Neutral Citation Number: [2011] IEHC 226

THE HIGH COURT

2008 1225 P

BETWEEN

NATALIE COURTNEY

PLAINTIFF

AND

OUR LADY'S HOSPITAL LIMITED T/A OUR LADY'S HOSPITAL CRUMLIN, JACKIE MURRAY AND SANDRA WALSH

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 27th day of May, 2011

1. In these proceedings, the plaintiff sues for damages for nervous shock suffered by the plaintiff arising from the circumstances of the death of the plaintiff's daughter, Aisling, in the defendants' hospital in the early hours of Sunday 19th February, 2006. The defendants have conceded liability and the case proceeded as an assessment of damages only.

2. The facts relevant to the issues to be determined by me are as follows.

3. The plaintiff, who was born on 7th September, 1982, and her partner, Leslie Maher, had, when the events which gave rise to these proceedings occurred, three children. The first of these, Caitlin, was aged four and a half years at the time, and her other two children, who are twins, are Aisling and Aaron, were born on 18th July, 2003.

4. On the evening of 18th February, 2006, the plaintiff and her partner put the twins to bed as usual, and Aisling, at that stage, was well. At 11.30pm, Aisling was awake and the plaintiff heard her crying. She was given Calpol but did not keep this down. She appeared to be hallucinating and pointed to the back of her neck as being sore. The plaintiff became immediately concerned and she and Leslie decided to bring her to Crumlin Hospital, which was nearby, the plaintiff and her partner were then living at 54, Galtymore Close in Drimnagh. They were at the hospital at about midnight and Aisling was examined by a Triage nurse who gave her Paracetamol. The plaintiff and her partner remained with Aisling awaiting attention in the hospital throughout the night. During that time, at about 3,00am, Aisling developed a rash on her back. The plaintiff, in her evidence, described repeatedly requesting attention throughout the night. Between 7.00am and 7.30am Aisling was examined by a doctor who said she had a viral gastric bug which would last 24-hours and she was mildly dehydrated. Aisling had developed purple stops, and at about 7.30am, she was put on a drip. At some stage thereafter, the plaintiff was informed that Aisling was being treated for meningitis and she was connected to a variety of medical equipment. Her condition rapidly deteriorated and she was brought to the Intensive Care Unit where she suffered a heart attack and died at 10.25am on the morning of Sunday 19th February, 2006. Apart from the half-hour or so when Aisling was in intensive care, the plaintiff had been with Aisling at all times.

5. The plaintiff's immediate and very understandable reaction to these horrific events was one of intense shock, and it is in respect of that "nervous shock" and the psychiatric illness that has resulted from it that she now seeks to recover damages.

6. The very difficult complicating feature in the assessment of damages in this case is distinguishing between the psychiatric illness suffered by the plaintiff as a result of her being present and witnessing the shockingly traumatic sequence of events that night, from the natural grief which would, and indeed, has resulted from the tragic death of Aisling. In this respect, the plaintiff, as one of the dependents of Aisling within the meaning of Part IV of the Civil Liability Act 1961, has been compensated for her mental distress, subject to the statutory limit in that regard, in proceedings that culminated in the order of this court (DeValera J.) made on 15th December, 2010, wherein DeValera J. approved the sum of €32,111.13, in settlement of the claim on behalf of the dependents of Aisling.

7. Apart from suffering, as was only to be expected, a grief reaction which may, indeed, have become a prolonged grief reaction, I am quite satisfied from the evidence of the plaintiff and her partner, Leslie, and from the evidence of her General Practitioner, Dr. Miriam Carey, and of Dr. Rita Condron, a consultant psychiatrist in St. James's Hospital, who saw her on four occasions between 18th May, 2006, and 24th October, 2007, and also the evidence of Dr. John Ryan, a consultant psychiatrist, who saw her on 23rd November, 2010, that the plaintiff suffered a significant depressive illness, which, I am satisfied, was caused by her exposure to and experiencing of the shockingly traumatic sequence of circumstances in the defendants' hospital, culminating in the death of Aisling. Over a period of in excess of a year, the plaintiff attended Dr. Finnegan, a psychologist in St. Martha's Unit attached to St. James's Hospital, on a very regular basis, but had to discontinue this therapy because she found it too distressing. The plaintiff also availed of antidepressant medication but was disinclined to continue reliance on this type of medication, being apprehensive of long-term dependence on same.

