation was carried out negligently which would be quite different.

There are a number of English cases on the subject of more recent origin. One of them is *Sniezek v. Bundy (Letchworth) Ltd*. (Unreported, Court of Appeal, 7th July, 2000). I mention this case for two reasons. First of all, it is an example of quite a number of English cases in which the judges of the Court of Appeal have clearly regarded the summary of the case law given by Brooke L.J. in *Spargo v. North Essex Health Authority* [1997] 8 Med L.R. 125 as being correct and that the principles as set out by him were applicable. But of interest also is the following passage contained in the judgment of Judge L.J. who in turn quotes Donaldson M.R. in *Halford v. Brookes* [1991] 1 W.L.R. 428 at p. 443:-

"The word (knowledge) has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start any proceedings. In this context 'knowledge' clearly does not mean 'know for certain and beyond possibility of contradiction. It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice, and collecting evidence'. Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice."

15. Two other issues arose during the course of the submissions on 8th July, 2016, in the reply to the defence of the first named Defendant served on 5th July, 2016. The following was pleaded:-

> "3. The Plaintiff further reserves the right to rely upon the provisions of Bunreacht na hÉireann 1937 and in particular Article 40.3.1 and 40.3.2 thereof so as to plead that in the circumstances of these proceedings, a finding that the action of the Plaintiff against the first named Defendant is statute barred would amount to an infringement of unenumerated and personal rights pursuant thereto.
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> 4. Further in the alternative, the first named Defendant is estopped from relying on the provisions of s. 11 of the Statute of Limitations 1957 (as amended by the Statute of Limitations (Amendment) Act 1991, and the Civil Liability and Courts Act 2004), in respect of all or any causes of action alleged by the Plaintiff against the first named Defendant as this Defendant, its officers, servants or agents were at all material times responsible for the medical care and treatment of the Plaintiff which is complained of in these proceedings and failed to disclose to the Plaintiff that the medical care and treatment which she had received from them was not of the requisite standard and has led to personal injury being sustained by her in the manner complained of in these proceedings."

16. Counsel for the Plaintiff sought to argue these points of law in the preliminary issue. The first named Defendant had not been put on notice of these arguments. The court permitted the arguments to be made giving the first named Defendant liberty to file supplemental legal submissions which were filed in the High Court Central Office on 28th July, 2016.

17. I propose to deal with those issues in this judgment.

The Constitutional Argument

18. The plaintiff's constitutional argument is an unusual one and the submissions are contained in p. 135 to 137 of the transcript.

19. Mr. Treacy for the Plaintiff stated:-

> "I don't in any way deny the fact that the HSE obviously and the Civil Legal Aid Board are completely autonomous and separate statutory authorities. Nonetheless they are both financed entirely from the same entity i.e. the Irish taxpayer and as I said earlier, the Legal Aid Board specifically have pleaded in para. 10 of their defence as follows:-
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> > 'In particular pending a decision on the part of the Third Named Defendant to grant the Plaintiff a legal aid certificate, the Third Named Defendant, owed no duty to institute or prosecute proceedings on her behalf.'"

20. He went on to state:-

> "I would ask the court to be very slow to allow that risk to happen given the constitutional right of the Plaintiff to litigate her claim to be very slow to allow a situation where you have two statutory bodies both funded by the taxpayer who could unwittingly or even innocently contrive a situation where the first statutory body succeeds in finding that the action is statute barred and the secondary statutory body succeeds in saying we didn't owe you any duty because you didn't have a legal aid certificate and the effect of that is that the Plaintiff would find that she cannot even get the issue litigated because of the way in which the servants or agents of two statutory publically funded bodies actually conducted the litigation. I am not for one moment suggesting anything other than the legal advisers or indeed the Defendants are behaving absolutely correctly in the respect of conduct of their defences but the Court, in my respectful submission should be very slow to allow a situation where a Plaintiff's constitutional right just to have the issue litigated that shouldn't be deprived to her where on the one hand it is statute barred and on the other hand they say you have no right against us because you don't have a legal aid certificate."

