

THE HIGH COURT

[2024] IEHC 287

[Record No. 2018/4520 P]

BETWEEN

PAUL MONAGHAN

PLAINTIFF

AND

PIERCE MOLONY

DEFENDANT

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 13th day of May 2024

1. This is the trial of a preliminary issue of law to determine whether the plaintiff's claim is statute barred pursuant to the provisions of s. 11 of the Statute of Limitations Act 1957, as amended by s. 3 of the Statute of Limitations (Amendment) Act 1991 and by s. 7 of the Civil Liability and Courts Act 2004.

2. For the reasons set out below, I find the proceedings are statute barred and should be dismissed.

Background

3. For the purpose of this application, the defendant accepts that the plaintiff will prove his allegations against the defendant. The burden rests on the plaintiff to prove that the proceedings are within time, having regard to the provisions of s. 2 of the Statute of Limitations (Amendment) Act 1991, which provides as follows:

"Date of knowledge for the purposes of this Act.

2.—(1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:

(a) that the person alleged to have been injured had been injured,

(b) that the injury in question was significant,

(c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,

(d) the identity of the defendant, and

(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him, or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.

(3) Notwithstanding subsection (2) of this section—

(a) a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and

(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury.”

4. The plaintiff, acting as a litigant in person, issued his personal injury summons on 21 May 2018, naming the HSE as defendant. Thereafter, he obtained an *ex parte* order on 10 December 2018 for leave to amend the name of the defendant to the current defendant and implemented that amendment on 21 January 2019. The defendant does not, for the purpose of this application, rely on that amendment but says the original personal injury summons was issued out of time. The personal injury summons was amended again pursuant to an order of Coffey J. of 27 June 2022, which amendments were made on 6 July 2022. I set out below the background to the plaintiff’s claim by reference, firstly, to the original personal injury summons and then by reference to the amendments he made in July 2022.

5. According to the original personal injury summons, the plaintiff sustained an injury on 21 May 2015 when he had to jump over a wall in order to escape from a cow. He attended at his then GP, the defendant, and was advised that he had sustained a tear to

his pec major muscle. A pain killing injection was administered and the plaintiff says he was directed not to attend at A&E but to go home and rest and to return the following day, which he did, and the defendant told him he had torn a muscle that would take two weeks to recover. He attended again on 29 June 2015, informed the defendant that he was still in discomfort. The defendant advised him to attend physiotherapy but that it could take up to six weeks for an appointment for a public patient. On 23 September 2015, the plaintiff re-attended the defendant and informed him that he had gone to a private physiotherapist and had had an MRI which confirmed a 50% partial rupture to his pec major. The defendant arranged a referral to Ms. Flannery, orthopaedic surgeon, whom the plaintiff attended in December and was told that an operation would be carried out in January and if direct repair failed, they would make plans to strengthen the area to compensate as much as possible. That operation was carried out on 29 January 2016, a direct repair failed, and allograft reconstruction was done. The morning after the surgery the plaintiff was told that 5cm of allograft was used.

6. The personal injury summons pleaded that the plaintiff had suffered significant injuries due to the defendant's negligence, nuisance and breach of duty. Particulars were set out including that:

- *"The defendant failed to obtain expert specialist advice before unacceptable consequences became evident."*
- *"The plaintiff was never fully informed about the possible/probable severity of injury during all attendances from 21st May 2015 to the final attendance on the 23rd day September 2015, about the major influence on quality of life if not treated on time" (para. 5 of the particulars of personal injury).*
- *"The time limit for surgical intervention before complications arise was lost on the 29th day of June 2015 attendance" (para. 12 of the particulars of personal injury).*
- *"This referral [to Ms. Flannery] should have been sent in the weeks from the 21st day of May to the 29th day of June 2015" (para. 15 of the particulars of personal injury).*
- *"The defendant's actions were costly based on this complete rupture injury having a timeline to be repaired, instead the injury is now significant and permanent with only partly restored function" (para. 16 of the particulars of personal injury).*

- Paragraph 22 of the particulars of personal injury set out the ongoing functional difficulties experienced by the plaintiff as "*permanent damage*" and the paragraph concludes in saying "*the allograft repair causation was due to [the defendant's] sub standard care and negligent breach of duty*".
- Paragraph 23 set out the occupational and functional impact of the allograft repair.