8. Since the death of Aisling, the plaintiff's life has changed utterly, and she has become, to a significant extent, disabled or dysfunctional across a broad range of the normal activities of daily living. Whereas before, she had no history of psychiatric illness and was a bright, outgoing individual who coped easily and cheerfully with the normal burdens of life, she has, since these events, become socially withdrawn, to the extent of not having gone out socially with her partner since then, and has abandoned all thought of developing her vocational life. She has become irrationally fearful for the safety and health of her other children to the extent of being unwilling to leave them for normal social engagement. In addition, she has been constantly bringing them to the doctor for the most minor of upsets, as she is constantly fearful of dire outcomes. Apart from these outward manifestations of mental illness, she, herself, suffers from very low mood and feelings of guilt and anger at what she perceived to be her own failure to have intervened and taken appropriate action during that terrible night to have obtained the appropriate response from the defendants in time to have saved Aisling's life. The fact that liability in respect of these events was not conceded by the defendants until late last year, shortly before the fatal accident proceedings came on for hearing, greatly aggravated her feelings in this regard.

9. It is quite clear that all of this gross alteration of the plaintiff's personality and lifestyle, and the complex of feelings that have dominated her life since 19th February, 2006, are very different from the content of a normal grief reaction, and I am quite satisfied

are to be attributed to the intense nervous shock suffered by the plaintiff, quite understandably and foreseeably, as a result of being present and witnessing the events that occurred that night.

10. I have no doubt that the nervous shock suffered by the plaintiff and the mental illness resulting from it have caused the plaintiff great suffering over the past five years, and in my view, the appropriate sum to compensate the plaintiff, by way of general damages for this is €75,000.

11. I accept the evidence of the two psychiatrists that the plaintiff can recover to a significant extent from the mental illness that currently swamps her life, through the process of cognitive therapy and, perhaps, from time to time, reliance on anti-depressive medication, but I also accept that she will never fully recover and the experience she endured will affect her to some extent for the rest of her life. The plaintiff is still a very young person, not yet thirty years of age, and so bearing in mind the arduous process which recovery will undoubtedly involve, and even if successful, the long-term effects of her experience, I would assess her general damages for the future in the sum of €75,000, making a total of €150,000 for general damages.

12. An issue arises which was adjourned in the fatal injuries claim as to whether or not the plaintiff is entitled to recover from the defendants her costs of legal representation at the inquest into Aisling's death. The plaintiff's claim in this respect amounted to €21,407. The defendants submit that the plaintiff is not entitled to recover this sum or any sum in respect of the costs of her legal representation at the inquest. They say that because the inquest did not and could not have determined any issue of criminal or civil liability, that there was no need for the plaintiff to be legally represented as there was no issue arising which could affect the outcome of the fatal accident proceedings. They submit that s. 49(2)of the Civil Liability Act, applies which reads:

> "(2) In addition, damages may be awarded in respect of funeral and other expenses actually incurred by the deceased, the dependents or the personal representative by reason of the wrongful act."

13. Properly construed, they submit that this sub-section does not permit the recovery of the costs of legal representation at an inquest. It was submitted that the *ejusdem generis* rule of construction applied, and that, therefore, such expenses as were recoverable as "Other Expenses" were confined to those expenses which arose in respect of the funeral and no more. Reliance was placed upon the following passage from p. 622 of '*Irish Law of Damages for Personal Injuries and Death*' by Dr. John White, where the learned author, in discussing what might fall within the general category of "Funeral Expenses", says the following:

> "Burial expenses, including the cost of a grave, coffin, embalming, death habit, wreath, transportation of corpse, travelling expenses of dependent mourners, gravediggers, morticians and undertaker's fees, advertising expenses, the cost of a tombstone (but not a memorial) and the expenses associated with religious services in connection with the burial of the deceased."

14. Dr. White then lists what he considered might come under "Other Expenses" as follows:

> "Other expenses, including the travelling expenses of dependents visiting the deceased while injured prior to death, the cost of mourning clothes for the dependents, the cost of a wake for the deceased, the cost of replying to letters of sympathy and having masses said for the intentions of the sympathisers."

15. Manifestly, Dr. White makes no mention of the costs of legal representation at an inquest as coming under "Other Expenses".

