Neutral Citation [2013] IEHC 303

THE HIGH COURT

Record No. 2012/10367P

Between/

DONALL "HAPPY" MURRAY

Plaintiff

-and-

JOHN SHERIDAN, IRELAND AND THE ATTORNEY GENERAL

Defendants

Judgment of Ms. Justice Iseult O'Malley delivered the 27th June. 2013.

Introduction

1. The defendants in this case have brought a motion to dismiss the plaintiff's claim, pursuant to the inherent jurisdiction of the court, on the grounds that the claim itself is frivolous and vexatious and that maintenance of the claim constitutes an abuse of the court. There is also an application for an order that no further proceedings be instituted by the plaintiff against these defendants, their employees, servants or agents, without the leave of the court.

2. The plaintiff is described as a qualified emergency medical technician and has in the past engaged in what he has described as the provision of "emergency and non-emergency medical transportation to the socially and financially disadvantaged". The use of a vehicle described as an ambulance, for the purposes of this activity, apparently brought him into confrontation with a number of members of An Garda Síochana in the Dun Laoghaire area and led to a large number of charges under the provisions of the Road Traffic Acts. The plaintiff has, as a result, what he perceives as a long-standing grievance against various Gardaí including the first named defendant.

3. The first named defendant is a member of An Garda Síochana. At all material times he held the rank of Sergeant.

Background

4. Before detailing the current proceedings it is necessary to consider the plaintiffs previous litigation against the second and third named defendants.

5. Between the years 2000 and 2006 inclusive, the plaintiff and, in one instance, his company Air Ambulance Services Limited, commenced ten sets of proceedings against Ireland and the Attorney General and a number of members of An Garda Síochana. The first named defendant in this case was not a defendant in any of those proceedings.

6. By order of MacMenamin J. made on the 30th July, 2007, the proceedings were consolidated and on the 9th January, 2008 a consolidated statement of claim was delivered. This document, which was 72 paragraphs long, set out complaints against the Gardaí in relation to the various prosecutions brought against him and the seizure by Gardaí of his ambulance. It was also alleged that the Gardaí permitted a named third party to threaten, assault and harass the plaintiff. The reliefs sought were damages for breach of constitutional rights, malicious prosecution and/or conspiracy to injure, breach of duty and/or conversion and for loss of business. The plaintiff also sought a mandatory injunction directing the return of his ambulance.

7. By orders made on 1st February, 2010 certain parts of the claim (paragraphs 43- 56) were held to be statute-barred. The remaining portions were split, with part to be dealt with by a judge alone (paragraphs 10-22) and the remainder by judge and jury.

8. The first part, to be tried by a judge alone, related to the claim of conversion in respect of the ambulance. The subject matter of the second part was, almost entirely, related to the alleged misbehaviour of different members of An Garda Síochana in and around the various road traffic prosecutions.

9. On the 2nd February, 2010 the jury trial commenced before Ryan J. and a jury. After the case was opened by counsel for the plaintiff, Ryan J. discharged the jury on the application of the defence. It is clear from the transcript that this occurred because of a surprising number of inappropriate and prejudicial remarks by counsel. The matter was then adjourned out of the jury session.

10. On the 23rd July, 2010, after a full hearing on various dates in March and April of that year, Ryan J. dismissed the part of the claim that was concerned with the alleged conversion of the ambulance.

11. On the 15th February, 2011 the jury trial came on again before Dunne J. Again, the jury was discharged on the basis of counsel's opening, for the similar reasons as before.

12. Subsequently, the defendants issued a motion seeking an order dismissing the proceedings on the basis that they were frivolous and vexatious or an abuse of the court. In a written judgment delivered on the 18th January, 2012, Michael White J. acceded to this application. It was his view (with which one would have to agree) that the behaviour of counsel at the second jury trial before Dunne J. was a serious abuse of the process of the court. He noted that it had been suggested by MacMenamin J., in the course of hearing a preliminary issue before the motion to dismiss, that different counsel should be retained but that had not happened. The same counsel had argued the motion before White J. and had made it clear to him that he would continue to be the advocate in the jury trial if it was permitted to proceed. White J. stated that he was certain that if the action were to be permitted to be heard before a jury again with the same counsel the same problem would arise. He therefore concluded that the proceedings were being conducted in a vexatious manner, in the absence of reasonable cause to justify what had happened, and accordingly struck out the proceedings.

