



**THE COURT OF APPEAL  
CIVIL**

**High Court Record No. 2017/217 MCA  
Court of Appeal Record No. 2018/281  
Neutral Citation No. [2022] IECA 24**

**UNAPPROVED  
NO REDACTION NEEDED**

**Haughton J.  
Murray J.  
Pilkington J.**

**BETWEEN**

**C**

**APPLICANT/APPELLANT**

**- AND -**

**JOHN CASEY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Murray delivered on the 2<sup>nd</sup> day of February 2022**

1. Statutory protection from civil liability for those facilitating the detention of persons pursuant to Mental Health legislation was first introduced in the law of England by s. 12 of the Lunacy Acts (Amendment) Act 1889. The terms of that provision were repeated in s. 330 of the Lunacy Act 1890. The approach adopted in those statutes (an immunity from suit for persons acting in good faith and with reasonable care combined with a power of the court to stay such proceedings where, on application to it, it was satisfied that there was ‘*no reasonable ground for alleging want of good faith or reasonable care*’) was significantly adjusted in the United Kingdom in favour of defendants to such suits by ss. 15 and 16 of the Mental Treatment Act 1930. These, in turn, were ‘*the prototype*’ adopted by the draftsman of s. 260 of the Mental Treatment Act enacted in this jurisdiction fifteen years later (per Griffin J. *O’Dowd v. The North Western Health Board* [1983] ILRM 186 at p. 194 to 195 (‘*O’Dowd*’)).
2. That section (a) introduced a requirement that a plaintiff obtain leave of the High Court before instituting proceedings ‘*in respect of an act purporting to have been done in pursuance of*’ that Act, (b) limited the causes of action that might be invoked by a plaintiff in such proceedings to those in which it was claimed that the defendant ‘*acted in bad faith or without reasonable care*’ and (c) conditioned the grant of such leave by imposing a requirement that there be ‘*substantial grounds for contending*’ that the proposed defendant had thus acted.
3. The rationale for the legislation was described by Henchy J. in the course of his judgment in *O’Dowd* at p. 196:

*‘It is an unfortunate syndrome of certain kinds of mental illness that a patient compulsorily detained in a mental hospital for treatment conceives a deep-seated but quite unjustified conviction that his detention was unnecessary, even malevolent or unlawful, and that what he considers to be victimisation should give him a good cause of action for damages. The undesirability of giving free rein in the courts to such a delusional obsession is recognised by s. 260 of the Mental Treatment Act 1945.’<sup>1</sup>*

4. While different language might be used today, the essential justification underlying the legislation as so explained demonstrates the extremity of the situation with which the Oireachtas was concerned. It was in that context that Henchy J. recognised a trade-off of sorts within the 1945 Act. Whatever the constraints attending the institution of legal proceedings by a person the subject of involuntary committal, the process of such committal is a grave one significantly impacting the liberty and dignity of a person subjected to it. It is thus conditioned by important and necessary procedural requirements. Many of these are preconditions to the legality of the detention that follows, and a want of care in compliance with some of them may in certain circumstances give rise to civil liability on the part of those responsible for such negligence and/or in false imprisonment (*O’Dowd* at p.204). The reasons are obvious

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<sup>1</sup>According to O’Neill *‘Irish Mental Health Law’* (Dublin 2005), s. 12 of the 1889 Act was prompted by the demands of the psychiatrist profession, which refused to implement the procedures for civil commitment introduced by that Act unless such a provision were introduced (at p. 354). The protection originally surfaced in the Lunacy Acts (Amendment) Bill 1886 (piloted by the Lord Chancellor). In the course of the debates (HL Deb 18 March 1886 Vol 303 Cols. 1136-1152), he explained that the summary power to stay actions which were brought against medical practitioners for having given such certificates where it could be shown that there was no ground for the allegation that they had acted with want of reasonable care and of good faith *‘would satisfy medical practitioners, who had been alarmed by the costly proceedings which had been taken against some of them in recent years.’* Lord Coleridge, then Chief Justice of the Kings Bench had suggested such provision at the second stage of the Bill (HL Deb 18 March 1886 Vol 302 Cols. 1489-1503), urging protection for those implementing the law *bona fide*.

