



AN ARD-CHÚIRT
THE HIGH COURT

[2023] IEHC 623

2014 1934 P

G.L.

PLAINTIFF

V.

THE HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment delivered electronically on 10 November 2023 by Mr. Justice O'Connor

Introduction

1. This judgment follows my order made on 6 October 2023 without objection from either party, which directed that the identity of the plaintiff, his extended family and staff members of the defendant be anonymised pursuant to s. 40 (3A) of the Civil Liability and Courts Act 2004 (as inserted by s. 5 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013) to protect the best interests and privacy rights of the children referred to in these proceedings. The applications with which this judgment is concerned are: -

(I) for leave to amend the personal injuries summons issued in January 2014 (“**the summons**”);

(ii) to dismiss the proceedings as they fail to disclose a reasonable cause of action.

The summons

2. The summons provides specifics in accordance with s. 10 (2) of the Civil Liability and Courts Act 2004 (“**the 2004 Act**”). Under the heading “Acts of the defendant alleged to constitute the wrong and/or Particulars of the circumstances in relation to the commission of the wrong”, it emerges that the plaintiff claims that an investigation by the defendant into the alleged abuse of his niece in early 2012 was conducted negligently and in a “deficient manner”.

3. Under “Particulars” the alleged factual background is set out. The father (now deceased) of the plaintiff’s then five-year-old niece (“**A.K.**”) had made a complaint about the plaintiff. Social workers (“**G.A.**” and “**H.A.**”) attended at the home of the plaintiff’s parents in February 2012 where it is alleged that G.A. “negligently, in breach of the plaintiff’s constitutional rights and not in accordance with best child practice suggested in the presence of [A.K. that the plaintiff] would jump into bed beside [A.K.]”.

4. The particulars of the allegations then aver: -

“The plaintiff’s sister informed [the plaintiff] of what [G.A.] had suggested to his niece.... The plaintiff was horrified [and attended at a health centre] in severe distress to deny these vicious allegations and to report the negligent manner in which the Defendant’s servants and/or agent had suggested to and/or coached the alleged victim that the Plaintiff would jump into bed beside her.”

5. The summons alleges that the defendant did not “...put any allegation to him resulting in the Plaintiff while aware that a malicious allegation had been made being unable to defend his good name”.

6. Later in February 2012 (at the top of p. 5 of the summons) a narrative is given about how another staff member of the defendant had written: -

“...to the plaintiff’s sister informing her that the matter was now subject to a Garda criminal investigation and the Defendant would therefore be unable to further liaise with her until such time as sanctioned to do so by the Garda Siochana”.

7. The summons then refers to the alleged “botched manner” of the defendant’s investigation, the plaintiff’s stress, upset and trauma.

8. Following that, details are given of a District Court order made pursuant to s. 20 of the Childcare Act 1991 which led to an investigation by G.A. of A. K’s circumstances. Reference is then made to the confirmation from the Gardai in August 2012 “...that the allegations were baseless and that no charges were to be brought”.

9. The subsequent paragraphs of the summons repeat the coaching like questions allegedly posed by G.A. which were raised by the plaintiff at a meeting with G.A. and another staff member of the defendant on 26 October 2012. The plaintiff felt ignored and that he would not be dealt with fairly, that “he remained under suspicion of committing a heinous crime and that the Defendant was biased against him”.

10. The final few paragraphs of the summons under this heading referred to the plaintiff's request for "...a review of the recommendation of the complaints officer of the defendant, CCTV footage of the alleged coaching and the appalling manner in which [the plaintiff] has been treated by the defendant, the plaintiff has no faith in any reinvestigation conducted by [the defendant]".

11. Nineteen subparagraphs of each instance of alleged negligence together with another ten subparagraphs of breaches of the plaintiff's alleged right to fair procedures are given in para. 4 of the summons.

Particulars of injuries

12. Para. 5 of the summons avers that the plaintiff suffered stress, upset, increased alcohol consumption, sleep difficulties, anxiety, low mood, insomnia, fleeting suicidal thoughts, constant feeling of stress, counselling and a referral to a consultant psychiatrist as a result of the wrongs of the defendant. Five categories of special damages are listed with the notation that they are "to be ascertained".

13. The summons was signed by junior and senior counsel and verified by the plaintiff by way of affidavit of verification filed in February 2014.

The defence

14. The defence delivered in February 2015 does not admit the facts relating to the alleged wrongdoing and requires the plaintiff at trial to establish on the balance of probabilities that an actionable wrong was committed by the defendant. Significantly, paras. 34 – 40 of the defence plead as follows: -

“34. Further and in the alternative and without prejudice to the foregoing, it is denied that the plaintiff suffered a recognisable psychiatric illness, or that same was shock induced, or that same were caused by any act or omission on the part of the Defendant, its servants or agents, as alleged or at all.

