**THE COURT OF APPEAL**

**Record No.: 2018/477**

**Neutral Citation Number [2021] IECA 318**

**Woulfe J.**
**Donnelly J.**
**Barrett J.**

**BETWEEN/**

**ROBERT MULLINS**

**PLAINTIFF/APPELLANT**

**-and-**

**THE IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE AND EQUALITY AND IRELAND**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT of Ms. Justice Donnelly delivered on the 29th day of November, 2021**

**Introduction**

**1.** The general background to this appeal has been set out in the judgment of Woulfe J. which I have had the opportunity to read prior to delivery. I gratefully accept the basic facts which he sets out therein. As I am in agreement with him that the appeal ought to be allowed and the issue of whether the plaintiff's case is statute barred remitted to the High Court for determination, I am of the view that it is preferable not to draw any inferences from the basic facts upon which there is no dispute. Similarly, extensive commentary on the adequacy or inadequacy of the evidence before the motion judge is also, in my view, not warranted; save to

say that I do not accept that there was no evidence before the High Court upon which the motion judge could have made the decision he made. In those circumstances, what I will do in the course of this short judgment is to indicate in broad terms how, as a matter of law, a trial judge ought to approach the assessment of whether the plaintiff had knowledge (actual or constructive) that his injury was significant.

**2.** For the purpose of clarity, I will repeat the following relevant dates:

| | |
|---|---|
| 8 January 2013 | Date of incident |
| 10 September 2015 | Date of application to the Personal Injuries Authorisation Board ("PIAB") |
| 11 March 2016 | Date of issue of the Plenary Summons (within 6 months of the authorisation from PIAB) |

**3.** If the date of accrual of the accident was the date of the accident (as posited by the defendants), the plaintiff was out of time as of the date of the application to PIAB unless he could establish that his date of knowledge that he was injured or that the injury in question was *significant* was within the permitted two year statutory period prior to issuing proceedings (a period permitted to be increased by virtue of his application to PIAB). On the agreed evidence, there can be no doubt but that on the date of the accident the plaintiff had suffered a provable personal injury *i.e.* the exacerbation of his back injury, which was capable of attracting compensation. As I discuss later, the plaintiff is asserting however that the injury of which he complains was not an exacerbation of that back injury but was a completely separate one, knowledge of which only came to him well within the two years prior to issue of these proceedings. Regardless of whether this was an exacerbation or otherwise of his back injury, the plaintiff said in evidence in the High Court and repeated in submissions, that he did not know his injury was significant until (at a minimum) he was told he needed surgery on his back.

**4.** It is unfortunate that the motion judge appears to have erred when he said that even if the date of knowledge of the plaintiff that his injury was significant was October 2013 then his case was statute barred. From reading the transcript of evidence, it is arguable that there were two factual errors. Arguably there was an error by the motion judge when he said that *the plaintiff said* he could not walk by October 2013. The interpretation I took from the transcript (see reference to the evidence at para. 22 of the judgment of Woulfe J.) is that the October to which the plaintiff was referring was October 2014. It is to the plaintiff's credit that when asked about this at the appeal, he openly and frankly accepted that he might have taken annual leave in 2013 because of flare ups because he was trying to keep his sick leave to a minimum. Nonetheless, he clarified that the time when he could not walk was in August 2014.

**5.** The second and more important error for the purpose of this appeal was that, even if the date of knowledge was October 2013, the case was not statute barred. The plaintiff had issued the plenary summons within 6 months of the authorisation from PIAB and he had applied to PIAB on the 10th September, 2015 *i.e.* within 2 years of a date of knowledge in October 2013.

**6.** The defendants accept that there was an error in the motion judge's finding that based on a date of knowledge of October 2013 the plaintiff's case was statute barred. The defendants have argued however, that on another view of the judgment, the motion judge found as a fact that the date of knowledge was the date of the accident thus rendering the case statute barred.