13. The result of all of the foregoing is that complaints arising from the following matters have been determined as follows:

A. Statute-barred matters

(i) The actions of one Raymond Kinsella between 1991 and May, 1995 and the alleged Jack of response of An Garda Síochana thereto, or collusion therewith.

(ii) The prosecution, and acquittal on appeal, in 1995, of the plaintiff on a charge of larceny and actions of the Gardaí in relation thereto.

(iii) Alleged actions by Gardaí in 1994 leading to the Joss of the plaintiffs employment and an alleged attempt to have him removed as a member of his Parish Pastoral Council.

(iv) Alleged efforts by the Gardaí to obtain details of the plaintiff's bank accounts.

(v) The alleged refusal of the Gardaí to concern themselves with the unlawful taking of a vehicle belonging to the plaintiff in the early 1990s.

B. Dismissed after plenary hearing by Ryan J.

(vi) The seizure of the plaintiff's ambulance on the 23rd August, 2000 and the subsequent detention of the vehicle.

C. Dismissed by Michael White J. on the basis of the vexatious conduct of the proceedings

(vii) The prosecution of the plaintiff for road traffic offences dealt with in the District Court on the 4th April, 2000.

(viii) The prosecution of the plaintiff for road traffic offences, alleged to have been committed on the 11th July, 2000, dealt with in the District Court on the 26th January, 2001 and, on appeal, the Circuit Court on the 19th April, 2002.

(ix) The prosecution of the plaintiff for road traffic offences alleged to have been committed on the 23rd August, 2000, dealt with in the District Court on the 26th January, 2001 and, on appeal, the Circuit Court on the 19th April, 2002.

(x) The prosecution of the plaintiff for road traffic offences, alleged to have been committed on the 30th August, 2000, dealt with in the District Court on the 26th January, 2001and, on appeal, in the Circuit Court on the 19th April, 2002.

(xi) The prosecution of the plaintiff for road traffic offences and an assault contrary to s. 2 of the Non Fatal Offences Against the Person Act, 1997 alleged to have been committed on the 31st October, 2000 dealt with in the District Court on the 26th January, 2001 and, on appeal, in the Circuit Court on the 19th April, 2002.

(xii) An allegedly malicious application by Garda Declan Hartley for a summons for no insurance in respect of the 23rd December, 2000.

14. It will be apparent that the only claim dealt with on the merits was that arising from the seizure of the ambulance.

The current proceedings

15. The plaintiff is now representing himself. He has issued a plenary summons and filed a statement of claim, both dated the 17th October, 2012. The defendants very belatedly entered an appearance on the 1st February, 2013, the plaintiff having consented to an extension of time after bringing a motion for judgment in default. They have not filed a defence.

16. In these proceedings the plaintiff claims damages for defamation, injurious falsehood, misfeasance in public office, breach of duty and infringement of constitutional rights including the right to his good name and the right to earn a livelihood. These claims all relate to alleged actions by the first named defendant.

17. It is important to bear in mind that the first named defendant was not named as a defendant in any of the original ten plenary summonses but was referred to in the consolidated statement of claim.

18. It was stated therein that he was present at the plaintiffs home on the 31st October, 2000, the occasion of the alleged s. 2 assault by the plaintiff, and that he roared at and threatened ("sometime in jest") the plaintiffs son. Clearly, this cannot constitute a cause of action for the plaintiff himself and I consider that it is included by way of evidential colour.

19. The first named defendant was also said, in that statement of claim, to have conducted the prosecution of the plaintiff on the charge of assault, on foot of which the plaintiff was convicted and sentenced to thirty days imprisonment. It was alleged that he stood outside the District Court on that day, the 26th January, 2001, after the plaintiff had been convicted and sentenced, so that he could wave "an animated and enthusiastic farewell" as the plaintiff was taken away in a prison van. Again, this might well be considered to be unprofessional discourtesy on the part of a Garda officer but is not actionable in itself.

20. In the current statement of claim the plaintiff complains in paragraph 2 that the first named defendant insulted and upset him in 2001 by making a sarcastic remark about his medical qualifications. This was at a time when he was moving from Dublin to Longford, with the intention of setting up a new medical business. Again, this would not be actionable in itself.

