THE HIGH COURT

[2013 No. 7560 P.]

BETWEEN

IAN COUGHLAN

PLAINTIFF

AND

THE MINISTER FOR DEFENCE,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Meenan delivered on the 29th day of January, 2019

Background

1. The plaintiff in these proceedings is a former member of the Irish Defence Forces. During the course of his employment as an aircraft mechanic at Casement Aerodrome the plaintiff alleges that he was exposed to various dangerous chemicals and solvents on an ongoing basis as a result of which he suffered severe personal injury, loss and damage. These injuries include skin rashes, sleep disturbance, fatigue, mood changes and short term memory difficulties. The plaintiff further alleges that he developed yellowness of the skin and eyes and on a number of occasions suffered from bloody diarrhoea.

2. As a result of these injuries the plaintiff alleges that he was discharged from the Defence Forces and is now, at the age of 42, on an invalidity pension.

3. The personal injury summons lists some 24 particulars of negligence, breach of duty and breach of contract as against the defendants, their servants or agents. Essentially, the plaintiff alleges that the defendants failed to provide a safe system of work, failed to provide the plaintiff with appropriate training for the safe handling of the chemicals and solvents he was required to work with and that necessary safety measures to protect the plaintiff from the ill-effects of these chemicals and solvents were not implemented.

4. The defendants delivered a full defence which pleaded, *inter alia*, that the plaintiff's claim is statute barred as the proceedings were commenced outside the period permitted by the Statute of Limitations Act 1957 as amended by the Statute of Limitations (amendment) Act 1991 (the Act of 1991) and the Civil Liability and Courts Act 2004.

Issues

5. The defendants issued a notice of motion seeking the following reliefs: -

> (i) An order striking out and/or dismissing the within proceedings pursuant to the Statute of Limitations Act 1957 - 1991 (as amended) and/or the inherent jurisdiction of this Honourable Court on the grounds that the plaintiff's claim is statute barred as against the defendants and is bound to fail.
>
> (ii) In the alternative, an order pursuant to O. 25 and/or O. 35 and/or O. 36 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court directing that the question, as to whether the plaintiff's action as against the defendants is barred by the provision of the Statute of Limitations 1957 as amended, be adjudicated upon this Honourable Court as a preliminary matter.

6. The plaintiff is relying upon the provisions of the Act of 1991 in respect of his "date of knowledge". I will set out the relevant dates later in this judgment.

7. This is not the hearing of a preliminary issue but nonetheless the Court has limited jurisdiction to assess evidence as to when the plaintiff acquired the appropriate knowledge to start time running under the Act of 1991, an assessment which could lead the Court to decide that it ought to strike out these proceedings on the grounds that they are bound to fail.

8. The jurisdiction of the Court to grant the relief being sought by the defendants is necessarily limited, as indeed it should be. This has been emphasised repeatedly in the case law of the Superior Courts. In *Barry v. Buckley* [1981] I.R. 306 Costello J. stated at p. 308: -

> "This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence."

9. The case before this Court does not involve the interpretation of a contract or agreed correspondence. It does, however, involve the interpretation of an expert report received by the plaintiff. I refer also to the Supreme Court decision in *Keohane v. Hynes & Ano*. [2014] IESC 66. In the course of his judgment therein, Clarke J. (as he then was) stated that a court cannot seek to resolve conflicts of fact in applications to dismiss as being bound to fail but rather is required to accept the facts as deposed to on behalf of the plaintiff. Clarke J. further stated: -

> "6.9 In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an

application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

10. Though the Court is bound to accept the facts as deposed to by the plaintiff it is, nonetheless, entitled to look at a particular document, in this case an expert report, and conclude whether or not it supports the plaintiff's contentions as to when his "date of knowledge" was.

