THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 45

Record Nos. 2018/210

2018/211

Whelan J.
McGovern J.
Costello J.

BETWEEN/

ANDREW MANGAN (A PERSON OF UNSOUND MIND NOT SO FOUND)

SUING BY HIS MOTHER AND NEXT FRIEND, LORRAINE MANGAN

PLAINTIFF/APPELLANT

- AND -

JULIAN DOCKERAY AND (BY ORDER) BRIAN DENHAM AND THE CONGREGATION OF THE SISTERS OF THE LITTLE COMPANY OF MARY, TRADING AS MOUNT CARMEL HOSPITAL

DEFENDANTS/RESPONDENTS

JUDGMENT of the Court delivered on the 22nd day of February 2019 by Mr. Justice McGovern

1. This is an appeal from a judgment of Binchy J. dismissing the claims against the second and third named defendants (the respondents) pursuant to O. 19, r. 28 of the Rules of the Superior Courts on the grounds that the pleadings disclose no cause of action against those defendants and that the proceedings against them are bound to fail.

2. The respondents brought separate motions to dismiss the appellant's claim. Both motions sought dismissal pursuant to O. 19, r. 28 of the Rules of the Superior Courts and also under the inherent jurisdiction of the court on the grounds that the proceedings were frivolous, vexatious and an abuse of process. Both respondents sought an order dismissing and/or striking out the appellant's claim on the grounds of inordinate and inexcusable delay by the plaintiff in prosecuting the claim against them and an order dismissing the claim on the basis that it breached their right to a fair trial within a reasonable time pursuant to Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The first respondent also sought the trial of a preliminary issue as to whether the claim was time-barred under the Statute of Limitations. Having heard the motions, the trial judge based his decision on O. 19, r. 28 and found it unnecessary to deal with the other matters raised. Insofar as this appeal is concerned it was conducted on the basis that any issues not decided by the High Court judge remain open for argument if the matter is remitted back to the High Court.

3. The appellant brings these proceedings through his mother and next friend. He was born on the 11th January 1995 at Mount Carmel Hospital in Dublin. The first defendant is a consultant obstetrician and gynaecologist who practised at Mount Carmel Hospital at all times material to the matters in dispute. The appellant was born with cerebral palsy and cortical blindness as a consequence of significant respiratory distress. He is profoundly disabled and will be totally dependent on care for his lifetime. The appellant was delivered by caesarean section. The appellant's claim against the first defendant is based on alleged failures in the management of the pregnancy of the appellant's mother and also in respect of alleged negligence in and about the management of the appellant's ante-natal care and his subsequent delivery pre term.

4. The personal injury summons in this case was issued on the 17th June 2008. As the summons was not served on time, it was necessary for the appellant to bring an application to renew it. An order to that effect was granted on the 15th July 2013. The first named defendant brought an application to set aside that order and the application was refused in the High Court on the 23rd October 2014. That decision was appealed to this court which dismissed the appeal on the 13th May 2015.

5. On the 2nd November 2016 the first defendant issued a motion to join the respondents as third parties to the proceedings. When the motion came on for hearing on the 21st November 2016 the appellant applied to have the respondents joined as co-defendants to the proceedings and the court acceded to that application. Subsequently, applications were brought by the respondents to strike out the proceedings against them and it is the decision of the High Court in granting those applications that is now the subject of this appeal.

6. The first named respondent is a retired paediatrician who was involved in the neonatal care of the appellant. The second named respondent is an order of religious sisters which had responsibility for the operation and management of Mount Carmel hospital throughout the period leading up to the appellant's birth and during his neonatal care thereafter. The second named respondent sold its interest in Mount Carmel hospital in April 2006 and the hospital subsequently closed entirely in early February 2014 when the company running it at that time went into liquidation. In those circumstances, the second named respondent claimed that it would be severely prejudiced if these proceedings were allowed to continue against it.

7. From the commencement of these proceedings on the 17th June 2008 up until the first named defendant's motion for liberty to issue and serve a third party notice upon the respondents on the 2nd November 2016, the plaintiff had not intimated any intention to bring proceedings against either of the respondents. The third party application was grounded on an affidavit sworn by Fiona Brassil, a solicitor in the firm of Daniel Spring & Co. acting for the first named defendant which was sworn on the 2nd November 2016. Paragraph 7 of the affidavit stated:-

> "The Plaintiff was born at 00:39 hours on 11th January 1995. The Plaintiff received suction and was transferred to the

