Neutral Citation Number: [2011] IEHC 231

THE HIGH COURT

2008 3084 P

BETWEEN

PATRICIA CARROLL

PLAINTIFF

AND

MATER MISERICORDIAE HOSPITAL

DEFENDANTS

Judgment of Mr. Justice Hedigan delivered on 8th day of June, 2011.

1. This proceeding is in the nature of a preliminary hearing to determine whether the plaintiff's action falls within s. 3 of the provisions of the Personal Injuries Assessment Board Act 2003 (PIAB Act) or whether it is excluded by virtue of the savings provisions in subsection (d).

2. Section 3 of the above Act provides for the application of the Act to a range of civil actions. It provides as follows:

> "3. This Act applies to the following civil actions –
>
> (a) …. ,
>
> (b) …. ,
>
> (c) …. ,
>
> (d) a civil action not falling within any of the preceding paragraphs (other than one arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person)."

3. The determination of this issue is of crucial importance for the plaintiff as it will determine whether or not the action is statute-barred.

4. The background facts are as follows; the plaintiff is a housewife born on the 26th January, 1956. In or about the 30th May, 2005 whilst present as an in-patient in the Mater Hospital, whilst she was on medication consisting of a number of drugs, she left her bed and unaccompanied went to the bathroom. Whilst entering the bathroom, she became dizzy, fainted and fell. As a result she suffered severe personal injury.

5. It is the defendant's defence, *inter alia*, that her claim is statute-barred because it is an action to which the above Act does not apply and consequently is one which is required to be brought within two years of the date of the accident, i.e. the 29th May, 2007. The personal injuries summons was issued on the 17th April, 2008. If the Act does apply then, subject to a date of knowledge question which I am not asked to address, the plaintiff's claim may not be statute-barred.

6. The plaintiff's submissions

Mr. Barron for the plaintiff submits the defendant clearly had a duty of nursing care but that this is not one excluded from the Act by virtue of subs. (d). In this regard I am referred to Kelly v. Board of Governors of St. Laurence's Hospital [1988] I.R. 402 at p. 406. Finlay C.J. stated therein:

> "I am satisfied, however, that as appears from the form of the question left to the jury, the propriety of which is not challenged, that this is more precisely a case where the issue is one of nursing care and attention than one where the allegation of negligence is to be categorised as negligence in medical treatment."

He submits on this authority that nursing care is distinct from medical care. He further submits that the exclusion provision of 3(d) seems intended to exclude cases of professional negligence and more particularly medical negligence from the Act. The accident that occurred herein arose out of nursing care and not medical care. She further submits that the only part of the exclusion that might cover the case is that which refers to an action "arising out of the provision of any health service". He submits that nursing cannot be such a service because if it were it would be so vague and wide in its application that nobody would know what was covered.

7. In interpreting "provision of a health service" the Court should look to the context. In this regard, the plaintiff relies upon *The People v. Richard Kennedy* [1946] I.R. 517 and *Dillon v. Minister for Posts and Telegraphs* (Henchy J., 3rd June, 1981). This context she argues is one where the apparent exclusion of medical negligence is all that is being provided. All other action including ones arising from nursing care are not contained in the exclusion clause and therefore the Act applies. In this regard he also relies upon the judgment of O'Neill J. in *Sherry v. Primark* [2010] I.R. 407. I am referred to page 11 of the judgment, 5.3 where dealing with the same section, the learned Judge observed:

> "The only actions that are expressly excluded, by virtue of s. 3(d), are medical negligence actions."

8. In determining the nature of the claim it is to the summons that the Court should look and in particular to paragraph 2 of the personal injuries summons. The claim as shown therein arises from the negligent management and maintenance of the hospital. It is not a claim for negligent prescription of drugs.

9. Submissions of the defendant
The defendant refers me to *Gunning v. The National Maternity Hospital* [2009] I.R. …. at p. 122 where O'Neill J., in a different context stated:

> "8. Section 3(d) of the Act of 2003 describes a number of circumstances in civil actions in the medical sphere where the Act of 2003 has no application. In my view, s. 3(d) of the Act of 2003 should be construed as applying to the factual circumstances out of which an action arises rather than applying to the specific legal causes of action set out in the legal proceedings."

The Court should look to the factual circumstances in short. Doing that, Mr. Buckley for the defendant submits, requires the Court to look to the opening letter of the 29th August, 2005 and then to paragraph 3 and 4 of the personal injuries summons. The Court should examine the particulars of negligence set out therein notably (a), (f), (g), (i) and (j). The Court should further look at the reply to the defence and in particular to paragraph 4 thereof. They argue that the claim clearly is that, having prescribed the plaintiff certain drugs, the defendant failed to provide proper medical advice or treatment. They should have known her physical co-ordination and orientation would be affected and that she was liable to faint. She should have been advised not to leave her bed without assistance. These claims are all claims of negligence arising from the provision of a health service and/or medical advice and treatment.

10. It will be necessary to call medical evidence to establish at the very least the foreseeability of the plaintiff's accident were she medicated as alleged. The case is not one of slipping and falling on the way to the bathroom.

11. The Court's decision
Section 3(d) is intended to exclude from the provisions of the PIAB Act certain specified types of action. They are civil actions arising out of

> (i) the provision of any health service,
>
> (ii) the carrying out of a medical or surgical procedure,
>
> (iii) the provision of any medical advice or treatment.

I agree with both sides who argued that words should be given their ordinary meaning and that words should be seen in their context. See *People v. Richard Kennedy*, *Dillon v. Minister for Posts and Telegraphs* and s. 5 of the Interpretation Act.

12. I accept that nursing care and medical care can be differentiated. Nonetheless, they are, it seems to me, linked. Either might fall under the rubric of medical care. This also seems the view of O'Neill J. in *Sherry v. Primark* [2010] I.R. 407 where he considers the provision of a health service falls to be considered in the context of medical negligence. Looking at the context in which "health service" is placed in the Act, whilst it certainly is separated from medical services as specified in the section, does that mean that nursing care is not to be covered by the exclusion clause? For that to be so, nursing care would have to be somewhat artificially excluded from the definition in s. (d) and defined as a service which is neither a part of a health service nor the provision of a medical service. I find it difficult to accept such an argument in particular in the context upon which it is based here. As stated by O'Neill J. in *Gunning v. The National Maternity Hospital* [2009] I.R. p. 122 it is to the factual circumstances the Court should look and not to any particular label the plaintiff puts upon the legal issues arising. Doing that, I cannot accept the argument of the plaintiff that the claim arises from the management and maintenance of the hospital. It seems apparent looking at the personal injuries summons and the reply to the defence that the plaintiff's claim arises from the actions of the defendants, its servants or agents in prescribing certain medication for her. To succeed, she would need to show that it was foreseeable that the effects of this medication would be such as was likely to make her dizzy and likely to faint if she got out of bed and walked, in this case to the bathroom. She would need nursing assistance in such circumstances. Medical evidence would need to be called in this regard. Turning therefore to the circumstances of the case as pleaded by the plaintiff herself, she was being treated for her illness with certain medication. It was arising from this treatment that, when she went to the bathroom unaccompanied, she felt dizzy and fainted. It seems to me therefore that the plaintiff's claim is one that arises from a mix of her nursing care and her medical treatment. As such, it is an action which is covered by the exclusion provided in section 3(d) and consequently it is one to which the PIAB Act does not apply.