Neutral Citation Number: [2008] IEHC 100

THE HIGH COURT

2004 No. 18547 P

BETWEEN

KAREN CREEVY

PLAINTIFF

AND

CAROL BARRY-KINSELLA, JAMES GARDNER, PETER McKENNA, BILL BOYD, ROBERT HARRISON AND THE GOVERNORS AND GUARDIANS OF THE HOSPITAL FOR THE RELIEF OF POOR LYING-IN WOMEN, DUBLIN

DEFENDANTS

Judgment delivered by Ms. Justice Dunne on the 17th day of April, 2008

1. The plaintiff gave birth to twins on 31st October, 2001, by Caesarean section at the sixth named defendant's hospital, the Rotunda. Following the birth she suffered a significant haemorrhage. In order to resolve the haemorrhage, a decision was taken to perform a hysterectomy on the plaintiff. It is alleged that the treatment of the plaintiff after the haemorrhage was negligent and in breach of duty, particularly the decision to perform a hysterectomy.

2. A plenary summons was ultimately issued on 12th August, 2004, claiming damages for personal injuries, loss and damage as a result of the alleged negligence and breach of duty of the defendant's their servants and agents. The plenary summons, though issued, was not served for a considerable period of time and had to be renewed. An order was made on 3rd April, 2006, by the High Court (MacMenamin J.) extending the time to apply for a renewal of the plenary summons and renewing it for a further six months.

3. The first and fourth defendants and the sixth defendant had sought an order pursuant to O. 8(2) of the Rules of the Superior Courts seeking to set aside the order of the High Court renewing the said summons.

4. Order 8(1) of the Rules of the Superior Courts provides *inter alia*:-

> "(1) No original summons shall be in force for more than twelve months from the … date thereof, … but if any defendant therein named shall not have been served therewith, the plaintiff may apply to extend time for leave to renew the summons. The Court … if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the … summons be renewed.
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> (2) In any case where a summons has been renewed on an ex parte application, any defendant shall be at liberty before entering an appearance to serve notice to set aside such order."

5. The application to renew the summons was grounded on an affidavit to Orlaith Traynor, solicitor, sworn on 27th March, 2006. In the affidavit, she set out the background and stated that she had obtained expert reports from Mr. Michael Gilmer, General Obstetrician and Gynaecologist of the John Radcliff Hospital, Oxford, dated 18th June, 2003, and 21st January, 2005, respectively. She also referred to the advices of counsel based on the first report of Mr. Gilmer. One of the matters raised by Mr. Gilmer related to the role of the anaesthetist who attended the plaintiff and Mr. Glimer advised that a report from an anaesthetist should be obtained. Counsel advised *inter alia* that the plenary summons should be issued to stop time running but not served. Ms. Traynor followed those advices.

6. It was not until February, 2006, that she obtained a report from Dr. Buchan, a consultant anaesthetist. His advices made it clear that that there was no fault apparent from the medical notes and instruction the anaesthetic handling of the plaintiff.

7. Finally, Ms. Traynor made the point that the sixth named defendant was aware of the possibility of a medical negligence action as the plaintiff's medical notes and records had been sought and obtained. She further expressed the view that the individual defendants would have been aware of the possibility of proceedings as a result of a letter from her to the hospital seeking the addresses of the defendants. That letter was dated 28th July, 2004. On the basis of that affidavit the plenary summons was renewed.

8. Two notices of motion have now issued on behalf of the first and fourth defendants and on behalf of the sixth defendant grounded on the affidavits of Andrea Mulligan on behalf of the first and fourth defendants and Shauna Sugrue on behalf of the sixth named defendant.

Affidavit of Andrea Mulligan

9. Ms. Mulligan described the background to this matter. She noted that Ms. Traynor received Mr. Gilmer's first report on 18th July, 2003 and that the plenary summons was not served because Ms. Traynor was awaiting a report from a consultant anaesthetist. However, she pointed out that no explanation was furnished by Ms. Traynor for the two years and eight months delay between getting Mr. Gilmer's report and Dr. Buchan's report. Further, she complained of the delay of more than three years in proceeding with the claim against the first and fourth defendants following receipt of Mr. Gilmer's report. She added that the letter of 28th July, 2004, referred to by Ms. Traynor, was not forwarded to her clients and that they first became aware of the possible claim as a result of a short letter of 7th July, 2006, four years and seven months after the date of the alleged negligence. She also noted that to date no statement of claim had been delivered and no reason for this was given. Finally, she stated in her affidavit as follows:-

> "I say and believe that the delay of the plaintiff in prosecuting this action has grossly prejudiced the first and fourth defendants in their ability to accurately recollect the subject matter of the proceedings and defend the case."