21. Mr. Treacy relied on extracts from the 4th Ed. of *J.M. Kelly and the Irish Constitution by Hogan and Whyte,* Chapter 7 on Personal Rights and dealing with the corollary rights of Article 40.3 on the right to litigate. Counsel referred to paras, 7.3.132, 7.3.133, 7.3.134. He went on to state:-

> "This is about the right to litigate to actually make sure that the issue as to whether she received excessive surgery and whether that was negligent, her right to have that litigated before the court. The author has just simply set out the case law establishing that right under Article 40.3.1 and 2 and an unenumerated right and I do not have anything further to say in case my friend is preparing a 30 page written submission this evening but basically all I say by way of conclusion on that is that I'd ask the Court not to allow, given she has a constitutional right to litigate in the rather extraordinary circumstances of this case where we are not dealing with two medical insurers for instance or two different insurers. We are dealing with two statutory bodies with statutory responsibilities created by statute and meant to carry out their public duties for the common good in accordance with the constitutional rights of citizens."

22. The first Defendant in its submission filed subsequent to the court hearing relied on the case of *Tuohy v. Courtney* [1994] 3 I.R. 1,

23. Paragraphs 11 and 12 of the submissions state:-

> "The Plaintiff wishes to refer to the undoubted right of access to the Courts as it seems that this is a counterweight to the Statute of Limitation (Amendment) Act 1991. It is not. Rather, the whole point of the limitation period is that the legislature has considered the general issue of the right of access to the Courts and has balanced that as against the right to protection from stale claims and all associated matters (see e.g. *Tuohy v. Courtney* [1994] 3 I.R. 1). The legislature has then as a result of carrying out that balance, enacted the Statute of Limitations (Amendment) Act 1991. As Finlay C.J. held in *Tuohy v. Courtney* (which considered the six year period in relation to a professional negligence suit):-
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> > 'It has been agreed by counsel, and in the opinion of the Court, quite correctly agreed, that the Oireachtas in legislating for time limits on the bringing of actions is essentially engaged in a balancing of constitutional rights and duties. What has to be balanced is the constitutional right of the plaintiff to litigate against two other contesting rights or duties, firstly, the constitutional right of the defendant in his property to be protected against unjust or burdensome claims and, secondly, the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims.'

Finlay C.J. went on to state:-

> 'Statutes of limitation have been part of the legal system in Ireland for very many years and were a feature of the system of law operating in force in Ireland apparently both before and after the Act of Union and have continued from 1922 up to the present (cf. the judgment of Griffin J. in *Hegarty v. O'Loughran* [1990] 1 I.R. 148 at page 157).
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> The primary purpose would appear to be, firstly, to protect defendants against stale claims and avoid the injustices which might occur to them were they asked to defend themselves from claims which were not notified to them within a reasonable time.
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> Secondly, they are designed to promote as far as possible expeditious trials of action so that a court may have before it as the material upon which it must make its decision oral evidence which has the accuracy of recent recollection and documentary proof which is complete, features which must make a major contribution to the correctness and justice of the decision arrived at.
>
> Thirdly, they are designed to promote as far as possible and proper a certainty of finality in potential claims which will permit individuals to arrange their affairs whether on a domestic, commercial or professional level in reliance to the maximum extent possible upon the absence of unknown or unexpected liabilities.'"

24. The first and third Defendants are separate statutory bodies with separate legal personalities. The possibility that both will not be found liable in the action for different reasons is irrelevant.

25. The Plaintiff has access to the courts as she has issued the Personal Injury Summons. The relevant sections of the act have the presumption of constitutionality. The first Defendant is entitled to make the case that the Plaintiff's action is statute barred. The fact that the first and third named Defendants are public bodies does not permit the Court to treat them differently from any other legal entity before the courts as a party to proceedings. The first Defendant is no different from any non-statutory or private litigant who wishes to make the case that a Plaintiff has not issued their legal proceedings in time and that their claim is statute barred.

26. Paragraph 3 of the reply to the defence is struck out and this matter should not be raised at the substantial hearing of the action.

