Neutral Citation No. (2002) NICA 36

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

Ref:	CARC3736
Delivered:	02/08/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN

PAUL HEATLEY

(Plaintiff) Appellant

and

WILLIAM DAVIES

(Defendant) Respondent

_____

Before: Carswell LCJ, Girvan and Weatherup JJ

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CARSWELL LCJ

[1] This is an appeal from an order made by Campbell LJ on 12 April 2000, whereby on the trial of a preliminary issue in the action he ruled that the appellant's claim was barred by limitation and gave judgment in favour of the respondent.

[2] The appellant, who was born on 28 April 1969, is now 33 years of age. In this action, which was commenced by writ of summons issued on 10 February 1993 (and amended on 14 September 1994 by the substitution of the respondent for the defendants originally named) he claims damages against the respondent as executor of Dr Donald Davies, a general medical practitioner who died in 1988. He claims that Dr Davies was negligent in the provision to him of medical care, treatment and advice over a period of a number of years commencing in or about 1978. The respondent in his defence denied negligence on the part of Dr Davies and pleaded that the appellant's causes of action, if any, are barred by the lapse of time and the provisions of the Limitation (Northern Ireland) Order 1989 (the 1989 Order).

[3] When the appellant was about nine years of age he complained of pains in his legs and his mother took him to see Dr Davies, their family GP. Dr Davies examined him and told the appellant and his mother that the pains

were "growing pains". On several occasions during his schooldays the appellant returned to see Dr Davies with the same complaint, but each time he was advised by the doctor that nothing could be done and that the pains would go away in time. The appellant gave up playing football and found as he grew up that the pains affected his working and social life, but he adjusted to them and took no further action to determine their aetiology. By the time he reached the age of eighteen years they were still affecting him, but the appellant averred in his evidence to the judge that it did not occur to him that they might not be properly attributable by then to growing pains, for he had become so accustomed since childhood to their presence.

[4] In December 1989, when he was aged 20, the appellant suffered an episode of acute and immobilising pain in his leg, which he thought was caused by cartilage trouble. An arthroscopy was carried out in hospital on 14 August 1990, when a large loose fragment of bone and cartilage was removed from his right knee. The appellant was informed that the diagnosis of the condition in his knees, but especially the right knee, was osteochondritis dissecans. In this condition, which usually occurs in young men in their teens, a fragment of bone and cartilage separates from the outer aspect of the medial femoral condyle. The cause is not certain: it may be due to injury or to an inherited abnormality in the knee joint. There is a significant risk that the appellant will develop osteoarthritis, particularly in the right knee.

[5] The appellant was subsequently seen by Mr James Nixon FRCS on 23 July 1992, and according to his evidence he first learned at this consultation that if he had been referred at an earlier stage to an orthopaedic consultant it was possible that the risk of osteoarthritis could have been reduced. Mr Nixon expressed an opinion to that effect in his medical report dated 28 August 1992 furnished to the appellant's solicitors and enlarged on this to some extent in a further letter to the solicitors dated 2 February 1998.

[6] By Article 7 of the 1989 Order the primary limitation period for actions for damages for negligence, where the damages claimed consist of or include damages for personal injuries, is three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured. The date of knowledge is prescribed by Article 7(6):

> "(6) Subject to paragraph (7), in this Article and in Article 9, references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts –
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> (a) that the injury in question was significant; and

(b) 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; and

(c) the identity of the defendant; and

(d) 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."

This provision is supplemented by Article 7(8) and (9):

"(8) For the purposes of paragraph (6) an injury is significant if the person whose date knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(9) For the purposes of paragraph (6) 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,

but a person is not to be fixed under this paragraph 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."

The effect of Articles 47 and 48 is that where the person injured is an infant at the time of the accident, the limitation period does not expire until three years after he attains his majority.

