Neutral Citation Number: [2008] IEHC 83

THE HIGH COURT

[2002 No. 8224 P]

BETWEEN

NICOLA GRIFFIN

PLAINTIFF

AND
LUCY CALALLY

DEFENDANT

Judgment of Mr. Justice John Edwards delivered on Friday the 1st day of February 2008

Introduction
1. The issue that I have to decide arises in the context of personal injuries proceedings arising out to a road traffic accident on the 18th July, 1999. The plaintiff was travelling as a passenger in a motor car which was in a head on collision with another motor car at Scarrawalsh, Enniscorthy, Co. Wexford. Unfortunately, the driver of the other vehicle, a Mr. Hugh Kerr, died in the accident. The plaintiff alleges that she suffered personal injuries, loss and damage in the accident, and that these were caused by the negligence and breach of duty of the deceased in or about the driving of his motor vehicle. The defendant named in the proceedings is a law clerk in a firm of solicitors and is sued as nominee on behalf of the deceased driver.

2. The Plenary Summons was issued on the 13th June, 2002, and a Statement of Claim was delivered on the 17th February, 2003. There was the usual request for further and better particulars arising out of the Statement of Claim and further and better particulars were duly furnished. On 12th May, 2005, a Defence was filed on behalf of the defendant. This was a very brief document and, in the circumstances, it is convenient to recite it in full:-

> "1. The defendant denies that the plaintiff suffered, sustained or incurred the alleged or any injuries or loss or damage or expense and each and every particular of same is denied as if individually set forth herein and traversed seriatim.
>
> 2. No admission is made as to the alleged or any items of special damage."

3. The defence as filed is not signed by counsel.

4. The defendant brings the motion that is presently before me and in her Notice of Motion seeks an order pursuant to O. 28, r. 1 of the Rules of the Superior Courts granting her liberty to deliver an amended defence to include the following preliminary plea and objection:-

> "The claim of the plaintiff herein is statute barred pursuant to the provisions of s. 9(2)(b) of the Civil Liability Act, 1961 and the Statute of Limitations, the proceedings herein not having been commenced within the period of two years after the 18th July, 1999, being the date of death of Hugh Kerr, the alleged tort feasor in the proceedings herein."

5. This application has been vigorously opposed by the plaintiff.

6. As the defendant is the moving party she will hereinafter be described as the applicant. Correspondingly the plaintiff will hereinafter be referred to as the respondent.

7. The application was grounded upon an affidavit of Ivan Durcan, solicitor, sworn on the 21st November, 2006, and the documents therein exhibited. A replying affidavit was filed on behalf of the respondent, namely an affidavit of David K. Anderson, solicitor, sworn on the 15th December, 2006, with accompanying exhibits. Then by way of rejoinder Mr. Ivan Durcan sworn a supplemental affidavit on the 2nd February, 2007 responding to Mr. Anderson's affidavit.

8. The matter came on before this Honourable Court sitting in Tralee on 17th January, 2008, and in the course of the hearing detailed legal arguments were presented to me, to which I will refer later. I then retired to consider the evidence and the parties respective submissions and, having done so, formed the view that it would be inappropriate in the particular circumstances of this case to allow the amendment sought. Accordingly, I dismissed the applicant's application and I indicated that I would give reasons for my decision in a written judgement on today's date. I now give those reasons.

The evidence
9. At para. 5 of his affidavit of the 21st November, 2006 Mr. Durcan exhibits a booklet of inter-partes correspondence in the case marked "ID 1". With respect to that course of correspondence he disposed:-

> "I acknowledge the references in the correspondence to liability not being an issue or otherwise being conceded, save for possible seat belt issues, but it is submitted that far from communicating directly or indirectly to the plaintiff's solicitors, that there was no need to issue proceedings, I repeatedly called upon the plaintiff's solicitors to move matters along and to issue proceedings."

10. It will be necessary to refer to the inter-partes correspondence in a little more detail later in this judgment. However, the other matter of significant substance in the affidavit of Mr. Durcan, is contained in para. 7 wherein he states:-

> "I say and believe that the failure to plead the limitation issue referred to above was a mistake and an oversight. I pray this Honourable Court for liberty to deliver an amended Defence raising this as a preliminary issue. I make this application in the context of the correspondence including the explicit references calling upon the plaintiff's solicitors to move the matter along and to issue proceedings which could not reasonably give rise to any assumption on their part that there was no requirement to issue the proceedings."

