

THE HIGH COURT

[2020] IEHC 596
[2018 No. 5942P]

BETWEEN

CLAIRE O'SULLIVAN A PERSON OF UNSOUND MIND NOT SO FOUND

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment delivered by Mr. Justice Kevin Cross Wednesday the 11th day of November, 2020

1. This is an application by way of notice of motion by the defendants for an order dismissing the proceedings because of, first of all, inordinate and inexcusable delay and/or on the basis that a fair trial is not reasonably possible and/or that to require the defendant to defend the claim would be unfair and unreasonable etc.
2. The trial was originally specially fixed and listed for trial in July 2020 and it was adjourned due to Covid and then it was listed again for the 22nd October, 2020 but had to be adjourned again due to the further imposition of the Covid regulations.
3. The defendants brought the motion herein dated the 12th October, 2020 for hearing at the trial. When the trial date had to be adjourned for the second time an application was made by the defendants and opposed by the plaintiff to detach the motion from the trial which application I granted and the motion for hearing on the 10th November, 2020.
4. I had the benefit of two affidavits from the plaintiff and two from the defendants. I also had the written submissions by both parties and the oral submissions by Mr. Hanratty on behalf of the defendant and Mr. Treacy on behalf of the plaintiff, both of the Inner Bar.
5. The plaintiff, a person of unsound mind not so found, claims that she was physically and mentally incapacitated due to the circumstances of her birth on the 9th May, 1977. The plaintiff claims negligence against the defendant and claims that the plaintiff's mother presented herself to the Carrick-on-Suir Hospital, a small local hospital on the 8th May, 1977 and advised the nurse in attendance, Nurse Anthony of a bleed that she had during the previous night. The hospital, as I said was a small local facility which had two maternity beds and did not have any resident doctor available but there was a local GP on call.
6. The plaintiff was admitted under the care of Nurse Antony and during the night she had a further bleed and the night nurse, Nurse Cox, phoned the doctor in charge and he arranged for the plaintiff's mother to be taken by ambulance to Clonmel Hospital. The ambulance came from Clonmel a journey of approximately 30 minutes and on its return as they approached Clonmel the plaintiff was born in the ambulance and she and her mother were apparently both ill and subsequently the plaintiff suffered significant seizures.
7. It is claimed in the proceedings that the plaintiff's mother ought to have been transferred to Clonmel or a suitable hospital at once when she presented with the bleed or certainly

earlier as she had other apparent bleeds before Nurse Cox came on duty and it is claimed that the defendant was negligent. Liability and causation are both denied.

8. The plaintiff's mother may have contacted the plaintiff's solicitor in 2011 in any a warning letter was issued in 2018 and the pleadings were started by summons dated the 2nd July, 2018. There is no complaint of the speed or progress of the case since the initiation of the proceedings.
9. While the motion complains of both unreasonable and inexcusable delay and therefore by implication the principles established in the *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 and *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. at p. 459 cases, Mr. Hanratty made it clear that he is in effect basing his application on the grounds of *O'Domhnaill v. Merrick* [1984] I.R. p. 151.
10. The defendants submit that they, either will not get a fair trial or that it would be a breach of fair procedures to require the defendants to defend the claim due to the lapse of time.
11. The defendants also submit that there has been no attempt to explain the delay between 1977 and 2018 and contend that they have no obligation to bring this application at any time before they did so and are not responsible for any delay.
12. The defendants submit that in order to defend it is necessary for them to show that there was not any breach of duty of care or that any breach of duty was not the cause of the injury. In order to do this, they submit, they must have available the factual information which was identified by Mr. Hanratty as the oral evidence as to the circumstances of the plaintiff's residence in Carrick hospital and of her birth. They submit that this oral evidence is necessary in relation to the issue of liability.
13. The defendants further submit that documentary evidence is necessary in relation to the issue of causation. Apart from the caveat that it is not necessary for the defendants to prove anything, rather the plaintiff must prove everything in issue, these are not, on the face of it unreasonable submissions to make.
14. The defendant further submits that the written records are incomplete. There is no doubt that the records in Carrick-on-Suir Hospital taken in 1977 are not as they would be today and there is no dispute about that. However, there are two nursing records, one signed by Nurse/Midwife Anthony who was on duty during the day and the other by Nurse/Midwife Cox who was the night nurse on duty.
15. The defendants complain that there are no ambulance records available and further that there are no records available from the hospital in Clonmel which were apparently destroyed at some stage by a fire. The plaintiff's mother remained in Clonmel Hospital being treated for some two months after the plaintiff's birth.
16. Accordingly, the defendant's claim prejudiced in relation to the alleged deficit in oral evidence and in relation to the deficit in notes the latter deficit being related to causation.