[7] The judge held that the appellant's date of knowledge for the purpose of the 1989 Order was 14 August 1990. He did not have actual knowledge until 1992, when he consulted Mr Nixon, of the material facts that Dr Davies' diagnosis was incorrect and that if he had advised him correctly some remedial action could have been taken. When he was informed in 1990, however, that the condition from which he was suffering was osteochondritis dissecans he might reasonably have been expected to seek medical advice, which would have enabled him to ascertain those material facts – in the convenient shorthand phrase, he then had constructive knowledge of them. The judge was, however, under the impression that the writ of summons had been issued on 10 February 1994, the date opened by the appellant's counsel in presenting the case to him, whereas it was in fact issued on 10 February 1993. Going on the incorrect date he held that the action had been commenced out of time. He then considered whether to extend the limitation period under Article 50 of the 1989 Order and decided in the exercise of his discretion that it was not a proper case in which to do so. He therefore concluded that the action had been barred by the operation of the limitation provisions and gave judgment for the respondent.

[8] On the appeal before us Mr BC Kennedy QC argued on behalf of the appellant that on the judge's finding concerning the date of knowledge he ought to have concluded that the action had been commenced within the limitation period of three years from that date and so the claim was not barred. Mr Morrow QC argued on behalf of the respondent that (a) the proceedings had not been commenced against the respondent until 14 September 1994, when he was substituted as a defendant to the action (b) the appellant's date of knowledge was not later than the time when he attained his eighteenth birthday. Mr Kennedy contended in response that the date of knowledge should not be earlier than 1990 and could well be fixed as 1992, when the appellant saw Mr Nixon. He submitted in the alternative that if the date of knowledge was earlier than 1990 the judge should have exercised his discretion to extend the limitation period under Article 50.

[9] The defendants originally named in the writ of summons as issued in 1993 were the Eastern Health and Social Services Board and Dr Paul R Corry of the Crumlin Road Health Centre. The appellant's solicitors subsequently decided that these were not the correct parties and on 2 August 1994 obtained an order from the master that the respondent be substituted as sole defendant in their place. The title of the writ of summons was amended pursuant to this order on 14 September 1994. By a further order dated 15 September 1994 the

master gave liberty to amend the indorsement on the writ of summons and the statement of claim to reflect the change of parties.

[10] The judge held, in reliance on Article 73 of the 1989 Order and RSC (NI) Order 20, rule 5 that the amendment whereby the respondent was substituted for the original defendants took effect from the date when the writ of summons was issued. The material portions of Article 73 are as follows:

> "(1) For the purposes of this Order, any new claim made in the course of any action is to be treated as a separate action and as having been commenced –
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> (a) if it is a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and
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> (b) in relation to any other new claim, on the same date as the original action.
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> (2) Except as provided by Article 50, by rules of court, or by county court rules, neither the High Court nor any county court may allow a new claim within paragraph (1)(b), other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Order which would affect a new action to enforce that claim.
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> For the purposes of this paragraph, a claim is an original set-off or an original counterclaim if it is a claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action.
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> (3) Rules of court and county court rules may provide for allowing a new claim to which paragraph (2) applies to be made as there mentioned, but only if the conditions specified in paragraph (4) are satisfied, and subject to any further restrictions the rules may impose.
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> (4) The conditions referred to in paragraph (3) are the following –

(a) as respects a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and

(b) as respects a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(5) The addition or substitution of a new party is not to be treated for the purposes of paragraph (4)(b) as necessary for the determination of the original action unless either –

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action."

By the definition provision in Article 73(8) the phrase "new claim" includes any claim involving the addition or substitution of a new party. The respondent was substituted by the master's order of 2 August 1994, pursuant to the terms of RSC (NI) Order 20, rule 5. We are satisfied that the amendment to substitute the respondent for the previously named defendants comes within the terms of Article 73(4)(*b*) and (5)(*b*). The judge was accordingly correct to hold that the amendment related back to the date of issue of the writ of summons.

[11] The consequence of that conclusion is that if the appellant's date of knowledge was, as the judge held, 14 August 1990 or any date not earlier than 10 February 1990, his claim is not barred by limitation. The major issue on this appeal accordingly was whether the date adopted by the judge was correct.

[12] It can be far from straightforward in medical negligence cases to determine when the injury has become significant within the meaning of Article 7(8) of the 1989 Order. The "injury" in this case could be said to be either the continuation of the pains in the appellant's legs, or alternatively the worsening of his condition of osteochondritis dissecans beyond the point at which it could still be improved or its progress by appropriate treatment. The date of his knowledge that the injury was significant would obviously vary, depending on which definition was adopted.

