

APPROVED

[2024] IEHC 210



THE HIGH COURT

2019 4875 P

BETWEEN

SUSAN MCGOVERN

PLAINTIFF

AND

GOVERNOR OF LIMERICK PRISON
THE IRISH PRISON SERVICE
THE MINISTER FOR JUSTICE AND EQUALITY
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 April 2024

INTRODUCTION

1. These proceedings relate to the historical incarceration of the plaintiff in Limerick Prison. The two principal complaints made are as follows. First, it is said that the plaintiff was subject to what is described as a “*slopping out*” regime. This refers to the past practice whereby, in the absence of in-cell sanitation, prisoners were required to use chamber pots overnight and to empty the contents of same into a sluice the following morning. Secondly, it is said that the plaintiff

NO REDACTION REQUIRED

was not provided, during the period of her incarceration, with adequate medical care, treatment or supervision in relation to her mental health and depression.

2. The defendants object that the proceedings are inadmissible by reason of delay. In particular, it is pleaded that the proceedings are statute-barred by reference to the Statute of Limitations 1957, the Statute of Limitations (Amendment) Act 1991, and the European Convention on Human Rights Act 2003. This objection will be referred to hereinafter by the shorthand "*the delay point*".
3. This judgment addresses the question of whether the delay point should be heard and determined separately *in advance of* the court embarking upon a substantive hearing of the proceedings. The defendants submit that if their objection that the claim is statute-barred is held to be well founded, this will be dispositive of the proceedings. It is said that a determination upon the delay point has the potential of producing a significant saving in time and costs. The plaintiff, conversely, submits that any bifurcation of the proceedings will result in unnecessary duplication of evidence and will cause prejudice to the plaintiff.
4. The plaintiff has brought a *separate* application for leave to amend her statement of claim. This amendment application has yet to be heard and determined. I have approached the application before me on the working assumption that the proposed amendments will be permitted. Put otherwise, I have taken the plaintiff's case at its height by having regard to the draft amended statement of claim as exhibited. I have assumed that the issues to be determined in the proceedings will include even the *additional* issues identified as part of the proposed amendments.

PRELIMINARY ISSUE OR MODULAR TRIAL?

5. The defendants' application to have the delay point dealt with in advance is posited on two alternative bases as follows. First, an application has been made for the trial of a preliminary issue pursuant to Order 25 of the Rules of the Superior Courts. Secondly, an application has been made for a modular trial pursuant to the court's inherent jurisdiction and/or the (amended) Order 36, rule 9(1). (The text of same is set out at paragraph 11 below).
6. For the reasons which follow, the application is more properly brought pursuant to the court's inherent jurisdiction and/or Order 36. This is because the material facts are in dispute. The case law in relation to the trial of a preliminary issue under Order 25 emphasises that there must be agreement in relation to the material facts before a preliminary issue can be tried. See, in particular, *Campion v. South Tipperary County Council* [2015] IESC 79, [2015] 1 I.R. 716 (at paragraph 35):

“There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.”
7. The defendants have cited the judgment of the Court of Appeal in *Elliott v. ACC Bank* [2020] IECA 278. There, the Court of Appeal declined to interfere with the High Court's decision to allow the trial, on oral evidence, of a preliminary issue in relation to the Statute of Limitations. The Court of Appeal attached some weight to the fact that the High Court had, for the purpose of the application, taken the plaintiffs' pleaded claim at its height and had adopted the same approach to the evidence given by the first plaintiff in the trial of the preliminary issue.

8. Whereas the Court of Appeal's judgment might suggest that, in exceptional cases, it may be appropriate to allow the trial of a preliminary issue even in circumstances where there is a (limited) dispute in relation to the material facts, the prevailing view on the authorities is that, for the purposes of Order 25, the material facts must either be agreed between the parties, or, alternatively, the moving party must take the plaintiff's case at its height for the purpose of the application.
9. There has been some discussion in the case law as to the overlap of the principles governing (i) the trial of a preliminary issue under Order 25, and (ii) a modular trial. The High Court (Clarke J.), in *Donatex Ltd v. Dublin Docklands Development Authority* [2011] IEHC 538, stated that it is not appropriate to use an application for a modular trial as a backdoor method of seeking to have the court determine what is, in truth, a preliminary issue in circumstances where the court would not have ordered the trial of a preliminary issue.
10. It follows, therefore, that just as the court will not normally direct the trial of a preliminary issue in circumstances where the determination of same is not likely to result in a saving of time or costs, so too will it be reluctant to direct a modular trial in such a scenario. The two procedural mechanisms overlap to this extent at least. However, the statement in *Donatex Ltd v. Dublin Docklands Development Authority* does not go so far as to suggest that the existence of a factual dispute *precludes* the possibility of a modular trial. Indeed, such a supposed preclusion would be inconsistent with the wording of the amended Order 36, rule 9(1) which expressly envisages the resolution of questions of fact. It would collapse the distinction between the two procedural mechanisms to suggest, as the plaintiff does, that a modular trial is only ever available in

