THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 205

Record Number: 2017/84

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN:

LEO GREEN

PLAINTIFF/RESPONDENT

- AND -

EILISH HARDIMAN

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 2ND DAY OF JULY 2018

Introduction

1. In these proceedings the plaintiff seeks damages for negligence arising from surgery he underwent at Tallaght Hospital on the 11th December 2007 and the care and treatment he received in its aftermath. He issued his personal injury summons on the 7th August 2012. He was therefore outside the two year limitation period now provided in respect of such proceedings by s. 3 of the Statute of Limitations (Amendment) Act 1991 ("the statute" or "the 1991 Act"), as amended by s. 7 of the Civil Liability and Courts Act 2004 ("the 2004 Act").

2. By way of defence to these proceedings the defendant pleaded the statute against the plaintiff who, in response, has sought to rely s. 2 of the 1991 Act, as amended by s. 7 of the 2004 Act, which provides for a so-called 'date of knowledge' test for determining whether the plaintiff has commenced his proceedings within the period permitted.

3. Section 2 of the 1991 Act provides:

> "(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) 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,
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> (d) the identity of the defendant, and
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> (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;
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> 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 purpose 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 of 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):
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> (a) a person shall not be fixed under this section with knowledge of the 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 the fact relevant to the injury which he has failed to acquire as a result of that injury."

4. By way In the High Court Cross J. ruled against the defendant's limitation defence in a judgment delivered on the 20th January 2017: see *Green v. Hardiman* [2017] IEHC 17. The trial judge was satisfied on the facts established by the evidence that the plaintiff's proceedings were commenced within two years from the date when he first had the requisite knowledge for the purposes of s. 2 above, and that his proceedings were not statute barred. The trial judge went on to assess damages. The defendant now appeals to this Court but his appeal is confined to the statute issue.

Some Factual background

5. On the 11th December 2007 the plaintiff underwent abdominal surgery at Tallaght Hospital to eradicate problems with his colon and his bladder caused by a colovesical fistula, which is an abnormal connection between the colon and the bowel. This surgery involved a repair by way of laparaotomy, and was carried out by Prof. N who, as noted by the trial judge, is a widely respected expert surgeon.

6. During this surgery, but unnoticed by Prof. N. at the time, the plaintiff's small bowel accidentally suffered a full tear, which allowed faecal matter to enter the abdominal cavity. By the 14th December 2007 the plaintiff was very unwell. Blood tests revealed a raised white cell count, and in addition there were significantly elevated C-reactive protein (CRP) levels, indicating infection. His abdomen had become distended and was uncomfortable.

7. Prof. N. believed that the injury to the small bowel was a serosal tear and not a full tear, and he closed this defect with 3/0 suture material. T his appears from the operation notes. Prior to the completion of the surgery on the 11th December 2007 Prof. N had palpated the small bowel to ensure that there was no escape of gas which would have indicated a full tear. The trial judge accepted Prof. N's evidence that he did in fact palpate the small bowel to test for gas. However, Prof. K, the plaintiff's expert, considered that if Prof. N did in fact properly palpate the small bowel as he said he did, this would have revealed the fact of a full tear. Notwithstanding Prof K's evidence in that respect, the trial judge was satisfied that he could not conclude that the failure by Prof. N to detect the full tear by his palpation of the small bowel amounted to negligence. His conclusion is explained thus in his written judgment at para. 4.10 of his judgment:

> "4.10 In answer to one of my questions to the effect that if a [palpation] test were done and a full tear was missed, whether it is something that Prof. K could understand, he replied 'yes – these things happen'. Accordingly, I believe that the plaintiff has not established, on the balance of probabilities, negligence in relation to the first ground complained of by Prof. K."

8. But the plaintiff made another allegation of negligence. This was based on the fact that after he became very unwell following the surgery on the 11th December 2007, no CT scan or other imaging of the plaintiff's small bowel was undertaken to discover the cause of the plaintiff's post-operative infection. Prof. N said in evidence that he was satisfied that as of the 14th December there was no real evidence of infection from his reading of the plaintiff's chart, and was reassured by the fact that there was no tear at the site of the operation performed on the 11th December 2007, and that it was only later that the plaintiff's symptoms developed more significantly. As appears from para. 4.11 of his judgment, the trial judge rejected that evidence in favour of that of Prof. K. whose view was that there was sufficient and significant evidence of infection on that date as described above, and that when it was discovered that there was no tear at the site of the operation itself the small bowel ought to have been examined by CT scan or similar to establish the next most likely cause of the infection.

