Neutral Citation Number: [2011] IEHC 124

THE HIGH COURT

2004 2102 P

BETWEEN

AIDAN CUNNINGHAM

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE AND MONAGHAN COUNTY COUNCIL

DEFENDANTS

Judgment of Mr. Justice Hedigan delivered on the 29th day of March, 2011.

1. The plaintiff claims damages in respect of sexual assault/abuse sustained whilst he was a patient in Monaghan General Hospital (MGH) in or about 1963. His assailant/abuser was a porter in the Hospital and was charged and convicted in respect of the incident.

2. The plaintiff's solicitors wrote to MGH on 29th July, 2003 notifying them of the plaintiff's claim. It was phrased in the manner usual to notify an intended defendant and advising it to pass the letter on to their insurers.

3. The Irish Public Bodies Mutual Insurance Co. Ltd. (IPB) replied on 26th August, 2003 acknowledging the plaintiff's letter and informing that they would be dealing with the matter for the North Eastern Health Board (NEHB). The letter stated that their inquiries were commencing and they would be in contact with regard to nominating a solicitor. These letters are apparently the only pre-commencement correspondence between the parties.

4. Solicitors were nominated and the plaintiff's solicitors issued a plenary summons on 19th February, 2004 naming the NEHB as defendant. An appearance was entered on 1st April, 2004. A statement of claim was delivered on 2nd April, 2004. Further particulars of negligence were served on 28th June, 2005. A notice of motion was served returnable for 24th July, 2006 for judgment in default of defence. On that day three weeks was allowed and on 10th August, 2006 the defence was delivered. At paragraphs 1 and 2 of that defence, the defendant pleads that no cause of action lies against it because it has no liability in tort for MGH. A letter of request for voluntary discovery dated 20th November, 2006 was served by the plaintiff. At page 2 thereof it sought details of the ownership, management and control of MGH which they raised because of the defence pleaded at paragraphs 1 and 2. The defendant by letter of 14th June, 2007 informed the plaintiff of the case of *Donegan v. Minister for Education* which essentially confirmed the defence they had pleaded at paragraphs 1 and 2 to the effect that no tortious liability was ever transferred to them. No further action occurred in the case for nineteen months until notice of change of name of solicitor was furnished on 14th January, 2009 together with a notice of intention to proceed.

5. The defendant on 14th July, 2009 served a notice of motion to dismiss the plaintiff's claim as disclosing no cause of action against it. This was returnable for 12th October, 2009. It is this motion with which I am concerned today. In it the defendant in essence relies on the argument that MGH's tortious liability for the time in question was never transferred and consequently they have no liability to the plaintiff. Any case he may have was and remains against MGH.

6. The plaintiff agrees that the tortious liability in question was never transferred and relies upon an estoppel raised by the defendants' letter of acknowledgment of the 26th August, 2003.

7. The plaintiff by notice of motion returnable for 9th November, 2009 joined Monaghan County Council (MCC) as co-defendant being the body responsible for the management and administration of MGH.

8. A number of significant matters emerge from the affidavits herein. In his affidavit grounding the application to add MCC as co-defendant and sworn on 28th October, 2009, Denis McMahon avers at paragraph 6 that the proceedings were initiated against NEHB because it was considered that tortious liability had been transferred to it for the actions of MGH by virtue of s. 37(5) of the Health Act 1970. It is immediately obvious from a cursory reading of s. 37(5) that this is not so. Section 37 deals only with the transfer of certain officers and the continuance of certain contracts of service. Further examination of the Act shows that s. 34 deals with dissolution of certain bodies and controls the transfer of their tortious liability. MGH is not one of these bodies. It is averred that their apparent misreading of s. 37 was the reason why the proceedings named the NEHB as defendants. No averment is made in this affidavit that the plaintiff was misled by the letter of acknowledgement of the insurance company.

9. However, in his replying affidavit in this motion sworn on 5th November, 2009, Mr. McMahon very explicitly avers that the reason the plaintiff issued against the NEHB was because it had suggested, insisted and directed that it should do so. I have not been furnished with any explanation for this contradiction. I cannot find any basis in the different nature of the two motions to explain it.

10. In her affidavit in this motion dated 8th July, 2010, Helen McGovern states that the originating letter of the plaintiff's solicitors in 2003 was addressed to the administrator of MGH. She further states that at that time the NEHB was in fact managing the administration of MGH. She also states that it was she who communicated the judgment in *Donegan v. The Minister for Education* to the solicitors for the plaintiff on 14th June, 2007.

