THE HIGH COURT

[2011 No. 2015 P.]

BETWEEN

JOSEPH CREEDON

PLAINTIFF

AND

DEPUY INTERNATIONAL LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 20th day of December, 2018

Introduction

1. On 22nd May, 2007, the Plaintiff received a right total hip replacement using an articular surface replacement ("ASR") metal-on-metal hip prosthetic manufactured by the defendant. On 27th June, 2007, he received a left total hip replacement using the same prosthetic. The prosthetic in question was found to be defective and in August, 2010, the Defendant conducted a worldwide voluntary recall of the product. The Plaintiff's surgeon alerted the Plaintiff to the defect in October, 2010 and the Plaintiff initiated proceedings against the Defendant on 22nd November, 2010. It is alleged that as a result of the defective prosthetics, the Plaintiff is in significant pain and discomfort and revision surgeries on both hips will be required in the future, as well as other medical treatment, including bi-annual MRI scans and annual ion level reviews. A personal injuries summons, seeking damages for negligence, breach of duty, breach of statutory duty and breach of the Liability for Defective Products Act 1991 was issued on 3rd March, 2011.

2. The Defendant did not file a defence until 18th June, 2013. The defence that was eventually furnished contained the following "*preliminary objection*":

> *"The plaintiff is precluded from maintaining a claim for personal injuries against the Defendant pursuant to the provisions of the Personal Injuries Assessment Board Act 2003 and the Personal Injuries Assessment Board (Amendment) Act 2004 and/or the Civil Liability and Courts Act 2004 as the Plaintiff has failed to obtain an authorisation from the Injuries Board to maintain such a claim."*

3. Based on this preliminary objection, the single issue to be tried in this case is whether or not the Plaintiff's action against the Defendant comes within the ambit of s. 3(d) of the Personal Injuries Assessment Board Act ("the 2003 Act"). That is, whether the Plaintiff ought to have applied to the Personal Injuries Assessment Board ("PIAB") prior to maintaining a claim for personal injuries against the Defendant, or whether the action is contained within one of the exclusionary categories described in s. 3(d). If the action does not come within the ambit of s.3(d), the Defendant submits that these proceedings must be dismissed in light of the Plaintiff's failure to comply with the requirement, in s. 12 of the 2003 Act, that proceedings under the 2003 Act not be brought until the PIAB issues an authorisation.

4. S. 3 of the 2003 Act provides:

> *"This Act applies to the following civil actions—*
>
> *a) a civil action by an employee against him or her employer for negligence or breach of duty arising in the course of the employee's employment with that employer,*
>
> *b) a civil action by a person against another arising out of that other's ownership, driving or use of a mechanically propelled vehicle,*
>
> *c) a civil action by a person against another arising out of that other's use or occupation of land or any structure or building,*
>
> *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)."*

5. S. 12(1) of the 2003 Act provides:

> *"Unless and until an application is made to the Board under section 11 in relation to the relevant claim and then only when the bringing of those proceedings is authorised under section 14 , 17 , 32 or 36 , rules under section 46 (3) or section 49 and subject to those sections or rules, no proceedings may be brought in respect of that claim."*

Defendant's Submissions

6. The Defendant argues that the Plaintiff's action does not come within any of the three types of civil action excluded from the requirement to obtain PIAB authorisation described in s. 3(d) of the 2003 Act, and that authorisation from the PIAB, as provided for in s. 12 of the 2003 Act, was therefore required before proceedings could be brought. In support of this, the Defendant relies upon the High Court decision of Faherty J. in *Murphy v. DePuy International Limited* [2015] IEHC 153.

Murphy v. DePuy International Limited

7. In *Murphy v. DePuy*, with facts very similar to those of the within proceedings, the Plaintiff had similarly not obtained authorisation under s. 12 of the 2003 Act before maintaining a personal injuries claim against the Defendant. The same preliminary objection to lack of PIAB authorisation was pleaded on behalf of the Defendant. The Plaintiff sought a preliminary ruling as to whether an authorisation from the PIAB was required before institution of proceedings.