16. For the plaintiff, it was submitted that s. 49(2) does not exclude the costs of legal representation at an inquest and the sub-section should be given a purposeful construction. It was submitted that at the time of the inquest, there had been no admission of liability on the part of the defendants and the plaintiff herself had to give evidence at the inquest, and at that stage, had been wholly dissatisfied with such explanations as had been advanced by the defendants concerning the circumstances in which Aisling had died.

17. The purpose of an inquest and the role of legal representation in one was discussed in the judgment of Finnegan J. in the case of *Magee v. Farrell and Others* [2009] 4 I.R. 703, where the learned judge says the following:

> "There are very considerable differences between proceedings before a coroner and criminal proceedings. An inquest is an inquisitorial process. It is a fact finding exercise and not a method of apportioning guilt or establishing civil liability. At an inquest there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial; it is a process of investigation which attempts to establish facts surrounding a death. Questions of civil or criminal liability may not be considered nor investigated. It is not a forum for gathering evidence for pending or impending criminal or civil proceedings. This being so I am satisfied that there is no constitutional right in a person entitled to attend before and be represented at an inquest to State funded legal representation. I would not extend the constitutional entitlement recognised in *The State (Healy) v. Donoghue* in the manner sought by the plaintiff. . ."

Whilst no issue arises in these proceedings as to any constitutional entitlement on the part of the plaintiff to be represented at the inquest, or to have State-funded legal representation, there is no question but that she was entitled to be represented at the inquest, and for that purpose, she engaged the services of solicitor and junior counsel.

18. Whilst also, as stated with crystal clarity by Finnegan J., there was no issue of criminal or civil liability to be decided, there were, undoubtedly, issues concerning how the death of Aisling had occurred, and the plaintiff had not accepted such explanations as had theretofore been advanced by the defendants in that regard, and, indeed, was in dispute with them concerning how Aisling had died. In this regard, the plaintiff gave evidence at the inquest, as did others who had participated in the events leading to Aisling's death.

19. It would seem to me that in these circumstances, where the facts concerning how her death had occurred were in dispute, or potentially in dispute, and where the plaintiff, as a next of kin, was a vital witness, having been involved intimately in the events leading to the death under investigation, it was to be foreseen that cross-examination of other witnesses could arise. In addition, as the plaintiff was a vital witness, it was of great importance that her evidence would be fully and properly led in the inquest. All of this generally calls for the skills and experience of a legal representative. Notwithstanding the fact that there was no issue of criminal or civil liability at stake, in my view, the parent of a child who had died in circumstances which were not adequately explained to the satisfaction of that parent would have a vital interest in establishing the true facts concerning how the death had occurred.

20. I am, therefore, quite satisfied, firstly, that the plaintiff had a vital interest in the outcome of the inquest, and, secondly, that the issues of fact that were likely to arise warranted legal representation.

21. The next question which arises was anticipated in the following passage from the judgment of Hardiman J. in the case of *Grant v.*

Roche Products (Ireland) Ltd. [2008] 4 I.R. 679, where the learned judge says at p. 702:

> "We have already seen, in the quotation from the Act of 1961, that a person entitled to sue for the wrongful death of another may recover funeral expenses and 'other expenses actually incurred'. There is, in my opinion, a bona fide and justiciable issue between the parties as to whether the considerable and expensive research engaged in by the plaintiff in preparation for the inquest into the deceased's death is expenditure recoverable under the statute. It is clearly expenditure which would not have arisen but for the death of the deceased and which was foreseeable and appears to me, at least arguably, thus to be recoverable. The plaintiff's case may derive some support on this point from the judgment of Barrington J. in *Condon v. CIE* (Unreported, High Court, Barrington J., 16th November, 1984). But I do not intend to decide this issue or to consider the cases cited on it, for the reasons given by Costello J. in *D.K. v. King* [1994] 1 I.R. 166. It is sufficient to say that the existence of that or any other justiciable issue between the parties, in my view, of itself would preclude an order striking out the proceedings at present."

22. The question posed, but not answered, by Hardiman J. is whether the costs of legal representation can be considered to be "other expenses actually incurred" within the meaning of s. 49(2) of the Civil Liability Act 1961.

