**Neutral Citation No.: [2009] NIQB 22** | *Ref:* **GIL7431**

*Judgment: approved by the Court for handing down* | *Delivered:* **11-03-09**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**PAUL TAYLOR**

**Plaintiff;**

**-and-**

**PAUL McCONVILLE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF NEIL McCONVILLE (DECEASED)**

**Defendant.**

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**GILLEN J**

## Application

[1] This matter comes before me by way of a preliminary issue pursuant to Order 33(3) of the Rules of the Supreme Court (Northern Ireland) 1980 ("the Rules") to determine whether the plaintiff's claim against the defendant is barred by the lapse of time and the provisions of Article 7 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order").

## Factual background

[2] The plaintiff's claim is for damages for personal injuries, loss and damage sustained by reason of the negligence of the deceased Neil McConville arising out of the driving and the control of a motor vehicle on 29 April 2003. The plaintiff was a police officer serving as part of the mobile support unit allegedly involved in the pursuit of a vehicle ("the vehicle ") driven by the deceased. It is the plaintiff's case that the vehicle was forced into a stationary position; the plaintiff alighted from a police vehicle and the defendant than drove the vehicle in such a manner that the plaintiff was

struck and knocked to the ground. The driver of the vehicle was then shot and fatally wounded by another police officer.

[3] A letter of claim was sent on behalf of the plaintiff on 16 August 2006 and a writ of summons was issued and served on the defendant on 5 January 2007 ie. three years and three and a half months and three years eights months and one week respectively after the date of the accident.

**The relevant statutory provisions**

[4] It is well known that under the terms of the 1989 Order the basic limitation period of three years is preserved and provides that the time should begin to run from either the date when the cause of action accrued or the plaintiff's date of knowledge.

[5] References to a person's date of knowledge in Article 7 are references to the date on which he first had knowledge of the following facts –

> "(a) that the injury in question was significant; and
> (b) that that injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence ….;
> (c) the identity of the defendant;
> (d) if 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 …. is irrelevant."

[6] Article 7(9) where relevant declares that a person's knowledge includes knowledge which he might reasonably have been expected to acquire –

> "(a) from the 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,
>
> (c) 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."

[7] The 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 are contained in Article 50 of the 1989 Order, which provides:

> "50. - (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 this application.**
**Date of Knowledge**

[8] Since the decision of the House of Lords in Horton v Sadler (2006) UKHL("Horton's case"), the claimant must bear responsibility, as against the defendant, for delays which have occurred, whether caused by his own default or that of his solicitors per Lord Carswell at paragraph 53.

[9] However Lord Carswell went on to say in Horton's case at paragraph 53(c):

> "That said, whereas the claimant will suffer obvious prejudice if the limitation period is not disapplied, this may be reduced by his having a cause of action in negligence against his solicitors. The extent of that reduction will vary according to the circumstances, but even if he has an apparently cast iron case against the solicitors the factors referred to by Lord Diplock in Thompson v Brown, at p. 750 require to be borne in mind."

[10] In Thompson v Brown (Ebbw Vale) Ltd [1981] 1 WLR 744, where the writ had not been issued until some 37 days after the expiry of the limitation period, and where the defendant had no defence at all on the merits, Lord Diplock pointed out that where the "time elapsed after the expiration of the primary limitation is very short, what the defendant loses in consequence of a direction might be regarded as being in the nature of a windfall".

[11] There is ample authority that where, although at the relevant time a plaintiff did not know the identity of the potential defendant, that will not avail him if he could have discovered it by making a simple enquiry. (see Heathcote and Heathcote v David Marks and Company (1995) 6 C.L. 286.) In short a person's knowledge includes that which he might reasonably be expected to acquire from facts observable or ascertainable by him if necessary with the help of such expert advice as is reasonable to seek.

[12] In Henderson v Temple Pier Company Limited (1998) 1 WLR 1540 solicitors appointed on behalf of the plaintiff had not provided a competent service in identifying defendants responsible for causing the plaintiff to slip and fall on a gangway when boarding a ship. Finding against the plaintiff, Bracewell J said at p. 1545C:

> "Having given her solicitors general responsibility for the conduct of her claim, actions were taken and knowledge was acquired on behalf of the plaintiff. If solicitors fail to take the appropriate steps to discover the person against whom her actions should be brought, she cannot take refuge under Section 14(1)(c) because on the face of it the occupier of the (ship) was knowledge which she might reasonably have been expected to acquire from facts obtainable or ascertainable by her. Even if the solicitor is to be regarded as an appropriate expert, the facts were ascertainable by him without the use of legal expertise. The proviso is not intended to give an extended period of limitation to a person whose solicitor acts dilatorily in acquiring the information which is obtainable without particular expertise."

