THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 8

[2014 No. 383]

The President
Irvine J.
Edwards J.

BETWEEN

OLIVER O'SULLIVAN

PLAINTIFF/RESPONDENT

AND

IRELAND, THE ATTORNEY GENERAL, THE MINISTER FOR HEALTH AND CHILDREN, THE HEALTH SERVICES EXECUTIVE, THE BON SECOURS HEALTH SYSTEM LIMITED TRADING AS BON SECOURS HOSPITAL

JUDGMENT of the President delivered on 24th January 2018

Introduction and Context

1. This is an appeal by the defendant hospital against the judgment and order of Kearns P. made on 10th February 2012 whereby the High Court held that the plaintiff's claim was not statute-barred and dismissed the hospital's motion to have the proceedings struck out.

2. Mr. O'Sullivan contracted MRSA while he was undergoing abdominal surgery in the Bon Secours Hospital in Cork on 20th September 2005. On 19th August 2008, he issued a personal injury summons claiming damages from the hospital and other defendants. The relevant limitation period for this action was two years from the accrual of the cause of action or from the date of knowledge, if later, within the meaning of the Statute of Limitations (Amendment) Act 1991, as amended by s. 7(a) of the Civil Liability and Courts Act 2004. If the starting point was the contraction of the disease, clearly the summons was out of time by some 11 months. The question before the President of the High Court and on appeal in this Court concerned the date of knowledge provisions in s. 2 of the 1991 Act.

3. The period of limitation for bringing an action for personal injuries was originally fixed by the Statute of Limitations 1957 at three years from the date when the cause of action accrued. The time limit was absolute; the courts had no discretion in the absence of fraud or disability to extend time irrespective of the circumstances. This gave rise to results that were unjust. For example, a person who sustained latent injuries that were not discovered until after the statutory period had elapsed fell victim to the time limit. Thus, as it was said, the person's right of action was barred before he knew he had a cause of action. The answer to this and other problems, uncertainties and injustices was the 1991 (Amendment) Act. Section 3 of the 1991 Act provided that an action for personal injuries caused by negligence, nuisance or breach of duty shall not be brought after the expiration of three years (two years in this case because of amending legislation) from when the cause of action accrued or the date of knowledge, if later, of the person injured.

4. The appeal concerns the interpretation and application of the date of knowledge provisions in s. 2 of the Statute of Limitations (Amendment) Act 1991, which is as follows:

> "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,
>
> (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; and

(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury."

5. The defendant's motion to dismiss the plaintiff's case on the ground that it was statute barred was heard on oral evidence. The plaintiff, Mr. O'Sullivan, his solicitor Mr. Simon, and Dr. Olivia Murphy, consultant bacteriologist at the hospital, gave evidence. There was dispute between Mr. O'Sullivan and Dr. Murphy about a conversation on 4th October 2005 on which occasion she said that she told the plaintiff that he had contracted MRSA. Kearns P. accepted the doctor's evidence as to that conversation in preference to Mr. O'Sullivan's recollection, but I do not think that was important in the reasoning of the President. He was satisfied that Mr. O'Sullivan was in a very distressed condition and was extremely ill. For her part, Dr. Murphy in her evidence accepted that Mr. O'Sullivan's capacity to absorb information at that time was impaired by his condition.

6. The following summary chronology is the background to the issue on the hospital's motion and the appeal.

- 20th September 2005 is the date when Mr. O'Sullivan contracted MRSA in the while undergoing a hemicolectomy procedure.

- 28th September 2005: discharged from hospital.

- 30th September 2005 readmitted for laparotomy and an ileostomy was performed.

- 4th October 2005: conversation above mentioned.

- 22nd October 2005: discharged.

- October 2005 to January 2006: Mr. O'Sullivan had a number of in-patient stays at the hospital.

- March 2006: Mr O'Sullivan's mother told him about a television programme; he followed up a contact who recommended a solicitor. This is described and discussed further below.

- 20th March 2006: Mr O'Sullivan contacted the solicitor, Mr Simon.

- 26th March 2006: Re-admitted to hospital when ileostomy was

reversed.

- 2nd May 2006: On solicitor's advice Mr O'Sullivan made FOI request to the hospital for his records.

- 21st June 2006: solicitor wrote to hospital about request for records.

- 17th July 2006: solicitor Mr Simon received the hospital records.

- 22nd February 2007: solicitor received a doctor's preliminary report following consideration of the records.

- 16th May 2008: solicitor received report from a consultant surgeon and microbiologist.

- 19th August 2006: date of issue of Personal Injuries Summons.

7. This skeleton needs to be supplied with some detail about the critical period from March 2006. The plaintiff's account was that he did not have any idea as to the reason why he had contracted MRSA in hospital or that it might have happened because something went wrong. Then, in March 2006, his mother told him about a television programme dealing with hospital MRSA infections. In regard to this evidence, Kearns P. concluded as follows:

". . . and, in a sense, things only started to take a meaningful focus following a TV programme which his mother was watching in March 2006 where other MRSA sufferers were identified and it became clear that legal redress might be obtained for persons who had become infected in this way in hospitals. These being people who went in with no infection and came out infected. And a certain gentleman, I think Tony Kavanagh was his name, was identified on that TV programme and the plaintiff decided to contact Mr. Kavanagh and in that way came into contact with his solicitor."