7. The amendments the plaintiff made to the personal injury summons in July 2022 set out:

- additional details of the plaintiff's attendances at a private physiotherapist in August 2015 and his MRI which was done by Alliance Medical who told him to attend Mr. Lunn, orthopaedic surgeon.
- Paragraph 22 of the particulars of personal injury in the amended personal injury summons pleaded misconduct by the defendant in his preparation of a medical report of 3 October 2015 (which was secured for the purposes of the plaintiff's claim against the owner of the cow) which he pleaded was "*supported by a clear grade 3 tear of the plaintiff's right sternal diagnosed, created on record, after it was revised in May 2019 and accurately documented the MRI imaging created on the 15th and 19th days of September 2015 respectively.*"

8. I have set out the detail of the original personal injury summons and the amended version because the plaintiff seeks to rely on what he says was the need to have the medical report of 7 May 2019 from a UK expert, Dr. Wilson, in order to set out his cause of action against the defendant and that the date of that report is his date of knowledge for the purposes of s. 2 of the Statute of Limitations (Amendment) Act 1991. I do not agree. Whilst the plaintiff's amendments of July 2022 expanded upon the cause of action he had against the defendant, it does not formulate the primary claim that the plaintiff makes, i.e. that the defendant failed to refer him for an MRI and/or orthopaedic assessment in May 2015 and, as a result of the delay in doing so, the plaintiff lost the window of opportunity to obtain a successful direct repair and instead has suffered the adverse consequences of a 5 cm allograft repair. That very case was made in the initial personal injury summons and the plaintiff has not satisfied me that he needed any later expert reports in order to plead his case or that the date of that report provided him with knowledge of the facts set out in s. 2(1) such as to render his proceedings within time.

Evidence of the plaintiff's knowledge within two years of the plaintiff's impugned attendance with the defendant

9. The defendant relied on a number of points made, firstly, in the plaintiff's correspondence with the Medical Council in November 2015 and secondly, in his correspondence with his former solicitors in 2016. The plaintiff made it very clear to the court that he wanted the correspondence to and from his solicitors to be reviewed and was not asserting privilege over it. The following arises:

- i) In his amended personal injury summons, the plaintiff sets out his attendance with Mr. Lunn, orthopaedic surgeon, in October 2015. Whilst he did not include detail on this until he amended the personal injury summons in July 2022, he was clearly aware of what he had been told by Mr. Lunn since October 2015. He says Mr. Lunn's impression was that he has suffered a pectoralis major rupture and Mr. Lunn mentioned allograft surgery with less optimal results than a direct repair. The plaintiff's account of Mr. Lunn's advice to him confirm his knowledge, as of October 2015, that his injury was significant and that the delay in diagnosis had rendered a direct repair less likely and an allograft more likely.
- ii) The plaintiff gave details of his dealings with Mr. Lunn in his complaint to the Medical Council by email dated 18 November 2015, where he said that Mr. Lunn (identified in the complaint as the orthopaedic surgeon, Hermitage Lucan, whom he attended on 15 October 2015) "*made it clear surgery is difficult enough to re attach, at 5 months old extremely difficult.*" He went on in his complaint to say, "*If I had been treated right at time of injury, a repair was 'entirely possible' and now it has a slim chance.*"
- iii) In a later email to the Medical Council of 3 December 2015, the plaintiff referred to the Book of Quantum which he said he believed "*may have been the reason for the great effort to make this out to be a minimal injury.*"
- iv) In another email dated 7 December 2015 to the Medical Council, he asked what charges will be brought against the defendant if found guilty of misconduct and said, "*I have no doubt in my mind I will be taking legal action.*"