21. Also in paragraph 2, the plaintiff again complains of the incident after court on the 26th January, 2001.

22. In paragraph 5 the plaintiff claims that in 1999 the defendant obtained a number of documents relating to him, described as including a "Confidential Credentials Portfolio", personal material and commercially sensitive documents. He says that the defendant brought these documents into court on the 26th January, 2001and told the judge that the credentials claimed by the plaintiff were "bogus".

23. Also in paragraph 5 the plaintiff claims that, on the 11th July, 2000, "...the First Defendant did write, produce, publish and circulate throughout the national Garda force a document which was entirely false and malicious..." The words complained of are said to be in the third paragraph of the document and state that "Murray represents himself as an emergency medical technician ...this man is clearly a fraud".

24. This document is referred to later in the statement of claim, in paragraph 8, where the plaintiff says that a Garda Gill, who seized his ambulance on the 23rd August, 2000, gave evidence before Ryan J. in the hearing related to that incident (the claim for conversion) that he had read it and relied upon it. (It will be remembered that that hearing took place in the months of March and

April, 2010.) The plaintiff says that this was the first occasion on which he became aware of the document, which is described by the defendants as an internal Garda memorandum. He further says that the document was handed to Garda Gill in court by the first named defendant, and he therefore makes the case that the first named defendant published it on that occasion.

25. Although he lost that action, the plaintiff claims that Ryan J. found that the Gardaí were negligent in confiscating "what turned out to be an insured ambulance" and says that the learned judge directed that the jury in the then forthcoming trial could be told about it. He then goes on to claim that Senior Counsel for the State misrepresented this ruling to Dunne J. in the second jury trial.

26. In paragraphs 6 and 7 of the statement of claim, the plaintiff again refers to the effect of the actions of the Gardaí on his reputation in his home area and mentions again his position on the Pastoral Council.

27. In paragraphs 9 to 14, the plaintiff complains that the actions of the Gardaí have caused an ongoing depression on his part, damage to his reputation leading to the failure of his Longford project to get off the ground despite obtaining planning permission for it and damage to his future employment or self employment prospects.

The application to dismiss
28. The application is grounded upon the affidavit of Pamela Hanley, a solicitor in the Office of the Chief State Solicitor who was involved in the previous litigation.

29. Having set out the history of the earlier case Ms. Hanley refers to the current proceedings and avers that the plaintiff is seeking to recite many of the matters alleged in the original case.

30. Referring to the defamation claim in respect of the document described by the plaintiff, Ms. Hanley says that the document was an internal Garda memorandum which drew attention to "the fact that the plaintiff was purporting to operate as the provider of an authorised ambulance service". She says that this claim seems on its face to be statute barred and/or to involve remarks the publication of which enjoyed qualified privilege and for public interest. Further, she says that the allegedly defamatory remarks arose from the same context of dealings with the plaintiff which were the subject of the previous proceedings and that the plaintiff is merely seeking to revisit those matters. She believes that this is an abuse of the court process, and that the plaintiff wishes to abuse the privilege attaching to court proceedings to utter unfounded allegations against the defendants.

31. Ms. Hanley goes on to say that the plaintiff has "persistently instituted frivolous, vexatious and groundless claims against the second and third named defendants and their employees, members of An Garda Síochana" and that this is an abuse of the process of the courts.

32. Counsel for the defendants did not refer the court to any authority other than the rulings made in the previous proceedings.

33. The plaintiff is adamant, in both his written and oral submissions, that he is not attempting tore-litigate any matter. The main focus of his submissions is on the allegedly defamatory matters arising in the District Court on the 26th January, 2001 and in the High Court during the course of the conversion action in 2010, neither of which featured in the previous proceedings, and on the document referred to as the internal Garda memorandum.

34. The plaintiff makes the case that the first named defendant was not in the witness-box, as such, when the two courtroom incidents of alleged defamation occurred. He says that any privilege that may have been enjoyed was displaced by malice. He has made diligent efforts to refer to relevant law in that regard but unfortunately has not dealt with the Irish authorities or legislation relating to privilege or limitation periods.

35. As far as the Garda memorandum is concerned, the plaintiff says that he is entitled to presume that it had previously been published on other occasions since 11th July, 2000.

Discussion of authorities and conclusions
36. In this application the defendants invoke the inherent jurisdiction of the court to dismiss a claim which is bound to fail. This jurisdiction, established in Irish law with the judgment of Costello J. in *Barry v. Buckley* [1981] I.R. 306, was endorsed by the Supreme Court in *Sun Fat Chan v. Osseous* [1992] 11.R. 425 and, in *O'Neill v Ryan* [1992] 1 I.R. 166.