35. Further and in the alternative and without prejudice to the foregoing, it is denied that the Plaintiff suffered a compensable injury as a result of any act or omission on the part of the Defendant, its servants or agents, as alleged or at all.

36. Further or in the alternative and without prejudice to the foregoing, if the Plaintiff suffered a recognisable psychiatric injury, which is not admitted, the same were not caused by reason of any actual or apprehended physical injury to the Plaintiff or a person other than the Plaintiff, as alleged or at all.

37. Further and in the alternative and without prejudice to the foregoing, it is denied that the Plaintiff suffered nervous shock which resulted in psychiatric illness or injury, or that the same was reasonably foreseeable by the Defendant, or that the same were caused by reason of the negligence or breach of duty or breach of statutory duty on the part of the Defendant, its servants or agents, as alleged or at all.

38. Further and in the alternative and without prejudice to the foregoing, if the Plaintiff suffered, sustained or incurred the alleged or any personal injuries, loss damage or expense, which is not admitted, the same would not be reasonably foreseeable on the part of the Defendant, its servants or agents and the same were too remote and, in the circumstances, the Plaintiff is not entitled to the relief claimed, or any relief.

39. Further and in the alternative and without prejudice to the foregoing, the defendant pleads that the Plaintiff's claim as a matter of law is not sustainable and/or the Plaintiff's claim is not sustainable for policy reasons and, in the circumstances the Plaintiff is not entitled to the relief claimed or any relief."

15. In summary, the plaintiff, who was then represented and advised by solicitors, was made aware as far back as February 2015 that the defendant was maintaining that it owed no duty of care to the plaintiff in the investigation of the alleged abuse of A.K. Furthermore, the

plaintiff was made aware of the defendant's position that the plaintiff was not entitled to compensation because: -

- (i) the injuries which are the subject of the claim do not constitute a recognisable psychiatric injury;
- (ii) no claim may arise from an apprehension of a mental condition by a third party (such as the plaintiff) arising from an investigation into the alleged abuse of a child;
- (iii) a claim for psychiatric or psychological complaints cannot be pursued by the plaintiff against the defendant as a matter of law.

Following set down

16. Following the setting down of these proceedings on 17 February 2015 an order was made by Gearty J. on 20 January 2022 directing the defendant to make discovery relating to all documents in relation to the investigation conducted by the defendant in respect of allegations of child sex abuse made against the plaintiff, complaints made by the plaintiff against the defendant arising out of their investigation, the protocols in place in 2012 for the carrying out of interviews and the complaints about the conduct of the defendant made by the plaintiff in 2012. A detailed affidavit as to documents was sworn in July 2020 on behalf of the defendant. The plaintiff's solicitors then furnished an updated list of reports from experts intended to be called at trial along with a list of witnesses in January 2021. Corresponding updating schedules on behalf of the defendant were delivered in January 2022. The proceedings came on for hearing before Hanna J. on 13 January 2022 and 14 January 2022.

Adjournment of plenary hearing

17. Senior counsel for the plaintiff explained to Hanna J. that which was pleaded in the summons and said according to the transcript: -

“In many ways it would probably be fair to say that the plaintiff has become completely obsessed with what occurred on this particular occasion. His doctors have

certainly given the opinion that he needs this case over and done with so that he can get on with his life.”

18. Hanna J. sought to clarify whether the claim was “a nervous shock case which resulted from a phone call from his sister to say this allegation had been made.” Senior counsel outlined to the trial judge that a consultant psychiatrist had indicated “From a mental health point of view, as a result of the way [the plaintiff] perceived his treatment by the HSE his depression, which was already present, due to harassment in his community, deteriorated worsening insomnia, suicidal thoughts, depression mood and reduced concentration.”

19. Senior counsel continued to quote from the report of the consultant psychiatrist which stated: -

“The plaintiff has serious obsessional ruminations of his perceived treatment by the HSE, and he cannot get this out of his mind....”

20. Senior counsel opened a letter dated 26 November 2012 addressed to the plaintiff from the defendant which acknowledged that there was no substance to the allegations made against the plaintiff. The letter asserted that it had a duty to investigate the allegations. Following Hanna J.’s expression of concern and an adjournment to consider mediation, the plenary hearing proceeded with senior counsel for the plaintiff finishing the opening. At that stage, counsel for the defendant submitted that the plaintiff was pursuing a claim for stress and upset in respect of which damages cannot be awarded in the circumstances outlined in the statement of claim and in the opening by senior counsel. Hanna J. noted that there appeared “to be a very substantial preliminary application that the pleadings disclosed no cause of action”.