8. The Plaintiff in *Murphy* argued that s. 3(d) of the 2003 Act was a context-driven provision, with the focus not on injury or cause of action, but factual context.

> *"It is therefore relevant that the alleged defective medical product, the subject of the within proceedings, was not received by the plaintiff under any arrangement between her and the defendant or its servants or agents; rather it was received in the course of orthopaedic advice and treatment from an orthopaedic surgeon. The plaintiff's claim therefore arises in the context of advice and surgical treatment from an orthopaedic consultant surgeon and thus falls within the provisions of a health service to the plaintiff, thereby obviating the requirement for an authorisation."*

9. The words "arising out of the provision of any health service to a person" in s. 3(d), it was submitted in *Murphy*, formed an "omnibus clause." The other s. 3(d) clauses were merely examples of the types of health service which may benefit from the exemption provided. The Plaintiff relied on dicta of O'Neill J. in *Gunning v. National Maternity Hospital and Eurosurgical Limited and Richard Wolfe GMBH* [2008] IEHC 352, of Hedigan J. in *Carroll v. Mater Misericordiae Hospital* [2011] IEHC 231, and of Baker J. in P.*R. v. K.C. Legal Personal Representative of the Estate of M.C.* [2014] IEHC 126 in support of the context-driven nature of s. 3(d).

10. The Defendant in *Murphy* submitted that an interpretation of s. 3(d) that would allow it to encompass a claim against a medical device manufacturer did not adhere to the natural and ordinary meaning of the words in the section. The Defendant stressed the dictum of O'Neill J. in *Sherry v. Primark* [2010] IEHC 66 that noted *"[t]he only actions that are expressly excluded [from having to obtain a PIAB authorisation] by virtue of s. 3(d), are medical negligence actions."* An action against a medical device manufacturer did not, it was argued, come within the natural and ordinary meaning of medical negligence.

11. Faherty J. agreed with the Defendant, observing (at paras. 23 and 24):

> *"I am not satisfied that the fact that the alleged defective hip implant was surgically inserted into the plaintiff following medical advice imports the factual circumstances, namely the manufacture and provision and/or supply of a defective hip implant under which the claim arises, into the ambit of the exclusionary provision of s. 3(d). To put it another way, notwithstanding that the alleged defective hip implant was received by the plaintiff in the course of medical treatment, to my mind, this cannot convert the genesis of this action, an alleged defective hip implant, and from which this civil action arises, into the provision of a health service to the plaintiff […] Here, there are no allegations against the defendant that it was negligent in the provision of any health service to the plaintiff or that it carried out any surgical or medical procedure on the plaintiff in a negligent manner or it negligently provided any medical advice or treatment to the plaintiff. The focus of the plaintiff's claim is on the defendant's connection (qua manufacturer and supplier) to the hip implant she received. That is the context or substance of her claim. I find nothing in the personal injury summons, including the paragraphs relied on by the plaintiff's counsel, which could be said to override this context such as to bring the claim within the provision of a health service or the carrying out of a medical or surgical procedure or the provision of medical advice or treatment. This is all the more so when one has regard to the ordinary meaning of the words used in s. 3(d)."*

Stare Decisis

12. Further to repeating the submissions of the Defendant in *Murphy v. DePuy*, the Defendant in the within proceedings urges this Court not to depart from a previous decision of the High Court and, to this effect, cites case law on *stare decisis* and judicial comity. This includes the dicta of Clarke J. (as he then was) in the High Court in In *Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189:

> *"It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority v. Watson [1947] K.B. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered.."*

13. The Defendant submits that the *Murphy* judgment does not meet any of the three criteria expressed in *Worldport*, i.e. it was not based upon a review of significant relevant authority, there is no clear error in the judgment, and it was not delivered so long ago that the jurisprudence has advanced. As a result, the Defendant argues that the only appropriate reaction for the Court is to abide by the decision in *Murphy v. DePuy*.