circumstances in which the trial of a preliminary issue would also be permissible under Order 25.

MODULAR TRIAL: LEGAL TEST

11. Order 36, rule 9(1) of the Rules of the Superior Courts (as amended by S.I. 254 of 2016) provides as follows:

“Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time order:

- (a) that different questions of fact arising therein be tried by different modes of trial;
- (b) that one or more questions of fact be tried before the others;
- (c) that one or more issues of fact be tried before any other or others.”

12. The High Court’s inherent jurisdiction to direct a modular trial has been considered in *McCann v. Desmond* [2010] IEHC 164, [2010] 4 I.R. 554. The following criteria were identified by Charleton J. as being relevant to an application for a modular trial:

- “(1) Are the issues to be tried by way of a preliminary module, readily capable of determination in isolation from the other issues in dispute between the parties? A modular order should not be made if the case could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate, so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.
- (2) Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of

the need to administer justice in the entire circumstances of the case.

- (3) Would a modular order result in any prejudice to the parties? If, for instance, the issue as to what damage was occasioned by reason of the wrong alleged by the plaintiff was so intricately woven in to the proofs that were necessary to the proof of liability for the wrong, so that the removal of the issue of damages would undermine the strength of the plaintiff's case, or the response which a defendant might make to it, then the order should not be made.
- (4) Is a motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues? I return to the idea that a judge should always be aware that tactical decisions are made, often out of an abundance of enthusiasm, by parties to litigation, who may seek to put the other party at a disadvantage through the obtaining of an order under the Rules of the Superior Courts 1986, or one capable of being made within the inherent jurisdiction of the court. Obvious examples of pre-trial motions that may merely be tactical are motions to strike out proceedings as being vexatious or frivolous or to seek an order for security for costs under s. 390 of the Companies Act 1963. Other instances include the lengthy arguments that can sometimes ensue in relation to discovery. If the removal of issues to a modular hearing is likely to disadvantage the proper process of pre-trial preparation that discovery orders, notices for particulars and notices to admit facts involve, then such a motion should be refused as resulting not from a genuine process that will assist the trial but for tactical reasons related to wrong footing the other party."

13. The criteria germane to an application for a modular trial have also been enumerated by the High Court (Clarke J.) in *Cork Plastics (Manufacturing) v. Ineos Compound U.K. Ltd* [2008] IEHC 93 (at paragraphs 3.1 to 3.14). The criteria which are of most immediate relevance to the present proceedings are as follows:

- (i). The default position is that there should be a single trial of all issues at the same time. In any straightforward litigation, and in the absence of some unusual feature (such as, for example, the unavailability of quantum witnesses which might otherwise lead to an adjournment), the risk that the proceedings will be longer and more costly if divided will be seen to outweigh any possible gain in court time and expense in the event that the plaintiff fails on liability.
- (ii). The first and most obvious factor to be considered is the likely length and complexity of the proceedings (if heard as a unitary trial), and the relative length and complexity of the proposed modules. It is the length and complexity of the *subsequent* module which is most relevant. The perceived advantage of modularisation is the potential to dispose of the proceedings on the basis of a relatively short first module. If the subsequent module would not be lengthy or complex, then this advantage would not weigh very heavily in the balance.
- (iii). The question of the extent to which there might be significant overlap in the evidence or witnesses that would be relevant to all modules needs to be taken into account.
- (iv). The court should consider the difficulties and delay which might be encountered in relation to a modular trial were there to be an immediate appeal by a party dissatisfied with the result of the first module.