[13] For present purposes it is not necessary to resolve this issue, for in order for a person to have the requisite knowledge it is necessary under Article 7(6)(*b*) that he knows that the injury is attributable to the act or omission which is alleged to constitute negligence, viz that Dr Davies failed to diagnose the appellant's condition or refer him to a consultant. The degree of certainty required to constitute knowledge in this context was defined by Lord Donaldson MR in *Halford v Brookes* [1991] 3 All ER 559 at 573:

> "The word has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start any proceedings. In this context `knowledge' clearly does not mean `know for certain and beyond possibility of contradiction'. It does, however, mean `know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence'."

The question to be asked accordingly is when the appellant knew or had means of knowledge that the injury, whether it be the continuation of his leg pains or the worsening of the osteochondritis dissecans to a point where it could not be helped by surgery, was attributable to Dr Davies' failure to diagnose the correct condition or refer him to a consultant for further advice or investigation.

[14] The judge found that the appellant did not have actual knowledge of this until he saw Mr Nixon in July 1992. He then went on to hold, applying the principles laid down in *Forbes v Wandsworth Health Authority* [1997] QB 402, that he had obtained constructive knowledge when he learned at the time of his operation on 14 August 1990 that he was suffering from osteochondritis dissecans. He said at page 9 of his judgment that a reasonable person, learning that the earlier diagnosis made repeatedly by Dr Davies was wrong, might reasonably have been expected to inquire whether it would have made any difference if he had made a correct diagnosis.

[15] Mr Morrow contended on behalf of the respondent, on the other hand, that by the time he reached his eighteenth birthday the appellant had sufficient knowledge that something must be wrong with Dr Davies' diagnosis to constitute actual knowledge. Alternatively, he knew enough to make it reasonable for him to institute further inquiries into the cause of his knee condition, from which he would have been likely to learn that a correct diagnosis could have led to his receiving corrective treatment at a time when it would have been of avail. He had finished growing by that date and still his knee pains persisted, which was quite enough to put him on notice that Dr Davies' diagnosis must have been wrong.

[16] We consider that the judge's conclusion on the appellant's date of actual knowledge was correct. He found that the appellant did not have actual knowledge until 1992, accepting his evidence that he thought that the pain in his knee in 1989 was a cartilage problem and that it did not occur to him that Dr Davies could have misdiagnosed the condition all along. This is in our view an entirely sustainable conclusion on the evidence.

[17] He then went on to hold that the date at which the appellant should have put inquiries in train was 14 August 1990, when he was informed that he was suffering from osteochondritis dissecans. This again is a sustainable view of the case, with which we agree. It is clear from the case-law that once the appellant knew that much, he was in possession of the requisite knowledge to start time running, even though he may not have realised at that stage that Dr Davies could be regarded as having been negligent in failing to make the correct diagnosis or refer the appellant to a specialist for advice and investigation. Once he knew that the condition was osteochondritis dissecans and not "growing pains", he knew that Dr Davies had been wrong in his diagnosis. There is not a clear finding whether the appellant knew in August 1990 that the condition had been osteochondritis dissecans all along, but it appears implicit in the judgment that he did so appreciate at that time. The most that can be said in favour of an earlier date of knowledge is that when the appellant changed on 1 July 1987 to a different general practitioner he might then have asked his new doctor about the knee pains from which he was still suffering. This was not pursued in evidence with the appellant, who was merely asked if he accepted that he changed doctors on that date. We should not be prepared on that ground to reverse the judge's conclusion that the date of constructive knowledge, and therefore the appellant's date of knowledge for the purposes of the 1989 Order, was at earliest 14 August 1990. We say "at earliest", because if the exact date were critical it might have been necessary to determine whether some time should be allowed to the appellant after the operation on 14 August for obtaining advice. It is not necessary, because even if one takes the date as 14 August 1990 the limitation period of three years from the appellant's date of knowledge had not expired when the proceedings were commenced.

[18] This conclusion is sufficient to determine the appeal and the question of extending the time under Article 50 of the 1989 Order is not now material. The appeal will accordingly be allowed and the preliminary issue decided in favour of the appellant.