Second day of trial

21. Before the plenary hearing resumed on the second day, the plaintiff’s solicitors served “updated particulars of personal injury, loss, damage and expense”. This notice referred to

counselling sessions and reviews by a consultant psychiatrist throughout 2021 and 2022. A notable revelation was set out at para. 4 which reads: -

“The plaintiff was reviewed by his Consultant Psychiatrist in December 2021. Due to the stress he was under from the investigations and due to the fact that he felt that the HSE investigators did not believe him the Plaintiff’s mental health suffered. He became depressed with insomnia, depressed mood, reduced concentration, crying spells and suicidal thoughts. On one occasion he developed a sudden impulse to drown himself and had to be restrained by a family member. He became withdrawn and began to avoid mixing with friends. He suffered paranoid thoughts and felt that people were talking about him.”

22. These details had been mentioned earlier by senior counsel. However, counsel for the defendant emphasised that the claim in the summons is for “damages for negligent and/or reckless infliction of emotional suffering and loss” which in his submission is “not an actionable wrong”. The defendant maintained in its defence, at the plenary hearing in January 2022 and at the hearing before me in October 2023 that the plaintiff has not identified a specific psychiatric illness arising from a breach of duty owed or from recklessness of its staff.

23. Hanna J. stated towards the end of the second day of hearing: -

“I have determined nothing in this case, but I will repeat that this case will involve a hearing of an allegedly negligently inflicted personal injury. It is not an inquiry. It is not an airing of grievances. It is not an opportunity for the defendant to say, ‘we were right all along’, that belongs in another arena. This is a personal injury case.”

Instructions from plaintiff

24. As a result of instructions given by the plaintiff to his legal team including those to serve the said notice of uploaded particulars on 13 January 2022, Hanna J. adjourned the proceedings to allow an application to be brought to amend the pleadings.

25. By notice dated 30 November 2022, the plaintiff discharged his solicitor who was on record in the proceedings and the plaintiff represented himself before this Court. During the long vacation in 2023, the plaintiff obtained leave from Quinn J. to issue a motion seeking leave to amend the summons. That notice of motion was filed on 8 September 2023 and was made returnable to the first day of the resumed trial. The notice of motion also stated that the plaintiff is “submitting [his] medical records and relevant documentation found in high court disclosure and my sworn affidavits to the courts”. The grounding affidavit of the plaintiff for the motion did not seek to explain the reasons for obtaining the leave. Suffice to say that ten pages of additional particulars in the form of a narrative are sought to be added to the summons. The plaintiff also seeks to introduce another complaint about the alleged coaching of a second niece by C.M. who was a social worker with the defendant.

Submissions by the plaintiff in person

26. The plaintiff on the first day of hearing before me read out a four page “opening speech” which he summarised as raising “questions about the fairness and integrity of the proceedings” (the Court understands that to refer to the investigation by the defendant). The plaintiff pleaded for a “thorough examination of all aspects of this case including the actions of individuals who may have compromised the integrity of the criminal matters. It underscores the urgency of ensuring that justice prevails and that the truth is brought to light”.

27. As the applications proceeded, the plaintiff addressed the application for leave to amend with his defence of the application to strike out for failure to disclose a cause of action. I summarise the submissions made by the plaintiff in person as follows: -

(i) the plaintiff blames his own legal representatives for not pleading his cause of action properly in advance of the hearing before Hanna J. The plaintiff without any basis when one looks at the transcript, submits that Hanna J. blamed the plaintiff's legal team for letting the plaintiff down and for ambushing the defendant at trial;

(ii) the plaintiff again blames his legal representatives for the delay in bringing the application for leave to amend the summons. He referred to his emails beginning on 18 January 2023 to his then solicitors which he expected to be acted upon. Those emails, according to the plaintiff, requested the solicitors to submit his medical evidence to the Court;

(iii) the plaintiff in an irrelevant way, referred to his previous solicitors not having an incentive to return to Court because of a "back-to-back cost" offer from the defendant at some stage;

(iv) the plaintiff then mentions how he had had a mental breakdown during the long period within which discovery and disclosure was made by the defendant. The plaintiff mentions his request for an inquiry addressed to the defendant and the Minister for Justice in the context of his ability to understand the import of what was obtained during the discovery process. The plaintiff again blames his solicitors and the defendant for his inability to articulate and plead his claim properly;

(v) among the additional details in the summons sought to be amended is the plaintiff's complaint that there was witness coaching for another niece ("L.L."), then aged 14 which he discovered in 2018;

