Neutral Citation Number: [2009] IEHC 537

THE HIGH COURT

2004 1747 P

BETWEEN:

LAURENCE FARRELL

PLAINTIFF

AND

GERARD COFFEY

DEFENDANT

JUDGMENT Delivered by Ms. Justice Dunne on the 4th day of December, 2009

Mrs. Ann Farrell went to her doctor in or about May 2001 concerning a lesion on the inner side of her right thigh. She was informed that she had a wart and the doctor proceeded to burn off the lesion under local anaesthetic. Subsequently, Mrs. Farrell developed an enlarged lymph node and a biopsy was taken which confirmed that she had a malignant melanoma.

Mrs. Farrell commenced proceedings against the defendant herein by plenary summons dated the 12th February, 2004. In those proceedings, she claimed damages for negligence in respect of the alleged misdiagnosis of her condition by the doctor who treated her in May 2001. At the time of issue of the proceedings, it was clear that Mrs. Farrell had a terminal illness. This was referred to in the proceedings.

Unfortunately, Mrs. Farrell died as a result of the malignant melanoma on the 24th October, 2005. A Statement of Claim was delivered herein on the 26th October, 2005. In fact, it appears that her Solicitors were unaware of the death of Mrs. Farrell when the Statement of Claim was delivered. On the 2nd May, 2007, an order was made herein by the Master of the High Court reconstituting these proceedings in the name of Laurence Farrell, the husband of the late Mrs. Ann Farrell.

Subsequently, a motion was issued on behalf of the plaintiff seeking liberty to amend the Statement of Claim herein. Thereafter, a motion was issued on behalf of the defendant seeking, *inter alia*, an order that the proceedings be struck out on the grounds of inordinate and inexcusable delay, on the basis that the plaintiff's claim disclosed no reasonable cause of action and that the same is unsustainable and/or is bound to fail.

It is fair to say that the defendant went to very considerable lengths in the affidavits sworn herein to demonstrate that he was not the doctor who dealt with the late Mrs. Farrell in 2001.

I dealt first with the latter motion as it was agreed by the parties that it was appropriate that I should do so. Ultimately, I ruled against the defendant on his motion. It is not necessary to rehearse the issues that arose in that motion. As that motion was disposed of, it became necessary to consider the plaintiff's motion to amend the Statement of Claim.

I do not propose to set out in detail the terms of the proposed amendments. Suffice it to say that the effect of the amendment was to transform the proceedings into a fatal injuries claim brought by the plaintiff on his own behalf and on behalf of the statutory dependants. Particulars of special damage were set out in the proposed amended statement of claim relating to funeral expenses and related matters in respect of the late Mrs. Farrell. Damages were also sought for mental distress.

Counsel on behalf of the plaintiff referred to a number of authorities in support of her application. Miss Campbell referred first to the decision in *Weldon v. Neal*, (1887) 19 Q.B.D. 394. Lord Esher M.R. stated in that case as follows:-

> "If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding, which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."

Reference was then made to the decision in *Bell v. Pederson* [1995] 3 I.R. 511. In that case, an amendment was allowed on the morning of the trial in circumstances where it was held to have been possible to overcome any possible prejudice to the plaintiff by granting an adjournment and by requiring the defendant to indemnify the plaintiff in relation to any extra expense he might incur by reason of the amendment.

I was also referred to the decision in *Krops v. Irish Forestry Board*, [1995] 2 I.R. 113, Keane J. Two passages from p. 121 of the judgment were opened to me:-

> "Where, as here, an amendment, if allowed, will not in any way prejudice or embarrass the Defendant by new allegations of facts, no injustice is done to him by permitting the amendment."

Keane J. went on to say:-

> "The evolution of the law in the neighbouring jurisdiction demonstrates, I think, that the difficulties that have arisen can be traced, not so much to the decision in *Weldon v. Neal*, as to an over rigid application of the principle laid down in that case. Where, as here, the Plaintiff seeks to add a new cause of action arising out of - to borrow the words of the English rule – 'the same facts or substantially the same facts', there seems no reason why this Court, even in the absence of a corresponding rule in this jurisdiction, should be precluded from permitting such an amendment."