8. Mr. Kavanagh recommended a solicitor, Mr. Simon, whom Mr. O'Sullivan contacted on 20th March 2006. Mr. Simon prepared an FOI request for Mr. O'Sullivan to send, which the latter did on 2nd May 2006, in which he asked the hospital to furnish his medical records. Following correspondence about payment for the records, the solicitors received the medical records on 17th July 2006 comprising, according to Mr. Simon's evidence, some 800 pages. The solicitor went through the records to get a brief or cursory overview and then he asked a general practitioner, Dr. Cummins, to give him a preliminary view. The doctor reported back on 22nd February 2007.Mr. Simon commissioned a report from an English consultant surgeon, Professor Scurr, and he reported on 16th May 2008. Professor Scurr took a quite different view to that of Dr. Cummins who had furnished the original and admittedly preliminary report. The personal injury summons was issued on 19th August 2008.

9. The particulars of negligence pleaded against the hospital in the Personal Injury Summons include the following allegations of fact:

- Placed the Plaintiff in an MRSA infected area which they knew or ought to have known was detrimental to his health and well-being;

- Admitted the Plaintiff to the Bon Secours Hospital at a time when there was an outbreak of MRSA not under effectual control;

- Failed to swab for or otherwise diagnose the presence of MRSA in the Plaintiff post the operative procedure and failed to administer proper drugs for the Plaintiff's MRSA infection initially;

- Discharged the plaintiff from the hospital within a very short period of time. Procedures which was unreasonable at a time when there was an outbreak of MRSA in the hospital of which they knew or ought to have known

"Failed to take any or any adequate measures to protect the Plaintiff in particular having regard to the foreseeability of the Plaintiff contracting MRSA whilst being placed in an infected area".

10. In his brief ex tempore judgment, Kearns P. said that the condition for which Mr. O'Sullivan was undergoing surgery was a very distressing condition

and he was satisfied that he went through an appalling time before eventually the various operative procedures resulted in improvement and restoration of his health. The court held that in circumstances where res ipsa loquitur did not apply, facts had to be clarified to enable the case to proceed. The facts were not observable or ascertainable by Mr. O'Sullivan himself. Neither were they ascertainable by Mr. Simon, the solicitor. They could only be ascertained with the help of a medical or other expert. The judge held that Mr. O'Sullivan took all reasonable steps, notwithstanding that several months passed before Dr. Cummins provided his report. As a result, Kearns P. found the date of knowledge to be 22nd February 2007 when Dr. Cummins furnished his report and "there was a congruence of all the requisite elements under the statute to start the clock ticking". The court accordingly refused the hospital's motion.

11. The hospital submits that Mr. O'Sullivan had the requisite knowledge as early as March 2006, when he consulted Mr. Simon on the recommendation of Mr. Kavanagh whom Mr. O'Sullivan contacted after hearing from his mother about the TV programme. Other proposed dates are 2nd May 2006, when Mr. O'Sullivan made the FOI request on the advice of Mr. Simon and 21st June 2006, when the solicitor wrote to the hospital concerning the records. Finally, if none of those dates meets the criteria under the Act, it is suggested that 17th July 2006, the date when the medical records were received, was the latest date for the purpose of s. 2 on any view of the case.

12. On Mr. O'Sullivan's behalf, it is submitted that the relevant date of knowledge is 22nd February 2007, as found by Kearns P, when his solicitor received the preliminary report from Dr. Cummins. Since each of the dates suggested by the hospital would mean that the action is statute barred the debate focused on the latest one and so the real dispute is between 17th July 2006 and the plaintiff's submission of 22nd February 2007.

13. The hospital appeals on the grounds that the trial judge was in error as a matter of law because he failed to distinguish between facts which were ascertainable for the purpose of the date of knowledge and facts which were ascertained. He was, accordingly, incorrect in holding that time did not begin to run until the preliminary report was obtained from Dr. Cummins on 22nd February 2007. It is also argued that the judge was in error in holding in respect of MRSA that unless res ipsa loquitur applied, the facts had to be clarified with the help of a medical expert before they could be held to be observable or ascertainable. The hospital argues that its arguments are in accordance with the section and the interpretation of it by the Supreme Court in Gough v. Neary [2003] 3 IR 92 and Cunningham v Neary [2004] 2 ILRM 498. The 1991 Act does not permit a party to delay instituting proceedings in a claim of medical negligence while he waits to receive an expert report. The hospital's submissions on the application of the law to the facts are considered below.

14. In my judgment, Kearns P. was correct to hold that the plaintiff's action was not statute-barred and to dismiss the application. Mr. O'Sullivan did not have the information required by s. 2 (1)(c) as to relevant acts or omissions on the part of the hospital and concerning the connection thereof with his injury. As such, for limitation purposes, the time only began upon his receipt of the expert report.

