

Neutral Citation No. [2011] NIMaster 8

Ref:

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

Delivered: **21/9/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

**LIAM HOLDEN
PERSONAL REPRESENTATIVE OF PAULINE BOWDEN (DECEASED)
Plaintiff**

and

**THE WHITEROCK HEALTH CENTRE
DR C WASSON
DR P HAGAN
AND
DR D BEIRNE**

Defendants

Introduction

[1] On 18 December 2000 Pauline Bowden died following an accidental overdose of prescription medication. Her husband, believing that her death was due to medical negligence, subsequently issued a Writ against the defendants. The issue now arises as to whether the Writ was properly served on the 2nd named defendant, Dr Wasson. In connection with this issue there are two applications before me:

- (i) A Summons dated 5 October 2010 issued by Dr Wasson seeking an order under Order 12 Rule 8 declaring that the Writ has not been duly served on him, or in the alternative, setting aside the Writ and/or service.
- (ii) A Summons dated 5 May 2011 issued by Mr Holden (in response to Dr Wasson's Summons) seeking what is termed an extension of "time for the service of the Writ"

under Order 6 Rule 7 (but which is properly an application to extend the validity of the Writ), or in the alternative, an order under Order 2 Rule 2 allowing the action to continue despite any procedural failures which may have taken place.

[2] I have had the benefit of oral and written submissions by Mr Miller on behalf of the 2nd named defendant and by Mr O'Hare on behalf of the plaintiff. Following consideration of their helpful submissions I have concluded that I must grant the application of the 2nd named defendant and refuse the applications of the plaintiff. This judgment sets out the reasons for these decisions.

The Order 12 Rule 8 Application

[3] The Writ was issued on 21 August 2007. Order 6 Rule 7 provides that, for the purpose of service, a Writ is valid in the first instance for 12 months beginning with as date of issue. Although the plaintiff has purported to serve the Writ, I find that, on the best case advanced by the plaintiff, it was served 8 days outside the period of validity.

[4] Order 10 Rule 1 provides three methods of serving a Writ on an individual:

- (i) Personal service
- (ii) Ordinary first class post at his usual or last known address
- (iii) Insertion of the Writ through the letter box of his usual or last known address.

Personal Service ?

[5] Two affidavits, both dated 3 November 2010, have been sworn by James Glynn who in 2002 served as an apprentice in Madden & Finucane solicitors and who subsequently became a qualified solicitor in the Republic of Ireland. The longer of the two affidavits filed by Mr Glynn states that he confirms that he "personally served the Writs on the doctors at the Health Centre and on Dr Wasson." The shorter of Mr Glynn's two affidavits states that the Writ was served as Dr Wasson at Whiterock Health Centre and also "on Doctor Wasson by hand delivery on the above-named". The use of the words "personally" and "by hand delivery" create the impression that Mr Glynn and Dr Wasson were both present in the same place at the same time and that the former passed the Writ to the latter who took it from his hand. Despite Mr Glynn's clear averments, this does not in fact appear to have occurred. Nichola Harte, a partner in Harte Coyle Collins who now act for the plaintiff, wrote in open correspondence dated 11 February 2011 to Tughans, the firm representing the 2nd defendant, that :

“the Writ of summons were served on 21 August 2002 personally by Mr Glynn to Whiterock Health Centre where it was accepted by the Receptionist. It was not directly served on the Doctor. In relation to the delivery at Dr Wasson’s home address Mr Glynn confirmed he cannot now recall the address but remembers delivering the Writ to the home address, no one was present and the Writ was posted through the letterbox”. (sic)

[6] The leaving of the Writ with the Receptionist at Whiterock Health Centre cannot amount to good service in the sense of personal service. However, even if, instead of delivering the Writ to the Receptionist, Mr Glynn had placed the Writ directly into Dr Wasson’s hands at Whiterock Health Centre on 21 August 2002, (which of course he did not) personal service would still not have been good because the validity of the Writ had elapsed the previous day.

Service by Ordinary first class post at his usual or last known address?

