REEVES . CARTHY

(161-1981)

THE SUPREME COURT

O'Higgins C.J.
Griffin J.
Hederman J.

FREDERICK REEVES

v.

DOCTOR ALAN CARTHY AND
DOCTOR PATRICK O'KELLY

JUDGMENT delivered on the 28th day of April 1982 by GRIFFIN J.

The facts have been stated by the Chief Justice in his judgment and it is not necessary for me to repeat any of the facts stated by him. There are however some additional portions of the evidence to which I will need to refer in the course of this judgment.

The plaintiff appeals to this Court against the dismissal of his action by the learned trial Judge, who acceded to an application on behalf of the defendants to withdraw the case from the jury. At the end of the evidence given on behalf of the plaintiff, the learned trial Judge refused an application to

withdraw the case from the jury. Both defendants renewed the application at the end of their evidence, and lengthy submissions were made on their behalf and on behalf of the plaintiff. The learned trial Judge acceded to the application on this occasion. Before doing so he made a very detailed and careful examination and analysis of the submissions made and of the law of negligence applicable, in particular in the case of a medical man. He held that, in the particular circumstances, it would be wrong to allow the jury to consider whether either doctor had been at fault in failing to foresee the risk of a stroke or in failing to take any steps which would have avoided the risk of a stroke.

In this case, as in all cases tried by a judge and jury, it is a question of law whether there is any evidence on which it would be open to the jury properly to hold that negligence on the part of the defendants or either of them had been established. If there is not, then the trial judge should withdraw the case

from the jury. If however there is any such evidence, it is the function of the jury, and not of the trial Judge or indeed of the medical witnesses to decide whether or not negligence is established.

The question of negligence on the part of a doctor was examined by this Court in Daniels v. Heskin, 1954 I.R. 73. Judgments were delivered by Maguire C.J., Lavery J. (with whose judgment Murnaghan J. and O'Byrne J. agreed) and by Kingsmill Moore J., but as pointed out by Lavery J. in O'Donovan v. Cork County Council, 1967 I.R. 173, at p. 184, there was no difference of opinion in the Court on the standard to be applied in considering whether a medical man had been negligent in the treatment of a patient. Indeed, there is no dispute in this case as to the principle involved, which, as Lavery J. said at p. 184 in O'Donovan's case, is the same in the courts of England, Scotland and Ireland.

Lavery J. puts the duty in this way. A doctor who undertakes to treat a patient is responsible for

damage caused by his treatment if he did not possess in a reasonable measure the skill necessary to perform what he undertook or if, possessing such skill, he failed to employ it with reasonable care. A general practitioner is bound to possess and use reasonable skill, having regard to his position as a general practitioner and in the circumstances of the particular case, and he is not negligent if he has acted in accordance with general and approved practice. Kingsmill Moore J. stated the duty in the terms set out in the passage which has been quoted by the Chief Justice in his judgment and it is not necessary to repeat it. Again, in O'Donovan v. Cork County Council, it was accepted by both Lavery J. (at p. 184) and Walsh J. (at p. 199) that even if he deviated from or did not follow that particular practice, he could not be found guilty of negligence unless it was established that the course he adopted or took was one which no doctor of ordinary skill would have taken if he had been taking the ordinary

care required from such a doctor.

In this case, the allegations made against Doctor Carthy are:

1. that he did not carry out any abdominal examination of the plaintiff, which was essential having regard to the plaintiff's history and his complaints, and

2. that he gave the plaintiff an injection of cyclomorph, which contained morphine, and that this drug should not have been used in the case of a patient suffering from severe abdominal symptoms because it could mask those symptoms and render subsequent diagnosis more difficult.

The allegations made against Doctor O'Kelly who, it was admitted, made a lengthy examination of the plaintiff, are:

1. that he did not communicate the gravity of the plaintiff's situation to the plaintiff and his wife, and did not apply the proper pressure to the plaintiff to prevail on him to go to hospital; and

2. that he gave to the plaintiff inappropriate treatment in giving him the drug largactyl.

