



**THE COURT OF APPEAL**

Neutral Citation Number [2021] IECA 297

**Record No.: 2019/102**

**Donnelly J.  
Collins J.  
Binchy J.**

**BETWEEN/**

**JOSEPH CREEDON**

**APPELLANT**

**-AND-**

**DEPUY INTERNATIONAL LIMITED**

**RESPONDENT**

**JUDGMENT of Ms. Justice Donnelly delivered on the 9th day of November, 2021**

**INTRODUCTION**

1. The issue to be determined on appeal is as follows:

*Does the plaintiff's action for personal injuries against the defendant manufacturer in respect of an allegedly defective hip implant that he received during surgery, fall within one or more of the exclusions to the general principle set out in section 3(d) of the Personal Injuries Assessment Board Act, 2003 thereby not requiring a Personal Injuries Assessment Board authorisation prior to issuing proceedings?*

2. The plaintiff (the appellant in this appeal) seeks damages for negligence, breach of duty, breach of statutory duty and breach of the Liability for Defective Products Act, 1991 (the "1991 Act") on the part of the sole defendant (the respondent to this appeal) arising from alleged defects in products produced and manufactured by the defendant, namely a DePuy ASR hip implant, that the plaintiff received by way of right hip replacement surgery on the 21st May, 2007 and left hip replacement surgery on the 26th June, 2007.
3. The present proceedings were instituted by personal injuries summons dated the 3rd March, 2011 by the plaintiff without having obtained authorisation from the Personal Injuries Assessment Board ("PIAB") pursuant to the provisions of the Personal Injuries Assessment Board Act, 2003 as amended ("the PIAB Act"). Schedule I of the plaintiff's personal injuries summons dealt with particulars of negligence, breach of duty, breach of statutory duty and, *inter alia*, breaches of the provisions of the 1991 Act.
4. The defendant delivered its defence on the 18th June, 2013. The defence contained a preliminary objection to the effect that the plaintiff is precluded from maintaining a claim for personal injuries as against the defendant pursuant to the PIAB Act and/or the Civil

Liability and Courts Act, 2004 (“the 2004 Act”), because the plaintiff had failed to obtain an authorisation from PIAB prior to initiating the proceedings.

5. The plaintiff delivered a reply to the defence on the 22nd October, 2013, which, *inter alia*, pleaded that no authorisation was needed before bringing the proceedings and that the defendant was estopped from raising the preliminary objection on the grounds of lack of authorisation because it did not raise any objection in that regard until it delivered its defence on the 18th June, 2013.
6. Subsequently, on the 9th June, 2015, almost 2 years from the date of the defence, the plaintiff applied to PIAB for an authorisation to bring proceedings against the defendant. The said authorisation issued on the 10th June, 2015. On the 10th August, 2015, the plaintiff issued a second set of proceedings arising out of the same factual background as the instant proceedings against the defendant on foot of the said authorisation from PIAB.
7. If the answer to the issue identified in the first paragraph is in the affirmative, then the plaintiff succeeds in this appeal and his claim can proceed. If the answer is in the negative, then, subject to the plaintiff’s further argument that the subsequent PIAB authorisation permitted the court to continue to hear the case being resolved in his favour, the plaintiff’s proceedings cannot be maintained and would stand dismissed by reason of his failure to comply with the requirement of s. 12 of the PIAB Act requiring a prior authorisation from PIAB.

#### **THE JUDGMENT APPEALED FROM**

8. Arising out of the defendant’s preliminary objection, the High Court directed that the issue as to whether the proceedings can be maintained in the absence of an authorisation from PIAB be tried as a preliminary issue. O’Hanlon J., in her judgment, [2018] IEHC 790, dismissed the plaintiff’s claim on the basis of the absence of the authorisation. O’Hanlon J. relied upon the decision of the High Court (Faherty J.) in *Murphy v. DePuy International Limited* [2015] IEHC 153 in holding against the plaintiff. In doing so, O’Hanlon J. felt bound to follow the decision in *Murphy v. DePuy International Limited*, relying on the *dicta* of Clarke J. in *In Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189 concerning the principle of *stare decisis*. In *Murphy v. DePuy International Limited*, Faherty J. found that the ordinary meaning of the exclusions under s. 3(d) of the PIAB Act did not encompass a claim in respect of a defective hip implant where the claim did not allege negligence in the provision of a health service by the defendant, but instead sued the defendant *qua* manufacturer and supplier. O’Hanlon J. held that a PIAB authorisation must be sought prior to the action being initiated.