17. In relation to the oral testimony, Nurse Anthony is now retired and the defendants believe her to be unwell and they are not disposed either to interview her or to call her as a witness as they have been advised that she may be upset over any approach to her.
18. Nurse Cox is available and gave two statements to the defendants, one by telephone and the other in a more formal consultation. She also gave one statement to the plaintiff. The defendants complain that Nurse Cox has given contradictory statements and have decided not to call her. The plaintiff has, after their consultation decided that they will call her. In the absence of oral evidence, the defendants contend that they cannot properly defend the liability aspect of the case.
19. In the absence of documentary evidence, the defendants claim that they are prejudiced also in defending the issue of causation.
20. The plaintiff responds first of all that the defendants ought to have made their application earlier and that the application should be dismissed on that basis alone as the case was ready for trial and specially fixed in July. This application by way of notice of motion was brought on the 12th October and was originally listed for hearing with the trial on its second date the 22nd October and has since been by order of this court "decoupled".
21. The plaintiff then claims that the motion on the 12th October was too late. The plaintiff is not arguing for any competing degrees of culpability or lateness in the sense of the *Primor* authorities but they do contend that the failure of the defendants to bring the application before now when all matters were ready for trial first in July and then in October should require the application to be dismissed on that ground alone.
22. Second of all and fundamentally, the plaintiff contends that the defendants have not reached the necessary hurdle that the law sets in order to be successful under the principles in *O'Domhnaill v. Merrick*.
23. The plaintiff contends that notes in Carrick do exist and while they are not as extensive as they would be today but they are the same notes as would have been in existence had the trial taken place in the 1980s. These nursing notes they submit are reasonable.
24. The plaintiffs then submit that from the exhibits in the affidavits that it has been established that the ambulance service did not take notes in 1977 and note taking only occurred later. They further then submit that the situation would have been the same whenever the trial was taking place.
25. It is certainly the case that measurements and scores would never have been taken probably not even today in an emergency ambulance birth situation.
26. The plaintiff accepts that the notes in Clonmel Hospital have been destroyed but they submit that there is, despite the absence of the notes, a reasonable narrative available as to what injuries the plaintiff and her mother sustained from the recent tests and scans which have been performed by the plaintiff's experts and referred to in the expert reports

and the plaintiff contends that these tests and scans reveal what she suffered in 1977 and what her mother suffered or underwent at the time of her birth.

27. In relation to oral evidence the plaintiff submits that there is full oral testimony from Nurse Cox and that the defendant's decision not to consult Nurse Anthony is a decision they have made and had the defendants wished to consult her that they could have done so.
28. The plaintiff submits that given the status of both the parties it would be grossly unfair to allow the motion to succeed and even if the court were not of a view that the plaintiff's submission should be accepted at the very least the court should adjourn the motion to the trial.
29. In reply the defendants repeated their submissions and noted that no explanation had yet been given for the delay between 1977 and 2018 and submitted that the court ought to determine the application on its merits.

The law

30. The difference between *Primor and O'Domhnaill v. Merrick* and the cases resulting therefrom was summarised by Geoghegan J. in *McBrearty v. Northwestern Health Board & Ors* [2010] IESC 27 when he says:

"First of all, the learned High Court judge, correctly in my view, considered that in applying the 'inordinate and inexcusable delay' test, he was concerned in the main with what happened after the commencement of the proceedings and not with what happened before the commencement."

31. As Irvine J., when she was in the Court of Appeal, stated in *Cassidy v. The Provincialate* [2015] IECA 74:

"While the Primor jurisdiction is usually exercised in proceedings where there has been post-commencement delay or a combination of pre- and post-commencement delay, the O'Domhnaill jurisdiction is most usually employed where, at the time the application to dismiss is brought, such a significant length of time has elapsed between the events giving rise to the claim and the likely trial date that the defendant can maintain that, regardless of the absence of blame of the part of the plaintiff for that delay, it would be unjust to ask to the defendant to defend the claim."