**7.** On reading the High Court judgment, the relevant parts of which are cited in the judgment of Woulfe J., I am not clear that the motion judge did in fact find the date of the accident to be the date of knowledge for the purpose of the Statute of Limitations (Amendment) Act, 1991 (hereinafter, "the Act of 1991"). While the motion judge referred to the date of the accident as the date of knowledge at an earlier point in his judgment, he appears to equivocate in his final conclusion when he stated he was satisfied:-

*"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".* (Emphasis added).

**8.** As this Court is clear that there was an error in the motion judge's conclusion that the proceedings were statute barred because he had found that the plaintiff had knowledge that his injury was significant in *October 2013*, the appeal must be allowed. What remains to be decided is whether this is a case which should be remitted or whether it is appropriate for this Court to resolve the issue based upon the evidence before the motion judge. I accept as a general principle the observation of Woulfe J. that, while remittal may be appropriate in some cases, there may be other cases where, given how the evidence evolved and the state of the evidence, it may be unfair to a plaintiff to remit. For reasons set out below, I consider this an appropriate case to remit.

**9.** Since this case was heard in the High Court, the Supreme Court in *O'Sullivan v. Ireland* [2020] 1 I.R. 413, clarified how to approach a plaintiff's reliance on a later date of knowledge as provided for in s. 2 of the Act of 1991 to defeat a defendant's plea that the claim is statute barred. Some of the problems in this case stem from the fact that there was no adoption of the step by step approach that the Act of 1991 requires and subsequently set out by Charleton and Finlay Geoghegan J.J. in their respective judgments in *O'Sullivan v. Ireland*. As Finlay Geoghegan J. said (the relevant part of the judgment is set out in para. 50 (c) in the judgment of Woulfe J.), the defendants ought to clarify whether they are opting for the date of the accident (or later date) as the date of *actual* knowledge or of *constructive* knowledge of the plaintiff.

**10.** There was a lack of clarity in the approach of the defendants here, which may have stemmed from the fact that three separate issues regarding date of knowledge were being *teased*

*out*, to use the words of the defendants' counsel in the court below. Counsel for the defendants identified those as the fact that the plaintiff had been injured (s. 2(1)(a)), that the injury was *attributable* (s. 2(1)(c)) to the alleged negligence and that the injury was significant (s.(2)(1)(b)). This is not a criticism of the defendants' counsel or of the plaintiff (who was unrepresented), it is simply to say that the issue of whether the plaintiff knew that the injury was significant did not receive the *particular focus* it deserved. Moreover, no written submissions appear to have been filed in the High Court and no written chronology appears to have been handed to the motion judge. In his judgment, the motion judge dealt concisely with the other issues concerning knowledge of injury and understandably focussed on the major issue between the parties which was the plaintiff's date of knowledge that his injury was significant. It was however in those circumstances that the error as to the October 2013 date arose.

**11.** It is also noteworthy that during counsel's reply to the legal submissions of the plaintiff, it was the motion judge who prompted counsel for the defendants to indicate what precise date of knowledge were the defendants advocating for in this case. In answer to that, counsel submitted that it was not necessarily the date of the accident. He then went on however to suggest that it was a constructive knowledge approach they were taking and to submit that it was at some point within two years of the accident that a reasonable man would have ample opportunity to take proceedings or alternatively to seek advice from a solicitor. These two explanations are not wholly consistent as the defendants' constructive knowledge submission appeared to refer back to the date of the accident even though the earlier answer was that the date of knowledge was not necessarily the date itself. Overall, I am satisfied that the defendants made clear to the judge that even if the date of the accident was not the date of knowledge, the date of knowledge was some point in excess of the permitted two year period for bringing the

action. That was something which should have been more clearly stated prior to the plaintiff's submissions however.

**12.** The plaintiff's main point at the hearing in the High Court (and in essence pursued by him on appeal) was that he only realised the significance of the injury in or about the time he had his MRI/appointment with Mr. Poynton (Consultant Spine Surgeon) in November 2014. In giving evidence before the motion judge, the plaintiff said that he really only knew the significance of his injury in the months after the surgery when he was aware that this was not "the previous injury" in his back. He did however say that "he was happy to go with the date" that he was told he required surgery. The plaintiff also relied on the fact that Mr. Poynton had stated in his report that this was the only time he could have known the injury was significant.