(vi) the plaintiff submits that while he does not know the date of the report furnished to the District Court pursuant to order made on 3 July 2012, he alleges a "witch hunt" of him by the staff of the defendant (a phrase he used four times during his oral submissions to this Court);

(vii) the plaintiff submits that he was deceived by the defendant with respect to the questioning or “coaching” (his own words) of his nieces and that he should be allowed to include that deception in an enlarged claim which he now seeks to pursue;

(viii) the plaintiff alleges that he was regarded as a suspect of child sexual abuse by the defendant after the confirmation given to him in August 2012 by the DPP and from the defendant to him in a letter of 26 November 2012 that there was no substance to the allegations made by the father of A.K.;

(ix) the plaintiff acknowledges his understanding of the two-year limitation period for claims in respect of personal injuries. However, he relies on deception and his mental state to counter any plea which could be advanced by the defendant in relation to wrongdoing in 2012 and subsequent years;

(x) the amendment to the summons adds a lot of narrative while two of the most controversial additional paragraphs appear at the very end. There, the plaintiff quotes from a report of his doctor dated 6 January 2022. The plaintiff contends that these additional paragraphs should defeat the application to strike out his claim for failure to disclose a cause of action;

(xi) the plaintiff further submits that he should be allowed to amend and pursue the defendant in respect of his recent claim about witness coaching of his second niece because he had been misled by the defendant and his own solicitor in relation to ongoing suspicions about his activities;

(xii) the plaintiff’s reliance on the judgment of *P.D.P. v. Health Service Executive* [2012] IEHC 591 is central to his perception of an actionable wrong having been committed by the defendant. In this way, he pleaded originally and in his proposed amended summons deficiencies in the methods of investigation used by the defendant.

He refers when pressed to: -

- (1) the absence of a prior notice in writing to him of the allegations made by the father of A.K.;
- (2) the visit to interview A.K. without prior notice;
- (3) the failure to disclose to him and the Gardai all of the facts in the “child custody battle”;
- (4) the omission to disclose to him at any stage “false allegations” about the mental condition of his mother and sister by the father and paternal grandmother of A.K.;
- (5) his concern about the historical record which will exist without any finding by a court that there had been deception on the part of the defendant;
- (6) the objection made on behalf of the defendant to the vacation judge (Quinn J.) in August 2023 for his application to seek leave to amend the summons; the plaintiff submits that this is further evidence of him being “duped”.

Leave to amend summons

28. Order 28 (1) of the Rules of the Superior Courts (“RSC”) provides: -
“The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”
29. The application before the Court does not comply with the rules and practice of the Superior Courts because the plaintiff has not sworn an affidavit setting out the facts in order to show his *bona fide* mistake, the necessity for the amendment or the prejudice which may be caused to the plaintiff. As the application to amend arose out of the interjection by counsel for the defendant to Hanna J. that no reasonable cause of action had been pleaded, this Court decided to proceed with the application for leave while hearing the application to strike out

the proceedings for failure to disclose a reasonable cause of action. That is a more efficient use of everyone's time including that of the Court.

30. The Court has not been persuaded by the plaintiff that the extensive narrative proposed to be added to the summons is necessary for the purpose of determining the real question in controversy between the parties. The plaintiff cannot rely upon the perceived errors or omissions of his own agents such as his solicitor. In any event, the plaintiff swore a verifying affidavit for the summons and he cannot avoid responsibility for same as he now seeks.

31. The principles established by the authorities as described by McGovern J. in *Citywide Leisure Limited (in receivership) & Ors. v. Irish Bank Resolution Corporation Limited* [2012] IEHC 220 at para. 16 are: -

- “1. A party who applies for an order allowing it to amend its pleadings must furnish reasons as to why the court should exercise its discretion in its favour.
2. The court is entitled to look at those reasons and the evidence adduced therefrom to inform the exercise of its discretion.
3. Fundamentally, the exercise of that discretion involves an analysis as to whether the new claim involved the real issues in controversy between the parties.
4. The court is entitled to look at other factors.
5. The court can enquire if the new claim or new plea is bound to fail.
6. The inquiry by the court as to whether the new claim is or is not bound to fail can involve analysis by reference to either or both of the tests set out in Order 19, rule 28 [RSC] or the court's inherent jurisdiction.
7. If the new claim fails to meet both these tests, then it is not one of the real issues in controversy between the parties.
8. If the new claim was bound to fail, the amendment will not be allowed.”

32. No real effort has been made by the plaintiff to explain why the additional particulars are required to resolve the real issue in controversy between the plaintiff and the defendant as originally pleaded. The introduction of his alleged discovery about the alleged coaching of another niece and the reference to the plaintiff's recent poor mental health adds little to the element of necessity required. The alleged coaching of another niece constitutes a separate cause of action. The summons already described the plaintiff's poor mental state.

