THE HIGH COURT

[2017/3446 P.]

BETWEEN

CIARA GANNON MAGUIRE

PLAINTIFF

AND

EILEEN O'CALLAGHAN

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 28th day of June, 2019

1. In the motion before the court, the defendant seeks the trial of a preliminary issue as to whether the plaintiff's claim is statute barred.

2. These are medical negligence proceedings brought by the plaintiff against the defendant in her capacity as the executrix of her late husband, Dr. Peter O'Callaghan who died on 30th September, 2013.

3. The relevant chronology is as follows: -

> 11th October, 1997 – the plaintiff's date of birth.
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> 5th March, 2013 – the plaintiff, who was then aged 15 years, attended Dr. O'Callaghan complaining of a lump in her neck. It is alleged that Dr. O'Callaghan indicated that it was just tissue and nothing to worry about and referred her to Temple Street Hospital for a blood test. She underwent the blood test but heard nothing further.
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> 30th September, 2013 – Dr. O'Callaghan died.
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> 25th April, 2015 - the plaintiff was seen by another general practitioner with the same complaint who referred her for an urgent appointment at the Mater Hospital where the plaintiff had a biopsy taken which led to a diagnosis of papillary thyroid cancer which had spread to her lymph nodes. She was immediately admitted for urgent surgery and thereafter radiotherapy.
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> 30th September, 2015 – this was the second anniversary of Dr. O'Callaghan's death.
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> 11th October, 2015 – the plaintiff attained her majority.
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> Summer 2016 – the date alleged by the plaintiff to constitute her date of knowledge for the purposes of the Statute of Limitations (Amendment) Act 1991.
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> 13th April, 2017 – a personal injuries summons was issued.

The Civil Liability Act 1961

4. Sections 8 & 9 are relevant to the issues arising in this application and provide as follows: -

> "8(1) on the death of a person on or after the date of the passing of this act all causes of action (other than accepted causes of action) subsisting against him shall survive against his estate.
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> (2) Where damage has been suffered by reason of any act in respect of which a cause of action would have subsisted against any person if he had not died before or at the same time as the damage was suffered, there shall be deemed for the purposes of subsection (1) of this section, to have been subsisting against him before his death such cause of action in respect of that act as would have subsisted if he had died after the damage was suffered.
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> 9(1) In this section 'the relevant period' means the period of limitation prescribed by the statute of limitations or any other limitation enactment.
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> (2) No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either –
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> > (a) proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or
> >
> > (b) proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."

5. This application is brought pursuant to O.25 of the Rules of the Superior Courts:

> "1. Any parties shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.
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> 2. If, in the opinion of the court, the decision of such points of law substantially disposes of the whole action, or if any distinct cause of action, ground of defence, set off, counter claim, or apply therein, the court may thereupon dismiss the action or make such order therein as may just."

The Arguments
6. The defendant contends that since these proceedings were issued more than two years after Dr. O'Callaghan's death, they are statute barred by s.9 of the 1961 Act. The constitutionality of that section has previously been upheld by the Supreme Court in *Moynihan v. Greensmyth* [1977] I.R. 55 and therefore on its face, the plaintiff's case is prima facie statute barred. This is a discrete issue of law which can be conveniently tried by the court as a preliminary issue without the defendant being exposed to the cost and inconvenience of a much lengthier medical negligence trial.

7. In response, the plaintiff contends that s.9(2)(b) of the 1961 Act is unconstitutional and that such constitutional issue can only be tried after a trial of the facts on oral evidence. Alternatively, the plaintiff contends that the defendant, who is indemnified by an insurance company, is not entitled to rely on s.9(2)(b) as it would be unconscionable and an abuse of process for the defendant's insurance company to so rely in circumstances where there is in truth no contest between the plaintiff and the estate of the defendant. Rather the contest is between the plaintiff and an insurance company and therefore the issue sought to be agitated on foot of this motion is moot.

8. A further argument raised by the plaintiff is that a constitutional interpretation of the section requires it to be read as subject to the date of knowledge provisions contained in the Statute of Limitations (Amendment) Act 1991. Finally, the plaintiff pleads that if the section is constitutionally valid, it is incompatible with the State's obligations under the European Convention on Human Rights. However, the parties are agreed that this can only be considered after the exhaustion of other remedies and does not fall to be dealt with as part of the preliminary issue.

