THE COURT OF APPEAL
UNAPPROVED

Record Number: 2023 249
High Court Record Number: 2015/10180P
Neutral Citation Number [2024] IECA 17

Costello J.

Noonan J.

Pilkington J.

BETWEEN/

AINE O'NEILL

PLAINTIFF

-AND-

LORCAN BIRTHISLE

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered *ex tempore* on the 23rd day of January, 2024

1. This is an application to dismiss for delay, recently described by this Court as among the most common applications now dealt with by the courts – see *Beggan v Deegan & Ors* [2024] IECA 4. The plaintiff appeals against the dismissal by the High Court (Heslin J.) of her clinical negligence claim. The plaintiff was born on the 10th October, 1984 and suffers from spina bifida. The nature of her claim, insofar as it can be understood, appears from the content of a personal injuries summons issued on her behalf on the 7th December, 2015. At para. 4, the plaintiff pleads as follows:

"The plaintiff underwent surgery for the realignment of her right lower limb during childhood. This involved the insertion of an internal fixation device in the distal tibia. From approximately November 2011, the plaintiff has suffered from symptoms of swelling and pain in the right lower limb. This had led to repeated episodes of recurrent infection and hospitalisation to the defendant hospital."

The reference to the *"defendant hospital"* appears to relate to St. James's Hospital in Dublin.

2. The plaintiff goes on to plead at para. 5:

"On the 3rd November 2013, the plaintiff underwent the surgical removal of a staple from the right distal tibia with wound wash out at the defendant hospital, under the care of Mr. Peter McKenna. This resulted in the alleviation of her condition in the right lower limb and she has not suffered from infection of the subject area since that time. The persistent infections and related symptoms that she suffered in the period from November 2011 until the date of the surgery under Mr. McKenna as aforesaid are attributable to the failure of the defendant, its servants/agents to identify the staple as the source of the plaintiff's symptoms and/or to remove the staple at an earlier date."

3. Particulars of negligence and breach of duty are then furnished which are wholly generic in nature and include at (c):

"Failing to identify or appreciate that the presence of the staple was the cause or a contributor to the plaintiff's condition and to arrange for the removal of same."

4. It emerged some six and a half years later from an affidavit sworn by the plaintiff's solicitor on the 26th April, 2022 that the surgery *"during childhood"* referred to in the summons was carried out *"approximately 22 years ago"*, or in or around the year 2000 when

the plaintiff was 15/16 years of age. Another relevant fact to emerge from this affidavit is that as of the date of the hearing before the High Court in July 2023, no expert report had ever been obtained by the plaintiff supporting the allegations of medical negligence made by her in the summons. Her current solicitor suggests that her previous solicitors sought a report for the first time in August 2019 but it was never obtained.

5. It is also relevant to note that the summons was not issued on the basis of being a protective writ to "stop the clock" for the purposes of the Statute of Limitations pending receipt of a supportive expert report, as has been the norm for some time.

6. Apart from the foregoing, there are a number of features about the summons that are immediately striking. The first is that absolutely no information is given about the original surgery other than a broad general description. In particular, the summons does not identify when the surgery was carried out, where or by whom. Further, it does not make clear whether there is, or is not, a complaint about the surgery itself and the fact that it involved the alleged insertion of a staple.

7. The plaintiff's complaint appears to relate to a two year period between November 2011 and November 2013 when she says she suffered from recurring infection in her right leg requiring multiple hospital admissions. The summons appears to suggest that the negligence attributable to the hospital, its servants or agents is an alleged failure to identify the staple as the source of the plaintiff's symptoms. The first thing to be said about this is of course that there is no expert evidence to support the allegation that the staple was the source of the plaintiff's symptoms. The same goes for the particular complaining of a failure to appreciate that this was the cause and these allegations were evidently made by the plaintiff's lawyers without, as I have said, any expert support.

8. Furthermore, the summons is entirely silent as to when the alleged failure is said to have occurred, where it occurred and who was responsible for that alleged failure. It is not evident from the summons if the failure was alleged to have occurred sometime between 2000 and 2011, or between 2011 and 2013, or both.

9. Indeed, it appears to me that the summons is so uninformative about what case is being made by the plaintiff as to render it a practical impossibility for the claim to be investigated by the defendant.