33. The additional material sought to be added to the summons is prolix. It adopts what can be described as a "scattergun approach" to make a wide range of accusations against the defendant and various members of the defendant. The allegations of witness coaching were incorporated in the original summons. I repeat that the plaintiff has failed to explain why he has adopted the "scattergun" approach. He is effectively asking the Court to sift through pages of narrative to find something which ought to be introduced by way of amendment.

34. As McGovern J. said in *Doherty v. Minister for Justice Equality and Law Reform* [2009] IEHC 246 at para. 14: -

"...it seems to me that it is not the function of the court to sift through the material in the statement of claim to see if, perhaps, somewhere within it, a claim can be found in the proper form. The court is entitled to have regard to the document as a whole.

There might well be cases where there is an isolated pleading here or there which may be scandalous or vexatious, but the greater part of the document contains pleadings in a proper form. In those cases, the courts can strike out the offending portions of the pleadings".

35. The Court cites the above having been referred to it by counsel for the defendants. The plaintiff, despite his lay litigant status, must comply with the RSC for pleading and particularly when seeking leave to amend pleadings. In the proposed amended summons,

there are matters pleaded which could be viewed as “calculated to cause embarrassment to or otherwise scandalise” the defendant and members of its staff.

36. Despite the pleas of the plaintiff that he was duped or misled by the defendant and even by his own solicitors when he was suffering from mental health issues, I am not satisfied that he could overcome a statute of limitations plea in relation to matters which were not pleaded in the summons. A mere reference in a “scattergun” type document or in oral submissions to mental health issues is not sufficient to avoid a successful statute of limitations plea. The plaintiff knew in 2018, over five years ago now, of information purportedly given to him by other members of his family relating to the interview of his second niece. He has had professional advice throughout; he is not entitled to lay off his own culpability onto the defendant for acts or omissions of himself or his agent.

37. I now refer to the last two paragraphs of the new particulars of personal injuries sought to be introduced by way of amendment: -

“On the 6th of January 2022 [Dr. English] enclosed copies of my two previous reports dated above 8th November 2013 and second report 28th of November 2016 and have also enclosed my computer records from my initial contact with [the plaintiff] on 27th of February 2012 to date. He last attended this surgery on 23rd of December 2021. The Plaintiff has been a patient of mine for more than 30 years. I would feel that I know him quite well from our contacts over these years. My initial two reports give a clear picture of my interaction with [the plaintiff] since 2012 and has continued to attend me on a regular basis. Since my last report in 2016 his situation has not changed over this time and I feel the best contribution I can make at this time is to supply my actual medical records to display the extent to which [the plaintiff] has been affected and traumatised by the ongoing case. My opinion remains the same, that is that until the case reaches a conclusion he is likely to continue to remain in an

agitated, preoccupied and depressed state and will continue to experience physical and emotional problems.”

38. Those two paragraphs add nothing to the particulars which could ground the plaintiff’s claim against the defendant for breach of duty. The Court does not need to see the report at this stage or to hear from that doctor. However, it is clear that the plaintiff and his advisors have been told that he will remain in an agitated and depressed state until these proceedings reach a conclusion. It is in the interests of all the parties that this litigation be brought to a conclusion sooner rather than later.

39. I repeat that it is now over eleven years since the events about which the plaintiff mainly complains arose. The father of A.K. is deceased, the plaintiff has had his own troubles and each member of staff concerned with the investigation have had their own professional reputations impugned over a protracted period of time. The proposed amended summons does not advance what appears to be the plaintiff’s desire for an investigation. It is stressed that the court in personal injuries litigation does not embark on an inquiry. It does not employ an inquisitorial process but rather it is constrained by the adversarial procedure. In other words, the plaintiff bears the burden of establishing on the balance of probabilities, the commission of a wrong, or an omission on the part of the defendant.

40. The defendant has maintained throughout that the plaintiff was exonerated from any allegation made by his deceased brother-in-law.

41. In all of the circumstances, and for the reasons outlined above, the application for leave to deliver an amended personal injuries summons is refused.

Application to strike out for failure to disclose a reasonable cause of action

Introduction

42. The Supreme Court (Charleton J.) in *Cromane Seafoods v. Minister for Agriculture* [2016] IESC 6 held at para. 29: -

“Negligence is not all encompassing. It has not swamped every other tort. If ill is broadcast of a person, the remedy is defamation. If a person is illegally arrested, the remedy is false imprisonment. If in public office, something is done which affects rights, the remedy may be judicial review in terms of overturning a decision in excess of jurisdiction or, if damages are sought, tort law requires that a claimant should prove misfeasance in public office.”