Statutory provisions and authorities

11. The relevant statutory provision is s. 2 of the Act of 1991: -

> "(2) (1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:
>
> *(a)* that the person alleged to have been injured had been injured,
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> *(b)* that the injury in question was significant,
>
> *(c)* that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
>
> *(d)* the identity of the defendant, and
>
> *(e)* if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

> (2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire —
>
> *(a)* from facts observable or ascertainable by him, or
>
> *(b)* from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.
>
> (3) Notwithstanding subsection (2) of this section —
>
> *(a)* a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice"

12. There are a number of authorities that have considered the interpretation of s. 2 of the Act of 1991. Firstly, I refer to two decisions of the Supreme Court. In *Gough v. Neary* [2003] 3 I.R. 92 the Supreme Court set out the principles to be applied when assessing when time begins to run for the purposes of the Act of 1991. In this case the plaintiff underwent a hysterectomy in the course of a caesarean section. This operation occurred in 1992 but proceedings were not commenced until 1998. As to when the statutory time period began to run, Geoghegan J. stated at p. 126: -

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

13. Further, Geoghegan J. referred to, with approval, the following passage from the English Court of Appeal decision in *Spargo v. North Essex Health Authority* [1997] MED L.R. 125 wherein Brooke L.J. at p. 129 said as follows: -

> "(1) the knowledge required to satisfy s.14(1)(b) is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable;
>
> (2) 'attributable' in this context means 'capable of being attributed to', in the sense of being a real possibility;
>
> (3) a plaintiff has the requisite knowledge when she knows enough to make it reasonable for her to begin to investigate whether or not she has a case against the defendant. Another way of putting this is to say that she will have such knowledge if she so firmly believes that her condition is capable of being attributed to an act or omission which she can identify (in broad terms) that she goes to a solicitor to seek advice about making a claim for compensation;
>
> (4) on the other hand, she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree; or if her knowledge of what the defendant did or did not do is so vague or general that she cannot fairly be expected to know what she should investigate; or if her state of mind is such that she thinks her condition is capable of being attributed to the act or omission alleged to constitute negligence, but she is not sure about this, and would need to check with an expert before she could be properly said to know that it was."

14. *Gough v. Neary* was followed the next year by another decision of the Supreme Court on the issue. I refer to *Cunningham v. Neary* (2004) 2 ILRM 498 where the plaintiff, who was a dental nurse, commenced proceedings in March 2002 alleging professional negligence in the year 1991. The plaintiff alleged that in the course of an operation the first named defendant had removed one of her ovaries which she claimed was unnecessary and thus negligent. Initially, the plaintiff discussed the entire matter with her G.P. who

informed her that, on the basis of what he had learned from the first named defendant, it had been necessary to remove the ovary. In October 1998 the plaintiff was admitted to the Coombe Hospital in Dublin where she had a hysterectomy. Whilst in this hospital she told her nurse about her experience with the first named defendant and the nurse encouraged her to make a complaint to the Medical Council. This the plaintiff did in December 1998. In May 2000 the plaintiff consulted with a solicitor. In April 2001 the plaintiff received a report from an independent expert who advised that the removal of her ovary had been unnecessary and amounted to incompetent medical practice. In the course of his judgment, Fennelly J. stated: -

> "Thus, at the stage when the plaintiff wrote to the Medical Council, she had knowledge of the fact that the defendant had removed her ovary in1991, that she had twice asked him why he had done so, that she had received no explanation at all and that others had made serious complaints about the defendant. This knowledge was such that it was then "reasonable" for her to seek medical or other expert advice. When she went to her solicitor in May, 2000, it took a further eleven months to obtain the report of Dr. Porter. This can, no doubt, be explained by the time needed to obtain the plaintiff's medical records from the hospital. It shows, however, that, if the plaintiff had gone to a solicitor in December, 1998, she would have obtained the sort of advice which would have made out a case in negligence against the defendant. Therefore, the key fact that the removal of the ovary had been unnecessary was "ascertainable" and, for the purposes of the section, the plaintiff is deemed to have had knowledge of it as of that date."