#### **STARE DECISIS**

9. As the defendant noted in its submissions, in refusing the appellant leave to bring a “leapfrog appeal” direct from the High Court to the Supreme Court, the Supreme Court observed at para. 14:-

*“Whilst Mr Creedon seeks leave to pursue several different grounds of appeal, the core issue in the proposed appeal would appear to be the correct interpretation of s. 3(d) of the PIAB Act 2003, and in particular whether Mr Creedon’s claim can be*

*considered to arise from a health service/medical procedure/medical treatment. This is a relatively straightforward question of statutory interpretation, to which the High Court has already provided an answer in the negative and which can be revisited by the Court of Appeal, which of course will not be bound by the decision of Faherty J. in Murphy. The Court of Appeal will be perfectly free to reach its own interpretation of the section for the purposes of deciding whether the prior authorisation of PIAB was required in respect of the claim advanced by Mr Creedon”.*

10. While the defendant argues that the High Court judge was correct in following *Murphy v. DePuy International Limited* and that both judgments were correctly decided, the decision in *Murphy v. DePuy International Limited* is not, of course, binding on this Court and the issue of *stare decisis* is not one that constrains this Court. Therefore, the defendant agrees with the plaintiff that the core question in this appeal is as set out at para.1 above.

### **THE RELEVANT LEGISLATION**

11. The outcome of this appeal involves a matter of statutory interpretation of the exclusions set out in s. 3(d) of the PIAB Act. To set the sub-section in its context, it is necessary to examine the relevant legislation more broadly.

12. Section 3 of the PIAB Act provides:

“This Act applies to the following civil actions—

- a) a civil action by an employee against his or her employer for negligence or breach of duty arising in the course of the employee's employment with that employer,
- b) a civil action by a person against another arising out of that other's ownership, driving or use of a mechanically propelled vehicle,
- c) a civil action by a person against another arising out of that other's use or occupation of land or any structure or building,
- d) a civil action not falling within any of the preceding paragraphs (other than one arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person).” (*Emphasis added*).

13. Section 4 of the PIAB Act defines a “civil action” as:

“an action intended to be pursued for the purpose of recovering damages, in respect of a wrong, for -

- (a) personal injuries [...]
- (b) [...]

but does not include -

- (i) an action intended to be pursued in which, in addition to damages for the foregoing matters, it is bona fide intended, and not for the purpose of circumventing the operation of section 3, to claim damages or other relief in respect of any other cause of action.”

There is no dispute that the plaintiff’s action here is a “civil action” for the purposes of section 4.

14. Section 12 of the PIAB Act provides:

“(1) Unless and until an application is made to the Board under section 11 in relation to the relevant claim and then only when the bringing of those proceedings is authorised under section 14 , 17 , 32 or 36 , rules under section 46(3) or section 49 and subject to those sections or rules, no proceedings may be brought in respect of that claim.”

15. Pursuant to s. 9 of the PIAB Act, “relevant claim” means a civil action to which the PIAB Act applies. The plaintiff’s action here is such a “relevant claim”

#### **THE PLEADINGS**

16. The plaintiff alleges that due to the negligence, breach of duty and breach of statutory duty on the part of the defendant by reason *inter alia*, of the alleged fact that it manufactured a defective product and failed to warn the plaintiff of the risk as to that product, he suffered personal injuries and is therefore entitled to damages. The *updated* particulars of negligence reflect the nature of the pleas made in cases alleging negligence due to defective products.
17. The defendant submits that its liability will therefore turn on the question of whether the hip replacement products were defective within the meaning of the 1991 Act by reason of, *inter alia*, the manufacturing, production or design process of the product. The plaintiff submits that the particulars of negligence and breach of duty (including statutory duty) reach further than the manufacturing, production or design process.

#### **THE PARTIES’ SUBMISSIONS**

18. The plaintiff’s primary submission, relying on the long-established principle that words should be given their ordinary meaning, is that his action comes within the exception carved out of s. 3(d) of the PIAB Act. Put simply, he submits that his action is plainly for personal injuries arising out of the provisions of a health service to him, the carrying out of a surgical procedure on him and/or the provision of medical treatment to him.
19. Counsel for the plaintiff submits that *Murphy v. DePuy International Limited* was wrongly decided and pointed to the fact that the judgment relied upon two matters which had turned out to be incorrect. It was incorrect to state that the PIAB Act had ousted the jurisdiction of the courts to hear claims other than those with a PIAB authorisation (where required) and reliance on the decision of *Sherry v. Primark Ltd t/a Penneys* [2010] 1 I.R. 407 was also incorrect as that judgment had subsequently been overruled.
20. Counsel for the plaintiff submits that s. 3 must be given its ordinary meaning. The words in the subsection did not refer to a cause of action but to a factual situation. Counsel relies

upon the decision of O'Neill J. in *Gunning v. National Maternity Hospital* [2009] 2 I.R. 117 where the High Court rejected the defendant hospital's submission that an action arising from the use of a defective product during surgery fell within the general scope of s. 3(d), thereby requiring a PIAB authorisation, because the legal wrong or cause of action concerned the defectiveness of the product rather than any alleged negligence in the carrying out of the procedure.