10. The chronology of events relevant to this application is as follows:

- Circa 2000 - The plaintiff underwent the original surgery.
- November 2011 - The plaintiff began to suffer from recurrent infections.
- 3rd November 2013 - Surgery to remove the staple was carried out which appears to have resolved the plaintiff's symptoms.
- 7th December 2015 - The summons was issued naming Michelle Rabbette as defendant. Ms. Rabbette is a solicitor formerly employed by the State Claims Agency and the defendant's deponent in this application avers that, contrary to what is stated in the summons, she was not nominated to represent St. James's Hospital. The appropriate defendant is said to be the current defendant, being the Chief Executive Officer of the hospital.
- 15th November 2016 - The summons was served on the State Claims Agency shortly before it was due to expire.
- 9th December 2016 - The defendant's solicitors wrote to the plaintiff's solicitors pointing out that the wrong defendant had been sued and nominating Mr. Birthisle. This letter was not replied to.

- 10th January 2017 - The defendant's solicitor sent a reminder letter, again not replied to.
- 20th January 2017 - A further reminder letter was sent by the defendant's solicitors. The plaintiff's solicitors responded saying they would be in touch with regard to amending the title. However, they took no further action.
- 6th April 2017 - The defendant's solicitors sent a further reminder and pointed to the need for a supportive expert report on behalf of the plaintiff.
- 15th November 2017 - A further reminder was sent by the defendant's solicitors again referring to Mr. Birthisle as the appropriate defendant and advising that an application should be made.
- 31st January 2018 - The plaintiff's solicitors issued an application to amend the title, over a year after they were first advised to do so.
- 12th April 2018 - An order amending the title was made by the Master of the High Court.
- 20th April 2018 - The latter order was perfected.
- 14th May 2018 - The defendant entered an appearance.
- 30th September 2018 - The defendant served a notice for particulars and a notice requiring further information. These required the most basic information concerning the claim such as, when the original surgery was carried out, when the negligence is alleged to have occurred and what acts or omissions are alleged to constitute the negligence. No reply to this notice for particulars has ever been furnished nor has the further information separately sought been provided.
- 30th March 2021 - Some two and a half years after the service of the notice for particulars, the defendant's solicitors wrote referring to the protracted nature of

the proceedings, the repeated delays by the plaintiff, the fact that the summons contained no detail and the notice for particulars had never been replied to. The letter went on to say that it appeared that the plaintiff did not wish to proceed with the case and accordingly asked for a notice of discontinuance to be served, failing which a motion to dismiss for delay would be brought. Rather surprisingly, to say the least, there was no response to this letter.

- 22nd June 2021 - The defendant's solicitors sent a reminder and again, *"shockingly"* as found by the motion judge, there was no response from the plaintiff's solicitors.
- 26th July 2021 - The defendant's solicitors served a notice of intention to proceed.
- 17th December 2021 - The within motion was issued seeking to have the proceedings dismissed for want of prosecution.
- February 2022 - It would appear by this stage that the plaintiff had instructed new solicitors who had received the file from the plaintiff's previous solicitors.
- 14th March 2022 - The plaintiff's new solicitors served a notice of change of solicitor.

The Affidavit Evidence

11. The application is grounded upon the affidavit of the defendant's solicitor, Sarah Kelly. She sets out the facts as I have described them and avers that, by virtue of the absence of detail in the summons, the defendant has been unable to investigate the claim and its ability to meet it may be prejudiced by the passage of time. Before that affidavit was replied to, the plaintiff instructed new solicitors who served the notice of change of solicitor referred to above. The plaintiff's new solicitor, Mr. Stephen McGrath, of Burns Nolan LLP Solicitors

swore an affidavit on the 26th April, 2022 previously mentioned. Neither of the plaintiff's two previous solicitors swore affidavits nor did the plaintiff herself.

12. Mr. McGrath refers to the fact that the plaintiff's second solicitors took over the matter in or around August 2019 and avers that the plaintiff was relying on her previous solicitors to progress matters and she now wishes to proceed. He refers to the fact that the previous solicitors appear to have intended to, or possibly did in fact, instruct an expert in the UK who the plaintiff subsequently discovered had retired in 2020 and was not in a position to provide a report.

