

Finlay C.J.
Henchy J.
Hederman J.

THE SUPREME COURT

279/86

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GREGORY TOAL

Plaintiff/
Appellant

and

NIALL DUIGNAN AND THE BOARD OF
GUARDIANS AND DIRECTORS OF THE
COOMBE LYING-IN HOSPITAL
KEVIN FEENEY, NAOMI KIDNEY,
MARIE CULHANE, TOM McMANUS,
CHAIRMAN OF THE BOARD OF
GOVERNORS OF HARCOURT STREET
CHILDREN'S HOSPITAL AND THE
BOARD OF GOVERNORS AND DIRECTORS
OF HARCOURT STREET CHILDREN'S
HOSPITAL AND MARGARET MCGILL

Defendants/
Respondents



JUDGMENT delivered on the 27th day of November 1987 by
FINLAY C.J.

This is an appeal brought by the Plaintiff against the Order of the High Court dated the 10th July 1986 made by Keane J. ordering that the proceedings herein as against the first, second, fourth and fifth named Defendants be struck out with costs against the Plaintiff. In that Order it is recited that the third named Defendant was deceased since the commencement of the proceedings and the action has never been re-constituted,

we are informed, against him. The motions in the High Court brought by the Defendants to dismiss the proceedings were based on the lapse of time between the acts of negligence and breach of duty complained of and the institution of the proceedings.

In short, the learned trial Judge in the High Court came to the conclusion that in each of the cases with which he was concerned the delay created a situation in which it would be a denial of justice to the Defendants to expect them to meet the claims at this stage, particularly when it was not alleged that they (the Defendants) contributed to the delay in bringing the proceedings and that there was manifest prejudice against the Defendants from the continuation of these proceedings established before him.

I have come to the conclusion that the learned trial Judge was correct in the view which he reached and the reasons by which he reached it.

The first named Defendant in this case was at the time of the institution of these proceedings in 1984 the

Master of the Coombe Hospital but he no longer holds that position and the claim against him is apparently based on his official position at the time when the Originating Plenary Summons was issued. He was not in fact a member of the staff of the Coombe Hospital at the date of the acts of negligence complained of by the Plaintiff in this case nor was he even qualified as a medical practitioner at that time. With regard to the second named Defendants, the authorities of the Coombe Hospital, the third named Defendant who has died since the institution of the proceedings and the fourth named Defendant who is sued as the widow of a deceased paediatrician, formerly a consultant in the Coombe Hospital, the claim arises in the following way.

The Plaintiff was born in the Coombe Hospital on the 28th June 1961. His mother was at the time of his birth attended as a gynaecologist by the third named Defendant who was then the Master of the Hospital. It is alleged that the Plaintiff was subsequently, within a very short time after his birth, attended in the Hospital and

examined by the late husband of the fourth named Defendant who was a consultant paediatrician in the Hospital. The complaint against all these Defendants is that the Plaintiff was born with an undescended testicle and that no remedial treatment was given to him at or immediately after the time of his birth, nor, it is alleged, were his parents warned of any necessity for subsequent remedial treatment.

It was established at the hearing of this application without contradiction, that the physical location of the Coombe Hospital was changed in the mid-sixties and that as a result there are only incomplete records in the possession of the Hospital with regard to the birth of the Plaintiff and that a particular search has failed to yield any more than the incomplete records that are retained. It has further been deposed to on behalf of the Hospital that none of the nurses who attended the Plaintiff's mother at the time of the Plaintiff's birth are still in the employment of the Hospital and that their whereabouts are unknown to Dr. Drumm who swore the

Affidavit on behalf of the Hospital. With regard to the fifth named Defendant who is a general practitioner the complaint made is that she was consulted by the Plaintiff's parents in 1971 when the Plaintiff was suffering from a condition of mumps, that she examined the Plaintiff and stated that she should be called again if complications arose, but failed to identify what those complications might be and that upon being summoned again by telephone she failed to attend. It is said that acts of negligence on her part at that time in July 1971 contributed to a condition in the descended testicle which has left the Plaintiff sterile. The Plaintiff was in fact, on his allegations, attended at that time by the last named Defendant and transferred to the care of the second last named Defendant. It was stated in Court, though it is not contained in any Affidavit and was not disputed that the paediatrician whose widow and personal representative is sued died in 1968.

