Neutral Citation: [2015] IEHC 153

THE HIGH COURT

[2011 No. 1134 O.P]

BETWEEN

RANDA MURPHY

PLAINTIFF

AND

DePUY INTERNATIONAL LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of January 2015

1. By Notice of Motion dated the 13th January 2014 the plaintiff seeks a preliminary ruling whether an authorisation from the Personal Injuries Assessment Board (or PIAB) was required prior to the institution of the within proceedings as provided for by part 2 of the Personal Injuries Assessment Board Act 2003 (or the Act of 2003).

Background

2. On the 10th October 2005 the plaintiff underwent a left hip resurfacing procedure at the Galway Clinic, Galway. A DePuy ASR resurfacing hip implant system was inserted. Post operatively, the plaintiff's recovery was unremarkable and she was discharged from hospital on crutches on the 15th October 2005, with outpatient and physiotherapy appointments. Thereafter, it is alleged that the plaintiff's left hip remained sore and painful and that she continued to suffer severe ongoing pain and distress. She was duly referred to an orthopaedic surgeon at Galway University Hospital and on the 21st May 2010 a consultant orthopaedic surgeon revised the left hip resurfacing to an uncemented total hip replacement.

3. On the 26th August 2010 the defendant, by its servants or agents, issued a worldwide recall in respect of two of its hip replacement systems, including the DePuy ASR resurfacing hip implant system which had been surgically inserted into the plaintiff on the 10th October 2005. By letters dated respectively 29th August 2010 and 15th November 2010, the plaintiff was informed by the surgeon who had inserted the DePuy ASR resurfacing hip implant system that that system was one of those which had been the subject matter of the worldwide recall by the defendant.

4. On the 15th December 2011 the plaintiff issued the within proceedings against the defendant for alleged severe personal injuries, loss of damage and expense, suffered and incurred by her as a result of the negligence, breach of agreement and breach of duty on the part of the defendant.

5. The defendant has, in its defence delivered on the 18th June 2013, pleaded, inter alia, that the plaintiff is precluded from maintaining her claim for personal injuries on the basis she failed to obtain an authorisation from the PIAB prior to maintaining her claim.

6. Notwithstanding having issued the within proceedings, the plaintiff duly obtained an authorisation from the PIAB in respect of her claim herein and a further set of proceedings issued on her behalf entitled "*Randa Murphy v. DePuy International Limited, Record Number 2012/801OP*".

7. The court has been advised that the second set of proceedings were issued on a protective basis only and that the plaintiff's position remains i.e. that the first set of proceedings, the subject of the within application, are valid and that an authorisation from the PIAB was not required. In the grounding affidavit to the present application, the plaintiff's solicitor avers as follows:-

8. "*I say and believe that at the time when these proceedings were issued a view was taken that the here and before described surgery, including the provision and use of the DePuy ASR resurfacing hip implant system in the course of the said surgery constitutes, inter alia, the provision of a health service and/or the carrying out of a medical or surgical procedure and/or arising out of the provision of medical advice or treatment within the meaning of s.3 (d) the PIAB Act, 2003 and therefore did not require an application to the Personal Injuries Assessment Board for an appropriate Authorization from them before the within proceedings were issued and served on the Defendant herein*."

Issue

9. The question to be determined in this application is whether the plaintiff's claim against the defendant comes within the exclusionary provisions set out in s. 3(d) of the Act of 2003, thereby obviating the requirement for an authorisation under the Act to institute court proceedings. It is accepted by both sides that absence of a PIAB authorisation in a case to which the Act applies is not a mere fault in procedure but goes to the root of the court's jurisdiction to hear and determine the claim. This was made clear in *Sherry v Primark Ltd.* [2010] 1IR 407 where O'Neill J. states:

