**THE HIGH COURT**

[2021] IEHC 225

**[2016 No. 5281 P]**

**BETWEEN**

**DAVID STEWART EVANS**

**PLAINTIFF**

**AND**

**BEACON HOSPITAL SANDYFORD LIMITED AND MAHER SHUHAIBAR**

**DEFENDANTS**

**AND BY ORDER**

**SALLY ELSIR ABU EL HASSAN MOHAMMED**

**THIRD PARTY**

**Judgment of Mr. Justice Meenan delivered on the 19th day of March, 2021**

**Introduction**

1. In May, 2014 the plaintiff was found to have an apical right lung tumour. He was treated for this condition at the first named defendant hospital where he was admitted on 17 June 2014 in anticipation of the procedure that would be performed the following day. The operation proceeded without incident.

2. On the day following the procedure, the second named defendant directed that a catheter which had been inserted in the plaintiff should be removed. Subsequently, the plaintiff was unable to pass urine and underwent a further catheterisation procedure. Unfortunately, difficulties were encountered and the "*house doctor*" was called to attend the plaintiff. This doctor attempted further urethral manipulations but, again, difficulties were encountered in inserting the catheter. In the course of these procedures, the plaintiff alleged that he sustained severe personal injuries, loss and damage by reason of the negligence and breach of duty on the part of the defendants, their servants or agents.

3. A personal injury summons was issued on 14 June 2016. The first named defendant (the hospital) entered an appearance, and a Defence was delivered on 13 April 2017 following replies to particulars from the previous October. A notice of trial was served on 20 February 2019. Proceedings were discontinued against the second named defendant.

4. Following a successful mediation on 19 December 2019 the hospital settled the plaintiff's claim in the sum of €175,000 (to include both general and special damages, plus costs to be adjudicated in default of agreement).

5. On 13 December 2019 the hospital issued a notice of motion seeking to have the above named third party joined in the proceedings. This Order was made on 16 January 2020 (Cross J.).

6. On 20 March 2020, the Solicitors for the third party issued a notice of motion seeking to set aside the third party notice on the grounds that it was not served as soon as "*reasonably possible*". This is the issue before the Court.

**Statutory provisions**

7. Order 16, rule 1 (3) of the Rules of the Superior Courts provides: -

"Application for leave to issue the third-party notice shall, unless otherwise ordered by the Court, be made within twenty-eight days from the time limited for delivering the defence …"

Section 27 (1)(b) of the Civil Liability Act, 1961 provides: -

"27.—(1) A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part—

…

(b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. …"

**Authorities**

8. The above provisions have been considered on many occasions by the High Court, the Court of Appeal and the Supreme Court. Clearly, a statutory provision that refers to taking a step "*as soon as is reasonably possible"* can only be interpreted in the context of the facts of the case in issue. What may be reasonable in one case might not be reasonable in another. In *Thomas Greene v. Triangle Developments Ltd* [2015] IECA 249 Finlay Geoghegan J. reviewed the case law in this area. Referring to the judgment of Denham J. (as she then was) in *Connolly v. Casey* [2000] 1 I.R. 345, Finlay Geoghegan J. stated: -

"24. [Denham J.] went on to deal with the particular facts of that case. Later in the judgment, at page 351, she stated:

> 'In analysing the delay - in considering whether the third party notice was served as soon as is reasonably possible - the whole circumstances of the case and its general progress must be considered. The clear purpose of the subsection is to ensure that a multiplicity of actions is avoided; see *Gilmore v. Windle* [1967] IR 323. It is appropriate that third party proceedings are dealt with as part of the main action. A multiplicity of actions is detrimental to the administration of justice, to the third party and to the issue of costs. To enable a third party to participate in the proceedings is to maximise his rights; he is not deprived of the benefit of participating in the main action.'

Denham J. having considered the facts of that case, allowed the appeal.

25. In my view, following the approach of the Supreme Court in Connolly -v- Casey, it is incumbent on a trial judge, when faced with an application such as the present before the High Court, to look not only at the explanations which were given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third party notice was or was not served as soon as is reasonably possible."

and: -

"27. Approaching the relevant dates and the entire circumstances in that case, I have formed the following views. Firstly, this was an action where the third party claim was a claim in professional negligence. And it is accepted by both parties, in accordance with indeed what was stated, inter alia, by the Supreme Court in Connolly -v- Casey, that it was appropriate that an expert's report be obtained before any third party notice was served. Therefore, following the approach of Mrs. Justice Denham, objectively it was reasonable to wait until the expert's report was obtained."

9. The issue was also considered in *Kenny v. Howard* [2016] IECA 243. In that case Ryan P. firstly considered what was "*the relevant time period*". He stated: -

"12. It is agreed between the parties that the relevant time with which we are concerned is between 22nd August 2013 and 26th August 2015. The first of those dates is when the third party notice should have been issued if the time limits in the rules had been observed. The second date is the date when the notice of motion was issued. …"

10. Ryan P. further stated: -

"21. The reference to all the circumstances in Connolly v. Casey and the import of the other citations is that it is proper in an appropriate case to allow time for a party to get expert advice or to wait for further and better particulars of something arising in the pleadings. It is impossible to catalogue all the exigencies that may arise in a case that take time to be satisfactorily addressed. Reasonably possible means what it says."

