THE HIGH COURT

[2024] IEHC 173

[Record No. 2022/2231P]

BETWEEN

LORRAINE KIELTHY

PLAINTIFF

AND

COOMBE WOMEN AND INFANTS UNIVERSITY HOSPITAL

DEFENDANT

JUDGMENT of Ms Justice Denise Brett delivered on the 19th day of March 2024.

Background

1. By notice of motion dated 25 July 2023 the defendant Hospital sought an order pursuant to Order 25, r.1 of the Rules of the Superior Courts directing *"the following points of law [be tried] as preliminary issues"*, namely: that the plaintiff's claim was barred pursuant to the Statute of Limitations Act 1957 ('*the 1957 Act*') and the Statute of Limitations (Amendment) Act, 1991 ('*the 1991 Act*') (collectively referred to as "*the Statute*", where relevant) and that the plaintiff's claim to be dismissed on grounds of delay. It was asserted then that facts necessary for the motion could be agreed.

2. The defendant now seeks to amend this notice of motion to seek, pursuant to O.36, r.9(1) R.S.C, an order directing the two issues to be determined *"as preliminary issues by way of oral testimony in advance of the hearing of the trial of the substantive issues"*.

3. The original notice of motion is grounded upon an affidavit of the defendant's solicitors, sworn on 26 July 2023. No further affidavit was sworn by or on behalf of the defendant.

4. The original motion was issued six days after delivery of the Defence, which raised both the Statute and delay as preliminary issues, and before the Plaintiff filed her Reply thereto.

5. The substantive proceedings arise out of an injury which the plaintiff sustained during the birth of her third child on 19 March 1995. The Personal Injuries Summons was issued on the 07 June 2022, 27 years later, such that, on their face, the proceedings appear to be outside their relevant limitation period and are, in any event, of some considerable vintage.

6. Other than pleading the two preliminary issues, the Defence simply put the Plaintiff on full proof. It does not further particularise the preliminary issues nor assert any positive pleas in defence of the action.

7. The substantive trial of the proceedings has been specially fixed for October 2024, for two weeks.

8. The Reply dated 5th of September 2023 denies that the action is statute barred and pleads that the plaintiff instituted the proceedings within two years of her 'date of knowledge'

as defined in the 1991 Act and alleges concealment by the defendant such as to amount to estoppel "*in circumstances where the defendant failed and neglected to advise the plaintiff of the nature and circumstances of the injury inflicted. In particular, the defendant:*

(a) concealed the true nature and circumstances of her injury from the plaintiff.

(b) Failed to advise the plaintiff that she had sustained a 3b tear to the perineum.

(c) Advised the plaintiff that she had sustained "a small tear" when that was manifestly untrue.

(d) *Advised the plaintiff that her symptoms of faecal incontinence upon her discharge from the hospital following delivery of her child were attributable to an infection*".

An intention to rely upon the provisions of s.71 of the 1957 Act was also pleaded.

9. Counsel for the defendant, Mr Lucey SC confirmed that the second relief in the motion, in respect of delay, was not being pursued in the motion, albeit it remained open in the Defence for the substantive trial.

10. I did not detect any serious opposition, if any, to the defendant's application to amend its motion and I will so order. Order 36, r.9 R.S.C. came into effect on 01 October 2016 and states:

> *"9. (1) Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time order:*
>
> *(a) that different questions of fact arising therein be tried by different modes of trial;*
>
> *(b) that one or more questions of fact be tried before the others;*
>
> *(c) that one or more issues of fact be tried before any other or others."*

11. The sole question for determination by the Court is whether to direct a separate trial on the Statute issue on oral evidence as a preliminary and determinative matter. Both sides referred to the principles outlined by the Supreme Court (McKechnie J) in *Campion v South Tipperary Co. Co.* [2015] 1 IR 716, at para. 35, as relevant when directing a trial of issues by preliminary hearing, subject to the distinction in this case of requiring oral evidence.

12. In the grounding affidavit, the plaintiff's solicitor averred that "*there should be no reasonable impediment to agreeing the material facts between the parties*" and that "*the questions of law are discreet and can be distilled from the factual matrix of the case*". This can self-evidently no longer be the case, given the application to amend to a preliminary hearing on oral evidence. The affidavit confirms that the defendant had been informed by way of letter dated the 3rd of February 2023 that the plaintiff first gained the requisite knowledge pursuant to Section 2(1) of the 1991 Act "*on receipt of expert opinion on the 30 May 2022*". Evidence on affidavit is not adequate to determine a date of knowledge issue (see: *Coughlan v Minister for Defence* [2020] IECA 53 and *Fennell v Minister for Justice* [2020] IEHC 236).