Case Law

15. In *Gough v. Neary and Cronin* [2003] 3 IR 92, the issue before the Supreme Court was whether the plaintiff's claim was statute barred in a case of medical negligence arising out of a hysterectomy operation performed by the first defendant which the plaintiff alleged was unnecessary. The defendants argued that the plaintiff knew that the injury she sustained was attributable to the acts or omissions of the defendants and so time for the purpose of limitation began to run at the date when the operation was performed. The plaintiff's case was that an essential feature of the knowledge requirement was that the operation was unnecessary and so it was from the date when she acquired that knowledge that the period started. The court was concerned with the requirement under s. 2(1)(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". The court, by majority of two to one, held that the starting point was when the plaintiff knew or believed that she had had an unnecessary hysterectomy. Hardiman J. was of the view that the plaintiff had a remedy elsewhere in the Statute of Limitations, in s. 71, on the ground of concealment by fraud but that was not the basis on which the plaintiff made her case.

16. Geoghegan J. reviewed the English authorities and endorsed what he considered to be the mainstream view in that jurisdiction. The other member of the majority, McCracken J, noted the differences in some of the English cases but preferred to base his conclusion in favour of the plaintiff's argument on the terms of the section. For his part, Hardiman J. who dissented on the application of the particular provision, preferred the reasoning of the English Court of Appeal in *Dobbie v. Medway H.A*. [1994] 1 WLR 1234, a case in which the plaintiff underwent a mastectomy operation and at a later time, outside the standard statutory time limit, came to the knowledge that the procedure was arguably unnecessary and negligent.

17. Geoghegan J. expressly approved a number of passages from the English cases. In *Forbes v Wandsworth HA* [1997] QB 402, Stuart-Smith LJ at p. 411 said:

> "In many medical negligence cases the plaintiff will not know that his injury is attributable to the omission of the defendant alleged to constitute negligence, in the sense that it is capable of being attributable to that omission, until he is also told that the defendant has been negligent. But that does not alter the fact that there is a distinction between causation and negligence; the first is relevant to s. 14 (1), the second is not. The fact that in such cases it may be necessary for the plaintiff also to know of the negligence before he can identify the omission alleged to have been negligent is nothing to the point. It does not mean that he falls foul of the closing words of s. 14 (1). For these reasons, I consider that the judge was correct in holding that there was no actual knowledge."

Geoghegan J. said, at p. 127: "I am in complete agreement with that passage."

18. In regard to the kind of knowledge or the amount of knowledge that is necessary to start the limitation period running, the judge said at p. 126:

> "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 she has knowledge do in fact constitute a cause of action as that particular knowledge is irrelevant under the Act. But the adequacy of the knowledge must be related to the context and in this case the plaintiff who was a person of limited education was entitled to assume that the hysterectomy was carried out by the first defendant to save her life at the time of childbirth because that is what she was told by him."

19. Geoghegan J. also quoted with approval the principles formulated by Brooke L.J speaking for the English Court of Appeal in *Spargo v. North Essex District Health Authority* [1997] 8 Med. L. R. 125, as follows:

> "(1) The knowledge required to satisfy section 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 properly be said to know that it was."

Brooke LJ also said that the test is "a subjective one: what did the Plaintiff herself know? It is not an objective one: what would have been the reasonable layman's state of mind in the absence of expert confirmation?"

20. *Cunningham v. Neary & Ors* [2004] 2 I.L.R.M. 498 was another case against the same doctor on the same grounds of negligence. There were, however, significant differences in regard to the date of knowledge of the plaintiff, as the Supreme Court made clear, and which resulted in a decision that this plaintiff's case was statute-barred. McGuinness J. and Fennelly J. accepted the analysis of the law as Geoghegan J. had set it out in Gough, but because of the different circumstances the outcome could not be the same. Of particular importance was the fact that this plaintiff had made a complaint to the Medical Council about her treatment by the defendant, including two separate complaints about the absence of explanation for the removal by the defendant of an ovary. Fennelly J, with whose judgment McGuinness J expressed her agreement, summarised the position at the time when the plaintiff wrote to the Medical Council:

> "She had knowledge of the fact that the defendant had removed her ovary in 1991, that she had twice asked him why he had done so, that she had received no explanation at all and that other women 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."

21. The Supreme Court in this judgment envisaged first the plaintiff's acquisition of material information, which would then make it reasonable for her to seek expert advice. Obviously, under the section, it is only on receipt of the latter that the plaintiff's date of knowledge would arise. Fennelly J. expressed doubt – it is actually clear by inference that he disagreed – about ascribing knowledge to a plaintiff for the purpose of the Statute on the basis of media reports: –

> "Personally, I doubt whether knowledge of media reports that other women had had unnecessary operations should be equated with actual knowledge that her own operation had also been unnecessary. Media reports of complaints that the defendant had performed unnecessary operations on other women may certainly have put the plaintiff on inquiry, but it can scarcely be said that, from such reports alone, she knew rather than suspected that her own operation had been unnecessary."

22. *Harte v. Ireland & Others* (Unreported, Hedigan J. 24th July 2009) is a case in which the plaintiff sued in respect of MRSA that she contracted in hospital in the course of surgery for varicose veins. The plaintiff was a senior nurse who had written a letter of complaint to the hospital in which she stated that the infection should not have happened and that she wanted it fully investigated so that other patients would not suffer as she had. The court held that the complaint meant that the plaintiff had sufficient information for the date of knowledge.

