THE HIGH COURT

No. 6119P/1999

BETWEEN

LIAM GRANT

PLAINTIFF

AND

ROCHE PRODUCTS (IRELAND) LIMITED, F. HOFFMAN – LA ROCHE, ROCHE HOLDINGS LIMITED, R.P. SCHERER LIMITED, ROCHE PRODUCTS LIMITED, THE IRISH MEDICINES BOARD AND GILLIAN MURPHY

DEFENDANTS

Judgment of Finnegan P. delivered on the 27th day of May 2005

1. The Plaintiff brings this action pursuant to the Civil Liability Act 1961 Part IV. He is the father of Liam Grant Junior. The Seventh Named Defendant is a Consultant Dermatologist who prescribed a drug Roaccutane to Liam Grant Junior. The First to Fifth Named Defendants are involved in the manufacture and distribution of the drug. The Sixth Named Defendant is the statutory body entrusted with the regulation of the manufacture and distribution of drugs within this jurisdiction. The Statement of Claim pleads that a side effect of the drug is depression, that Liam Grant Junior became depressed and suicidal as a result of taking the drug and on the 15th June 1997 took his own life. It is pleaded that the death was caused by the negligence, breach of duty and breach of statutory duty of the Defendants. Defences were delivered denying liability. By letter dated 13th October 2004 the solicitors for the First, Second, Third, Fourth and Fifth Named Defendants offered to the Plaintiff a sum of money sufficient they say to satisfy the claim. I am not satisfied that the sum offered is indeed sufficient so that it could be said with certainty that the Plaintiff would not recover a greater sum. However as the parties had come to court prepared to argue the issue raised on the Notice of Motion and court time had been set aside for that purpose and as in the particular circumstances of a claim under the Civil Liability Act 1961 Part IV it would be possible for the said Defendants to offer a sum more than which the Plaintiff could not be awarded it was agreed that I should proceed and determine the issue raised on this application. Further I propose treating the said Defendants offer as a tender although not made in the form prescribed by the Rules of the Superior Courts (No. 5) (Offer of Payment in Lieu of Lodgement) 2000 S.I. No. 328 of 2000 for the purposes of dealing with the issue before me. S.I. 328 of 2000 provides a qualified party with the alternative to lodging money in court of making an offer of tender. In practical terms and for present purposes therefore I propose having regard to the situation as if a lodgement had been made.

2. The relief sought by the First to Fifth Named Defendants on this Notice of Motion is as follows –

> (a) An order pursuant to the inherent jurisdiction of the Court staying the proceedings herein, or alternatively, restraining the continued prosecution of the proceedings on the grounds that, in light of the open offer made to the Plaintiff by Solicitors for the First, Second, Third, Fourth and Fifth Named Defendants by letter dated 13 October 2004, the relief sought by the Plaintiff in the proceedings has been offered to him by these Defendants and in those circumstances the continued prosecution of these proceedings would be an abuse of the process of the Court."

3. If the action proceeds the costs of the same will be substantial indeed. The Plaintiff has obtained an Order for Discovery against the First to Fifth Named Defendants from the Master which is under appeal. On foot of that Order the first to fifth named Defendants will be required to discover between 4 and 5 million documents. As to the nature of the documents many will be highly technical and lengthy. The Plaintiff has appealed the Master's Order and if he succeeds on that appeal the number of documents will be increased to some 9 million. It is estimated that the hearing will take in excess 3 months.

4. In an Affidavit filed on behalf of the Plaintiff on this application it is deposed as follows –

> "4. In the first instance the offer letters are repeatedly stated to be made without prejudice to the issue of the Roche Defendants' liability. My client wishes the issue of liability to be determined. My client believes that the wrongful actions of the Roche Defendants caused or contributed to the tragic death by suicide of his son, Liam. In the circumstances, I believe that my client is entitled to an adjudication of the liability issue and that he cannot be precluded from asserting his right of access to the court by reason only of the offer of a small monetary sum without any acknowledgement that the Roche Defendants were guilty of negligence in the manner claimed in these proceedings."

