Neutral Citation [2016] IEHC 702

THE HIGH COURT

[2015 No. 979P]

BETWEEN

MARTIN McDONAGH

PLAINTIFF

– AND –

LENA McDONAGH

DEFENDANT

– AND –

THE HEALTH SERVICES EXECUTIVE (HSE)

AND PATRICK O'MEARA AND JOHN RICE

THIRD PARTIES

JUDGMENT of Mr Justice Max Barrett delivered on 6th December, 2016.

I. Key Issue Arising

1. Ought the third party notice in the within proceedings now to be set aside?

II. The Alleged Accident Underpinning the Within Proceedings

2. Mr McDonagh alleges that he suffered injuries in an accident. He claims against Ms McDonagh, his wife, for injuries allegedly suffered while getting out of a van that was insured by Mr McDonagh but being driven by Ms McDonagh. The alleged accident occurred in June, 2013. Thereafter Mr McDonagh attended and was treated at the emergency department of a hospital operated under the auspices of the HSE, and also a general medical practice operated by Drs O'Meara and Rice. On 25th January, 2016, the High Court (Barr J.) ordered that Ms McDonagh be at liberty to issue and serve a third party notice on each of the HSE and Drs O'Meara and Rice regarding alleged medical negligence that occurred in his treatment.

III. Requirement for Report in Medical Negligence Proceedings

3. The rule is well-established in case-law that it is an abuse of process to commence or continue an action in medical negligence without appropriate expert evidence to support it. The justification offered in case-law for this rule is that there are particular reputational and other implications that afflict medical professionals which require that such a rule be applied. Whether the personal and professional reputation and financial well-being of medical professionals is any more at stake in negligence proceedings than like proceedings brought against non-professional commercial actors acting in an individual capacity, and/or the rule is rooted in a particular, and not particularly egalitarian, perception of those who are professionally qualified, are issues that might reasonably be raised. But the fact remains that the rule referred to above is well-established in case-law that is binding on this Court.

4. The relatively recent decision of the High Court in *Flynn v. Bon Secours Health Systems Ltd* [2014] IEHC 87 offers a good example of the rule in operation. *Flynn* was a case in which the defendants applied for a permanent stay on the plaintiff's action for negligence, in circumstances where the plaintiff was unable to produce an expert report to support his claim. In the High Court, Hogan J., directing that the plaintiff obtain a report within 12 months, observed, *inter alia*, as follows:

> *"[19] In* Cooke v. Cronin *[1999] IESC 54 the Supreme Court held that it was an abuse of process to pursue an action in medical negligence in circumstances where there were no reasonable grounds for so doing. In her judgment Denham J. approved the following passage from the judgment of Barr J. in* Reidy v. The National Maternity Hospital, *High Court, 31st July, 1997, where he stated*:
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> > *'It is irresponsible and an abuse of the process of the court to launch a professional negligence action against institutions such as hospitals and professional personnel without first ascertaining that there are reasonable grounds for so doing. Initiation and prosecution of an action in negligence on behalf of the plaintiff against the hospital necessarily required appropriate expert advice to support it.'*
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> *[20] She added:*
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> > *'While bearing in mind the important right of access to the Courts, I am satisfied that these statements of law are correct. To issue proceedings alleging professional negligence puts an individual in a situation where for professional or practice reasons to have the case proceed in open Court may be perceived and feared by that professional as being detrimental to his professional reputation and practice…*
>
> *…[24] It is clear from* Cooke *that it is inappropriate to commence (or, for that matter, to continue) medical negligence proceedings against a medical professional without an appropriate basis for so doing because of the reputational and other implications of such proceedings for the professional involved."*

5. These observations were recently implicitly affirmed by the Supreme Court in a related determination in *Flynn v. Dental Hospital Committee* [2016] IESCDET 1, in which the Supreme Court referred to the above-mentioned observations of Hogan J., and, at para.25 of its determination, to "[t]*he established law as to the requirement of a medical report in medical negligence proceedings."*

IV. The Form of the Within Applications

6. By notice of motion of 12th May, 2016, the HSE seeks, *inter alia*, an order pursuant to O.16, r.8(3) of the Rules of the Superior Courts 1986, setting aside the order of the court (Barr J.) of 25th January, 2016, joining the HSE to the within proceedings. Order 16, rule 8(3) provides that "*third party proceedings may at any time be set aside by the court*".