[7] In her affidavit dated 21 December 2010 Nicola Harte deals with the issue of what occurred to post which had been received at Whiterock Health Centre after Dr Wasson left the Practice in or around November 2000 and it had been taken over by the Eastern Health and Social Services Board. Ms Harte avers that in correspondence dated 16 November 2010, Belfast Health and Social Care Trust informed her that all correspondence addressed to Dr Wasson at Whiterock Health Centre was forwarded to Dr Kathryn Booth at the General Practitioner Unit in the former Eastern Health and Social Services Board. Ms Harte then states that it seems to her most unlikely that such correspondence would not have been forwarded to Dr Wasson in these circumstances. Ms Harte does not, however, mount an argument that the copy of the Writ delivered to Whiterock Health Centre was subsequently then routed through Dr Booth to Dr Wasson and that this amounted to good service within the time limit laid down by the Rules. The realism of her approach can be viewed as confirmed by correspondence subsequently handed in by Mr Miller at the hearing, although not exhibited to an affidavit. On 10 January 2011 Shauna McAuley of Tughans wrote to Dr Booth and asked for copies of all correspondence from either Madden & Finucane or Harte Coyle Collins which had been sent to Dr Wasson and subsequently forwarded on to Dr Booth. Dr Booth replied on 7 March 2011 that The Eastern Health and Social Care Board had retrieved its records relating to Dr Wasson, hand searched ten storage boxes of records, and found no such correspondence. It appears therefore that the Writ which was left with the Receptionist at Whiterock Health Centre was not forwarded to Dr Wasson at his home address. I do not therefore have to address the issue of whether, if it had been, it would have amounted to good service.

Service by Insertion of the Writ through the letter box of his usual or last known address?

[8] The effect of Order 10 Rule 1(3)(a) is that where a Writ is inserted through the letterbox of a defendant's usual or last known address, the date of service, unless the contrary is shown, is deemed to be the seventh day after the date on which the Writ was inserted through the letterbox.

[9] Even therefore if I was to disregard the worrying inconsistencies between Mr Glynn's two affidavits; and to disregard the worrying inconsistencies between the affidavits and Ms Harte's letter; and to set aside any questions I might have as to why there was no contemporaneous note as to when and how service was effected and as to why it appears that it was only Dr Wasson who is purported to have been served at his home address when the other doctors do not appear to have been so served - even on the plaintiff's best case, the Writ was therefore served 8 days outside its period of validity.

[10] Doctor Wasson denies in his affidavit sworn on 21 July 2010 having received the Writ or having become aware of it until 28 June 2010 when he was contacted in relation to it by his medical defence organisation. He asserts in his affidavit that he cannot recall receiving any letter from the plaintiff's solicitor, or a Writ of Summons at the Whiterock Health Centre, or at his home address. The plaintiff has not produced evidence which is sufficient for the court to regard the contrary to be shown. As Mr Miller for the 2nd named defendant correctly submitted, *The White Book*, 1999 Edition, points out at paragraph 10/1/29 :

"It must, however, be stressed that as a matter of necessary practical precaution service of the writ by post or by insertion through the letterbox should be effected at least seven clear days before the date of its expiry for service, otherwise the service will be deemed to have taken effect after such date and will therefore be invalid, unless the plaintiff can show the contrary, which he will ordinarily be unable to do".

[11] It is clear of course that Dr Wasson knew earlier than August 2002 that his treatment of Pauline Bowden was the subject of criticism. Disciplinary charges against him were heard by the General Medical Council in April 2002. The General Medical Council found in May 2002 that his practice in relation to the prescribing of certain drugs, including drugs of addiction and those which carried a serious risk in overdose, both in respect of individual patients and more generally, in the context of a wider group of patients, was seriously deficient and fell far below accepted standards of practice carrying with it risks to these patients. The Committee found that his standards in relation to prescription writing generally, and record keeping, were also significantly below the standard expected of a medical practitioner and also carried with

them risks to his patients. It described these deficiencies as grave and, in the circumstances, found him guilty of serious professional misconduct. It has been argued on behalf of the plaintiff that Dr Wasson might therefore have reasonably been expecting to be served with a Writ for clinical negligence. The counter argument is, of course, that he might have believed he would not be sued. The Coroner's Inquest in 2006 would subsequently find that there was no evidence that Pauline Bowden's death was other than accidental. Dr Wasson might therefore have believed that, though negligence might be asserted, causation could not be proved. Regardless, however, of what he did or did not believe or expect, a defendant who is being sued must, under the Rules of the Court of Judicature, still receive valid service. Proof that a defendant should have expected service is not sufficient.

[12] I therefore conclude that service has not been validly effected by any of the three means of service allowed under the Rules.

The Order 2 Rule 1 Application

[13] *The White Book*, 1999 Edition, para 2/1/93 states that the authorities, taken as a whole, show that Order 2 Rule 1 should be applied liberally in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to the technicalities in the rules of procedure. It points out that defective service of proceedings, however gross the defect, and even total failure to serve where the existence of the proceedings is nevertheless known to the defendant, is an irregularity which can be cured by the court by the exercise of its discretion under Order 2 Rule 1. As Mr O'Hare submitted, and as *The White Book* authors observe in paragraph 2/1//6 the rule is so framed as to give the court the widest possible power to do justice.

[14] However, paragraph 6/8/3 of the White Book also states:

“This rule provides a comprehensive code for the renewal of a writ and therefore an irregularity in procedure caused by failure to renew a writ under this rule is such a fundamental defect in the proceedings that the wide powers of the court under Order 2 Rules 1 and 2 to cure non-compliance with the rules ought not to be exercised by treating a writ which has become invalid for service as though it had been renewed and is therefore valid for service (*Breenstein v Jackson* [1982] 1 WLR 1982; [1982] 2 All ER 806 CA).