5. A second issue raised in that Affidavit is that of special damages. The Plaintiff as special damages claims the expense incurred in investigating and gathering scientific information about Roaccutane. The amount claimed is €696,193. A considerable portion of this sum has already been paid - $219,000, $33,243, $10,500, €21,066.03, €13,865.54 and €139,595.83. There is an issue as to whether some or all these items are properly items of damages or items of costs. However this could be determined either as a preliminary issue or on taxation. It may be that some or all of the items are not recoverable under either heading of damages or costs.

The Issue

6. The issue which arises is this. If, without admission of liability, a defendant tenders or lodges in court a sum of money in satisfaction of the Plaintiff's claim that claim being a claim which can be calculated with mathematical certainty is it an abuse of process for the Plaintiff to continue to prosecute the action.

The Nature of Payment into Court pursuant to Order 22 Rule 1 of the Superior Courts Rules

7. A payment into court is simply an offer to dispose of the claim on terms: *A Martin French (a firm) v Kingswood Hill Limited* 1962 All ER 251. Where the Defence denies liability the payment in should be without admission of liability and the acceptance of the sum so paid implies no admission about the merits of the cause of action as there has been no adjudication and no estoppel is created. In effect acceptance of money so paid in is nothing more than a compromise.

Rules of the Superior Courts

8. Order 22 Rule 1 of the Rules of the Superior Courts provides for the payment into court by a defendant of a sum of money in satisfaction of a claim or where several causes of action are joined in one action in satisfaction of one or more of the causes of action. The pleadings in this case are broadly framed in negligence, breach of duty and breach of contract. There is in effect only one cause of action – the statutory cause of action created by the Civil Liability Act 1961 section 48. That section creates a statutory tort of causing death by wrongful act. Rule 1(6) requires the Notice of Payment into Court to be in one of form number four or number five in Appendix C of the Rules of the Superior Courts that is either admitting or denying liability. Rule 6 deals with the effect of a

payment into court on costs. The Rule provides that if the amount paid into court exceeds the amount awarded to the Plaintiff the Plaintiff is entitled to the costs of the action up to the time when such payment into court was made and of the issues or issue, if any, upon which he shall have succeeded. In *Willcox v Kettell* 1937 1 All ER 222 the Rules of the Superior Courts England and Wales Order 22 were considered. The Rules provided that the Notice of Payment into Court should state whether liability is admitted or denied. Rule 6 of that Order further provided as follows –

> "The Judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment".

9. In that case the Defendant paid £100 into court with a denial of liability the Plaintiff's claim being in trespass. The Plaintiff recovered £31.10 shillings. It was held that the Plaintiff should have his costs of the action up to the time of payment in and the subsequent costs of the issue of trespass and the Defendant to have his costs since payment in on the issue as to damages. In the course of his judgment Clauson J. cited with approval a passage from the Annual Practice 1937 at p. 405:

> "If the Defendant in an action for unliquidated damages denies liability but pays money into court, and the Plaintiff proceeds with the action, there are two distinct issues raised, namely
>
> (a) Whether the defendant is under any liability to the plaintiff and
>
> (b) Whether the sum paid in is sufficient to cover the liability, if any.

10. If the Plaintiff succeeds in recovering from the Defendant an amount which carries costs, even though it is less than the sum paid into court, he succeeds in the first of those issues, and is entitled to the whole costs of the action down to the payment in, and the subsequent costs of the issue on which he has succeeded. The above statement of the Practice was read and adopted in the judgments given in *Powell v Vickers, Sons & Maxim Limited* 1907 1 KB 71"

11. The present position in England and Wales however is that set out in *Hultquist v Universal Pattern and Precision Engineering Company Limited* 1962 All ER 266. Where there is a payment in with denial of liability costs follow the event and it is very rare indeed that a plaintiff is awarded the costs of the issue of liability. Sellers L.J. at page 272 said –

> "The action of tort consists of wrongdoing and damage resulting therefrom and the Plaintiff must prove both to obtain a judgment. On the face of it there can be no complaint and no ground for an order for costs on the issue of liability because the plaintiff is being called on to prove a case to establish his right to damages and has failed to get more than the amount in court. A payment into court is an offer to dispose of the action and if accepted prevents all further costs. A plaintiff who continues an action after a payment in takes a risk and cannot normally complain if he has to pay all the costs which his acceptance of an award would have avoided."

