Northern Ireland Unreported Judgments

Sheerin v Ministry of Defence

QUEEN'S BENCH DIVISION

MACDERMOTT LJ

17 JANUARY 1992

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On 27 July 1987 Mr Brendan Kearney, solicitor, issued a writ against the defendant, Ministry of Defence, on behalf of the plaintiff, Gerald Sheerin. The statement of claim delivered on 2 September 1987 revealed that the plaintiff was claiming damages in respect of injuries which he alleged he had received on 24 September 1976 when he was struck on the face by a plastic bullet fired by a soldier in the vicinity of Waterloo Place, Londonderry.

In its defence, delivered on 11 November 1987, the defendant denied liability, alleged that the plaintiff was injured when behaving riotously, and claimed that the plaintiff's cause of action was barred by the provisions of section 9A of the Statute of Limitations (Northern Ireland) 1958 as amended.

By an amended reply delivered on 21 September 1988 the plaintiff claimed -

(a) that he first had the necessary knowledge not earlier than three years before the issue of the writ, and

(b) that the court should exercise its discretion under section 9(D) of the Limitation Acts (Northern Ireland) 1958 to 1982 and direct that the defendant was not entitled to rely on its claim that the plaintiff's action was barred.

In due course the defendant sought an order pursuant to Order 33, rule 3 of the Rules of the Supreme Court that the following issues should be tried as preliminary issues, namely:

"1. Whether the plaintiff's cause of action is barred by the provisions of Section 9A of the Statute of Limitations (Northern Ireland) 1958 as amended.

2. Whether it appears to the Court that it would be equitable to allow the action to proceed by virtue of Section 9D of the Statute of Limitations (Northern Ireland) 1958 as amended.

And for an order that the costs of determining the said issues may be provided for.

On 23 November 1990 Master Wilson so ordered and the matter came before me on Friday, 10 January 1992. At that hearing Mr Cahill QC (who appeared with Mr Daniel Mulrine for the plaintiff) indicated that he

was not relying on the lack of knowledge point but would argue that I should exercise my discretion in favour of the plaintiff.

This is not a case where a claim is first intimated after the three year limitation period had elapsed though, as I have already indicated, no proceedings were issued on behalf of the plaintiff until more than 10 years after the incident on 24 September 1976 when the plaintiff was seriously injured. The claim was in fact raised a fortnight after the incident when Mr John L Doherty, solicitor wrote to the Ministry of Defence as follows:

"Dear Sir

I have been consulted by Gerard Sheerin, 11 Meenan Drive, Londonderry, with reference to the personal injuries, loss and damage suffered by him as a result of an incident at Waterloo Place, Londonderry on the 24th September, 1976. My instructions are that Mr Sheerin was passing through the pedestrian turnstile at Waterloo Place along with two other friends when he was hit in the face by a rubber bullet which was fired without justification or reason. From such instructions, it is clear that this was a blatant assault by members of the security forces, and I am instructed to enquire whether you are willing to compensate my client for the said personal injuries, loss and damage suffered by him. Failing a satisfactory adjustment of such compensation, I am instructed to issue legal proceedings without further notice."

Further letters were written by Mr Doherty on 23 March 1977, 4 April 1977 (enclosing a medical report dated 28 October 1976 from Mr TG Emerson, Consultant Oral Surgeon) and on 6 May 1977 which pointed out that a formal complaint was lodged in respect of the incident and that the Director of Public Prosecutions had directed "no prosecution".

It is clear from the papers before me that the defendant investigated the incident and statements were taken from the four soldiers in the sangar in the vicinity of which the incident had occurred - namely Bombardier Howckham, Gunner McCulloch, Gunner Wilkes and Gunner Adair. These statements appear to have been made in November 1976.

The Crown Solicitor on 27 July 1977 replied to Mr Doherty's letter of 6 May 1977 indicating that for security reasons the names of soldiers could not be released.

Despite the expeditious and helpful manner in which Mr Doherty had raised the claim on behalf of the plaintiff nothing further was done by Mr Doherty after July 1977: no letter was written, no writ was issued. The claim went into total hibernation. The next that was heard of it was when the writ, issued on 27 July 1987, was served upon the defendant. It appears from paragraph 6 of the affidavit of Mr Kearney, sworn on 29 October 1990, that the plaintiff first sought advice from his office on 7 February 1987. Mr Kearney then investigated the matter and says that it was not until 6 April 1987 that he was in a position to advise the plaintiff. As the writ was issued in July it can fairly be said that Mr Kearney acted with reasonable expedition.