(O'Dowd at p. 205, referring to Articles 40.3.1 and 40.4.2 of the Constitution and *Re Phillip Clarke* [1950] IR 235):

*'It was the implementation of these constitutional guarantees that caused the Legislature to hedge round the making of a chargeable patient reception order with the formalities mandated by the Act and the regulations made under it . As Clarke's case shows, some of those formalities are only formalities; but others are clearly obligatory, designed to implement the constitutional guarantees I have quoted, and in particular to ensure that, not even for a short period, will a citizen be unnecessarily deprived of his liberty and condemned to the tragic and degrading status of a compulsory inmate of a mental hospital, with the dire social consequences that such a fate is likely to have on his future and on that of his relations'.*

5. While one might hope that the social consequences of such involuntary committal have been softened by time, experience and attitudinal change the central thesis of this dissent was important. The majority judgments (O'Higgins CJ. with whom Griffin J. agreed) allowed an appeal against a decision of Costello J. granting leave to the applicant to institute proceedings against a medical practitioner who (as Henchy J. described the sequence) had failed to comply with statutory requirements mandating examination of the patient upon arrival at a hospital, failed to ensure the reception order was made upon the arrival of the patient, failed to advise the patient of his entitlement to obtain in-patient treatment on a voluntary basis, and failed to complete an examination on his arrival as he had represented in the reception order he had done. There were, the majority found, no substantive grounds for the plaintiff's contention

that the medical practitioner had acted without reasonable care, O’Higgins CJ. observing (at p. 190) that the provision did not seem to be ‘*unduly restrictive or unreasonable*’.

6. The court may have adopted a different view of the legislation when in *Blehein v. Minister for Health and Children and ors.* [2008] IESC 40, [2009] 1 IR 275, s. 260 was declared invalid having regard to the provisions of the Constitution. The legislation was found to have had a legitimate purpose – preventing persons who are or have been thought to be mentally ill from mounting a vexatious action or one based on imagined complaints - but the restriction on the constitutional right to litigate around an alleged infringement of the right to liberty was disproportionate. While the judgment of the court is brief, the essential reasons for its view that the provision was arbitrary and thus unfair are not difficult to discern. The section enabled only two grounds of application and imposed a requirement of ‘*substantial grounds*’ combining these with a scheme which imposed the burden of justifying the proceedings at an early stage. For this reason, the legislation did not ‘*impair the rights involved as little as possible and so the effect on rights is not proportionate to the object to be achieved*’ (at p. 281).
  
7. The response of the legislature via s. 73 of the Mental Health Act 2001 was to maintain the pre-existing requirement that an intending plaintiff seeking to institute civil proceedings in respect of an act purporting to have been done in pursuance of the Act, obtain the leave of the High Court to commence that action. However, the consequent jurisdiction is now defined by the following features:
  - (i) The default position is reversed. Whereas under the 1945 Act a plaintiff had to satisfy the court of identified statutory criteria before being

permitted to proceed with his action, under s. 73 the court must grant leave *unless* it is satisfied of the limiting grounds now prescribed.

- (ii) The plaintiff does not have to establish '*substantial grounds*' for any aspect of his or her claim. Now, the reversed burden merely requires that the court before refusing leave be satisfied of one of two matters.
- (iii) The first of these matters is that the proceedings are '*frivolous or vexatious*'. This, of course, reflects the requirement imposed on any plaintiff where an application to dismiss their claim is brought pursuant to Order 19 Rule 28 of the Rules of the Superior Courts.
- (iv) The second is that '*there are no reasonable grounds for contending that the person against whom the proceedings are brought acted in bad faith or without reasonable care*'. Whether by accident or design, this mirrors the basic trigger for an application for a stay under the 1890 Act.
- (v) The *only* causes of action that may be maintained by a person in respect of an act purporting to have been done in pursuance of the 2001 Act are those which involve a defendant acting in bad faith or without reasonable care. This follows from the second ground for refusing leave, and is underscored by s. 73(3):