[13] On the other hand in Cressey v E Timm and Son Limited (2006) P.I.Q.R. p.90("Cressey's case"), the Court of Appeal held that a plaintiff has a reasonable time in which to make appropriate enquiries about the identity and in that case could not have known the correct defendant until an insurer's letter identifying the correct employer was received. At page 99 paragraph 35 Rix LJ said:

> "The identity of a defendant appears to look to something specific enough to enable a person to be identified for the purpose of a claim form, and that is ultimately looking for a name. One cannot sue 'the driver of the other car' or even 'my employer': a name has to be provided. …. In most straightforward situations I think there would be no difficulty in concluding that the identity of a defendant will be

> known to or ascertainable by a victim at the time of the accident. In some situations, however, it may be that an identity is only known or knowable in a more general way and that it will not be possible to say that the identity is properly known, even with the assistance of constructive knowledge until a name has been or could have been attached."

**Article 50;**

[14] In Taylor v Taylor, The Times, 14 April 1984 the Court of Appeal held that a trial judge must have regard to all the circumstances of the case, when considering whether the exercise his discretion to exclude a limitation period, not merely the six matters in particular contained in sub-sections (a)(-(f) of the corresponding discretionary power to override time limits set out in s. 33 of the Limitation Act 1980.

[15] The exercise of the court's discretion to "disapply" the time limits preserved by the 1989 legislation is unfettered (see Thompson v Brown (1981) 1 WLR 744).

[16] The burden of proof in an application under Article 50 rests upon the plaintiff (see Barrand v British Cellophane, The Time, 16 February 1995).The onus has been described as a heavy one .It is "an exceptional indulgence to be granted only where equity between the parties demands it "(see KR v Bryn Alyn Community (Holdings) Ltd (in liquidation) 2003Q.B.1441at [74])

**The issue**

[17] The essential issue in this matter is whether the date when the plaintiff first had knowledge of the identity of the driver of the car was at the date of the accident itself or when the solicitor claims he first learned the name of the driver, his address and vehicle registration mark.

[18] In an affidavit Mr Caher, solicitor acting on behalf of the plaintiff, deposed as follows:

> "On 6 May 2003 I sought a police report from the PSNI and in particular sought details of the name, address of the driver of the pursued vehicle, namely the deceased, together with his insurance details. A reply from the PSNI dated 19 June 2003 indicated that the investigating officer had been in touch with the Ombudsman's Office and at that stage was not in a position to answer my request. I again contacted the

> PSNI on 21 June 2004 and by a reply dated 25 June 2004 was advised that the file was with the DPP and that I would be informed accordingly. I again sought this information by letter dated 22 October 2004 and was informed by letter dated 26 October 2004 that the position was unchanged in that the DPP had not made a decision as they were awaiting paperwork from the Ombudsman's Office. I responded by letter dated 1 November 2004 to the PSNI pointing out that it was over 1½ years since the date of the accident and that the plaintiff was unable to institute proceedings because we had not been provided with the name and address of the offending motorist or his insurers and asked for this information pending a decision from the Ombudsman/DPP to initiate proceedings. I then spoke with a Ms Dean, who was a member of the administrative staff of the Criminal Justice Unit of the PSNI and was informed by her that they were awaiting permission from the Ombudsman's Office to release the details I was seeking. I followed this up with a letter to Ms Dean dated 15 November 2004. On 22 November my secretary spoke to Ms Dean and was informed by her that the copy file had been lost and that this was the reason for the delay. I followed this up with a letter dated 25 November 2005 to Ms Dean. On 15 December 2004 I received a letter from the PSNI informing me of the name of the driver, his addressed and the vehicle registration mark."

**The Submissions**

[19] Mr Skelt, who appeared on behalf of the defendant and argued his case with consummate skill and commendable economy , contended that the incident which led to this case was widely publicised and that the deceased had been identified by name in many press reports. Death notices were published giving details of the deceased and his relatives at the time of his death. Indeed Mr Caher eventually obtained details of the next of kin of the deceased as late as August 2006 from archived newspaper death notices.

[20]Counsel further contended that the identity of the deceased could have been found in seconds via the internet and the plaintiff, as a serving officer in the PSNI engaged in a police operation targeted to some extent at the deceased, is likely to have known his identity.

[21] Mr McCartney, who appeared on behalf of the plaintiff and who presented his case equally skilfully, countered this argument by submitting that the newspapers articles often did not give any indication who the driver was simply focusing on the facts of the incident and that two young men had been involved in a car chase and confrontation with the police. Insofar at least one newspaper named the deceased as the driver, even this was couched in equivocal terms on the basis that "the deceased was believed to be the driver" or that the young man with him was "understood to be the front seat passenger".