15. This issue has more recently been considered by the Court of Appeal in *O'Sullivan v. Ireland & Ors.* [2018] IECA 8. This case concerned a plaintiff who contracted MRSA in September 2005. The following March the plaintiff's mother informed him of a television programme that concerned individuals who had contracted MRSA and which mentioned a legal redress. The plaintiff subsequently contacted the person who had appeared on the television programme who in turn put the plaintiff therein in touch with a solicitor who was at that time specialising in MRSA cases. In June 2006 the plaintiff's solicitor wrote to the hospital requesting the plaintiff's medical records. In February 2007 a preliminary report was received from an independent expert, which report supported the plaintiff's claim. Giving a majority judgment of the court, Ryan P. at para. 63 stated: -

> "He did not know whether the hospital or the surgeon caused him to contract the infection and by what acts or omissions. He did not have a basis for believing that his condition was capable of being attributed to an act or omission which he could identify in broad terms so that he could go to a solicitor to seek advice about making a claim for compensation. See *Spargo* test (3) above. He was I think much closer to the position identified in test (4). This is where his knowledge of what the potential defendants, the hospital and the surgeon, did or did not do was so vague or general that he could not fairly be expected to know what acts or omissions might form the basis of his claim."

16. What distinguishes *O'Sullivan v. HSE* and *Cunningham v. Neary* is the plaintiff's state of knowledge. In *O'Sullivan* the plaintiff's knowledge was not of an order as to make it "reasonable" for him to seek medical or other expert advice. In *Cunningham* the plaintiff had knowledge at an earlier stage of the fact that her ovary had been removed without explanation despite seeking same and she had written a letter of complaint concerning the defendant to the Medical Council. This was knowledge which made it "reasonable" for her to seek medical or other expert advice.

Consideration of issues

17. After the receipt of a medico-legal report the plaintiff made an application to the Personal Injuries Assessment Board on 10 June 2013. In considering the provisions of the Personal Injuries Assessment Board Acts 2003 and 2007 the defendants accept that the relevant date for considering the Statutes of Limitations is two years prior to the date of the application, namely 10 June 2011. The plaintiff issued his proceedings on 22 July 2013. The plaintiff contends that he only acquired knowledge for the purposes of the Statute of Limitations on 15 May 2013 when he received an expert report from Professor Howard, a toxicology pathologist based in England.

18. The defendants, being the plaintiff's employer, are in possession of his medical records. From as early as 1994 there are references to the plaintiff suffering from diarrhoea and sleep disturbances. There are references in these records to symptoms of jaundice and skin rashes dating back to 1997. In 2004 - 2005 the plaintiff came under the care of the Gastroenterology Department of the Adelaide and Meath Hospital Dublin. There are reports of September 2004 and March 2005 relating to this. Many of the complaints referred to in these reports are set out in the personal injuries summons and it is claimed that these symptoms were caused by exposure to chemicals and solvents in the course of his employment.

19. In May 2007 a chair on which the plaintiff was sitting collapsed causing him to fall backwards and thereby sustain injuries to his wrist and back. Arising from this incident a number of medical reports were produced. Firstly, in a report of Mr Martin G. Walsh, Orthopaedic Surgeon, of October 2008:-

> "Previous history:
>
> Five years ago, Mr. Coughlan reports that he developed some skin lesions in his upper limbs with associated jaundice and impairment of liver function. It was felt that this problem related to handling of toxic substances during the course of his work.
>
> He was assessed by Dr. Margiotta who recommended a change of work practice and as a result, Mr. Coughlan was assigned office duties which included filing and computer work which he informs me that his problems settled over a period of six months"

There was a further report from Dr. Camillus Kevin Power, Pain and Perioperative physician, from December 2009 which states: -

