



**AN CHÚIRT UACHTARACH  
THE SUPREME COURT**

S:AP:IE:2020:000094

**Clarke C.J.,  
O'Donnell J.,  
MacMenamin J.,  
Dunne J.,  
Charleton J.**

**P McD**

**Plaintiff/Appellant**

**- AND -**

**The Governor of X Prison**

**Defendant/Respondent**

**Judgment of Mr. Justice O'Donnell delivered the 17<sup>th</sup> day of September, 2021.**

1. I gratefully adopt the comprehensive account of the facts and arguments in this unusual and sad case contained in the judgment of MacMenamin J. and which allows me to address the legal issues with only an outline of the facts set out in greater detail in his judgment.
2. Ongoing difficulties between Mr. McD and the prison authorities had escalated to the point that he had commenced a hunger strike and all attempts to dissuade him from that course had failed. The prison governor took the unusual step of bringing proceedings in the High Court to determine if the prison authorities had legal obligations towards Mr. McD in relation to his hunger strike. When contentious internal disputes have to be

resolved in the High Court, it is often, thankfully, a sign of a dysfunctional system. However, in this case, the engagement of the High Court had a number of beneficial consequences. First, Mr. McD obtained the services of lawyers who represented him with skill and dedication. During the course of the proceedings in the High Court in relation to capacity, it was announced, thankfully, that Mr. McD had decided to end his hunger strike, and it seems plausible that the attention given to this matter in the High Court had played some part in that decision. The focus on his circumstances also led to the commencement of these proceedings which were much broader in scope than the capacity proceedings.

3. The capacity proceedings were determined by a finding that the Prison Authorities were not under a duty to prevent the appellant going on hunger strike or remaining on hunger strike, and that the authorities were not obliged to seek to force-feed him. He was a person who had capacity to make autonomous decisions concerning his own life whilst on hunger strike, and the governor was entitled to give effect to his stated decisions to refuse medical and nutritional services.
4. These proceedings were commenced and canvassed a large number of claims. It should be said that imprisonment of a person may give rise to legal issues in the field of public law, in relation to constitutional law, the law of the European Convention of Human Rights, administrative law more generally and may indeed give rise to issues under the international obligations assumed by the State. The relationship between a prisoner and the Prison Authorities is one which also may give rise to private law issues. However, by the time the appeal in this case was argued, the only issue for determination was the private law issue of whether the Prison Authorities owed to the prisoner, in this case, a duty of care in relation to the handling of complaints made by him under the provisions of the Irish Prison Complaints Policy document which had been introduced in June 2014, that is a matter of some months before the commencement of the hunger strike. As

recorded by MacMenamin J., the High Court found that the Prison Authorities were under a duty of care to the plaintiff to implement the policy in accordance with its terms, and failure in that regard had the effect of lengthening the plaintiff's hunger strike and accordingly awarded the plaintiff €5,000 damages. The High Court also made a declaration sought by the plaintiff that "in his treatment of the plaintiff's written complaints the governor had breached the terms of the Irish Prison Service Prison Complaints Policy". This declaration was a logical corollary of the finding that the prison governor owed a duty of care to the prisoners to implement the complaints policy in accordance with its terms and was moreover in breach of that duty. The Court of Appeal set aside the finding of liability and the declaration. The appellant sought and obtained leave to appeal to this Court on the basis that the appeal concerned an issue of general public importance. I have read the judgments of MacMenamin and Charleton JJ. on this appeal. It appears to me only two issues arise for determination:

- (1) Whether the Court of Appeal was correct to overturn the finding of liability;
- (2) If the Court of Appeal was so correct, whether it is nevertheless appropriate to make a declaration.

5. Briefly, I agree with both MacMenamin and Charleton JJ. that the Court of Appeal was correct to overturn the High Court's finding of liability, but would, however, set out as briefly as possible the reasoning which had led me to that conclusion. In relation to the second issue, MacMenamin J. would grant a declaration "to the effect that the administration of the Irish Prison Complaints Policy document introduced in the year 2014 did not comply with the requirement to provide an effective complaints system in the case of the appellant". MacMenamin J. considers that this is permissible on the authority of a judgment of Walsh J. in *Transport Salaried Staffs' Association and Ors v. C oras Iompair  ireann* [1965] IR 180 ("*Transport Salaried Staffs' Association*"). On this issue, I agree with Charleton J. that such a declaration is not appropriate.

