THE HIGH COURT

[2016 No. 2258 P.]

BETWEEN

ROBERT MULLINS

PLAINTIFF

AND

IRISH PRISON SERVICE AND

MINISTER FOR JUSTICE AND EQUALITY AND IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 24th day of July, 2018

1. In these proceedings, the plaintiff, who is a prison officer employed by the first named defendant, claims damages in respect of personal injuries that he claims he sustained in the workplace on 8th January, 2013. The plaintiff is a litigant in person and issued these proceedings, not by way of personal injuries summons, but by way of plenary summons which issued on 11th March, 2016. He subsequently served a statement of claim dated 7th July, 2016. It appears to have been received by the solicitors for the defendants on 11th July, 2016. He had previously made an application to the Injuries Board, but the defendants declined to have the claim dealt with by that board and an authorisation to issue proceedings issued on 14th September, 2015.

2. The defendants issued a notice of motion dated 19th June, 2017 seeking, *inter alia,* orders dismissing the plaintiff's claim on the grounds that it is statute barred pursuant to the Statute of Limitations Act 1957, as amended and/or pursuant to the Civil Liability Act 1961 or alternatively, the defendants seek a declaration that the plaintiff is not entitled to maintain the within proceedings in circumstances where he failed to comply with the provisions of the Personal Injuries Assessment Board Acts 2003 and 2007 and/or the Civil Liability and Courts Act 2004. This motion came before the Court for hearing on 15th May, 2018. However, on that date the defendants did not pursue an application for the declarations referred to above, and confined their application to an order dismissing the plaintiff's claim on the grounds that it is statute barred.

3. Because the plaintiff is a litigant in person, counsel for the defendant suggested that the plaintiff give evidence as to the incident in which he claims to have suffered injury, rather than dealing with the application on the basis of the affidavits filed by the plaintiff in reply to this application, which did not address these issues with sufficient clarity. The plaintiff readily agreed to this suggestion. He gave evidence that on 8th January, 2013, he was involved in a "control and restraint" incident, during the course of which he and a number of colleagues were required to remove a prisoner to hospital. This required the plaintiff and his colleagues to restrain the prisoner who had lain upon the floor and it was necessary to pick him up, and during the course of this manoeuvre the plaintiff claims that he injured his back. The plaintiff said that he was brought immediately to the surgery in the prison. There he was seen by a nurse, and later in the day attended his own general practitioner who gave him a medical certificate, whereby he was certified unfit for work for ten days.

4. The plaintiff stated that he had previously had back problems and his general practitioner, a Dr. Keegan, considered that he had aggravated his existing condition. This was evidenced by a report from his general practitioner dated 16th July, 2015 in which, under the heading of "aggravation of pre-existing condition?", she replied "yes". She also notes: " known lumbar disc disease on MRI June 2012. Aggravated January 2013 following incident at work as outlined above".

5. After the ten day period, the plaintiff went back to work. However, his discomfort persisted and he attended his general practitioner again on numerous occasions. In her report of 16th July, 2015, Dr. Keegan records that the plaintiff had attended with her on nine occasions subsequent to January, 2013 in relation to his back. The plaintiff gave evidence that he took medication and had physiotherapy, but by late October, 2013, his condition had worsened to the point that he could not walk. By this I took him to mean that he had great difficulty in walking, rather than that he literally could not walk at all. He was referred by Dr. Keegan to a Mr. Ashley Poynton in November, 2014. In a short report dated 12th November, 2014, to Dr. Keegan, Mr. Poynton records:-

> "Robert has run into trouble with a large disc herniation at L5/S1 on the right side. He is in a lot of pain and his foot has gone numb. His MRI scan shows a large sequestrate L5/S1 disc herniation on the right side. I am going to get him in and perform surgery next week."

6. In a report dated 4th February, 2015, Mr. Poynton deals both with the plaintiff's pre-accident and post-accident medical condition. In the first two paragraphs of this report he states the following:-

> "Mr. Mullins was referred to me initially by his general practitioner in August of 2012. This was for assessment of intermittent back pain and left sided sciatica. When I reviewed him he had evidence of degenerative disc disease at L4/5 and L4/S1 with a central and left sided disc bulge at L5/S1. I recommended at that point an epidural steroid injection. Following the epidural Mr. Mullins did very well, his pain settled down considerably, he began increasing his physical activity and returned to training and lost a considerable amount of weight and was in good condition until he was injured during the course of his occupation in January of 2013.
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> He described an incident in which he was dealing with a violent and aggressive prisoner and had to restrain this individual and carry the individual out of a holding cell. He injured his back in doing so and immediately after the incident developed back pain and right sided sciatica. The right sided leg pain was a new symptom which he did not experience before. His symptoms persisted and did not respond to treatment. He contacted my office subsequently in October, 2014 complaining of persistent sciatica. An MRI scan at that point showed a large right sided disc protrusion at L5/S1 which was a new finding."