13. A replying affidavit by the plaintiff's solicitor was sworn on the 13th of September 2023 and addresses each of the points raised by the defendant in its grounding affidavit, and some omissions. It highlights that the defendant knew in advance of drafting its Defence that the plaintiff was pleading a date of knowledge of 30 May 2022, which the defendant had not disputed, and sets out the concealment alleged in respect of the tear suffered by the plaintiff and an incorrect explanation for symptoms at the time.

14. Mr Lucey SC readily accepted the long established case law which confirms that a unitary trial, with all issues being determined in one hearing, is preferable and is the starting

point of any such consideration (see: *Weavering Macro Fixed Income Fund Ltd (In liquidation) v PNC Global Servicing (Europe) Ltd* [2012] 4 IR 681 (High Court, Clarke J.); *Campion v South Tipperary Co. Co.* [2015] 1 IR 716 (Supreme Court, McKechnie J.) ("*Campion*") and, most recently, *O Sullivan v Ireland* [2020] I IR 413 ("*O Sullivan*").

15. He submits however that a separate, discreet trial on a preliminary point can be directed where it can be shown that this would be the best use of court time if a matter is amenable to determination in advance of the trial and would lead to an expeditious determination thereof. He emphasised that, in this case the issue is a net point that could be heard on 'limited evidence' (per Finlay Geoghegan J in *O Sullivan*) and that if the defendant succeeded on the Statute, it would dispose of the entire case and therefore there would be a large saving of time and expense. He suggested a timescale of two days for such a preliminary hearing.

16. Mr Lucey highlighted the judgment in *Elliott v ACC Bank* [2020] IECA 278 (a case on directing trial of a preliminary matter under O. 25 RSC concerning negligence in financial dealings) in which the Court of Appeal upheld the trial of a preliminary issue on oral evidence as "*not unfair*"; and *O Sullivan* (a case on the interpretation of the date of knowledge provisions in the 1991 Act, originally heard as a preliminary issue on oral evidence) as examples where such a preliminary trial on oral evidence had occurred.

17. He referred to the particulars of wrong alleged by the plaintiff in her personal injury summons as covering dates from April 1996 to 2007 to demonstrate that the plaintiff must have known she had a significant injury within that timeframe and before she retained her experts. Such argument would not trespass upon issues to be determined at trial and that any overlap between the evidence required to determine the preliminary issue of the Statute with

obstetric evidence required for liability would differ in emphasis because of their differing purpose.

18. Mr Lucey indicated the defendant was hopeful of relying upon cross examination of the plaintiff only without the need for witnesses on behalf of the defendant for a preliminary trial.

19. Mr Fitzpatrick SC, counsel for the plaintiff, opposed the defendant's application in full, on six different points:

(i) the long established default position that a unitary trial is preferable such that this application constitutes a departure from the default position;

(ii) the norm for a trial of a preliminary point was to do so based upon agreed facts (even if agreed only for the purposes of the application) such that seeking trial of a preliminary issue on oral evidence constituted a double departure from the preferable norm;

(iii) the defendant had not put anything before the court to justify any departure from the norm;

(iv) even in the material which the defendant had put before the court, there were gaps and uncertainties as to exactly what the defendant was asking the court to embark upon;

(v) procedural considerations of the case would lean against the defendant's application; and

(vi) the particular and unusual features of this case would reinforce the default position as preferable and the wisdom outlined in caselaw urging caution in respect of directing trial of any issue as a preliminary hearing.

20. In particular in *Elliott*, insofar as the defendant had relied upon a test for an oral hearing as *"not unfair"* the plaintiff argued this ignored three important issues:

(i) decades of jurisprudence in respect of the trial of preliminary issues;

(ii) countless warnings in the jurisprudence of the need for caution if departing from the default of a unitary trial; and

(iii) caution in respect of a second departure from the norm, in the absence of agreed facts, necessitating an oral hearing.