### **Duty of Care**

6. It is important not to underestimate the fraught nature of the proceedings when they arrived in the High Court. The High Court judge heard the capacity case with admirable expedition and particular sensitivity and empathy. In relation to the claim launched by the appellant against the Prison Authorities, the High Court found that the complaints system was not operated correctly and in accordance with its terms in relation to the complaints made by the appellant. She pointed out that this failure was particularly unfortunate in the case of Mr. McD because his personality bordered on the obsessive. These findings appear fully justified upon the facts of the case and were not challenged on appeal. The legal issue is, however, whether these facts give rise to a private law cause of action in negligence entitling the appellant, or a person in his position, to recover damages declaratory relief.
7. I agree with the Court of Appeal, and with MacMenamin and Charleton JJ., that the appellant's claim in this case cannot succeed as a matter of law. It may well be that the only issue in the appeal is not the outcome of this aspect of the case but rather the precise legal basis for that conclusion. It is true to say that the issues of duty of care, foreseeability, proximity, remoteness and even causation in the law of negligence tend to run into each other so that cases which may be analysed under one head could possibly be understood as an application of the principles applicable to another. However, it is that very protean nature of the tort of negligence and the fluidity of its component concepts, and its wide application in everyday life, which requires us to approach the analysis of the case as rigorously as possible, and leads me to set out my own reasoning in this regard.
8. For my part, I would not consider that the appellant's case fails for lack of sufficient proximity between the Prison Authorities and the appellant, unless the concept of proximity is understood as capturing in some indefinable way the essence of a duty of

care so that the reasoning becomes circular: because there is no duty of care, there is not sufficient proximity, and therefore – there being no sufficient proximity – there is no duty of care. There is, however, no doubt that there was sufficient proximity between the Prison Authorities to give rise to a duty of care on the part of the Prison Authorities to avoid causing physical injury to the prisoner, and indeed to protect him from foreseeable harm. The appellant was, by definition, in a prison run by the governor, and therefore to an unusual degree under his control. Thus, if by some inexplicable failure in the prison system, the appellant was deprived of food and water for a prolonged duration, giving rise to some physical injury or measurable damage to health, I do not doubt that there would be sufficient proximity to give rise to a duty of care a breach of which would be actionable.

9. I agree, however, that the adoption by the Prison Authorities of the complaints policy did not, however, create a private law duty of care to the prisoner to perform the complaints policy in accordance with its terms. It follows that the authorities did not have a private law duty of care to have a complaints policy or one in any particular terms. That is sufficient, perhaps in itself, to determine the case. However, I also agree, that even if a broader view were taken of the duties owed by the Prison Authorities to the appellant, that the appellant could not succeed in a claim that his hunger strike was either caused or prolonged by the failures of the authorities in this regard. That is because there is an important, and in most cases, legally significant, distinction between Prison Authorities taking positive steps to deprive a prisoner of food, or to force the appellant to live in unsanitary conditions, or being careless about either the feeding of a prisoner or the conditions in which he or she was being held and a decision by a prisoner to protest either by hunger strike or by rendering his or her prison cell unsanitary. That is because the decision of the prisoner is an exercise of personal autonomy which he or she normally has capacity to exercise, the same autonomy indeed which the High Court found this

appellant to have and to have exercised, and which meant that the governor was not under a duty to take steps to feed him.

10. In general, an individual may owe a duty of care to avoid injury to another person by that individual's own acts or omissions. In some cases, that duty can extend to protecting a person from the acts of a third party, even if wrongful. But it is, I think, extremely unusual for an individual to owe a duty of care to another person to protect them from the consequences of their own decision which they are competent to take.
11. This general area was discussed in the judgment of the House of Lords in *Reeves v. The Commissioner of the Metropolis* [2000] 1 S.C. 360 ("*Reeves*"). The interesting legal discussion in that case must be viewed in the light of two important features of the case. First, the trial judge found that the deceased man was of sound mind at the time he committed suicide. This was a finding which was remarked upon because it had been established in *Kirkham v. The Chief Constable* [1990] 2 Q.B. 283, that police authorities owed a duty of care to a person of unsound mind to protect them against the risk of suicide. In *Reeves*, however, the case had to be approached on the basis that Mr. Murphy, the deceased, was of sound mind and therefore capable of making a rational decision to end his own life. Furthermore, the discussion in the House of Lords was complicated by the fact that the existence of a duty of care was conceded by the police commissioner and the appellant in that case, and the only issues raised were the different, albeit related, issues comprehended under the Latin maxims *volenti non fit iniuria* (a person cannot complain of an injury when they have consented to the activity), *novus actus interveniens* (the injury was caused by a separate act) and *ex turpi causa non oritur actio* (a wrongful act cannot be the basis of a cause of action). For these reasons, the case did not address squarely the difficult issue arising in this case and the observations of the Court must be read in the light of those features of the case.