7. In a report, dated 7th April, 2015, Mr. Poynton again records how the right sided leg pain was a new symptom that the plaintiff had not experienced before and again records that the MRI scan following his attendance with Mr. Poynton in October of 2014 showed a large right sided disc protrusion at L5/S1, "which was a new finding".

8. In a report dated 10th July, 2015, Mr. Poynton states:-

"was previously reviewed by me in August, 2012, I had recommended an epidural steroid injection together with core muscle stability exercises to help his pain. Mr. Mullins initially had one full years' relief from this injection. I had not anticipated that surgery would be required. He could, therefore, not have any awareness prior to November that his injury was significant. Neither would he have gained knowledge of the extent of his symptoms until his pain recurred and an MRI was performed".

9. In cross-examination, the plaintiff accepted that the incident of 8th January, 2013 was a clearly defined incident. He agreed that he completed an accident report form soon afterwards. He agreed that he had hurt himself when lifting the prisoner, and that this was something that he was required to do by his employer in the course of his duties. He said that it was only when he found out how significant the injury was that he decided to issue proceedings. Up until that point, he said, he had thought it was an exacerbation of a pre-existing injury.

10. Counsel for the defendants submits that on the date of the incident about which the plaintiff complains i.e. on 8th January, 2013 he was aware of the following facts:-

(a) That he had sustained an injury at work;

(b) That the injury was significant;

(c) That the injury occurred owing to an action that he was required to take by his employer in the course of his work in respect of which he alleges his employer was negligent;

(d) That he was aware of the identity of the defendant i.e. his employer.

11. All of that being the case, the defendant submits that the plaintiff had, on 8th January, 2013, the knowledge required to issue these proceedings, as prescribed by s. 2 of the Statute of Limitations (Amendment) Act 1991 ("the Act of 1991"), which provides:-

"2.—(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."

12. It is submitted therefore that proceedings should have been issued within two years of 8th January, 2013, unless stayed by reason of an application to the Injuries Board within that period. Since the plaintiff did not make an application to the Injuries Board until some two years and eight months after the date on which he claims to have sustained injuries, it follows that the proceedings are statute barred. Counsel for the defendant referred me to the authority of *Gough v. Neary* [2003] 3 I.R. 92. In that case, Geoghegan J. cited a decision of Brooke L.J. in relation to the equivalent limitation period in the United Kingdom, in the case of *Spargo v. North Essex District Health Authority* [1997] 8 Med. L.R. 125 wherein Brooke L.J. stated that the principles to be applied in the interpretation of the statutory provisions in the United Kingdom 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."

13. Geoghegan J. accepted those principles as applicable in this jurisdiction. He also went on to cite an extract from another English judgment, that of Donaldson M.R. in *Halford v. Brookes* [1991] 1 WLR 428 who is quoted as saying 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."

14. Counsel for the defendant also referred me to the case of *Naessens v. Nicholas C. Jermyn & Anor* [2010] IEHC 102, a decision of Dunne J. in this Court in which she stated:-

> "Counsel on behalf of the plaintiff also referred to the decision in the case of *Fortune v. McLoughlin* [2004] 1 L.R. 526, a decision of the Supreme Court in which it was held that the word 'attributable' in s. 2(1)(c) of the Act of 1991 was not satisfied by the plaintiff's knowledge of the factual situation. The knowledge referred to was knowledge of attribution and knowledge that there was a connection between the injury and the matters alleged to have caused the injury. McCracken J. in the course of his judgment in that case, at p. 534 went on to say: -
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> > 'The knowledge referred to in that subparagraph is knowledge of attribution, in other words knowledge that there was a connection between the injury and the matters now alleged to have caused the injury. This is a connection which the plaintiff did not make in this case. If a plaintiff is to have knowledge within the meaning of s. 2(1)(c) of the Act of 1991, she must have knowledge at least of a connection between the injury and the matters now complained of to put her on some inquiry as to whether the injury had been caused by the matters complained of …'"

15. Finally, counsel for the defendants also referred me to the decision of Quirke J. in the case of *Whitely v. the Minister for Defence* [1998] 4 I.R. 442 in which he considers the interpretation of the word "significant" in s. 2(1) (b) of the Act of 1991. At p. 453 he said:-

