Neutral Citation Number: [2010] IEHC 102

THE HIGH COURT

2006 6476 P

BETWEEN

EDWARD NAESSENS

PLAINTIFF

AND

NICHOLAS C. JERMYN AND NIALL O'HIGGINS

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered on the 26th day of March, 2010.

The plaintiff herein issued a personal injuries summons on the 21st December, 2006, against the defendants. The plaintiff is an actor/comedian and the first named defendant is being sued in his capacity as Chief Executive of St. Vincent's Hospital, Elm Park, Dublin 4 and the second named defendant is a medical practitioner who carried on practice as a Consultant Surgeon at St. Vincent's Hospital.

The plaintiff had surgery on his left parotid gland in or about the month of February 1994. He claims damages for personal injury, loss and damage by reason of the alleged negligence and breach of duty on the part of the defendants, their servants or agents in and about the management and treatment of an adenoid cystic carcinoma in the plaintiff's left parotid gland and in and about the follow up, including post surgical follow up of the plaintiff, delay in diagnosing recurrence of the plaintiff's tumour and/or in and about the advice given to him in that regard. Following the plaintiff's surgery in 1994, he attended St. Vincent's hospital and the second named defendant or his team, on a number of occasions between 1994 and 2001. A recurrence of the tumour was diagnosed on the 16th January, 2001. On the 21st February, 2002, the plaintiff underwent radical surgical resection of his left parotid gland tumour. He received post operative adjuvant radiotherapy.

Thus, the plaintiff's claim is that the defendants and their servants or agents were negligent and in breach of duty in and about the management and treatment of the adenoid cystic carcinoma in the plaintiff's left parotid gland and in and about their follow up, including post surgical follow up and in and about the advice they gave to the plaintiff and by their failure to use all due or reasonable care, skill, competence, diligence and judgement. The plaintiff claims that as a consequence of the foregoing there was a delay in the diagnosis of the recurrence of the plaintiff's tumour in the left parotid gland, that he was deprived of an opportunity to avail of earlier intervention therefore, that he has been caused to undergo more extensive surgery than he would otherwise have been required to undergo and to suffer pain and suffering that he would not otherwise have suffered. Full particulars of personal injury were set out in the personal injuries summons and damages were claimed.

An order was made on the 11th May, 2009, directing the trial of a preliminary issue as to whether the plaintiff's claim against the second named defendant is barred pursuant to the provisions of the Statute of Limitations Act 1957 and 1991 as amended.

Counsel on behalf of the second named applicant identified three areas in which negligence is alleged against his client. They are, firstly, a criticism of the surgery carried out in 1994, secondly, a criticism of the follow up that took place and in particular the failure to diagnose a recurrence of the plaintiff's cancer in 1997 and/or 1998 and thirdly an allegation that the original surgery was not followed up with adequate treatment such as the provision of radiotherapy.

In the course of the submissions of the second named defendant a chronology of the treatment/review of the plaintiff was furnished to the court on behalf of the second named defendant, as follows:-

1. The plaintiff underwent his operation at the hands of the second named defendant in February of 1994.

2. The plaintiff was referred for outpatient review in 1996, 1997 and January 1998. It is disputed that he attended all appointments and further what took place when he did attend but it is common case that, on the dates he did attend, recurrence of cancer was not diagnosed.

3. In or about December 2000, the plaintiff attended A & E in the first named defendant's hospital suffering pain, underwent CT examination of the parotid gland. Diagnosis in January 2001, noted indicia highly suggestive of tumour recurrence.

4. Between December 2000 and February 2001 the plaintiff was referred to a variety of different specialists for second opinions from specialist cancer surgeons and/or further advice on the extent, nature and treatment required for his condition. These referrals were initiated, assisted and facilitated by the second named defendant.

5. For the purpose of these referrals the second named defendant made the plaintiff's treatment and other records available to the various experts whose opinion was being sought.

6. As early as March 2001, the plaintiff was advised that he needed urgent surgery.

7. The plaintiff underwent surgery on the 21st February 2002.

8. The plaintiff commenced these proceedings on the 21st December, 2006, four years and ten months later.

At this point it would helpful to refer to the provisions of the Statute of Limitations Act 1957 as amended. There is no dispute between the parties that the relevant limitation period for the plaintiff's is three years by virtue of the provisions of s. 11 of the Statute of Limitations Act 1957 as amended. It is the case that the provisions of the Statute of Limitations (Amendment) Act 1991,

also applied to the facts of this case such that the plaintiff's cause of action does not accrue and therefore the limitation period does not run until his "date of knowledge" of matters provided for by that Act. Section 2 of the Act is in the following terms:-

> "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:
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> (a) that the person alleged to have been injured had been injured,
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> (b) that the injury in question was significant,
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> (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.
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> (2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire -
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> (a) from facts observable or ascertainable by him, or
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> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.
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> (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."