21. Mr Fitzpatrick's main submission is that the facts in this case are not agreed and are in strong dispute. He relied on the Court of Appeal (Collins J.) decision in *Smith v Coughlan* which reminded that although the court has an inherent jurisdiction to direct a separate trial for a preliminary issue where facts are not agreed, the power is a residual power, *i.e.*, an exception rather than the rule. He asserted that the defendant had not set out any alternative time options and the real timeline cannot become apparent until the plaintiff's evidence has been outlined as that evidence will be relevant to liability and a myriad of different issues not just the Statute but also the additional plea of concealment, set out in the Reply to Defence. Evidence and credibility will be inter-reliant, particularly where witnesses' recollections will be from a significant time ago. The matter, he argues, was now a mixed question of law and fact.

22. Additionally, he reminded, it was only if the defendant was successful in all respects at the preliminary trial that the action would be wholly disposed of. This was by no means a surety such that the trial would proceed in any event.

23. The plaintiff indicated three witnesses would be required on the issue of 'date of knowledge', namely the plaintiff herself and her two expert witnesses, one a colorectal

surgeon and the other an obstetric consultant, who were also the primary witnesses for liability and the evidence will therefore have an overlap and will take some time. Finally, he argued that the possibility of an appeal from the finding on any preliminary issue would defeat the whole point of setting down a preliminary point of law to save in time and costs.

24. I am grateful to both Counsel for their very full and fair presentation of the relevant cases.

Decision

25. Directing trial of issues by way of preliminary hearing is a step not to be taken lightly. Principles applicable to a decision to try points of law at preliminary hearing have been set out by the Supreme Court (McKechnie J.) in *Campion* (at paragraph 35). It must be remembered however that *Campion,* concerned O.25 RSC in the context of *inter alia* misfeasance in public office and not personal injury as is the case here where date of knowledge is the key issue.

26. O. 25 provides for a preliminary trial of a point of law where the underlying facts must be agreed or at least accepted for the purposes of the trial of the preliminary issue. Mixed questions of law and facts which are not agreed are not amenable to such separate, preliminary trial (see *Dempsey v Minister for Education and Science* [2006] IEHC 183). In the Supreme Court (McKechnie J) in *Campion* expressed caution on the dangers in departing from a unitary trial:

> *"30. The caution which I have urged as being appropriate, when deciding whether or not to adopt the preliminary issue process (paras. 21 & 22 supra), stems from litigation experience which shows that, it may be very difficult in some cases to predict in advance of the hearing what facts might be critical in determining the*

issues which they potentially give rise to. The same problem may even exist as to what the established facts mean, either in a primary or secondary sense. Whilst the various procedural tools of pre-trial investigation are designed to eliminate differences in this regard and insofar as possible to eliminate them, nevertheless the evidence of witnesses, even that as anticipated, frequently gives rise to some variations even in the most thoroughly prepared of cases.

31. From another perspective, sometimes the reliefs claimed and the issues of law involved, when discussed at trial, may give rise to the necessity to further explore a factual context which previously might not have been considered, as relevant. Hence, the necessity in order to avoid these difficulties, for fairly well established certainty on the factual situation, before a point of law under the preliminary process, can be safely dealt with. The most frequent example given of the type of issue which confidently can be disposed of in this way, is one arising under the Statute of Limitations (Delaney & McGrath: 3rd Ed., para. 14.13). Even then however such may be problematic, if for example, some controversy exists with regard to a person's date of knowledge. Whilst undoubtedly there are certain issues which appropriately can be disposed of in this way, nonetheless there will be many others which cannot be. Therefore careful consideration must be given to each such issue, as raised." (emphasis added)

27. Similarly, both concurring judgments for the majority of the Supreme Court in *O Sullivan* (Charleton J at paragraphs 64-69 and Finlay Geoghegan J at paragraph 160) cautioned of the dangers of departing from the unitary trial principle. Finlay Geoghegan J continued in respect of the Statute:

"160. ....I also recognise that it may be appropriate sometimes to determine a limitation issue as a preliminary issue. The 1957 Act, inter alia, protects a defendant

against being required to defend a stale claim. In many instances, however, the limitation period is a period from the date of accrual of the cause of action and capable of being established with limited evidence.

161. However, as this appeal demonstrates, where reliance is placed on the later date of knowledge in s.3(1) of the 1991 Act the limitation issue may not be capable of being determined on limited evidence. Any decision to try such a limitation issue in advance of a full hearing requires very careful consideration to decide if it is in the interests of justice."