13. Mr. McGrath avers that the medical records for all treatment received by the plaintiff are still available, although he does not identify what those records are, what period they relate to or where they are to be found. He says that having regard to the fact that the plaintiff's understanding was her previous solicitors were obtaining a report and that the medical records are still available, that the court should not strike out the plaintiff's claim. He concludes by saying that every step will be taken to expedite the proceedings if the plaintiff is allowed to continue.

14. Mr. McGrath's affidavit was replied to by a further affidavit of Ms. Kelly sworn on the 24th January, 2023. She says that Mr. McGrath appears to contend that it is appropriate to pursue a medical negligence claim without the benefit of an expert report. She says that she believes and is advised that it is an abuse of process to commence a professional negligence action, without first ascertaining that reasonable grounds to do so exist. She says that in cases where the operation of the Statute of Limitations may give rise to potential injustice where no expert has been obtained, that the summons will make that plain but does not do so in this case. She disputes the plaintiff's apparent contention that it is appropriate

to expect the defendant to investigate a claim not founded on expert evidence and not appropriately particularised.

15. Ms. Kelly notes the fact that the defendant's motion was adjourned on consent on the 25th July, 2022 for a period of six months to the 30th January, 2023 on the basis of the plaintiff's agreement to provide updated particulars of negligence and breach of duty based on expert evidence prior to the adjourned date. Ms. Kelly subsequently wrote on the 27th July and 28th September, 2022 seeking an update regarding the status of their expert opinion and, again remarkably, neither letter was replied to.

16. This affidavit is responded to in two further affidavits from the firm of Burns Nolan LLP by Ms. Jennifer O'Sullivan and Mr. McGrath respectively. Ms. O'Sullivan says that on the advice of their senior counsel, on the 17th October, 2022 she wrote to an expert in the UK enclosing all the plaintiff's medical records and reports together with the pleadings. What records and what reports is not stated. She says that despite reminders to this expert, by the date of swearing of the affidavit (1st February, 2023) no response had been received. She prays for a short adjournment to allow the report to be delivered.

17. Mr. McGrath swore a second affidavit on the 26th July, 2023, almost six months later and immediately prior to the hearing of the motion in the High Court. In it, he says he spoke to the expert's secretary on the 26th July, 2023 who informed him that she had emailed his office on the 27th April, 2023 but it appears to have gone into their spam file and was not seen. He says that he was advised that the report would take a further three to four months and says that it is just that the plaintiff be allowed to obtain this report.

Judgment of the High Court

18. The matter came on for hearing before the High Court on the 28th July, 2023 and on the same date, the motion judge delivered a written *ex tempore* judgment. He commenced by reviewing the legal principles on delay as identified in the leading cases of *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *O'Domhnaill v Merrick* [1984] IR 151. He summarised the well known principles emerging from these two cases. He then refers to the content of the personal injuries summons noting that the pleas contained therein were in the most general terms. He observes that it is clear from the summons that witness testimony will be essential for any future determination of the matters in dispute.

19. The judge referred to the judgment in *Rooney v HSE* [2022] IEHC 132 where Simons J. said the following:

> *"[41] ... the courts have said that it is irresponsible, and, potentially, an abuse of the process of the court to commence professional negligence proceedings without first ascertaining that there are reasonable grounds for so doing (Cooke v. Cronin [1999] IESC 54). An independent expert report will be required in the vast majority of medical negligence claims, but there will be certain circumstances where such is not an essential precondition (Mangan v. Dockeray [2020] IESC 67).*
>
> *[42] This has resulted in a convention whereby proceedings alleging professional negligence will not normally be issued without the intended plaintiff's lawyers having first had sight of an independent expert report. This convention is not absolute, and proceedings are sometimes issued notwithstanding the absence of the requisite report. This is done to protect the intended plaintiff's position in respect of the two-year limitation period. This practice is sometimes referred to as issuing a 'protective writ' or issuing proceedings on a 'protective basis'. It is imperative,*

however, that the requisite report be obtained thereafter with reasonable expedition (Murphy v. Health Service Executive [2021] IECA 3 at paragraph 93). Depending on the views expressed by the independent expert, it may become necessary to discontinue the proceedings."