The common law relied upon by the plaintiff

43. The plaintiff, in his submissions to this Court, cited the judgment of O’Neill J. in *PDP v. HSE* [2012] IEHC 591 (“**the second PDP judgment**”). He handed into the Court a copy which was highlighted with manuscript notes. The plaintiff repeatedly referred to the alleged omission to send him “*the Barr judgment letter.*” This is a reference to letters sent by the HSE to those whose employment may be affected by investigations pursuant to the Childcare Act 1991. It followed the judgment of Barr J. in *M.Q. v. Gleeson* [1984] 4 IR 85. It is worth noting that *PDP* was a secondary school teacher whose employment and prospects were central to his earlier successful judicial review of the procedures adopted by the HSE.

Negligence out ruled

44. Paragraph 15 of the second *PDP* judgment ([2012] IEHC 591) is equally applicable to the plaintiff’s claim set out in the summons: -

“It is, in my view, well settled in Irish law that for reasons of public policy, duties of care to parties potentially affected by the conduct of these types of investigations [i.e. child abuse investigations] and their outcomes are excluded.”

Differences between PDP and the plaintiff

45. The Court, in an effort to explain matters, will set out the differences which can be identified between *PDP* and the plaintiff: -

(1) The applicant in *PDP* sought damages arising out of earlier successful judicial review proceedings (“**the JR proceedings**”) between PDP on the one side and the Health Service Executive and the Board of Management of his school on the other. O’Neill J. had delivered a comprehensive judgment on 20 May 2010 in those JR proceedings ([2010] IEHC 189 (“**the first PDP judgment**”). The focus of the JR proceedings was the procedure followed by the HSE in its investigation of complaints by its former employee (“JK”) about PDP who had taught the child of JK. O’Neill J. in the first *PDP* judgment set out chronologically the history from November 2001 to the hearing before him in December 2009.

Suffice to say, the plaintiff in the proceedings before this Court did not commence judicial review proceedings. Further, the plaintiff is out of time to apply for leave to issue such proceedings upon whatever grounds he could have sought to review the decisions of the defendant.

(2) As mentioned in the second *PDP* judgment, “An unusual feature of the entire judicial review proceedings” brought by *PDP* was the absence of any denial of wrongdoing on the part of the HSE. The defendant in these proceedings categorically denies any wrongdoing and the plaintiff cannot rely on the implicit acknowledgment by the HSE in *PDP* of its own wrongdoing. Moreover, O’Neill J. had found “...many egregious breaches of [PDP’s] right to fair procedures and natural justice”. The plaintiff does not have the benefit of any similar findings. The plaintiff in his opening speech and in various

exchanges with this Court, pleaded that there is a “need for a thorough examination of all aspects of this case... ”.

The Court remains neutral in the adversarial process which governs the plenary proceedings instituted by the plaintiff nearly ten years ago now. The Court is not a tribunal, an inquest or a court which may be inquisitorial, as exists in other jurisdictions. As a judge, I explain the reasons for the decision of a ruling of the court. The court does not advise a party in adversarial proceedings. So, the plaintiff's plea to this Court for an examination or investigation of procedures is misplaced.

It may help to note that in the second *PDP* judgment, O’Neill J. referred to his findings in the JR proceedings which had been explained in the first *PDP* judgment. O’Neill J specifically stated: - “The bedrock of fact upon which [PDP’s] causes of action [were] sought to be based [was] not in dispute ” (para. 12 of the second *PDP* judgment). The Court reiterates that the plaintiff does not have the benefit of any order or judgment which arose from the JR proceedings in the PDP litigation.

- (3) O’Neill J. in the second *PDP* judgment accepted that “the mere continuance of the investigation itself was more than sufficient to have prevented [PDP] returning to his teaching post or applying for a new one ”. The parties in that litigation had agreed the net loss of earnings and there was no dispute about the actuarial figures. Ultimately, O’Neill J. awarded €436,984 to PDP for past and future loss of earnings as a teacher up to his 65th birthday. The plaintiff’s position as set out in his summons, the replies to particulars dated 18 February 2015 and even the “notice of updated particulars of personal injury, loss,

damage and expense” dated 13 January 2022 singularly omit to identify special damages claimed by the plaintiff.