> "Accordingly, s. 2 of the Act of 1991 expressly avoids any attempt to define what is meant by a 'significant' injury within the meaning of s. 2(1)(b) of the Act, and I take the view that by excluding any definition it was the intention of the legislature to avoid confining the sense in which the word 'significant' ought to be understood to the terms of the definition contained in s. 14(2) of the English Act, or to any particular terms. If I am correct and if it was intended that a broader test should be applied than was contemplated by the definition contained within s. 14(2) of the English Act, then it would seem to follow that the test to be applied should be primarily subjective and that the court should take into account the state of mind of the particular plaintiff at the particular time having regard to his particular circumstances at that time."

16. Counsel for the defendant submits that it is clear that the plaintiff knew that he had suffered an injury on 8th January, 2013, and that that injury was attributable to the acts of the defendants, because there was a clear connection between the injury and the actions or omissions of his employer alleged to have caused that injury i.e. he knew it was caused by actions that he was required to take in the course of his employment. Moreover, it was clearly a significant injury in respect of which he was immediately certified as unfit for work for a period of ten days, and in respect of which he was prescribed medication and attended for physiotherapy. Accordingly, he had all the knowledge he needed to have on the date that he allegedly sustained the injury, and the proceedings are therefore statute barred.

17. Alternatively, it is submitted that the plaintiff had sufficient knowledge on 8th January, 2013 to undertake investigations and seek appropriate medical or other expert advice and that by reason of s. 2(2)(b) of the Act of 1991, he is deemed to have that knowledge as though he had obtained that advice in a timely manner.

18. In response to all of this Mr. Mullins says that he took medical advice and was advised that he had exacerbated a pre-existing condition. Any delay around this time was a delay caused by his general practitioner in not referring him sooner for further expert advice, as she eventually did in referring him to Mr. Poynton. Mr. Mullins said he did not know that the injury that he had sustained was in fact a new injury until an up to date MRI scan was undertaken on 12th November, 2014, which scan confirmed a large sequestrate L5/S1 disc herniation on the right side.

Conclusion

19. In his plenary summons issued on 11th March, 2016, the plaintiff says very little by way of description of his injuries, other than to refer to "serious injury and harm caused to the plaintiff while under instruction/order of his superiors."

20. Somewhat surprisingly, his statement of claim does not elaborate very significantly on this description of his injuries. He claims simply, at para. 5:-

> "The defendants are responsible for serious injury and harm caused to the plaintiff in the form of serious back injury causing ongoing severe pain and restriction of the use of the plaintiff's arm(s) and leg(s)".

21. He goes on to claim that his quality of life has been chronically altered for the rest of his life, that there is no guarantee that further surgery will cure the injury and there is a real risk of further injury directly associated with any further surgery. In his affidavit in reply to this application, he does not address the nature and extent of his injuries at all. However, he does say at para. 8 that:-

> "I was not aware of the extent, severity or indeed nature of the injuries involved until November 2014, as I was doing all I could which was more than would be expected of a reasonable person under the circumstances, and when it became evident that there was something far more seriously wrong that originally anticipated, wherefore an MRI scan was advised and sought. The MRI was performed and the outcome of same was not as I had hoped and surgery was advised."

22. He then proceeds to quote from the report of Mr. Poynton of 10th July, 2015, referred to above.

23. The plaintiff acknowledges that he was aware that he had suffered an injury in the incident of 8th January, 2013. However, he thought it was an exacerbation of a pre-existing back injury, in respect of which he had previously received medical attention and an epidural steroid injection. He had received this treatment in August, 2012, as a result of which he experienced significant relief and according to Mr. Poynton, his pain at this time settled down considerably.

24. Following upon the incident on 8th January, 2013, he attended with his general practitioner who, like the plaintiff, considered that whatever injury he sustained was an aggravation of his pre-accident condition. If these proceedings were concerned solely with such an injury, then they would undoubtedly be statute barred because the plaintiff had sufficient knowledge (of both the injury and its cause) at the time, or soon afterwards, for the purposes of s. 2 of the Act of 1991. The only question about which there might be any doubt in this regard is whether or not the injury was "significant" for the purposes of that section. However, given the level of discomfort which the plaintiff describes that he experienced, the fact that he was certified unfit for work for ten days, prescribed painkillers and advised to attend physiotherapy (and did, in fact, attend for physiotherapy), all suggest that the injury was significant for the purposes of s. 2 of the Act of 1991, even applying a subjective test and taking into account the state of mind of the plaintiff at the time, in accordance with the test postulated by Quirke J. in *Whitely v. Minister for Defence*. If there was any doubt about this however, the issue as to the significance of the injury was fully put to rest by October, 2013. By this time the plaintiff had been suffering for ten months, approximately, and his condition had worsened to the point that he said he could not walk. So he would have had sufficient knowledge as to the significance of his condition by that time, at the very latest. I might add that this part of the plaintiff's oral evidence is somewhat at odds with his averment, referred to at para. 21 above, that he was not aware of the severity of his condition until November, 2014.