**Conclusion on Date of Knowledge**

[22] The plaintiff has satisfied me in this instance that Mr Caher did not act dilatorily in seeking to acquire the name of the driver. On the contrary I consider it would have been rash for him to act on the word of a newspaper report – even if he had more than one newspaper reports naming the deceased as the driver – without making appropriate further checks. Solicitors are rightly well versed in cases of negligence such as Goody v Bearing (1956) 2 All ER 11 where even in an apparently simple conveyancing transaction to accept the word of the other party on some crucial question of fact without making further checks was negligent. Hence I think it was entirely appropriate for Mr Caher to have sought to ascertain the identity of the driver of this vehicle from the proper sources namely the police and/or the Police Ombudsman. To have acted on inference drawn from a newspaper report without confirming that from the proper authorities could have left him exposed to criticism and insensitivity especially if he had served proceedings on the incorrect person. Similarly internet information may be based on unreliable hearsay. It is clear from the newspaper reports that this accident attracted a great deal of local publicity and notoriety. In the particular circumstances of N. Ireland it is difficult to criticise a solicitor who determined it was unwise for him to have sought definitive information in the area itself acting as he was on behalf of the police involved in the incident. Whilst he may have known that the deceased was somehow involved in the incident, he had no definitive knowledge of the identity of the driver of the car until the information was given to him definitively in December 2004.

[23] I have therefore come to the conclusion that this instance is wholly distinguishable from Henderson's case. To borrow the words of Rix LJ in Cressey's case, the identity of the defendant was not properly known until that information from the police had been received.

[24] On that basis alone I dismiss the defendant's application.

**Discretion under Order 50**

[25] Even if I had concluded that the date of knowledge of the plaintiff should be fixed at the date of the accident, in this instance I would have exercised my discretion under Article 50 in favour of the plaintiff. My reasons for so doing are as follows.

[26] The length of delay on the part of the plaintiff is comparatively modest amounting to eight months and one week.

[27] The reasons for the delay on the part of the plaintiff's solicitor – namely that he was frustrated in his attempts to definitively have confirmation of the name of the driver through contact with the official sources of the Police Ombudsman's Office and the PSNI until 15 December 2004-amount at most to a surfeit of caution and in my view do not amount to dilatory behaviour.

[28] Thereafter he was informed ,according to the affidavit of Mr Caher, that insurance details were not held as the Police Ombudsman's Office had directed that the investigating officer should have no contact with the deceased's family. His pursuit of the insurers of the deceased was fuelled by the belief that if he issued proceedings against the defendant without notifying the insurance company within seven days, and it turned out that the defendant was insured, however unlikely that may have been in the circumstances of the case, he risked the insurance company defaulting. As late as July 2005 he had sought details of the registered keeper of the offending vehicle from the DVLNI by letter dated 19 July 2005 and received a response indicating that the vehicle had been acquired on 28 April 2003 and that the name and address of the registered keeper on the 29April (*presumably 2003)* could not be confirmed.

[29] Subsequently he spoke to Mr Maguire of the Ombudsman's Office on 31 July 2006 pointing out that he needed details of the next of kin of the personal representative or deceased so that he could notify the Motor Insurers Bureau. Mr Maguire directed him to Ms McShane so he again wrote to Ms McShane by letter dated 1 August 2006. He spoke with her on 14 August 2006 and she stated she was not permitted to release details of the next of kin. He then sought this information from archived newspaper death notices and was able to ascertain the names of the parents of the deceased.

[30] Thus there appears to be a litany of impediments placed in the way of the solicitor ascertaining the necessary information. Whilst it is clear that once the primary period has expired I should take into account all the circumstances of the case including the overall expedition with which this solicitor has dealt with this case even during the primary limitation period as well as the expired period, and having noted that there were some lengthy periods allowed to elapse between correspondence, the fact of the matter is that as late as August 2006 Mr Caher was still not being afforded the necessary information from the Ombudsman's Office. Whilst it might be

argued that he was striving for perfection in the information he was obtaining rather than going to secondary sources, I am satisfied that the reasons for the delay were again probably fuelled by an excess of caution rather than any dilatory behaviour in the exercise of his duty.

[31] Mr Skelt submitted that the delay in the processing of this case has occasioned prejudice to the defendant who will be relying largely on civilian witnesses dipping into their memory bank for incidents that occurred now well over six years ago. He referred to the published report of the Police Ombudsman which was critical of aspects of police activity, including for example the deletion of relevant information from police computers within hours of the incident occurring . Thus he asserted that the ability of the defendant to assemble evidence in this case will be gravely impeded.

[32] I consider that this contention ignores the fact that a lengthy Police Ombudsman's report, which I have had the benefit of reading, has identified a number of civilian witnesses who were interviewed shortly after the incident and who have made statements to the Ombudsman. This affords to the defendant a benefit given to few parties in such cases namely that witness statements have been professionally prepared dealing with the circumstances of the incident in question – see for example paragraphs 7.4, 7.9, 7.15, 7.37 and 7.39 of the report. This will serve to dilute any possible prejudice that the defendant may suffer as a result of the delay in this case.

[33] I am satisfied that the defendant did not materially contribute to the delay in this case but whilst the plaintiff's adviser could not be described as having acted promptly in all aspects of this case, nonetheless as I have already indicated he has been driven by an excess of caution rather than dilatoriness. In those circumstances criticism must be measured and proportionate. It is not such as to dissuade me from exercising my discretion in his favour.

[34] For these reasons therefore I am satisfied that had I been required to do so, I would have exercised my discretion under Article 50 of the 1989 Order in favour of the plaintiff.

[35] I therefore dismiss the defendant's application