*'Where proceedings are, by leave, granted in pursuance of subsection (1) of this section, instituted in respect of an act purporting to have been done in pursuance of this Act, the Court shall not determine the proceedings in favour of the plaintiff*

*unless it is satisfied that the defendant acted in bad faith or without reasonable care'.*

8. These factors dictate the legal principles and their proper application to the facts here, as follows. First, I have laboured the context to and history of s. 73 because it appears to me to be central to a proper understanding of how the court should approach the process of interpreting and applying the provision. The starting point is that every citizen is entitled to have recourse to the courts to agitate justiciable disputes. The Oireachtas has sought, through s. 73, to maintain a filter on actions by persons who have been subject to the processes provided for in the Act. It must be presumed it has done so for the reasons I have earlier identified. However, it has greatly narrowed the circumstances in which the power of the court conferred by the provision may be employed so as to prevent the commencement of legal proceedings, and the construction of the legislation must be approached on the basis that it has adopted that course because of the constitutional concerns identified in *Blehein*. The presumption is that an applicant who wishes to pursue legal action of the kind permitted by the legislation (that is legal action depending on a lack of *bona fides* or reasonable care) will be permitted to do so, and that insofar as s. 73 represents a legislative exception to the general entitlement of a plaintiff alleging a legal wrong to litigate that alleged injury, it should be strictly construed (see the comments of Finlay CJ. addressing the same principle to s. 260 of the 1945 Act in *Murphy v. Greene* [1990] 2 IR 566 at p. 572 to 573).
9. Second, at the same time no person has the right to bring proceedings that are either frivolous or vexatious and every defendant has the right to have proceedings dismissed on the basis that they have been sued in an action that is bound to fail. The imposition

of a requirement to this end by s. 73 adds little to the burden on a plaintiff in an action to which the section applies and while he or she must bring an application to court as a precondition to instituting such an action, and must in that context defend their proposed proceedings against any suggestion that they are frivolous or vexatious, this is only an alteration of timing and procedure (in requiring the application before the action is instituted and in giving the defendant a statutory opportunity to agitate the stateability of the claim without having to himself apply to court to strike out the claim). The test applicable to whether proceedings are '*frivolous and vexatious*' is well travelled in the authorities, extending over whether the proceedings disclose any cause of action, where it is obvious that the action cannot succeed, or where the proceedings are brought for an improper purpose such as the harassment and oppression of other parties (see *Riordan v. Ireland (No. 5)* [2001] 4 IR 463 at p. 466).

- 10.** Third, the phrase '*bad faith or without reasonable care*' exercises two different functions in the section. The plaintiff can only succeed in his or her claim if such bad faith or lack of reasonable care is established. A claim which does not incorporate one of these elements is a cause of action in respect of which a plaintiff may not as a matter of law be granted leave under s.73.
- 11.** Fourth, and following from this, before it can refuse leave the court must be satisfied that there are no reasonable grounds for contending that the proposed defendant acted in bad faith or without reasonable care. The double negative is confusing, but the proper test was well formulated by Clarke J. (as he then was) in *AL v. The Clinical Director of St. Patrick's Hospital and anor.* [2010] IEHC 62, [2010] 3 IR 537 at para. 11: '*where ... there is any legitimate basis on which a court might arguably conclude that a relevant intended defendant had acted without reasonable care, then it follows that*



*leave must be granted*'. At the same time the '*reasonable grounds*' for establishing bad faith or absence of reasonable care must be clear (*MP v. Health Services Executive and ors.* [2010] IEHC 161 at para. 69 per MacMenamin J.), and the court should be conscious that in cases of mental illness, more perhaps than in other situations, a mistaken diagnosis does not of itself constitute a failure to take reasonable care on the part of the doctor (*Bailey v. Gallagher* [1996] 2 ILRM 433 at p. 446 (per Keane J. (as he then was))).

