

Neutral Citation No: [2013] NIQB 123

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 28/11/13

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

NEIL McARDLE

Plaintiff;

-and-

JASON MARMION

Defendant.

GILLEN J

Application

[1] This is an application by the defendant for an Order pursuant to Order 33 Rule 3 of the Rules of the Court of Judicature (NI) 1980 that the issue as to whether the plaintiff's claim is statute barred having been issued outside the time limits specified in the Limitation (Northern Ireland) Order 1989 ("the 1989 Order") be determined as a preliminary issue. Both parties accepted that this should be determined as preliminary issue and I therefore proceeded to hear the matter.

Background facts

[2] The plaintiff, who was born on 18 June 1977, has brought a claim for damages for personal injury, loss and damage by reason of the negligence of the defendant arising out of the driving and control of a motorcycle on the Concession Road, Crossmaglen on 2 April 1995. It is the plaintiff's contention that he was a pillion passenger on a motorcycle being driven by the defendant when the defendant's cycle crossed to the wrong side of the road and collided with an oncoming vehicle driven by Thomas Fee. The plaintiff has sustained what are alleged to be severe

injuries and it is contended on his behalf that he can give no relevant instructions in relation to the actual cause of the accident.

[3] An affidavit from Stephen Begley, the solicitor in charge of the proceedings on behalf of the plaintiff dated 13 June 2013, inter alia, makes the following points:

- The plaintiff had instructed a different firm of solicitors to act on his behalf originally.
- A letter of claim was sent by that firm to the defendant on 26 May 1995.
- Papers were transferred to Stephen Begley and Co. on 18 November 1997 and on 10 December 1997.
- At that time Mr Begley's former partner understood that the defendant's insurers were not providing an indemnity to him and it was not clear whether or not the matter would be covered by the Motors Insurance Bureau (MIB).
- The relevant limitation period was due to expire on 18 June 1998.
- A writ of summons was issued on 27 March 1998. The plaintiff also issued proceedings against Kieran Daly and the Department of the Environment ("the Department") for Northern Ireland on the basis that the case being made by the defendant in this action was that the accident may have been caused by a trench on the highway opened and reinstated by Mr Daly in circumstances where the Department was responsible for the maintenance of the highway under the provisions of Article 8 of the Roads (Northern Ireland) Order 1980.
- The defendant in this action had obtained expert engineering reports from Mr Duffy, engineering consultant, dated 16 May 1995 and Wood and Associates, consulting engineers and scientists, dated December 1995. Both of these reports have been disclosed in the current proceedings.
- No notice of these proceedings was served on MIB as is required under the relevant Agreements until 9 September 1999 at which stage the MIB took issue with the timing of the notice.
- The writ was not served in person on the defendant as is required in the jurisdiction of the Republic of Ireland.
- When directions were received from senior counsel on 4 April 2012, the advice was that the only remedy open to the plaintiff was to reconstitute the action by discontinuing proceedings against the defendant in the main action and to issue fresh proceedings against him whilst simultaneously ensuring

that notice of the new proceedings were served on the MIB and the insurers who have now taken an interest in the matter and instructed the defendant's current solicitors.

- The new writ was issued on 25 September 2012.
- The action was subsequently listed for trial on 18 November 2013.

[4] The current writ was issued on 25 September 2012, a period of more than 17 years after the accident and more than 14 years after the primary limitation period has expired.

[5] The affidavit of Mr Begley, eight pages in length extending over eleven very detailed paragraphs, attempts to explain the delay between his firm being instructed in the case in November 1997 and the present date. Suffice to say that his explanation for the delay is wholly unsatisfactory and without merit. Not only has the case been delayed but the time limits for directions given by this court have been ignored on a number of occasions. He has allowed periods of several years at a time to elapse between steps being taken.

The statutory context

[6] Under the terms of Article 7 of the 1989 Order the basic limitation period of three years for personal injuries is preserved. Time should begin to run from either the date when the cause of action accrued or the plaintiff's date of knowledge.