> *"Section 12(1) stipulates that an application first be submitted to the Personal Injuries Assessment Board for an authorisation from the Personal Injuries Assessment Board before court proceedings may be brought. It contains a statutory prohibition on actions being instituted at all unless and until an application is made to the Personal Injuries Assessment Board and an authorisation issued; only then can court proceedings be brought… Thus, in my view, the correct conclusion is that s. 12(1) operates as a jurisdictional rather than a procedural provision, so that a court does not have a jurisdiction to permit the commencement of proceedings in respect of a relevant claim until the foregoing procedures under the Act of 2003 have been exhausted."*

The law

10. Section 3 of the Act of 2003 provides:-

"This Act applies to the following civil actions—

(a) a civil action by an employee against his or her employer for negligence or breach of duty arising in the course of the employee's employment with that employer

(b) a civil action by a person against another arising out of that other's ownership, driving or use of a mechanically propelled vehicle

(c) a civil action by a person against another arising out of that other's use or occupation of land or any structure or building

(d) a civil action not falling within any of the preceding paragraphs (other than one arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person)."

The plaintiff's submissions

11. Counsel for the plaintiff contends that the within proceedings come within the exclusionary wording of s. 3(d) of the Act of 2003 and he submits that the particular wording in s. 3(d) was consciously chosen by the Legislature to underscore what counsel describes as a "*context driven*" approach to the exclusionary provision. It is submitted that it had been open to the Legislature to adopt a more restrictive approach but, it is argued, the Legislature must be taken to have deliberately chosen not to categorise according to legal cause of action or legal plea. The focus is neither on injury nor cause of action but rather rooted in the factual context. It is therefore relevant that the alleged defective medical product, the subject of the within proceedings, was not received by the plaintiff under any arrangement between her and the defendant or its servants or agents; rather it was received in the course of orthopaedic advice and treatment from an orthopaedic surgeon. The plaintiff's claim therefore arises in the context of advice and surgical treatment from an orthopaedic consultant surgeon and thus falls within the provisions of a health service to the plaintiff, thereby obviating the requirement for an authorisation.

12. Counsel emphasises that the most important component of the exemption in s. 3(d) are the words "*arising out of the provision of any health service to a person*" , which is the "omnibus" clause and he submits that the remaining provisions are simply illustrative of the types of health service which benefit from the exemption. It is submitted that the provision of a health service such as occurred in the plaintiff's case i.e. the advice and surgical treatment she received is the context and, since her claim arises out of that context sine qua non it is excluded from the Act of 2003.

13. While the plaintiff's central submission is that the wording of s. 3(d) plainly encompasses the plaintiff's situation, reliance is placed on the dictum of O'Neill J. in *Gunning v. National Maternity Hospital and Eurosurgical Limited and Richard Wolfe GMBH* [2008] IEHC 352 as direct support for the plaintiff's contention that, in determining s. 3 (d) exclusions, one looks at the context or factual circumstances.

14. In *Gunning*, the plaintiff instituted proceedings in respect of personal injuries suffered while undergoing a laparoscopic right ovarian cystectomy at the first named defendant hospital. During the course of the surgical procedure a portion of a forceps broke and lodged in the plaintiff's abdomen. The plaintiff instituted proceedings against the first named defendant hospital, the second named defendant supplier and the third named defendant manufacturer. Application was made to PIAB for authorisation in respect of all three defendants. PIAB issued authorisations in respect of the second and third named defendants and declined to issue an authorisation in respect of the first named defendant hospital on the basis that none was required.

15. In determining the question raised by the first named defendant hospital whether the plaintiff was entitled to bring the proceedings instituted against it in the absence of a PIAB authorisation, O'Neill J. construed s. 3(d) as follows:-

"Section 3(d) of the Act of 2003, describes a number of circumstances in civil actions in the medical sphere where the Act of 2003 has no application. In my view, s. 3(d) of the Act of 2003 should be construed as applying to the factual circumstances out of which an action arises, rather than applying to the specific legal causes of action set out in the legal proceedings. I say this because if the latter approach is followed, it would result in some parts of the same grievance or complaint falling within the remit of the P.I.A.B and others falling outside. This would clearly be an undesirable situation, as it could result in two aspects of the same personal injury complaint proceeding in parallel in two jurisdictions, i.e. the Courts and the P.I.A.B.