37. The defendants say that the plaintiff's claim is bound to fail because parts of it repeat claims that have already been disposed of, or that are statute barred, or that relate to matters that are manifestly covered by privilege.

38. The first issue then is whether the plaintiffs claim has already been disposed of. The principles applicable in a case where the moving party relies on a previous dismiss of the claim were analysed by Clarke J. in *Moffitt v. ACC* [2007] IEHC 245.

The passages relevant to the instant case are as follows: -

> *'The jurisdiction of this court to dismiss proceedings which are bound to fail has been clear since the decision of Costello]. in Barry v. Buckley [1981] I.R. 306. The relevant principles are well settled. It is a jurisdiction to be exercised sparingly and the onus rests upon the defendant to satisfy the court that there is no prospect of success. In addition the court should not judge the matter on a narrow or technical basis referable to the pleadings. It is well settled that, even if the proceedings as currently drafted might have no chance of success, the proceedings ought not be dismissed if, by an appropriate amendment, the proceedings could be recast in a fashion which would give rise to a prospect of success. (See the judgments of McCarthy]. in Sun Fat Chan v. Osseous Limited [1992} 1 i.R. 425 and Fennelly]. in Lawlor v. Ross (Unreported, Supreme Court, Fennelly]., 22nd November, 2001 at p. 10).*
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> *The principal basis advanced on behalf of ACC for suggesting that these proceedings are bound to fail is that the same issues have already been determined. In that context it is important to identify the scope of the doctrine of res judicata. It is well settled that in order for a plea of res judicata to succeed, the judgment upon which it is founded must be a final and conclusive judgment on the merits...*
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> *...In that context there is an issue as to whether a dismissal on the basis that proceedings are frivolous and vexatious or are an abuse of process amounts to a judgment on the merits...*
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> *... There may well be cases where the fact that proceedings are dismissed as being frivolous or vexatious may not give rise to a bar to further proceedings. However it seems to me that where proceedings are dismissed as being bound to*

fail following on from a hearing in which the court considered the merits of the case for the purposes of determining whether the case had any chance of success, then it follows that fresh proceedings on the same basis are barred. In order to determine that proceedings are bound to fail, the court must enter into a consideration of the merits. Indeed it does so on the basis of allowing the benefit of the doubt concerning any factual or complex legal issues to be determined in favour of the plaintiff

The proceedings will only be dismissed, under Barry v. Buckley, where the court is satisfied that there is no prospect of success on the merits. Such a hearing can, in my view, be properly described as a hearing on the merits.

There may, of course, be other reasons why proceedings may be dismissed as being frivolous or vexatious which would not require the court to go fully into the merits of the case. In those circumstances a dismissal may not amount to a bar to future proceedings.

39. Applying those principles to the instant case, it will be seen that if the plaintiff attempted to re-litigate issues relating to the seizure of the ambulance he would be "bound to fail", on the basis that the conversion claim has already been determined on the merits by Ryan J. However, his statement of claim in these proceedings does not, in my view, trespass into that area. I therefore consider that the argument of the defendants that the matters complained should be dismissed because they have already been disposed of is not well founded.

40. Separate considerations arise in relation to the questions of privilege and the limitation periods as regards the defamation claims based on what was said in the District Court prosecution and the High Court civil action.

41. At common law, words spoken in the ordinary course of proceedings in court, whether by judges, counsel, jury, witnesses or parties, were absolutely privileged - see Halsbury, 4th ed. val 28. This position is currently continued by s. 17 of the Defamation Act, 2009.

42. In *Looney v. Bank of Ireland* [1996] 11.R. 157 the alleged defamatory statement was contained in an affidavit sworn for the purpose of court proceedings. In giving judgment on the defendant's motion to dismiss the plaintiffs claim, Murphy J. said at p.159:

"The basis of the present motion is that such an action cannot be sustained because the statement made by the second defendant in her affidavit, whether true or false, enjoys absolute privilege. That is the contention on behalf of the applicant, the defendants in the present case. There is no doubt, that this has always been regarded as the law in this country. One may take one brief sentence confirming that proposition from Kennedy v. Hilliard (1859) 10 Ir. Com. Law Rep.195 from the judgment of Pigot C.B. at the end of p. 200 where he says:-

'I take the following propositions, as to the points with which they deal, to state correctly the law in reference to immunity, on the one hand, and liability on the other, of a party making a false and defamatory imputation, written or spoken, to the injury of another. First; for what is stated by a party on his own behalf, or a witness in giving evidence in the ordinary course of a judicial proceeding, there is absolute immunity from liability to an action for libel or slander.'