Estoppel

27. The Plaintiff's argument on estoppel is dealt with at pp. 138 to 144 of the transcript. The essence of the submission is at P139 when Mr Treacy stated "if it is the case that the Plaintiff had excessive surgery conducted on 16th March, 2007, the people who actually are culpable for that, if that proves to be the case are the people who actually carried it out and they had never advised her or suggested to her that the surgery was unnecessary or excessive. In fact to this date the HSE, completely legitimately, but the HSE have placed all issues of negligence completely in issue."

28. There is no allegation of concealment or fraud in these proceedings. The first time the first Defendant had notice of the Plaintiff's claim was the service of the Personal Injury Summons on 14th November, 2012. There is no suggestion that the Plaintiff invoked any complaints procedure directly against the first named Defendant. There was never an acknowledgment by the first Defendant of the Plaintiff's claim prior to the issue of the proceedings. The first Defendant contests liability and has served a full defence. There is no suggestion that any record was withheld or any difficulty in procuring same, although the court accepts that the plaintiff did not procure the records from South Tipperary Hospital until 8th February, 2012. There is no suggestion that the delay is the first Defendant's responsibility.

29. If the first Defendant contends that the surgery was properly carried out, there was no onus on it to advise the Plaintiff that the

surgery was unnecessary or excessive. Estoppel does not arise and paragraph 4 of the reply to the defence should be struck out and the Plaintiff cannot raise it at the trial of the action.

Decision on Statute.

30. The Plaintiff did not swear an affidavit for this application. The Court has to rely on the replying affidavit of Cian O'Carroll, Solicitor, sworn on 23rd February, 2016, the Personal Injury Summons of 5th November, 2012, and the further particulars of fact of 23rd February, 2006. There is no evidence about the nature of the complaints or her concerns about the treatment of her disease when she sought legal advice in June 2007 and November 2007 or when she consulted her present solicitor on 17th June, 2011.

31. The Plaintiff alleges she has developed lymphoedema which will last for the remainder of her life affecting her physical and psychosocial morbidity with poor quality of life. She alleges that both her left arm, right arm, left forearm and right forearm are swollen. The court does not know if the lymphoedema was present shortly after her surgery in March, 2007 or present on the initial consultation with the second Defendant on 30th November 2007.

32. The Court infers from the submissions by the Plaintiff to this Court on 8th July, 2006 that her decision to seek legal advice in June, 2007 related to her concern of delay in the diagnosis of cancer from 20th November, 2006 to 16th March, 2007. Her counsel submits she had no knowledge including constructive knowledge of the alleged improper surgery carried out on 16th March, 2007.

33. When she attended to seek legal advice in June 2007 she had actual and constructive knowledge of the state of affairs which are set out at paras. 3(x) and 4(i), to (vi) . Therefore that aspect of the claim as set out is statute barred as is the allegation set out in the first sentence of para. 5 of the Personal Injury Summons.

34. The Plaintiff submits that the action is primarily an allegation of excess treatment not justified by the histology. The Court cannot on the balance of probabilities in this trial of the preliminary issue determine if she had constructive knowledge of the allegations set out at 4(vii) to 4(xviii), because of the fourth principle in the Spargo judgment already quoted. While I accept Geoghegan J. in his judgment at p. 128 did not cast these principles in stone and referred to them as relevant in the context of the appeal at hearing, I regard that principle relevant to the issues surrounding the surgery on the 16th March 2007 which allegedly only came to be considered as a result of the contents of the expert report of Prof Bundred received on the 12th July 2012. In the court's opinion it would be vital to establish the state of mind of the Plaintiff about the detailed complaints made by her when she was instructing the second and third Defendants and her present solicitor, any direct complaints made to the hospital authorities, also the evidence of the second named Defendant if tendered and admitted would be relevant. The trial judge will have to deal with the balance of the statute points when he or she hears the evidence.

35. In view of the submission made on behalf of the Plaintiff on 8th July, 2016, the Court is surprised that the Plaintiff consented to the order of Barr J. directing that the point of law on the statute be tried as a preliminary issue. This has caused considerable extra expense to the first Defendant

36. The Plaintiff is entitled to continue her action against the first named Defendant on the allegations remaining in the Personal Injury Summons. The first Defendant is entitled to maintain its defence that the Plaintiff's claim is statute barred and that the date of knowledge either actual or constructive was much earlier than 12th July, 2012.