23. In *Farrell v. Ryan* [2016] IECA 281, the Court of Appeal considered the application of the statutory provisions in a case concerning a symphysiotomy procedure that was carried out in September 1963. Again, television programmes were relevant to the consideration of when the plaintiff first had the information required for the date of knowledge within the statutory meaning. The particular decision depended of course, as all these cases do, on the facts as they related to the plaintiff's information. Peart J. held that a television programme could be a sufficient source of information for the limitation period to begin to run, citing the observation made by McGuinness J. in *Cunningham v. Neary*:

> "In *Gough v. Neary* [it] seems clear that the plaintiff's 'knowledge' that her operation was unnecessary derived solely from the December 1998 reports in the media. This was the fact that was 'capable at least upon further elaboration of establishing a cause of action'. There is no indication that she had an expert medical report available to her before she initiated proceedings against the defendant. Knowledge based on media reports rather than full medical knowledge was the 'knowledge that her hysterectomy was unnecessary' which was held by the court to mark the point at which the statute started to run."

Peart J. said that it was:

> "Incorrect as a general proposition that a plaintiff may wait until she receives her medical records before time starts to run against her under the statute. That would give a plaintiff control over when time starts to run, as it would be dependent on how long the plaintiff chooses to wait before seeking her records. If a plaintiff has had an operation or some procedure carried out, and thereafter has suffered adverse sequelae in the nature of a personal injury reasonably attributable to what was done, she does not need to wait for her hospital records or other records to arrive before she can be taken to know that she has a cause of action."

Peart J. concluded that the plaintiff did not need to know that she had a good case. "It was sufficient if she had enough knowledge to connect her injuries to the procedure which she knew had been carried out on her". He also said "[m]edical records would no doubt elaborate upon the knowledge that she had, but were not a prerequisite to time commencing to run".

24. Once again, the importance of the particular facts of the case is highlighted. The court's function in each case is to apply the statutory provision to the facts as found. Information can come from different sources, including the media, to give the plaintiff relevant knowledge. A plaintiff cannot simply rely on the absence of a medical report to stop time running. The knowledge required is not that the plaintiff has a good case. The Act envisages circumstances in which knowledge will be attributed to a plaintiff which he could reasonably have acquired with the assistance of expert advice. The role of the expert is to help the plaintiff to acquire the necessary information.

Applying the Law to the Facts

25. The quotation from the judgment of Stuart-Smith LJ in *Forbes v. Wandsworth HA*, with which Geoghegan J. expressed his complete agreement, is, I think, a helpful insight for the understanding of this provision. In many cases of medical negligence, the plaintiff will not know that his injury is attributable to the allegedly negligent act or omission of the defendant until he is also told that the defendant has been negligent. That circumstance does not ignore the distinction between causation and negligence as Stuart Smith LJ explained.

26. Geoghegan J. said in *Gough v Neary* that the plaintiff must know "enough facts as would be capable of at least upon further elaboration of establishing a cause of action". In regard to the tests authored by Brooke LJ that the judge cited, the first is that the plaintiff needed to have a broad knowledge of the essence of the causally relevant act or omission. The third of the four tests, as I understand it, means that a plaintiff has knowledge when he knows the facts that he can then put before a legal adviser to know whether that amounts to a case. According to the fourth test, vague or general knowledge is insufficient.

27. In an application of the kind the court is dealing with, the search is for a date when the pieces of information specified in s. 2(1) are present in the plaintiff's mind. It is obviously a retrospective analysis of the claim as put forward in the pleadings. The question that the court has to address is when the particular plaintiff was possessed of the information stated in the claim.

28. I begin with basic propositions. There is a claim in being and the question for the court is whether it was initiated within the relevant period - in this case two years- from a date. That date is when the plaintiff first came into possession of 5 pieces of information, which are specified in s. 2(2). We are particularly concerned with item (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" and we have to ask what that means.

29. An important point, as Brooke LJ noted, is that it is a subjective matter as to the plaintiff's knowledge of his own case. When did he know what he alleges caused his injury? It is not what actually caused his injury but what he believes and is claiming caused it. When did he know the facts he pleads as his own case?

30. The injured person is fixed with knowledge under s. 2(2) which he might reasonably have been expected to acquire "from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek". However, as s. 2(3)(a) provides, the person is not treated as having that knowledge "so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice".

31. A plaintiff says that his injury was caused by some act or omission of the defendant. He may be correct or incorrect but that does not matter. The conduct may constitute negligence or it may not but that is irrelevant. What is important is that the plaintiff at a certain point of time knows that he has sustained a significant injury and he is ascribing that injury as a matter of cause and effect to an act or omission of the defendant.

32. If the plaintiff is claiming that the act or omission that caused his injury was conduct of a person other than the defendant, he has to know the identity of that person and the additional facts on which he is relying to make the defendant liable. Section 2(1)(e) reads:

> "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". [Emphasis added].

Therefore, an act or omission is in issue. Paragraph (e) is not relevant to the present appeal but it illustrates the focus of the date of knowledge conditions on knowledge of a specific act or omission.