28. Bearing such wise caution in mind, I find compelling the arguments by the plaintiff that facts have not been agreed; may overlap with facts going to liability; may take some time to hear and, further, that the issue of the Statute of Limitation is not a discrete issue for preliminary determination in this case given that concealment and s. 71 of the 1957 Act are also alleged. In particular, in my view, the allegations of concealment, fraud and estoppel by conduct are inextricably entangled with the date of knowledge issue and would require full adversarial examination to determine the facts.

29. While the nature and purpose of a limitation period, whether under the 1957 or 1991 Acts, is to protect a defendant from the need to defend a stale claim and, in appropriate cases, a discrete preliminary trial of the Statute issue can fully dispose of the plaintiff's claim, this is not such an appropriate case.

30. I do not see that setting the matter down for preliminary hearing at this time will lead to a saving in time and costs, being the point of such setting down. The likelihood of an appeal adds to my concern in this regard. By way of salutary tale, the trial of the preliminary point on 'date of knowledge' in *O Sullivan* was only finally resolved some 8 years after the

notice of motion giving rise to the preliminary hearing, over 10 years after the proceedings had issued and 13 years since the wrong complained of occurred, following appeal to both the Court of Appeal and Supreme Courts, with majority judgments in both.

31. In *O Sullivan*, the Supreme Court (Finlay Geoghegan J.) also set out a process appropriate to ground a consideration of 'date of knowledge' under the 1991 Act:

> *"100. I would suggest, therefore, in a personal injury claim where a defendant pleads by way of defence that a claim is statute barred and the plaintiff contends for a 'date of knowledge', in the sense of actual knowledge, not earlier than a date within two years of the date of issue of the proceedings, a defendant should then make clear to the court whether or not it is contending for an earlier date of constructive knowledge in application of s.2(2)(a) or (b) of the 1991 Act. The first factual issue to be determined by the court should probably be the date upon which the plaintiff first had actual knowledge of the cumulative relevant facts in paras. (a)–(e) of s.2(1) of the 1991 Act. If the date of actual knowledge is outside of the two year period, then the claim is statute barred. There was no dispute in this appeal that the onus rests on the plaintiff to satisfy the court that the date of first actual knowledge of the facts specified in s.2(1) of the 1991 Act, as amended, is not earlier than 2 years prior to the date of issue of the summons, in accordance with the judgment in Farrell v. Ryan [2016] IECA 281.*
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> *101. If, however, the plaintiff's date of first actual knowledge of the relevant facts set out in s.2(1)(a)-(e) is within 2 years of the date of issue of the proceedings and the defendant contends that, in accordance with s.2(2)(a) or (b), the plaintiff must be imputed to have constructive knowledge of all the relevant facts at an earlier date, then the court will have to continue and determine that issue."*

32. A general outline of the defendant's position, and in particular an indication of the potential dates said to constitute a constructive date of knowledge, would have been of considerable assistance to the court in its consideration of whether or not to direct a separate, preliminary trial. I don't believe that a defendant can seek a preliminary hearing with a view to seeing what may arise on cross examination. Rather a defendant should first lay some foundation, however simple, to demonstrate such parameters for a preliminary hearing, showing how such hearing was capable of determining the action *in toto*, saving time and costs on the basis of the Statute being a complete defence, particularly where a defendant has available to it the salient medical records of the plaintiff in the intervening time.

33. Ultimately, in my view, the defendant has not satisfied the prerequisites for a preliminary issue hearing. There is too much evidence yet to be elicited to make a consideration of the plaintiff's date of knowledge, or any concealment arising, suitable for hearing as a preliminary issue.

34. In the premises, I do not see that it would be in the interests of justice to direct a preliminary trial in the circumstances of this case, and I dismiss the defendant's amended motion. However, in doing so, I emphasise that nothing in this judgment should be taken as tying the hands of the trial judge at a future date, where, on more fulsome details becoming clear, he or she may determine it appropriate to determine all issues under the Statute as a discrete issue.

The defendant has been unsuccessful in its application. Accordingly, the usual rule that costs follow the event should apply which would result in a costs order against it in favour of the plaintiff. However, if the defendant wishes to contend otherwise, I give leave to file and serve a short-written submission – not exceeding 1000 words - within 14 days of the delivery of this judgment in the event of which I would allow the respondent 14 days to file and serve a response, similarly so limited.