9. The trial judge also noted other expert evidence contained in an agreed report of the defendant's expert that "the failure to provide a CT scan on the 14th cannot be defended". That opinion was consistent with the view expressed by Prof. K. The trial judge accepted that evidence and stated at para. 4.13:

> "4.13 … I accept accordingly that the defendants were negligent in their failure on the 14th to carry out a CT scan or other imaging of the plaintiff's small bowel given the level of infection and I conclude as a matter of probability that had they done so, they would have discovered the leak and they would have performed an operation on 14th or 15th to deal with the growing infection. It follows that their failure to do so on 14th or 15th is also negligent and accordingly I accept the uncontested evidence that the defendants were negligent."

10. It is unnecessary for the purpose of the statute issue to detail the serious consequences that the defendants' negligence had for the plaintiff, except to say that the failure to scan the small bowel or otherwise appropriately investigate the cause of the infection resulted in the continuing leakage of faecal material into the abdominal cavity, and led to the development of wound sepsis, peritonitis and a ventral hernia. On the 19th December 2007 the plaintiff underwent a second operation resulting in a second and unnecessary scar, and a loop ileostomy. This in turn necessitated a third operation in February 2008 for the closure/reversal of the loop ileostomy. As found by the trial judge, none of this would have been occurred had a scan being performed of the small bowel on the 14th December, as the full tear would have been immediately identified, and corrected by laparotomy on the 14th or 15th December 2007.

The statute issue

11. The question arising therefore is when the plaintiff first had knowledge of the act or omission alleged to constitute negligence, as it is only from that date that the clock started to run against him, so to speak, for the commencement of his proceedings. To avoid his proceedings being found to be statute-barred, the plaintiff must establish that he gained that knowledge for the purpose of s. 2 of the 1991 Act, as amended, only at some date within the two year period prior to the date of commencement of his proceedings on the 7th August 2012, i.e., after the 7th August 2010. The plaintiff's case is that he acquired sufficient knowledge to be in a position to attribute his injuries to the negligence of the defendant only when the expert report from Prof. K was received by his solicitor on the 20th May 2012, as this was the first time that he became aware of the omission by Prof. N to perform a CT scan or other imaging of the small bowel on the 14th December 2005 to establish the cause of his infection, and which would have shown a full tear of his small bowel as being the cause of his being so unwell on the 14th December 2007.

12. The defendant submitted that the plaintiff had sufficient knowledge for the purposes of s. 2 of the 1991 Act by the time he first consulted his solicitor in January 2011. It was following that consultation that his medical records were requested in February 2011. They were received by his solicitor on the 31st March 2011. An expert report was then sought from Prof. K and that report was received on the 20th May 2012. The defendant submits that it was not necessary for the plaintiff to await this expert report in order to know that he had a cause of action, and refers to the terms of s. 2 of the 1991 Act which provides that the plaintiff's date of knowledge refers to the date on which he first had knowledge of the following facts:

> (a) that the person alleged to have been injured had been injured,

(b) that the injury in question was significant,

(c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,

(d) the identity of the defendant, and

(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

13. As to (a) the defendant submits that there is no doubt that in the days following his surgery in December 2007 the plaintiff knew that he had been injured, since he knew that the surgery performed on the 11th December 2007 had not gone as expected since by the 14th December 2007. He knew this, the defendant says, because he had needed further surgery after which he was kept in the Intensive Care Unit, was being ventilated, and needed to use an ileostomy bag. The defendant has referred to some of the plaintiff's evidence to the High Court which indicated a degree of anger with the hospital and Prof. N as to the way he was treated, so much so that he did not wish to go back there. The defendant referred to the plaintiff's evidence that by January 2008 he knew that something had gone seriously wrong. These and other evidence to which reference has been made indicate, in the defendant's submission, that (a) and (b) above are fully satisfied. There is no question but that (d) is satisfied, and (e) is not relevant to the plaintiff's case.

14. It is s. 2 (1) (c) of the 1991 Act that is at the heart of this appeal. n other words, when did the plaintiff first know 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" [Emphasis provided]. To answer that question it must be established what is the relevant "act or omission" alleged to have been negligent. Before looking at that question I draw attention to the final part of s. 2(1) of the 1991 Act which provides that "knowledge that any acts or omissions did or did not, *as a matter of law*, involve negligence, nuisance or breach of duty is irrelevant" [Emphasis provided].