That said it seems to me entirely understandable that the defendant has pleaded that the claim has been statute barred since 23 September 1979 - the question, however, for my decision is whether or not, despite the gross delay, I should exercise my discretion in favour of the plaintiff and allow the action to proceed.

Both Mr Weatherup (who appeared for the defendant) and Mr Cahill accepted that the statutory position was rather complex and perhaps uncertain. The relevant present day legislation is the Limitation (Northern Ireland) Order 1989, whereas the plaintiff's claim was barred by section 9(2) of the statute of Limitations Act (Northern Ireland) 1958 which, with its amendments in 1982 was repealed by the 1989 Order. Both sides, however, sensibly agreed that the proper course was to invite me to exercise the discretionary power contained in Article 50 of the 1989 Order. The jurisdiction to override the three year time limit imposed by Article 7 is contained in Article 50(1) which reads:

"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."

and by Article 50(4) the court is directed to have regard to all the circumstances of the case and in particular to a number of specified matters:

"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 the 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."

It goes without saying that claims for compensation should be dealt with in an expeditious manner. All delay, and especially inordinate delay, adversely affects the fair and efficient working of the legal system and statutory limitation periods were Parliament's attempt to ensure that claims did not become stale. This point was emphasised by Lord Edmund-Davies in Birkett v James [1978] AC 297 at page 331:

"Statutory provisions imposing periods of limitation within which actions must be instituted seek to serve several aims. In the first place, they protect defendants from being vexed by stale claims relating to long past incidents about which their records may no longer be in existence and as to which their witnesses, even if they are still available, may well have no accurate recollection. Secondly, the law of limitation is designed to encourage plaintiffs to institute proceedings as soon as it is reasonably possible for them to do so; though in

this context one should recall the pertinent observation of Sellers LJ in Cartledge v E Jopling & Sons Ltd [1962] 1 QB 189, 195 that:

'The courts have discouraged delay in seeking redress and so has legislation, but on the other hand there has been no encouragement given to precipitate litigation. It is undesirable for workmen to be encouraged to keep their eyes on the courts.'

Thirdly, the law is intended to ensure that a person may with confidence feel that after a given time he may regard as finally closed an incident which might have led to a claim against him, and it was for this reason that Lord Kenyon described statutes of limitation as 'statutes of repose': per Dallas CJ in Tolson v Kaye (1882) 3 Brod & Bing 217, 222-223.

The legislature must be taken to have sought - and achieved - a proper balance between all these competing interests in enacting that, if actions are to be heard at all, they must be instituted within the various specified periods from the accrual of the cause of action."

Though that was a "dismissal for want of prosecution" case the good sense of the observation is apposite in the present type of case.

In this case the delay appears to be due to the default of Mr Doherty. The plaintiff took the necessary initial step of consulting a solicitor as soon as he was released from hospital and Mr Doherty immediately raised a claim. There is no affidavit from the plaintiff to explain why he did not press his solicitor to produce results - paragraphs 3 and 4 of Mr Kearney's affidavit indicate that the plaintiff felt that his solicitor would contact him and in any event he believed his case "would take years". Such averments should have been made by the plaintiff but I take them at their face value. For years the courts have been bedevilled by the negligence of a minority of solicitors in attending to their client's cases and the observation of Lord Griffiths in Ketteman v Hansel Properties Ltd [1987] 1 AC 189, 220 bears repetition though I am mindful that that case was concerned with the issue of amending pleadings out of time. He said:

"Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

Two authorities in the House of Lords which do deal with the Limitation Acts and the courts discretionary powers are Thompson v Brown Construction (Ebbw Vale) Ltd & Others [1981] 2 All ER 296 and Donovan v Gwentoys Ltd [1990] 1 All ER 1018. Counsel referred me to them and they are helpful guidelines when approaching the exercise of one's discretion in the present case which is not to be decided upon the factual determination of similar cases. Each case is peculiar to itself and I have to decide what is equitable having regard to the particular circumstances of the present case and in doing so I bear in mind what Lord Griffiths said in Donovan (page 1023G) in relation to the English equivalent of Article 50(4):

"This subsection is not intended to place a fetter on the discretion given by sub-s(1) (this much is made plain by the opening words 'the court shall have regard to all the circumstances of the case') but to focus the attention of the court on matters which past experience has shown are likely to call for evaluation in the exercise of the discretion and which must be taken into consideration by the judge."