33. Let me try to put this into practical shape of a process of enquiry on which the court embarks. The first date that the court has to establish is when the plaintiff first made the connection between the act or omission that he claims caused his injury and the injury. Assuming that the other specified matters in s. 2(1) are known by the plaintiff, this is the date of knowledge unless it is displaced by subsequent enquiry.

34. The court then enquires whether there is an earlier date on which the plaintiff could reasonably have been expected to acquire knowledge of the act or omission and the connection, from observable or ascertainable facts. This question requires clarifying the facts that were observable or ascertainable by the plaintiff which would have given him the relevant information and then deciding whether "he might reasonably have been expected to acquire" the knowledge in that way. If the court is satisfied that such an earlier date is established, that becomes the date of knowledge and in my judgment that is the end of the matter because it is unnecessary to proceed further.

35. If a date of knowledge is not established on the basis of observable or ascertainable facts, the court asks whether another earlier date may be found. Could the plaintiff have acquired the knowledge with the help of a medical or other expert? If so, was it reasonable for the plaintiff to seek such expert advice? So, if the plaintiff could have acquired the relevant information by taking the step of getting expert advice which it was reasonable for him to seek, then the date on which that information was or would have been available becomes the potential date of knowledge. However, we have to bear in mind the overall qualifier in subsection (2) that the court is satisfied that the plaintiff "might reasonably have been expected to acquire" the information. Under this head we have "reasonably" and "reasonable" to apply. So, it was reasonable to seek the advice and the plaintiff might reasonably have been expected to acquire the knowledge from the facts ascertainable with the expert's help. The plaintiff's knowledge under this provision as to expert advice may furnish another earlier date of knowledge. This enquiry is not concerned with the circumstances of the particular case as they happened but rather with information that the plaintiff could reasonably have been expected to acquire by seeking the advice. It is not what he did acquire but what he could have acquired and more particularly when he could have acquired it. There is however a saver for the situation where the plaintiff does actually seek expert advice. That is provided for in subsection (3).

36. Subsection (3)(a) provides that the plaintiff is not fixed with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain the advice and where appropriate to act on it.

37. The case in this appeal is not that there were observable or ascertainable facts that would have given the plaintiff the information for the date of knowledge but rather that he was actually in possession of knowledge sufficient to satisfy s. 2 and particularly the requirements of subsection (1)(c).

38. On my understanding of the paragraph, in light of the assistance provided by the authorities, the question to be answered in respect of s. 2 (1) (c) of the Act is: on what date did the plaintiff first know that the MRSA he contracted was attributable to the acts or omissions of the Bon Secours hospital?

39. As appears from the particulars of negligence quoted above, the plaintiff's claim includes allegations of fact that the hospital had an ongoing outbreak of MRSA at the time when the plaintiff was admitted, that it was aware of the situation but failed to deal with it, that it should have monitored the plaintiff for MRSA and treated him appropriately, with particular attention being paid to the presence of the virulent infection in the areas of the hospital in which the plaintiff was kept or treated. These are some of the matters that the plaintiff relies on to establish negligence on the part of the hospital. This is why he says that he contracted the infection. These are some of the acts and omissions to which he says his injury is attributable. The question arises, accordingly, as to when the plaintiff had knowledge of these things.

40. A plaintiff does not need to know all the particulars of negligence that will be detailed in pleadings and further correspondence. However, he does require certain specific information as defined in the 1991 Act. He has to know in general terms that he has a claim and what that is based on. In this case, it seems to me that the information that Mr. O'Sullivan had to have in regard to his claim is knowledge that one or more of these alleged facts caused him to contract MRSA.

Discussion

The Hospital's Submissions on the Application of the Law to the Facts in the Case

41. The first point, by way of introduction, is that the trial judge's acceptance of the evidence of Dr. Murphy in preference to that of the plaintiff in respect of the conversation in hospital on 4th October 2005 furnished a basis for fixing the plaintiff with knowledge of some of the items constituting date of knowledge. The judge also found on the evidence that Mr. O'Sullivan was extremely ill at the time and his capacity to imbibe important information was seriously impaired. The submission is that the conversation satisfied elements (a), (b) and (d) of section 2 (1). It is not disputed that Mr. O'Sullivan knew that he had suffered a significant injury and while there might be debate about his knowledge of the defendant, that is, whether it was properly the hospital or one of his treating doctors, the principal issue concerned item (c) and I accept this part of the submission.

Television Programme: March 2006

42. The factual basis for this submission is the plaintiff's evidence that his mother told him about the television programme she had seen in mid-March 2006

and had given him the contact number for Tony Kavanagh, who featured on the programme and who had lost his leg as a result of MRSA. Mr. O'Sullivan contacted Mr. Kavanagh and "filled him in briefly on what happened and he asked me would he give a solicitor in Galway a phone call. So I said I'll give him a phone call anyway".

43. The point that the hospital makes in this regard is that this program "fixed the Respondent with the knowledge that there were other individuals in Ireland who, like him, had been significantly injured through MRSA infection, picked up in hospitals and crucially, that these individuals were seeking legal redress for such injuries". Knowledge that others were seeking legal redress meant that blame was attributable to another party and that was enough to satisfy requirement (c).