Having asserted that the proceedings herein are statute barred, it was contended by counsel on behalf of the second named defendant that as the plaintiff was relying on the provisions of s. 2 of the 1991 Act i.e. asserting that his date of knowledge arose within the three year period prior to the issue of the proceedings that the evidential burden shifted to the plaintiff to demonstrate that the date of knowledge was within the time frame of three years prior to the date of issue of the proceedings. Counsel on behalf of the plaintiff did not disagree with that contention and accordingly the matter proceeded before me on that basis.

Counsel on behalf of the plaintiff referred to the facts and history of the matter. Reference was made to a chronology of events dated April 2004, prepared by the plaintiff and which was brought by the plaintiff when he first went to consult his solicitors in relation to the bringing of proceedings. Having referred to a number of factual matters, the plaintiff was called to give evidence.

Mr. Naessens in his evidence described the operation that took place on the 21st February, 1994. Following the operation he was told that he would be seen after the operation every six months to see how things were settling down. There was some discussion in the early stages about whether further treatment might be required, but two weeks after the operation he was told that nothing else needed to be done other than attending for reviews. At his attendance at St. Vincent's in 1996, he reported that he had pain at the site of the operation. It was explained that this was due to scar tissue and nerve damage which was part of the result of the operation. That pain continued. The medical records of that visit noted that there was occasional pain at the site wound.

He was referred back to the second named defendant by his GP towards the end of November 1997. At that stage it appears, that the plaintiff was "most anxious about follow up investigations and seems to have great anxiety regarding recurrence of tumour". The second named defendant replied by letter dated the 16th December, 1997, having seen the plaintiff and the plaintiff confirmed that he was told about the contents of that letter which stated that "I know that this unusual type of tumour can recur locally, even some years after apparently complete excision and for this reason, I have not been able to give him the total reassurance which he obviously wishes. Nonetheless, if he continues for four or five years without recurrence, I think he will be on a very good 'track'." On that basis the plaintiff said that he took it that he had nothing to be concerned about and that he was reassured by the visit to Professor O'Higgins. He had occasional pain in the jaw area from time to time and had a bump in the area of the operation which was described as scar tissue.

The plaintiff indicated that by 1999, he was five years past the operation and as he had been reassured by the second named defendant, he was confident that he was on "a very good track". Subsequently towards the end of 2000 he went back to the A & E Department in St. Vincent's Hospital complaining of a pinching sensation in the area of his earlobe. It was similar to the type of pain he had experienced previously following the operation. He was advised to see a member of the second named defendant's team and indicated that the pain he was having was more intense pain than he had had previously but was similar to the pain he previously had. He was advised to see Mr. McDermott and a CT Scan was arranged. Following the CT Scan, he was advised that there was a recurrence of the tumour. He referred to a letter dated the 22nd January, 2001, which was sent to his GP in which it was indicated that the CT Scan was "highly suggestive of recurrence". Indeed the scan was reported on around the 14th January, 2001 and concluded "the appearances are those of recurrent tumour in the left parotid gland with extension from the superior to the deep plains and a possible metastatic node in the left posterior cervical space".

The plaintiff said that he was terrified as a result of the outcome of the scan and was anxious to have further advice in relation to the findings. He had intended to travel to New York where his girlfriend resided for St. Valentine's Day and decided to see if he could get further advice while there. He spoke to his GP and to the second named defendant about pursuing this course. In fact, he wrote a letter dated the 11th February, 2001 to the second named defendant in which he stated:-

> "I am going to New York this Wednesday. While I am there I would like to know more about the 'stage' of my condition at present, the treatment options and the impact of further surgery and radiation treatment. Dr. Murphy suggested that you are in the best position to recommend an expert in ACC. I would be grateful if you could assist me to do this. . . ."