Further, as I have already pointed out, the present case is unlike either Thompson (where the plaintiff's solicitor slipped up and in issuing the writ 37 days out of time presented the defendant's insurers with what Lord

Griffiths termed "a totally unexpected windfall" and Donovan where what was described as a "truly stale claim" was first made 5 years after the event. In this case the claim was promptly raised but proceedings were delayed until almost 8 years after the claim became statute barred.

Mr Cahill, who accepts that the burden of persuading me to make a direction in favour of his client rests upon him, made three principal points:

(1) The plaintiff would be prejudiced by not being able to proceed against the defendant as he would lose the damages he would undoubtedly have recovered.

(2) The plaintiff's present predicament is not of his own making but arises from the misconduct of his former solicitor.

(3) The defendants would not be substantially prejudiced by having to defend the action as the matter was fully investigated at the time and statements taken from all likely witnesses.

As to 1: Prejudice to the Plaintiff

All plaintiffs who fail to secure a direction to enable them to pursue a statute-barred claim are prejudiced in that they do not receive their just compensation or have to seek it elsewhere - for example by suing their negligent solicitors. But that is a factor in the overall balancing exercise and not determinative.

2. Suing a Solicitor

The ability so to do is a factor which may well be considered but as Thompson's case [1981] 2 All ER 1018 shows that factor must not be elevated into a determining factor. As Lord Diplock said in Thompson, p 303:

". . . when weighing what degree of prejudice the plaintiff has suffered, the fact that if no direction is made under S.2D he will have a claim against his solicitor for the full damages that he could have recovered against the defendant if the action had proceeded must be a highly relevant consideration."

Mr Cahill suggested that there might be difficulties in suing this solicitor as he might raise the statute. If he did I suspect that most judges would have no difficulty about making a direction against him as the delay was of his own making.

3. Prejudice to the Defendant

Mr Cahill says that the plaintiff establishes a prima facie case by proving that he was hit by a plastic bullet. That is undoubtedly so and the defendant is unlikely to be able to justify the action of the soldiers in "shooting over the heads of the crowd" when in fact the plaintiff was hit in the face. But contributory negligence is in issue in the case and the defendant has the burden of proof on that issue. Wasson v Chief Constable [1987] NI 420 is an example of this type of issue and in that case contributory negligence was assessed at 50%. There is a clear conflict as to what was going on around the sangar:- was there a riotous situation?, if so, was the plaintiff participating in it? It is claimed on behalf of the defendant that the recollections of the two soldiers who can be found - Wilkes and Adair - are now vague. When added to the fact that the Gunner who discharged the baton round, McCulloch, died in 1978 and Bombardier Howckham cannot be found, it does seems to me fair to say that the passage of time must have disadvantaged the defendant. In such circumstances it seems to me that a passage in the speech of Lord Oliver of Aylmerton in Donovan [1990] 1 All ER 1018 at page 1025 is relevant:

"A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the court is directed to consider all the circumstances of the case and, to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim cannot, in my judgment, be irrelevant."

The delay period in this case is almost 8 years - such delay in my view must undermine the fairness of the trial process to the disadvantage of this defendant. This is especially so when as in the case that delay will mean that the action will not come on for hearing until more than 15 years after the event.

Having considered Mr Cahill submissions I have looked again at the "hotchpot" of matters specified in Article 50(4). In the end I have asked myself the final question - is it equitable to make the order sought? I do not consider that it is - the delay in the case is quite unacceptable and bound to prejudice the defendant in its presentation of its case. I would add that I have sympathy for the plaintiff who would appear to have been ill-served by Mr Doherty but directions under Article 50 are not founded in sympathy. I have no doubt that the plaintiff will speedily be fully advised as to his rights in respect of a claim against Mr Doherty.

Accordingly, I answer the two questions raised as preliminary issues as follows.

1. Whether the plaintiff's cause of action is barred by the provisions of Section 9A of the Statute of Limitations (Northern Ireland) 1958 as amended. Answer 'Yes'.

2. Whether it appears to the Court that it would be equitable to allow the action to proceed by virtue of Section 9D of the Statute of Limitations (Northern Ireland) 1958 as amended. Answer 'No'.

Judgment accordingly