25. It is apparent from paras. 19-21 above that the plaintiff has not, in the proceedings issued by him, particularised the precise nature of the injuries sustained by him, notwithstanding that at the time of issue of the proceedings on 11th March, 2016, he had available to him the diagnosis and opinion of Mr. Poynton. It is not clear if he had available to him all of the reports of Mr. Poynton referred to above, but it seems very likely to me that he did have some of them at least as they are addressed simply "to whom it may concern".

26. In any case, in resisting this application, the plaintiff does so on the basis that it was not until he attended with Mr. Poynton on 12th November, 2014, for an MRI scan, that he became aware of a new injury, a large right sided disc protrusion at L5/S1, which Mr. Poynton confirms was a new finding. In his report of 7th April, 2015, Mr. Poynton states:-

> "Following a work related incident occupation in January 2013, Mr. Mullins developed back pain and right side sciatica. The right sided leg pain was a new symptom that he did not experience before. His symptoms persisted and did not respond to treatment. He contacted my office subsequently in October 2014, complaining of consistent sciatica. An MRI scan at that point showed a right sided disc protrusion at L5/S1 which was a new finding."

27. While this may well be a new finding, Mr. Poynton also records, in his report of 7th April 2015, that "following a work incident in January, 2013, Mr. Mullins developed back pain and right side sciatica. The right sided leg pain was a new symptom that he did not experience before". This pain might have been an indicator to the plaintiff that there was more than just an exacerbation of a pre-existing injury involved. It is also of some passing interest to note that in a letter dated 28th May, 2016, to the plaintiff, following upon a review of the plaintiff on 15th May, 2016, Mr. Poynton states "overall your symptoms are due to the degeneration in these discs", which suggests that the symptoms are not attributable to an injury sustained by the plaintiff. However, this is not a factor to be taken into account on this application.

28. It is clear that 12th November, 2014, when he had the MRI scan, was the first date on which the plaintiff became aware that he had a right sided disc protrusion at L5/S1, although he had probably been suffering from the condition since the incident of 8th January, 2013. If 12th November, 2014 is taken to be the date on which the plaintiff had knowledge of having sustained a significant injury, for the purposes of s. 2 of the Act of 1991, then these proceedings are not statute barred. But did the plaintiff need a diagnosis in this level of detail in order to be able to issue the proceedings? The first point to be made in response to this question is that in the proceedings as issued, the plaintiff makes no reference at all to the condition diagnosed in November, 2014. Nor does he do so in his statement of claim. Such detail as is provided in the proceedings as issued by the plaintiff could readily have been provided in proceedings issued immediately following the incident of 8th January, 2013.

29. Even making allowance for the plaintiff being a lay litigant, the fact is that he did not need the outcome of the MRI scan in November, 2014 in order to issue the proceedings as issued. He knew, as of the date of the accident, or by the very latest by October, 2013, when he said he could not walk, that he had sustained a significant injury. Whether it was an exacerbation of a pre-existing condition or a new injury was neither here nor there; it was a back injury of sufficient significance to merit the institution of proceedings, or at a minimum, to put him on the inquiry as to his legal entitlements. Moreover, he knew the injury was attributable to the incident of January, 2013, because, up to that time, he had been enjoying the relief afforded to him by the injection he had received from Mr. Poynton in 2012. This is apparent from the reports of Mr. Poynton referred to at paras. 6 and 8 above. The fact that a more detailed or specific diagnosis was not yet available to him is immaterial. I have no doubt at all that had the plaintiff attended with a solicitor in the course of 2013, he would have been advised that the exacerbation of his pre-accident condition was actionable, and that he would almost certainly have been advised to obtain a report from an expert to advise with more precision as to the cause of his symptoms. I am satisfied therefore that the plaintiff had the necessary knowledge, or must be deemed to have the necessary knowledge, for the purposes of s. 2 of the Act of 1991, no later than October, 2013, when he said he was unable to walk because of his discomfort. That being the case, these proceedings were statute barred at the time of their issue, and the defendant is entitled to succeed with this application.