> "Going on in the background he had a medical investigation for what was first termed a mixed connective tissue disease but more recently he states that the constellation of signs and symptoms that he had are now attributed to some form of heavy metal poisoning confirmed by Toxicology in London. He states that the metal was part of the exposure to toxins at work a number of years ago. Initially when I reviewed him I was reluctant to prescribe drugs such as Lyrica and Neurontin because of the abnormal liver tests. More recently these have been prescribed and offered him some benefit"

20. Counsel on behalf of the defendants, Mr. Andrew Fitzpatrick S.C., submits that what is contained in these reports amounts to sufficient knowledge on the part of the plaintiff as would make it "reasonable" for him to seek legal and expert advice and thus start time running for the purposes of the Act of 1991. It is submitted that at that stage, 2007 – 2009, the plaintiff had the required knowledge for the purposes of s. 1(c) namely "that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty".

21. Mr. Finbarr Fox S.C., on behalf of the plaintiff, submits that the plaintiff did not in 2007 – 2009 have the requisite knowledge and refers to what the plaintiff deposed to in his affidavit of 26 January 2017, wherein he stated: -

> "While I acknowledged and accept that during that period I experienced symptoms of dizziness, recurrent skin rashes, nasal irritation, sores, fatigue, sleep disturbance, headaches and mood disorders as well as developing yellowness of the skin and eyes and persistent bloody diarrhoea, at no time during that period was I informed or advised that the symptoms and manifestation of illness were related to my working environment or an exposure to organic solvents or chemicals. Moreover, during that period I attended for frequent medical treatment, examination and investigation and I was repeatedly reassured that my symptoms were not related to my working environment …"
>
> " … I acknowledge that I did have concerns that the exposure to chemicals and solvents in the course of my employment may have had an impact on my symptoms and I raised this on occasion with the various medical personnel to whom I was referred. In each instance, I was reassured that there was not such an association and various other explanations and diagnosis were provided in respect of each of the various symptoms which I suffered. If I had in fact believed that my ongoing symptoms related to chemical exposure I would not have continued to work in such an environment"

22. This is a motion to dismiss proceedings on the grounds that they are bound to fail. I have referred to the authorities that state that in an application such as this the Court is required to accept the facts as deposed to by the plaintiff. It therefore follows that the reports referred to do not fix the plaintiff with knowledge so as to start time running. I make the point, however, that were this a hearing of a preliminary issue on the Statute of Limitations the plaintiff would have to give evidence as to what he had deposed to in his affidavits and be subject to cross-examination so a different conclusion might be reached.

23. The plaintiff maintains that it was not until he received a report from Professor Howard, a suitably qualified medical expert, that he had sufficient knowledge to make the connection between his work environment and his injuries. This report was produced on 15 May 2013, the date upon which the plaintiff accepts that he had knowledge for the purposes of the Act of 1991.

24. However, Professor Howard was not the first suitably qualified medical expert to be involved in the plaintiff's case. In 2005 the plaintiff attended Dr. Brendan O'Shea, a General Practitioner and specialist in occupational medicine. Dr. O'Shea advised that the plaintiff seek the opinion of a toxicologist and, ultimately, Dr. David Wood was engaged. Dr. Wood was a locum consultant physician and clinical Toxicologist. It is necessary to examine the report of Dr. Wood in some detail.

25. Dr. Wood had available to him the plaintiff's medical records including the various reports from the Department of Gastroenterology of the Adelaide and Meath Hospital and "ambient air monitoring report" compiled by Mr. Conor Tonra on behalf of Environmental Engineering Limited Dublin dated 2 August 1995. Dr. Wood was asked to comment as to whether the plaintiff's complaints of injuries related to his previous employment and exposure to solvent(s).

