

THE HIGH COURT

[2022] IEHC 359

[Record No. 2020/3824P]

BETWEEN

**JANE HARTE A PERSON OF UNSOUND MIND NOT SO FOUND,
SUIING BY HER MOTHER AND NEXT FRIEND OLIVIA HARTE**

PLAINTIFF

AND

PALLANY PILLAY T/A CITY GENERAL HOSPITAL

DEFENDANT

DECISION of Ms. Justice Bolger delivered on the 15th day of June, 2022

1. This is the defendant's application to dismiss the proceedings for delay because he says he is at risk of an unfair trial. The plaintiff is 28 years old and is operating under a disability and therefore does not have to prove that the delay in bringing her proceedings was not inordinate or excessive. For the reasons set out below I am refusing this application.

Background

2. The plaintiff's claim is for damages for personal injuries arising from catastrophic injuries sustained by her shortly after her birth on 8 October 1995. The defendant seeks to dismiss the plaintiff's proceedings on the basis that it is unjust to require him to defend them because of the delay since the plaintiff's birth, and the prejudice he has sustained arising principally from the absence of his medical records which he claims significantly compromises his ability to defend the proceedings, and creates a real and substantial risk of an unfair trial such that the proceedings should be dismissed.
3. The plaintiff was born on 8 October 1995 at Cork General Hospital which was a private maternity hospital where the defendant served as principal attending consultant gynaecologist. Cork General Hospital did not provide any specialised neonatal services, and any new-born baby who required specialist neonatal treatment or administration of antibiotics was, according to the defendant, transferred to Erinville Hospital. The defendant's practice was to write a letter with all relevant clinical details to accompany the patient on such transfer. Seventeen hours after her birth the plaintiff was transferred to Erinville, accompanied by a midwife who advised Erinville that the plaintiff had been "grunting" all day, and had become tachypneic in the hour prior to her arrival. The plaintiff was noted to be cyanosed. The plaintiff was diagnosed in Erinville with sepsis and meningitis.
4. The plaintiff's septic shock and meningitis caused her catastrophic injuries as a result of which she will require fulltime care and significant therapeutic inputs for the remainder of

her life. The plaintiff claims that the defendant's negligence led to a delay in her treatment and that, had she been treated earlier when she exhibited signs of respiratory distress, she would not have developed septic shock and meningitis.

5. The defendant has averred that he has no recollection of the plaintiff's birth, her care at Cork General Hospital, or her transfer to Erinville. The defendant has also averred to the absence of the medical records in relation to the plaintiff and her birth, due to his decision in or around 2015 to shred charts of patients he had managed in Cork General Hospital after his retirement from obstetric practice in 2000 and the closure of Cork General Hospital, and before he was notified of these proceedings or any indication of the plaintiff's intention to bring them. The defendant has a note written by his then secretary confirming that the plaintiff's medical records were destroyed in May 2015. That brief note records the plaintiff's mother's name and then address, the plaintiff's date of birth, and the fact of the plaintiff's transfer to Erinville with what is recorded as a "cardiac abnormality".
6. Attempts have been made to locate the plaintiff's medical records from Erinville, but it appears that they are unavailable, other than those records that were incorporated into the plaintiff's medical records from Cork University Hospital where she attended over many years.
7. Whilst it is accepted by both sides that most of the records relating to the plaintiff's treatment in the early hours of her life are no longer available, the following three documents are available: -
 - (i) The Erinville discharge summary of 8 November 1995, which gives an account of the plaintiff's transfer to Erinville from Cork General Hospital, including a reference to the verbal account apparently given by the midwife who accompanied her. That midwife is recorded as having reported verbally that the plaintiff had been "grunting" all day, had become tachypneic in the hour prior to her arrival, and was noted to be cyanosed. The summary also confirmed that the plaintiff was noted on arrival in Erinville to be cyanosed and mottled, that she was tachypneic and grunting, and was very poorly perfused and shocked. The summary confirmed the diagnosis of sepsis.
 - (ii) A note from Dr. Anthony Ryan, neonatologist who transferred the plaintiff to Lavanagh Centre on 11 November 1995. which states that the plaintiff was "critically ill with Group B Streptococcus Septicaemia and meningitis when she arrived in Erinville Hospital".
 - (iii) A letter sent by the defendant to the plaintiff's GP dated 24 October 1995, which states that in the first few hours of life the plaintiff was a "very poor feeder", that "physical examination revealed no obvious cardiac or pulmonary abnormality" and that "body temperature and blood sugar levels remained within normal limits". It states that she was transferred to Erinville "with an increase in respiratory rate" and because she was "an undiagnosed unwell baby".