That case concerned the death of the plaintiff's wife when a tree fell on the car in which he and his wife had been travelling on a public road. The amendment sought in that case was to add the words "and nuisance" to a Statement of Claim in which it had been pleaded that the tree had fallen as a result of the negligence, breach of duty and breach of statutory duty of the Defendants. It was contended on behalf of the first named defendant that the amendment would deprive them of a defence under the relevant limitation period. The amendment was allowed.

The decision in that case was distinguished in the case of *Croke v. Waterford Crystal Limited,* (Unreported, High Court, 20th April, 2004), by Smyth J. on the basis that in the case before him, there was a new allegation of fact. He referred to an earlier decision of the Supreme Court in the case of *Bank of Ireland v. O'Connell* [1942] I.R. 1 where Murnaghan J. stated:-

> "Where the amendment sought is one that affects the operation of the Statute of Limitations, the rule has consistently been followed since the Judicature Act that an amendment will not be allowed if it prejudices the rights of the opposite party as existing at the date of the amendment."

I was also referred to the decision in *L.B. v. Minister for Health and Children*, (Unreported, High Court, 26th March, 2004). That case concerned an attempt to reconstitute an appeal under the Hepatitis C scheme. Having regard to the particular terms of that statutory scheme, I do not think that the judgment in that case is of particular assistance in the circumstances of this case.

Finally reference was made to a passage from Kerr on the *Civil Liability Acts* (3rd ed.) at p. 61 which sets out the provisions of s. 48 of the Civil Liability Act. It is worth bearing in mind the provisions s. 48 (1):-

> "Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain such an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased."

The commentary on that section in Kerr notes that:

> "The dependents can thus only recover on the deceased's cause of action if 'the deceased had at the time of his death the right to maintain an action and recover damages for the act, neglect or default of which they complain', per Scrutton L.J. in *Nunan v. Southern Railway Company* [1924] 1 K.B. 223 at p. 227. Scrutton L.J. went on to say that if the deceased had lost such a right, such as by failing to make a claim within the relevant limitation period or by reason of a release by Accord and Satisfaction, so that he could not have brought an action at the time of his death, then neither could his dependents bring an action: see respectively, *Williams v. Mersey Docks and Harbour Board* [1905] 1 K.B. 804 and *Read v. Great Eastern Railway Co.* (1868) L.R. 3 Q.B. 555.

The English approach was adopted by Lavan J. in *Mahon v. Burke* [1991] 2 I.R. 495. The deceased had settled his negligence action against the defendants but died shortly thereafter. His widow then brought an action for the benefit of the deceased's dependants (herself, her son and her four daughters, her father-in-law, the deceased's seven brothers and his three sisters). It was argued on her behalf that, where the death of a person is caused by the wrongful act of another such as would have entitled the deceased to maintain an action, such person should still be liable to a dependent of the deceased notwithstanding a compromise by the deceased of his cause of action. This was not accepted by Lavan J. who held that for a plaintiff to succeed under s. 48, it must be proven that there was vested in the deceased a cause of action at the time of his or her death."

Mr. McDowell S.C. by way of response pointed out that the late Mrs. Farrell died on the 24th October, 2005, some two days before the delivery of the Statement of Claim. Proceedings on behalf of the dependants of the deceased should have been commenced within two years of the date of her death. At the time of the application to amend (and for this purpose, I am relying on the return date of the notice of motion, namely 31st March, 2008 – the position would be the same if I took the date of the issue of the motion) any claim brought on behalf of the dependants was statute barred. He pointed out that the personal injuries claim on behalf of the deceased was extinguished on her death. After the action in her name had been reconstituted, it was indicated in replies to particulars that the claim in respect of special damages was no longer being pursued. The effect of the proposed amendments is to construct the original action into a new action, namely, a fatal injuries claim on behalf of the dependants. He argued that this claim is not the same claim as was originally made out in the proceedings commenced by the late Mrs. Farrell. This is a new cause of action seeking damages for mental distress and financial dependency together with other headings of special damage. He pointed out that the claim now being brought was one which clearly could not have been brought in the original proceedings. It is an entirely new and separate claim.