23. Before there can be any recovery of damages under this part of the Act, it must be established that the damage in question has occurred by reason of the wrongful act of the defendants. In this case, the wrongful act in question was the negligence of the defendants resulting in the death of Aisling, giving rise to an action on behalf of the dependents of Aisling under Part IV of the Civil Liability Act 1961. Section 49 of the Act regulates the damages that may be recovered in a fatal injuries action under Part IV of the Act. Thus, it is necessary to construe s. 49(2) to ascertain whether the phrase "other expenses actually incurred" can include the cost of legal representation at an inquest. In my opinion, the *ejusdem generis* rule does not apply as there is only one genus mentioned, namely, "funeral", unlike the many situations which give rise to the application of the rule, where a number of specific items of a similar nature are mentioned from which it can be inferred that the ensuing or dependent general provision is limited to things of a similar nature, for example, apples, oranges and other foods could lead to "*other foods*" being construed as confined to fruits. In my view, the recital of one primary item, namely, "funeral", does not suggest an intent on the part of the Oireachtas to limit "other expenses actually incurred" to expenses deriving from or associated with a funeral. I am satisfied, therefore, that the *ejusdem generis* rule does not apply.

24. In seeking to ascertain the scope or extent of expenses that may be considered to fall within the ambit of "Other Expenses", in my view, one must fall back on the general law governing the wrongful act. In this case, the wrongful act is such because the tort of negligence has been committed. Therefore, in my opinion, to ascertain whether the claimed expense can come within the ambit of "Other Expenses", one must ask the question whether it is an expense, which, as an item of damage, can be recovered in an action for negligence. This in turn means that it must be ascertained whether the expense in question was one, which, arising from the tort committed was reasonably foreseeable. In this respect, I find the judgment of Barrington J. in the case of *Condon v. Córas Iompair Éireann* (Unreported, 16th November, 1984) of great assistance.

25. In that case, the plaintiff claimed damages in negligence against the defendants, his employers, in respect of personal injuries which he suffered in the Buttevant train disaster, and he also claimed the costs of his legal representation before a Court of Enquiry set up by the relevant Minister under s. 7 of the Railway Regulation Act 1871, to enquire into the causes of the disaster. The plaintiff was a central figure in the events leading to the disaster and was legally represented before the enquiry. That Inquiry exonerated the plaintiff from any blame in respect of the cause of the disaster. The plaintiff had been refused his cost of representation before the Inquiry by the Inquiry itself on the grounds that it did not have power to make such award, and in his negligence action against the defendants, he made a claim for the costs of his legal representation before the Inquiry.

26. At page 24 of the judgment, the learned judge said the following:

> "In the present case, the Minister had a discretion on whether to establish or not to establish a Court of Inquiry. But this discretion was not an arbitrary discretion but one to be exercised in the appropriate way when the appropriate case arose. In the circumstances, it appears to me to have been reasonably foreseeable that the Minister would, in fact, establish a formal Court of Inquiry into this accident. In fact, it is almost unthinkable that the Minister would not establish a formal Court of Inquiry into a disaster such as the present one. This being so, it appears to me to be also reasonably foreseeable that the plaintiff, as a person intimately involved in the events leading up to the disaster, and whose actions must require minute examination from the Court of Inquiry, should, in his own interest, seek representation before the Inquiry and be granted such representation. The Court of Inquiry itself clearly took the view that it was reasonable for the plaintiff to look for such representation and I respectfully agree with the court's decision.
>
> It appears to me that the plaintiff was placed in the position of needing such representation as a consequence of the negligence of CIE and that this was a reasonably foreseeable consequence. Under these circumstances, it appears to me that the plaintiff is entitled to recover, as part of his damages, the reasonable costs of being legally represented before the Court of Inquiry . . ."

27. Where the death of a person is occasioned by a wrongful act in circumstances similar to those that prevail in this case, the holding of an inquest is virtually inevitable and, as such, a manifestly foreseeable consequence of the wrongful act. Equally foreseeable is that the next of kin, and, in particular, the parent of the deceased, would have a vital interest in establishing the true facts concerning how the death occurred, leaving aside altogether any questions of civil or criminal liability.

28. In general, therefore, I would be of opinion that the reasoning of Barrington J. in the *Condon* case is apposite to the facts of this case, and I am satisfied that legal representation at an inquest into the death of a person occasioned by the wrongful act of another, is, in general, an entirely foreseeable consequence of the wrongful act.