Those emails confirm the plaintiff's view at the time, that he had sustained a significant injury to the defendant's treatment of him for which he intended to take legal proceedings.

v) *The plaintiffs account of Ms. Flannery's treatment*

In the personal injury summons, the plaintiff says he found it "troubling" that he was only seeing Ms. Flannery in December 2015. He gave his account of the surgery of January 2016 when an attempted direct repair failed and a 5cm allograft reconstruction had to be done which would require a far longer period of rehabilitation.

The plaintiff's own account of his January 2016 surgery confirms that he knew at that time that the direct repair (that Mr. Lunn had told him would be more difficult due to the delayed diagnosis) was not possible, the allograft had to be done and that his rehabilitation period was thereby lengthened.

vi) *Mr. Nicholson's report, 25 January 2017*

The plaintiff's previous solicitors commissioned a report from Mr. Nicholson, consultant orthopaedic surgeon. The report stated, "*the fact that his surgery was delayed required the reconstruction for me to use an allograft using an achilles tendon.*" This report clearly advised the plaintiff that the delayed diagnosis led to the allograft reconstruction. The plaintiff says this is his date of knowledge. However, this was not new knowledge to him as it was very similar to what he had already been told by Mr. Lunn in October 2015 and, indeed, Mr. Nicholson recorded in his report the plaintiff as being "*particularly annoyed and frustrated in the delay of his clear definitive diagnosis of his right shoulder injury.*"

vii) *Correspondence between the plaintiff and his previous solicitors in 2016*

In his correspondence with his former solicitors in 2016, the plaintiff repeats the same intention to bring legal proceedings against the defendant as he had expressed in his correspondence to the Medical Council in December 2015. In his email of 2 February 2017 to his former solicitors, he said, "*I plan on pressing charges against Mr. Moloney the treating doctor for lack of appropriate care/medical negligence*". Three days later, he asked his solicitors whether the delay by the defendant in referring him to an orthopaedic surgeon affected his case (presumably his claim against the owner of the cow).

viii) By email, dated 19 February, he tells his solicitor, in relation to the delay in referring him to an orthopaedic surgeon, that he was "*mis-guided and neglected*". He attaches an account of his medical treatment, dating from 21 May 2015, when he first attended the defendant, and including an account of his attendance with the defendant on 23 September 2015 when he told him he had an MRI which confirmed "*a ruptured pec major*". At the end of that document, he records a number of "*Points to Note*" including:-

"The results from the graph prove a direct repair is best for improvement, was this chance at better results for my health taken from me? Plus, by accident or intentionally?"

"I am with no doubt that Mr Moloney intentionally concealed my exact injury... Absolute no attempt to contact an ortho surgeon until 4 months later... I believe he concealed this info to protect the neighbour's interests financially, this neighbour owned the cow involved, so a premium was at stake on his insurance policy and still is..."

ix) It seems that the plaintiff was advised by his then solicitors to only proceed against the owner of the cow and he accepted that advice at the time.

x) By email dated 7 April 2016, the plaintiff advised his then solicitor that he had "*decided to pursue the Medical Negligence case*". Some weeks later, on 1 June 2016, he raised the issue of the statute with his solicitor and said, "*it is now 12 months passed for statute and would like to make sure it is processed before the statute expires, and 100% served within another 6 months.*"

The plaintiff was clearly aware, at that stage (when he was still within time to bring the medical negligence proceedings), not only of his own wish to bring medical negligence proceedings, but also of the time issues within which such proceedings would have to be both issued and served.