The parties' submissions

8. Those three documents (set out at paragraph 7 above) are described by the defendant's expert as "significant", but he also says that the absence of Cork General Hospital's records compromises his ability to opine on the plaintiff's allegations of negligence against the defendant. This forms the central basis to the defendant's claim that he is at real risk of an unfair trial.
9. As well as the absence of medical records from Cork General Hospital, the defendant relies on his own lack of recollection of the plaintiff's birth and treatment, as well as the fact that the defendant has been unable to identify the midwife who accompanied the plaintiff to Erinville (despite strenuous efforts by the defendant's solicitors to do so), or to locate the doctor who prepared and signed the Erinville discharge summary of 8 November 1995.
10. The plaintiff contends that the medical records that are available constitute relevant and reliable evidence, which has enabled her expert to express opinions of negligence by recourse to facts not capable of being contradicted. The plaintiff highlights the defendant's current ability, in spite of his lack of recollection about the plaintiff or her treatment, to give evidence of his normal practice and protocols in Cork General Hospital for the care of new-born babies (some of which is referred to in the defendant's affidavit). The plaintiff also highlights the defendant's involvement in the destruction of the medical records at a time when good practice required their preservation for at least twenty-five years, and had the defendant followed that, the records would have been available when the plaintiff's proceedings were instituted.
11. The plaintiff cites the evidence that will be available from her mother and grandmother, both of whom recall relevant events prior to her transfer to Erinville including her symptoms after birth, the allegedly initial unsuccessful attempts to secure the attendance of the defendant, the absence of review by a neonatologist or paediatrician throughout 8 October 1995 and the alleged timing of the defendant's attendance and review late on 8 October prior to the urgent transfer.

The risk of an unfair trial

12. In *Sullivan v. HSE* [2021] IECA 287, a similar case involving catastrophic injuries sustained during or following the plaintiff's birth, and where a substantial amount of medical records were unavailable, Donnelly J. in the Court of Appeal described, at paragraph 59, the issue for the court as

"... whether there is a real and substantial risk of an unfair trial on the basis of the lapse of time since the event giving rise to the action occurred".

13. Donnelly J. referred to the Supreme Court's repeated statements in cases involving the risk of an unfair trial, that the risk "must be real, serious and unavoidable; the ability as a trial judge to give rulings and directions must be taken into account". She confirmed (at para. 105) that "the onus was on the defendant in this motion to establish that its constitutional rights would be breached by being subjected to a trial in this case."

14. Therefore, whilst there may be interests to be balanced, this is not a case involving a determination where the balance of justice lies, but rather whether the defendant is at a real and substantial risk of an unfair trial that cannot be addressed by the judge at the trial.

Determination

15. There are numerous difficulties and challenges faced by a defendant in defending a claim many years after the incident is alleged to have occurred, but these do not necessarily equate to a real and substantial risk of an unfair trial. The less-than-perfect situation that a defendant may have to face in a trial many years after the incident is alleged to have occurred has been confirmed in the authorities where a defendant has had to proceed to trial even after years have passed and significant documentary and oral testimony was missing. For example, in *Sullivan*, Donnelly J. having set out the limited documentary evidence that was still available, stated that (at para. 102) "this may not be 'perfect' evidence, but it is not a right to a perfect trial that a defendant has rather it is the right not to be put at the real and substantial risk of being subjected to an unfair trial or an unjust result."
16. In *Mangan v. Dockeray* [2020] IESC 67 McKechnie J. cited an Australian case which had been approved in the High Court in stating at para. 110: -

"Finally, the following passage in the judgment of Cross J., in *Calvart v. Stollznow* [1980] 2 N.S.W.L.R. 749, which was approved by Murphy in *Hogan v. Jones* [1994] 1 I.L.R.M. 512, should be noted:

"Considerations of justice transcend all other considerations in these matters. Of course justice is best done if on action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice."