The plaintiff explained that around this time he learned for the first time of the phrase "adenoid cystic carcinoma" ("ACC") and that the complaint he had was a very rare complaint. There was an internet site for people suffering from ACC. Having seen the second named defendant, he was referred to a Dr. Shaha in New York. The second named defendant wrote by letter dated the 12th February, 2001, to Dr. Shaha. The arrangements to see Dr. Shaha were made by the second named defendant on behalf of the plaintiff. In order to assist him, the plaintiff was given scans and X-rays. Dr. Shaha furnished a detailed report of his examination of the plaintiff and he recommended radical surgery followed by radiation treatment. At that point in time, the plaintiff said that he had no issue as to any question of fault on the part of the original team who dealt with him in 1994 and subsequently.

Subsequent to that visit the plaintiff wrote again by letter dated the 27th February, 2001, to the second named defendant. In that letter he expressed his gratitude to the second named defendant for the arrangements made by him for the plaintiff to meet Dr. Shaha. The plaintiff set out the advice given by Dr. Shaha to the plaintiff. The letter concluded:-

> "I know that you are familiar with this area and I am reliant on your help and guidance as to the way ahead. I have an appointment with you at clinic next Tuesday and I would like to bring with me an old friend of myself and my family, John Keane, who is providing me with a lot of support."

The plaintiff then outlined a series of steps taken with the second named defendant to obtain further opinions and advice in relation to the position that he found himself in. He consulted a Mr. Thomas attached to the Royal Marsden Hospital in London; he also saw Dr. Moriarty in St. Luke's Hospital in Dublin in relation to the issue of radiation. He consulted Dr. John Armstrong, a specialist in radiation, who had worked in the Sloan Kettering Hospital in the United States. Finally the plaintiff stated that he heard about a doctor attached to St. James's Hospital in Dublin a Professor Tyman. Ultimately he had surgery on the 24th February, 2002 and the plaintiff described that surgery.

Following the operation, the plaintiff started radiation in August/September of 2002. This took place over a six week period in St. Luke's Hospital.

He described the affect of the surgery on his career and how he went home to live in his parent's house for most of 2003. He attended counselling at ARC in Eccles Street. The counselling appears to have taken place in the years 2001 to 2002 and related to the situation in which he found himself. It lasted for approximately a year.

The plaintiff then gave evidence that he saw an article in the Irish Times edition of the 16th December, 2003. The article was entitled "Mistakes by Medical Staff Estimated to Kill or Injure 14,000 Patients Each Year". The article was general in its nature save that it referred in some detail to an individual who was wrongly diagnosed with stomach cancer and had an operation to remove most of his stomach. Following the operation it was discovered there was no cancer. The individual concerned was left seriously and permanently injured. It appears that this article started to cause the plaintiff to question his previous treatment. He described meeting a friend, a Mr. Kineen, a Barrister some time after Christmas 2003. They discussed the plaintiff's care and the frequency of follow up required by the plaintiff. This led the plaintiff to consider the difference between the standard of care available in St. James's Hospital and St. Vincent's. He stated that he wondered whether the difference in levels of follow up was due to the fact that in St. James's Hospital he was being followed up subsequent to a recurrence of a tumour. He described the level of scanning done in St. James's together with the X-rays taken there and he described the follow up in St. James's as meticulous. He contrasted this with the fact that in St. Vincent's Hospital prior to his surgery in 1994, no scanning had taken place. These issues were discussed with Mr. Kineen. Ultimately, following their discussions, Mr. Kineen advised him to see a solicitor. He talked to Mr. Kineen again in early March, but unfortunately Mr. Kineen himself took ill in March 2004 and died that month.

Shortly afterwards the plaintiff went to his current solicitors on the 15th April, 2004. As mentioned previously he gave the chronology he had prepared to his solicitors. He asked his solicitors to follow up the suspicions he had now as to the difference in treatment provided by St. Vincent's in relation to his first surgery and St. James's in relation to the second surgery. Through his solicitors, reports were obtained from medical experts and in particular reference was made to two reports from John Townend dated the 10th September, 2004 and the 5th November, 2004, respectively. Mr. Townend in his report recommended that an opinion from an oncologist was necessary. As a result, a further report was obtained from a Mr. Martin on the 20th February, 2006 and this was followed up by a second report on the 20th November, 2006. Shortly after the second report was received from Mr. Martin these proceedings were issued.

The plaintiff was cross examined extensively as to the state of his knowledge at various stages. In particular he was asked about researches done by him on the internet in relation to his illness. He indicated that he started training as a computer programmer in October 1999 and he was of the opinion that he had access to the internet from that time onwards.