21. Counsel for the plaintiff submits that the ordinary interpretation was in fact consistent with a purposive interpretation of the PIAB Act. Counsel refers to the Supreme Court decision of *Clarke v. O'Gorman* [2014] 3 I.R. 340, which placed s. 3 in its context. Counsel submits that the interpretation proposed by the defendant was a technical and legalistic construction of the PIAB Act which would inhibit the capacity of litigants to bring actions. It is more consistent with the purpose of the Act to interpret the sub-section as referring to factual situations rather than applying the more difficult legal and complex analysis advocated by the defendant.
22. The plaintiff also relies upon the constitutional context in which the PIAB Act had to be interpreted. Access to the courts has been recognised and it was satisfied that if the Court read the Act in the manner that the defendant contends would be a denial or ouster of the right of access. Giving the PIAB Act a constitutional interpretation meant that any such ouster had to be clearly and expressly made.
23. Counsel also relies upon a number of UK cases which demonstrated that the phrase *arising out of* had been given a broad interpretation to mean *connected with*. He refers to *Samick Lines Co. Ltd v. Owners of the Antonis P. Lemos* [1985] 2 W.L.R. 468 in which the phrase *arising out of* was given that meaning in its context, but also to put forward the submission that the phrase had more broadly been given the meaning *connected with* in English law.
24. Counsel for the defendant submits that although *Clarke v. O'Gorman* had little direct relevance to the issue in this appeal, it was of importance that the Supreme Court identified that the purpose of the PIAB Act was to provide a service to litigants. For that reason, the Act was deliberately set up to be broad and inclusive, thereby capturing a wide range of actions. The defendant points to the outcome that if the plaintiff's interpretation was accepted, it could give rise to certain anomalies; an example of which is that a person who imports a defective product from outside the EU and supplies it to another could find themselves inside the scope of the PIAB Act. The defendant accepts that no matter which interpretation is accepted, there could be cases where one defendant might fall inside the Act or another outside the Act. The defendant recognises that this is not of itself an enormous concern as the PIAB Act provides for circumstances where one defendant consents to a PIAB assessment and the other does not. In the context of the overall policy, the defendant submits however that it would be surprising if the Oireachtas had legislated to keep defective products out of the scope of the PIAB Act.
25. It was agreed by counsel for the defendant that the primary question was the plain meaning of the words, but he submits that the plaintiff's interpretation did violence to the language. He submits that the only possible argument that the plaintiff could make was that the

exception arose because this arose in the “provision of a health service”. He submits that his client had neither carried out a medical or surgical procedure nor had they provided medical advice. Counsel submits it was also not on the facts a provision of a health service.

26. The key issue, in counsel’s submission, is the phrase “*arising out of*”. This has to mean “*arising from*” or “*arising under*” but did not mean simply “*connected with*” or causally related to. He contrasted s. 3(d) with s. 3(a) which relates to civil actions against employers where those actions “aris[e] in the course of the employee’s employment with that employer”. Thus, he submits, the Oireachtas can use a different phrase in a different part of the same section to express a different idea.
27. In written submissions, the defendant relies upon *Sherry v. Primark Ltd t/a Penneys*, where O’Neill J. stated “[t]he only actions that are expressly excluded, by virtue of s. 3(d), are medical negligence actions.” The Supreme Court in *Clarke v. O’Gorman* did not disagree with or comment upon O’Neill J.’s above quoted interpretation of s. 3(d) of the PIAB Act. The defendant submits that whatever else may be said about the exception carved out in s. 3(d) of the PIAB Act, it is clearly directed at medical negligence actions. In oral submissions however, the defendant clarified that he was not suggesting that the section only related to medical negligence. Counsel for the defendant is not making the case that the sub-section identified particular causes of action, rather the action had to arise out of the areas mentioned in the exclusions. Instead, “medical negligence” was a useful shorthand for what the Oireachtas clearly had in mind in the exceptions set out in s. 3(d) of the PIAB Act.
28. The defendant also relies upon *Gunning v. National Maternity Hospital* [2009] 2 I.R. 117. In that case, the plaintiff underwent an operation at the defendant hospital during which a portion of forceps broke and lodged in her abdomen. She instituted personal injuries proceedings against the hospital and the two other defendants who were the suppliers and manufacturers of the forceps product respectively. The claim made against the suppliers and manufacturers of the product was both in negligence and a claim that the forceps was defective. For the claim against the suppliers and manufacturers the plaintiff obtained an authorisation under the PIAB Act. However, no application to PIAB for authorisation of the claim against the hospital was made (because PIAB said it was not required). The hospital brought an application to dismiss the plaintiff’s claim as a result of her failure to obtain an authorisation from PIAB. O’Neill J. held that the exclusion provided by s. 3(d) of the PIAB Act should be construed as applying to the factual circumstances out of which an action arises, rather than to the specific legal causes of action set out in the proceedings. He noted that otherwise it could result in different aspects of the same personal injuries claim proceeding in parallel before the Courts and the Personal Injuries Assessment Board. In applying the “factual circumstances” test, O’Neill J. took the view that the claim against the hospital occurred in the course of the carrying out of a medical or surgical procedure. Counsel pointed to the difference in the particulars of negligence against the hospital which were not particulars referable to defective products but to the use of them.