11. The question for the Court is whether the letter written on 26th August, 2003 by IPB constituted an estoppel by representation made by or on behalf of the NEHB from which they cannot now resile.

12. The nature of estoppel by representation

Estoppel is not to be lightly inferred. As stated in Wilken and Villiers – *The Law of Waiver, Variation and Estoppel* (2nd Ed. at 9.2):

> *"In view of the serious consequences of establishing an estoppel by representation, fairly stringent clarity requirements*

are imposed. This is a means of restricting the operation of the doctrine. The same requirement has been expressed in a number of slightly different ways. Thus it has been stated that the representation must be clear and unequivocal. An alternative formulation is that the representation must be clear and unqualified, precise and unambiguous. There is some uncertainty as to whether the representation will be construed objectively or not. The traditional rule was stated in Low v. Bouverie [1891] 3 Ch. 82 CA as follows:

> *'The language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed.'"*

The courts should be careful before constraining parties to a course of action they did not intend to follow. This must be particularly so where, as herein, it is sought to attach liability in tort to a defendant who has no liability in law. Where there has been deliberate leading on, little difficulty presents itself to the Court. In the circumstances that prevail here, nothing like deliberate misleading can be found. The IPB wrote the standard acknowledgement letter to a letter notifying a claim. It no doubt was at least partly responsible for leading the solicitors, until the defence was filed, to assume they had identified the correct defendant. It was not however the only thing that led them to chose the NEHB as the defendant. They had, they aver, considered s. 37 of the Health Act 1970 and come to the incorrect conclusion that it transferred liability in tort from MGH to the NEHB. This indeed strongly suggests that the plaintiff's solicitors did not in fact rely solely upon the IPB letter. Moreover, the representation made seems very far from the clear and unequivocal ones that are instanced in the cases below which were opened to me and which demonstrate the clear representation required in order to sustain a claim of estoppel. These were:

> *Oakland Metal Company Ltd. v. D. Benjamin & Co. Ltd*. [1953] 2 QB 261;
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> *Gregory Finnegan v. Graham Richards and Padraic Madigan as Attorneys of Barbara Allen* (McKechnie J., 20th April, 2007);
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> *David Murphy v. Michael Grealish* [2006] IEHC 22;
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> *Ryan v. Connolly* [2001] 2 ILRM 174;
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> *Doran v. Thompson* [1978] I.R. 223.

No representation regarding the merits of the case was made herein. No apparent admissions of liability can be inferred. At most what occurred was an initial mistake, made with no *mala fides* and no negligence because the NEHB were in fact, at that time, managing the MGH. Indeed one recollects the judgement of Griffin J. in *Doran*;

> "Apart from stating in the first letter that they were investigating the circumstances of the accident, the insurers thereafter made no reference, express or implied, to the circumstances of the accident or a question of liability."

13. Here the PBI were informed of a proposed action arising from events occurring forty years ago. Having been served with the plenary summons and statement of claim by 2nd April, 2004 and further particulars of negligence and breach of duty on 28th June, 2005, it is not surprising they waited to see what would happen. When they were served with a notice of motion for judgment in default of defence returnable for 24th July, 2006, they responded with their defence on 10th August, 2006. In this the plaintiff was explicitly told that they had the wrong defendant. Voluntary discovery was sought on 20th November, 2006, the contents of which made clear the plaintiff was now fully aware of the problem with the correct identification of the defendant. Inexplicably, and no explanation was proffered, the plaintiff then waited two years and two months before moving again. This in the context of a case originally forty years old and now rapidly approaching its half century is difficult to overlook. When the plaintiff discovered its error in August 2006, it had a very arguable case that the delay involved between 19th February, 2004 and 10th August, 2006, in the context of a forty year old case hardly added any prejudice to the ultimate correct defendant. The confusion over the identity of the defendant was understandable and arguably excusable. The picture now is unfortunately much less favourable. That however is something for which responsibility largely lies with the plaintiff.

14. So too lies responsibility for the original mistake. As has been sworn in the motion to add MCC as a co defendant, the plaintiff considered s. 37 and came to an incorrect conclusion. The IPB letter was no more than the standard letter of acknowledgment. Whilst it continued the plaintiff in their misapprehension, it did so on the evidence before the Court, inadvertently, with no *mala fides* and in the circumstances as I find them, without negligence.

15. No tortious liability exists on the part of the NEHB and in the circumstances of the case no satisfactory grounds to raise an estoppel by representation have in my judgment been sustained. I will therefore make an order in accordance with paragraph 1 of the notice of motion herein dismissing the plaintiff's claim against the NEHB on the grounds that it discloses no cause of action.