[7] A court may allow an action to proceed notwithstanding the expiry of the relevant period of limitation, by overriding the prescribed time limits. The circumstances in which the court may exercise its discretion to disapply the time limits are contained in Article 50 of the 1989 Order which provides:

“(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—

- (a) the provisions of Article 7, 8 or 9 prejudice the plaintiff or any person whom he represents; and
- (b) any decision of the court under this paragraph would prejudice the defendant or any person whom he represents,

the court may direct that those provisions are not to apply to the action, or are not to apply to any specified cause of action to which the action relates.

- (4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to—
- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
 - (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or, as the case may be, 9;
 - (c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
 - (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
 - (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
 - (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

Principles governing the application of the 1989 Order

[8] The principles governing the manner in which this Order is to be applied and in particular the exercise of the discretion under Article 50 are now well-trammeled in this court, for example in Walker v Stewart [2009] NIJB 292, McFarland v Gordon

[2010] NIQB 84 and Taylor v McConville [2009] NIQB 22. Accordingly I need only make brief reference to them in this case. They include:

- The discretion under Article 50 is expressed in the widest terms.
- The trial judge must have regard to all the circumstances of the case and not merely the six matters set out above. The exercise of the court's discretion to disapply the time limits is unfettered.
- The burden of proof in an application under Article 50 rests on the plaintiff.
- Ordinarily the court should not distinguish between the litigant himself and his advisors. That said, the prejudice the plaintiff may suffer if the limitation is not disappplied may be reduced by his having a cause of action in negligence against his solicitors.
- Discretion can in an appropriate case be exercised in the plaintiff's favour even where the delay is substantial, but in such cases careful consideration must be given to the ability of the court to hold a fair trial. (Buck v English Electric Company Limited [1977] 1 WLR 806). Even 5 or 6 years delay raises a presumption of prejudice to a defendant but this presumption is rebuttable. As a general rule however the longer the delay after the occurrence of the matters giving rise to the cause of action, the more likely that the balance of prejudice will swing against allowing the action to proceed by disapplying the limitation period.

[9] However what is at the heart of Article 50 is whether it would be equitable to allow an action to proceed, and in fairness and justice, the obligation of a tortfeasor to pay damages should only be removed if the passage of time has significantly diminished his opportunity to defend himself. The basic question therefore to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay in the commencement. (See Cain v Francis [2009] 3 WLR 551).

Applying the principles to the present case

The length of, and the reasons for, the delay on the part of the plaintiff

[10] I accept entirely the submission by Mr Dunlop on behalf of the defendant that the reasons for the delay in the commencement of these proceedings, being 17 years and 5 months from the date when plaintiff's cause of action accrued, is without justification. As counsel contended, the fact of the matter is the writ was only discontinued against the defendant in September 2012 because the original notice to MIB was not served until 9 September 1999. It was therefore 13 years until the defects in the first proceedings were identified. Examining the time line provided

by the plaintiff's solicitors there are gaps of 2-3 years at a time when nothing of substance was done. Even after the notice of intention to proceed was served on 8 November 2007, it took nearly five years before the plaintiff recognised that the proceedings against the first defendant were flawed and fresh proceedings commenced. I am satisfied that the inordinate delay in this matter lies virtually entirely at the feet of his solicitor who, in fairness to him, has not seriously attempted to deny his culpability.

The extent to which having regard to delay the evidence adduced or likely to be adduced by the plaintiff or the defendant is likely to be less cogent

[11] It is important in a case such as this not to approach the matter with an air of ruminative dissonance whereby, suffused with indignation at the inordinate delay by a professional adviser, the court loses sight of the decision on fairness and justice. The fact of the matter is that this is a most unusual case where the prejudicial effects of the delay have been significantly diminished by virtue of a number of factors unlikely to be found in cases of similar vintage. These include:

- The police attended at the scene of the accident and had taken contemporaneous statements from witnesses at the scene. A full police report is available containing those several police statements of witnesses and the plaintiff accepts that these statements may be admitted at the hearing without the necessity of formal proof. This factor meets the reproach by the defendant that the witnesses are outside the jurisdiction and cannot be compelled to attend.
- A letter of claim was sent on behalf of the plaintiff to the defendant on 26 May 1995 and engineers were obtained by the defendant with reports dated 16 May 1995 and December 1995. These reports have been disclosed in the proceedings as mentioned above. Unusually therefore the defendant has retained two engineers already which deal with the issue of the reinstated trench in the highway which seems to be the essence of the defendant's defence.
- The defendant's insurers have settled a claim arising out of this incident brought by Mr Thomas Fee whose vehicle was struck by the motorcycle being driven by the defendant. They thus have had an opportunity to explore and investigate this matter.
- It is also a factor that if the defendant was to succeed in this application and the plaintiff was to succeed against Daly and the Department (where proceedings were issued in time), these parties would have 2 years to seek contribution against the defendant. However this is not a factor that has carried any material weight in my overall conclusion.

[12] Balanced against this of course must be the following points made by Mr Dunlop on behalf of the defendant:

- The defendant's solicitor has written to the parties named in the police report and a number of witnesses have not responded to the correspondence. They obviously cannot be compelled to attend the trial as they reside outside the United Kingdom.
- The defendant has limited recollection of the accident with the passage of time.
- The engineers' ability to give evidence is dependent on their own recollection of the observations made by them at the scene of the accident. Moreover the report from Wood Associates is based on estimates provided by Mr Patrick Kelly who did not provide a police statement and who has not been traced by the defendant in the current proceedings.
- The engineering evidence supporting the proposition that the Road Service contributed to the defendant's loss of control relies on matters such as the speed of the defendant, the dimensions of the trench and the repair, the impact the repair would have had on the motorcycle and the road conditions. Much of this will depend on empirical evidence and the subjective opinion of the various witnesses who were present. It is inevitable that 17 years will have eroded the memory of those witnesses to some extent.
- The fact that the accident occurred in Northern Ireland has given rise to the claim for an indemnity from the insurers Aviva due to the EC extension to the policy. Unfortunately, due to the long delay in the case being pursued against Aviva, the Norwich Union file (in the Republic of Ireland) has been destroyed which prevents:
 - (a) Full analysis of the insurance position as it developed.
 - (b) The records of claim investigation conducted in relation to the related case brought by the driver of the vehicle Mr Fee with whom the defendant's motorcycle collided.

The conduct of the defendant after the cause action arose

[13] I consider the defendant to have been blameless in the conduct of this case after the cause of action arose.

The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages

[14] I have already indicated that I do not consider the plaintiff's solicitor has acted with either promptitude or application in this matter. That the plaintiff may have been blameless in all this does not repair the deficit and such unjustified delay is to be visited on the plaintiff.

The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice

[15] The plaintiff has carried out medical investigations of the injuries suffered by the plaintiff. I am also informed that the aspect of general and special damages have been fully investigated on behalf of the Department from an insurance company/defence perspective.

[16] Mr Dunlop argued that the ability of the defendant to investigate what employment the plaintiff has had since the date of the accident or what efforts he has made to obtain an employer are all now hampered by the delay. However the onus of proof will lie on the plaintiff and if he does not establish on the balance probabilities the necessary evidence to show what work he has been doing or has attempted to carry out then it is he who will suffer.

Conclusion

[17] I have asked myself the basic question of whether it is fair and just in all the circumstances, bearing in mind that the onus of proof rests on the plaintiff, to expect the defendant to meet the claim on the merits in this case notwithstanding the delay in commencement. To what extent has the defendant been disadvantaged in investigation of the claims and/or the assembly of evidence in respect of the issue of both liability and quantum? I have also looked at the reasons for the delay. Whilst it is a fine decision, I have come to the conclusion that by virtue essentially of the highly unusual circumstance where, notwithstanding the inexcusable and lengthy delay on the part of the plaintiff's solicitor, there exists such a wealth of evidence gathered close to the accident itself in the overarching narrative of events, it is only fair and just that I should conclude the plaintiff has discharged the burden of satisfying me on all the available evidence that it would be equitable to disapply the limitation period in this case. In short I consider that the passage of time has not in these circumstances significantly diminished the opportunity of the defendant to defend himself. I therefore allow the claim to proceed. I dismiss the preliminary issue raised by the defendant. I will invite the submissions of counsel on the questions of costs.