15. The plaintiff has submitted that the first time he became aware that Prof. N failed to perform a CT scan or similar imaging which would have revealed immediately the full tear of the small bowel, and, therefore, the reason he was so unwell by the 14th December 2007 was when Prof. K stated this in his report received on the 20th May 2012. That is the omission upon which he relies for a finding of negligence, and is the omission found by the trial judge to have been negligent.

16. But the defendant refers to the case as pleaded by the plaintiff, and as further particularised, and as presented initially to the High Court in counsel's opening at the trial. The defendant submits that while the report of Prof. K may have been the first time the fact that no CT scan had been performed by Prof. N was identified by reference to the hospital records, nonetheless on the facts of the case as pleaded and the evidence given by the plaintiff, he had sufficient knowledge of relevant facts prior to the receipt of that report, and that his first date of knowledge for the purpose of s. 2 of the 1991 Act pre-dates 7th August 2010.

17. The defendant focuses on the fact that in replies to particulars dated 29th April 2014 the plaintiff stated that the reason he had consulted his solicitor for the first time on the 31st January 2011 was that he had become concerned about the quality of the care he had received while in hospital because of difficulties which he was experiencing with his hernia. This was some 16 months before his solicitor received Prof. K's report from which for the first time he found out that no scan had been performed by Prof. N to assist in the investigation of why he was so unwell by the 14th December 2007 following his first surgery. The defendant was naturally keen to ascertain what new facts or new event had occurred following his initial knowledge that he had a hernia that had led him to consult his solicitor in January 2011. In reply to para. 3.4 of the defendant's letter for particulars dated 2nd January 2014 the plaintiff stated:

> "3.4: the plaintiff's hernia was a progressive condition which began to interfere with his physical activities such as golf and this led to a return to his GP, Dr William Ryan, who in turn referred him to Mr Peter Murchan, consultant surgeon, at South Tipperary General Hospital. Mr Murchan examined the plaintiff and explained that it was an incisional hernia, outlined a possible treatment but felt overall that it was better left alone given the risk of various complications. Following this, the plaintiff began to question whether this was an acceptable outcome for him and he became desirous of seeking an expert medical opinion on liability and causation regarding the hernia."

18. The defendant argues that it was the second operation on the 19th December 2007 that caused the hernia about which the plaintiff was complaining significantly prior to the 10th August 2010, and that the plaintiff knew at latest by the date on which he saw Mr Murchan (*i.e.* 13th January 2009), that it was an incisional hernia and that it resulted from that second operation. The defendant argues therefore that at latest time started to run against the plaintiff from the 13th January 2009, and this is the date at latest that he knew something out of the ordinary had occurred with his surgery resulting in his hernia, and therefore, in the words of s. 2(1)(c) of the 1991 Act, he had knowledge "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" by the defendant, and accordingly his proceedings were issued out of time.

19. It is argued by the defendant that by the 13th January 2009 after he had seen Mr Murchan the plaintiff knew enough to have suspicions about the surgery and the care he had received thereafter because of the hernia that was causing him great difficulty, and certainly sufficient to cause him to go to a solicitor and seek advice about issuing proceedings; and yet he delayed seeing any solicitor for a further two years until January 2011. The defendant points to the fact that no evidence was led to explain why he waited two years before consulting his solicitor, and nor any of what they call "a triggering event" between 7th August 2010 and January 2011 that increased or progressed his state of knowledge causing him to then seek legal advice. It is argued therefore that the Court has no evidence from which to conclude that the knowledge that he had in January 2009 was not sufficient knowledge for time to start to run against him, since nothing new had occurred by January 2011 other than the gradual deterioration of the same condition, namely his hernia. In making these submissions the defendant emphasises that where the statute is pleaded against the plaintiff, it is the plaintiff who bears the burden of establishing the date of first knowledge of relevant facts for the purpose of s. 2 of the 1991 Act, and that the plaintiff has failed to discharge that burden.

20. As already stated the trial judge found that the act of omission by the defendant that constituted negligence in this case was the failure of Prof. N to have performed a scan on the 14th or 15th December 2007 in order to investigate the cause of the plaintiff being so unwell, and that time should run against the plaintiff only from the date on which he first had knowledge of that omission. The defendant's submission that time should be deemed to have run from his knowledge that he had a significant injury, namely the hernia, and at latest from the date on which he first consulted his solicitor was rejected.