12. In his replying affidavit, Mr. Anderson referred at para. 3 to the averment in para. 7 of Mr. Durcan's affidavit, that the failure to plead the statute of limitations in the applicant's Defence "was a mistake and an oversight". In regard to that Mr. Anderson deposed:-

> "I am surprised that Mr. Durcan should make such an averment because the entire course of the dealings between us up to the issue of this motion was that liability was not an issue in this case. Indeed, on the date the Defence was delivered, a Notice of Tender was also served in which the defendant made a substantial offer in settlement of this case."

13. At para. 4 of his affidavit Mr. Anderson avers that the correspondence exhibited by Mr. Durcan only gives a partial history of the proceedings. Mr. Anderson then goes on to exhibit further correspondence and, save for one item which must be mentioned at this point, I will deal with the relevant correspondence later. The one letter that must be referred to at this point was a letter of 4th September, 2000 from Mr. Durcan to the respondent's solicitors stating plainly:-

> "Liability will not be an issue in these claims save for possible seat belt issues."

14. At para. 5 of his affidavit, Mr. Anderson deposes:-

> "Following the letter of 4th September, 2000, the dealings between our respective firms of solicitors proceeded on the basis that liability was not an issue. Certainly, I accepted on behalf of the plaintiff that this was the case and that the only reason that proceedings might be required would be to assess quantum."

15. At para. 6 of his affidavit, Mr. Anderson states:-

> "Mr. Durcan avers that he repeatedly called upon my firm to move matters along and to issue proceedings. However, as is apparent from the correspondence, when this was done it was always in the context of attempts being made to settle the proceedings and never against any suggestion that the proceedings when issued would actually be contested as regards liability."

16. Mr. Anderson goes on to describe the course of dealings between himself and Mr. Durcan both before and after the issuing of proceedings and it is not necessary to recite in full the evidence in that regard. He alludes to various attempts to negotiate a settlement of the matter; to the furnishing of medical reports and vouchers to the applicant with a view to reaching settlement; to the fact that the respondent was requested to, and did, attend numerous medical consultations set up by the applicant; to the issuing of proceedings and the raising of Notices for Particulars by the applicant, to the furnishing of replies to the applicant's Notices for Particulars and extensive correspondence between the solicitors with regard to the respondent's claim for loss of earnings. Mr. Anderson comments:-

> "This was all done against the background that liability was not an issue in the case, and in which every effort was being made to co-operate with, and facilitate, the defendant's inquiries."

17. At para. 10 of his affidavit, Mr. Anderson refers with particularity to the fact that a Notice of Tender offer was delivered with the Defence on the 12th May, 2005. He points out that the tender was not accepted but by letter dated the 24th June, 2005 he communicated with the applicant's solicitor that he was currently awaiting an occupational therapist's report in respect of his client and that he would revert in respect of the tender. He points out that on 8th November, 2005 he furnished the applicant with the respondent's occupational therapist's report together with an updated schedule of loss of earnings from the respondent's accountant, and also the respondent's actuarial report. He states that in reply, the applicant's solicitor, who had previously sought settlement negotiations, requested service of a Notice of Trial.

18. It appears that Notice of Trial was never in fact served. However, the respondent attended a further medical consultation at the behest of the applicant on the 4th May, 2006.

19. It would appear that the first intimation received by the respondent that the applicant was seeking to rely on the Statutes of Limitation was when, out of the blue, the Notice of Motion in the present application was issued on the 21st November, 2006.

20. In his supplemental affidavit of the 2nd February, 2007 Mr. Durcan makes the following points. At para. 3 he contends that Mr. Anderson equates references to "liability not being an issue" with an express or inferred representation, which he asserts, that a defence under the Statutes of Limitation will not be relied upon. He submits that these are not synonymous. He points out that the correspondence exhibited makes no reference to the Statutes of Limitation. He avers that no express representation was made that the applicant would not raise the limitation period. He points out that the respondent's advisers did not seek any latitude or indulgence in this regard. Moreover, he says, the applicant's advisers did not offer any comfort on this point and did not, for example, at any stage suggest either that proceedings could be dispensed with or that no point would be raised if the issuing of proceedings was delayed beyond the expiry of limitation period.

