[2019] IEHC 690

THE HIGH COURT

[2015 No. 10394 P.]

BETWEEN

SINEAD BARRY

PLAINTIFF

AND

CONOR MCCANN, MATER PRIVATE HOSPITAL, MATER PRIVATE HEALTHCARE AND MATER MISERICORDIAE UNIVERSITY HOSPITAL LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 9th day of October, 2019

1. In these medical negligence proceedings, the first and fourth named defendants have separately brought applications, which were heard together, to set aside the renewal of the personal injuries summons herein by order of this court (Meenan J.) on the 15th April, 2018. That order for renewal was made on the usual *ex parte* basis.

Relevant Background and Chronology

2. The plaintiff in these proceedings is a 44 year old medical practitioner who currently practises as an obstetrician gynaecologist in Australia. Prior to the events giving rise to these proceedings, she was also a keen athlete having participated in triathlon competitions in various countries.

3rd December, 2013 - The plaintiff attended the first defendant, who is a consultant cardiologist, with a complaint of palpitations occurring at rest. Following assessment, the first defendant advised the plaintiff to undergo an electrophysiology (EP) study of her heart. The summons alleges that this procedure involved the insertion of a catheter through the femoral vein which is used to stimulate the heart.

12th December, 2013 - The pre-arranged EP study of the plaintiff's heart took place at the second defendant hospital ("the Mater Private"). After the procedure, the plaintiff was advised by the first defendant that it had revealed no problem. The plaintiff alleges that following the procedure, she experienced a weak spell when she got out of bed and returned to the Mater Private where she was assessed by a doctor and advised she was fine. The plaintiff claims she began to develop symptoms after the procedure including a feeling of rectal fullness and backache.

4th January, 2014 - The plaintiff was walking in a street in Dublin when she experienced very significant pain in her back passage which caused her to collapse and lose consciousness. She woke up lying on the street with injuries including a broken tooth, a split lip and skull fractures. The plaintiff was unable to stand and claims that nobody would come to her aid. She eventually succeeded in calling an ambulance with her mobile phone. The plaintiff was brought by ambulance to the fourth defendant hospital ("the Mater Public") where she was admitted. An MRI scan was carried out of her pelvis.

8th January, 2014 - She was discharged from the Mater Public and advised that the MRI scan was normal. The plaintiff subsequently asked a consultant radiologist colleague to review the scan and he advised that it showed a large mass in her pelvis.

10th January, 2014 - The plaintiff was readmitted to the Mater Public where she underwent further scans which confirmed the presence of a pelvic mass and incidentally, a DVT in the left iliac vein. In her summons, the plaintiff pleads that she was advised that this mass was potentially a bleeding tumour. She underwent a CT guided biopsy of the mass with the result described in the records as a "grossly haematoma". The histology report suggested that the mass was likely a benign tumour. The plaintiff alleges that she was subsequently informed that there was a 10 to 15% chance that the tumour would convert to a sarcoma which would require resection and there would be a 60% chance of local recurrence. There is no evidence of this conversation in the hospital notes.

16th January, 2014 - The plaintiff was discharged from the Mater Public.

19th February, 2014 - The plaintiff emigrated to Australia, an event planned prior to her illness. Although prior to her departure, the plaintiff was advised that her DVT had resolved, she continued to suffer significant pain and swelling in her left leg.

Subsequent to her arrival in Australia, the plaintiff was seen at the Royal Prince Albert Hospital, Sydney. She pleads that she was diagnosed with a possible low grade sarcoma requiring surgery which she might not survive. She was also advised that as a consequence of the surgery, there would be damage to her bladder nerves, her rectum and her sciatic nerves which would leave her with a significant disability and she would require stomas for both urine and stools. A report obtained from a consultant psychiatrist, Dr. Catherine Anne Llewellyn dated the 12th November, 2018 discloses that the plaintiff was informed by Professor Michael Solomon at the hospital in Sydney that she would be unlikely to survive the operation, but that in any event she had most likely a terminal diagnosis. The plaintiff informed Dr. Llewellyn that she was shocked by this diagnosis.