12. Fifth, while the reference to '*bad faith*' requires little elaboration, the term '*without reasonable care*' must be understood as referring not simply to an absence of proper medical care, but as also capturing an obligation to use care in ensuring that persons are not committed to unlawful custody (*AL v. Clinical Director of S. Patrick's Hospital* at para. 8 per Clarke J.). This includes '*a breach of duty of care on the part of a doctor or hospital arising out of the procedures, followed or not followed in the course of putting in place the necessary measures required to procure the detention of a patient*' (*AL v. Clinical Director of St. Patrick's Hospital* at para. 9). The same point was made by O'Flaherty J. in *Melly v. Moran* (Unreported, Supreme Court, 28 May 1998). In applying these preconditions the court should keep firmly in sight the purpose and limits of the legislation. It is, I think, hard to improve on the summary in the judgment of Vaughan Williams LJ. in *Shackleton v. Swift* [1913] 2 KB 304, at p. 316: s. 330 of the 1890 Act, he said '*gives special protection to those officers and others acting under the powers of this Act in cases where, although they may have misconstrued the Act and although they may have done things which there was no jurisdiction to do, they have acted in good faith and in a reasonable manner*'.

- 13.** In applying these principles to the case at hand, I gratefully adopt the detailed account of the evidence in the judgment of Pilkington J. As is clear from that account, the appellant's complaint as recorded in the proposed Civil Bill furnished to this court is that the proposed defendant falsely signed off the Form 5, thereby contravening his rights under the Mental Health Act 2001. In that regard he complains that the respondent did not inform the appellant that he was engaging in any assessment for the purposes of that Act beforehand and that he did not conduct an examination of the appellant, in the sense of '*a proactive psychological assessment, not merely a purely physical examination by stethoscope, blood test/pressure, ECG*'. He draws attention to the fact that the respondent left the police station in question stating that the appellant was fit for interview. He claims that the respondent failed to follow the required procedures, did not establish the relevant statutory requirements before signing the Form D5, and was induced wrongly by the Gardaí to do so.
- 14.** It does not need to be said that if all of the facts underlying this claim were established at trial, the appellant would enjoy an arguable claim in law against the respondent. A claim of this kind is not excluded by s. 73 as – by definition – it involves allegations of both a want of care and of a lack of good faith.
- 15.** As the judgment of MacMenamin J. in *MP v. Health Services Executive and ors.* makes clear, the court should be wary in acceding to an application for leave under s. 73 in respect of a claim that is based upon no more than assertion. The extent to which independent evidence will be required to support such allegations before permission to proceed will be given under the provision will of course depend on all of the circumstances including the nature and context of the allegations, the existence of material that corroborates them and the response of the medical practitioner himself or

herself. The onus of proof is on the defendant, and insofar as his or her evidence may operate to shift an evidential burden on to the plaintiff, it is not a heavy one (see *JOT v. Healy and ors* [2018] IEHC 571 at para. 64).

**16.** In assessing whether an action meets the test suggested by Clarke J. in *AL v. The Clinical Director of St. Patrick's Hospital and anor.* and whether there is any legitimate basis on which the court might conclude that the respondent had acted without reasonable care, the court will be guided not merely by whether the intended plaintiff's claims are corroborated by factual or expert evidence, but also by an analysis of the credibility of the case itself in the light of all of the evidence. That involves having regard to whether the claim is so far-fetched or so self-contradictory as not to be credible (see, albeit in the different context of assessing whether an arguable defence has been made out in an application for summary judgment, *Aer Rianta cpt v. Ryanair Ltd.* [2001] 4 IR 607, at p. 615 per McGuinness J.).

**17.** Here, the following appear to me to be key to that assessment:

- (i) The respondent was not called to the Garda station to address any identified concern as to the appellant's mental health, but instead to treat a complaint of chest pains.
- (ii) The respondent avers in his replying affidavit that the appellant was at the time of this first examination '*behaving bizarrely and he gave a history which suggested paranoid ideation*'. However, the respondent following this examination expressed the view that the appellant was fit to be interviewed by the Gardaí. This is borne out by the custody record ('*Dr. Casey stated he was satisfied that the person had no underlying medical condition and stated he*

*believed that the prisoner was fit for interview*'). The respondent avers in his replying affidavit that following this examination *'I was satisfied that the applicant was suffering from an acute psychotic episode'*.