21. At para. 5 of his affidavit he states that so far as reliance on implied representations is asserted, the furnishing of loss of earnings documentation, experts reports and other information, or indeed references to possible settlement negotiations, do not of themselves, separately or in combination, constitute or comprise a representation that proceedings are not required or that a defence under the Statutes of Limitation will not be relied upon. He makes certain specific references to the correspondence and, as I have said, I will deal with the correspondence separately.

Relevant correspondence

22. I should say at the outset that "without prejudice" correspondence was included in the correspondence exhibited by both parties. Neither side has asserted a claim of privilege before me nor has any objection been taken by either side to me seeing or placing reliance upon "without prejudice" correspondence. In the circumstances I propose to treat and have regard to all correspondence in the same way, regardless of whether or not any particular item is expressed to be "without prejudice".

23. The course of correspondence exhibited before me commences with a letter of the 21st July, 2000 from the applicant's solicitors to the respondent's solicitors indicating that they have authority to accept service of proceedings. They further request the sharing of medicals on the usual without prejudice basis or, failing that, that the respondent might be made available for medical examination on the usual terms. This letter was replied to by a lengthy letter from the respondent's solicitors to the applicant's solicitors dated 30th August, 2000. Part of the reason for its length was that it dealt with not just the claim of the respondent in these proceedings, but with a second claim relating to the respondent's husband and a third claim relating to the respondent's daughter, both of whom were also injured in the accident. The letter, inter alia, promulgates various complaints on the part of the respondent's solicitor concerning the manner in which the applicant's insurer had dealt with all three claims up to that point. The letter dealt at length with the claim of the respondent's husband on the basis that his claim "appears to be the only one of the three Griffin claims that might rightly be approaching a possibility of long term assessment of his loss, damage and injury… ." Significantly with regard to the respondent's husband's case the letter states:-

> "We have no problem in producing our client's medical reports, on the usual basis and we attach hereto copies of the above surgeon's reports."

24. There was no offer to furnish medical reports in respect of either the respondent herself or her daughter but, in fairness, this has to be understood in the context of the view asserted that the only claim that was ready to be progressed was that of the respondent's husband.

25. In response to the said letter of the 30th August, 2000 the applicant's solicitors wrote to the respondent's solicitors on the 4th September, 2000 in the following terms:-

> "Dear Sirs,
>
> Thank you for your letter of the 30th August. Liability will not be an issue in these claims save for possible seat belt issues.
>
> Thank you for the medical reports in relation to Garda Griffin. We await a further report following his recent operation.
>
> Can you furnish us with any medical reports in relation to Mrs. Nicola Griffin's claim and Catherine Griffin's claim?
>
> If you wish to issue proceedings you might note that the nominated Defendant is Lucy Calally. Ms. Calally is a law clerk in this office and is nominated purely for the purposes of these proceedings.
>
> We await hearing from you.
>
> Yours faithfully."

26. There was some delay on the part of the respondent's solicitors in responding to the applicant's solicitors letter of the 4th of September, and reminders were sent by the applicant's solicitors to the respondent's solicitors on the 25th October, 2000, the 8th December, 2000, and the 25th January, 2001 respectively. By letter of the 26th January, 2001 the respondent's solicitors replied to the applicant's solicitors. This reply indicated:-

> "We are prepared to recommend to our client that you appoint a medical attendant to independently assess our client's injuries arising out of the above accident and for record purposes we also enclose a further medical report which we hold on file from Mr. Michael O'Riordan dated the 7th September, 2000.
>
> We propose to attempt to settle and resolve the claim of Garda Joseph Griffin as a preliminary matter and thereafter the two other family member's claims.
>
> We await your formal reply by return.
>
> Yours faithfully."

27. The applicant's solicitors responded on the 31st January, 2001 reiterating that there had been a formal of concession of liability save for possible seat belt issues. It went on to state:-

> "You say you want to attempt to settle the claims. Do you want to meet now or do you intend to issue proceedings and then meet?
>
> What is the position about the other cases? When do you intend to issue proceedings?
>
> We await hearing from you.
>
> Yours faithfully."