The plaintiff's explanation for the delay

10. The plaintiff contends that his state of knowledge runs from either Mr. Nicholson's report of January 2017 or the report he obtained from his UK expert, Dr. Bowman, of 17 April 2019 or from his UK expert, Dr. Wilson of 7 May 2019. He makes the following points in submitting that his claim is not statute barred:-

- (i) In his replying affidavit, he avers that he had numerous legal opinions from June 2016 and October 2017 to January 2018 that his case had no reasonable prospect of success. He says his former solicitors did not obtain a medical report. The plaintiff did obtain his own medical report in April 2019 and has not given any explanation as to why he was unable to do that any earlier or what happened that finally enabled him to obtain that report in April 2019, other than averring to his status as a lay litigant.
- (ii) The plaintiff blames the PPC of the Medical Council for not retrieving "*essential evidence*" and for not awaiting the outcome of his January 2016 surgery. The plaintiff offered no legal basis for what he appeared to view as the Medical Council's legal responsibility to assist him in preparing to institute the within proceedings. No such legal basis exists.
- (iii) The plaintiff relies on that delay he experienced as a lay litigant in obtaining the views of Dr. Burton, UK expert on GP care. He has not exhibited any report from Dr. Burton and says he is still waiting for it, although, in his letter of 22 June 2021 in which he references opinions that he attributes to Dr. Burton, he seems to advise Dr. Burton that "*[t]he only way I want a report is if you can put an ambulance in the clinic or an attempt to obtain the next of kin for transport*". He advised the court that he is still waiting for a report from Dr. Burton. Nevertheless, he does seek to rely on the contents of what seems to be a letter he sent to Dr. Burton in which he comments on what he claims were Dr. Burton's comments. It is difficult to attribute any evidential value to this document which has an unclear origin but, even if it does contain Dr. Burton's opinion, it is one critical of the defendant's delay in referring the plaintiff to an orthopaedic surgeon, a view that had already been furnished to the plaintiff by Mr. Lunn in October 2015 and Dr. Nicholson in January 2017.
- (iv) The plaintiff says the first time the details of his injury were available to him was on receipt of Dr. Burton's opinions set out in a letter from the plaintiff dated 22 April 2021 which was some two years after the original personal injury summons issued and a number of years before the plaintiff amended that summons. It seems that the plaintiff may be confusing his

claim against the defendant with a potential claim against his radiologist in how his MRI was read, as that is the only new information in the account he gives of Dr. Burton's opinion contained in what seems to be a letter from the plaintiff rather than a formal medical report. In any event, in that letter, the plaintiff states:-

"The expert radiologist report is a bombshell. Absolutely delighted. Clear and prima facie evidence of misleading conduct and will expect the court to believe his word because he failed to comply with his duties documenting evidence of care."

11. In his replying affidavit, the plaintiff claims, at para. 22, that he was diagnosed with depression in 2016 for which he is on "a severe dosage", and that he had concussion in February 1997. He says, "this would certainly impede the plaintiff's efforts to act by themselves due to flaws in the legal sector." There is nothing corroborative of those claimed diagnoses exhibited. Even if those diagnoses are correct, there is no evidence of the plaintiff having been impeded in bringing his claim at that time. He has made it clear that he was well able, during the time he was within time to issue these proceedings, to make a complaint to the Medical Council and instruct his then solicitors about issuing proceedings against the owner of the cow that had caused him to sustain an injury and communicating his views about an additional claim against his GP for medical negligence. There is no evidence of the defendant having been under a disability that could have affected his state of knowledge.

The law

12. Whilst these cases will depend on their own facts in determining a plaintiff's stated knowledge, there is assistance to be garnered from the case law.

13. In *O'Sullivan v. Ireland* [2020] 1 IR 413, Finlay Geoghegan J. considered many of the authorities including *Gough v. Neary* [2003] 3 IR 92 and *Cunningham v. Neary* [2004] IESC 43. Finlay Geoghegan J. focused on the facts required by s. 2(1) and concluded, at para. 104:-

"The issues which a court has to consider in determining the date upon which a plaintiff first had actual knowledge are all questions of fact as to what a plaintiff did or did not know on a given date."