20. The judge then proceeded to set out the chronology above in some detail. He observes that this was a claim in which a late start was made and cites authority in support of the proposition that this mandates the plaintiff to proceed without delay, once the proceedings have been instituted. The *"late start"*, as the motion judge described it, remained entirely unexplained by any evidence advanced by or on behalf of the plaintiff.

21. Turning to analyse the delay, the judge noted that counsel for the plaintiff had fairly accepted that the delay that had occurred in the case was inordinate. He noted the primary submission of counsel that the plaintiff herself is completely blameless in relation to delay although the judge said that there was no particular evidence to substantiate that contention. In particular, he noted that the plaintiff had not sworn an affidavit. He was entirely satisfied that the delay was both inordinate and inexcusable.

22. With regard to the balance of justice, the judge felt that the absence of a supporting medical report after such a length of time weighed heavily in the balance against the plaintiff. He considered that there was evidence that the defendant was still unable to investigate a claim which remained unarticulated and this amounts to real prejudice weighing heavily in favour of dismissal. This was particularly the case in the context of the likelihood that the case would not come on for hearing for years, even if a report was now available. There was in addition the factor of degrading memories after such a length of time. All of this gave rise to at least moderate prejudice sufficient to dismiss the case under the *Primor* jurisprudence.

23. In addition, the prejudice was in the judge's view such as to also meet the *O'Domhnaill* test, namely that there was a serious risk that a fair trial would no longer be possible. He accordingly dismissed the claim.

The Appeal

24. Although four grounds of appeal are identified, there are in reality two grounds of substance. The first is that the High Court was wrong to dismiss the claim when the defendant had failed to lead any evidence to show that it was prejudiced by the delay. Secondly, it is said that the judge was wrong in holding that the prejudice suffered by the defendant was sufficient to rule that the balance of justice was in favour of the defendant.

Discussion and Decision

25. There are number of features about this appeal that are, to say the least, unusual. The first unusual feature, so unusual as to be quite extraordinary, is that over eight years from the commencement of this action, the plaintiff cannot say, not just what her case is, but if she has a case at all. This is because the plaintiff has never, certainly up to the time the matter was heard in the High Court, obtained a report from an expert. The failure to obtain such a report despite the passage of such a length of time, is little short of staggering. Regrettably, it has to be said that the plaintiff has been badly served by her lawyers in this case, noting that she is now on her third set of solicitors.

26. The catalyst for these proceedings appears to have been the surgery in November 2013 when the plaintiff may, or may not, have been told by one of her treating doctors that the staple was the cause of her infection. Even if that were true, it is not evidence of negligence. Despite that fact, the plaintiff's lawyers appear to have taken it upon themselves to assume that this was evidence of negligence and purport to plead the plaintiff's claim

accordingly. That of itself is of considerable concern, even without regard to what came later. It is, as Simons J. pointed out in *Rooney* above, irresponsible and a potential abuse of process to commence professional negligence proceedings without ascertaining that there are reasonable grounds for so doing. That is precisely what has occurred here. If there was any doubt about whether the commencement of these proceedings was an abuse of process without an expert report, their perpetuation for a further eight years, still without a report, is certainly an abuse of process.

27. Clinical negligence claims are inherently complex and mostly attended by the difficulty, from a plaintiff's perspective at least, that it is very frequently necessary to go outside this jurisdiction to obtain the services of a suitably qualified expert who is prepared to take the case on. Indeed, and again relatively commonly, more than one expert may be required, because even where some basis for an allegation of negligence is established, causation is often an issue requiring further expert evidence. Without both ingredients, there is no claim. This was for example the position in *Murphy v HSE* [2021] IECA 3 referenced by Simons J. above in *Rooney*, a judgment of this Court delivered by Haughton J. with which Whelan J. and I agreed.

28. The mere act of identifying relevant experts can be time consuming and such experts are commonly very busy doctors, so that even where they are willing to take a case, it may take time for them to prepare a report. All of this means that it is a regular occurrence given the short two year limitation period that, despite the best endeavours of the plaintiff's solicitors, it may not be possible to obtain the requisite reports before the statute expires. For that reason, the convention identified by Simons J. has developed of issuing *"protective"* writs pending the obtaining of such reports and this has, by now, become a well-established and legitimate practice.