July 2014 - It would appear that around this time, the plaintiff was advised that the mass in her pelvis, which was then reducing, was not a tumour but rather a hematoma that most likely was the result of a bleed caused during the EP procedure in December 2013 and which was also responsible for the DVT. The plaintiff suggests that this is her "date of knowledge" for the purposes of the Statute of Limitations (Amendment) Act, 1991. The plaintiff however continued to suffer with pain and swelling of her left leg.

22nd December, 2014 - The plaintiff had a stent placed in her leg. She underwent therapy thereafter which was difficult to tolerate.

February 2015 - Scans revealed that the stent was compressed and she commencedanti-coagulant therapy.

August 2015 - The plaintiff's mother contacted B.V. Hoey & Co.mpany, solicitors in Drogheda, County Louth with regard to a possible claim against the defendants herein.

September 2015 - The plaintiff gave formal instructions to the solicitors.

October 2015 - B.V. Hoey & Co. sought the plaintiff's medical records from the first defendant and the Mater Public and engaged in correspondence with the State Claims Agency in the context of the correct title of the hospital.

November 2015 - B.V. Hoey & Co. received the hospital records and instructed counsel to draft a personal injuries summons.

11th December, 2015 - The personal injuries summons was issued and it indicates that it was issued for the purposes of the statutory limitation period in the absence of an expert report. If the limitation period were to be regarded as commencing on the date of the EP on the 12th December, 2013, the summons was issued on the final day of the limitation period.

April 2016 - The plaintiff saw a vascular surgeon, Dr. Andrew Cartmill following an episode of severe leg pain. The plaintiff was concerned that she had a DVT and was preoccupied by the concern that she may die from it.

10th December, 2016 - The personal injuries summons expired without having been served.

30th November, 2017 - The plaintiff attended Dr. Llewellyn for the first time.

7th December, 2017 - The plaintiff first attended her present solicitors, Michael Boylan Litigation Law Firm where she saw Mr. Boylan.

12th December, 2017 - Mr. Boylan sought the plaintiff's file from B.V. Hoey & Co.

1st February, 2018 - Mr. Boylan received the file.

21st February, 2018 - The plaintiff attended Dr. Christine Hyde, a clinical psychologist, for therapy having been referred by Dr. Llewellyn.

8th March, 2018 - Dr. Cartmill provided a report to Mr. Boylan and separately to the plaintiff noting that over the past twelve months (i.e. since March 2017) the plaintiff's leg symptoms had progressively worsened and were causing both lifestyle and work limitations. It should be noted that it was the plaintiff's ambition to practice as a surgeon but it is felt that she is now no longer able to do so by virtue of her continuing symptoms. She now practices as an obstetrician gynaecologist.

5th April, 2018 - Mr. Boylan swore an affidavit grounding the ex parte application to renew the summons. In this affidavit, Mr. Boylan avers (at para. 13):

> "Unfortunately, the plaintiff has recently learned that the injuries she suffered are far more debilitating than she first thought and in such circumstances she has instructed this firm to pursue her claim for damages."

At para. 16, he says:

> "I say and believe that the summons herein expired on the 10th December, 2016 and was not renewed. However, I believe that the recent revelation in respect of the extent of the plaintiff's injuries and of the physical, social and occupational limitations to which she is now subject constitute 'other good reason', justifying the renewal of the summons, within the meaning of O.8 r.1 of the Rules of the Superior Courts."

16th April, 2018 - The order renewing the summons was made.17th April, 2018 - The renewed summons was served on the defendants.

2nd August, 2018 - The fourth defendant issued the motion to set aside the renewal of the summons.

14th August, 2018 - The first defendant issued a similar motion.

15th October, 2018 - Mr. Boylan sought a medical report from Dr. Llewellyn.

12th November, 2018 - The date of Dr. Llewellyn's report.