Relevant timelines

46. It is worth recalling at this stage the uncontroversial timelines relevant to the complaint about the plaintiff which are set out in the summons and in respect of which more details were given at the beginning of this judgment: -

- 24.2.2012 – The plaintiff became aware of the allegation made by the father of AK. AK was interviewed in the evening. According to p. 4 of the summons, this was captured on CCTV installed for antisocial behaviour by neighbours.
- 27.2.2012 – The plaintiff learned from his sister that the Gardaí had started a criminal investigation which led to interviews of the plaintiff by the Gardaí.
- 07.2012 – The plaintiff was informed by his sister that the defendant was undertaking an investigation on foot of a District Court order pursuant to s. 20 of the Childcare Act 1991.
- 08.2012 – The plaintiff was informed by the Gardaí that “The allegations were baseless and that no charges were to be brought.”
- 26.10.2012 – The plaintiff met with GA and CA of the defendant to voice his complaints about the manner of the investigation conducted by the defendant.

26.11.2012 – The plaintiff received the letter from the defendant refuting the complaint of “coaching” while acknowledging that there was no substance to the allegations made against the plaintiff. The plaintiff then sought a review of the recommendation made by the complaints officer of the defendant relating to his complaints voiced in October 2012.

47. All of the above contrasts with the lengthy period in the *PDP* case, commencing with the complaint against *PDP* on 23 November 2001 and ending in December 2009 with the agreement to quash the decisions of the HSE which adversely affected *PDP*.

Psychiatric injury

48. O’Neill J. in the second *PDP* judgment stated at para. 297 :-

“The circumstances revealed in this case as the subject matter for compensation are highly unusual, if not unique, and thus, comparison with other normally compensatable injuries does not give a clear guide to an appropriate award in this case.”

Significantly, O’Neill J. found that the “malfeasance in public office of the HSE had the consequence of destroying, irreparably, the life which [PDP] enjoyed in all its aspects, professional, social and domestic”.

49. As outlined earlier, the causes of action pleaded in the summons and the additional particulars are limited to negligence, breach of duty and “reckless infliction of emotional suffering”.

50. As a starting point, the plaintiff is limited to claiming damages for physical injury wrongfully inflicted. Paragraph 17.02 of McMahon & Binchy, *The Law of Torts*, 4th Ed., (Bloomsbury Professional, 2013) strikingly summarises that “the psychiatric injuries were accessorised to the physical injuries... psychiatric injuries in that sense were simply

parasitic”. The judgment of Noonan J. in *Harford v. ESB* [2021] IECA 112 (16 April 2021) is quite apposite in considering the plaintiff’s position as pleaded. The oft-cited principles articulated by Hamilton J. in *Kelly v. Hennessy* [1995] 3 IR 253 apply to the plaintiff’s claim. The following extracts from the *Harford* judgment lead me to conclude that the plaintiff’s claim for relief in these proceedings is futile: -

“67. The requirement for the occurrence of a “sudden” event, be it described as shocking, distressing, horrifying, terrifying or calamitous, has consistently been held in this jurisdiction to be a prerequisite to recovery for purely psychiatric injury. Such an event was described by Geoghegan J. in *Fletcher* [[2003] 1 IR 465] and Denham J. in *Devlin* [[2008] 2 IR 222]. Lord Ackner’s definition of “shock” has been consistently approved in Ireland. Thus, what he describes as more gradual assaults on the nervous system over a period of time do not qualify. That the injury must be “shock induced” is clear from Hamilton C.J.’s second principle in *Kelly v. Hennessy*, adopted from the dicta of Brennan J. in *Jaensch v. Coffey* [[1984] 54 ALR 417]. Brennan J. adopted a very similar definition of “shock” to that of Lord Ackner.

...

75. Even accepting for a moment that the facts in *Donachie* [2004] EWCA Civ 405 could be regarded as complying with the requirements of *Kelly v. Hennessy*, which must be open to serious doubt, I do not think this case is of assistance to the plaintiff. The cause of the injury in *Donachie* was the plaintiff knowingly being placed in extreme danger and fearing for his life. Those features are of course entirely absent here. The plaintiff here did not knowingly enter into a dangerous situation where he knew that at any moment,

he might be killed or injured. It was that knowledge in Donachie that caused the injury.

...

78. In my judgment, the plaintiff cannot satisfy the requirements of the second and fourth principles identified by Hamilton C.J. in *Kelly v. Hennessy*. The injury was not “shock induced”, as the second principle requires, in the sense that this expression is explained in the authorities to which I have referred. There was no sudden calamitous or horrifying event in the nature of an accident. There was thus no qualifying event and on one view, no event at all. There was instead a post hoc realisation that injury had been avoided by a decision not to proceed with what, with hindsight, was a dangerous course. The implications of that realisation unfolded over a period of hours for the plaintiff.

...

83. Were liability to be imposed in this case, it would inevitably involve an extension of the existing law in this jurisdiction. Policy considerations of the kind discussed in *Fletcher* and *Devlin* would become relevant. A case such as the present, dependant on a purely internal realisation by the plaintiff, unaccompanied in many instances by any verifiable event or incident, would give rise to considerable practical problems and real uncertainty in the law.”