44. The hospital argues that the two Neary cases featured knowledge acquired by the plaintiffs through media coverage in December 1998. Neither of the plaintiffs had an expert report at that time. In Mr. O'Sullivan's case, the hospital claims that the television programme of March 2006 fulfilled a similar role to the one in December 1998.

Contacting Mr. Simon: March 2006

45. The hospital's case is that there was a build-up of knowledge in the plaintiff's mind. Insofar as the contention on the television programme may be thought insufficient, it is still material as a brick in the wall of knowledge to which there was a substantial addition in Mr. O'Sullivan's contact with the solicitor, Mr. Simon.

46. The material evidence as cited in the written submissions is in Mr. O'Sullivan's evidence as follows:

> "I wanted to find out as I went through hell. I had six months of hell gone passed me. I was told after the very first surgery by Mr. Gough . . .that it wasn't a massive operation, I don't really know why he did it . . . So two days later, after being released, I was back in there . . . And I'm left with a scar the size of a ruler . . . I'm left with a wound, because of my colostomy bag I have puncture holes all over my stomach. I want to know what happened, what led to it, like. As in, I did not know what went wrong . . . I rang Ian Simon and I talked him through what happened."

He said in cross-examination: "Because I wanted to find out what happened in the last six months. Did something go wrong?" He also said: "So I contacted Ian Simon who explained to me that he was doing MRSA cases".

47. Mr. Simon's letter to the hospital on 21st June 2006 stated:

> "Our client has made this request for his medical notes because he contracted a hospital-acquired infection in your hospital."

This means according to the hospital that the plaintiff had enough information to know that his injuries were at the very least capable of being attributed to the acts of the hospital: "This information was entirely ascertainable by him at this stage in March 2006".

48. It was sufficient, as the hospital argues, that Mr. O'Sullivan knew that he had contracted a hospital-acquired infection in the hospital.

> "The fact that he had not been told by an expert or had not ascertained as a matter of law that there was a causal link between his injuries and the acts or omissions of the hospital is not relevant, as per the rider in section 2 of the 1991 Act."

49. The hospital then relies on quotations from the four tests set out by Brooke LJ in *Spargo v. North Essex District Health Authority* to the effect that this plaintiff had the requisite knowledge for paragraph (c) because he knew enough at the point when he consulted Mr. Simon to "make it reasonable for [him] to begin to investigate whether or not [he] added a case against the defendant".

50. In the result, it is submitted that Kearns P. erred in law in not distinguishing between facts which are ascertainable and facts which are ascertained. When the judge said that unless res ipsa loquitur applied facts had to be clarified to enable the case to proceed, this was an incorrect application of the relevant legal principles. The reason for this as submitted is that it suggests that before a plaintiff can be fixed with knowledge for the purpose of s. 2 "he must know as a matter of law that there was a connection between his injuries and the acts of the hospital".

51. It is also argued that the judge's reference to knowledge that could only be ascertained with the help of a medical or other expert, as provided by subsection (3) that was not applicable in circumstances where the plaintiff already possessed the information necessary to satisfy the date of knowledge requirements. This provision is only applicable to situations involving a latent injury in which the only way to link the injuries with the acts is with the help of an expert opinion.

Discussion

52. The 1991 legislation effected a loosening of the original, strict regime and a radical shift in focus from an absolute, objective mode of ascertaining the point of time when the limitation period began to a subjective approach that focuses on the date when the particular plaintiff is in possession of specified, relevant information. But it is not an open door whereby there is no effective limitation period. There is indeed a specific date as provided by the Act of 1991 i.e. the later of two dates, the first being when the cause of action accrued – in this case, 20th September 2005 – and the later date is when the plaintiff had the information specified in subsection (2). There are four items of information at (a) to (d); we are not concerned with paragraph (e). Section 2 of the 1991 Act specifies the pieces of information that constitute knowledge on the part of the plaintiff. When he knows those things, on the date when he first has that information time starts to run. In order to know one or more of those things, he may need to get advice from an expert medical or other person. The advice is not whether he has a case in negligence; that is not only not required knowledge, it is explicitly excluded from being relevant. However, the expert advice that the party requires may also incidentally supply him with knowledge about negligence but the relevance for the purpose of the statutory provision is the specified list of information. The expert advice for section 2 is in relation to the listed particulars insofar as the particular plaintiff is not able to know them by himself.

53. The plaintiff cannot rely on his own ignorance of the facts to stave off the commencement of the limitation period. Section 2(2)(a) fixes a person with knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him. Section 2(2)(b) does the same for knowledge that he might reasonably be expected to get from facts ascertainable with expert medical or other assistance if it was reasonable for him to seek it. In Gough v. Neary the broadcast gave Ms. Gough the vital, missing piece of the information for the date of knowledge, which was that her operation was or might have been unnecessary. She had everything else that was specified in s. 2(2) of the Act. By contrast the Supreme Court held that Ms. Cunningham did not lack relevant information until the television programme because she had made a detailed complaint to the Medical Council about her treatment by Mr. Neary.

54. The analysis and application by a Court in a case of this kind concerning s. 2(1) of the Statute of Limitations Amendment Act 1991 is always retrospective. The claim of negligence is an existence in the court proceedings. The question is: when did THIS claimant know a set of facts? All of the specified facts in regard to the injury that is the subject of the claim must be known - it is not sufficient for the date of knowledge to be triggered for a plaintiff to know only some of the information listed in s. 2(1)(a) to (e). The section does not prescribe a time for this information to be acquired or deemed to be acquired by a plaintiff.