12. In that case, the features giving rise to a duty of care were identified as the fact that it was well known and indeed established by official reports that there was a significant suicide risk among persons arrested and detained in a police station, and the prior attempted suicide of the man detained in that case. It is clear, however, that these circumstances were deemed to create an exceptional situation. Nevertheless, Lord Hoffmann (at p. 369B) specifically addressed the question of hunger strike and stated that the authorities would not have been entitled to administer forcible feeding to an individual on hunger strike for example. Any duty to a prisoner could not involve overriding his personal autonomy at least to this degree.
13. Even if this Court were to hold that in similar circumstances. An Garda Síochána would owe a duty to protect a person against the risk of suicide – and that issue does not arise in this case – I do not think that the principle can or should be extended beyond that limited and extreme case. Like MacMenamin J., I would reserve the question of any duty of care to a vulnerable person or a person of unsound mind. Given the fact that these categories are not necessarily hard edged, I would not wish to rule out the possibility of it being argued that a novel duty of care may be owed to a prisoner in particular facts or circumstances. I am, however, satisfied that the prison governor did not owe the prisoner in this case a private law duty of care to ensure that the complaints system operated in accordance with its terms so as to make the governor liable for the prisoner’s hunger strike in this case.
14. Finally, I agree with MacMenamin J. and Noonan J. in the Court of Appeal that, even if a duty of care could be said to arise, the appellant’s case would face a significant hurdle in establishing causation. It seems clear that this appellant commenced his hunger strike and continued on his hunger strike, not because he was dissatisfied with how the complaints process was handled, but rather because his demands had not been conceded. Thus, even after he received the response of both the prison governor and the outcome of

the complaints mechanism was communicated to him, he continued on his hunger strike. Accordingly, I agree that the appellant's claim in negligence fails, and the decision of the Court of Appeal must therefore be upheld.

### **Declaration**

15. The declaration made by Baker J. in the High Court, that the governor had breached the terms of the complaints policy followed from the conclusion that the prison governor owed the appellant a duty of care to operate the complaints system. The declaration was therefore no more than a component of the findings of fact giving rise to liability. With the failure of the appellant's claim in negligence, that declaration must also fail, and it is not contended that it could survive independently of the claim in negligence.
16. However, MacMenamin J. would propose a different declaration. In particular, he considers that the decision in the *Transport Salaried Staff Association and Ors v. Córas Iompair Éireann* case is sufficiently broad to permit the declaration he suggests: that the administration of the complaints policy did not comply with the requirement to provide an effective complaints policy in the case of the appellant. I regret that I do not agree.
17. There are, I think, a number of fundamental objections to the course proposed. First, and not irrelevantly, the appellant has never sought such a declaration at any stage of the proceedings, or argued that it is appropriate and the defendant has never had notice that such a declaration was being claimed or might be granted. There are occasions upon which it might be said that a court may modify a declaration sought by an appellant to align with the precise findings made by the court. There is, however, no sense in which this could be said to a mere modification of the declaration sought. Both as a matter of fact and law, it is materially different. What is proposed is standalone relief shorn of any cause of action and making a declaration of a general inadequacy of the complaint system.



- 18.** I do not agree that the decision of Walsh J. in the *Transport Salaried Staffs' Association* case provides authority for this course. It is worth recalling the facts of that case to understand the context in which Walsh J. made his observations as to the flexibility of the declaratory remedy. CIE had entered an agreement in 1947 with the plaintiff union as to the salary scale payable to employees. Section 55 of the Railways Act 1924 (“the 1924 Act”) provided that the rates of pay of railway employees were to be regulated in accordance with agreements made by trade union representatives of employees and the railway company. In 1960, CIE sought to establish a graduate entry route that would pay new employees coming through that route more than the starting salary under the 1947 agreement. The union and a number of its members sought a declaration that such a scheme was both a breach of the agreement and a breach of the statute. Declarations were sought in those terms, and an injunction.
- 19.** It appears to have been argued that the plaintiffs were not entitled to the declaratory relief. That appears to have been based on the contention that the plaintiffs had no legitimate interest in a determination as to whether there was a breach of the 1924 Act, that perhaps the employees had no entitlement to sue upon the agreement and that, in any event, since the members of the union were being paid in accordance with the agreement, the union had no legitimate complaint if other employees were paid more.
- 20.** These objections troubled neither the High Court or the Supreme Court. It was held that the plaintiffs had a legitimate interest in establishing a breach of the agreement, and, moreover, that such a breach also constituted a breach of statute.
- 21.** If there was any novelty in the case, it was the conclusion that the union had a sufficient interest to seek the declaration in respect of the statute. However, the declarations sought were matters of law, involving both the interpretation of a contract and the legal consequences of that interpretation under the 1924 Act. That is classically a legal matter in which a court is competent to make a declaration. A court may also make a declaration

as to fact, which may have some legal consequences, or which it can be said that the plaintiff has some legitimate interest to seek. But, as observed by Clarke C.J. at paragraphs 11.3 and 11.5 of his judgment in *Fox v. Minister for Justice and Equality, Ireland & the Attorney General* [2021] IESC 61 (Unreported, Supreme Court, Clarke C.J., September 14<sup>th</sup>, 2021), the jurisdiction to grant a declaration is wide, but far from unlimited.