Plaintiff's Submissions

14. The Plaintiff argues that the subject matter of the within proceedings does fall within the exclusionary provisions of s. 3(d) of the 2003 Act, and submits that this Court is free to depart from the decision in *Murphy v. DePuy*. In support of this submission, the Plaintiff cites the Supreme Court decision of *Clarke v. O'Gorman* [2014] IESC 72, dated 30th July, 2014 and delivered between the hearing of the preliminary issue and the delivery of the judgment in Murphy. In *Clarke v. O'Gorman*, the Supreme Court determined that the lack of PIAB authorisation is a procedural bar only, and does not go to jurisdiction. By contrast, Faherty J. in Murphy had recorded that it was "*accepted that the absence of a PIAB authorisation in a case to which the Act [of 2003] applies is not a mere fault in procedure but goes to the root of the court's jurisdiction to hear and determine the claim*." Accordingly, the Plaintiff argues that, as the starting premise for the decision in *Murphy* (i.e. that s. 12 operates as a jurisdictional provision) was an incorrect statement of the law, the Court is in a position to depart from *Murphy*.

15. The Plaintiff also argues that, despite their factual similarity, the nature of the Plaintiff's claim differs fundamentally from that in *Murphy*, as, in *Murphy*, it appears that the claim had related solely to the Defendant's manufacture and sale of a defective product. Consequently, there was "no element […] which could refer to the exclusionary provisions of s. 3(d)." (para. 19). The Plaintiff's pleading, by contrast, includes claims other than those relating to the Defendant's liability for manufacture and sale of a defective product. The Plaintiff points to particulars (f), (h), (i), (m), (n) and (q) of their Further Particulars of Negligence as examples of this differentiation. These particulars allege *inter alia* that the Defendant:

> *"(f) Failed to warn the Plaintiff—and those health professionals utilising the product—as to the risk and dangers of which*

the Defendant knew or ought to have known.

(h) Failed to pay any or any adequate and proper attention to complaints regarding the suitability of the device from other users in other jurisdictions and to react accordingly.

(i) Failed to issue a recall either promptly adequately or at all but in any event before the device was inserted into the Plaintiff.

(m) Ignored the high revision rate of ASR implants.

(n) Ignored warnings (in particular, warnings by the Australian Registry on multiple occasions) about problems with the ASR.

(q) Failed to warn the Plaintiff and those medical advisors who performed the procedure that the Plaintiff ought to have had her [sic] serum chromium and cobalt levels measured on a regular basis."

16. The Plaintiff submits that these particulars demonstrate that his claims go beyond the initial manufacture or sale of a defective product and, rather, that they relate to events occurring long after the initial manufacture and sale of the prosthetic. They relate, namely, to the Defendant's alleged knowledge of the fact that there were complaints that the prosthetic was failing and causing personal injuries and to the Defendant's negligence in allowing the product to be used in the Plaintiff's surgery despite this alleged knowledge of the prosthetic's defective nature.

17. Further, the Plaintiff submits that, as the Defendant solicitors engaged in correspondence with the Plaintiff between 22nd December, 2010 and 18th June, 2013 without leading the Plaintiff to believe that they would assert a defence related to lack of PIAB authorisation, the Defendant is now estopped from pleading this as a defence. The Plaintiff cites *Traynor v. Fagan* [1985] IR 586, *Doran v. Thompson & Sons Limited* [1978] 1 IR 223, *Ryan v. Connolly* [2001] 1 IR 627 and *Murphy v. Grealish* [2009] 3 IR 366 in support of this. As the absence of a PIAB authorisation was considered a jurisdictional bar in *Murphy*, estoppel was not considered.

18. It seems to me that the Plaintiff's arguments can be summarised as: (i) in light of the Supreme Court decision in *Clarke v. O'Gorman*, *Murphy v. DePuy* was wrongly decided and the Court may depart from its holding that this type of action is not a medical negligence action and therefore is not captured by the exclusionary provisions in s. 3(d); (ii) whether or not *Murphy v. DePuy* was wrongly decided, it is not applicable here, as unlike in Murphy, this action is not rooted solely in liability for defective products; (iii) whether or not *Murphy v. DePuy* was wrongly decided, the Defendant is estopped from pleading failure to obtain PIAB authorisation as a defence.