15th November, 2018 - Mr. Boylan swore two separate replying affidavits in similar terms in response to the defendants' grounding affidavits. In these affidavits, Mr. Boylan repeats the earlier averment that the fact that the plaintiff discovered in the past twelve months that her injuries are more debilitating than previously thought is a *prima facia* "good reason" meriting renewal. However, in addition, Mr. Boylan exhibits the medical report of Dr. Llewellyn which was not available at the time he swore his first affidavit grounding the *ex parte* application to renew.

Dr. Llewellyn's Report

3. Dr. Llewellyn's report is lengthy and detailed and chronicles the history of events from the end of 2013 to the date of the report some five years later.

4. The following sections of the report are of particular relevance to the issues that arise in this application:

> "Over the years between 2014 until the time of our consultation (November 2017), Dr. Barry spoke about her experience of grief and shock associated with the initial diagnosis of a life-threatening sarcoma, complicated by worsening anxious ruminations that she subsequently developed regarding the possibility of dying of her stenosed iliac vessel with the associated risks of thromboembolic phenomena. Dr. Barry became increasingly preoccupied with the notion that in the event of a medical complication she may be left with a permanent disability, and this caused a major personal crisis for Dr. Barry privately regarding her ability to pursue to (sic) career as a surgeon with its requirement that she be able to stand whilst operating.
>
> Dr. Barry described how over the three to four years preceding her consultation with me, she had developed the onset of what appeared to be a specific phobia regarding fainting or losing consciousness, either during surgery or when she was

alone, whether in public or private places. Dr. Barry was able to psychologically link these intrusive thoughts to her experience of lying on the street in Dublin in 2014 during which she felt helpless and during which she observed that members of the public failed to help her.

Dr. Barry described how in the years prior to her consultation with me, she had intrusive memories of the conversation held with Professor Michael Solomon, in which she was informed that essentially she had a terminal prognosis (I refer to the consultation of March 2014). Dr. Barry stated that whilst in a hospital environment she felt safe, but outside of her working hospital environment she became preoccupied with the notion that she may collapse and people would not help her, or she otherwise would not make it to a hospital in time…

I informed Dr. Barry at the initial consultation that I believed her diagnosis was consistent with Post-Traumatic Stress Disorder."

In the conclusion section of her report, Dr. Llewellyn expresses the following views:

"Based upon the history provided by Dr. Barry today, my medical opinion is that Dr. Barry has been struggling with Post-Traumatic Stress Disorder. My opinion is that her presentation to psychiatric and psychological services has been hampered by her understandable anxiety that by receiving psychological support this would somehow affect her medical registration. This is a common anxiety and misconception that I see when treating medical professionals that often delays presentation to services for psychological support.

My impression of Dr. Barry is that she is receiving a constellation of complex medical care, here in Brisbane, for her unusual presentation, with which she is compliant.

It is my medical opinion that it is highly likely that she delayed and/or was unable to follow through with legal avenues in the past in light of her disabling psychiatric symptoms."

5. It would appear therefore that the psychiatric symptoms which in Dr. Llewellyn's opinion prevented the plaintiff from prosecuting her claim date back to early 2014.

Order 8 rule 1

6. Order 8 rule 1 in relevant part provides:

"No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons. After the expiration of twelve months, an application to extend time for leave to renew the summons shall be made to the Court. The Court or the Master, as the case may be, if satisfied that reasonable efforts have been made to serve such defendant, or

> for other good reason, may order that the original or concurrent summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons…."

7. Rule 2 provides that where a summons has been renewed on an *ex parte* basis, the defendant shall be at liberty to bring a motion to set aside the renewal. In the present proceedings, it is common case that no attempt to serve the summons during its currency was made and so to obtain a renewal, the plaintiff must satisfy the court that it should be renewed "for other good reason". What constitutes a good reason has been the subject of many judgments but cannot be regarded as a closed category. It will of course depend in large measure on the specific facts of the case.

8. The proper approach to an application to set aside a renewal was considered in *Chambers v. Kenefick* [2007] 3 IR 526. In her judgment, Finlay Geoghegan J., then a judge of the High Court, said (at p. 530):

> "Firstly, the Court should consider is there a good reason to renew the summons. That good reason need not be referable to the service of the summons. Secondly, if the Court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the Court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason the Court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."