In *Leal v Dunlop Bio Processes International Limited* [1984] 1 WLR 874; (1984) 2 All ER 207 CA the matter was put differently, but in a way that in most cases

is likely to secure the same practical effect. There it was held that Order 2 Rule 1 was wide enough to give the court the jurisdiction to cure irregular service of a writ, the validity of which had expired before the purported service, but that it would be an improper exercise of discretion under that rule to make good the irregular service retrospectively where the writ could not properly have been renewed under Order 6 Rule 8; if the plaintiff cannot properly enter through the front door of Order 6 Rule 8 he should not be allowed to enter through the back door of Order 2 Rule 1 but see *Boolock v Hutton International* [1993] 4 All ER19 and *Singh (Joginder) v Dupont Harper Foundries* [1994] 1 W.L.R. 769 paras 6/8/12 and 6/8/6 below.”

[15] In *Paterson v The Trustees of St Catherine's College* [2003] NIQB 25 Nicholson LJ considered that, in the circumstances of that case, there was a basis for validating irregular service of a Writ of for deeming service good. However he described the circumstances in that case as exceptional. The Writ had been delivered well within the period of validity to the solicitors nominated to accept service. The defendants' solicitors then caused a delay through requiring the title of the proceedings to be amended. As a result of confusion between the solicitors as to which firm had the original Writ which had to be amended, the validity of the Writ expired. It was submitted on behalf of Dr Wasson that there is nothing exceptional about the circumstances of the present case. The plaintiff's solicitors appear either to have simply delayed making an attempt to serve the Writ on Dr Wasson or alternatively, having taken out a Writ on a protective basis, have failed to apply for its validity to be extended. Whatever the reason, although the plaintiff argues that Dr Wasson will suffer no prejudice from the failure to serve, no exceptional circumstances have been argued such as would justify granting an application under Order 2 Rule 1.

The Order 6 Rule 7 Application

[16] Order 6 Rule 7(2) provides that, where a Writ has not been served on a defendant, the Court may by order extend the validity of the Writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application is made to the Court before that day or such later day (if any) as the Court may allow.

[17] The principles to be applied on an application to extend the validity of a Writ are set out in paragraph 6/8/6 of *the White book*, 1999 edition. The principles to be deduced from the authorities include :

- (i) It is the duty of the plaintiff to serve the Writ promptly. He should not dally for the period of its validity; if he does so and gets into difficulties as a result, he will get scant sympathy.
- (ii) There must always be a good reason for the grant of an extension. This is so even if the application is made during the validity of the Writ and before the expiry of the limitation period; the later the application is made, the better must be the reason.
- (iii) It is not possible to define or circumscribe what is a good reason. Whether a reason is good or bad depends on the circumstances of the case. Normally the showing of good reason for failure to serve the Writ during its original period of validity will be a necessary step to establishing good reason for the grant of an extension.
- (iv) The decision whether an extension to the validity of the Writ should be allowed or disallowed is a matter for the discretion of the court. The exercise of discretion, however, follows upon the showing of good reason by the applicant. Hardship to the applicant if the extension is disallowed is not a substitute for good reason.

[18] In respect of the plaintiff's application in this case, which comes before me some 9 years after the validity of the Writ has expired, no explanation at all has been furnished as to why the Writ was not served during its period of validity. Nor has any explanation been offered as to why the court should extend its validity (other than, by inference, that the plaintiff's action against Dr Wasson will otherwise be unsuccessful.) In such circumstances, the application of the legal principles must inevitably result in a declining to extend the validity of the Writ against Dr Wasson.

Conclusion

[19] I therefore grant the application sought by Dr Wasson under Order 12 Rule 8 for a declaration that the Writ was not duly served upon him. I also refuse the applications by Mr Holden under Order 6 Rule 7 to extend the validity of the Writ and under Order 2 Rule 1 allowing the action to continue despite the procedural failures in relation to service which have taken place. It appears from counsel's submissions that this decision may place Mr Holden's entire action in jeopardy. I was informed that there was no evidence that either Dr Hagan or Dr Beirne, the other doctors named in the Writ, were served with the Writ. Furthermore, there must be doubt that the only other party named on the face of the Writ, "Whiterock Health Centre", is a proper legal person who can be sued. Counsel for Dr Wasson submitted that the appearance entered by Brangam Bagnall & Co solicitors for "Whiterock Health Centre" is difficult to comprehend. It is a matter entirely for Mr Holden and his legal advisers as to whether the circumstances set out in this

judgment provide a good cause of action against any solicitor or counsel who has acted for him.