The factual circumstances, out which the plaintiff's personal injury claim arises, in my view, clearly occurred in the course of "…the carrying out of a medical or surgical procedure…" and are well within the provisions of s. 3(d) of the Act of 2003. This conclusion would be sufficient to dispose of this application in favour of the plaintiff. Even if one were to adopt the approach of construing s. 3(d) of the Act of 2003, by reference to the specific causes of action pleaded or to looser categorisations such as "product liability claim", "occupiers liability claim" or "employer liability claim", the plaintiff would have to succeed in this application for the following reasons.

In this action the plaintiff alleges that the first named defendant was negligent on various grounds as set out in the particulars quoted above. Manifestly these grounds extend far beyond merely alleging that the forceps was a defective product. Even if the Mr. Meenan was correct in his submission that a defective product liability case was not caught by s. 3 (d) of the Act of 2003, this could only result in the striking out of these proceedings of that aspect of the plaintiff's claim against the first named defendant and no more. I was not urged by Mr. Meenan to adopt that approach.

In my view, the case as made by the plaintiff in her Personal Injury Summons comfortably falls within the terms of s. 3(d) of the Act of 2003."

16. The court was also referred to the dicta of Hedigan J in *Carroll v. Mater Misericordiae Hospital* [2011] IEHC 231 where the contextual nature of the s. 3(d) exemption was also addressed. In that case the plaintiff alleged she was injured when she was an inpatient in hospital and that while she was on medication given to her in the hospital, she became dizzy, fainted and fell as a result of which she suffered personal injury. As was the case in *Gunning*, the issue to be determined by Hedigan J. was whether the plaintiff's action fell within s. 3 of the Act of 2003 or whether it was excluded by virtue of the saving provisions in s. 3(d). That issue was of crucial importance for the plaintiff as it would determine whether or not the action was statute- barred. In arguing that the plaintiff's case arose from the management and maintenance of the hospital and was not therefore covered by the exclusionary provisions in s. 3(d), the plaintiff's counsel sought to differentiate between the provision of nursing and medical care. In determining

that the plaintiff's circumstances was covered by the exclusionary provisions of s. 3 (d), Hedigan J stated:-

> *"I agree with both sides who argued that words should be given their ordinary meaning and that words should be seen in their context: see The People (Attorney General) v. Kennedy [1946] IR 517; Dillon v. Minister for Posts and Telegraphs (Unreported, Supreme Court, 3rd June, 1981 and s. 5 of the Interpretation Act 2005*
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> *I accept that nursing care and medical care can be differentiated. Nonetheless, they are, it seems to me, linked. Either might fall under the rubric of medical care. This also seems the view of O Néill J. in Sherry v. Primark [2010] IR 407, where he considers whether the provision of a health service falls to be considered in the context of medical negligence. Looking at the context in which "health service" is placed in the Act of 2003, whilst it certainly is separated from medical services as specified in the section, does that mean that nursing care is not to be covered by the exclusion clause? For that to be so, nursing care would have to be somewhat artificially excluded from the definition in subs. (d) and defined as a service which is neither a part of a health service nor the provision of a medical service. I find it difficult to accept such an argument, in particular in the context upon which it is based here. As stated by O Néill J. in Gunning v. National Maternity Hospital [2008] IEHC 352 it is to the factual circumstances the court should look and not to any particular label the plaintiff puts upon the legal issues arising. Doing that, I cannot accept the argument of the plaintiff that the claim arises from the management and maintenance of the hospital."*

17. It is argued that the only difference between G*unning* and *Carroll* and the present case is that here only the manufacturer of the product received by the plaintiff in the course of medical care is named, but counsel contends nothing turns on this when one considers the dictum of O'Neill J. in *Gunning*, in particular his rejection of the defendant hospital's arguments that as the claim contained a products liability plea an authorisation was required before the plaintiff could proceed against the hospital.