55. The fact that the plaintiff in Gough v. Neary was relying on for establishing negligence was that it was an unnecessary operation. She attributed her injury to the fact that it was unnecessary to do the operation. That is the claim she was making in her proceedings so that is the relevant knowledge. It is not the claim as objectively viewed by the court in retrospect that is important. It is the claim as made by the plaintiff. When did this plaintiff have the information comprised in the definition of date of knowledge that applies to his or her particular case?

56. The Act is not confined to a latent injury because that is provided for in s. 2(1)(a) requiring that the plaintiff knows that he or she has suffered an injury. The court takes the plaintiff's claim as pleaded. He alleges negligence in respect of particular acts or omissions. He claims that the defendant was negligent in doing or failing to do those things and that his injury resulted, that is, that it is attributable to those acts or omissions.

57. A plaintiff does not need to know all the particulars of negligence that will be detailed in pleadings and further correspondence. However, he does require the specific information as defined in the Act. He has to know in general terms that he has a claim and what that is based on: "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;" Spargo test (1) above. Brooke LJ said that attributable meant capable of being attributed to in the sense of being a real possibility.

58. Were the relevant facts specified in s. 2(2) of the 1991 Act ascertainable by the plaintiff prior to 19th August 2006, two years before he issued his proceedings on 19th August 2008? That was the question for the High Court. This court has to ask whether the trial judge was entitled on the evidence to come to the conclusion he did that time did not begin to run until the 22nd February 2007. The defendant submits that it was 17th July 2006 at the latest, when Mr. O'Sullivan's solicitor received the hospital records. The date proposed by counsel for Mr. O'Sullivan is 22nd February 2007 when Mr. O'Sullivan received a preliminary report from Dr. Cummins. This general practitioner performed a function for Mr. Simon of filtering medical information to try to extract the relevant information. He formed the view that Mr. O'Sullivan had a case against the surgeon who performed the original operation but that was out-ruled in the subsequent report from Professor Scurr, the consultant surgeon.

59. This case is a claim by Mr. O'Sullivan that he contracted MRSA in the defendant's hospital because of certain acts and omissions. One of the specific facts that this plaintiff relies on is that the hospital knowingly exposed him to an infected environment. When did he first know those acts and omissions that he says caused him to get the infection? We have to bring in the constructive knowledge measures to examine their impact on the case.

60. Accordingly, for our purposes, questions along the following lines arose in regard to s. 2(1)(c): to what act or omission does the plaintiff attribute his injury? And when did he first make the connection between his injury and that act or omission? This means that the plaintiff had to know about the act or omission and the connection.

61. The plaintiff's knowledge that he contracted MRSA in the hospital does not mean that he was in possession of this information. Could he reasonably have been expected to acquire that knowledge from facts observable by him - if so, which facts? Or from facts ascertainable by him - if so which facts? I do not think so. There is nothing in the evidence or argument to suggest how Mr. O'Sullivan could have known these things from any facts that he should have observed or ascertained. This knowledge is what the plaintiff himself knows or should find out. Matters that require expert assistance are the subject of separate provision.

62. The facts, as they appear material to me, are that after he had heard about the television programme from his mother, the plaintiff contacted Mr. Kavanagh and Mr. Simon in turn, looking for information. Mr. Kavanagh referred him to the solicitor who knew nothing about Mr. O'Sullivan's case, just like Mr. Kavanagh. The plaintiff knew he had been ill with MRSA in hospital, but not more. Specifically, he did not know whether any acts or omissions of the hospital or his doctor might have caused his illness. His state of knowledge was different from the two other plaintiffs in whose cases a TV programme also featured. The fact that Mr. Simon was "an MRSA solicitor" is to me irrelevant. That is why Mr. Kavanagh recommended him to the plaintiff, but that was essentially the beginning of the process as the trial judge found and as appears to be clear from the evidence. The point is that Mr. O'Sullivan was looking for information, not supplying it. In those circumstances, it seems to me to be illogical as well as unreasonable to fix the plaintiff with knowledge of the very matters on which he was consulting people in search of information.

63. 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.

64. In the circumstances, it must be considered reasonable for Mr. O'Sullivan to have obtained expert medical advice. In order to have the knowledge for the statutory purpose Mr. O'Sullivan needed to make a connection between the acts and omissions he was complaining about and the condition and that was absent it seems to me. And while in the circumstances I do not think it makes any difference, the primary defendant was not known because the defendant that Mr. O'Sullivan is accusing of negligence is the hospital and I do not think there was a basis for thinking that Mr. O'Sullivan knew or ought to have known prior to getting Professor Scurr's report that the hospital and not a treating doctor was responsible for his condition of MRSA.