26. Dr. Wood set out in some detail the plaintiff's medical history. Under the heading "evidence of exposure to solvent(s) at his employment", Dr. Wood gives an account of the plaintiff's exposure to solvents and degreasers as part of his work and what steps were taken to protect employees, including the plaintiff, from exposure to such. Dr. Wood referred to a report from Mr. Conor Tonra already referred to. In respect of this report Dr. Wood states: -

> "[I]n this report, analytical results are reported for dichloromethane, trichloroethylene, 1,1,1-Trichloroethane, toluene, xylene, methoxy-1-propyl-2-actetae, tungsten compounds. This demonstrated that only dichloromethane exceeded the health and safety limits at that time in the engine cleaning shop"

27. Under the heading "whether his condition could be attributed to any proven solvent(s) exposure" Dr. Woods states: -

> "exposure to solvents such as dichloromethane could possibly explain the skin rash that he developed on an exposed areas of skin, such as his face and neck and arms when his sleeves were rolled up. Long term exposure to dichloromethane has been reported to be associated with neurocognitive effects, including memory impairment, difficulty with simple intellectual tasks and poor concentration, as well as cerebellar dysfunction with cerebellar signs of ataxia, dysarthria and unsteady gait. In particular during my examination of Mr. Coughlan, I was unable to detect any evidence of cerebellar dysfunction"

and: -

> "exposure to dichloromethane for prolonged period of times is reported to be associated with abnormal liver enzyme concentrations"

28. The report from Dr. Wood concludes: -

> "Therefore in my opinion:
>
> 1. …
>
> 2. …
>
> 3. Mr. Coughlan has abnormal liver function tests, that have been extensively investigated and in the material that I have been forwarded to review, no conclusive diagnosis for these findings has been made. The letter correspondence suggests that the liver biopsy is diagnostic of "fatty liver", however, I have not been forwarded the liver biopsy result to confirm this interpretation in the letter correspondence. It is possible that exposure to dichloromethane can be associated with abnormal liver function tests and/or the development of fatty liver from animal studies and case reports. However, the case control study described above appears to suggest that there is no association between exposure to dichloromethane and the development of abnormal liver function tests"

This report was received by the plaintiff in January, 2009.

29. Though the report from Dr. Wood only refers to the effects of one chemical or solvent(s) that appears to have been present in the workplace, dichloromethane, it clearly establishes a link between at least some of the injuries which the plaintiff complains of and his working environment. Skin rashes, neurocognitive effects including memory impairment and symptoms of an abnormal liver are

referred to in the particulars of injury in the personal injuries summons. In my view, this inevitably leads to a finding that as of January 2009 the plaintiff had knowledge that the injury complained of was attributable "in whole or in part" to the negligence and breach of duty alleged on the part of the defendants.

30. In his affidavit the plaintiff states: -

> "[T]hat unfortunately due to the lack of information available to Dr. Wood with regard to the nature of the chemicals and solvents to which I had exposed during the course of my employment with the Air Corps, he was very much limited in his capacity to provide an opinion as to any causal in connection between my symptoms and my working environment. At that stage I was not aware of the precise nature of the chemicals involved and Dr. Wood required information in this regard"

31. In my view, the plaintiff's view of the report of Dr. Wood is incorrect. Though the plaintiff was of the view that the report of Dr Wood did not provide him with all the information he required this did not stop time running for the purposes of the Act of 1991. What was stated in the report of Dr. Wood was more than sufficient to make it reasonable for the plaintiff to seek further expert advice. In my view, on receiving this report the plaintiff knew "enough facts as would be capable of at least upon further elaboration of establishing a cause of action", (as per Geoghegan J. in *Gough v Neary*). Thus, as of January 2009, the date of receipt of the report from Dr. David Wood, the plaintiff had the knowledge provided for in s. 2(2) (b) "from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek".

Conclusion

32. By reason of the foregoing I am satisfied that as of January 2009 the plaintiff had the knowledge required under s. 2 of the Act of 1991 to start the two-year limitation period running. This period expired in January 2011. As proceedings were not issued within that period the defendants are entitled to the reliefs sought at para. (i) of the notice of motion.