- (iii) At no point before leaving the station on this first occasion is the respondent recorded as having expressed any concern as to the appellant's mental health, and there is no record of his being prompted to undertake nor of his undertaking any assessment of the appellant's mental condition. There is no reference to a *'psychotic episode'* in the custody record. As Pilkington J. has observed, it is to be presumed that had the respondent expressed any concern to the Gardaí as to the appellant's mental health they would not have proceeded to interview him. Following the interview with the Gardaí that record states that he was *'all ok'*.
- (iv) The respondent stated in his e-mail of May 30 2015 that it was while driving away from the station that he became concerned at the appellant's behaviour and determined that it may be necessary to take steps to admit him. In that e-mail he said that he realised that the appellant *'may be suffering from a mental illness that may be clouding [the appellant's] judgment.'* He did not, however, make any contact with the Gardaí to advise them of this, whether to halt the interview or otherwise.
- (v) Upon return to the Garda Station, the respondent avers, he was advised by a member of an Garda Síochána that the appellant was *'very agitated'*. There is no reference to this in the custody record. That record suggests that eight minutes passed between the arrival of the respondent at the station, and the completion of the Form 5. Within that period, the respondent's evidence is not merely that he had a conversation with a member of an Garda Síochána and

assessed the appellant, but discussed with him the prospect of voluntary admission.

**18.** A question arises as to why, if the respondent believed that the appellant was behaving bizarrely or had provided a history suggestive of paranoid delusion (as the respondent avers), this is not referred to in the custody record (which consistently describes the plaintiff as 'OK') and why the respondent proceeded to certify the plaintiff as fit for interview (*'fit for interview no underlying medical condition'*). A question arises as to how, if the appellant was in fact behaving bizarrely or was manifesting conduct consistent with the diagnosis, the Gardaí continued to interview him. The issue presents itself as to why, if (as he has averred) the respondent formed the view that the appellant was in fact suffering from a mental illness while travelling from the Garda station he made no contact with the station to advise the Gardaí of this and to halt the interview. The fact that the assessment was conducted within an eight minute period is striking. A further and related question arises as to why if, as the respondent says, the Gardaí did not call him back to the station, the clinical notes prepared at University Hospital Galway record the Gardaí as having done the opposite and in fact rung him and asked him to return to the station.

**19.** These questions combine to present those features that cause the courts in their general jurisprudence to refrain from dismissing at the interlocutory stage proceedings or granting judgment in a case which might, at trial, disclose a good claim or defence in law. This hesitance to ground any final determination of the merits of a case on affidavit evidence, it must be emphasised, works both ways. The High Court heard no oral evidence, and at a trial the respondent will have the opportunity to address all of these issues and to adduce evidence to establish both his good faith in acting as he did, and

the reasonableness of his conduct. It follows that neither the High Court nor this court can or should express any view as to the likelihood of the appellant succeeding in his case. That is not the issue. The question is whether the respondent has at this point and on the basis of affidavit evidence alone established a basis on which it can be said that there are no reasonable grounds for the appellant to advance the claims that he seeks to make. I do not believe he has. While the appellant's case may not be affirmatively corroborated by any independent evidence, the facts and questions arising from the evidence that is before the court are sufficient to allow the appellant to proceed with his claims.

- 20.** In the course of his judgment ([2018] IEHC 281), Barrett J., noting the judgements in *Reidy v. National Maternity Hospital* [1997] IEHC 143, *Greene v. Triangle Developments Ltd.* [2008] IEHC 52 and *Cooke v. Cronin and Neary* [1999] IESC 54 and ('*Reidy*', '*Greene*' and '*Cooke*' respectively), stated as follows:

*'no professional negligence proceedings may be commenced against a medical doctor without having a sufficient expert opinion available that would allow an assessment to be made that there is a stateable case for the professional negligence intended to be asserted. There is no such opinion before the court.'*