11. In the course of his judgment Ryan P. also considered the issue as to whether "*prejudice*" is a factor to be taken into account in an application such as this. He stated: -

"24. The other issue raised and which was relied on by the judge in the High Court is that there is no evidence of any specific prejudice on the part of the HSE. However, even if it is difficult to see how prejudice, express or implied, could arise in the case, that is not the issue; if it is clear that the third party notice was not served as soon as reasonably possible, that is a failure of compliance with the specific mandatory requirement of s. 27(1)(b). The section does not require proof of prejudice in order to rely on its terms. It is true that in *Robbins v. Coleman* [2010] 2 I.R. 180, McMahon J. held that the question of the presence or absence of prejudice was not to be out-ruled a priori.

25. It seems to me that a third party applying to set aside a notice served by a defendant could argue that he had suffered prejudice and that a shorter period than might otherwise be allowed ought to be imposed in determining what was as soon as reasonably possible. I find it difficult to understand how a defendant who is in

default of the clear requirement of the subsection can escape the consequences by proposing that the third party has not suffered any specific prejudice. The authorities cited do not go as far as suggesting that the section's impact may be defeated by demonstrating the absence of prejudice. In the present case, it seems to me that it is irrelevant whether or not the HSE has suffered prejudice by reason of the delay."

**Consideration of issue**

12. These are medical negligence proceedings, so not only are the interests and rights of a patient involved but also the professional reputations of those whose actions are being criticised. It is well established that legal proceedings, which would include a claim for contribution or indemnity from a third party, should not be initiated without a supportive report from a suitably qualified expert. It is also the case that professional negligence proceedings should not be defended on the issue of liability without an expert report justifying such a stance.

13. In this case the relevant period to be considered is that period which commenced on the application of O.16, r.8 (3) RSC, being in or about October, 2016 extending to 13 December 2019 when the motion seeking leave to issue and serve the third party notice was served.

14. The first matter which the hospital had to attend to was identifying the doctor referred to in the personal injury summons and, more importantly, identifying the relevant indemnifier. It is the case that the indemnifiers of junior doctors change from time to time and it may not always be straightforward identifying the correct indemnifier. This was the case here, as evidenced by the various communications that passed between the indemnifier of the hospital and other indemnifiers involved. This matter was not resolved until late July, 2018.

15. Whilst the identity of the relevant indemnifier was being ascertained, the Solicitors for the hospital, Eversheds Sutherland (Eversheds), obtained an expert report from a Consultant Urologist which identified negligence and breach of duty on the part of the third party concerning the attempts made to pass a catheter. This report was dated 23 June 2017.

16. After these matters had been attended to, there then commenced correspondence between Eversheds and the Solicitors instructed to represent the interests of the then proposed third party, Kennedys. It is necessary to look at this correspondence in some detail for the purposes of reaching a conclusion as to whether the hospital joined the third party "*as soon as is reasonably possible".*

17. The first letter from Kennedys was dated 18 September 2018. This letter confirmed that they had been appointed to represent the interests of the third party and sought copies of pleadings "*in order to allow us to proceed with our investigations*".

18. This letter was responded to by a letter from Eversheds dated 21 September 2018 which stated, *inter alia*: -

> "Please confirm that you have instructions to engage with us in relation to engagement with the Plaintiff's Solicitors on a joint basis, subject to negotiation of issues inter Defendant on an apportionment basis.
>
> Please advise if it is the case that you believe talks with the Plaintiff's Solicitors could be scheduled, that you would wish to be present at such talks, and that you are agreeable to engaging with the Plaintiff's Solicitors on a 50/50 apportionment basis to resolve the claim, and thereafter to agree apportionment as and between our clients."

Kennedys replied to this letter, on 1 October 2018, stating: -

> "In circumstances where we continue to await a copy of the medical records, you will appreciate that we are not yet in a position to take instructions in relation to your requests."

It would appear that the relevant documentation was furnished to Kennedys, as was the hospital's expert report, on a without prejudice basis.

19. By letter dated 24 October 2018 Eversheds wrote to Kennedys stating: -

> "Please note that we confirm that we will hold off engaging with the Plaintiff's solicitors to afford you an opportunity to obtain your client's instructions. Please note that in the circumstances we will afford you until 30 November 2018 to confirm that an indemnity will be provided to the Second Named Defendant."

It will be noted that this letter set a deadline of 30 November 2018, but in the interim Eversheds sent two further letters one of which, dated 7 November 2018, indicated that the hospital would be open to mediation with the plaintiff *"at the earliest possible opportunity".*

20. By letter, dated 6 December 2018, Kennedys stated: -

> "We are in the process of obtaining expert evidence in relation to this matter and will revert to you upon receipt of our expert evidence.
>
> We trust you will note the position."