**13.** In so far as this case is to be viewed as an "exacerbation of previous injury", that attitude by the plaintiff would be an inadequate response to the plea by the defendants that his case was statute barred because:

a) As set out in para. 50(a) of the judgment of Woulfe J., the onus lies on the plaintiff in asserting that his date of knowledge arose within the two year period prior to the issue of proceedings.

b) What the plaintiff means by this assertion is that he is relying on the date of his knowledge as being the date he knew the *full* significance of his injury. It has long been observed that the date a plaintiff realised the *full* significance of the effect of an injury is not relevant once it is established that the plaintiff knew that his injury was significant (See the Supreme Court (Hamilton C.J.) in *Bolger v. O'Brien* [1999] 2 I.R. 431 and applied by the High Court (Dunne J.) in *Martin v. Irish Express Cargo Ltd*. [2007] IEHC 224). Taking a factual example closer to the present case, if a plaintiff is aware that an injury caused by an accident has left him or her unable to walk (or only able to

walk with extreme pain), that awareness is knowledge that the injury is significant. It is not affected by a lack of knowledge that surgery may be required.

c) The opinion of Mr. Poynton that the plaintiff could have had no awareness prior to November 2014 that his injury was significant is not determinative of the issue. Arguably his expression of opinion on the ultimate issue is inadmissible. Ultimately, a court must make the decision on what was the date of knowledge of the plaintiff, a consideration that requires both a legal *and* factual determination.

**14.** I do however note that the plaintiff has made the case consistently that he could not have had knowledge that he had been injured or that the injury was significant because "the injury sustained on the 8th of January are (sic) separate to the ones from beforehand so, in layman's terms I couldn't know what I didn't know." The plaintiff points to the injury being on the opposite side of the spine than that before. He submitted at the appeal that Mr. Poynton's reports demonstrated that he was not *aware of the injury* or the *extent* or the *significance* of the injury until he had surgery in November 2014. The plaintiff does not accept that this is an exacerbation of injury case but a new injury. The focus of the appeal however became whether he knew the injury was *significant* with a concentration on his experience of back problems from the time of the initial incident.

**15.** It is not at all clear however that Mr. Poynton is saying in his report precisely what the plaintiff asserts that the surgeon has said. For example, Mr. Poynton, in his report of the 4th February 2015, states the plaintiff "immediately after the incident developed back pain and *right sided* sciatica. The right sided leg pain was a new symptom that he did not experience before". Mr. Poynton says these symptoms persisted and did not respond to treatment. One interpretation of this statement by Mr. Poynton, is that the plaintiff was aware of the injury to his right side on the 8th January, 2013. Furthermore, his G.P.'s report of August 2015 in submission to PIAB refers to his case as "partially aggravation of back pain in the incident in

January 2013 and further flare up in August 2014, resulting in surgery to treat his ongoing symptoms." On the other hand, I acknowledge that the G.P.s report also says that he had reports of lower back pain on the day and that examination on the day "revealed tenderness over his *left sacro iliac* joint and pain on flexion of his lumbar spine." These are matters to be addressed at trial before the High Court.

**16.** As stated above, as a matter of law it is not the date of knowledge of the *full significance* of the injury in question that is the relevant date of knowledge; rather it the date of the plaintiff's actual (or constructive) knowledge that the injury he or she sustained was *significant*. I do not consider that the date of knowledge in the present case could *only* be at one extreme or the other (date of accident -*v*- date of knowledge of surgery) because I am satisfied that the defendants did seek to have the date of knowledge fixed at *some period prior* to the two-year period for bringing proceedings. While it may be that the defendants ought to have been clearer as to the date (or parameters of the date) of knowledge (actual or constructive), I am satisfied that having done so before the motion judge, it is now an issue which can be safely and properly remitted to the trial judge for determination.

**17.** I also support the view that the remittal of the case to the High Court should be to the full trial of the matter. This appears to be a suitable and appropriate case, subject to any further appropriate but limited case-managing by the High Court, in which to have the type of unitary trial referred to by the Supreme Court in *O'Sullivan v. Ireland*.