29. That, however, is not the end of the matter. In determining whether a particular item of damage was reasonably foreseeable, the reasonableness of the conduct of the plaintiff is a relevant factor in determining whether the loss in respect of which damage is claimed was foreseeable.

30. The following passage from p. 21 of the judgment of Barrington J. in the Condon case illustrates this, as follows:

> "In the days before the Wagon Mound decision, one of the tests applied by the English courts in deciding whether damages were or were not too remote to be recoverable in law was if a plaintiff's conduct was reasonable, having regard to the situation created by the defendant's negligence. Thus, in the "Solway Prince" [1914] 31 T.L.R.P. 56, where, partly through the negligence of the defendants, the defendants' ship sank in the plaintiff's canal, the plaintiff was held entitled

> to recover, not only the cost of raising the wreck, but also the cost of hiring tugs to tow other ships around the wreck while it still partially obstructed the canal, the decision to hire the tubs being held to be a reasonable decision in the circumstances. It appears to me that the decision of whether the plaintiff's conduct, or indeed, that of a third party, was reasonable, having regard to the situation created by the defendants' negligence, may still be of assistance in deciding whether that conduct was reasonably foreseeable . . ."

31. Thus, in determining whether or not costs of legal representation at an inquest are recoverable as "Other Expenses", it is relevant to examine whether the decision to be legally represented at the inquest was reasonable in the circumstances. There could be cases in which the facts relevant to the circumstances of the death were fully disclosed prior to the inquest and not subject to any dispute, so that legal representation for the next of kin would be superfluous.

32. However, that is not the position in this case. As stated earlier, because the plaintiff was herself a witness of central importance in the inquest, and because the explanations of the death, as advanced prior to then had not been satisfactory to her, and as she was potentially in dispute concerning how the death of Aisling occurred, the decision to be legally represented at the inquest was entirely reasonable, and therefore foreseeable.

33. The phrase used in s. 49(2) is "other expenses actually incurred". Some debate arose in the argument around the words "actually incurred", namely, as to whether this required that the expense in question had to have been paid before there could be recovery. I am of opinion that the words "actually incurred" do not require that the expense has to have been discharged before there can be recovery in a claim in this respect under Part IV of the Act. What is essential is that there is incurred a liability to discharge the expense in question, rather than that it has been actually paid, as a precondition to recovery. If it were the case that actual payment was required, that would have the, I am quite sure, the entirely unintended effect of precluding an impecunious family from recovering the actual funeral expenses where, undoubtedly, these had been incurred, but because of impecunosity not yet discharged. I am quite satisfied that no such effect was intended by the Oireachtas.

34. This beings me, finally, to the defendants' submission that because the solicitor for the plaintiff acted on a "no foal no fee basis", that no liability was incurred by the plaintiff and, hence, no entitlement to recovery of the costs of legal representation at the inquest under s. 49(2) of the Act.

35. The costs of legal representation at the inquest are claimed in the claim brought on behalf of the dependents of the deceased under Part IV of the Civil Liability Act 1961. All other aspects of the claims made in that action were determined and the damages approved by DeValera J. in December 2010. By agreement between the parties, the issue as to whether or not the plaintiff was entitled to recover the costs of legal representation at the inquest was adjourned for hearing, and that is the issue that I am now asked to adjudicate upon.

36. As is apparent, the plaintiff has been successful in the action, the defendants having conceded the issue of liability, and the plaintiff having recovered predictable damages. Thus, I am quite satisfied that on the "no foal no fee" basis, the plaintiff, having been successful in the action, has a liability to her legal representatives to discharge their reasonable costs. I have already found that a decision to be legally represented at the inquest was a reasonable one, and I am therefore satisfied that the plaintiff has a liability to her legal representatives in respect of their reasonable costs in providing that legal representation at the inquest.

37. Accordingly, I have come to the view that costs of legal representation at the inquest were an entirely foreseeable consequence of the defendants' wrongful act and are recoverable as "other expenses actually incurred" within the meaning of s. 49(2) of the Civil Liability Act 1961.

38. I have been asked to consider the quantum of the sums claimed. In my view, the amounts claimed in respect of counsel's brief fee and solicitor's instruction fee appear to me to be somewhat excessive, and I would assess, as reasonable, a brief fee of €3,500 and an instruction fee of €7,000 and I will allow recovery accordingly.