12. Thus even if two issues arise in an action, that is liability and quantum, and the Defendant lodges money in court without an admission of liability, if the Plaintiff succeeds on liability but fails to achieve an award in excess of the sum lodged in court in the ordinary case the Plaintiff will not be awarded the costs of the liability issue after the date of lodgement. That is the position within this jurisdiction.

The Issues on an Action pursuant to the Civil Liability Act 1961 Part IV

13. Section 48 of the Act provides as follows –

> "(1) Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured but for his death to maintain an action and recover damages in respect thereof the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased."

"Wrongful act" is defined in section 47 of the Act –

> "Wrongful act" includes a crime.

"Wrong" is defined in section 2 of the Act –

> "Wrong" means a tort, breach of contract or breach of trust whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime and whether or not the wrong is intentional.

The definition of "wrongful act" and "wrong" read together give the comprehensive meaning of wrongful act. In an action under Part IV two issues arise:-

1. Did the Defendant commit a wrongful act.

2. Assessment of damages.

14. An unusual feature of an action under Part IV, having regard to the maximum sum which can be awarded for general damages fixed by statute, is that the maximum sum which can be recovered for damages can be ascertained from the pleadings with mathematical certainty. The pleadings will identify the special damages. Section 49(3) of the Civil Liability Act 1961 provides that it is sufficient for a defendant in paying money into court to pay in one sum as damages for all the dependants of the deceased without apportioning the sum between them: accordingly Order 22 Rule 1(5) does not apply.

Remedies at Law

15. The principle of the ubi jus ibi remedium is accepted by the courts of this jurisdiction. The appropriate remedy will vary with the cause of action and the circumstances of the same. The most common remedy is damages. Damages are the pecuniary compensation obtainable by success in an action for a wrong. The object of an award of damages is to give the Plaintiff compensation for damage, loss or injury which he has suffered. The heads of damages are divisible into two main groups; pecuniary and non pecuniary loss. However an award of damages is not the only object of a claim. Thus in *Willcox v Kettell* above two issues arose – vindication of the Plaintiff's claim that the Defendant had trespassed on his property and the award of damages. Where there has been injuria but no damage the courts have traditionally awarded nominal damages. In *the Mediana* 1900 A.C. 113 at 116 Lord Halsbury L.C. said –

> "Nominal damages is a technical phrase which means that you have negatived anything like real damage but that you were affirming by your nominal damages that there is an infraction of a legal right which though it gives you no right to any real damages at all yet gives you a right to the verdict or judgment because your legal right has been infringed."

16. Nominal damages can be awarded in cases of breach of contract: *Marzetti v Williams* (1830) 1B & AD. They can be awarded in

torts actionable per se: *Constantine v Imperial London Hotels* (1944) KB 693 which concerned refusal by a hotel to receive a guest. Thus the Courts can vindicate a right by an award of nominal damages the main object of the Court's judgment being the vindication of the right and the award of nominal damages being no more than "a mere peg on which to hang costs": Maule J in *Beaumont v Greathead* (1846) 2 CB 494 at 499.

Abuse of Process

17. The Court has an inherent power to strike out or stay proceedings which are an abuse of process. It is a power which the Court should be slow to exercise: *Sun Fat Chan v Osseous Limited* 1992 1 I.R. 425. The reported cases in this jurisdiction tend to turn on whether the Plaintiff could succeed: that is not the issue of abuse of process raised here. An abuse of the process can also arise where the process of the Court is used, not in good faith or for proper purposes, but as a means of vexation or oppression or for ulterior purposes. In *Dorene Limited & Anor v Suedes (Ireland) Limited* 1982 ILRM 126 Costello J. recognised the existence of an action for damages at common law for the institution or maintenance of a civil action –