21. Clearly, it was good practice and appropriate for Kennedys to obtain an expert report concerning the care given to the plaintiff by the third party. In the absence of such report it would not have been appropriate for there to have been a denial of liability on the part of the third party. It was also reasonable for Eversheds not to have taken any steps to join the third party pending the receipt of the said expert report. As it turned out, this expert report was received by Kennedys on 18 November 2019, nearly one year later, after it was apparently sought.

22. I refer now to the Grounding Affidavit of Ms. Maeve Geary, Solicitor of Kennedys instructed in the matter, which stated: -

> "41. … In addition, I say and believe that the further period of delay between 18th September 2018 and May 2019, when there was no direct contact between Eversheds Sutherland and Kennedys and further where there was limited telephone communications between May 2019 and November 2019 is also evidence of unreasonable delay. …"

This is factually incorrect. The affidavit of Ms. Aisling Gannon from Eversheds exhibits "*without prejudice*" correspondence that passed between parties, the hospital having waived its privilege. She stated at para. 20 of her affidavit: -

> "20. Eversheds made a number of attempts to progress matters in 2019, writing to Kennedys on 12 March 2019, 25 April 2019, 29 May 2019, 12 July 2019, 14 August 2019 and 8 November 2019. … Eversheds received no response to this correspondence other than a limited telephone conversation from May 2019 onwards …"

23. It was probably the position that Kennedys were acting in accordance with what they had said in their letter of 6 December 2018 that they were awaiting an expert report and would revert to Eversheds "*upon receipt*". As stated earlier, this report was only received on 18 November 2019.

24. In the meanwhile, the plaintiff was proceeding with his action. On the day Kennedys received their expert report, Eversheds wrote to Kennedys stating that the case had been listed for hearing to commence on 16 January 2020, and: -

> "We confirm herein, by open letter, that we have kept you fully appraised of all developments throughout the life of the pleadings herein. No prejudice has arisen to your client by virtue of third party proceedings not issuing, indeed on the contrary we have been seeking to engage with your client on the basis that a joint defence strategy can appropriately be adopted and a joint defence approach to the Plaintiff's Solicitors managed, maintained and implemented for the purposes of saving costs, and ultimately with a view to the resolution of the claim at the earliest possible opportunity."

The letter concluded by saying that if Eversheds had not heard further from Kennedys by 29 November 2019 instructions would be given to Counsel to draft the appropriate proceedings to join the third party.

25. The response to this letter was dealt with at para. 27 in the affidavit of Ms. Geary. It stated that the Urologist reported on 18 November 2019 and that it was confirmed to Eversheds, by letter dated 29 November 2019, on a without prejudice basis, that the expert was supportive of the third party and that they would not be attending any

settlement discussions. A copy of this supportive expert report was also furnished to Eversheds on a without prejudice basis on 3 December 2019.

26. There was further correspondence from Eversheds to Kennedys seeking to have them involved in the mediation. These letters set out, in some detail, the desirability, both in the interests of the plaintiff and the various medical professionals involved, to have matters of liability resolved without resort to third party proceedings. However, this was to no avail in that Kennedys declined to attend the mediation, which had been scheduled for 19 December 2019, which proved successful.

27. In considering this correspondence, a number of points can be made. It was appropriate for the hospital to seek to resolve issues of the liability of the third party prior to resorting to legal proceedings. This did not in any way prejudice the position of the plaintiff, who achieved a settlement prior to the court hearing. It would not have been reasonable for Eversheds to commence third party proceedings against the doctor involved without first ascertaining the position of the doctor's indemnifier on liability. Hence, the need to await the expert report from the third party. This was in accordance with the terms of the letter from Kennedys of 6 December 2018 to the effect that they were in the process of obtaining expert evidence "*and will revert to you upon receipt of our expert evidence*". This expert evidence was only made available to Eversheds on 3 December 2019, nearly a year later. The third party proceedings were commenced on 13 December 2019, some ten days later. This was "*as soon as is reasonably possible*" as required by s. 27 (1)(b) of the Act of 1961.

28. In the course of her affidavit, Ms. Geary stated that the delay on the part of the hospital in issuing the third party proceedings "*has, I believe caused an irretrievable prejudice to the Third Party. I believe that the First Named Defendant has consciously and tactically chosen not to do so in order to retain control of the litigation until settlement*". Firstly, no prejudice, irretrievable or otherwise, has been identified, not that it is relevant as per the judgment of Ryan P. in *Kenny v. Howard* cited above. Secondly, the suggestion that the hospital refrained from issuing third party proceedings "*in order to retain control of the litigation until settlement*" does not accord with the correspondence that came from Eversheds, which was repeatedly seeking the involvement of the indemnifier of the third party in any settlement.

**Conclusion**

29. By reason of the foregoing, I will refuse the application herein. As this judgment is being delivered electronically, I will allow the parties fourteen days to make submissions as to costs.