29. Counsel for the defendant submits that where he was the only defendant there could be no suggestion that the claim arose out of the provision of a health service. Counsel referred to sub-sections (a) (b) and (c) of s. 3 of the PIAB Act in submitting that those sub-sections identified the person who one can sue i.e. the employer, the owner/driver of a car or user or occupier of land. He submits that s. 3(d) was in fact the compendium claim for all civil actions with the exclusions for certain types of actions.
30. Counsel for the defendant also relies on the *Murphy v. DePuy International Limited* decision in which Faherty J. had looked at the relevant context or factual circumstances, thereby adopting the approach taken in *Gunning v. National Maternity Hospital*. She correctly identified the factual claims made which was a product liability claim. Similar to the facts of this case, no claims of medical negligence were made against the surgeon or the hospital. Secondly, the factual circumstance out of which the claim arose was the alleged defect in the defendant's product.
31. Counsel for the defendant takes issue with the plaintiff's view that the general requirement for a PIAB authorisation in s. 3(d) provided an exception to the general rule of access to the courts and therefore the sub-section had to be construed narrowly in so far as any other interpretation might require a PIAB authorisation. The overall thrust of the sub-section was that personal injury actions *generally* will have to go through PIAB and that only a sub-category would not. There is no basis for saying that one should read the exception to the general rule of requiring an authorisation more widely than the plain words permitted. He responds to the plaintiff's reliance on *Samick Lines Co. Ltd v. Owners of the Antonis P. Lemos* by highlighting that the interpretation of "arising out of" depends on context.
32. In reply, counsel for the plaintiff submits that Faherty J. in *Murphy v. DePuy International Limited* had not referred to (and it seems had not been referred to) s. 4 and had treated "civil action" as meaning a cause of action. She had also relied on *Sherry v. Primark Ltd t/a Penneys* and the *dicta* by O'Neill J. that the only actions that are expressly excluded were medical negligence actions. Counsel also refers to the particulars of negligence actually pleaded which went further than mere defective products particulars, although counsel submits that an examination of the particulars was not required as it was a factual and not legal test that was at issue. Counsel for the plaintiff also refers to a later UK case, *Fiona Trust & Holding Corporation v. Privalov* [2007] 4 ALL ER 951, in which the House of Lords said it was time to abandon the distinction between "arising out of" and "arising under". They had to be given their ordinary meaning. He also urged the Court to reject the defendant's invitation to say there were no downsides to going to PIAB because that is a policy choice drawn by the Oireachtas.

### **ANALYSIS AND DECISION**

33. The object of any attempt at statutory interpretation is to give to a statute or part thereof the interpretation which reflects the intention of the body that enacted the legislation. The intention of the legislative body is said to be reflected in the words chosen in the enactment. In the present case, both parties agree that the ordinary and plain meaning ought to be given to the words in s. 3(d) of the PIAB Act. In the language of statutory interpretation, this is to apply a literal approach to the Act which is the primary method of construction

(see McKechnie J. for the Supreme Court in *AWK v. The Minister for Justice and Equality* [2020] IESC 10).

34. In *AWK v. The Minister for Justice and Equality*, McKechnie J. also noted at para. 35 that:-

*"[a]s part of this approach however, it has always been accepted that context can be critical. It is therefore perfectly permissible to view the measure in issue by reference to its surrounding words or other relevant provisions and, if necessary, even by reference to the Act as a whole."*

35. In the case of *DPP v. Brown* [2019] 2 I.R. 1, McKechnie J. had expanded on what was meant by *context*, stating at para. 94 that:-

*"'Context' in this regard may require the one interpreting the legislation to consider the immediate context of the sentence within which the word is used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including on occasion LRC or other reports; and perhaps even the mischief which the Act sought to remedy. With each avenue of remove, the natural meaning of the word may, or may not, begin to shift."*

36. The Oireachtas must of course be presumed not to have intended to produce an absurd approach and on that basis, without looking at a purposive approach (as provided for by s. 5 of the Interpretation Act, 2005), McKechnie J. said in *AWK v. The Minister for Justice and Equality* that *"it is permissible to have regard to the underlying rationale for the provision(s) in question"*.

37. For the purposes of examining the underlying rationale of the PIAB Act, regard must be had to what was stated by the Supreme Court in *Clarke v. O'Gorman*. That case concerned a claim of sexual assault. The issue was whether a claim relating to sexual assault was a personal injuries action and, if so, whether the court had no jurisdiction to entertain the hearing. There had been no pleading to the effect that the absence of a PIAB authorisation meant that the case must be struck out, but the High Court held that as it was a question of jurisdiction the High Court could not hear the case. The Supreme Court overturned the decision, holding that in order to rely upon the s. 12 requirement to seek an authorisation a defendant must plead that provision in its defence. The Supreme Court pointed to the factual nature of the claim which was a claim for *personal injuries* arising out of an assault of a sexual nature.