Discussion
Effect of Clarke v. O'Gorman on Murphy v. DePuy

19. Given that the Supreme Court in *Clarke v. O'Gorman* held that s. 12 of the 2003 Act does not operate as a jurisdictional bar and is procedural in nature only, the parties in Murphy were in agreement on a statement of law—that the absence of PIAB authorisation is a jurisdictional matter—ultimately held incorrect by a higher court. However, that is not to say that, on this basis alone, the Plaintiff in the within proceedings can succeed in its effort to persuade the Court to depart from the decision in *Murphy v. DePuy*. The effect of s. 12 of the 2003 Act being a procedural clause is that the absence of PIAB authorisation was therefore required to be dealt with by formal pleading, and not by way of submission to the Court. In other words, *Clarke v. O'Gorman* holds that failure to obtain PIAB authorisation may still be validly raised by the Defendant as long as that failure is pleaded in the defence. This is made yet more explicit by Ord 19 r 15, Superior Court Rules, as substituted by Art. 2(ii), Rules of the Superior Courts (Personal Injuries Assessment Board Act 2003) 2017, which took effect from 1 June 2017 and which provides:

"The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, absence of authorisation by the Personal Injuries Assessment Board, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

20. Notwithstanding the extended period of time it took the Defendant to furnish its defence to the Plaintiff, it did include absence of PIAB authorisation in the pleadings. The Plaintiff's first line of argument, that, based on *Clarke v. O'Gorman* the Court may depart from the decision in *Murphy v. DePuy*, appears devoid of significant application to the within proceedings.

Estoppel

21. The Plaintiff submits that the Defendant's conduct, i.e. extended correspondence with the Plaintiff's solicitors over the course of over two and a half years, amounts to an implied representation that the proceedings were validly initiated, and that it is therefore unconscionable for the Defendant to assert that they must be dismissed for want of PIAB authorisation.

22. The question of what amounts to an implied representation was discussed in the leading case of *Doran v. Thompson & Sons Limited*, in which Henchy J. declared that

"Where in a claim for damages such as this a defendant has engaged in words or conduct from which it was reasonable to infer, and from which it was in fact inferred, that liability would be admitted, and on foot of that representation the plaintiff has refrained from instituting proceedings within the period prescribed by the statute, the defendant will be held estopped from escaping liability by pleading the statute. The reason is that it would be dishonest or unconscionable for the defendant, having misled the plaintiff into a feeling of security on the issue of liability and, thereby, into a justifiable belief that the statute would not be used to defeat his claim, to escape liability by pleading the statute. The representation necessary to support this kind of estoppel need not be clear and unambiguous in the sense of being susceptible of only one interpretation. It is sufficient if, despite possible ambiguity or lack of certainty, on its true construction it bears the meaning that was drawn from it. Nor is it necessary to give evidence of an express intention to deceive the plaintiff."

23. In *Doran*, the Supreme Court held that no representation made by the Defendant or his insurers could have induced in the Plaintiff's mind the idea that the Defendant would not plead the Statute of Limitations in its defence, and that such a belief could

have arisen only through misapprehension on the part of the Plaintiff and his solicitors. In *Ryan v. Connolly*, too, Keane C.J. held that the party seeking to rely on estoppel could not rely on a strained or fanciful interpretation, but must show that it was reasonable for him to have construed the words of the other party in the way that he had done.