29. However, where it does become necessary to resort to the issuing of a protective writ in advance of obtaining an expert report or reports, it is incumbent on the plaintiff to obtain those reports with reasonable expedition thereafter, as Simons J. points out. It is nonetheless permissible and desirable that a personal injuries summons, even if issued on a protective basis, should give the defendants at least sufficient factual information to enable them to commence an investigation, if they have not already done so by virtue of earlier correspondence.

30. While as I have said, a plaintiff may plead the general facts of the case, it appears to me that it is inappropriate and unprofessional to make specific allegations of negligence, as in the present case, against a defendant when there is no reasonable basis for doing so. In the vast majority of cases, an expert report is an essential prerequisite to the pleading of particulars of negligence although, as *Mangan v Dockeray* recognises, there may be some cases where it is reasonable to issue proceedings and plead some basic particulars of negligence even in advance of obtaining an expert report, *e.g.*, the defendant amputated the wrong limb. This however is not such a case.

31. The trial judge regarded this as a case where a late start had been made and thus, as the authorities demonstrate, the onus lay upon the plaintiff to proceed with expedition thereafter. It is impossible to know, as matters stand, how late that start in fact was because it cannot be discerned from the summons when the plaintiff is saying the cause of action accrued. There may, or may not be, date of knowledge issues involved but the summons appears to suggest that as the removal of the staple alleviated her symptoms, it was from that time or shortly thereafter that the plaintiff considered that the negligence of the defendant had been responsible for her injury.

32. If that is so, and again of course it is entirely unknown, then clearly the summons was issued towards the end of the limitation period, and the defendant might yet contend that it was after its expiry. Either way, I agree that the plaintiff bore the onus of proceeding with her case without delay. However, quite the opposite occurred.

33. It is little short of remarkable that despite the plaintiff having to date been represented by three different firms of solicitors, none have managed to obtain an expert report such that even at this juncture, it is not known if the plaintiff has any case at all.

34. The first firm represented the plaintiff for, apparently, some seven years during which, beyond issuing a summons against the wrong defendant, virtually nothing was done. Despite repeated reminders to amend the title of the proceedings, most of which were ignored, it took them over a year to do so. Having done so, they then failed to respond in any way to a straightforward notice for particulars seeking the most basic information about the claim for a further two and a half years. A second firm is said to have been instructed during this time, possibly around August 2019, but if they were, they never came on record and equally did little or nothing for a further two years.

35. It really beggars belief that after five years of inactivity, the first firm, when threatened with a motion to dismiss, did not even reply. Following the issuing of the motion, the plaintiff's current firm came on record in March 2022 having been instructed the previous month. At this juncture, the file was in crisis and required urgent action. Instead, a period of some seventeen months was allowed to elapse and still no expert report was obtained before the motion was heard. Indeed, it is striking that having obtained a six month adjournment of this motion on 25th July, 2022 expressly for the purpose of getting an expert report and replying to the particulars, it took until 17th October for the solicitors to even write a letter seeking an expert's help, evidently in response to the defendant's follow up letter of

28th September, not replied to. This does not demonstrate anything approaching the level of urgent action that was by then required.

36. This is, by any standards, an alarming catalogue of failure and indolence. The plaintiff seeks to blame her solicitors for these failures and suggests that she should not be held responsible for them. However, the plaintiff cannot avoid responsibility for the actions of her solicitors acting on her instructions by seeking to visit the consequences on the defendant. In that regard, the plaintiff's counsel relies on a High Court authority which appears to suggest that there is no requirement that delay on the part of professionals must be laid at a client's door so as to render it inexcusable. With great respect, I cannot accept that proposition. The conduct of legal business would soon grind to a halt if parties were in a position to disavow the actions of their solicitors in such a fashion. Subject to very limited exceptions, the act of a solicitor is the act of the client who retains the solicitor. If the plaintiff's solicitors failed in their duty to her as their client, it is to them she must look for a remedy.

37. Moreover, as the motion judge correctly pointed out, there is no admissible evidence before the court of the plaintiff's interactions with her solicitors. The plaintiff has chosen not to swear an affidavit when she could have done so. Where her evidence is clearly available, hearsay evidence from her solicitor is inadmissible, even were this to be classed as an interlocutory application - see in that regard the judgment of the High Court (Murphy J.) in *F & C Reit Property Asset Management plc v Friends First Managed Pension Funds Limited* [2017] IEHC 383 approved in *Murphy v The Law Society of Ireland & Anor.* [2023] IECA 310 at para. 61.