28. By a letter dated the 30th April, 2001 from the respondent's solicitors to the applicant's solicitors in reply to theirs of the 31st January, 2001 the respondent's solicitors complained that, with respect to the case of the respondent's husband, the applicant's solicitors had neither commented upon the medical reports sent to them or nominated a medical examiner. The letter continued:-

> "In respect of the other two members of the Griffin family their condition is still very serious – we know and understand that your client's objective is to 'box' the claim and assess the value thereof. This has no beneficial interest to our clients and unless and until both Mrs. Griffin and her young daughter reach a recovery stage they will remain under constant medical supervision and attendance and we will not limit their claim by suggesting settlement or otherwise until a clear path of damage, loss and injuries is ascertained.
>
> We again draw your attention to the penultimate paragraph of our letter dated the 26th January, 2001 when we clearly specified our proposal and we now look forward to receiving a beneficial response forthwith."

29. The applicant's solicitors responded by a letter of the 1st May, 2001 stating:-

> "The issue is quite simply – do you want to meet in one or more of the cases now to see if we can settle them or if not, please issue proceedings and we will get on with the case. Three months have gone by and nothing has happened (between us) and it is time to move the case on now, either by negotiation or issue of proceedings. Accordingly, please let us hear form you.
>
> Yours faithfully."

30. Again, there was delay on the part of the respondent's solicitors in responding to the letter of the 1st May, 2001 and the applicant's solicitors sent one line reminders on the 29th May, 2001 and the 18th July, 2001, respectively, the latter date coincidently being the date on which the limitation period expired. The latter reminder appears to have crossed with a reply from the respondent's solicitors to the applicant's solicitors dated the 18th July, 2001. It again complained that the applicant's side had neither commented upon the medical report furnished nor nominated a medical examiner. It then states:-

> "On this side of the fence if you had to hear and translate the very considerable family loss and upset which has arisen in respect of the above incident you might better well better understand the trauma and distaste that has arisen in respect

of the entire matter which occurred two years ago today."

31. There was then a reiteration of the call for the nomination of a medical examiner and the letter concluded:-

> "If we do not receive what we consider to be a proper beneficial response we will institute proceedings without further reference. It appears to our company that no matter what we say and/or how we say it – our words, queries, proposals and otherwise have never got a full and/or proper response from you at any time. The other Griffin family members, for whom we also act, await a proper, positive and helpful response from your firm.
>
> Yours faithfully."

32. The first letter written in the post expiration stage of the correspondence was a letter of the 23rd July, 2001 from the applicant's solicitors to the respondent's solicitors. It stated:-

> "Our letter of the 31st January could not be clearer. You were kind enough to send us a report from Mr. O'Riordan. We asked you whether or not you wanted to meet to settle the claim or else we invited you to issue proceedings. Since then you have done neither. We are quite happy to proceed on the basis of Mr. O'Riordan's medical report (and any updated ones since).
>
> It is not for us to comment on what you have to do for the plaintiffs. Our respective firms are here to represent our clients and with that in mind we have invited you to settlement discussions. If you do not wish to meet to discuss settlement of the claim on a without prejudice basis we suggest that you issue your proceedings and get on with the case or cases. We await hearing from you – by return please.
>
> Yours faithfully."

33. The next letter is a letter of the 1st August, 2001 again from the applicant's solicitors to the respondent's solicitors referring to "our recent meeting". It requests "will you please serve proceedings". There is then another letter from the applicant's solicitors to the respondent's solicitors dated the 7th November, 2001 in the following terms:-

> "We refer to our meeting at the end of July. We have not heard from you with proceedings. Will you please let us hear from you so that this matter can proceed?"

34. A one line reminder was sent on the 3rd December, 2001 from the applicant's solicitors to the respondent's solicitors. On the same date, but by separate letters, each of the claimants was requested to attend a medical examination by a doctor nominated by the applicant. By a letter from the respondent's solicitors to the applicant's solicitors dated the 13th December, 2001 it was confirmed that the three claimants would attend the said medical examinations.