18. The plaintiff's counsel also pointed to *P.R. v. K.C. Legal Personal Representative of the Estate of M.C. deceased* [2014] IEHC 126, where Baker J., in the course of determining whether the plaintiff's claim damages for assault was a claim covered by the Act of 2003, reviewed the jurisprudence on the Act of 2003 to that point in time and, in the course of so doing, noted that in *Campbell v. O'Donnell & Ors* [2008] IESC 32 the Supreme Court took a purposive approach to its interpretation of the Act of 2003 and looked in effect to the substance of the cause of action and not to the way in which the relief sought was pleaded. She noted that this approach had also been adopted by O'Neill J in *Gunning* and followed in *Carroll v. Mater Misericordiae Hospital* [2011] IEHC 231. Baker J. opined:

" *What is noteworthy is that the court in that case, as in the earlier cases I have referred to, took the view that the factual circumstances were a key to understanding the nature of the cause of action."*

In emphasising the interdependence between the defective product claim and the medical context, counsel places reliance on paragraphs 15, 16 and 18 (a) of the Personal Injury Summons (recited below). Further, the plaintiff's case will require a consideration of evidence from specialist medical experts, firstly to establish that the hip implant was not fit for purpose in all the circumstances of the plaintiff's case and for the purpose of establishing causation, through a review of the advice and treatment afforded the plaintiff.

The defendant's submissions

19. The defendant takes a fundamentally different approach to the plaintiff to the ambit of the exclusionary provision in s. 3(d). In essence, it is argued that where the defendant here was the manufacturer of the alleged defendant product and thus not the provider of any health service to the plaintiff, nor the person or body who carried out any medical or surgical procedure on the plaintiff, nor the provider of any medical advice or treatment to the plaintiff, then in such circumstances, an authorisation from PIAB was required. The defendant submits that to interpret the exclusionary provision in s. 3 (d) as meaning that the manufacturer of a medical product is, without more, captured by the exclusion, is to do violence to the natural and ordinary meaning of the words and undermine the limited purpose of the section, which was to exclude medical negligence actions from the remit of PIAB. Counsel emphasises that the issue considered in *Gunning* was different; could the provider of medical services, whose position was clearly covered by the exclusion in section 3(d), rely upon the fact that an authorisation was required with regard to the other defendants (the manufacturer and supplier of the product) to say that an authorisation should have been sought in respect of it, notwithstanding the clear words of section 3(d). The factual circumstances, out of which that action arose, in the words of O'Neill J.,"*clearly occurred in the course of…the carrying out of a medical or surgical procedure… and are well within the provisions of s. 3(d) of the Act of 2003."* Counsel contends that O'Neill J.'s view that the s. 3(d) exemption should be construed as applying to the factual circumstances was because of a concern that given the specific circumstances that pertained in *Gunning* (vis a vis the liability of the respective defendants) were the defendant hospital to succeed, this, in the words of O'Neill J. "*would result in some parts of the same grievance or complaint falling within the remit of PIAB and others falling outside*". This does not arise in the present case as there is no element of the plaintiff's claim that could on any view of the pleadings be regarded as falling within the s. 3(d) exemption. Given, therefore the issue that had to be decided in *Gunning*, the defendant rejects any suggestion that that case is authority for the proposition being advanced on behalf of the plaintiff.

20. In the present case, the factual circumstances are that the defendant manufactured and supplied a product which others, who are not sued, used while providing the plaintiff with the services expressly contemplated by the exclusionary provisions of s. 3 (d), services which were never provided to the plaintiff by the defendant.