9. The authorities show that the reason advanced as a good reason for renewal must explain the failure to serve the summons during its currency. As noted by Peart J. in *Moynahan v. Dairygold Cooperative Society Ltd* [2006] IEHC 318:

> "The Court is required in my view to reach the conclusion not only as to what is the true reason why the summons was not served within the proper time, but also to conclude that that reason justifies the failure to serve. It is in that sense that the word 'good' must be read."

See also the judgment of the Court of Appeal in *Monahan v. Byrne* [2016] IECA 10.

10. That the reason advanced must explain the failure to serve within the initial twelve months is clear from other judgments including that of Laffoy J. in *O'Reilly v. Northern Telecom (Ireland) Ltd* [1999] 1 IR 214 where she observed (at p. 218):

> "The Plaintiff has not established any good reason for his failure to serve the summons within the year prescribed in Order 8, Rule 1. His explanation that he feared he would jeopardise his position with the Defendant if he instituted proceedings rings hollow. In any event, if an excuse of that nature was

countenanced, the time restrictions imposed by the Statute of Limitations, 1957 could easily be set at nought."

In *Lawless v. Beacon Hospital* [2018] IEHC 736, another medical negligence action, Binchy J. set aside the renewal noting (at p. 21):

> "…the plaintiff has not advanced any good reason as to why the personal injuries summons was not served during the lifetime of the summons."

11. Many of the recent authorities lay emphasis on the court's reduced tolerance of delay, having regard to the State's obligations, not only under the Constitution but also the European Convention on Human Rights, to ensure that parties to litigation obtain a fair trial within a reasonable time. Several judgments have emphasised the fact that the policy concerning renewal under O.8 r.1 is to an extent at odds with the Statute of Limitations and the public interest in the finality of litigation – see for example *Moloney v Lacy Building and Civil Engineering Ltd* [2010] 4 IR 417.

Further, it is in general not permissible to issue a summons and not serve it while it remains valid in the hope or expectation that some future event may occur to warrant the pursuit of the proceedings – see *Darjohn Developments* v. IBRC [2016] IEHC 535.

Discussion

12. As noted above, the reason advanced at the ex parte stage for renewal was that the plaintiff had only become aware recently that her injuries were more debilitating than she first thought. Mr. Boylan avers that the swelling and discomfort in the plaintiff's left leg had progressively worsened over the past twelve months, that is to say in the twelve months prior to April 2018 when the affidavit was sworn. This would appear to suggest that the earliest point in time at which the plaintiff considered that she might now pursue her claim was in or about April of 2017 but of course the summons had already expired on the 10th of December, 2016, some four months earlier.

13. It seems clear therefore that the reason advanced initially for seeking renewal of the summons is entirely unrelated to the failure to serve the summons while it remained in force. There is accordingly no explanation why the summons was not served during the initial twelve months other than it might be inferred that during that period, the plaintiff did not consider her injuries to be serious enough to warrant pursuing the claim. If that were to be the true reason, it could not be a good one. As matters stood at the ex parte stage, the plaintiff failed to explain why the summons was not served on or before the 10th of December, 2016 and if that were the only reason now advanced, the defendants' applications would have to succeed.

14. However, the situation has changed significantly by the introduction of Dr. Llewellyn's report. That report was not available at the time of the original *ex parte* application and the court must consider these applications now in the light of all the available evidence. This is a *de novo* consideration of the issue and not a review of whether the *ex parte* application was correctly granted.

15. The defendants, with some justification, criticised the fact that the reason now advanced in the light of this report is contradictory to the reason originally advanced, which is still relied upon. Counsel for the defendants submitted that the court should be sceptical of this new reason because it was not previously referred to and the suggestion that the plaintiff was suffering from a psychiatric handicap which prevented her from pursuing the claim is at odds with the suggestion that she decided to pursue it because her symptoms got worse. I think up to a point this is a valid criticism.