35. The next item of correspondence is a letter of 26th June, 2002 from the respondent's solicitors to the applicant's solicitors enclosing a Plenary Summons in respect of the respondent's claim. That letter was responded to by letter of the 27th June, 2002 from the applicant's solicitors to the respondent's solicitors returning the original Plenary Summons duly stamped with acceptance of service endorsed thereon. The letter also enclosed an Appearance to the proceedings and called on the respondent's solicitors to deliver a Statement of Claim. Thereafter, there was the usual type of correspondence that one expects in connection with proceedings recently served. There were letters requesting particulars; letters threatening motions and so on. By letters of 20th August, 2002 all three claimants were again requested to attend a medical examination by a doctor nominated by the applicant. By letter of 3rd April, 2003 the applicant requested the claimants to attend yet another medical examination by the applicant's doctor. There was a similar request communicated by a letter of the 3rd September, 2003. The affidavit of Mr. Anderson exhibits a continuation of the correspondence between the respective solicitors from that time up until April 2006. There are twenty three further letters in all and, as many of them are lengthy and detailed it will be sufficient for the purposes of this judgment to characterise the correspondence in a general way. There was very detailed and protracted correspondence between the parties concerning the special damages claimed by the respondent and in particular her claim for loss of earnings. Accountants were involved on both sides. Further, the applicant's solicitors were furnished with an Actuary's report by the respondents' solicitors and also with a report of a Vocational Rehabilitation Consultant. The applicant's solicitors also requested the respondent to undergo a number of further medical examinations.

36. In addition, and quite tellingly, it was during this period that the Defence was filed, namely on the 12th May, 2005, and the tender offer made. Further, there are at least two demands in the correspondence from the defendant to the plaintiff that the plaintiff should serve Notice of Trial, failing which "we will serve Notice of Trial ourselves". Throughout all this time there was no suggestion in any letter that the Statute was being, or might be, relied upon.

The Applicant's Submissions

37. The applicant relies firstly on the terms of O. 28 r. 1 which states:-

> "The court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

38. The applicant contends that the amendment requested is "necessary" for the determination of the real questions in controversy between the parties. Anticipating, correctly, that the application was likely to be resisted and opposed on the basis of a plea of estoppel arising from the representation contained in the letter of the 4th September, 2001 to the effect that liability would not be an issue in the case, the applicant places strong reliance on the following passage from the judgment of Chief Justice Keane in the case of *Desmond Ryan v. Michael Connolly and Ann Marie Connolly* [2001] 2 I.L.R.M. 174 at 182:-

> "The fact that a defendant has expressly and unambiguously conceded the issue of liability in a case will not necessarily of itself make it reasonable for the plaintiff to assume that he can defer the institution of proceedings beyond the limitation period. Where an insurance company within days of the accident accepts that no issue on liability arises – e.g. in the case of a passenger wearing a safety belt – but for some reason the subsequent negotiations become dormant, the plaintiff may well find himself unable to rely on the principle under consideration if he permits the limitation period to expire without instituting proceedings. In the absence of a statement by the insurance company from which it was reasonable to infer that, in the event of proceedings not being instituted within the limitation period it would refrain from relying on a defence under the Statute, there seems no reason in principle why the insurance company should be subsequently

precluded from relying on such a defence."

The Respondent's Submissions

39. The respondent relies on the decision of the Supreme Court in *Kevin Doran v. Thomas Thompson & Sons Ltd* [1978] 1 I.R. 223 and also upon the case *of Murphy v. Grealish* [2006] IEHC 22, a decision of Mr. Justice John MacMenamin.

40. Particular reliance was placed on the following passages from the judgments of Henchy J. and Griffin J., respectively, in the *Doran* case. At p. 225 of the report Henchy J. stated:

> "Where in a claim for damages such as this a defendant has engaged in words or conduct from which it was reasonable to infer, and from which it was in fact inferred, that liability would be admitted, and on foot of that representation the plaintiff has refrained from instituting proceedings within the period prescribed by the statute, the defendant will be held estopped from escaping liability by pleading the statute. The reason is that it would be dishonest or unconscionable for the defendant, having misled the plaintiff into a feeling of security on the issue of liability and, thereby, into a justifiable belief that the statute would not be used to defeat his claim, to escape liability by pleading the statute. The representation necessary to support this kind of estoppel need not be clear and unambiguous in the sense of being susceptible of only one interpretation. It is sufficient if, despite possible ambiguity or lack of certainty, on its true construction it bears the meaning that was drawn from it. Nor is it necessary to give evidence of an express intention to deceive the plaintiff. An intention to that effect will be read into the representation if the defendant has so conducted himself that, in the opinion of the court, he ought not be heard to say that an admission of liability was not intended."