CHRONOLOGY

24 October 2000 to 23 April 2003	First period of imprisonment
2 February 2006	Personal injuries proceedings issued (alleged assault)
28 April 2013 to 17 May 2013	Second period of imprisonment
19 June 2019	Present proceedings issued

DISCUSSION AND DECISION

14. The defendants have pleaded that the present proceedings are inadmissible by reason of delay. In addition to making a general objection on the grounds of delay and laches, the defendants have cited three limitation periods as follows: (i) the general six year limitation period under section 11(2) of the Statute of Limitations 1957; (ii) the two year limitation period prescribed for personal injuries actions under section 3 of the Statute of Limitations (Amendment) Act 1991 (as amended in 2004); and (iii) the one year limitation period prescribed in respect of a claim for damages under section 3 of the European Convention on Human Rights Act 2003.
15. The plaintiff's response to the delay point is to contend that she had been labouring under a statutory "*disability*" and thus qualifies for an extension of the limitation period pursuant to section 49 of the Statute of Limitations. More specifically, the plaintiff intends to assert that she was of "*unsound mind*", within the meaning of section 48, during the limitation period. To this end, the plaintiff has obtained a report from a consultant psychiatrist dated 2 February 2022. The report concludes with the following summary:

“In summary, [the plaintiff] has had a very dysfunctional difficult childhood and adolescent (*sic*). Her background dysfunction and complicated psychiatric history is well documented in the various reports I have read. In my

opinion, the evidence of psychological dysfunction and psychiatric illness is very significant and has been documented for many years. She has a history of sexual abuse and a very significant history of substance abuse. Her severe psychological and psychiatric problems date back to her childhood. I believe the extent of her psychological and psychiatric problems prevented her from taking legal action in regard to her grievances relating to conditions in Limerick prison. She remains on high doses of psychotropic medication.”

16. The defendants, in their replying affidavit, have drawn attention to the fact that the plaintiff, seemingly, instituted personal injuries proceedings against the Governor of Limerick Prison on 2 February 2006 in relation to an alleged assault said to have taken place while she was incarcerated (High Court 2006 467 P). The defendants suggest that this indicates that, as of that date at least, the plaintiff was capable of instructing solicitors. These earlier proceedings are not referenced in the consultant psychiatrist’s report.
17. A successful outcome to the present proceedings is contingent upon the delay point being resolved in favour of the plaintiff. The only question currently before the court is a procedural one, namely whether the delay point should be resolved as a stand-alone issue in advance of a substantive hearing in relation to the proceedings, or, alternatively, whether it should be addressed as part and parcel of an omnibus hearing.
18. In order to decide whether a modular trial in relation to the delay point is likely to result in a saving of time and costs, it is necessary to consider what such a modular trial might look like. More specifically, it is necessary to consider the nature and extent of the legal and factual issues which would arise at the modular trial, and to compare same to those likely to arise at the substantive hearing of the proceedings.

19. A modular trial in relation to the delay point would be focused on the plaintiff's state of mind during the limitation period. The plaintiff would have to establish that she was labouring under a statutory disability, i.e. was of "*unsound mind*", as of the date of the accrual of her respective causes of action. The plaintiff would also have to establish that she had instituted proceedings within either two or six years of her statutory disability ceasing. This would, presumably, necessitate the plaintiff establishing that she was of "*unsound mind*" up and until, at the very earliest, 2013. (It appears that there may be a dispute between the parties as to whether the proceedings are subject to the shorter limitation period applicable to personal injuries actions under section 3 and section 5 of the Statute of Limitations (Amendment) Act 1991).
20. The modular trial would consist, principally, of a consideration of the plaintiff's mental health during the years following her first term of imprisonment. The logic of the plaintiff's position is that for a significant period of time, up and until at least 2013, she was of "*unsound mind*". Counsel has indicated that it is intended to call the plaintiff to give evidence in this regard. It also appears, although this has not been expressly confirmed, that expert evidence will be called from the consultant psychiatrist who prepared the report referred to earlier.
21. The defendants have indicated, in correspondence, that they intend to call their own expert evidence. It also seems likely that, subject to their being admitted or formally proved, the plaintiff's medical records for the relevant period will be put before the court.
22. In terms of legal submissions, it is likely that the court will be addressed on the meaning of the concept of "*unsound mind*"; any distinction between this concept and that of "*psychological injury*" under section 48A of the Statute of

Limitations; and the implications, if any, of the recently commenced provisions of the Assisted Decision-Making (Capacity) Act 2015. There may also be argument in relation to whether these proceedings represent a personal injuries action such as to trigger the shorter limitation period under the Statute of Limitations (Amendment) Act 1991. The implications, if any, of the plaintiff having instituted personal injuries proceedings on 2 February 2006 against the governor arising out of her first period of imprisonment will also have to be considered.