The Plaintiff asserts that he was not aware of his true physical condition until the summer of 1983. He then

consulted solicitors who wrote making claims on his behalf in August of 1984 and a Summons was issued in October 1984.

Although the application before the High Court was heard on four Affidavits, this Court permitted for the purpose of the hearing of this appeal further Affidavits to be filed by the Plaintiff who complained that one of the Affidavits filed and sworn by him in the High Court was one which he was pressurised to swear and was inadequate and incomplete and also permitted the filing of a further Affidavit on behalf of the fifth named Defendant.

Much of the further Affidavits filed on behalf of the Plaintiff dealt with the question of whether he was responsible for delay after the period when he became aware of his condition and as to allegations that delay, which did undoubtedly occur to a very considerable extent, even since that time, was the fault of his former solicitors.

I am prepared to deal with this appeal on an assumption that the Plaintiff has not got a personal responsibility for any delay in the prosecution of these proceedings since they were instituted in October 1984.

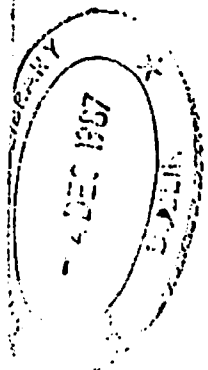
Even on that assumption, I am driven to the conclusion that each of the Defendants is entitled to the Order which was obtained on his or her behalf in the High Court, having the proceedings struck out against him.

No arguable case of any description has been made against the first named Defendant which could constitute a claim for either personal or vicarious responsibility on his part in connection with anything that occurred in the Coombe Hospital in 1961. Quite apart, therefore, from any question of delay, he is, in my view, entitled to be struck out of these proceedings.

With regard to the Hospital and the fourth named Defendant who is the widow of the consultant paediatrician employed in the Hospital in 1961, the position appears to me to be as follows. What is alleged is a failure either to diagnose on examination an undescended testicle or, in the alternative, a failure, having diagnosed it, to give the appropriate advice to the Plaintiff's parents with regard to what should be done if it did not rectify itself naturally by the time he was between three and five years

of age. It would be impossible for either the hospital authorities or the consultants engaged, in the absence of the most detailed clinical notes and records, to defend themselves twenty-six years on from attendance at a birth in 1961. It is wholly impossible, the death having occurred of both the gynaecologist and paediatrician concerned either for the Hospital or for the widow sued as a personal representative of the paediatrician to defend themselves in any way against the allegations which are being made against them.

Even though, therefore, the Plaintiff may be blameless in regard to the date at which these proceedings have been instituted and with regard to the period of twenty-five to twenty-six years since the events out of which they arose, as far as these Defendants are concerned there would be an absolute and obvious injustice in permitting the case to continue against them. One cannot but be moved with sympathy for the Plaintiff who obviously feels deeply the medical condition which he is advised he presently suffers from, but that sympathy could not be permitted to justify



what would be an unjust proceedings against these Defendants. In the High Court it was held by Keane J. that the case was governed by the decision of this Court in the case of O Domhnaill v. Merrick 1984 I.R. I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this Court in that case, but they may be summarised in their application to the present appeal as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the Plaintiff has contributed to it or not, the Court may as a matter of justice have to dismiss the action.

I am therefore satisfied that this appeal must be dismissed in relation to the second and fourth named Defendants as well as the first named Defendant.

The position of the fifth named Defendant in respect of whom the allegation of negligence is concerning

matters which she is alleged to have omitted or failed to do in 1971 is to the extent of the lapse of time between the acts and omissions complained of and the trial different from that of the other Defendants.

In her case, however, what she is being asked to do is to recollect detailed conversations and advice given or not given sixteen years ago. On the evidence which was before the High Court and the totality of the evidence which was before this Court, I am satisfied that the same legal considerations apply to her case as apply to the other Defendants with which I have already dealt. I am therefore satisfied that even if the claim being made against this Defendant represented a statable case against her that it would be unjust and unfair after this lapse of time to expect her to be able properly to defend herself. In those circumstances, I would dismiss the appeal in its entirety and confirm the Order made in the High Court.

apparel v. a. Friday

27.11.1987