Affidavit of Shauna Sugrue

10. Ms. Sugrue complained of the fact that the summons, though renewed in April, 2006, was not served until 27th September, 2006, some six days before the renewal period was due to expire. She also complained of the delay between obtaining Mr. Gilmer's advice that a report be obtained from a consultant anaesthetist and the receipt of the report from Dr. Buchan. She pointed out that there was no explanation for the delay. Finally she added:-

> "I further say and believe that the delay in prosecuting this claim has and will prejudice the sixth named defendant because the passage of time to date and the expected period of time that will elapse between now and the trial of this action will adversely affect the ability of the servants and agents of the sixth named defendant to remember the events of the plaintiff's delivery and to aid in the defence against the plaintiff claim. I say that in the circumstances, the renewal

of the said summons is unjust to the sixth named defendant and should be set aside."

Affidavit of Orlaith Traynor
11. In reply, Ms. Traynor swore a lengthy affidavit on the 23rd November, 2006. In that affidavit, Ms. Traynor sets out a comprehensive history of this matter. She outlined her difficulties in finding an appropriate expert to give an opinion on the circumstances surrounding the plaintiff's delivery and the subsequent hysterectomy. That took from November, 2002, to February, 2003, and a report was received as noted already on 18th June, 2003, from Mr. Gilmer.

12. The task of finding a consultant anaesthetist to advise on that aspect of the case took considerably longer. Ms. Traynor has set out details of the attempts made by her in this regard. She had written to a Ms. Doig of Actions for Victims of Medical Accidents in November, 2004, to assist in finding an appropriate expert and when this did not prove fruitful, she contacted a British firm called Medical Case Notes Assessment Limited in September, 2005. Ultimately, through the intervention of that company, the report was obtained from Dr. Buchan on 3rd February, 2006.

13. Why Ms. Traynor was trying to find a consultant anaesthetist to advise, she was also taking other steps in relation to the matter. She confirmed the position in relation to hospital records with the sixth named defendant's solicitors and received some missing pages from the medical notes of the plaintiff. She obtained a copy of the relevant protocol from the hospital dealing with post-partum haemorrhage and she obtained further advices from Mr. Gilmer in respect of same. There was further correspondence about service of the proceedings. She was also in correspondence with counsel. She maintained that it was clear that the case had not remained idle and that she was at all times "attempting to properly prosecute the plaintiff's case". Finally she rejected the assertion that there was any prejudice caused to the defendants by reason of the delay.

Supplemental affidavit of Andrea Mulligan
14. In this affidavit, Ms. Mulligan asserted that Ms. Traynor had proffered no explanation regarding her failure to effect service within the proper time period. She also reiterated her belief that the first and fourth named defendants would be severely prejudiced in their ability to defend the plaintiff's claim. Finally, she complained that it was not until 7th July, 2006 that her clients were notified of the proceedings.

Legal submissions
15. I had the benefit of helpful legal submissions on behalf of the parties.

16. Ms. Leonowitz, on behalf of the first and fourth defendants, refers to the provisions of O. 8. As this was a case where there was not a difficulty in serving the defendants, it was necessary for the plaintiff to establish "other good reason" for the renewal of the plenary summons. She referred to *O'Grady v Southern Health Board* (Unreported, High Court, O'Neill J. 2nd February, 2007) in which it was held that a defendant seeking to set aside or renewal of a summons had to adduce new evidence which, had it been before the court on the ex parte application, would have persuaded the court to have refused the renewal. Her contention was that from the date of receipt of Mr. Gilmers's report on 18th June, 2003, the plaintiff and her advisers were aware of the nature of the cause of action against the first and fourth defendants. There was no reason why the plenary summons could not have been served. She relied on a passage from the judgment of O'Neill J. at p. 17 where he stated:-

> "I would readily accept that the plaintiff and his legal advisors had an obligation to ensure that there was a sound basis in law for the claim before it was commenced and that it was legitimate for him as said by McGuinness J. *in Cunningham v. O'Leary* [2004] 2 I.L.R.M at 502-503 to issue his plenary summons to stop the statute running and to delay serving it while he investigated the available medical evidence.
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> However, this permission could not amount to a licence to delay. Indeed, I would be of opinion that a plaintiff in this situation carried an onerous duty to eliminate all unnecessary delay knowing that some delay in communicating the claim to the proposed defendant would be inevitable because of the need to establish that there was sound medical evidence to support the claim. The inordinate loss of time as discussed impedes the plaintiff in my view from claiming that his obligation to investigate the medical evidence provides a justification or acceptable excuse for not serving the summons within the time prescribed by the Rules of the Superior Courts."