24. Throughout their extensive correspondence between initiating proceedings and furnishing the defence, which the Court has examined thoroughly, the Defendant made no representation, either direct or indirect, on the subject of PIAB authorisation. With no representation whatsoever in the correspondence, it is difficult to see what could reasonably have created the impression that the Defendant would not use the Plaintiff's failure to obtain PIAB authorisation in their defence. While the Plaintiff was perhaps entitled to be under the impression that the Defendant would not raise the issue of PIAB authorisation, the Defendant was equally entitled to remain silent on this during correspondence, as long as it was formally pleaded. In these circumstances, it appears that any assumption the Plaintiff may have arrived at that the Defendant would not use PIAB authorisation as a defence was entirely of the Plaintiff's mind. Where it is unable to find that any type of representation has been made, the Court is unable to find that the Defendant is estopped from pleading PIAB authorisation in its defence.

25. The Plaintiff was alerted to the defective nature of the prosthetic in August, 2010. He initiated proceedings on 22nd November, 2010. The Defendant filed its defence, containing its preliminary objection to the lack of PIAB authorisation, on 18th June, 2013. This was a whole two years, six months and 27 days since proceedings had been initiated, although it must be noted that the Plaintiff had acquiesced in much of this delay by generously consenting, on numerous occasions, to late delivery of defence. After receiving the defence, the Plaintiff did not seek authorisation from the PIAB as a precautionary measure until 8th June, 2015: one year, 11 months and 21 days after receipt of the defence, and four months and 20 days after the decision in *Murphy v. DePuy*. It would have been a far more prudent measure for the Plaintiff's solicitors to have applied to the PIAB after having received the defence, if only as a precautionary measure and without prejudice to the proceedings that had already been initiated, when they originally received the defence in 2013. The cautionary remarks of Keane C.J. in *Ryan v. Connolly* (in the context of estoppel operating to prevent application of the Statute of Limitations) are of note here:

> *"It has to be pointed out that, in cases such as this, the expense which a plaintiff's solicitor incurs on his client's behalf in issuing a Plenary Summons in order to prevent the Statute running is comparatively small; the consequences, by contrast, of refraining from issuing proceedings can be extremely serious."*

Difference in Particulars

26. The argument that there is sufficient difference in the particulars sought in *Murphy* and the within proceedings to bring the within proceedings into the exclusionary provisions of s. 3(d) is not one in which the Court can find much merit. Having examined the particulars sought in *Murphy* and those sought here, it is clear that, while they are phrased differently, the substance is almost identical. In *Murphy*, for example, particular (c) alleged that the Defendant "failed to exercise due skill, care and diligence in the performance of its said tasks." Particular (f) in *Murphy* alleged that the Defendant "failed to take any or any adequate measures, whether by way of examination, inspection, test or otherwise to discover and remedy the defects in the said hip replacement system before providing the same to third parties and ultimately to the Plaintiff." A failure to warn the Plaintiff and health professionals as to the defects of the prosthetic, as alleged in particular (f) of this case, is itself an allegation that the Defendant "provided the said hip replacement system when they knew or ought reasonably to have known that the same was defective," (particular (f) in *Murphy*). The same could be said about particulars (m) and (n) (ignoring high revision rate and ignoring warnings about problems with the prosthetic) in the present case. The Court fails to see how particulars such as these are different in substance to those particulars, quoted above at para. 15, that the current Plaintiff suggests operate to bring the within proceedings into a different territory to that of *Murphy*. The particulars in both *Murphy* and the present case go beyond and stay within the subject of defective product liability to the same extent, and in these circumstances the Court is unable to find sufficient difference between the two cases to depart from *Murphy*.

Decision

27. With the Court unable to find any aspect that could operate to bring the within proceedings beyond the reach of the decision in *Murphy*, precedent binds the Court. I note that, in *Murphy*, the Court of Appeal found the appeal proceedings moot, as the Plaintiff in that case had other proceedings ongoing, by virtue of a PIAB authorisation having been sought as a precautionary measure on receipt of the defence. This Court is unable to depart from the decision in *Murphy v. DePuy* that authorisation from the PIAB must be sought before an action of this type is initiated. None of the criteria expressed in *Worldport*, nor any other reason for departing from a decision, apply here. The Court therefore finds in favour of the Defendant in relation to the preliminary objection.