**18.** How then is the trial judge to make that determination? Certainly, he or she must do so by following the two (or three) step approach set out in *O'Sullivan v. Ireland.* I am however not in complete agreement with the principles set out by Woulfe J. in para. 50 of his judgment. For example, the references in the latter part of para. 50(b) to the decision of Quirke J. in *Whitely v. The Minister for Defence* [1998] 4 I.R. 442 I do not consider helpful as this repeats the apparent conflation in *Whitely* of the separate and distinct constructive tests set out in s.

2(2)(a) and(b) of the Act of 1991. The steps posited by Finlay Geoghegan J. set out in principle (c) of para. 50 of the judgment of Woulfe J. give clarity as to what is required. On the other hand, a reference to the subjective nature of the test as set out by Quirke J. in *Whitely v. Minister for Defence* is necessary on the state of the authorities.

**19.** What does it mean to say that the assessment has to be primarily subjective as Quirke J. in *Whitely v. Minister for Defence* emphasised? Assistance can be gained from how other courts have applied it. In *Bolger v. O'Brien* the Supreme Court applied the *dicta* from *Whitely v. Minister for Defence*, having stated that both parties had accepted that the correct test was set out by Quirke J. in *Whitely v. Minister for Defence* as primarily a subjective one, but which included an objective element by virtue of s. 2(2) of the Act of 1991. The Supreme Court (Hamilton C.J.) held that *"[b]y any standards, subjective or objective, the plaintiff had suffered a significant injury".* In the course of the judgment, Hamilton C.J. stated as follows at p. 439:-

> *"The uncontested evidence clearly established that the plaintiff suffered a significant injury on the 22nd March, 1990; that the plaintiff was aware of the injuries sustained by him viz. concussion, shock, cuts and bruises and an undisplaced fracture of his left sacrum; that he was obliged to undergo a course of physiotherapy; that he was unable to return to work for a period of three months; that after return he was unable to perform manual work and only engaged in supervisory work."*

**20.** Having regard to the approach in *Whitely v. Minister for Defence*, in *Bolger v. O'Brien* and in *Martin v. Irish Express Cargo Ltd*, I have come to the conclusion that the subjectivity that is really at issue is the experience of the particular plaintiff of *the injury itself*. It is not a subjectivity as to how the plaintiff understands the word *significant*. In those cases, the actual experience of each plaintiff in terms of the injury sustained was the reason those courts decided that each plaintiff was aware that he had a significant injury. It is therefore for the court to assess whether that subjective experience amounted to knowledge that the injury was

significant. A plaintiff may also be fixed with constructive knowledge (*i.e.* knowledge which he might reasonably be expected to acquire) that the injury was significant from either a) facts observable or ascertainable by him or her or b) from facts ascertainable by him or her with the help of medical or other appropriate expert advice which it is reasonable for him to seek.

**21.** Woulfe J. states at para. 50(d) that in its context, the phrase *significant* injury usually denotes an injury that is something more than a *minor* injury. By contrast, McMahon & Binchy, *Law of Torts*, (4th Edition, Bloomsbury Professional, 2013) states that under the Act of 1991: *"the clock will not start until the injury moves from one of trivial character to become a more significant injury"* (emphasis added). Canny, *Limitations of Actions* (2nd Edn., Round Hall, 2016), at para. 13-41, states on the other hand *"[o]nce a plaintiff has knowledge of a "significant injury" (even if relatively minor) then time runs against all injuries, even if more serious, arising out of the same breach of duty"* (emphasis added). Woulfe J. goes on at para 50(e) to outline a non-exhaustive list of factors which may arise for consideration. My concern with this formulation is that it leaves open-ended the date of knowledge for an extremely wide variety of injuries. For example, the juxtaposition of the phrase *minor injury* and injuries attracting a *small level of damages* leaves open the possibility that some, most, or perhaps all, injuries that might come within the jurisdiction of the District Court (minor injuries attracting a small level of damages), would leave a plaintiff with an entitlement to bring proceedings at a long remove from the infliction of injury on the basis that the injury was not significant within the meaning of s. 2(1)(b) of the Act of 1991. This could lead to a situation that for those types of injuries no date of knowledge sufficient to commence the time running for the purposes of the Act of 1991 could ever have been reached because, subjectively or objectively, the injury cannot be said to reach the level of significance required under the Act. Even the reference to time span of the injuries leaves open the question of whether the date of knowledge may only occur after a certain period of time has elapsed or if it may start on the day of an incident when