Discussion
9. In *Moynihan v. Greensmyth*, the plaintiff was injured in a road traffic accident that occurred on 6th August, 1966. She was then aged 16 years and was a passenger in a car driven by William Greensmyth which collided with a bridge. Mr. Greensmyth was killed in the accident and the defendant was his personal representative. Proceedings were issued by way of plenary summons on 5th August, 1969. The plaintiff attained her majority on 16th April, 1971, the age of majority then being 21 years. The defendant pleaded that the claim was barred by s.9(2)(b) of the 1961 Act, having been instituted more than two years after Mr. Greensmyth's death.

10. The plaintiff replied that s.9 was invalid having regard to the provisions of article 40.3 of the Constitution. Both the High Court and the Supreme Court upheld the validity of the section. It is important to note that the case was determined by way of trial on the preliminary point of law arising in advance of the plenary hearing. In argument before the Supreme Court, the plaintiff contended that as a person suffering from a disability at the date of the accident, s.9(2)(b) constituted an unjust attack on her property rights. This argument was rejected by the Supreme Court whose judgment was delivered by O'Higgins, C.J. who said (at p.72): -

> "When it was decided to provide generally for the survival of causes of action, a general limitation period of two years was provided in the impugned provisions of s.9 ss.2(b) of the Civil Liability Act 1961. It was conceded in argument that this could not be regarded as an unjust attack on those not suffering from incapacity and that, in such circumstances, the period was reasonable and fair. In relation to those (such as the plaintiff) who at the time of the accrual of the cause of action or under twenty-one years of age, is a two-year period from the death of the wrongdoer so unreasonably short as to constitute an unjust attack on their rights? Bearing in mind the State's duty to others – in particular those who represent the estate of the deceased, and beneficiaries – some reasonable limitation and actions against the estate was obviously required. If the period of infancy were to form part of the period of limitation, as was formerly the case, then the danger of stale claims being brought would be very real and could constitute a serious threat to the rights of beneficiaries of the estate of a deceased. The alternative was to apply a period of limitation which would have general application. It had to be either one or the other; and it does not appear that any compromise was possible."

11. In the course of his argument, counsel for the plaintiff contended that, while not suggesting outright that it was wrongly decided, in the intervening 42 years since *Moynihan v. Greensmyth* was decided, judicial thinking had advanced significantly, particularly in the context of the trial of a constitutional issue by way of a preliminary point of law. He submitted that *Moynihan* was not consistent with later authorities such as *Murphy v. Roche* [1987] I.R. 106 and *McDaid v. Sheehy* [1991] 1 I.R.1. In the former, the plaintiff was a member of an unincorporated members club who suffered an injury while attending a dance at the club's premises. He sued and was met with the defence that he was estopped by his membership from bringing the proceedings.

12. The plaintiff replied that any estoppel was repugnant to the Constitution. The plaintiff applied under O.25 to have these points of law determined by preliminary issue and put the Attorney General on notice. The Attorney General objected on the grounds that it was inappropriate to have a question of constitutional law determined when it might ultimately prove to be moot if the plaintiff failed on the negligence issue.

13. The Supreme Court found in the Attorney's favour holding that the court should decline to decide any question of law in the form of a moot and that where the issues between the parties could be disposed of by the resolution of an issue of law other than constitutional law, the court should consider that issue first and if it proved decisive, decline to express any view on the constitutional issue.

14. Counsel for the plaintiff placed particular reliance on the judgment of the Supreme Court in *McDaid v. Sheehy* [1991] 1 I.R.1. Here again, the principle of avoidance was discussed, which is that the constitutional issue should always come last, and only if necessary. The court declined to follow its earlier judgment in *McDonnell v. Bord Na gCon (2)* [1965] I.R. 217 where the constitutional validity of the Greyhound Industry Act 1958 was tried as a preliminary issue without evidence. This left subsequently to be determined an allegation by the plaintiff that even if the provisions of the act were constitutionally valid, the procedures that had been adopted were in fact unlawful. The Supreme Court in effect held that this was putting the cart before the horse. Finlay C.J. observed (at p.18): -