23. In light of the foregoing, it is to be anticipated that a modular trial in relation to the delay point would require no more than a one or two-day hearing slot. The focus of the hearing would be narrow and the nature and extent of the documentary evidence, e.g. the medical records of the plaintiff for the period post-imprisonment, relatively modest. The legal issues (described above) are neat and will not require a lengthy hearing. The suggestion by counsel for the plaintiff that the modular trial would take up to four days is unduly pessimistic.
24. The nature and extent of the modular trial is to be contrasted with that of a substantive hearing. A decision on whether there has been a breach of the plaintiff's rights will depend, in large part, on the detail of her conditions of detention. The Supreme Court explained, in *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81, [2020] 3 I.R. 113, that a court will have particular regard to features such as the duration of detention, the space in a cell, overcrowding, the linked issues of sanitation and hygiene, lighting, heat, ventilation, as well as predictable out-of-cell time, out-of-cell activities, and access to showers, in addition to access to education and work. It follows, therefore, that there will be a requirement for there to be extensive discovery of

documentation, addressing these factual matters, in advance of the trial if the present proceedings are to go to substantive hearing. There is also likely to be extensive oral evidence in relation to events some twenty years ago.

25. As to the second limb of the plaintiff's claim, namely the allegation that she was not provided with adequate treatment for her mental health and depression, this will require consideration of her medical records for the two periods of her incarceration.
26. Counsel for the plaintiff suggests that the substantive hearing would take two weeks. It follows, therefore, that the substantive hearing would be much longer than the modular trial. The substantive hearing would also require extensive discovery documentation. The documentation to be considered would be different as between the two hypothetical hearings. As to the oral evidence of the plaintiff, and the medical records, these would be directed to a different period of time in the case of a modular trial.
27. A modular trial would, therefore, allow for a potential saving of time and costs. If the delay point were to be resolved in favour of the defendants, then the proceedings would have been disposed of on the basis of a one or two-day hearing. The recent judgment of the High Court (Bolger J.) in *Johnson v. Dunnes Stores plc* [2022] IEHC 580 provides a practical example of a limitation issue being determined on the basis of a short hearing on oral evidence.
28. Of course, a modular trial will not be directed if it would cause prejudice to one of the parties. Counsel on behalf of the plaintiff has pointed to what he says are two types of prejudice which will be suffered. First, it is said that the plaintiff, who is described as a highly vulnerable person with a significant psychiatric history, would be put through the ordeal of having to give evidence before the

court on two occasions. Secondly, it is said that a modular trial would result in the duplication of legal costs.

29. With respect, neither of these represents an actual prejudice. As to the first, the courts are alive to the challenges which the giving of evidence presents for a vulnerable individual and take measures to ensure that their sensibilities are respected during the hearing and, in particular, during cross-examination. As to the second, it seems unlikely that there will be a duplication of costs. The issues which would arise at the modular trial are different from those which would arise at the substantive hearing. The aggregate length of the two modules will not be greater than that of a single omnibus hearing.
30. In any event, if the plaintiff is successful in the modular trial, i.e. the delay point is resolved in her favour, then she would, in accordance with the default position under section 169 of the Legal Services Regulation Act 2015, have a *prima facie* entitlement to recover her legal costs from the defendants. The plaintiff could apply to have those legal costs paid out in advance of the determination of the substantive hearing.
31. One of the criteria to be considered in the context of an application for a modular trial is the implications of same for the efficient conduct of any appeals which might be taken. Counsel for the plaintiff has submitted that, in the event the delay point were to be decided against her, the plaintiff is likely to pursue an appeal. In the event that such a hypothetical appeal were to be successful, then the proceedings would be remitted to the High Court for substantive hearing. A further appeal might then be brought by whichever of the parties is unsuccessful in relation to the substantive hearing. It is suggested, therefore, that a unitary trial would be more efficient in that it could only result in a single appeal.