She held that:-

"a plaintiff must have broad knowledge of the causally relevant acts or omissions which are alleged to constitute negligence and to which the injury is potentially attributable..."

What all the decisions make clear is that it is not necessary for a person to have knowledge of facts detailed enough to enable a statement of claim to be drafted. However, the way that has been further explained in some decisions in connection also with the level of certainty next referred has given rise to some confusion." (at paras. 132-133)

14. On the facts of that case, Finlay Geoghegan J. found the plaintiff did require the assistance of expert advice to ascertain the facts and emphasised the fact-specific nature of the assessment.

15. In *Green v. Hardiman* [2019] IESC 51, O'Donnell J. (as he then was), in determining the knowledge required by a plaintiff in relation to s. 2(1), gave the example of an amputation of a limb where it was negligent because the wrong limb was amputated, a fact that would be known by a patient almost immediately without any need to seek expert advice, as versus where the advice to amputate at all was negligent. In the latter situation, time would not run until the patient had some reason to believe that the advice to amputate was wrong or questionable. The facts in *Green* were similar to here in that, had intervention taken place sooner than it did, there would have been a better result for the plaintiffs. However, the plaintiff had been advised by his surgeons that the difficulties he experienced were due to a pre-existing condition and it was not until he obtained independent expert advice at a time he was beyond the statutory time limit, that he became aware of his cause of action. In those circumstances, his proceedings were not considered to be statute barred.

Discussion

16. The plaintiff contends that he falls within the same situation as befell Mr. Green, i.e. that he was not aware of his cause of action until he was outside the statutory time limit that expired sometime in 2017. I do not agree that the facts of this case support such an analysis. The amended personal injury summons of 2022 certainly contains more detailed particulars of negligence and breach of duty, much (though not all) of what he pleads was within his knowledge in 2015, particularly after he attended Mr. Lunn. The new matters pleaded in 2022 do not go to establishing the cause of action, but, rather, expand

upon it as is commonplace in pleading further particulars, whether of negligence or personal injury in many cases of negligence against a medical practitioner.

17. The April 2019 report from Dr. Bowman on which the plaintiff relies heavily and the account of Dr. Burton's opinions in June 2021 may have given him additional knowledge about the detail of his injury and may have informed him the injury was even more severe than he had previously known, but it did not give him the initial knowledge of what is set out in section 2(1). The plaintiff knew well before sight of either medical opinions that his injury was significant and that he believed it had been caused by the negligence of the defendant in a delayed diagnosis and in not referring him for an MRI and/or to an orthopaedic surgeon between May and June 2015.

18. The plaintiff is, therefore, not entitled to rely on the date of Dr. Bowman's report or the opinions of Dr. Burton as his date of knowledge and his proceedings are statute barred.

Conclusion

19. That the plaintiff has sustained a significant injury attributable in whole or part to the defendant's delay in referring him for an MRI and/or orthopaedic assessment, was known to him within the period of two years from his attendance with the defendant between May and June 2015. The matters relied on by the plaintiff, including the reports of Dr. Bowman in April 2019 or Dr. Wilson of 7 May 2019 or the opinion of Dr. Burton of June 2021 do not justify the delay in issuing his personal injury summons outside the statutory time period and his proceedings are, therefore, statute barred.

Indicative view on costs

20. As the defendant has succeeded in his application to have the proceedings dismissed as statute barred, my indicative view on costs in relation to the provisions of s. 169 of the Legal Services Regulation Act 2015 is that the defendant is entitled to his costs to adjudicated upon in default of agreement.

21. I will put the matter in for mention before me at 10.30am on 18 June 2024 in order to hear whatever submissions the parties wish to make in relation to costs and final orders.

The plaintiff appeared for himself.

Council for the defendant: Alistair Rutherford BL.