He explained that when he was diagnosed with the recurrence of the cancer in January 2001, he was terrified and shocked. He did not fully understand at that stage the nature of the specific complaint i.e. ACC. In 1994 after his operation he was not concerned about the issue of recurrence. He said his concern was about pain. The letter of the 6th November 1997, from his GP to the second named defendant was put to the plaintiff and he explained that at that stage he was anxious to see either Dr. McDermott or the second named defendant about the pain. He accepted that he had some concern at that stage with follow up investigations/recurrence. However, he explained that following the receipt of a letter in January 1998, which was sent by the second named defendant to his GP, he was reassured. That letter indicated that the plaintiff was well and had no evidence of recurrence of carcinoma of the parotid gland. He described the researches he made on the internet in relation to ACC and he obtained the information that it was a difficult cancer to treat and that it does not have the usual follow up. He explained that any information he got from the internet was brought back to the second named defendant for the purpose of obtaining guidance and clarification.

Dr. Shaha's report was put to the plaintiff in which Dr. Shaha noted "the patient comes in today after having done considerable research on the disease via the internet consulting various physicians". He agreed that he had done considerable research but pointed out that it was research by a layman. Asked if he had known from his research that he would have had scans done as part of the normal follow up, he said that he was of the view that he had what was the appropriate follow up and that he did not have any

expectations as to the nature of the follow up. He was not of the view that there was something amiss about the follow up at that stage.

He was also referred to a letter written by Dr. Armstrong, in which Dr. Armstrong had referred to the plaintiff as "a very insightful man who has a clear grasp of the issues". He accepted that he had a lot of knowledge at that stage in relation to issues such as the loss of the facial nerve, the possibility of paralysis and so on. He had had lots of discussion at that stage with various consultants and physicians and he had also obtained information on the internet.

He reiterated that he was prompted to question the situation following the article he read in the Irish Times on the 16th December, 2003. He described that article as a big motivating factor. The question he had in his mind was whether the difference in follow up between St. James's and St. Vincent's Hospital was because he had a recurrence or because there was a difference in the standard of treatment between St. Vincent's Hospital and St. James's Hospital. He commented that at that stage he knew that there had been a difference in treatment, but he was not aware of whether the difference was due to the fact that St. James's was dealing with a recurrence of a tumour. In other words he knew there was a difference in treatment but was not aware of the reason of the difference. Finally the plaintiff in cross examination was asked about a number of matters set out in the document he had produced to his solicitors called Chronology of Events in which he stated:-

> "I contend that:
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> Following my first operation in 1994, I should have received follow up radiation.
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> I should have been CT Scanned in 1997 or earlier when I complained of pain.
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> I should have had the disease and its high risk of recurrence explained to me.
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> Ideally, I should have been passed on to a medical team with more experience and a better expertise in the treatment of this rare form of cancer."

In regard to these matters he pointed out that his awareness of these matters was different in 2004 to his state of awareness in 1994 and subsequently. By 2004 he had done more research and had looked at the issues more closely. He denied that he could have done this in April 2002. That concluded the plaintiff's evidence.

Nuala Cadwell was also called on behalf of the plaintiff and she confirmed that she was a psychotherapist who was involved in the counselling of the plaintiff in the period 2001 to 2002. She was not sure if the counselling took place before or after the surgery. She described the function of psychotherapy and she described the concerns of the plaintiff. She recalled the extent of the damage done to the left side of the plaintiff's face at the time that she was involved in counselling. He had concerns at that stage about recurrence and not being able to earn his living.

That concluded the evidence. In relation to the evidence given by the plaintiff in this case, I would echo the comments made in correspondence referred to above by Dr. Armstrong to the effect that the plaintiff is an insightful man. He is clearly an intelligent man and not surprisingly, strongly motivated to find out as much as possible about his illness. Throughout the time that the plaintiff was being treated by the second named defendant, he relied on him very much for guidance and information in relation to his situation. The plaintiff at different stages corresponded with the second named defendant and attended with the second named defendant or his team. It is also clear that he was appreciative of the lengths that the second named defendant went to on his behalf, in relation to assisting the plaintiff to obtain appointments with other consultants and relied extensively on the views of the second named defendant. That is something which comes clearly from the evidence of the plaintiff and indeed from the correspondence produced in the course of this hearing.