38. The defendant submits that *Clarke v. O'Gorman* has no material effect on the issue to be determined in this appeal save that the defendant submits that in para. 1 and 2 of his judgment, O'Donnell J. describes how the PIAB Act was introduced to reduce the burden of costs upon insurers in the belief that this would substantially reduce insurance premiums. He said the Act is structured to provide a service to litigants which may remove the necessity for litigation. It should also be noted that he held that it was not an abolition of the right to sue for damages. In outlining the architecture of the Act, O'Donnell J. said that



it appears to have acted upon an assumption that many cases do not involve or at least should not involve a serious contest on liability and will therefore result in an award to the plaintiff. The theory appears to be that the machinery of civil litigation is an unnecessarily costly way of getting to a predictable end point. Having a valuation of injuries given by an independent assessor might allow the end point to be reached without the costs, stress, delay and trauma of court proceedings if both parties agree to the valuation.

39. In my view *Clarke v. O’Gorman* is also to be important because of the clarification given to the related and intersecting concepts of “wrong”, “civil action”, “cause of action” and “action for personal injuries”. Having discussed the legislative definitions of “civil action” and “wrong”, O’Donnell J. said: “*It is important however to note however that a ‘claim for personal injuries’ which is the central concept in the Act of 2003, is not itself a cause of action. Personal injuries are the injuries suffered which, if caused by a wrong, may give rise to a remedy, most often an award of damages.*” He went on to say at para. 18:-

*“Thus, while proceedings may be described colloquially as proceedings for personal injuries, as a matter of law they are proceedings for remedies flowing from asserted causes of action. In the bulk of cases this poses no problem. Indeed, the Act of 2003 seems to adopt the approach that personal injuries actions may be difficult to define but easy to recognise.”*

40. O’Donnell J. also stated at para. 29:-

*“For reasons already touched on, causes of action on the one hand, and claims for personal injuries on the other, are not similar concepts. In my view, it is wrong to pose the question whether this was an action for trespass to the person and assault or a civil action for personal injuries, as if these were mutually exclusive categorisations. They are not. A cause of action is something logically and legally different from the type of damage suffered as a result of the facts giving rise to the cause of action. The fact that a claim can be described as one for personal injuries does not mean that it is not an action for assault, for example. Since they are different things, the description of the cause of action on the one hand and the damage alleged in consequence on the other are not mutually exclusive categories of causes of action, but instead overlap and intersect.”*

41. *Clarke v O’Gorman* established that the requirement under s. 12(1) of the PIAB Act to obtain such an authorisation was not jurisdictional; rather the section operates as a limitation on the right of access to the courts. It was not a provision which controlled the right to recover damages for a personal injury itself but is a provision which controls part of the manner in which a claim may be brought and compensation received. The Supreme Court held that as it was not a jurisdictional matter, the provision could only be relied upon if pleaded by a defendant. It follows therefore that the onus is on the defendant to prove that the plaintiff’s case comes within the general requirement under s. 3(d) to obtain an authorisation from PIAB and that it does not fall within one of the exclusions set out in the sub-section.

42. The defendant submits that there is nothing in the judgment of O'Donnell J. in *Clarke v. O'Gorman* that discusses or addresses the meaning and scope of s. 3(d) of the PIAB Act. As the defendant notes however, O'Donnell J. observed that in light of the scope of that provision, it was not clear why s. 3 had been divided into four separate paragraphs because subsection (d) was a "catch all", which if slightly amended would make (a) (b) and (c) redundant. O'Donnell J. did also observe however, that it may have been so structured to allow for staggered commencement dates but if so, it has had the unfortunate effect of complicating the subsequent interpretation of the statute. While there is no such direct discussion as to the interpretation of this sub-section in *Clarke v. O'Gorman*, I consider that the insights of O'Donnell J. into the distinctions between "civil action" and "causes of action" assist in ensuring that a correct interpretation of the section is reached. I agree with the submissions of the plaintiff that in enacting s. 3, the Oireachtas has also adopted the approach that the scope of the exclusions may be difficult to define but easy to recognise. That dovetails with the application of the ordinary or plain meaning test; the section does not apply to a legal category of cases arising from particular causes of action. Pared down, the exclusions in s. 3(d) apply to claims in relation to any civil wrong which resulted in personal injuries "arising out of" a) the provision of a health service b) the carrying out of a medical or surgical procedure and c) the giving of any medical advice or treatment to a person.
43. The ordinary meaning of wording in legislation is not necessarily its ordinary meaning in everyday speech. In the absence of a specific definition of a word or phrase within the legislation, the ordinary meaning in everyday speech appears a good starting place however. After all, legislation is addressed to the public at large and should be as accessible as possible. During the oral hearing, the Court queried if the ordinary, everyday understanding of the phrase "arising out of" would be reflected by a person who might describe the type of problems besetting this plaintiff as follows: "I had a hip replacement, "arising out of" which I have significant pain and discomfort in my hip". That is an ordinary and natural meaning of the phrase "arising out of" which conveys a broad sense of being "in connection with" the matter at issue.
44. Counsel for the defendant's reply to that observation is that the issue does not turn on what the average person might say, rather it turns on answering the question "what is the *proper meaning* of the phrase "arising out of"? In order to assess that meaning, counsel submits that one has to look at what the claim is for and to do that it is necessary to examine the pleadings. Prior to looking at the pleadings, it is also necessary to point out that the defendant's submission is that, within the context of the PIAB Act, the phrase "arising out of" had a restrictive meaning; it meant "arising under" but not "arising in the course of" or "in connection with" the matter in issue.
45. It is worth commenting that if one was to substitute "arising under" for "arising out of" in the exclusions in the sub-part of s. 3(d), which is the defendant's contended meaning of the latter phrase, the language in the sub-section would not be a natural or ordinary usage. The sub-phrase would read "other than one arising under the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or