In the course of his submissions, Mr. McDowell also referred to the decision in the Krops case. He referred to a passage at p. 120 where Keane J stated:-

> "I have referred to these authorities in England subsequent to *Marshall v. London Passenger Transport Board* which were not cited by Counsel on the present application, merely for the sake of completeness. In the absence of any rule in Ireland corresponding to the English 1965 rule, the question as to whether the court should apply the practice referred to in *Weldon v. Neal* to the circumstances of the present case must be determined by reference to

> principle rather than authority. I am proceeding on the assumption, again not debated in argument, that the High Court is not bound by decisions of the English Court of Appeal prior to 1921, although it will not lightly depart from a decision of that court which has been repeatedly acted on without demur in this court. I also approach the question on the basis that, so far as the researchers of Counsel and myself go, there is no Irish authority to guide me.
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> Treating it as a matter of principle, I think one can start by positing a somewhat extreme set of circumstances. A person is injured in a traffic accident and issues proceedings within the limitation period. In his statement of claim, he describes the accident as having happened in O'Connell Avenue, Finglas, Co. Dublin. In fact, the point at which the accident occurred is in the city of Dublin. A pedantic counsel asks the court to permit an amendment of the statement of claim. At this stage, the limitation period has run. The trial judge allows the amendment notwithstanding that the limitation period has expired, on the grounds that *Weldon v. Neal* has no application as neither a new cause of action nor any new facts of any significance are being added.
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> It is obvious that in such a case the defendant is not deprived of any defence under the Statute of Limitations: he never had such a defence in the first place since the plenary summons and statement of claim were issued within the limitation period. That example simply serves to illustrate that the pleadings which initiate an action in this court carry with them from the time they are issued or deliberate potentiality of being amended by the court in the exercise of its general jurisdiction to allow a party to amend his endorsement or pleadings 'in such manner and on such terms as maybe just'."

The passages quoted previously from the judgement of Keane J. in that case and referred to previously by Counsel on behalf of the plaintiff followed on from the passage quoted above.

In the *Krops* case the amendment to the pleadings was the addition of the words "and nuisance" to the Statement of Claim. It did insert a new cause of action into the proceedings but it clearly arose from the same or substantially the same cause of action. Keane J. in that case saw no reason not to amend. He took the view that the amendment in that case would not in any way prejudice or embarrass the Defendant by new allegations of facts and no injustice would be done by permitting the amendment.

Decision
For the sake of completeness, I should refer briefly to the Supreme Court decision in the case of *Croke v. Waterford Crystal Limited* [2005] 1 I.L.R.M. 321. I was, as mentioned above, referred to the decision of the Smith J. in that case but for some reason the Supreme Court decision on appeal from that decision was not opened to me. In the course of his judgment in the case, Geoghegan J. observed at p. 321:

> "An important High Court decision is *Krops v. Irish Forestry Board Ltd* [1995] 2 I.R. 113; [1995] 2 I.L.R.M. 290 where Keane J (as he then was) carefully considered the ambit of O. 28, r. 1, and held that the court has a wide discretion to amend pleadings in such manner and on such terms as it considers just in the circumstances. He went on to hold that as a matter of principle, pleadings carry with them from the time they are issued or delivered the potentiality of being amended by the court and that since their issue the proceedings were always capable of amendment by the court in such manner as might be just and in order to allow the real question and controversy between the parties to be determined. The mere fact that if a new cause of action sought to be included in the statement of claim had been brought by separate action it would be statute barred does not prevent the amendment being granted. This decision has particular relevance to the objection to the inclusion of '1999' in the proposed amended statement of claim. But if that really is the year when the plaintiff acquired the knowledge it is *prima facie* a necessary amendment for having the real issues tried or certainly, it would have to be included in a reply. The insertion of date of knowledge is merely an expansion of the claim being made at any rate."