I accept the evidence before me that while the plaintiff asked a lot of questions over the years and was concerned about the issue of recurrence in 1997, as expressed in his letter of the 6th November, 1997, it is the case that the plaintiff accepted the reassurance which came from the second named defendant at that stage. The fact that he went to Australia in 1999 bears this out. It also seems to me to be reasonable to conclude having regard to the evidence that the plaintiff did not have any real concerns about his treatment by the second named defendant and the nature of the follow up following the original surgery in 1994 until after he had had surgery in St. James's Hospital and went on to experience the difference of treatment by way of follow up. Although the plaintiff was cross examined as to the extent of the knowledge he acquired via the internet in relation to such things as scanning and radiotherapy it should be noted that no evidence was put before me as to the state of information available on the internet during the period when the plaintiff first began to research his disease in that way. Therefore I have nothing before me to show what the plaintiff should have been able to find on the internet in relation to topics such as scanning and the need or otherwise for radiotherapy.

I now want to look at the authorities opened to me by counsel on behalf of the plaintiff and the defendants. I should say in this regard that there was little disagreement between the parties as to the appropriate authorities and applicable principles. Counsel on behalf of the applicant referred to the specific provisions of the Statute of Limitations (Amendment) Act 1991, and in particular s. 2 of that Act. He identified the elements to be considered in relation to the date of knowledge, firstly that there was an injury, two, that the injury was significant, and three, that that injury was attributable in whole or in part to the act or omission alleged to constitute negligence. The injury referred to in this context was the operation carried out in February 2002 and it is the plaintiff's contention that this operation would not have been necessary or alternatively would not have been as invasive had the appropriate follow up and attention been provided to the plaintiff following his first operation in 1994. Accepting for the moment that the plaintiff establishes the injury as being the operation in February in 2002 and that the injury was significant in the sense that the procedure undergone by the plaintiff at that time was more extensive than would have been the case if as alleged he had received the appropriate treatment follow up following the 1994 operation, the question then arises as to the date on which the plaintiff first had knowledge of the fact that that injury was attributable in whole or in part to the act or omission alleged to constitute negligence.

One of the difficulties in a case such as this is that an individual may be aware of an injury in the sense used in s. 2 of the 1991 Act and that the injury was significant but depending on the circumstances of the case it may not be clear to them that the injury was attributable to negligence. For example one only has to consider the possibility of surgery being carried out on someone in circumstances where it is found subsequently that the surgery was unnecessary. At the time of undergoing the surgery the patient consents to the surgery in the belief that he/she has a particular illness or injury which requires surgery. It will not be apparent to the patient at the time that the surgery is not necessary. The patient will suffer an injury, the surgery, but will not realise this to be the case at the time of the surgery. Therefore it will not be known to the patient that the injury is attributable to negligence.

I am satisfied that the plaintiff suffered an injury, a significant injury, in undergoing an operation in February 2002, which was more

invasive than would have been necessary had the operation been carried out earlier. The question to be considered is when could and should the plaintiff have had sufficient knowledge of the facts that the injury was attributable in whole or in part to the acts or omissions alleged to constitute negligence in this case.

Counsel on behalf of the Plaintiff referred to Medical Malpractice Law, Healy, at para. 3-25 where it is stated:-

> "In medical malpractice cases the plaintiff's knowledge of his injury is more often interwoven with the question of the association between that injury and a culpable breach of duty by the defendant. This is for reasons intrinsic to the context of medical care. A patient enters a relationship with the doctor that at the outset is marked by physical complaint; thereafter the doctor treats the patient; and since all forms of treatment effects some change to the patients person, the patient, unlike other plaintiffs, often must be prompted to interpret what has been done to him and whether it was therapeutically necessary or competently performed. In a great many cases of iatrogenic injury – perhaps the majority – the plaintiff is given, or digests inadequate information in the aftermath of the event and only later, reasonably, is alerted to the significance or character of the event that gave rise to his injury. Unlike other cases of personal injury, the plaintiff is typically a person focused on his medical complaint prior to injury, and in many cases the injury he suffers in the course of treatment is difficult to extricate from his sense of the medical complaint itself and the risk associated with any treatment of it. This is not a plaintiff who suffers injury 'out of the blue', as tends to be the case where other negligence litigants; nor is it a case where the plaintiff is a stranger to the defendant – on the contrary the plaintiff, as a patient and the defendant as a doctor, tend to have been in a unique relationship characterised by one party's dependence on the other for skill, advice and information. In consequence, the patient's post operative response to fresh or further injury tends to be as different for the quotidian plaintiff as the doctor's duties of care are from the duties on other defendants. It is therefore more usually the case that before the plaintiff begets a reasonable suspicion as to a right of action against the defendant, he must first have formed a reasonable suspicion, or been advised accordingly, that his present physical condition potentially constitutes a compensable injury or that the treatment he received was neither therapeutic nor carefully preformed. Clearly, in such cases classification of the plaintiff's outcome as injurious is converges with attribution of that outcome to culpable negligence, and thereafter it falls to be considered whether the plaintiff knew or ought to have know the identity of the negligent party which, when not readily apparent, tends to be determined by a medical expert after sight of all the relevant medical records. Because of the potential multiplicity of other causes or other defendants in complicated medical negligence cases, this process is rarely as straightforward as it is for plaintiffs in cases of negligence *simpliciter.*"