1. Without reasonable or probable cause.

2. For some improper or wrongful motive including the use of the legal process for some other than its legally appointed and appropriate purpose and

3. The Defendant thereby sustains damage or damage is presumed.

18. To cause a man to be put to expense is damage of which the law will take notice: *Saville v Roberts* 1 Ld Ray 374. At page 130 Costello J. dealt with reasonable or probable cause: the test is an objective one and it is for the Court on that basis to determine whether there is reasonable cause for maintaining the action. The Court found that the motive in maintaining the action notwithstanding legal advice that it could not succeed was to exert pressure on the Defendant by maintaining in place a *lis pendens* and to use this to assist the Plaintiffs in their bargaining position in dealing with the Defendant.

19. See also *Parton v Hill* (1864) 10 LT 414, *Sean Quinn Group Ltd., v An Bord Pleanala & Ors* 2001 2 ILRM 94. In *Goldsmith v Sperrings Limited* (1977) 2 All ER 566 Scarmen L.J. dealing with an action for this tort said –

> "In the instant proceedings the Defendants have to show that the Plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out "to effect an object not within the scope of the process".

20. The American Second Statement of the Law of Tort (1977) para 682 states the following principle under the heading "Abuse of Process" –

> "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process".

21. Thus abuse of process in this sense gives rise to a cause of action in the Defendant: however I am satisfied that it should equally give rise to an entitlement to have the proceedings maintained in abuse of process struck out or stayed.

Conclusion

22. There are two objects of the present action –

1. To establish that the Defendant committed a wrongful act and

2. To recover damages.

23. The Plaintiff maintains that his concern is to establish that the death of his son was caused by the wrongful acts of the Defendants. In these circumstances he is not seeking "to effect an object not within the scope of the process". If the Plaintiff's motive was to excite adverse publicity damaging to the Defendants or to punish the Defendants for their wrongful act by causing them to incur extravagant costs (as will certainly be the case here) a case for abuse of process could be made out. As the determination of liability is one of the objects of the proceedings and as there is no admission of liability the Plaintiff is not acting in abuse of process. The right to litigate to achieve the appropriate remedy is an unenumerated right under Article 40.3.1 of the Constitution: *Tuohy v Courtney & Ors* 1994 3 I.R. 1. It may well be the case that the Defendants on making a tender or lodgement such that there is no possibility of the Plaintiff beating the same that in that event the Plaintiff will be unable to satisfy any award of costs against him. This is not a factor to be taken into account. Mere poverty is never a bar to bringing an action: *Tormey & Ors v ESRI* 1986 I.R 615. While the consequences for the Defendants of the Plaintiff determining to proceed will be significant in terms of costs the Constitutional right of the Plaintiff takes precedence. See *Crindle Investments Limited & Ors v Wymes & Ors* 1998 4 I.R. 567 at 595. There is no question, I am satisfied, of the Court carrying out a cost benefit analysis. While in the particular circumstances of the case in *AB & Ors v Wyeth* Unreported 1996 EWCA Civ 1202, part of group litigation, the Court had regard to the very modest measure of damages, the fact that the Plaintiff was impecunious and the enormous costs which would be incurred by the Defendant in striking out a claim no such general principle was established. At page 10 of the judgment Stuart Smyth L.J. said –

> "Mr. Buchan sought to rely on an analogy with the case of a multi millionaire who wished to sue Wyeth. His damages might be only £20,000 but he might be prepared to pay the several millions required to bring the case to trial and face the risk of paying the Defendant's costs if he was unsuccessful. Even for a very rich man this would be economic madness, but I agree that the Court would probably not strike out his action."

24. Our system of procedure penalises in costs a plaintiff who fails to accept a sufficient sum paid into court or tendered and this is the only penalty which our procedures provide.

25. Having regard to the foregoing should the Defendants tender or pay into court a sum equal to or greater than the maximum award which the Plaintiff could achieve but without admission of liability the Court would have no jurisdiction to stay or strike out the Plaintiff's claim. I refuse the First to Fifth Named Defendants the relief which they seek.