Geoghegan J went on to say at p. 337:

> "It is not clear to me that the amendments as against the first named respondent would give rise to any relevant legal prejudice. If by reason of the appellant's date of knowledge the action which might otherwise have been statute barred is not in fact statute barred it cannot be said that prejudice has arisen. It is not necessary for this purpose to apply the principles adopted by Keane J in *Krops v. Irish Forestry Board* cited above."

In all of the discussions on the point in the cases referred to above, the basic principle enunciated by Lord Esher M.R. has not been altered or changed, namely, that a plaintiff will not be allowed to amend pleadings to set up a cause of action, which, if the writ were issued in respect thereof at the date of amendment, would be statute barred, as this would allow the plaintiff to take advantage of the existing proceedings to defeat the statute and would prejudice the defendant.

To a large extent, the plaintiff in this case has relied on the argument that the facts necessary to establish the new cause of action in the amended statement of claim are the same or substantially the same as those in the original statement of claim. That is undoubtedly so. The nature of the claim is, however, very different. These proceedings commenced as a personal injury action by the late Mrs. Farrell. Sadly, she died before the proceedings could be completed. Indeed, as already pointed out, the original statement of claim was delivered two days after her death. In the original statement of claim, the plaintiff's claim was for damages for personal injuries. Following her death, the original action was reconstituted. However, that part of the claim which was in respect of damages for pain and suffering could no longer be pursued. The claim for medical expenses was withdrawn by the plaintiff in the reconstituted proceedings. It was only then that the plaintiff sought to amend these proceedings so as to transform the original personal injuries claim into a fatal injuries case on his own behalf and on behalf of the statutory dependants. Had separate fatal injury proceedings been issued at the time of the issue of the Notice of Motion seeking the amendments herein, such proceedings would have been statute barred. There is no issue about that.

A fatal injuries claim is different to a personal injuries claim. This is so even if the claims arise out of the same facts. The nature of the claim and the damages that flow from the set of facts giving rise to the cause of action are different. The parties are different. The situation in this case seems to me to be quite different to the situation in the *Krops* case referred to above. The amendment in that case was limited to the addition of a cause of action in nuisance where the plaintiff relied on the same facts and circumstances to ground that cause of action. The facts pleaded in that case could

have given rise to a claim arising both in negligence and nuisance. All of the elements necessary to ground the claim in nuisance had been pleaded. In the circumstances the amendment of the pleadings in that case meant that the statute could not be pleaded in respect of the cause of action in nuisance but as was pointed out there was no new allegation of facts and in those circumstances, it was held that no injustice was done by allowing the amendment. As was said in that case:-

> "In that sense, it is true to say that the amendment does not in truth deprive him of a defence under the statute of limitations: since the proceedings were always capable of amendment in such manner as might be just and in order to allow the real question in controversy between the parties to be determined, it cannot be said that the defendant was at any stage in a position to rely on the statute of limitations."

By contrast, in these proceedings, it seems to me that the plaintiff is attempting by means of the proposed amendment to set up an entirely new case, i.e. a fatal injuries case, using the vehicle of the personal injuries case. In effect, the plaintiff is seeking, by amendment of the original proceedings, to bring a new claim on his own behalf and on behalf of the statutory dependants. If permitted to do so, the defendant would be deprived of his right to rely on the statute. The amendments sought to be made in this case would bring about a change of significance in the nature of the proceedings. Accordingly, in my view, allowing the amendments in the circumstances of this case would prejudice the defendant.

There is no explanation of any kind as to why the plaintiff sought to reconstitute these proceedings instead of issuing new proceedings to bring a fatal injuries claim pursuant to statute within an appropriate time. Had that been done, such proceedings would not have been statute barred.

In the circumstances, it seems to me that the proposed amendments cannot be permitted.