That paragraph highlights some of the difficulties that can arise in medical malpractice cases. There was little dispute between the parties in relation to the case law applicable. Both parties referred to the Supreme Court decision in the case of *Gough v. Neary* [2003] 3 I.R. 92 and to the decision of Geoghegan J. and in particular to a passage from his judgment at p. 127 in which he referred to an English decision which set out a number of principles which were found to be of assistance in that case and in which both parties in this case agreed were appropriate to be considered. Geoghegan J. stated:-

> "Since the hearing of this appeal it has come to my notice via the internet that there are quite a number of later English cases relevant to this limitation provision. As in a broad way they range over the same issues which have been debated at the hearing of this appeal I think that I can safely refer to a few points in them without introducing any new matter that has not been the subject of argument before this court. The principal authority to which I want to refer is *Spargo v. North Essex District Health Authority* [1997] 8 Med L.R. 125 and the judgment of the Court of Appeal (Nourse, Brooke, Waller L.J.J.) delivered the 13th of March, 1997. The judgment of the court is the judgment of Brooke L.J. in which he asks himself the rhetorical question, what does the law require in order that actual knowledge is established? He observes that 'this branch of the law is already so grossly overloaded with reported cases . . . that I see no reason to add to the overload by citation from earlier decisions'. He then cites a large number of the reported cases and draws from them certain principles. I think it important to mention this because these principles have ever since been regularly referred to in later English judgments and have almost been interpreted as though they were statutory. As formulated by Brooke L.J. at p. 129, they are as follows:
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> > '(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.'"

The plaintiff relied in particular on clause 4 of those principles as stated by Brooke L.J. Geoghegan J. in dealing with those principles went on to comment on the fact that another judge observed in a subsequent case that those principles were helpful up to a point but their application was by no means easy. He went on to add:-

> "Certainly there is no merit in my view in casting them as stone."

Geoghegan J. went on at p. 129 of the judgment to quote from a passage from Donaldson M.R. in the case of *Halford v. Brookes* [1991] 1 W.L.R. 428 at p. 433:-

> "The word (knowledge) has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start any proceedings. In this context 'knowledge' clearly does not mean 'know for certain and beyond possibility of contradiction.' It does, however, mean 'know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking

> legal and other advice, and collecting evidence'. Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice."

That is a useful passage in that it highlights the difficulty in a case such as the present one. The difficulty is trying to ascertain the point at which it could be said that the plaintiff had sufficient knowledge "to justify embarking on the preliminaries to the issue of a writ". Counsel on behalf of the plaintiff also referred to the decision in the case of *Fortune v. McLoughlin* [2004] 1 I.R. 526, a decision of the Supreme Court in which it was held that the word "attributable" in s. 2(1)(c) of the Act of 1991 was not satisfied by the plaintiff's knowledge of the factual situation. The knowledge referred to was knowledge of attribution and knowledge that there was a connection between the injury and the matters alleged to have caused the injury. McCracken J. in the course of his judgment in that case, at p. 534 went on to say:-

> "The knowledge referred to in that subparagraph is knowledge of attribution, in other words knowledge that there was a connection between the injury and the matters now alleged to have caused the injury. This is a connection which the plaintiff did not make in this case. If a plaintiff is to have knowledge within the meaning of s. 2(1)(c) of the Act of 1991, she must have knowledge at least of a connection between the injury and the matters now complained of to put her on some inquiry as to whether the injury had been caused by the matters complained of. At what stage she is put on inquiry must be a matter to be determined in each case, but in the present case the plaintiff quite clearly did not make the connection at all, as even when she was alerted to the fact that there might have been negligence, her reaction was to attribute her injuries to the actions of the National Maternity Hospital rather than of the defendant. It should be emphasised that the plaintiff's knowledge of these matters is largely a question of fact. The trial judge in this case heard and placed reliance on, not only the expert evidence, but also the evidence of the plaintiff herself. . . ."