38. While it is certainly apparent that the plaintiff's first and possibly second and third solicitors failed in certain respects to progress this litigation with anything like the expedition

it required, the reasons for failure to obtain an expert report are unknown. For example, had the plaintiff been advised that she would have to put her solicitors in funds to obtain such a report but failed to do so, then the failure to obtain the report would be hers.

39. However, it is not material in the context of this application whether the failure to obtain a report is the responsibility of the plaintiff, or her solicitors, or both. Either way, the delay was both inordinate and inexcusable as the trial judge found and I agree with his findings. I also agree with the defendant's submission that it is not open to the plaintiff by way of written submission to challenge the finding on inexcusable delay, when it does not feature in her grounds of appeal.

40. Beyond blaming her former solicitors, the main thrust of the appeal is that the defendant has not established any concrete or other prejudice sufficient to tip the balance against allowing the case to proceed. The authorities show that moderate prejudice may be sufficient to dismiss a claim and that such moderate prejudice may be inferred in the context of deteriorating memories with the passage of time. Such prejudice must be significant enough to make it unfair to the defendant for a trial to proceed - see in that regard *Beggan & Anor v Deegan & Ors* (op. cit.) at para. 18.

41. Here, the plaintiff says that all records are available and there is no suggestion that, for example, relevant witnesses are deceased or otherwise unavailable. In medical negligence claims, they are often in truth quasi-documents cases when the impact of the passage of time on recollections may have less importance than in cases where oral evidence of recollection of events is critical - for a recent example see *Walsh v The Mater Hospital & Anor* [2023] IECA 276. That is not, however, to minimise in any way the role of the *viva voce* evidence of treating clinicians which is often significant and sometimes decisive.

42. The plaintiff's submission that the defendant has not demonstrated concrete prejudice is somewhat ironic. The defendant could never demonstrate such prejudice until he knows what the case is and thus far, he does not. This submission is, as the defendant suggests, circular and without merit. In my judgment, the institution of these proceedings constituted an abuse of process. As already explained, this is because the summons contained no indication that it was issued on a protective basis, which it should have, and further made specific allegations of negligence that should not have been made in the absence of a reasonable basis for doing so.

43. Furthermore, the perpetuation of these proceedings for some eight years without any evidential basis is a further and gross abuse of process. It constitutes in itself the clearest prejudice to the defendant. To suggest that the plaintiff should be afforded further time to get an expert report, which might result in a trial many years hence, is to make a mockery of all the jurisprudence on delay. I also agree with the views of the motion judge that it is perfectly reasonable to accept the defendant's evidence that the delay has seriously hampered the defendant's ability to investigate this claim and this is a clear and additional source of prejudice.

44. A relevant factor in the context of this type of application is the availability of an alternative remedy. As Simons J. observed in *Rooney* (at para. 14): -

> *"In a case where the entire responsibility for delay rests upon a professional adviser retained by the plaintiff, then the court can and should take into account the fact that a plaintiff may have an alternative means of enforcing his or her rights, i.e., by way of an action in negligence against that professional advisor (Rogers v Michelin Tyres plc [2005] (IEHC 294) at pp. 10 and 11) and Sullivan v Health Service Executive [2021] IECA 287 (at para. 56)"*

These observations were recently approved in this court in *Walsh* above.

45. Accordingly, if the plaintiff is correct in suggesting that the blame for all this extraordinary delay rests with her solicitors, then a remedy is available to her. I have little hesitation in concluding that the judge was correct in finding that balance of justice leans strongly in favour of dismissal. That is dispositive of the appeal. While the judge also found that there is a real risk that a fair trial is no longer possible because of the effect of the passage of time on recollections, I would take a slightly different view for the reason already identified, namely that it is simply not possible to form a view about this in the absence of knowing what the plaintiff's case is. However, this does not affect the outcome, particularly as that finding has not been appealed.

46. I would dismiss this appeal.

[Costello J.]: I agree.

[Pilkington J.]: I agree.