the provision of any medical advice or treatment to a person". By contrast, the sub-phrase "other than one *in connection with* the provision of any health service to a person etc..." is one that reads naturally.

46. How then must the ordinary meaning of "*arising out of*" in the context of the PIAB Act, be understood? The Act provides the context; to supply a service to litigants. That however is a service not available to every litigant's claim for personal injuries. Actions where there is a *bona fide* claim relating to another cause of action other than that in which personal injuries are claimed (see s. 4(1)(i) of the PIAB Act and O'Donnell J. in *Clarke v. O'Gorman* at para. 30) are not civil actions within the meaning of the Act. Subsequent to the commencement of each of the sub-sections in s. 3, the only actions solely claiming for personal injuries that are *excluded* from the Act are those coming within the three exclusions listed in s. 3(d) thereof. While there may be a dispute as to whether the exceptions relate only to "medical negligence" actions, there cannot be a dispute that in its broadest sense those exclusions exist because they at a minimum cover medical negligence actions which are usually highly complex actions involving disputes on liability and on quantum. They are the opposite of the "*many claims for personal injuries [that] do not involve, or at least should not involve, a serious contest on the issue of liability, and will therefore result in an award to the plaintiff*" (per O'Donnell J. in *Clarke v. O'Gorman* at para. 3) which was the impetus for the Act.
47. Counsel for the defendant accepts that the focus must be on the facts and not the nature of the cause of action. Alive to the nuances of the legislation, counsel does not claim that defective products cases are as a *cause of action* excluded, instead the argument is that those types of claims do not factually arise out of any of the three exclusions contained in the sub-section. I do not consider however that the context of the Act argument assists the defendant in seeking to narrow the understanding of the phrase "*arising out of*" based purely on the defendant's acceptance that there must be a factual consideration of the claim. A claim for personal injuries relating to liability for a defective product in a context other than any health/medical setting is one that will require an authorisation. The Oireachtas chose not to make product liability claims in and of themselves an exception to this requirement for an authorisation. We cannot know precisely why; it may be because these types of claims often do not give rise to any great difficulties on liability.
48. On the other hand, it does not follow that if a claim for personal injuries is made concerning, to use a neutral phrase, *the use of* an alleged defective product in a health or medical setting, that the liability issue will be simple. On the contrary, liability issues concerning the use of defective medical/surgical products are likely to give rise to complexity. For example, the claim might also include a claim that not only was the product defective but that further or in the alternative, the negligent manner in which the product was used by medical personnel resulted in personal injury. The medical personnel or the medical setting (as occurred in *Gunning v. National Maternity Hospital*) in which the procedure took place may have been sued by the plaintiff and those claims do not come within the scope of the Act. Interpreting "*arising out of*" in the sense of "*connected with*" results in interrelated actions being brought before the High Court without the need for part of the claim to be

sent to PIAB. That interpretation recognises that the complexity of the claim favours a straight path towards the courts. Moreover, it is more complex for a litigant to have to commence proceedings in a different manner against different defendants when the personal injuries claim only arose because he or she had undergone surgery in which an allegedly defective device was implanted.

49. The defendant submits that the difference in terminology between the sub-sections is indicative of a more restrictive interpretation to the exclusions. Counsel submits that the use of the phrase "*arising in the course of*" demonstrates that the Oireachtas were capable of expressing a different idea in each of the subsections to s. 3 of the Act. They did not use "*arising in the course of*" in s. 3(b)(c) or (d) of the Act. I do not find this submission particularly helpful to the defendant's case. An examination of the sub-sections identifies what can only be very carefully chosen language that distinguishes the "employer's liability" claim from the others. The claim is one for personal injuries by an employee against the employer *for negligence or breach of duty* arising in the course of the employee's employment with that employer. None of the other sub-sections refer to specific legal aspects of the claim other than the incorporated reference to "wrong" which as O'Donnell J. said in *Clarke v. O'Gorman* "*captures most, if not every, cause of action litigated in civil proceedings at common law.*" Therefore, there must be a particular reason for the focus to be on *negligence and breach of duty* that must arise in the course of the employment. This means that a claim for personal injuries that arises out of a breach of the contract of employment would not be sufficient. It is a sub-section where the *type or nature of the legal wrong* within a particular context is the focus of the sub-section rather than simply have a focus on the fact that personal injury was sustained in a particular factual situation. That is a significant factor.
50. It is also difficult to understand why the phrase "*arising in the course of*" must be given an interpretation that is wider than the meaning of the phrase "*arising out of*". It seems to me to be a more restrictive phrase because it conveys a sense of something that is time limited. A claim in tort for personal injuries will only accrue when damage has been caused. If the claim based in tort is to be limited to something that occurred "in the course of employment" it would appear that the damage would have to occur (or be manifest) during *the course of employment*. This would lead to a situation for example where damage such as mesothelioma, occurring many years after the employment has ended, would not give rise to a civil action which arises *in the course of the employee's employment* with the employer. For that reason, it is necessary to identify aspects concerning the legal nature of the claim (and not merely the factual nature thereof), that is, a claim based on *negligence or breach of duty* in the course of employment in order to ensure that even claims where delayed damage had occurred would be caught within the scope of the sub-section. The Oireachtas has chosen not to legislate in that fashion in other sub-sections of 3(d) of the Act. Instead, there is no time limit on when damage must have occurred or any restriction such that negligence or breach of duty must have occurred, to use the example of s.3(d), arising out of the provision of the health service, the carrying out of the medical or surgical procedure or the giving of medical advice or treatment.