> "The judgment of the majority of the court was delivered by Lavery J. and Kingsmill Moore J.; Haugh J. and Walsh J. concurred with it. That judgment appeared to be entirely directed towards questions of convenience in the procedures and no question of the inappropriateness of trying the constitutional validity of the stature as a moot arose.
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> The facts in *McDonald v. Bord na gCon* [1964] I.R. 350 undoubtedly are different from the facts in the present case, for if the plaintiff in that case were to succeed on the constitutional validity claim (in fact he succeeded on that claim subsequently in the High Court and lost on appeal in the Supreme Court) he would have succeeded in the entire of his action and it would have been unnecessary to have any trial of the issue as to the improper procedures under the act.

> Insofar, however, as the case constitutes a break in what otherwise appears to be a relatively consistent attitude by this Court to the question which I am here considering, I would feel obliged, after careful consideration, to refuse to follow it."

15. Counsel accordingly suggested that the procedure adopted in *Moynihan v. Greensmyth* where the constitutionality of legislation was considered by way of the trial of a preliminary point of law, was expressly or by implication overruled by later cases and in particular *McDaid v. Sheehy*.

16. I cannot accept that proposition. It seems to me that the principle that the court was enunciating in each of these cases was that the constitutional issue should be considered only after all non-constitutional issues which might otherwise be dispositive of the case were dealt with. It is only at that stage that one comes to the constitutionality of the legislation. That appears to me to be the conclusion of both *Murphy v. Roche* and *McDaid v. Sheehy* which declined to follow *McDonald v. Bord na gCon* for that very reason.

17. I see no incompatibility arising between *Moynihan v. Greensmyth* and the later cases relied upon by the plaintiff. Indeed, *Moynihan v. Greensmyth* has been consistently followed in a number of subsequent decisions – see *McCullough v. Ireland* [1989] I.R. 484, *Keane v. Western Health Board* [2006] I.E.H.C. 283 and [2007] 2. I.R. 555 and *Prendergast v. McLoughlin* [2011] 1. I.R. 102.

18. Counsel for the plaintiff also argues that a preliminary issue of the kind sought by the defendant can only be tried on agreed facts and in the present case, the plaintiff's date of knowledge is not agreed or at least is only agreed by the defendant for the purposes of the issue but not the substantive trial. It is certainly true to say that at least since *McCabe v. Ireland* [1999] 4. I.R. 151, it has been held that preliminary issues of law cannot be tried *in vacuo* but only in the context of established or agreed facts. Thus Lynch J. delivering the court's judgment in that case said (at p.157): -

> "The facts relevant to the preliminary issue must not be in dispute, but they may be agreed for the purposes of the preliminary issue of law only without prejudice to the right to contest the fact that the actual determination of the preliminary issue should not dispose of the matter at issue. The facts must be agreed or the moving party must accept, for the purposes of the trial of the preliminary issue which he raises, the facts as alleged by the opposing party".

19. As the above chronology shows, the proceedings here were issued within two years of the plaintiff's eighteen birthday so if the limitation period of two years from Dr. O'Callaghan's death does not apply, the proceedings were issued in time. On that basis, the plaintiff's date of knowledge does not appear to be relevant but even if it is, the defendant has expressly in her submissions accepted the plaintiff's alleged date of knowledge for the purposes of the trial of the preliminary issue (at para. 3.16). As the above cited passage from the judgment of Lynch J. makes clear, it is perfectly open to a defendant to accept given facts solely for the purposes of the issue without prejudice to his right to contest them at the trial proper.

20. Although it was suggested on behalf of the plaintiff that the recent judgment of the Supreme Court in *Ras Medical Limited v. Royal College of Surgeons* [2019] I.E.S.C. 4 changes that position, I have to say that I do not read it thus. The passages in the judgment relied upon by the plaintiff appeared to me to be primarily concerned with the evidential status of, in particular, documents exhibited in a trial on affidavit.

21. Another argument advanced on behalf of the plaintiff is that the court should not order a trial on a point of law which is in effect moot. The mootness allegedly arises from the fact that there is no issue between the plaintiff and the estate of Dr. O'Callaghan but rather with his insurers. Since the estate in reality has no interest in these proceedings, it is said that the insurers cannot in conscience rely on the statutory provision.