> Special Care Baby Unit at Mount Carmel wherein the Plaintiff received ventilation between the 11th and 15th January 1995. The Defendant has received expert advice to the effect that the ventilation provided to the Plaintiff and his management was not appropriate and the Plaintiff was inappropriately hypocarbic as a result leading to brain injury. The Defendant has also been advised by his experts that it was inappropriate to provide or attempt to provide the kind of paediatric or neo-natal care actually afforded to the Plaintiff in the setting of Mount Carmel hospital without specialised and resident paediatric expertise. Further, there was an inadequate setting to ensure appropriate availability of blood gas testing and monitoring at Mount Carmel hospital. The Defendant will allege as against the Third Party that it was not acceptable for the Plaintiff to have remained in Mount Carmel, as opposed to being transferred elsewhere for appropriate neonatal care and that the care actually afforded to the Plaintiff by Mount Carmel staff (whether under the direction of Dr. Denham or in applying hospital policy or protocols) was negligent. The negligence on the part of the proposed Third Parties, it will be alleged, has caused the Plaintiff to suffer the injuries he now suffers from. It may well be the case that one of the proposed Third Parties is willing to indemnify the other against some or all of the particular issues arising inter se the Third Parties but from the Defendant's perspective both the actual care afforded to the Plaintiff and the adequacy of the setting in which it was delivered are at issue."

8. Although the plaintiff does not have an expert report which ascribes negligence to either of the respondents, his legal advisors were extremely apprehensive that the first named defendant might lead evidence tending to establish that he was not responsible but that the blame should lie with the respondents. If, in those circumstances, a court was to conclude that the first named defendant was not liable this would have serious consequences for the appellant if the respondents were merely in the proceedings as third parties and not defendants. It was in those circumstances that the appellant applied to join the respondents (the proposed third parties) as co-defendants in the proceedings.

9. In due course the respondents were joined as co-defendants. An amended personal injury summons was issued on the 9th January 2017. In the context of this appeal it is instructive to quote from paras. 9 and 10 of the amended summons.

> "9. As of the date of issuing of the present amended Personal Injury Summons, the Plaintiff does not possess any expert medical evidence that would support allegations of actionable and causal negligence and/or breach of duty as against the second and/or third named Defendants, their servants or agents. The second and third named Defendants are joined to these proceedings in reliance upon the expert medical opinion of the first named Defendant's instructed experts: the allegations of wrongdoing on the part the second and/or third named Defendants have been summarised on behalf of the first named Defendant in the following terms:
>
> > [The content of para. 7 of the affidavit of Fiona Brassil sworn on the 2nd November 2006 and quoted above in para. 7 were set out].
>
> 10. The aforesaid constitutes the best particulars available to the Plaintiff pending acquisition of further medical opinion which will in turn be predicated upon information as to the operation and management of Mount Carmel Hospital and its appropriateness as a venue for the Plaintiff's neo natal care that shall only become available to the Plaintiff in the course of a process of discovery and kindred procedures in these proceedings. The Plaintiff shall furnish further and better particulars of negligence and breach of duty as against the second and/or third named Defendants, their servants or agents at that stage."

10. Following the delivery of the amended personal injury summons, the respondents brought a motion pursuant to O. 19, r. 28 of the Rules of the Superior Courts and under the inherent jurisdiction of the court to strike out the proceedings on the grounds that they are bound to fail and disclose no cause of action against the respondents. The respondents argue that this portion of the amended personal injury summons makes it quite clear that the plaintiff does not have the type of evidence that would be required to maintain professional negligence proceedings against the respondents and that applying the relevant jurisprudence on this topic the proceedings must be struck out on the basis that they are bound to fail and are an abuse of process. This was indeed the conclusion of the High Court judge in his decision which is the subject to this appeal.

The law

11. For some time, the courts in this jurisdiction have expressed the view that it is irresponsible and an abuse of process for a party to commence professional negligence proceedings in the absence of an opinion from a suitably qualified expert that there are grounds for maintaining such proceedings. This line of authority arises out of an understanding by the courts that claims for professional negligence can have very serious consequences for a medical practitioner or hospital transcending the particular proceedings even where there is no finding made.

12. In *Reidy v. National Maternity Hospital* [1997] IEHC 143 Barr J. stated at para. 24:-

> "It is irresponsible and an abuse of the process of the court to launch a professional negligence action against institutions such as hospitals and professional personnel without first ascertaining that there are reasonable grounds for so doing."

13. This statement of the law was approved by the Supreme Court in *Cooke v. Cronin* [1999] IESC 54 at para. 14 where Lynch J. observed:-

> "In all cases of alleged negligence on the part of a qualified professional person…there should be some credible evidence to support the plaintiff's case before such an action commenced."