"The question most commonly considered by the court when exercising its O'Domhnaill jurisdiction is whether by reason of the passage of time there is a real or substantial risk of an unfair trial or an unjust result."

32. To interject I find that this is indeed the test to be applied in this case, whether there is a *"real of substantial risk of an unfair trial or an unjust result."* Irvine J. continued:

"Having reflected upon many of the authorities in relation to the 'delay' jurisprudence, I am satisfied that the third leg of the Primor test, which obliges the defendant to prove that the balance of justice favours the dismissal of the claim, does not carry the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the O'Domhnaill test."

33. And further at para. 38:

"Considering its jurisdiction having regard to the test in O'Domhnaill, a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result."

34. The defendant has further relied upon the case of *Keating v. Riordan* [2016] IEHC 635 and *Whelan v. Lawn* [2014] IESC 75 both of which the plaintiff alleged sexual abuse against a person but in both cases the alleged perpetrator, and only contemporary evidence available to the defendant, was dead and accordingly I do not find that these cases are directly applicable to the instant case.

35. I was also referred by the defendants to the case of *O'Gorman v. Minister for Justice, Equality and Law Reform* [2015] IECA 41 in which eleven years had passed between the complaint and the motion to dismiss. In that case, in the Court of Appeal, Irvine J. referred to the evidential difficulties that arise due to the lapse of time and at p. 62 stated:

"Regardless of the integrity of witnesses, it is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the more fragile and unreliable the evidence becomes. This is of particular concern in cases where there is no documentary or other objective evidence to support a claim where there is conflicting oral testimony. As has been stated so often on applications such as the present one, memories fade and justice is put to the hazard."

36. The plaintiffs referred me to the very recently decided case of *Mangan v. Dockeray & Ors* [2020] IESC 67, a decision of the Supreme Court within one week of the hearing of this motion, and the judgment of McKechnie J. He repeats a number of points which he says have been constantly made in the case law and at para. 109 states:

"(i) The ultimate outcome of a delay/prejudice issue must invariably depend on the particular circumstances of any given situation: 'Every case is different. Factual resemblances are only of limited value'. (McBrearty at pg. 36)

(ii) *In cases where the court is essentially concerned with delay post the commencement of proceedings, it will view the obligation of expedition much more strictly where there has been a considerable delay pre-commencement.*"

This is a case of the reverse. There has been considerable delay pre-commencement but there has been no delay post-commencement.

"(iii) *Delay and certainly culpable delay on the part of a defendant may constitute countervailing circumstances which militates against a dismissal.*"

That does not apply in this case.

"(iv) *The existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply.*

(v) *This latter point may be of very considerable significance, particularly in medical negligence cases as most treating doctors and certainly all consulted experts, will rely on such information for their evidence. (McBrearty at pg. 48)"*

37. Further at para. 145 McKechnie J. states:

"Looking at the interest of justice situation in the round, the following points come to mind:-

- *The crucial importance for the plaintiff in continuing with this action.*
- *The fact that being of unsound mind not so found, the limitation period cannot apply.*
- *The fact that Dr. Denham is insured and no specific prejudice has been advanced on his behalf.*
- *The inadequacy of the evidential material advanced on behalf of Mount Carmel regarding insurance.*
- *The availability of what appears to be full and complete records of the events at and surrounding birth and thereafter during the plaintiff's stay in Mount Carmel Hospital.*
- *The likelihood that irrespective of the passage of time, the evidence of both the second and third named defendants and any experts called on their behalf, would be heavily if not almost entirely reliant on those medical records."*

38. Mangan concluded that:

"In all of these circumstances, I do not believe that, on the evidence presently available, there is a serious risk of an injustice being done to either the second or third defendants in allowing this action to proceed, whereas the undoubted prejudice to the plaintiff would be enormous. In any event, there is a continuing obligation on a trial court to ensure that fair procedures and constitutional justice is always adhered to."