51. By way of summary, the plaintiff’s claim – if a tort could be established cannot trigger a claim for damages in respect of his alleged psychiatric illness.

Striking out proceedings

52. Order 19, Rule 28 of the RSC provides that a court may order a pleading to be struck out on the grounds that it discloses no reasonable cause of action or answer. The Supreme

Court in *Aer Rianta CPT v. Ryanair Ltd*; [2004] 1 IR 506 confined the exercise of this rule to the entire pleading which, in the application before this Court, refers to the summons. It was emphasised by Denham J. that the jurisdiction under O. 19, r. 28 of the RSC is one which the court will be slow to exercise. However, she stated that “...if a court is convinced that a claim will fail” the summons will be struck out.

53. The Court is conscious of the necessity to consider pleadings on their own and to proceed on the basis that everything contained in the summons, as in this case, can be proved by the plaintiff. Baker J. in *Wilkinson v. Ardbrook Homes Ltd* [2016] IEHC 434 at para. 19 suggested that the court should “...ask whether the plaintiff could possibly succeed”.

54. Lastly, the Court is aware of the jurisprudence which allows for leave to amend a summons, for example, in order to overcome a deficiency in the summons and particularly where the summons was drafted by a lay litigant. As Birmingham J. said in *ON v. McD* [2013] IEHC 35 at para. 18, there is no question of a litigant “being deprived of his right of access to the courts by reason of any lack of skill as a draftsman”.

55. That point would have been in the mind of Hanna J. when he adjourned the trial to allow the plaintiff to seek leave to amend the summons. The plaintiff has had that opportunity and I have earlier refused leave for the reasons given.

56. In summary, the Court finds that the summons exhibited to the plaintiff’s affidavit of verification sworn on 13 January 2014 fails to disclose a reasonable cause of action. The plaintiff’s claim for damages in respect of psychiatric injury is bound to fail. The plaintiff has not met the criteria set out by Hamilton C.J. in *Kelly v. Hennessy*. The defendant did not owe the plaintiff the duty of care as the plaintiff claims. Taking the plaintiff’s claim at its height and even allowing for a further amendment to include “misfeasance in public office”, the plaintiff has failed to particularise the facts required for such a claim. The Court cannot

advise a party; it must assess the claim as presented. In the circumstances, the Court strikes out the summons pursuant to O. 19, r. 28 of the RSC.

Inherent jurisdiction

57. There is also the jurisdiction of the Court to strike out proceedings if they are bound to fail. This jurisdiction is used sparingly. As Clarke J. stated in *Keohane v. Hynes* [2014] IESC 66 at para. 6.5: -

“...the underlying basis of the jurisdiction to dismiss as being bound to fail stems from the court's inherent entitlement to prevent an abuse of process...”

In these proceedings, the plaintiff successfully requested the defendant for a review of the investigation by the defendant's staff. The plaintiff did not seek a judicial review of that review and merely alleges that he had no faith in same. In the introduction to this part of the judgment, the Court cited the words of Charleton J. who stated that negligence has not swamped every other tort. The plaintiff was given leave to amend his summons which has been refused by me for the reasons given.

58. Finality as the plaintiff's own psychiatrist said and was sought to be pleaded by the plaintiff is required. Similarly, the staff members of the defendant deserve a determination of the claims which impugn effectively their integrity and professionalism. In all of those circumstances, the Court in order to limit or prevent an abuse of process which emerges from an analysis of everything pleaded and submitted by the plaintiff also strikes out these proceedings.

Proposed orders

59. Subject to the consideration by the Court of further written legal submissions limited to 1,000 words to be served by the plaintiff on the defendant's solicitors and delivered to the Court within fourteen days from the date of delivery of this judgment electronically, the

Court proposes to make the following orders in Court at 10.30 on Tuesday 28 November 2023: -

- (1) An order refusing the plaintiff's motion pursuant to a notice of motion filed on 8 September 2023 for leave to amend the personal injuries summons;
- (2) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the personal injuries' summons issued herein on 31 January 2014 as the proceedings are bound to fail;
- (3) An order pursuant to the inherent jurisdiction of the Court striking out the proceedings on the grounds that they are bound to fail and constitute an abuse of process;
- (4) An order directing the plaintiff to discharge the costs of the defendant including all reserved costs and the costs of making discovery all to be adjudicated in default of agreement.

The plaintiff appeared in person.

The defendant was represented by:

Harrison O'Dowd Solicitors

Gerard Clarke SC and David Boughton BL.