17. Ms. Leonowitz also referred to *Hogan v Jones* [1994] 1 I.L.R.M. 512, which held *inter alia* that:-

> "Time elapsed prior to the commencement of the proceedings within the relevant limitation period cannot of itself constitute inordinate delay. However, a late start within this period makes it more incumbent on a plaintiff to proceed with expedition."

18. She also complained of the lengthy delay in notification of the claim to the first and fourth named defendants. While there was correspondence between Ms. Traynor and the hospital in connection with the claim against her clients, they were not notified directly of the claim until July, 2006.

19. She submitted that on the evidence before the court, the prejudice to the first and fourth defendants outweighed the prejudice to the plaintiff. Finally, she referred to the case of *Roche v Clayton* [1998] 1 I.R. 596. In the judgment of the Supreme Court, O'Flaherty J. commented as follows:-

> "I cannot detect that there is any good reason. It is not a good reason in light of *O'Brien v. Fahy* to renew a summons simply to prevent the defendant availing of the Statute of Limitations. The Statute of Limitations must be available on a reciprocal basis to both sides of any litigation."

20. Mr. McGinn, on behalf of the sixth named defendant, pointed out that the hospital was put on notice of a claim, in July, 2004. He highlighted the delay of two years and eight months between the reports from Mr. Gilmer and Dr. Buchan. He submitted that no good reason was given for this delay.

21. He relied on the submissions made by Ms. Leonowitz and also referred to the decision in the case of *Kelleher v Bradley and Others* (Unreported, High Court, 18th December, 2006).

22. Mr deBlacam appeared on behalf of the plaintiff. He accepted Mr. McGinn's identification of the critical period from the point of view of delay as being the period from the receipt of Mr. Gilmer's report in June, 2003, until the receipt of Dr. Buchan's report in February, 2006. He referred to the lengthy explanation given in Ms. Traynor's affidavit for this delay and referred to the other steps

taken during this period as outlined by Ms. Traynor in her affidavit. He submitted that the delay arose because of the need to complete the investigation into the plaintiff's claim and that such delay was entirely legitimate.

23. He referred to the decision in *Reidy v National Maternity Hospital* (Unreported, High Court, Barr J., 31st July, 1997), in which it was stated at p. 5 of the judgment:-

> "It is irresponsible and an abuse of the process of the court to launch a professional negligence action against institutions such as hospitals and professional personnel without first ascertaining that there are reasonable grounds for so doing. Initiation and prosecution of an action in negligence on behalf of the plaintiff against the hospital necessarily required appropriate expert advice to support it. It appears that experts in Ireland were not prepared to advise the plaintiff and eventually it was necessary to obtain the services of an English paediatrician. All in all, it seems to me that there is not a convincing case to be made that there was inordinate and inexcusable delay in bringing and prosecuting the plaintiff's claim against the defendant, prior to the year 1992 at earliest."

24. Mr. de Blacam speculated that if the plaintiff's solicitor had served the plenary summons before the investigation was completed, that there would be pressure on the plaintiff from the defendants to deliver a statement of claim.

25. He also referred to the decision in *Roche v Clayton* referred to above.

26. Mr. de Blacam then referred to the decision in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459. He referred to the applicable principles to an application to dismiss an action for want of prosecution set out at p. 475 of the judgment. One of the matters set aside in that case as a ground for dismissal was inordinate and inexcusable delay. But he emphasised that the court had to consider what was in the interests of justice.

27. Mr. de Blacam conceded that the delay in this case might be considered inordinate but he rejected the suggestion that it was inexcusable.

28. His final point related to the question of prejudice. He pointed out that this was not the most complicated case. Neither the first nor the fourth named defendants had averred that they have no recollection of the case and there has been no suggestion that any prejudice will result in an unfair trial.

Decision

29. This is a case in which the plaintiff seeks to pursue a claim for negligence arising out of the events that occurred during the delivery of twins in October, 2001. The plenary summons was issued on 12th August, 2004, and ultimately it was served on or about 21st September, 2006, on the first and fourth defendants and on 27th September, 2006, on the sixth named defendant, having been renewed in April, 2006.