Finally in the course of the submissions counsel for the plaintiff referred to the case of *Cunningham v. Neary* (Unreported, Supreme Court, Fennelly J., 20th July, 2004). The plaintiff in that case did not consult a solicitor until May 2000. McGuinness J. in the course of her judgment at p. 4 commented:-

> "It was argued on behalf of the plaintiff that she as an ordinary lay person did not have the required medical knowledge to take immediate action in December 1998. It is perhaps understandable in the circumstances that she may have been hesitant about taking the step of consulting her solicitor. However, once she had done so she not only had the information already available to her but also had the benefit of legal advice. It must be presumed that this legal advice included knowledge of the operation of the Statute. In May 2000 proceedings initiated by the plaintiff would have been within the statutory limit."

In that case the plaintiff waited until after a medical expert presented a report to the solicitor in April 2001, and proceedings were not issued until the 22nd March, 2002. In those circumstances the court came to the view that the proceedings were statute barred. Looking at that particular decision, counsel on behalf of the plaintiff urged this Court to take the view that there was a requirement in cases such as this for a triggering event that means it is reasonable to obtain legal advice. He submitted that there was nothing on the facts of this case to put the plaintiff on inquiry until 2003. After he was put on inquiry he began to take the appropriate steps. In those circumstances it was contended that the plaintiff's case herein was not statute barred.

By way of response, counsel on behalf of the second named defendant pointed out that the plaintiff herein was an intelligent person, well informed and as described in the course of dealing with various medical consultants a person of great insight. As long ago as 1997, his GP in a letter to the second named defendant had made observations as to the anxiety of the plaintiff in relation to the issue of follow up and the recurrence of a tumour. It was therefore contended on behalf of the second named defendant that by 2001 the plaintiff had the necessary knowledge to be put on inquiry. The recurrence of the tumour was diagnosed in 2001 and it was pointed out that at that stage the plaintiff was aware of the nature of the follow up between the period of 1994 and 2000. He was also aware of investigations which had or had not been carried out. He rejected the suggestion that there had to be a triggering event. As he pointed out, the Act itself does not contain any provision for a triggering event. He submitted that it was very strange that the article referred to by the plaintiff from the Irish Times on the 16th December, 2003 should be viewed in some way as a triggering event. Rather he suggested that the triggering event might be the alleged difference in treatment between that which the plaintiff had in St. Vincent's following the 1994 operation and that which was available in St. James's Hospital after the 2002 operation. The plaintiff was aware of differences in the nature of scanning, staging and the overall more rigorous follow up in St. James's Hospital as opposed to that which took place in St. Vincent's Hospital. In other words, after the plaintiff had his second operation in February 2002, he should very quickly thereafter have experienced the difference in follow up between the two hospitals.

Counsel on behalf of the second named defendant suggested that rather than the fourth relied on by counsel for the plaintiff in the *Spargo* formulation that the third clause was appropriate, namely that a plaintiff has the requisite knowledge when they know enough to make it reasonable for them to begin to investigate whether or not they have a case against the defendant. It was contended that the plaintiff was an intelligent person whose cancer had recurred at the end of 2000 and the beginning of 2001 when he had the benefit of a wide variety of independent experts whose opinions had been sought in regard to future treatment. Accordingly it was submitted that in truth the plaintiff had the necessary knowledge available to him as of early 2001 at the latest. In those circumstances it was contended that the plaintiff's claim was statute barred.

Counsel on behalf of the first named defendant adopted the submissions of the second named defendant.

Decision

I accept that the *Spargo* principles as set out by the Supreme Court in *Gough v. Neary* and subsequently followed in other decisions of the Supreme Court are of considerable assistance in looking at the question of the date of knowledge as defined in s. 2(1)(c) of the 1991 Act. In order to apply those principles it is necessary to look at the facts of this case.