22. Whether that is correct or not is of course an issue yet to be decided. It is certainly at a minimum arguable that it is not moot. The defendant is expressly sued in her capacity as personal representative of her husband's estate so that as a matter of law, the estate is the defendant, not the insurance company. It might be argued that the estate does in fact have a stake in the matters in issue whether from the perspective of Dr. O'Callaghan's reputation or the fact that if at any time in the future indemnity was to be declined for any reason, a scenario not unheard of, the estate would become directly liable. The point is however that I do not think it can be said that the issue is so clear cut as to be beyond argument.

23. The plaintiff does however concede that the issues she raises by way of reply relating to mootness, unconscionability or abuse of process are suitable for trial by way of preliminary issue, while maintaining her objection to the necessity for the constitutional issue to be tried in the same manner. However, I accept the defendant's submission that the avoidance principle is more accurately described as being that the court should not engage in a challenge to the validity of a statute unless it is necessary to do so for its decision. In the present case, it would become so necessary in circumstances where the plaintiff's other arguments concerning mootness and abuse of process fail.

24. I am satisfied therefore that there is no impediment to the determination of the preliminary issues sought by the defendant provided it is otherwise procedurally appropriate to deal with the matter as a preliminary issue. Helpful guidance as to the relevant criteria to be applied in considering applications for trials of preliminary points of law under O.25 was given by the Supreme Court in *Campion v. South Tipperary County Council* [2015] 1 I.R. 714. The court's judgment was given by McKechnie J. who summarised the principles thus at p.731: -

> "Summary of Legal Position
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> 35. The following therefore is a summary of the legal position before Order 25 of the Rules of the Superior Court can be successfully invoked:-
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> • There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.
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> • There must exist a question of law which is discrete and which can be distilled from the factual matrix as presented.
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> • There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.

> • The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.
>
> • Conversely if irrespective of the court's decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an order.
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> • Exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.
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> • As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate.
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> • It must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful, to retain the traditional separation of such matters.
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> •'Convenience' therefore should be understood as meaning that the process will enhance in an overall way the most efficient, timely and cost effective method of disposing of the entire litigation.
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> • The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties.
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> • The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally
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> • Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."

25. Other recent decisions of the Supreme Court have applied these principles – see L.*M. v. Commissioner of An Garda Síochána* [2015] 2 I.R. 45 and *O'Sullivan v. Ireland* [2019] I.E.S.C. 33. In the latter case, Charleton J. endorsed the principle that a unitary trial would in the normal way be the default option and approved the judgment of Clarke J. (as he then was) in *Weavering Macro Fixed Income Fund Limited v. PNC Global Investment Servicing* [2012] 4 I.R.681 where Clarke J. said (at 699-700): -

> "As is clear from those authorities the trial of the preliminary issue under the rules is concerned with circumstances where it is possible to separate out a legal issue which can be determined on the basis of facts agreed either generally or for the purposes of the preliminary issue. It is also possible under O.35, to have an issue of fact tried where the case will almost completely depend on a resolution of that factual question. What is, however, clear from all the authorities is that the trial of an issue, formally separated out as a preliminary issue in the sense in which that term was used in the rules, is a practice which is to be adopted with great care by virtue of the experience of the courts that 'the longest way around is often the shortest way home'."

Conclusion

26. The defendant in these proceedings is facing the trial of a medical negligence action which will likely concern issues of liability, causation and quantum. The duration of such trials is often measured in weeks rather than days. Very significant costs are usually involved. The defendant here contends that the claim is clearly statute barred on its face on foot of a provision which has already been found by the Supreme Court to be constitutionally valid.

27. One would have expected the trial of an issue on this point to be of very limited duration, even allowing for the incorporation of the additional points raised by the plaintiff. It would seem likely that the duration of the hearing would not exceed a day or so. If the point is decided in favour of the defendant, that is decisive to the outcome of the case. It is only in the event that the defendant succeeds that the Attorney General becomes involved in answering the complaint of constitutional invalidity, at which stage the defendant's involvement will cease.

28. Viewed in this light, it seems to me that the interests of justice must favour the granting of the defendant's application. I will discuss further with counsel the precise wording of the order.