30. The defendants have raised a number of issues as to the information before the court which granted the order to renew the plenary summons herein. However, the question is whether the information now before the court is such as to bring the case to the point that had such information been before the court on the ex parte application to renew, would that information have persuaded the court to have refused the application to renew the plenary summons. (See *O'Grady v Southern Health Board* referred to above). Lengthy affidavits have been exchanged between the parties and in particular the affidavit of Orlaith Traynor referred to above sets out in great detail the steps taken by her prior to the renewal of the plenary summons to establish that the plaintiff did indeed have a case against the defendants. Mr. de Blacam S.C. in the course of his submissions accepted that there was a considerable period of delay between the receipt of the report from Mr. Gilmer and the report of Dr. Buchan. He accepted that whilst the delay could be described as inordinate, it was not inexcusable. During the course of argument he referred to the decision of the High Court in the case of *Reidy v National Maternity Hospital* in which Barr J. had described it as irresponsible and an abuse of the process of the court to launch a professional negligence action against institutions such as hospitals and professional personnel. The question therefore arises, does the need to carry out such an investigation provide the necessary "other good reason" as set out in O. 8(1)? In my view, the answer to that question in the context of this case, and having regard to all the circumstances of this case, is undoubtedly yes. It is clearly the case that there was an inordinate delay in completing the investigations as to the appropriate parties to be sued. There was a question of whether or not the anaesthetist who attended the plaintiff during the delivery of the twins should be joined as a defendant. It would not have been appropriate to simply issue proceedings following the receipt of Mr. Gilmer's report including a claim against the anaesthetist simply on the basis that there might be a claim open against that individual. It was appropriate to get a report on that aspect of the case. It is unfortunate, to say the least, that it took so long to obtain such report. It is clear that Ms. Traynor had difficulty in finding an appropriate person to furnish such a report. I accept, therefore, that the delay of two years and eight months, whilst it is inordinate, is not such as to be inexcusable. I note that during the relevant period, the plaintiff's solicitor was taking further steps in the matter; it is clear that throughout this time she engaged in further correspondence with the sixth defendant's solicitors to ensure that she had the complete medical records of the plaintiff and also to obtain from them a copy of the post-partum haemorrhage protocol; she also sought further advices from Mr. Gilmer and from counsel. It is not as though the case fell into abeyance during this period.

31. It is clear that I am satisfied that there is other good reason for the failure of the plaintiff to serve the plenary summons within the time permitted. I am also, as is clear from the above, satisfied that the delay herein, although inordinate, is not inexcusable. I accept the principle that the need to investigate the basis of the claim is not a licence to delay but on the facts of this case, I am satisfied that the plaintiff and her advisors have not overstepped the boundaries of what is permissible.

32. The final issue to be considered is the issue of prejudice. One of the complaints made herein relates to the lack of notification of the claim to the putative defendants. So far as the first and fourth defendants are concerned, it is deposed to by their solicitor that they were not made aware of the proceedings prior to 7th July, 2006. I am not sure if it is also the case that they were unaware of the possibility of a claim being made against them before that date, given that there had been correspondence between the hospital, its solicitors and Ms. Traynor since June, 2002. That is not clear from the affidavits sworn herein. However, I accept that they were not made aware of the proceedings until the letter of the 7th July, 2006.

33. It is undesirable that any party seriously contemplating litigation should not inform the party or parties against whom litigation is contemplated of that fact at an early stage. Once a party is informed of the possibility of litigation in contemplation against them, they may, if they chose to do so, take steps to prepare for any threatened litigation. They may make enquiries to establish the facts, to ascertain the identity of witnesses, to preserve evidence and so on. In the case of the first and fourth defendants, they could have informed their insurers and prepared appropriate statements from their recollection of the relevant facts. They were deprived of that opportunity until long after the events giving rise to these proceedings. In my view, that is not the way litigation should be conducted. The effect of the failure to inform the defendants of the possibility of proceedings is something that could, in some cases,

tip the balance against a plaintiff in favour of a defendant when considering the question of prejudice. In this particular case, from the receipt of the report of Mr. Gilmer, it is clear that proceedings were in contemplation against the first and fourth named defendants and the sixth named defendant. There is no reason why they could not have been notified of that fact at an earlier stage.

34. The position of the sixth named defendant was somewhat different. From an early stage, there had been correspondence between the plaintiff's solicitor and the solicitors for the sixth named defendant. It is necessary to consider whether the delay complained of in this case is such as to require this Court to set aside the renewal of the summons.

35. In considering such a step, it seems to me that the Court is required in the interest of justice to balance the prejudice to the plaintiff in setting aside the renewal against the prejudice to the defendants in not setting aside the renewal of the summons. The prejudice to the plaintiff is obvious. So far as the first and fourth defendants and the sixth defendant are concerned, no specific or actual prejudice has been asserted by them other than the effect of the passage of time on the recollection of the witnesses. In assessing the respective prejudice of the plaintiff and the first and fourth defendants and the sixth defendant, it seems to me that the prejudice to the plaintiff in not renewing the plenary summons herein far outweighs the prejudice to the defendants. Having considered the matter, I am satisfied that the interest of justice requires that the summons in this case should have been renewed. Accordingly, I am refusing the relief sought herein.