41. He continued at 227 of the report:

> "Looking at the matter without the benefit of hindsight, I consider that no reasonable legal adviser who read the file of the plaintiff's solicitor at the stage when the end of the limitation period was approaching could have reasonably believed that the issue of liability had been or would be abandoned. At best he could only have hoped or expected that such would be the case, and the basis for that hope or expectation would have been the plaintiff's instructions and not anything said or done by the insurers.
>
> The insurers had exercised their right to remain silent on the issue of liability. There was no onus on them to deny the allegation of negligence that had been made in the opening letter. It was for the plaintiff's solicitor to pursue the matter in correspondence and, in the absence of a satisfactory reply, to issue proceedings. His failure to do so was not supported by any causative representation by the insurers. As many a would-be plaintiff has learned, it is a fact of life in the world of insurance that a not unusual way for insurers to dispose of unprosecuted claims is to allow them to die of inanition. That is what happened here."

42. Griffin J. stated the following in his judgment in the matter at pp. 230-231 of the report:

> "Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance. The representation, promise or assurance must be clear and unambiguous to found such an estoppel: see Bowen L.J. at p. 106 of the report of *Low v. Bouverie* [1891] 3 Ch. 82. But this does not mean that the representation must be positively incapable of more than one *possible* interpretation. Where, however, more than one construction is possible, the meaning relied upon must clearly emerge in the context and circumstances of the case, although in other contexts or other circumstances the same words might possibly have borne a different construction. In addition, the party relying on the representation must show that the representation was *reasonably* understood by him in a sense materially inconsistent with the allegation against which the estoppel is attempted to be set up: see Cairns L.J. at p. 306 of the report of the Court of Appeal in *Woodhouse Ltd v. Nigerian Produce Ltd* [1972] A.C. 741 where he explained and analysed the celebrated passage of Bowen L.J. in *Low v. Bouverie*.
>
> If the defendant's insurers had made a clear and unambiguous representation (in the sense I have explained) that liability was not to be in issue, and the plaintiff's solicitor had withheld the issue of proceedings as a result, I would have held that the defendants were estopped from pleading the Statute of Limitations."

43. In the present case Counsel for the respondent makes the point that in neither *Doran v. Thompson,* nor in *Ryan v. Connolly*, was there a clear and unambiguous admission of liability. This point was treated as being of significant importance by MacMenamin J. in *Murphy v. Grealish*, and was one of the grounds on foot of which he distinguished the facts in Murphy from those in the Doran and Ryan cases respectively. Moreover, counsel for the respondent in the present case drew attention to the fact that on account of this material difference it had been strenuously argued in *Murphy v. Grealish* that the remarks of Keane C.J. in *Ryan v. Connolly* (which the applicant relies upon) must be treated as obiter dicta. He submitted that this had been accepted by MacMenamin J. and that I should do the same. According to counsel for the respondent the *ratio decidendi* of Ryan is encapsulated in this further quotation from Keane C.J. (which follows on immediately after the passage relied upon by the applicant):

> "On any view, however, it is clear that a plaintiff who seeks to rely on the law as laid down in *Low v. Bouverie* and *Doran v. Thompson Ltd.* must be in a position to satisfy the court that there was a clear and unambiguous representation by the defendants that liability would not be in issue from which it was reasonable for the plaintiff to infer that the institution of proceedings was unnecessary …."