21. Moreover, counsel for the defendant points to the dictum of O'Neill J. in *Sherry v. Primark* [2010] IEHC 66 as having defined the parameters of the exclusionary ambit of s. 3(d) of the Act of 2003 in the following terms:-

> *"Section 3 of the Act of 2003 sets out the types of civil actions to which the Act applies. It includes "a civil action by an employee against his or her employer for negligence or breach of duty arising in the course of the employee's employment with that employer", as arises here. The only actions that are expressly excluded, by virtue of s. 3(d), are medical negligence actions."*

22. Counsel submits that this is no more than what was said in *Gunning*, i.e. the claim against the first defendant hospital in that case was a medical negligence action, thus exempting the plaintiff from the requirement to obtain an authorisation vis a vis the first defendant hospital. The factual circumstances directly in issue in *Gunning* related to the liability of the parties sued in that case. In the present case, there is no allegation of medical negligence against the defendant and it is argued that the factual circumstance that a surgeon inserted the allegedly defective hip implant into the plaintiff is irrelevant. There is no element of the present claim made against the defendant, which could refer to the exclusionary provisions of s. 3(d). In this regard, counsel relies on the following passage from *Gunning*:-

> *"In this action the plaintiff alleges that the first named defendant was negligent on various grounds as set out in the particulars quoted above. Manifestly these grounds extend far beyond merely alleging that the forceps was a defective product. Even if the Mr. Meenan was correct in his submission that a defective product liability case was not caught by s. 3 (d) of the Act of 2003, this could only result in the striking out of these proceedings of that aspect of the plaintiff's claim against the first named defendant and no more."*

The defendant refutes the plaintiff's suggestion that the "*Even if ……"* statement in Gunning was obiter and argues that O'Neill J. was simply putting forward an alternative basis for his ruling that no authorisation was required in respect of the first defendant hospital by reference to the grounds of negligence alleged, which "*manifestly*" extended "*far beyond merely alleging that the forceps was a defective product."* The issue could therefore be disposed of simply on the basis that the allegations against the defendant hospital included allegations in relation to substandard care provided to the plaintiff. Thus, the defendant hospital that carried out the surgical procedure could not allege that the very joinder of the co-defendant manufacturer of the forceps was a sufficient basis to require the plaintiff to obtain an PIAB authorisation from the Personal Injuries Board before proceeding against the hospital.

Counsel submits that the factual circumstances relevant to the position of a manufacturer of an alleged defective product relate to its manufacture and the circumstances in which the product was released. The fact that medical evidence may be required at trial is not a sufficient basis to bring the case within the ambit of the exemption clause in s. 3(d).

Decision

In the first instance, I agree with the view expressed by Hedigan J. in *Carroll*, that the words in s. 3(d) must be attributed their ordinary meaning and words should be seen in their context.

Three types of civil action are excluded from the ambit of the section, namely those arising out of:

> (i) the provision of any health service to a person,
>
> (ii) the carrying out of a medical or surgical procedure in relation to a person,
>
> (iii) the provision of any medical advice or treatment to a person

Accordingly, I find no basis to accept the plaintiff's contention that the words "*arising out of the provision of any health service*" constitute the "omnibus" exclusionary clause and that (ii) and (iii) above are merely illustrative of the type of health service in respect of which no authorisation is required. The words are clear on their face, as is the structure of the relevant clause. I turn now to the plaintiff's primary contention, namely that this personal injury action comes within the ambit of the exclusionary clause in s. 3(d) on the basis that the advice and medical/surgical treatment which the plaintiff received is the context or factual circumstances out of which her claim arises, and the plaintiff's reliance on *Gunning* in this regard.