the plaintiff has experienced a severe, immediate and indeed debilitating injury and is told that it will be many months before he or she will recover. It seems to me that the fact of being advised by a doctor as to the future impact of the injury is a *fact* within the meaning of the Act of 1991 of which the plaintiff has knowledge.

**22.** I agree however with Woulfe J. that the meaning of the words in the sub-section must be derived from the context. That context must take into account the constitutional balancing act that the Oireachtas sought to achieve in s. 2 of the Act of 1991. Finlay Geoghegan J. articulated this constitutional balance at para. 94 of the reported judgment in *O'Sullivan v. Ireland* as follows:-

> *"The Oireachtas has, in my view, sought to achieve that constitutional balance in s. 2 of the 1991 Act in setting out, in subs. (1), the relevant facts of which a plaintiff must have knowledge before the limitation period commences to run, whilst at the same time in subs. (2) making provision for the imputation to a plaintiff of constructive knowledge of such relevant facts, subject to the provisions of subs. (3). This approach seeks to protect the interests of a plaintiff by requiring knowledge of the facts identified relevant to the injury and its cause and to protect the interests of a defendant by providing that, in certain circumstances, such factual knowledge may be imputed to a plaintiff."*

As identified in *Hegarty v. O'Loughran* [1990] 1 I.R. 148, a decision which of course predated the Act of 1991 and arguably led to its enactment, the overall interests of defendants in having a Statute of Limitations arise from *"the desirability of finality and certainty in the potential liability which citizens may incur into the future"* and also the potential for harshness and injustice to defendants called to defend themselves years later.

**23.** If the intention of the legislature as contained in the wording of s. 2(1)(b) is as set out by Woulfe J., then of course that intention must be applied. It is not clear to me however that

all of the matters set out by Woulfe J reflect the intention of the Oireachtas. I am conscious however that in seeking to give complete guidance to the trial court as to how to proceed, this Court runs a great risk of reaching an inaccurate conclusion without having had the benefit of full legal argument on the precise *application of the meaning of significant injury* to the facts of this case having regard to this particular plaintiff's knowledge (both actual and constructive). This is not said to disparage or criticise this very able and articulate plaintiff. In his view, the answer to the date of knowledge issue was simple and straightforward and therefore he did not make any alternative argument that an otherwise experienced counsel might have made. On return to the High Court the plaintiff may have the opportunity, is he so wishes, to engage solicitors (and counsel) or he will at least have an opportunity to consider this judgment and the implications of it with a view to articulating an alternative argument. In all the circumstances, it would be unwise to set in stone a principle (and I am conscious that Woulfe J. is not setting out rigid criteria) that was not the result of a fully argued case. Indeed, it may well be that the meaning of significant injury in the sub-section is difficult to define but easy to recognise (to borrow from, and paraphrase, O'Donnell J. in *Clarke v. O'Gorman* [2014] 3 I.R. 340 on the meaning of personal injuries actions in the Personal Injuries Assessment Board Act, 2003). Certainly, in the cases of *Whitely v. Minister for Defence*, *Bolger v. O'Brien* and *Martin v. Irish Express Cargo Ltd*, the judges had no difficulty in concluding that on a subjective (or constructive) basis the plaintiff knew that the injury was significant.

**24.** In all the circumstances, the just and appropriate Order for this Court to make is to allow the appeal and remit the matter to be decided as part of a unitary trial. I agree with Woulfe J. that it is most unfortunate that the separate trial of this issue as a preliminary one has caused lengthy delay and that hopefully this case can move ahead quickly to trial. I also agree with the presumptive order on the payment of the plaintiff's expenses by the defendants.