As I have previously said, I accept that the plaintiff is an intelligent, insightful man. As such it is not surprising that when he was diagnosed with cancer in 1994, he sought reassurance from the medical team treating him as to the issue of radiotherapy and follow up treatment and the possibility of recurrence of his illness. He received the information that it was not necessary to have radiotherapy and he was required to attend for follow up on a regular basis. He attended for review and at his reviews in 1996 and 1997 he informed the members of the second named defendant's medical team that he had specific complaints of pain at the site of his operation. At this time he was given various assurances that the matters he complained of were due to scar tissue and damage to the facial nerve. In the summary of the evidence of the plaintiff, I referred above to correspondence between the plaintiff's GP and the second named defendant in November 1997 and early 1998. That correspondence is clear as to the nature of the plaintiff's concerns at that time and also as to the reassurance given to the plaintiff as to his well being.

I accept that as time went on the plaintiff began to make use of the internet to seek out information about his illness. This probably commenced sometime around 1999 when the plaintiff was engaged on a computer programming course. It is difficult to be more precise than that in relation to this issue. By the end of the year 2000, the plaintiff re-attended at the A & E Department in St. Vincent's Hospital. The pain he had complained of previously was now more severe and investigations carried out at that time by way of CT scan which took place in January 2001 revealed a recurrence of the cancer.

At this stage I have no doubt that the plaintiff actively researched his illness on the internet and that he brought his findings and concerns and questions to the second named defendant and his medical team. He discussed what options were open to him and he sought second opinions. There is no doubt and it is accepted by the plaintiff that the second named defendant was of considerable assistance to the plaintiff in obtaining second opinions from a variety of sources. Ultimately he had further surgery in February 2002.

I find it very difficult to accept the submissions made by counsel on behalf of the second named defendant that following the diagnosis of the recurrence of the tumour in 2001 that the plaintiff then could have had or should have had the necessary knowledge to embark on an inquiry as to whether there had been an injury attributable in whole or in part to the act or omission alleged to constitute negligence. It was ultimately conceded by counsel on behalf of the second named defendant in the course of the hearing that time should run at the latest from the date of the operation in 2002. The point made by the plaintiff in this hearing is that it was not until he had the experience of being operated on in St. James's Hospital and was in a position to contrast the treatment he received in St. James's as against that which he had received in St. Vincent's that he had any doubts about the inadequacy of the treatment by the second named defendant and indeed the first named defendant herein. In the immediate aftermath of his operation, he would have observed that there had been pre-operation scanning and staging to assist in assessing the form of surgery that was required. The difference in post operative treatment could not have been ascertained until such time as the operation had taken place.

In his evidence the plaintiff said that whilst he was aware of differences in the treatment afforded to him by St. Vincent's leading up to and in the aftermath of the 1994 surgery and that afforded to him before and in the aftermath of the surgery in 2002 carried out in St. James's Hospital, his initial views were that the difference was attributable to the fact that in 2002 he was being treated for a recurrence of the cancer.

I accept that s. 2(1)(c) of the Act does not require a triggering event to start the statute running. What is clear from the case law is that the statute begins to run when a plaintiff has knowledge of attribution i.e. that the injury was caused by the act or omission involved and knowledge that there was a connection between the injury and the matters alleged to have caused the injury as described in the case of *Fortune v McLoughlin* by McCracken J. in the passage referred to above. In other words, the plaintiff has to be able to make that connection.

The evidence given by the plaintiff in this case is that it was not until the article published in December 2003 that he began to consider the possibility that what he now complains of in these proceedings, namely, that the recurrence of the tumour might not have required such extensive and invasive surgery had his treatment in St. Vincent's Hospital been different. He gave evidence as to his discussions after Christmas 2003 with a friend of his who was a barrister. The plaintiff had a further discussion with that individual in March 2004 and within a very short period of time consulted his solicitors with the result that proceedings ultimately issued at the end of December in 2006. Accepting as I do that the plaintiff is an intelligent, educated man who acquired a great deal of information in relation to his illness it still does not seem to me to be possible to attribute knowledge within the meaning of s. 2(1)(c) of the Act of 1991 to the plaintiff. It seems to me that it is reasonable to conclude that for a long period of time after his surgery in February 2002, the plaintiff did not make a connection between the requirement to have such radical treatment then with the now alleged failings in relation to his treatment in St. Vincent's following his operation in 1994. There is nothing to suggest otherwise in the evidence before me. His view as to the difference in treatment in the two hospitals was down to the fact that the second hospital was dealing with a recurrence of a pre-existing tumour.

Finally, I should note that counsel for the first named defendant joined in the submissions of the second named defendant.

In these circumstances I am satisfied that the plaintiff's claim is not statute barred and accordingly I will refuse the application of the first and second named defendants herein.