To put the parties' opposing arguments into context, it is apposite to recite some of the particulars set out in the Personal Injury Summons, as follows:

> *"12. At all material times hereto, the Defendant by its respective servants or agents, in their respective capacities which included the research, development, manufacture, assembly, distribution and supplying for sale and selling of, inter alia, the DePuy ASR resurfacing hip implant system, knew and were aware of the particular purpose for which the said hip replacement system was required and that the same would be provided to, inter alia, hospitals and surgeons and would, thereafter, be fitted and inserted into patients, including the Plaintiff without any additional input by them so as to show as was the fact that the said hospitals, surgeons, and patients, including the Plaintiff, relied upon the skill and judgment of the said Defendant, by its respective servants or agents and the said hip replacement system was a good which it was in the course of the Defendant, by its respective servants or agents to provide."*
>
> *"13.In the premises it was an express or implied condition and fundamental term of its agreements with hospitals, surgeons and patients, including the Plaintiff, and the said Defendant, by its respective servants or agents thereby represented and warranted to them that the said hip replacement system, inter alia:-*
>
> *a. Was reasonably fit for the purpose for which it was required.*
>
> *b. Was and would be of merchantable quality and free from defect.*
>
> *c. Was and would be in perfect condition and trouble free.*
>
> *d. Was free from latent manufacturing defects which would cause pain and suffering, damage or injury to the Plaintiff herein."*
>
> *"15. Further, at all times material hereto, the Defendant, by its servants or agents, held itself out as experienced, skilled, and competent in the provision of specialist surgical implants and other medical services including the said hip replacement system supplied by it for the Plaintiff and, accordingly, it had a duty of care to the plaintiff to exercise all reasonable skill and care in the provision of those goods and services."*
>
> *"16. By reason of the matters aforesaid, the Plaintiff has required additional surgery with the removal of the defendant's said hip replacement system together with a total hip replacement, and she has suffered severe continuous pain in her hip area from the time of the insertion of the said hip replacement system until the time of its removal and her health has been adversely affected thereby in consequence whereof she has thereby suffered and continues to suffer severe personal injury, anxiety, mental distress, loss, damage and expense,"*
>
> *"18. The Defendant by its Servants or Agents was guilty of negligence and breach of duty, including breach of Statutory Duty, and breach of the aforesaid agreement in that it:*
>
> > *a. Failed to exercise any or any proper or adequate care for the safety and well-being of the Plaintiff herein in connection[sic] the surgical insertion of its said hip replace system which was defective.*

b. Exposed the Plaintiff to a risk of damage or injury of which it knew or ought reasonably to have known.

c. Failed to exercise due skill, care and diligence in the performance of its said tasks.

d. Failed to properly or adequately research and/or develop and/or manufacture the said hip replacement system prior to supplying same to a third party and ultimately to the Plaintiff.

e. Failed to discover and/or to remedy the said defects prior to supplying same to a third party and ultimately to the Plaintiff.

f. Provided the said hip replacement system when they knew or ought reasonably to have known that the same was defective.

g. Failed to take any or any adequate measures, whether by way of examination, inspection, test or otherwise to discover and remedy the defects in the said hip replacement system before providing the same to third parties and ultimately to the Plaintiff.

h. Caused or permitted defects to occur in the said hip replacement system.

i. Failed to note and/or to heed some of the design features in its hip replacement system which made it more likely to have excessive wear and/or more likely as a result of such excessive wear to initiate allergic hypersensitivity reaction from the wear particles.

j. Caused or permitted damage or injury to the Plaintiff by reason of the defects in its hip replacement system."

In the course of his submissions, counsel for the plaintiff did not contend that the defendant itself afforded either a health service to the plaintiff, or carried out a medical or surgical procedure on the plaintiff or provided her with medical advice or treatment. What is argued is that the claim arises out of the "context" of the provision of a health care service. It is thus submitted that the fact that the defendant did not provide a health service to the plaintiff is irrelevant. Counsel places particular emphasis on the approach adopted by O'Neill J. in Gunning, namely the learned judge's focus on the "*factual circumstances out of which an action arises*" , in arguing the applicability of the exclusionary clause in s. 3(d) to the within proceedings. It is with reference to this focus that counsel argues that what the plaintiff needs to establish is that her claim arises out of the context of the provision of a health care service.