65. Following Mr. Simon's advice, Mr. O'Sullivan looked for his hospital records. Until they were received and examined, he and his solicitor could not have knowledge of the acts or omissions to which his illness was attributable. That is an essential point in the case, in my judgment. And that is what Kearns P. found as he succinctly expressed it in his ex tempore judgment. In my opinion, it was reasonable for Mr. O'Sullivan to seek medical expert advice as to the causation of his injury. He did not himself make that connection, and it was only after becoming aware of media information that he followed up the question and consulted a solicitor. The legal adviser would obviously have wanted to get a medical opinion, but before he could do that, he had to get the hospital records, which Mr. Simon set about obtaining. That happened on 17th July 2006, and the solicitor got a preliminary report from Dr. Cummins on 22nd February 2007. The proceedings were instituted by personal injuries summons on 19th August 2008.

66. Did Mr. O'Sullivan take all reasonable steps to obtain that advice as required by s. 2(3)(a)? It follows from what I have said above that I am satisfied that this question should be answered in the affirmative. Accordingly, in my judgment Kearns P. was correct to dismiss the motion.

67. It is also relevant to mention that the High Court had to apply the provisions of s. 2 to the facts of the case, as found by the judge on the evidence that he heard. The fact that the motion to dismiss was heard and determined on oral evidence is significant because it deters this Court from interfering without substantial reason and accords a degree of deference to inferences drawn by the court from the evidence and findings. See Hay v O'Grady [1992] I.R. 210.

68. If it came to a question whether to prefer the view of the trial judge, as opposed to my own judgment of the evidence, I would bear this precept in mind, but it does not arise in circumstances where I am satisfied that on the evidence as found the High Court was correct to hold that the case was not statute-barred.

69. I will comment on the arguments raised by the hospital which I outlined above. I do not think that these cases establish what the hospital seeks to prove. Neither do I agree that the President did not afford sufficient weight to the television programme. It is inevitable, in a case that features a television programme in some relevant manner, that there will be comparisons with other cases that have that element. But that does not make them comparable. I share the hesitation expressed by Fennelly J. to accord media coverage high significance in and of itself, by which I mean that it all depends on the impact of the information on the plaintiff in the particular case. The mere fact that something was featured in a television programme does not of itself establish

knowledge. This caution is even more applicable in a case where the person did not himself actually see the programme but who was told about it subsequently by somebody else.

70. The fact that some other people were making claims for compensation because they contracted MRSA in hospitals did not and could not have given Mr. O'Sullivan the knowledge that his infection was attributable to the acts or omissions of the hospital. It certainly would have raised the possibility in his mind that he had a claim and that is no doubt why he followed up by contacting Mr. Kavanagh and then Mr. Simon.

71. In Gough v Neary, the plaintiff discovered from the television programme the crucial piece of information that she needed which was that the defendant had performed an unnecessary operation on her. It was not necessary that this piece of information be correct and it was not relevant that the alleged wrongdoing constituted negligence; the plaintiff's state of knowledge is what was important. In Cunningham v. Neary, the court held that the plaintiff had sufficient information as to the case that she subsequently made in her pleadings at the time when she wrote her letter of complaint to the Medical Council.

72. It seems to me that the question that arises from the submissions made by the hospital is whether the information cited was sufficient to satisfy requirement (c). Was it enough that Mr. O'Sullivan had been alerted to the fact that other people who contracted MRSA in hospitals had brought claims; that he had consulted Mr Kavanagh who put him in touch with Mr. Simon, a solicitor dealing with MRSA cases; that he had looked for his hospital records; that Mr. Simon had written on his behalf in the terms quoted; and that he had made the statements above quoted?

73. I do not think that these arguments are correct. They are not, in my view, a correct application of the terms of the section; neither are they consistent with the jurisprudence in Ireland and England. Thinking that you might have a claim is not knowledge that you have a claim. Still less, is it actual knowledge that your claim is based on a causal connection that you understand to exist between acts or omissions of the defendant and the injury that you sustained.

74. Although it does not matter to the outcome of the appeal, I would respectfully disagree as to the date of knowledge. The judge identified the date of receipt of Dr. Cummins's report as being the date of knowledge, as submitted on the plaintiff's behalf. That meant that the summons was issued in time. However, I would go further and say that it was the receipt of Professor Scurr's report that provided the last piece or pieces of the jigsaw of required information. When did Mr. O'Sullivan know that the injury he sustained was the MRSA infection, not a defective operation or some other issue, and that the injury was attributable to the acts or omissions of the Bon Secours Hospital? In my opinion that was on 16th May 2008 when his solicitor Mr. Simon received the expert medical report from the consultant surgeon Mr. John Scurr.

75. I might add that I think it may be questionable that a plaintiff is to be fixed with knowledge of complete matters of causation e.g. simply because a large pile of medical records has been delivered to his solicitor. On the last of the dates suggested by the appellant as the date when the limitation period began to run, the evidence is that Mr. Simon received some 800 pages of medical records. It seems to me that if Mr. O'Sullivan needed to get his records before acquiring the relevant knowledge, as I think was undoubtedly the case, then it must follow that some reasonable time had to be allowed for consideration of the records by an appropriate person which, it could be argued, is a solicitor experienced in such cases, but would more likely mean that the opinion of a doctor had to be sought. I make this point simply because I do not think that 17th July 2006 can be a realistic date of knowledge in the particular circumstances because of the large volume of records.

76. I would accordingly dismiss the appeal.