51. Looking further into the context in which the words “*arising out of*” appear in the Act, it is noteworthy that there is no legislative history for this Act, being an Act setting up an entirely new procedure, which requires those words to be interpreted in a specific manner. There is therefore no legislative history on which to draw for the correct interpretation. It may also be a little surprising that, unlike the UK case law and the references therein to UK statutes which have been referred to the Court in submissions, no Irish statutes or case law has been put before us which points to a more restrictive interpretation of the phrase “*arising out of*” than its ordinary meaning would suggest. A quick exploration of the Irish Statutes database reveals it is a phrase that has been utilised literally hundreds of times in legislation, yet from what has been submitted to us no judicial consideration appears to have been given to the meaning of those words in this jurisdiction. That is all the more surprising given that the Workman’s Compensation Act, 1934, s. 15 mandated the payment of compensation by an employer to a workman for personal injury that is caused to the workman “arising out of and in the course of the employment”. Perhaps the use of the phrase “in the course of the employee’s employment” contained in s. 3(a) of the PIAB Act concerning employment claims was a deliberate reference back to the “workman’s compensation” claims under the previous legislation. If so, it is noteworthy that only part of the required link with employment under the earlier legislation was chosen; the second requirement “in the course of the employment” in the Workman’s Compensation legislation is not reproduced in the PIAB Act. This would also tend to support a view that “*arising out of*” is a broad phrase and that the qualifying phrase “in the course of” the employment was added in the Workman’s Compensation legislation to further restrict it.
52. The House of Lords in *Samick Lines Co. Ltd v. Owners of the Antonis P. Lemos* considered the meaning of the phrase “*arising out of*” in the UK Supreme Court Act, 1981 which gave Admiralty jurisdiction to the High Court to hear “any claim arising out of any agreement relating to [...] the use [...] of a ship”. The issue was whether this jurisdiction extended to claims not founded on the agreement between parties but to other claims in tort including those between persons who were not party to the agreement. Lord Brandon stated that he would:-

*“readily accept that in certain contexts the expression ‘arising out of’ may, on the ordinary and natural meaning of the words used, be the equivalent of the expression ‘arising under’ and not that of the wider expression ‘connected with’. In my view, however, the expression ‘arising out of’ is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression ‘connected with’. Whether the expression ‘arising out of’ has the narrower or the wider meaning in any particular case must depend on the context in which it is used”.*

In its context however, the House of Lords gave the expression its wider meaning, Lord Brandon noting that the meaning had been that which had previously been given 26 years previously to the expression in an earlier statute and that the legislature had not seen fit to change it. I accept that the overall import of that decision is that the ordinary and natural meaning of the phrase “*arising out of*” may be context derived.