7. By notice of motion of 3rd October, 2016, each of Drs O'Meara and Rice seeks, *inter alia*, (i) an order pursuant to O.16, r.8(3) of the Rules of the Superior Courts 1986, as amended, and/or the inherent jurisdiction of the court setting aside the third-party notice against each of them, and (ii) an order pursuant to O.19, r.28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court dismissing the third-party notice as an abuse of process. Order 19, rule 28 provides that "*The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.*"

V. The Medical Report

8. Before any third party notice was served, it was necessary, by virtue of the above-described rule, as established and affirmed in case-law, for Ms McDonagh to obtain an appropriate medical report. In this regard, Ms McDonagh initially placed reliance on a medical report of 28th May, 2014, from Dr Desmond Mackey, a trauma and orthopaedic surgeon, as supplemented by a letter of 23rd March, 2015. There are three difficulties arising as regards reliance on Dr Mackey's report and supplementary letter:

- first, without seeking in any way to diminish Dr Mackey's professional qualifications and skills as a trauma and orthopaedic surgeon, he is not, with respect, qualified to opine on GP care;

- second, Dr Mackey expresses no opinion in his report and supplementary letter on (a) whether or not there was any negligence on the part of the HSE, its servants or agents, and (b) the appropriateness or otherwise of the care that was provided by Drs O'Meara and Rice as GPs;

- third, in an affidavit of 16th November, 2016, Ms McDonagh's solicitors belatedly indicated that they were withdrawing Dr Mackey's report. Counsel for Ms McDonagh acknowledged at the hearing of the within application that Dr Mackey's report would not be relied upon to support Ms McDonagh's claims, but that an alternative medical report was to be sourced.

9. The net result of the foregoing is that (i) there has never been a medical report sufficient to ground the joining of the third parties to the within medical negligence proceedings, (ii) there was at the date of the hearing of the within applications no medical report sufficient to ground the joining of the third parties to the within medical negligence proceedings, and (iii) ten months after the High Court order issued joining the third parties to the proceedings, there was but the possibility that a suitable report would be forthcoming at some future time (this, of course, being a possibility that arises in respect of all medical negligence proceedings before they can properly be commenced and which does not suffice for them to be commenced). It clearly does not satisfy, indeed it entirely subverts, the established rule that medical negligence proceedings should not be pursued without there being a previous medical report in place that (a) a report that is patently inadequate should initially be relied upon in the pursuit of such proceedings, and (b) the said report is thereafter withdrawn in the hope that an adequate report might at some future time be forthcoming and with no certainty that it will be.

VI. Delay

10. Though the focus at the within proceedings was on the abuse of process arising due to the absence of appropriate expert evidence, it was also contended that there was sufficient delay arising to justify a strike-out of the within proceedings by reference to s.27(1) of the Civil Liability 1961 and the requirement therein that a third-party notice be served "*as soon as is reasonably possible*". This is a provision which seems recently to have come into renewed vogue but in respect of which there is an abundance of past case-law, including the recent decision of the Court of Appeal in *Kenny v. Howard* [2016] IECA 243.

11. In light of the crystal-clear abuse of process arising in the within proceedings, it does not seem necessary to consider the issue of delay in great detail. Suffice it for the court to note, by reference to *Kenny,* and the various judgments referred to in the judgments in the Court of Appeal, that there was in the within proceedings a failure to join the third parties as soon as was reasonably possible. Two periods of especial delay stand out in this regard, viz. the delay between, on the one hand, the issuance of (a) Dr Mackey's report of May, 2014 and (b) the issuance of Dr Mackey's supplementary letter of March, 2015 and, on the other hand, the service of the third-party notice in February, 2016.

12. It has been sought to explain such delay as has arisen by reference to (a) the unwillingness of solicitors in the town where the alleged events in issue transpired to attend to the swearing of certain affidavit evidence (the fact that there were also solicitors in the next town rather defeats this unconvincing excuse), (b) the intervention of holiday periods (there were both holiday and work periods during the period of delay and while some degree of delay might be inevitable and potentially tolerable during holiday periods, the mere fact of a holiday period does not of itself justify any delay arising, and (c) the complexities of the case arising and, in particular, the sourcing of medical records (in truth, these seem complexities that had more to do with the commencement of the proceedings than the application to join the third parties).

VII. Conclusion

13. Having regard to the foregoing the court will strike out the third party notice (i) on the ground that its service, in the circumstances presenting, amounts to an abuse of process, and also (ii) because the delay presenting yields a want of compliance with s.27(1) of the Civil Liability Act 1961.