If that is good law then indeed the plaintiffs claim in the present case must fail and I would have really no option but to strike out this claim in fairness both to the defendants and to the plaintiff because there could be no purpose in proceeding further with it."

43. Further on, Murphy J. said

"At no stage, as far as I am aware, has it ever been doubted or questioned in any jurisdiction that there is absolute privilege in relation to matters in issue in legal proceedings. Such debate as has arisen has concerned matters, or the extension of privilege to matters, which are not directly in issue."

44. Upholding Murphy J. in the Supreme Court (Supreme Court, unrep.,9th May, 1997) O'Flaherty J. confirmed the necessity to give immunity to witnesses, whether giving evidence orally or by affidavit. He acknowledged that

"The price that has to be paid is that civil actions cannot be brought against witnesses even in a very blatant case, which of course this case is not, but even in a case of perjury- which would be such a case- the law says that an action cannot lie."

45. In *Fagan v. Burgess* [1999] 3 I.R. 306, O'Higgins J. applied the principles set out in Looney where the claim was for damages for alleged perjury by the defendant in giving evidence in another case.

46. It is clear therefore that a witness has absolute immunity from suit when dealing with matters in issue in the proceedings, as does a party or representative. A Garda prosecuting in the District Court may in some cases play a variety of roles in the same case and will enjoy the same immunity in each. Since the privilege is absolute, it is not destroyed by malice.

47. Where a witness giving evidence mentions a document and that document is handed in to be referred to, the act of handing it in cannot constitute publication, by the person who gives it to the witness, for the purposes of the law of defamation.

48. Finally, on the issue of defamation, there is the argument made by the defendants that the claims are statute barred.

49. Section 11 of the Statute of Limitations Act, 1957, which governed defamation actions until amended by the Defamation Act, 2009, provided a three year limitation period for actions for slander and six for libel.

50. There can therefore be no doubt about the fact that the claim in respect of what was said in the District Court in 2001 is statute barred.

51. By the time of the hearing of the conversion action before Ryan J., the Act of 2009 was in force. The applicable provision is s.38 which provides for a limitation period of one year, or such longer period as the court may direct, not exceeding two years, from the date on which the cause of action accrued. The date of the accrual of the cause of action is the date upon which the defamatory statement is first published.

52. The plaintiff argues that it can be assumed that the Garda memorandum had been published to others in the years preceding the court hearing. He may very well be right, but the insuperable problem that arises is that the Act does not, on the face of it, allow for any extension of time in a case where a plaintiff was unaware of the fact of publication of a defamatory statement, such as where it is published to a specially limited audience of which the plaintiff is not part.

53. In any event, no argument in relation to discoverability could avail the plaintiff on the facts of this case. This document was produced in court, to the knowledge of the plaintiff, on one of the hearing dates in the High Court in March or April of 2010. The plenary summons was not issued until the 17th October, 2012. There is no power to extend time in those circumstances.

54. It is well-established law that a limitation period operates as defence, rather than extinguishing a cause of action, and I have therefore considered whether it should be required that a defence be filed before an application of this sort be brought. However, in the circumstances it seems to me that there can be no doubt as to the intention of the defendants to rely upon the Statute, given the contents of Ms. Hanley's affidavit. Equally, there can be no doubt but that the defence would have to succeed. It seems to me, therefore, absolutely clear that the plaintiff has no chance of success in relation to his defamation claims and that his action must be dismissed on the basis that it is bound to fail.

55. Apart from defamation, the plaintiff has not demonstrated any basis on which his other claims of, injurious falsehood, misfeasance in public office, breach of duty and infringement of constitutional rights including the right to his good name and the right to earn a livelihood could be founded.

56. The defendants' notice of motion seeks an order that no further proceedings be issued by the plaintiff against these defendants, their employees, servants or agents without the leave of the court. I do not think that any specific argument was addressed to the court in this regard and I will therefore refuse that application.