14. In *Gallagher v. Letterkenny General Hospital & Ors.* [2017] IEHC 212 there were many similarities with the present case. In that case, having remarked that it was ten years since the plenary summons issued and thirty years since the plaintiff was born with catastrophic injuries, Baker J. stated at para. 47:-

> "The plaintiff in the present case does not even at this stage have expert opinion to substantiate his claim."

15. The judge adopted the views of Clarke J. in *Green v. Triangle Developments Limited & Anor.* [2008] IEHC 52 at para. 4.3 where he explained the importance of having expert evidence in advance of commencing proceedings for professional negligence: -

> "It is, of course, the case that no party should issue proceedings (or join a third party to existing proceedings) without having a credible basis for so doing. That situation applies with particular force in cases where it may be considered appropriate to maintain a claim for professional negligence. It would be most inappropriate for any party to issue proceedings alleging professional negligence or join a third party against whom professional negligence was to be alleged,

> without having a sufficient expert opinion available that would allow an assessment to be made to the effect that there was a stateable case for the professional negligence intended to be asserted. In some types of litigation it may well be possible for solicitors or counsel to form a judgment as to the existence of a stateable case on the basis of evidence without the benefit of expert reports. However, it seems unlikely, at least in most cases, that any such judgment could responsibly be formed in relation to a claim in professional negligence without having an appropriate expert report which addressed the alleged failings on the part of the professional person concerned."

16. In *Gallagher v. Letterkenny Hospital*, Baker J. adjourned the motion to dismiss the proceedings for a period of three months to allow the plaintiff assemble expert evidence and reports. In doing so she stated that she was following the approach of Hogan J. in *Casserly v. O'Connell* [2013] IEHC 391, where a motion to strike out proceedings (in a road traffic case) was adjourned to enable the plaintiff to put his preparations for trial in order.

17. It has to be said that, so far as the first defendant is concerned, his application to join the respondents as third parties was based on the fact that he does have expert evidence to support his claim against them for contribution or indemnity. It is the plaintiff, having joined the proposed third parties as defendants who is lacking any expert report alleging negligence against them.

18. During the course of the appeal there was some discussion as to whether or not the authorities dealing with this subject require a plaintiff to have a written report from an expert before it is proper to commence proceedings. Counsel for the plaintiff argued that while he does not have an expert report he is aware that the first named defendant has one which purports to criticise the respondents in circumstances that would amount to medical negligence. But the plaintiff's legal team have not seen the report and the first named defendant has declined to make it available to them. The allusions to allegations of professional negligence against the respondents postulated in the affidavit of Ms. Brassil constitutes too slender a thread upon which to hang such a claim against the respondents. I am fortified in that view by the fact that the appellant's own medical expert flatly demurs in the assessment.

19. Counsel for the appellant maintained that the existing jurisprudence should not be interpreted to mean that one has to have a written expert report. He argued that what is required is that a plaintiff has reasonable grounds for commencing such proceedings and he relied on the observations of Kelly J. in *Connolly v. Casey* (Unreported judgment, 12th June 1998) where he stated at p. 19:-

> "I have no difficulty in endorsing the views of Barr J. that the commencement of proceedings alleging professional negligence is irresponsible and an abuse of process of the Court unless the persons advising such proceedings *have reasonable grounds for so doing*." (emphasis added).

20. For my part, I am prepared to accept that the requirement for a party to have a credible basis for commencing medical negligence proceedings or joining a third party in such proceedings does not necessarily require that a written report is available, although in most cases one would expect this to be the case. But if, for example, a plaintiff or his legal advisors has had a full consultation with an appropriately qualified expert who has indicated that he/she is prepared to give evidence of professional negligence against the proposed defendant, and states clearly what that evidence is, this would form a sufficient basis for a plaintiff or his professional legal advisors to meet their obligations. In the event that the matter proceeds to trial it will be necessary for such a witness to produce a report, and for it to be furnished under the provisions of Statutory Instrument 391 of 1998 if the witness is to give evidence.

Discussion

21. The appellant has not received an opinion or report from a suitably qualified expert alleging negligence against the respondents. On the contrary, the appellant's experts offer no evidence to support a malpractice suit against either respondent. Counsel informed this court that he was relying entirely on the evidence contained in the affidavit of Ms. Fiona Brassil. That affidavit does not contain the report relied on by the defendant in the third party application and the appellant has not had sight of it.