<u>As to Doctor Carthy</u>: The Chief Justice has set out the evidence of the plaintiff's wife, which effectively was that Doctor Carthy did not carry out any physical examination of the plaintiff although she gave a full history of his treatment and symptoms. She later somewhat resiled from that position when she was cross-examined on the doctor's records in relation to blood pressure, pulse and temperature, but she remained adamant that he at no time put a hand on or examined the plaintiff's abdomen. Doctor Carthy gave evidence of his examination, and there was a sharp conflict between him and the plaintiff's wife in relation to an abdominal examination. This is a conflict of fact which can only be resolved by a jury. All the medical witnesses, including Doctor Carthy, agreed that an abdominal examination was vital, having regard to the plaintiff's complaints, and there is therefore evidence on which a jury could hold that he

did not employ the skill he possessed with reasonable care, and that the course he adopted was one which no general practitioner of ordinary skill would have taken if he had been taking the ordinary care required from him.

The evidence given on behalf of the plaintiff was that, with regard to the administration of cyclomorph at 3 a.m., although the danger is that this drug would mask the plaintiff's symptoms, that did not in fact occur. The plaintiff obtained relief from pain for about an hour or so, but severe pain and vomiting recurred thereafter. His wife endeavoured to get a doctor hourly until 9 a.m.. When Doctor O'Kelly called at approximately 9 a.m. he was informed that the plaintiff had been given this drug, but the plaintiff was quite clear and coherent at this time. This issue should therefore in my opinion not be left to the jury.

As to Doctor O'Kelly: In his case, the plaintiff has not, in my opinion, established

that there was evidence to go to the jury that Doctor O'Kelly failed to communicate to the plaintiff the gravity of his situation or that he did not apply sufficient pressure to persuade him to go to hospital. Doctor O'Kelly was brought to the plaintiff's bedroom by the plaintiff's wife. As she was preparing the children for school, she left the doctor with her husband and went downstairs to attend to the children. She estimated that Doctor Kelly was alone with her husband for approximately half an hour. The evidence is that during that time Doctor O'Kelly made a full examination of the plaintiff. Before dealing with the conclusions reached by Doctor O'Kelly, and the advice given to the plaintiff, the plaintiff's history is of particular relevance. He had been a long-distance lorry driver for many years. For approximately 3 years prior to 1977 he suffered periodic bouts of vomiting and pain in his abdomen. These would last from 24 to 48 hours and would then disappear. However, they increased in frequency and intensity as time

went by. In March 1977 he had a barium meal and was X-rayed in Dr. Steeven's Hospital, with negative results. After further attacks of abdominal pain, he attended St. James's Hospital as an out-patient during the month of April, and was diagnosed as "constipation and an irritable bowel". After further attacks, he was admitted to St. James's Hospital in May as an in-patient under Professor Neal, who in fact, as was disclosed at the trial, never saw him - indeed it was disclosed that the plaintiff was attended by a very junior doctor who was beginning his second post registration year, but Doctor O'Kelly had no means of knowing this. The plaintiff was in hospital for some days, and the diagnosis of constipation and irritable bowel was confirmed.

The uncontroverted and uncontested evidence at the trial was (Q. 2576) that when Doctor O'Kelly completed his examination, he explained to the plaintiff that the cause of his abdominal pain and vomiting was not precise, and that he was not

satisfied with the previous diagnoses he had been given (i.e. constipation, irritable bowel and peptic ulcer), particularly that of constipation, and that he needed further investigation, which was only available in hospital, and treatment in hospital. He advised and urged the plaintiff to go to hospital, but the plaintiff refused to accept the advice. He repeated his advice later, but the plaintiff again refused and asked the doctor to give him something for the vomiting. That evidence was unchallenged, as the plaintiff did not give evidence, which, to say the very least, was somewhat unusual. After Doctor O'Kelly had spoken to the plaintiff's wife, she went into the bedroom and on three separate occasions she pleaded with the plaintiff to go to hospital. She started to cry, and Doctor O'Kelly once again asked him to go to hospital and said that he was upsetting his wife in refusing, but the plaintiff persisted in his refusal.