- 21.** Although in none of these cases was it held that a plaintiff in a professional negligence action would have his claim dismissed if he was not in a position to confirm that he had obtained an expert report supporting them, comments were certainly made that so suggested. In *Reidy* Barr J. (at para. 45) said that it was '*irresponsible and an abuse of the process of the court to launch a professional negligence action against institutions such as hospitals and professional personnel without first ascertaining that there are*

*reasonable grounds for so doing. Initiation and prosecution of an action in negligence ... against the hospital necessarily required appropriate expert evidence to support it.'*

The comments were cited with approval by Kelly J. in *Connolly v. Casey and Murphy* [1998] IEHC 90 (at para. 55), and by Denham J. in *Cooke* who explained the rationale for the requirement as follows (at para. 10):

*'To issue proceedings alleging professional negligence puts an individual in a situation where for professional or practice reasons to have the case proceed in open Court may be perceived and feared by that professional as being detrimental to his professional reputation and practice. That fear should not be utilized by unprofessional conduct'.*

**22.** The finding that a person has acted '*without reasonable care*' requires an identification of the actions in question, the level of care with which they were in fact executed, and an assessment of whether the combination of the two was '*reasonable*'. In many cases of alleged professional negligence the determination of the second and third issues (and indeed - in many cases - questions of causation) will not be possible without an independent expert assessment. In the medical field, where the issue is one of clinical judgment, the evidence of standard practice in the relevant discipline will be critical to a finding of the reasonableness of the action.

**23.** However, it is not every case of professional negligence that requires such an assessment, and it is therefore not every such case in which an expert report must be obtained. The majority judgement in *Cooke* expressed the requirement in terms not of the production of an expert report prior to the institution of proceedings, but of ensuring that there was a reasonable basis for the claim. Lynch J. said (at para. 32):

*'In all cases of alleged negligence on the part of a qualified professional person in carrying out his professional duties there should be some credible evidence to support the plaintiff's case before such an action is commenced'.*

24. The decision in *Mangan v. Dockeray and anor.* [2020] IESC 67 confirms that the mere fact that a plaintiff is bringing an action for professional negligence does not in itself require that, in order to successfully resist an application to dismiss the claim, an expert report is needed. Everything depends on the nature of the claim being advanced. McKechnie J. (with whose judgment Clarke CJ., MacMenamin J, Dunne J. and Baker J. agreed) explained the position as follows (at para. 97):

*'It seems to me that the most appropriate way of expressing this requirement is to say that a reasonable basis must exist before any such proceedings are issued. Almost by definition therefore, there will be situations where it may not be necessary to insist upon the availability of an expert report before that takes place. There are several like examples to that given by Irvine J. in Deasy, in addition to which reference can be made to the issue of a holding writ to avoid the claim being statute barred (Cunningham v. Neary [2004] IESC 43, [2005] 2 I.L.R.M. 498 at para. 11). Such qualifications are necessary so as to be consistent with one's right to access the court system as well as being required to reflect the reality of professional litigation. Further, I see no danger that this formulation would undermine the rationale for the rule in the first instance. As the same must apply to all professionals, a degree of flexibility is required, so as to accommodate a variety of diverse circumstances. I therefore think that the rule should best be framed in the manner suggested. In the vast majority of*



*medical cases that will require a report, but there will be circumstances where such is not an essential precondition in all situations.'*

**25.** In this case I express no view as to whether the appellant will be in a position to maintain this case at trial without an expert report. At this point, and for the purposes of the application presently before the court, I do not believe that his failure to obtain one is fatal to his ability to proceed with his claim. His claim is more factual and legal in nature than it is medical. He says that the respondent did not in fact undertake an examination in the manner alleged by him. If the appellant is wrong about that, issues may well arise as to the adequacy of the examination and it may well be that expert evidence will be required to address that. It is his central case, however, that his version of events is the correct one. That core aspect of his case presents a claim of fact which it will be for the trial court to resolve as a matter of evidence, and the effect of which it will have to determine as a matter of law. Neither require expert evidence.

**26.** For these reasons I agree with the judgment of Pilkington J. and the orders she proposes. Pilkington J. and Haughton J. both agree with this judgment.