44. Counsel for the respondent submitted that if that is regarded as the ratio of the *Ryan* case then *Ryan* can be readily reconciled with *Doran v. Thompson* and the earlier cases. Essentially, where there has been a clear and unambiguous representation by a defendant that liability will not be in issue, and the plaintiff has reasonably relied upon it, the plaintiff will be able to successfully claim estoppel. The dictum of Keane C.J. engages with the issue of the "reasonableness" of the plaintiff's reliance on the representation. As the Chief Justice pointed out:

> "Where an insurance company within days of the accident accepts that no issue on liability arises – e.g. in the case of a passenger wearing a safety belt – but for some reason the subsequent negotiations become dormant, the plaintiff may well find himself unable to rely on the principle under consideration."

45. In the contention of counsel for the respondent the Chief Justice was doing no more than echoing Henchy J.'s recognition of a legitimate strategy frequently employed by insurance companies, namely that of allowing unprosecuted claims to die of inanition. Thus, if a claim is allowed to go dormant and is not prosecuted for a significant period then, depending on the circumstances of the case, continued reliance on a representation that liability is not in issue *may* become unreasonable. Whether, and if so when, it becomes unreasonable to continue to rely on the representation will be dependent on the circumstances of the particular case, so says the respondent. Counsel for the respondent contends that in this particular case the correspondence, and the course of dealings between the parties, clearly establishes that the respondent's claim was anything but dormant.

Decision

46. This court regards the legal submissions of the respondent as representing a careful and correct analysis of the law. I am satisfied that in this case the respondent was the recipient of a clear and unambiguous representation from the applicant, initially proffered in the letter of the 4th of September 2000, and reiterated in later correspondence. The respondent undoubtedly relied upon this representation from the moment it was made. On the basis of the correspondence and the dealings between the parties I am completely satisfied that the plaintiff's claim was not allowed to go dormant, nor was it not being prosecuted. The non-issuance of proceedings by the 18th of July 2001 occurred in the context of the applicant having been informed of the respondent's solicitors of their wish to have the respondent's husband's case dealt with first, and thereafter to deal with the other two cases. Moreover, the applicant had also been informed that the injuries of neither the respondent nor the respondent's daughter had stabilised to the point where negotiations could be progressed. As recently as the 30th of April 2001 the applicant was informed:

> "In respect of the other two members of the Griffin family their condition is still very serious – we know and understand that your client's objective is to 'box' the claim and assess the value thereof. This has no beneficial interest to our clients and unless and until both Mrs. Griffin and her young daughter reach a recovery stage they will remain under constant medical supervision and attendance and we will not limit their claim by suggesting settlement or otherwise until a clear path of damage, loss and injuries is ascertained."

47. In the light of that representation the applicant could not reasonably have regarded either claim as being abandoned, nor could it have inferred an intention not to prosecute them. In fact it was the very opposite. They were simply being told that these claims were not ready to be progressed *at that point.*

48. Moreover, the way in which the applicant dealt with the respondent at all stages up until the autumn of 2006 served only to reinforce the express representation that had been made that liability would not be an issue. The question of the statute was never raised in correspondence. The respondent's solicitors were encouraged to engage in settlement talks, and did so, and then to issue proceedings. A defence was filed that admitted liability and did not plead the statute. That defence was accompanied by a Notice of Tender. The applicant pressed the respondent to serve Notice of Trial. Throughout this phase there was a very active course of correspondence about the special damages claim. The respondent was regularly being asked to attend medical examinations at the behest of the applicant and was doing so. Experts reports were being exchanged. On no view or construction of the matter could the respondent's claim be regarded as having been abandoned, or as having gone dormant, or as not being prosecuted. The issuance of the Notice of Motion of the 21st of November, 2006 came completely out of the blue, and in my view was unconscionable having regard to the clear and unambiguous representations that had been made, and the course of dealings between the parties. Moreover, I am unimpressed with the averments in Mr. Durcan's affidavit that the limitation period was not initially pleaded due to "a mistake and an oversight". It might be one thing or the other but it is hard to understand how it could be both. This is not explained. Moreover, he does not amplify or describe the nature of the "mistake" referred to. The same comments can be made with respect to the claim of "oversight". It is hard to see how a mistake or oversight could have occurred in the light of the dealings that in fact occurred and in the absence of adequate explanations this Court cannot accept the bald, and on one view of it contradictory, excuses put forward by Mr. Durcan. I consider that the applicant is estopped in the circumstances of this case from relying upon the Statutes of Limitation. I therefore dismiss the application to amend.