The plaintiff's wife accepted (Q. 338 to 341)

that the plaintiff was quite clear and coherent, though distressed with pain, and that he was quite capable of making a decision as to whether to go to hospital or not. The decision as to whether or not to go to hospital must be that of the patient, not of the doctor or even of the wife. It must be remembered that Doctor O'Kelly was a stranger to the plaintiff, and in my opinion he went as far as he might reasonably be expected to go when he had advised and urged the plaintiff, on three separate occasions, with the support and backing of the plaintiff's wife, to go to hospital. All he can do is to try to persuade the patient to go to hospital, and the choice of whether to accept that advice or persuasion is that of the patient. The submission that failure to do more than he did is negligent is in my opinion imposing too high an obligation on a doctor. Most solicitors and barristers are familiar with the case of the client who will not take the advice he has been given, frequently with disastrous consequences to the client, and it has always been

accepted practice that, having been given the advice, the client is free to accept it or not. I can see no difference in principle in the case of a doctor. In my judgment, having regard to the advice given to the plaintiff by Doctor O'Kelly, and to the history during the previous 3 months when doctors who knew the plaintiff's condition much better than Doctor O'Kelly had the plaintiff treated in hospital without results, Doctor O'Kelly was not failing in any duty he owed to the plaintiff in not making further efforts to persuade the plaintiff to go to hospital.

With regard to the administration of largactyl, what was said by Kingsmill Moore J. in Daniels v. Heskin at p. 85 is apposite. There he said that "an honest difference of opinion between eminent doctors as to which is the better of two ways of treating a patient does not provide any ground for leaving a question to the jury as to whether a person who has followed one course rather than the other has been guilty of negligence. It would be

different if a doctor had expressed the opinion that the course adopted was definitely erroneous". Whilst there was evidence that this drug was innocuous when given in moderate doses, Professor Neal, and Doctor Kirker who is an eminent consultant physician, gave evidence that it was wrong to give this drug in a case of tachycardia. In Doctor Kirker's opinion, the plaintiff suffered a stroke i.e. death of a portion of the brain, due to interference with his blood supply. This had arisen because the general circulatory state had been very low for a period of time, allowing clogging up of the blood vessels, and ultimately blockage of the blood vessels occurred. The action of a drug like largactyl could weaken his circulatory control. It could therefore be a contributory factor in the stroke. In my opinion, there was evidence to go to the jury on this aspect of the case against Doctor O'Kelly.

The plaintiff's counsel submitted that the learned trial Judge was incorrect in applying the test

of foreseeability in relation to the stroke suffered by the plaintiff. The case made in the High Court on behalf of the plaintiff was that the Crohn's disease from which he suffered led to perforation of the bowel not less than 12 hours before he was admitted to hospital at 2 p.m., and that this would therefore have occurred before Doctor Carthy was called to see him. When perforation takes place, the fluid escapes from the bowel into the abdominal cavity, and rigidity of the abdomen would be evident at once. If the patient is left untreated, he develops shock in a severe degree due to the loss of too much fluid into the abdominal cavity, thus reducing his blood volume. This leads to severe circulatory collapse (i.e. low blood pressure) and if this persists for a long time, the circulation to the brain may fail and a stroke results. The evidence for the plaintiff clearly established that the circulatory collapse he suffered was a factor in the stroke. For the defendants, Professor

Fitzgerald accepted that the state of shock and low blood pressure were contributing factors in the stroke suffered by the plaintiff, coupled with a possible predisposition resulting from Crohn's disease. Doctor Carthy (Q. 1982 to 1991) accepted that where there is a history of severe abdominal pain for several hours, one of the factors which he would have to consider is the risk of perforation and that if it occurs the abdomen becomes increasingly tender and if this is allowed to continue shock and low pressure is inevitable.