23. I am not persuaded by the arguments advanced on behalf of the plaintiff. The pleadings clearly show that the plaintiff's civil action arises from the actions of the defendant. Manifestly, the plaintiff's grounds of claim relate to the manufacture and provision or supply by the defendant of an alleged defective hip implant system ultimately received by her. Thus, the relevant context or factual circumstance out of which this claim arises is that the plaintiff's alleged injuries were caused by receipt of a hip implant system manufactured and supplied by the defendant. I am not satisfied that the fact that the alleged defective hip implant was surgically inserted into the plaintiff following medical advice imports the factual circumstances, namely the manufacture and provision and/or supply of a defective hip implant under which the claim arises, into the ambit of the exclusionary provision of s. 3(d). To put it another way, notwithstanding that the alleged defective hip implant was received by the plaintiff in the course of medical treatment, to my mind, this cannot convert the genesis of this action, an alleged defective hip implant, and from which this civil action arises, into the provision of a health service to the plaintiff. I do not find *Gunning* authority for such a proposition even while I accept that s. 3(d) is to be construed as applying to the factual circumstances out of which an action arises. In *Gunning*, the factual circumstances vis a vis, the defendant hospital, and out of which the personal injury claim against that defendant arose, occurred in the course of a medical/ surgical procedure which the plaintiff in that case alleged was performed negligently. Furthermore, the basis upon which Hedigan J. in *Carroll* considered the application of s. 3(d) cannot assist the plaintiff in the present case, since the factual circumstances in *Carroll* were the provision of medical and health services by the defendant hospital, as noted by Hedigan J.:-

> *"It seems apparent looking at the personal injuries summons and the reply to the defence that the plaintiff's claim arises from the actions of the defendants, its servants or agents in prescribing certain medications for her. To succeed, she would need to show that it was foreseeable that the effects of this medication would be such as was likely to make her dizzy and likely to faint if she got out of bed and walked, in this case to the bathroom. She would need nursing assistance in such circumstances. Medical evidence would need to be called in this regard. Turning therefore to the circumstances of the case as pleaded by the plaintiff herself, she was being treated for her illness with certain medications. It was arising from this treatment that, when she went to the bathroom unaccompanied, she felt dizzy and fainted. It seems to me therefore that the plaintiff's claim is one that arises from a mix of her nursing care and her medical treatment. As such, it is an action which is covered by the exclusion provided in s. 3(d) and consequently it is one to which the PIAB Act of 2003 does not apply."*

Therefore, I accept the defendant's arguments that the factual circumstance which the courts in *Gunning* and *Carroll* emphasised related directly to the liability of the parties sued.

While it was argued by counsel for the plaintiff that the notion that s. 3(d) was confined to medical negligence cases was expressly rejected in Gunning, it is the case that in *Sherry v Primark Ltd*. O'Neill J. himself expressed the view that the only actions that are expressly excluded by virtue of s. 3(d) are medical negligence actions.

24. Here, there are no allegations against the defendant that it was negligent in the provision of any health service to the plaintiff or that it carried out any surgical or medical procedure on the plaintiff in a negligent manner or it negligently provided any medical advice or treatment to the plaintiff. The focus of the plaintiff's claim is on the defendant's connection (*qua* manufacturer and supplier) to the hip implant she received. That is the context or substance of her claim. I find nothing in the personal injury summons, including the paragraphs relied on by the plaintiff's counsel, which could be said to override this context such as to bring the claim within the provision of a health service or the carrying out of a medical or surgical procedure or the provision of medical advice or treatment. This is all the more so when one has regard to the ordinary meaning of the words used in s. 3(d). Furthermore, I cannot accept the plaintiff's argument that the fact that specialist medical evidence will be required at trial is a sufficient basis to bring this case within the saving provision in s. 3(d).

25. Accordingly, since the present action is one other than an action falling within the exclusionary clause in the section, an authorisation was required.