21. In my view the trial judge was entitled to conclude as he did based on the evidence that he heard. The hernia clearly resulted from the second surgery. That surgery would not have been required had there not been the omission to scan the plaintiff on the

14th/15th December 2007. It is this omission that was found to have been negligent based on the evidence of Prof. K. and was the cause of everything that followed, including the hernia. That was a conclusion open to him on that evidence.

22. The trial judge was entitled on the evidence to conclude that the plaintiff did not, and could not, have known that no such scan was performed after his first surgery, until his solicitor received his medical records at the end of March 2011, and the report of Prof. K. The defendant had submitted that when the plaintiff consulted Mr Murchan in January 2009 he had sufficient knowledge for the purpose of the statute since on that date he knew that he had an incisional hernia and that this was the result of the second operation. But that submission ignores the fact that it was the omission to scan the plaintiff that led to the need for that second operation. That omission is the critical knowledge that the plaintiff needed before time could be said to run against the plaintiff, as otherwise he would, so to speak, have been "barking up the wrong tree". In other words, he would have been seeking to establish negligence on the basis of some act of negligence in the manner in which the second operation was carried out which led to the hernia. If the allegation of negligence related to the manner in which the second surgery was carried out, then it might have been open to the defendant to submit that the plaintiff knew enough by the time he consulted Mr Murchan. But that is not the allegation of negligence which was found to be made out. Rather it was the failure to scan the plaintiff.

23. Under s. 2 of the statute knowledge includes knowledge that the plaintiff might reasonably be expected to have obtained. For convenience I will set out the provisions of s. 2 (2) and (3) of the statute again which provide:

> "(2) For the purpose 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 of observable or ascertainable by him, or
>
> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.
>
> (3) Notwithstanding subsection (2) –
>
> (a) a person shall not be fixed under this section with knowledge of the 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 the fact relevant to the injury which he has failed to acquire as a result of that injury."

24. The question therefore arises whether the omission to scan him after the first surgery was something that the plaintiff might reasonably be expected to acquire prior to the 10th August 2010 from facts of observable or ascertainable by him, or from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek. While the trial judge did not directly address that question, it is implicit from his judgment that he considered that the plaintiff could not have known about the omission to scan him from anything observable by him, as it was only his hospital records that revealed that essential fact to him. Was it reasonable to expect that he should have sought the assistance of his doctors to further ascertain if there was some omission or act of negligence that necessitated an unnecessary second operation prior to the 10th August 2010? The trial judge did not address that question directly, but again, in my view, it is implicit from his judgment that his view was the plaintiff could not reasonably have been expected to do so when he saw Mr. Murchan in January 2009. He referred to the fact that Mr. Murchan did not have the hospital records at that time. He also referred to the letter that Mr Murchan wrote to the plaintiff's GP after that consultation in January 2009. The trial judge concluded that "the plaintiff's initial concerns as to any faults whatsoever on the part of the defendants for any significant injury must have been assuaged by Mr M's report in 2009". That is a conclusion that was open to the trial judge in the light of the letter from Mr Murchan to the GP, and the evidence of the plaintiff. In the light of these findings, it could not be reasonable to find that the plaintiff ought at that stage and before August 2010 to have embarked upon a course of further inquiry, with or without the assistance of medical experts, with a view to finding out if there had been some negligent act or omission which necessitated the second operation from which all else ensued.

25. The defendant has sought to rely on my judgment in *Farrell v. Ryan* [2016] IECA 281 for a submission that the plaintiff did not need to see his hospital records in order to know that he had suffered a significant injury since he already knew that at latest by the time he saw Mr Murchan. In my view the present case is so different on its facts to *Farrell v. Ryan* as to be easily distinguishable. In the latter, the plaintiff at the relevant time knew that she had undergone an unnecessary symphysiotomy, and that fact alone was sufficient for time to start to run against her. She did not need her hospital records for time to start to run. On the case she was making (*i.e.* that a symphysiotomy was *in all circumstances* an unnecessary and negligent act) she knew enough already.

26. The present case is very different. Here the plaintiff did not know the essential fact which grounds his allegation of negligence, namely that no scan had been performed by Prof. N, until his solicitor received his hospital records in March 2011. He certainly did not know this when he consulted Mr Murchan in January 2009, and nor did Mr Murchan.

27. In his judgment the trial judge carefully and thoroughly analysed the relevant authorities to which he had been referred by the parties. It is unnecessary that I do so again. I agree with his analysis. I am satisfied that he correctly applied the legal principles deriving from same to the facts of this case, and that he was correct to conclude that the plaintiff's claim was not statute-barred for the reasons which he gave.

28. For these reasons I would dismiss this appeal.