In these circumstances, it is alleged that if Doctor Carthy had properly examined the plaintiff at 3 a.m. he would have discovered the rigidity of the abdomen, and would have diagnosed the perforation, and endeavoured to arrange to have the plaintiff admitted to hospital, and that the shock and circulatory collapse which ultimately led to the stroke would not have occurred. Likewise, in

Doctor O'Kelly's case, if largactyl which could weaken his circulatory control had not been administered, the ultimate circulatory collapse which led to the stroke would likely have been delayed somewhat longer, and the plaintiff's wife who was about to call an ambulance to get him to hospital just before the stroke occurred might have succeeded in doing so before its occurrence.

On behalf of the plaintiff, Mr. McGrath submitted that once damage of a type which is foreseeable occurs, the full extent of that damage is the liability of the defendants, although the extent of the damage might not be foreseeable. That submission is in my opinion well-founded.

In Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. (the Wagon Mound) 1961 2 W.L.R. 126, Viscount Simonds, in the course of giving the advice of the Privy Council, said at p. 142 that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen and that thus

foreseeability becomes the effective test. In Overseas Tankship (U.K.) Ltd.v. the Miller Steamship Company Pty., 1966 3 W.L.R. 498 (the Wagon Mound No. 2) Lord Reid said at p. 506:

> "It has now been established by the Wagon Mound (No. 1) and by Hughes v. Lord Advocate, 1963 A.C. 837 that in such cases damages can only be recovered if the injury complained of was not only caused by the alleged negligence but was also injury of a class or character foreseeable as a possible result of it".

The test of foreseeability as adopted in the Wagon Mound has been accepted in this Court in Burke v. John Paul, 1967 I.R. 277. The relevant passage from the judgment of Budd J. in that case has been cited by the Chief Justice in his judgment. I agree with the Chief Justice that the reasoning of Budd J. in that passage can properly be said to be applicable to this case.

Since the Wagon Mound and Burke v. John Paul the law does not therefore require that the precise

nature of the injury must be reasonably foreseeable before liability for its consequences follows. Professor Heuston in Salmond on the Law of Torts, 16th edn., para. 202 at p. 564 has, with his customary clarity, concisely and conveniently summarised this branch of the law as follows:

> "Type of damage must be foreseen. It has been made plain that the precise details of the accident, or the exact concatenation of circumstances, need not be foreseen. It is sufficient if the type, kind, degree, category or order of harm could have been foreseen in a general way. The question is, was the accident a variant of the perils originally brought about by the defendants' negligence? The law of negligence has not been fragmented into a number of distinct torts".

In this case, the damage which occurred was of a type that was foreseeable (i.e. circulatory damage and shock), so that even if the stroke was not, as such, foreseeable by the defendants, if they or either of them was held to be negligent then they or he would

be answerable for the stroke, because that was the extent of the damage suffered.

One final matter arises. On behalf of Doctor Carthy Mr. Sutton submitted that, even assuming negligence on the part of Doctor Carthy, this did not lead to the stroke because Doctor O'Kelly did fully examine the plaintiff later and his intervention broke the chain of causation. In my view, the intervention of Doctor O'Kelly was not a novus actus interveniens. He, if at all, merely contributed an additional act of negligence. Doctor Carthy's original negligence continued to operate until the stroke occurred around midday. The refusal of the plaintiff to accept Doctor O'Kelly's advice to go to hospital may be a good ground for contributory negligence, but it was not a novus actus.

I would allow the appeal and direct a new trial against each of the defendants on the ground, in Doctor Carthy's case, that there was evidence to

go to the jury in relation to whether or not he carried out an abdominal examination, and, in Doctor O'Kelly's case, in relation to the administration of largactyl.

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