Neutral Citation [2016] IEHC 694

THE HIGH COURT

[2011 No. 7510 P.]

BETWEEN

LINDA MURPHY

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice White delivered on the 2nd of December, 2016

1. This matter arises by way of the Defendant's motion of the 12th June, 2014 returnable for the 21st July, 2014 and the order of the President of the court of the 24th November, 2014 directing the trial of a preliminary issue on the Statute of Limitations 1957, as amended.

2. A Personal Injury Summons was issued on the 17th August, 2011 alleging negligence against the Defendant in the care and treatment of the Plaintiff as an in-patient in University College Hospital Galway. On 30th December, 2008 her third child was delivered by way of emergency caesarean surgery. It is alleged that the Plaintiff sustained personal injuries, loss and damage resulting from the negligence and breach of duty of the Defendant, its servant and agents arising from the performance of an unsuccessful vaginal and subsequent operative delivery of her son.

3. A defence contesting liability was served on the 26th June, 2013, claiming that,

> "The Plaintiff's right of action is statute barred pursuant to the Civil Liability Act 1957, the Statute of Limitations Amendment Act 1991 and s. 7 of the Civil Liability and Courts Act 2004 as proceedings were not instituted within two years of the Plaintiff's date of knowledge of the potential cause of action."

Brief Medical History

4. The Plaintiff attended at University Hospital Galway on the 15th August, 2008 for anti-natal care in respect of her third pregnancy. She had previously undergone an emergency caesarean section when delivering her second child owing to the size of the baby and resulting from this experience she was very concerned about the birth and weight of her expectant third child and raised these issues with her obstetrician. On the 29th December, 2008 she experienced a spontaneous onset of labour and was admitted to the labour ward of the hospital and after intense labour and an attempted vacuum delivery her son was born following emergency caesarean surgery in the early hours of the 30th December, 2008. Following the delivery the Plaintiff required prolonged emergency repair surgery for a tear in her womb. She underwent further surgery on the 31st December, 2008. She was a patient in intensive care and remained in hospital for a further period to 22nd January, 2009.

Subsequent Enquiries by the Plaintiff

5. The Plaintiff knew that something had gone wrong during the birth and subsequent to her discharge from hospital met members of the Defendant's staff in particular Fiona Cullinane, an obstetrician, on a number of occasions. She did not know what had happened and was looking for answers. She subsequently between the dates of her discharge and April 2009 met other medical staff of the hospital

6. The Plaintiff wrote to the hospital for her medical records on the 29th March, 2009 and received them on 22nd April, 2009. In October 2009, she met someone from Patient Focus. On the 12th May, 2010 she sought a copy of an internal investigation report, commissioned by the hospital. She also sought her outpatient notes by letter of 12th May, 2012. The Plaintiff received a copy of the internal investigation report on the 1st July, 2010.

7. She instructed a firm of solicitors on the 1st October, 2010 and on the 20th October, 2010 the solicitors wrote to the hospital seeking detailed records.

Statute of Limitations

8. Section 3 of the Statute of Limitations (Amendment) Act 1991, as amended by s. 7 of the Civil Liability and Courts Act 2004, states:-

> "(1) An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of two years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

9. Section 2 states:-

> "Date of knowledge for the purposes of this Act.
>
> (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:-
>
> (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;

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.

(2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts 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) 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."

Legal Principles

10. There are many legal authorities on this issue. The court wishes to rely on the Supreme Court decision of *Gough v. Neary* [2003] 3 I.R. 92, which in turn quoted with approval a number of English decisions, *Halford v. Brookes* [1991] 1 WLR 428; *Spargo v. North Essex Health Authority* [1997] 8 Med L.R. 125; and *Sniezek v Bundy (Letchworth) Limited* (Unreported, Court of Appeal, 7th July, 2000).

11. The head note in Gough v. Neary states:-

"*Held* by the Supreme Court (Geoghegan and McCracken JJ.; Hardiman J. dissenting), in dismissing the appeal on the question of the Statute of Limitations but in reducing the award of general damages into the future by €50,000, 1, that the plaintiff had neither actual nor constructive notice within the ordinary limitation period that the injury was attributable in whole or in part to the act or omission which was alleged to constitute negligence.

Hallam-Eames v. Merrett Syndicates Ltd. [1996] 7 Med L.R. 122 and Spargo v. North Essex Health Authority [1997] 8 Med L.R. 125 approved.

Per Geoghegan J.: That in order for the statute to run, a plaintiff must know enough facts as would be capable of at least, upon further elaboration, establishing a cause of action even if the plaintiff had no idea that those facts of which he or she had knowledge did in fact constitute a cause of action as that particular knowledge was irrelevant under the Act."

12. In the judgment at p. 126, having reviewed a number of English authorities Geoghegan J stated:-

"It is appropriate to pause at this stage in the review of the English case law and consider those principles in relation to this particular case. While it may not be necessary for the purposes of starting the statute to run to know enough detail to draft a statement of claim, a plaintiff in my opinion must know enough facts as would be capable of at least upon further elaboration of establishing a cause of action even if the plaintiff has no idea that those facts of which he has knowledge do in fact constitute a cause of action as that particular knowledge is irrelevant under the Act. But the adequacy of the knowledge must be related to the context."

13. At p. 127 of his judgment he recited with approval the *Spargo* judgment of the English Court of Appeal. He 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 Health Authority* [1997] 8 Med L.R. 125 and the judgment of the Court of Appeal (Nourse, Brooke and Waller L.JJ.) delivered on the 13th 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 at p. 129 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'."

14. 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:-

"(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.”

15. One of the judges in a later case observed that while this summary of the case law by Brooke L.J. was helpful up to a point, the application of the four principles in a given case was by no means easy. Certainly, there is no merit in my view in casting them as stone. But I do think that on the facts of this particular case the first of Brooke L.J’s principles is relevant. The plaintiff would have to know or be expected to know that the hysterectomy was unnecessary before she could be said to have "a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable". I am, of course, referring to the context in which the hysterectomy was carried out in this case. I am not referring to a situation where a particular operation was carried out negligently which would be quite different.

16. There are a number of English cases on the subject of more recent origin. One of them is *Sniezek v. Bundy (Letchworth) Ltd.* (Unreported, Court of Appeal, 7th July, 2000). I mention this case for two reasons. First of all, it is an example of quite a number of English cases in which the judges of the Court of Appeal have clearly regarded the summary of the case law given by Brooke L.J. in *Spargo v. North Essex Health Authority* [1997] 8 Med L.R. 125 as being correct and that the principles as set out by him were applicable. But of interest also is the following passage contained in the judgment of Judge L.J. who in turn quotes Donaldson M.R. in *Halford v. Brookes* [1991] 1 W.L.R. 428 at p. 443:-

“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.”

Decision

17. The court is satisfied that considering the relevant sections of the Act and the judicial authorities cited, the date of knowledge of the Plaintiff was when she had sufficiently recovered from the trauma of the birth of her son and was in a position to realise that something serious and untoward had happened during the birth of her third child. I will fix that date as the date of her discharge from hospital on the 22nd January, 2009.

18. Her claim against the Defendant is statute barred and accordingly I will dismiss the proceedings.