32. With respect, any supposed risk of inefficiencies in relation to potential appeals is overstated. It follows from the fact that the first module will be short that any appeal from the High Court will similarly be short. The first module presents net issues of law which are capable of being addressed in a short hearing by the Court of Appeal. It is correct to say that, in the event the delay point is not dispositive of the proceedings, there might be a second appeal. This is not, however, a reason to refuse a modular trial. The time expended before the High Court and the Court of Appeal in relation to the delay point is likely to be much shorter than the time expended before the High Court alone in a unitary trial. This potential saving of time and costs for the parties justifies the risk that there might be two appeals.
33. In conclusion, I am satisfied that this is an appropriate case in which to direct a modular trial. The legislature has prescribed various time-limits for the bringing of legal actions. The present proceedings are *prima facie* out of time. The claim in respect of the “*slopping out*” regime relates to events which occurred some sixteen years prior to the institution of the proceedings. The claim in relation to the adequacy of the medical treatment afforded to the plaintiff is, in large part, directed to the first period of imprisonment. Again, these events occurred some sixteen years prior to the institution of the proceedings. Even the claim in respect of the second, shorter period of imprisonment in April 2013 and May 2013 would appear to be out of time, having been instituted more than six years after the event.
34. It would be unsatisfactory if a defendant who, on the face of it, appears to have a complete defence to the proceedings by reference to the expiration of a statutory time-limit—whether under the Statute of Limitations 1957, the Statute

of Limitations (Amendment) Act 1991, or the ECHR Act 2003—was nonetheless put to the time and expense of preparing for and participating in a *full* trial of the action in circumstances where the proceedings might ultimately be found to be statute-barred. It is preferable that, where same can be done without causing prejudice to the other side, the question of whether the proceedings are statute-barred should be determined in advance. This is, of course, subject to the caveat that a modular trial will not normally be directed unless there is a significant saving of time and expense. A modular trial might not be appropriate where, for instance, the issue of delay is inextricably linked with the substantive issues in the proceedings. An obvious example might be where an extension of time is sought in relation to a claim arising out of child sexual abuse. Depending on the particular circumstances of the case, there may well be a significant overlap between the type of evidence and argument which would be relevant to an application for an extension of time pursuant to section 48A of the Statute of Limitations and that relevant to the substantive hearing.

35. By contrast, in the present proceedings the overlap, if any, between the evidence and legal argument which are relevant to the delay point and the evidence and legal argument to be had at the substantive hearing is minimal. As discussed in detail earlier, the evidence in relation to the issue of delay will be directed to the state of mind of the plaintiff during the period *after* her incarceration and the legal argument will turn on questions such as, *inter alia*, the correct interpretation of section 48 and section 49 of the Statute of Limitations and the implications, if any, of the recently commenced provisions of the Assisted Decision-Making (Capacity) Act 2015. These are all stand-alone issues which

will not arise for reconsideration at the substantive hearing (in the event that the modular trial were not to be dispositive of the proceedings).

CONCLUSION AND PROPOSED FORM OF ORDER

36. This is an appropriate case in which to direct a modular trial. The first module will address the issue of whether the proceedings are statute-barred or otherwise inadmissible by reason of delay. If this issue is resolved against the plaintiff, then this will be dispositive of the proceedings. If, conversely, the issue is resolved in favour of the plaintiff, then the issues of liability and quantum will be addressed in a second, final module.
37. The issues to be addressed in the first module are those pleaded by way of preliminary objections in the defence. I will hear counsel further as to whether the wording of any of these issues requires to be finessed so as to reflect the (proposed) amendments to the statement of claim.
38. As to legal costs, my *provisional* view is that the defendants, having been entirely successful in obtaining an order directing a modular trial, are entitled to recover the costs of the motion as against the plaintiff.
39. These proceedings will be listed before me on 2 May 2024 at 10.30 o'clock to address the final form of order and the allocation of costs.

Appearances

Glen Gibbons SC and Rachel McGovern for the plaintiff instructed by Burns Nowlan LLP

Remy Farrell SC and Frederick W. Gilligan for the defendants instructed by RDJ LLP (Dublin)