Findings

39. First of all, I reject the submission by the plaintiff that the application should be refused solely because of the delay in bringing the motion. This delay is not submitted as something that resulted in the case itself being in any way delayed. The submission was that everything was ready for trial when the defendants took advantage of the necessary first adjournment due to Covid to bring the application and then due to the second adjournment to decouple the application from the trial.
40. Such matters in relation to the lateness of the application may possibly be of relevance in any later submissions or indeed as part of the mixture in the case when I am dealing with the substance and assessing the justice of the matter but of themselves are not grounds to refuse the application.
41. Just as the failure to address the issue of the lapse of time between 1977 and 2018 of itself is not grounds to dismiss the procedures and indeed has not been relied upon, I do not think that the failure of the defendants to bring this motion at an earlier stage can be grounds of itself to dismiss it.
42. I must now consider the substance of the application as to whether I should utilise my jurisdiction to dismiss the case at this stage. The application is founded upon both the lack of oral evidence in relation to the question of liability and of documentary evidence in relation to the issue of causation.
43. I will deal with the oral evidence issue first.
44. Whereas there are inconsistencies and possible criticisms of Nurse /Midwife Cox, these inconsistencies would have been present in the 1980s just as much as in 2020. The plaintiff is required to prove her case and presumably Nurse Cox's evidence and the alleged inconsistencies between her various conferences or attendances can be tested. As Irvine J. stated recollections do dim and if a court is not satisfied with the evidence adduced and cannot decide then if the plaintiff has failed on the balance to prove the case, the case must fail.
45. Whether or not Nurse Cox knows or is a friend of the plaintiff's mother is no reason to allow this application. Her friendship, if that is what it is, can be tested in cross examination if necessary.
46. In relation to Nurse Anthony I find that she is in fact available to the defendants but the defendants have chosen not to call her or indeed even to interview her to see whether she would be available. In that absence I cannot conclude that she is not available or

that the defendants have any evidential lack due to her alleged unavailability. Had they interviewed her or attempted to interview her the situation might be different.

47. I accept that the defendants have for good and caring reasons decided not to interview or approach Nurse Anthony but that is their choice and having made their choice I find that they cannot use it to support this application. Who knows what evidence Nurse Anthony would give. She might support the plaintiff or the defendant or indeed she might have no recollection as to what occurred. The latter instance is probably the only occasion that would support the defendant's application.
48. I find that the defendants have not established that any oral testimony deficit due to the delay is such as to result in an unfair trial or injustice.
49. The issue of record is more difficult and must be addressed. There is no evidence that the hospital in Carrick has lost any records that would have been available earlier. I have accepted the evidence that there were no records taken in the ambulance in 1977 and I reject the submission by the defendants that in effect there "must have been" records. The emails exhibited indicate to the contrary. I do find that the records in Clonmel have been lost and that these may have been of importance in defending the case. The test is whether this deficit establishes that there is now a real or substantial risk of an unfair trial or an unjust result.
50. The account of what occurred to the plaintiff and to her mother in the hospital which would have been, presumably, recounted in records and even those records taken in 1977 is, the plaintiff submits substituted by the subsequent tests and trials and the plaintiff submits that these tests and trials established what occurred in the absence of any records. This is not accepted by the defendants.
51. I have come to the view that the parties can, with the benefit of these subsequent tests and trials litigate and discuss and argue and examine witnesses on the basis as to what if anything these subsequent scans and tests show. It is up to the plaintiff to demonstrate that on the balance of probabilities they have established causation.
52. The records in Clonmel do not and cannot refer to the issue of liability and this is accepted by Mr. Hanratty, but they do or might well have been relevant to the issue of causation in other words what occurred to the plaintiff and her mother resulting in the disabilities suffered by the plaintiff. Having accepted that the subsequent tests and trials will at least to a certain extent fill the evidential gap of the absent records and enable the parties to litigate the issue of causation, I find that the defendant has failed to establish the necessary grounds for this application and that there is not any real or substantial risk of an unfair trial or an unjust result.
53. I repeat of course what McKechnie J. stated in *Mangan* (above) that it is always incumbent upon whoever is hearing the case by way of trial at any stage to intervene if he or she is of the view that an injustice presents itself due to any evidential deficit.

54. So I will not adjourn this motion to the trial but repeat that if any such injustice arises, subject to the law, that it is always open on any new submissions or new facts for the defendants to raise the issue of injustice again.

55. I will dismiss this application.

APPROVED

NO REDACTIONS NEEDED

Mr. Justice Kevin Cross

16th November, 2020