17. I consider the following to be relevant in determining whether this defendant faces a real and substantial risk of an unfair trial.

(i) The medical records that are available

The Erinville discharge summary of 8 November 1995 contains significant information, albeit some of it recording what was verbally reported by the midwife who accompanied the plaintiff to Erinville. I note the emphasis placed by Donnelly J. in *Sullivan* on a similar discharge letter.

The defendant questions how he can establish what the midwife's report of the plaintiff having been "grunting all day" actually means. The plaintiff says that "grunting" is a recognised medical term indicating respiratory distress but whether that is correct or not, I am satisfied that the defendant will be able to deal with the extent to which the contents of this discharge summary constitutes good, the best, or relevant evidence at the trial.

The defendant also has the benefit of his own letter to the plaintiff's GP of 24 October 1995, sixteen days after the plaintiff's birth, in which he sets out an almost contemporaneous account of his examination of the plaintiff and the tests administered along with an explanation for his decision to transfer her to Erinville. Whilst the court will not have the

benefit of the letter the defendant says his normal practice was to write, setting out all relevant clinical details to accompany a transferring baby, it can be assumed that those clinical details would have been available to the defendant when he wrote to the plaintiff's GP on 24 October 1995 if only by way of his recollection of a birth a mere sixteen days earlier.

Many of the records that the plaintiff or the defendant may have sought to rely on are not available, and what is available is not perfect evidence. Nevertheless, I do not consider the records to be so non-existent as to put the defendant at a real and substantial risk of an unfair trial in circumstances where any unfairness can and will be addressed by the trial judge.

(ii) The availability of the defendant's own evidence

The defendant has confirmed on affidavit that he is 88 years of age. He makes no claim of infirmity or age-related memory difficulties. He sets out a clear account of what his practice was in the event of an infant delivered at City General Hospital requiring specialist neonatal treatment and/or the administration of antibiotics, which was to arrange transfer to one of the two specialist neonatal units in the vicinity including Erinville Hospital. He states that it was his standard practice to write a letter with all relevant clinical details to accompany the patient on transfer.

On the basis of that recounted practice, there will be evidence available for the defendant to give at the trial, including of the point in time when it can be submitted that the defendant made the decision that the plaintiff required specialised neonatal care and/or the administration of antibiotics.

One of the plaintiff's experts, Mr. Clemants, is critical of the absence in City General Hospital of a paediatric presence. The defendant will be able to address that criticism in his evidence regardless of his lack of recollection about the plaintiff or the absence of her medical records.

(iii) The plaintiff's evidence

The plaintiff's solicitor avers that her mother and grandmother can both recall relevant events prior to the plaintiff's transfer to Erinville. Some of this evidence has already been set out in the plaintiff's replies to particulars, where the plaintiff's mother recalls hearing the plaintiff making noises from about 2pm on the day of her birth. The defendant has relied on that reply in challenging the veracity of the midwife's verbal account recorded in the Erinville discharge summary of 8 November 1995. Those witnesses will be available to the defendant for cross-examination including by reference to any relevant matters such as the replies to particulars.

(iv) The role of the trial judge

The role of the trial judge is among the most significant of the matters I must consider in determining whether the defendant has established that he is at a real and substantial risk of an unfair trial. This issue has been emphasised in the authorities and is a vitally important safeguard for the defendant in dealing with any risks of an unfair trial falling short of a real and substantial risk that may exist. Donnelly J. in *Sullivan* referred to the

decision of McKechnie J. in *Mangan* in relying on the fact that "it was always incumbent on a trial judge to intervene at any stage if he or she is of the view that an injustice presents itself due to any evidential deficit."