22. The proceedings were commenced after the appellant had obtained a report from Mr. Roger Clements, an obstetrician and gynaecologist. At the request of Mr. Clements the appellant retained the services of a neonatologist, Mr. Anoo Jain, who does not criticise the respondents. Between March 2008 and March 2011 there was extensive contact between the appellant's legal advisors and Mr. Clements and Mr. Jain. Despite extensive consultations no application was made by the appellant to join the respondents in the proceedings. Since receiving the affidavit of Ms. Brassil sworn on the 2nd November 2016 the appellant has known, at least in broad terms, what case the first named defendant is making against the respondents. So this is not a case where the appellant has no evidence as to what the nature of the claim against the respondents might be. Armed with that general information the appellant had ample opportunity to instruct appropriate experts for their view on whether or not the respondents, or either of them, were negligent in the manner set out in the affidavit of Ms. Brassil. There is sufficient information in para. 7 of that affidavit to have enabled the appellant to initiate further inquiries and obtain an expert opinion as to whether his post-natal management and care was appropriate or not.

23. Despite all this, the appellant has been unable to obtain an expert report supporting the proposition that the respondents, or either of them, were guilty of professional negligence. Indeed, Mr. Jain, having considered all the evidence that is available has concluded that they were not. Mr. Clements makes no criticism of the respondents. The appellant continues to retain Mr. Jain as their key expert witness.

24. This is a highly unusual case in which the appellant has pleaded specifically that he "does not possess any expert medical evidence that would support allegations of actionable and causal negligence and/or breach of duty as against the second and/or third named defendants, their servants or agents". Somewhat paradoxically this appears under the heading "Particulars of Negligence and Breach of Duty against the second and/or third named defendants, their servants or agents".

25. While the amended personal injury summons states at para. 10 that "further particulars of negligence against the second named respondent will only become available through the process of discovery" this is "putting the cart before the horse". The discovery process is rooted in the pleadings and cannot be used as a device to ascertain whether or not a plaintiff has a good cause of action.

26. The jurisdiction to strike out, dismiss or stay proceedings *in limine* is one that must be exercised sparingly and only where the position is clear. Even taking the appellant's case at its height on the pleadings, the court is inevitably driven to the conclusion that the pleadings disclose no reasonable cause of action against the respondents and are bound to fail. The action against the first defendant was brought following an expert liability report prepared by Mr. Roger Clements, a consultant obstetrician and gynaecologist and later a report from Mr. Anoo Jain, a consultant in neo natal medicine. But the appellant has no comparable report or evidence to support a claim against the respondents.

27. But it goes even further than that. He has an opinion that they were not negligent. In an affidavit sworn on the 4th April 2017, Ms. Agatha Taylor quoted at para. 14 from a report from Mr. Jain in which he stated:-

> "In the absence of any serial cranial ultrasound scans, comments on his brain parenchyma or a neurological examination before discharge that might facilitate timing any postnatal acquired risk, I consider that Andrew Mangan's neonatal and subsequent care under Dr Denham was satisfactory.
>
> In light of the above my professional opinion is that there are no obvious postnatal factors that might have resulted in Andrew Mangan's developmental delay.
>
> My professional opinion is that Andrew Mangan's developmental delay is an unfortunate result of his premature delivery…"

28. Any evidence suggestive of fault on the part of the respondents would involve a challenge to the professional opinion of Mr. Jain who is an important witness for the appellant. He makes no causal connection between the actions or inactions of the respondents and the injuries sustained by the plaintiff.

Conclusion

29. The court has considered whether or not it should allow the appellant further time to see if an opinion or report can be obtained for the purpose of maintaining a claim against the respondents having regard to the particular circumstances of this case and following the approaches of Baker J. in *Gallagher v. Letterkenny General Hospital & Anor.* and Hogan J. in *Casserly v. O'Connell*. On the 1st February 2017 the appellant's solicitors wrote stating that they were taking advice in relation to the issue. Despite this, at the hearing of the appeal two years later this court was given no indication that they had received advices or reports which would allow the appellant to plead a case based on his own medical expert opinion against either respondent. Having regard to the very long timeline that arises in this case and the matters referred to at para. 6 *supra*, the prejudice to the respondents in allowing the appellant further time far outweighs any benefit that might be gained by the appellant. In those circumstances the court will not extend the time to allow the appellant to see whether he can obtain the necessary opinion or report.

30. I am satisfied that the High Court judge correctly assessed the legal principles applicable in an application of this nature both so far as O. 19, r. 28 of the Rules of the Superior Courts was concerned and also having regard to the *jurisprudence* on the professional obligations on legal advisors before commencing professional negligence proceedings.

31. The High Court judge correctly applied the applicable case law to the facts of this case and reached a conclusion which cannot be criticised. In those circumstances I would dismiss the appeal.