53. The context of the Act, as set out by O'Donnell J. in *Clarke v. O'Gorman*, does not point to a more restrictive meaning instead of the wider (or ordinary) meaning which a potential litigant with no legal knowledge might give it. In that sense therefore, the ordinary and everyday meaning of the phrase "*arising out of*" is that the claims must *stem from* the provision of the health service or the carrying out of the medical or surgical procedure or the giving of medical treatment. That may be another way of saying that the claim must be *connected with* the provision of the health service *etc.* Contrary to the defendant's submission, this interpretation certainly fits within the rationale of the Act, which is to provide a service to litigants while excluding the particularly complex area of breach of duty in health and medical related matters. I would caution however that the interpretation I have given to the phrase is not a purposive one, it is simply an interpretation that fits within the rationale of the scheme.
54. Undoubtedly the Oireachtas could have taken a different legislative approach. It could have carved out an exception for medical negligence claims (perhaps by using the same definition of clinical negligence action as contained in Part 2A of the Civil Liability and Courts Act, 2004 as inserted by s. 219 of the Legal Services Regulation Act, 2015). The Oireachtas could have legislated specifically to require that all claims against manufacturers/suppliers of defective products must have a PIAB authorisation. The Oireachtas has chosen not to do so, instead, it has legislated in ordinary language that claims *arising out of* the provision of a health service *etc.* are exempt from the requirement to have a PIAB authorisation. For the reasons set out above, that language refers to actions that are *connected with* or *stem from* the provision of those services or the carrying out of those procedures.
55. Even if the Court is required to examine the pleadings, I do not consider that such an examination assists the defendant. The defendant refers to those pleadings that reflect the nature of a product liability claim but other pleadings reflect the wider nature of the claim. For example, the plaintiff pleads a number of particulars about failing to provide warnings before and after the procedure. Particular (q) recites: "Failed to warn the Plaintiff and those medical advisers who performed the procedure that the Plaintiff ought to have had her [sic] serum chromium and cobalt levels measured on a regular basis."
56. I consider that these pleas reflect the factual situation that this claim arose out of the surgical procedure in which the allegedly defective product was inserted. This surgical procedure was the carrying out of the surgical procedure of hip replacement and it is not necessary to say whether it also amounts to the provision of a health service or the giving of medical treatment. On that basis alone, the defendant's case must fail; the pleadings reveal that this was more than a "mere" defective products claim.
57. Of the utmost importance to the decision in this appeal are the facts. A consideration of those facts reveal that it is a claim that "*arises out of*" at least one of the exclusions set out in s. 3(d) namely, the provision of a health service, the carrying out of a medical or surgical procedure or the giving of medical treatment. The allegedly defective hips were fitted by way of surgical procedure; this being the only way in which the replacement hip at issue could be fitted. If a claim was made against the surgeon alleging negligence in the fitting

of the replacement hip that would not require a PIAB authorisation as it would clearly fall within one or more of the exclusions including that of arising out of a surgical procedure. A claim against the manufacturer of an allegedly defective replacement hip, whether brought in conjunction with a claim against the surgeon or, as here, a standalone claim, is also a claim which *arises out of ... a surgical procedure*. This is a determination based on the facts of this case. Every claim must be determined on its facts. The facts here demonstrate in the most stark terms a clear “but for” situation. If there had been no surgical procedure there could have been no injury and thus no claim. There is a direct and proximate connection with the surgical procedure; there is no remoteness. There may be civil actions where the factual scenario is so remote that it severs the connection with the surgical (or medical) procedure so that, applying the ordinary and natural meaning of the wording in the sub-phrase dealing with the exclusions, the action cannot be said to *arise out of* the procedure; but this is not such an action.

58. For the purpose of this appeal, it is unnecessary to decide how each of the particular exclusions in s. 3(d) are to be interpreted and how, if at all, they can be distinguished from each other. Counsel for the defendant did however submit that the only exclusion he could envisage was that of provision of a health service as his client certainly did not *carry out* any medical or surgical procedure. On the basis of the meaning of the phrase “*arising out of*” I have rejected that limitation based upon its ordinary interpretation. In the course of submissions, counsel suggested that if the plaintiff was correct then the door was open for a huge range of claims in what were properly defective product claims. Such a door will only open however if those claims are truly claims *arising out of* the provision of a health service (or in respect of the other exclusions). It is difficult to see where this deluge of claims will come from but even if there are, this will be because these claims have been viewed by the Oireachtas as inappropriate for PIAB consideration.
59. In this case, applying the ordinary and natural meaning of the statute to the facts, the plaintiff was not required to obtain an authorisation from PIAB prior to the commencement of proceedings against the defendant. The plaintiff’s appeal must therefore succeed.
60. In light of the decision I have reached in relation to the interpretation of the exceptions set out in the sub-section, it is not necessary to go further and consider the plaintiff’s argument that the exclusions could amount to a potential restriction of the plaintiff’s constitutional right of access to the courts and therefore must be strictly construed. It is also unnecessary to consider the argument that the subsequent authorisation granted by PIAB could save the proceedings from being dismissed on the basis that the obtaining of the authorisation was a procedural issue and did not go to the jurisdiction of the court to hear the action.

## **CONCLUSION**

61. For the reasons set out in this judgment, I have concluded that the intention of the Oireachtas in providing exclusions within s. 3(d) of the PIAB Act from the general requirement to obtain a PIAB authorisation is that the plaintiff’s action for personal injuries against a defendant manufacturer in respect of an allegedly defective hip implant that he received during surgery does not require such a PIAB authorisation. That factual claim is an action pursued for the purpose of recovering damages, in respect of a wrong, for

personal injuries, arising out of (at a minimum) the carrying out of a surgical procedure to the plaintiff.

62. I would therefore allow this appeal.
63. As regards costs, given that the plaintiff has succeeded in his appeal, it would appear to follow that the plaintiff is entitled to the costs of his appeal, to be adjudicated in default of agreement.
64. If the defendant wishes to contend for a different form of order on this appeal (including the order for costs), it will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the defendant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.
65. *In circumstances where this judgment is being delivered electronically, Collins and Binchy J.J. have authorised me to record their agreement with it.*