In *IRBC v. Singleton* [2020] IEHC 372 Hunt J. concluded that the defendant had not, in spite of identifying some prejudice from the absence of testamentary evidence and the defendant's difficulties due to disability to engage with complex litigation, satisfied him that the trial judge would be unable to secure a fair trial. He held (at para. 25) as follows:

-

"In reaching that conclusion, I attach importance to the consideration that the balance of justice and fairness will remain live issues in the continuing proceedings. Monitoring this issue will be a continuing obligation on the trial judge, who will ensure fairness with the benefit of the clarity that comes with a trial in progress. The defendant will have a continuing ability to raise issues of concern in that context, particularly at the close of the plaintiff's case."

18. In addition to those four considerations, there is a balance to be drawn, which was described by Donnelly J. in *Sullivan* as "between taking from a plaintiff who is under, and continues to be under a disability, the chance to be fairly recompensed for its injury and a defendant who should not be put on the hazard of an unfair trial and an unjust result." In drawing that balance I consider the following to be relevant: -

- (i) The prejudice to the defendant due to the risk of an unfair trial as against the prejudice to the plaintiff if she is to be denied the opportunity to assert her substantial claim for damages arising from the catastrophic injuries she claims to have suffered due to the defendant's negligence. I note that both *Mangan* and *Sullivan*, in which the defendants' applications to dismiss were refused, were also cases involving catastrophic injuries claimed to have been sustained during or shortly after the plaintiff's birth. A similar claim was made in *McBrearty and Murr v. Northern Western Health Board* [2010] IESC 27, which seemed to be one of the few of these types of claims where an application to dismiss was allowed but only in relation to some of the defendants, who were still practising as doctors at the time and therefore faced reputational damage which is not a prejudice claimed by this defendant who retired from his medical practice many years ago.
- (ii) The plaintiff's counsel distinguished some of the cases in which applications to dismiss were allowed as ones in which the plaintiff had no expert report. This plaintiff has secured the opinion of three experts that she has a good case to make in establishing liability against this defendant.
- (iii) The defendant's responsibility for the destruction of the medical records. The defendant has fully acknowledged in his affidavit that he personally, with assistance from his secretary, shredded the plaintiff's patient chart in May 2015 before he was made aware of these proceedings. He asserts no reason for this course of action other than referring to the closure of City General Hospital and his retirement from obstetrics practice in 2000. He went to the trouble of recording the files that were

shredded and exhibits documentary evidence of same, along with many other (properly redacted) files that were carefully recorded as having been shredded. The only detail recorded of the plaintiff's record is "t/s Erinville? Cardiac abnormality" which confirms the fact of her transfer to Erinville with a questioned medical diagnosis. The defendant avers to having no recollection of the plaintiff, which presumably also applies to her diagnosis in Erinville and her subsequent significant medical issues. Nevertheless, the defendant does not dispute the plaintiff's account of best practice in retaining such records, as confirmed by the plaintiff's own expert and by certain HSE recommendations. Whilst I do not suggest (and it has not been suggested by the plaintiff) that there was anything malicious in the defendant's decision to destroy the plaintiff's records, which he did at a time when he had no indication of her intention to bring these proceedings, I do consider it to be the defendant's responsibility that the records were destroyed at a time and in a manner that fell well short of best practice. In the same way as decisions on post-commencement delay can and do take account of culpable delay by a plaintiff in determining where the balance of justice lies, I consider it appropriate in whatever balance needs to be drawn here, to take account of the defendant's role in and responsibility for the fact that the plaintiff's medical records from City General Hospital are no longer available to her or indeed to the defendant. The defendant of course bears no responsibility for the absence of some (though not all) of the medical records from Erinville.

Conclusions

19. Applying all of the considerations set out above to the facts and paying particular regard to the role and ability of the trial judge to address any issues of unfairness that may arise at the trial, including any unfairness arising from the delay and the lack of documentary and testamentary evidence, I conclude that the defendant has not satisfied me that he is at a real and substantial risk of an unfair trial. I therefore refuse this application.

Indicative view on costs

20. My indicative view on costs is that as the defendant has not succeeded in his application, the plaintiff is entitled to her costs. I will list the matter for mention at 10:30 am on 5 July for consideration of any further submissions which either party may wish to make to me in relation to costs or any final orders to be made. I do not require written submissions but if either party wishes to make them they should be filed with the court at least 24 hours before the matter is back before me.