16. However, on the other hand it seems to me that I cannot ignore the un-contradicted expert opinion of Dr. Llewellyn. It is clearly not something which was created after the event for the purposes of this application. The plaintiff had attended Dr. Llewellyn for the first time one week before she instructed Mr. Boylan. Counsel for the plaintiff suggests that these events are clearly connected and are consistent with the plaintiff's inability to progress the matter until she got psychiatric help.

17. Unlike the first reason proffered, Dr. Llewellyn's opinion does in fact explain the failure to serve the proceedings within the twelve months. The plaintiff's psychiatric issues commenced in early 2014 and she continued to be affected by them right throughout the currency of the summons. Although she was able to instruct solicitors to issue the proceedings, she was, as Dr. Llewellyn puts it, unable to "follow through" as a result of her psychiatric symptoms. That in my view is a good reason which explains the failure to serve the summons.

18. That being so, I must now turn to considering the balance of hardship between the parties if the summons is, or is not, renewed. First, from the plaintiff's perspective, if the renewal is set aside the plaintiff will lose the benefit of her cause of action as it is now likely statute barred. Even assuming that the cause of action did not accrue in December 2013 but rather in July 2014, her alleged "date of knowledge", the limitation period would have expired in June 2016.

19. The plaintiff has suffered, on her case, what are serious injuries which may expose her to a degree of life long pain and suffering, disruption of her life as it was before the events complained of and the loss of her career as a surgeon. These are, on any view, very serious matters. As against that, both defendants say that they are significantly prejudiced by the passage of time and the long delay between the events in issue and the service of the summons. That complaint is exacerbated by the fact that the defendants say that they had no prior notice of the claim before the receipt of the summons in April 2018.

20. The plaintiff disputes this and points to the correspondence with the first defendant and the email exchange between B.V. Hoey & Co. and the State Claims Agency in early December 2015 when the plaintiff's then solicitors were seeking confirmation of the correct title of the hospital. The solicitors identified the plaintiff as the patient concerned and the plaintiff therefore argues that the defendants ought to have anticipated a claim at that stage and cannot complain that they were taken by surprise by the summons.

21. While it might be true to say that the correspondence could be taken as an indication that some claim of an unspecified nature might be made against the defendants at some time in the future, I cannot accept that in any realistic sense this put the defendants on notice of the claim that ultimately transpired or could have justified the time and expense of investigating an unspecified claim that might never arise. I think it is somewhat unreal to suggest that the first defendant or the hospital, through the auspices of the State Claims Agency, should at that point in time set about a full investigation of the matter and interview every member of staff who may have, for any reason, had contact with the plaintiff. I cannot see how a meaningful investigation could be conducted when the defendants had no idea what the complaint was.

22. I am therefore satisfied that the defendants have, to an extent, been prejudiced by the delay that has occurred. However, I have to bear in mind that medical negligence cases like this, more often than not, turn largely on the medical notes and the opinions of medical experts based on those notes. It might thus be said that in the particular context of this class of case, prejudicial delay may to a significant extent be ameliorated by the availability of comprehensive contemporaneous notes.

23. The fourth defendant points to the fact that the plaintiff in her summons places specific reliance on conversations had with the hospital's medical staff, which are undocumented in the notes. Insofar as reliance is placed on those conversations therefore, I accept that the defendants will to a degree be handicapped. On the other hand, the plaintiff would have been within her rights to serve the summons at any time up to the 10th of December, 2016 when three years had already elapsed from the events complained of. In the event, the summons was not actually served until sixteen months later.

24. While recollections will disimprove with the passage of time, it is not immediately clear to what extent the defendants are worse off by having to investigate matters, including the recollection of witnesses, four years and four months later as against three years later. One suspects that most doctors being asked to recount interactions with a patient three years earlier would be largely, if not entirely, reliant on their notes as they equally would if asked the same question about events four years and four months earlier.

25. Whilst I accept therefore that there must be some element of prejudice arising by virtue of the plaintiff's delays in this case, I do not think I could conclude that this prejudice outweighs the prejudice that would be suffered by the plaintiff if the renewal is set aside. I am therefore of the view that the balance of hardship lies in favour of the plaintiff and that the interests of justice accordingly require refusing these applications.