22. Even if the broadest view is taken of the ambit of the declaratory power, I cannot see that it either extends to this case, or if it does, that it would be appropriate to exercise the power here. The High Court has already made a finding that the operation of the complaints process was inadequate and unsatisfactory in relation to the appellant and that too long was taken to respond to the appellant’s written complaints. What legitimate interest has the appellant in seeking a formal declaration in those terms (and which he has not sought in these proceedings), and in what way can it be said that the appellant’s position in law or in fact would be improved by such a declaration? Furthermore, the declaration proposed by MacMenamin J. subtly shifts the focus to the perceived general defects in the complaints system justified as “a means whereby the systems failings can be highlighted”. In doing so, MacMenamin J. refers to a range of materials – none of which were addressed in the High Court judgment. The United Nations Standard of Minimal Rules for Treatment of Prisoners, and the second general report of the European Committee for Prevention of Torture, and the European Prison Rules are not relevant to any claim for breach of a private law duty of care, and raise issues, not argued in this case, as to the legal effect in Irish law of any such documents. Moreover, the proposed declaration that the administration of the Complaints Policy document “did not comply with the requirement to provide an effective complaints system” is question begging. The only legal requirement argued in this case to operate the complaints system contained in the Irish Prison Complaints Policy document (and not “an effective complaint system”

was) and was said to arise in private law giving rise to an entitlement to damages. This claim failed in the Court of Appeal, and that decision has been upheld in this Court. If it is suggested that there is some other requirement to provide an effective complaints system, then it is necessary to identify the source of that obligation, and explain how any such legal issue giving rise to a declaration can arise in the context of this appeal, when no such claim was made hitherto and neither evidence adduced nor argument made in the trial court. I understand that MacMenamin J. would seek to locate such a requirement in the Constitutional right to communicate and the ECHR right to private and family life. It is, I hope, enough to observe that it is, at a minimum, a very significant stretch to seek to derive a right to an effective complaints system from the texts and cases to which he refers, and, even more fundamentally, that issue was not debated in this appeal, which was confined to the private law claim in negligence. I cannot agree, therefore, that the Court should make the declaration he suggests.

**23.** In coming to this conclusion, I do not wish to lose sight of the fact that the general operation of the complaints system in Irish prisons, and, in particular, in Prison X, was the subject of detailed scrutiny and analysis and criticism by the then inspector of prisons, the late Judge Michael Reilly. That was an official report produced by an official appointed to conduct that very task and to do so by consideration of a range of materials and representations which were not advanced in evidence in this case. This is the performance of a valuable public service, specifically directed to the identification of systemic failures in the Irish prison regime. This is a function which cannot easily or effectively be performed by a private law cause of action. Returning to that context, the fundamental question must be: what benefit would this appellant in these proceedings, or anyone else, obtain from a much more limited declaration of general inadequacy, by reference, moreover, to a particular and unusual case?

24. It does not appear to me that this appellant has any interest, outside the confines of the case itself, in seeking a declaration in the form proposed by my colleague, and which, moreover, the appellant had never in fact sought. The only interest, it seems, the appellant could have in obtaining such a declaration related to the case itself, is that it might allow the appellant to contend that the claim had not entirely failed or that it had succeeded in some respect and that should be reflected in costs. This is an unusual case, and I do not doubt that the circumstances of the case, the issues which arose, and the criticisms made by the trial judge, might well be relied upon to resist any order for costs in favour of the respondent, and perhaps to contend that the appellant should obtain an order for costs of some description against the respondent. However, the Court should consider directly and on its merits. It should not depend on the grant or withholding of a declaration which cannot be said to flow from the cause of action asserted unsuccessfully by the appellant, and which, moreover, the appellant has not sought. Accordingly, while I acknowledge the importance at a policy level of the some of the matters touched on in this aspect of the judgment of MacMenamin J., and respect the sentiments which underpin his approach to the case, and recognise the flexibility and utility of declaratory relief, I cannot agree that the proposed declaration should be made by this Court, and accordingly agree in that respect with the judgment of Charleton J.