

THE HIGH COURT

2003 No. 7175 P

BETWEEN

**JOHN DEMPSEY (A MINOR)
SUING BY HIS MOTHER AND NEXT FRIEND ITA DEMPSEY**

PLAINTIFF

**AND
THE MINISTER FOR EDUCATION AND SCIENCE,
IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 18th May, 2006,

Background to application.

1. The plaintiff in these proceedings, who will be eight years of age next July, has been diagnosed as autistic. The proceedings were initiated by plenary summons which issued on 16th June, 2003. The plaintiff seeks various reliefs, declaratory relief, damages and injunctive relief, to redress what he alleges was the defendants' failure to provide educational facilities for him appropriate to his educational needs, in breach of his constitutional and statutory rights. Specifically, the plaintiff claims declarations that –

(a) the education facilities made available to him by the defendants were not appropriate to meet his educational needs, and

(b) the failure of the defendants to provide free primary education for him appropriate to his needs as an autistic child is discriminating against him and has deprived him of his constitutional rights pursuant to Articles 40, 41 and 42 of the Constitution, and is also in breach of his statutory rights and the defendants' statutory obligations and, in particular, the obligations set out in the Education Act, 1998 (the Act of 1998) and the Equal Status Act, 2000.

2. On foot of an interlocutory application brought by the plaintiff provision has been made, and approved by the court, for the plaintiff's educational needs pending the trial of the action.

3. In order to address the issue on the instant application, it is necessary to consider the pleadings which have been delivered and the procedural steps which have been taken to date, insofar as they impact on that issue, in some detail.

4. In the statement of claim the plaintiff particularises forty-seven alleged breaches by the defendants of their constitutional, statutory and common law duties to the plaintiff. To a greater or a lesser extent failure to allocate sufficient resources is implicit in each allegation, even if not expressly alleged. Two examples illustrate this: it is alleged that the defendants failed to provide any or any adequate and proper speech therapy; and it is alleged that the defendants failed to provide any or any adequate and proper teachers with suitable qualifications for teaching persons such as the plaintiff with his particular disabilities, together with appropriate support staff. Failure to provide resources is also expressly alleged. For instance, it is alleged that the defendants failed to provide sufficient resources to make the position of teachers teaching children with disabilities more attractive by way of training, remuneration, support and supervision. It is also alleged that the defendants failed to provide any or any adequate framework throughout the State to enable education to be provided for persons with special needs to an acceptable standard and, in particular, that they failed to provide a framework that would enable the plaintiff to be provided with education appropriate to his needs. It is specifically alleged that such a framework would involve "such basic matters" as obtaining from the Department of Finance sufficient funds to enable education to be provided for the plaintiff.

5. In their defence, the defendants admit that the plaintiff has a constitutional right to free primary education and that they are obliged to provide such education. There follows a blanket traverse of the plaintiff's assertions as to the nature and extent of the defendants' obligations and a statement that the scope of the defendants' obligations to provide free primary education is a matter for the trial of the action. Similarly, the defendants admit that they have statutory obligations under the Act of 1998 and state that the application of the Act is a matter for the hearing of the action. The defendants deny any breach of the plaintiff's constitutional and statutory rights. The pleas in the defendants' defence which directly give rise to the issue on the instant application are contained in paras. 21 and 22 and are in the following terms:

"The Defendants will further contend at the hearing of this action that their obligations under Bunreacht na hÉireann and under Statute to the Plaintiff require that those obligations be vindicated as far as reasonably practicable. The Defendants will contend at the hearing of the action that in utilising and allocating limited resources they are exercising an executive power, as sanctioned by Oireachtas Éireann. Insofar as the plaintiff seeks relief directing the defendants as to the manner in which resources should be allocated, the Defendants will contend that any such order made by this Honourable Court will constitute a breach of the principle of separation of powers and, therefore, in the premises no such Order should be made by this Honourable Court.

Furthermore, insofar as the relief sought within the Plaintiff's Statement of Claim involves a claim for damages against the Defendants, it is denied that the Plaintiff is entitled to same to the extent that any such award of damages as sought is predicated upon this Honourable Court forming the view that in the past the Oireachtas and/or the Executive has failed or has failed appropriately to distribute public resources and/or has failed to distribute those resources in the manner which this Honourable [Court] might regard, or might have regarded, as appropriate."

6. In the plaintiff's reply, issue is joined on those pleas. It is specifically denied that the plaintiff is seeking relief directing the defendants as to the manner in which resources are to be allocated.

7. The stance being adopted by the defendants in this action has been further clarified. The plaintiff raised particulars on para. 21 of the defendants' defence and, in response, the defendants have explained that plea as follows:

"That is a plea to the effect that the Court is not entitled to intervene in the utilisation and allocation of resources by the Government, as sanctioned by the Oireachtas. This plea is not dependant upon a quantification of the resources allocated by the Government to the Plaintiff. The Plaintiff (sic) is not relying upon documentary material for the purpose of the plea contained in paragraph 21."

8. In their response the defendants also asserted that they have complied with their obligations under the Constitution and/or statute. It would be more correct to say that they have pleaded that they are not in breach of their constitutional, statutory or common law duties.

9. A more explicit statement of the defendants' stance is contained in the following extract from a letter of 18th November, 2005 from the Chief State Solicitor to the plaintiff's solicitor:

"The Minister will be defending this case on the basis that what was provided was appropriate. This does not necessarily mean that there were not other matters which could have been provided if the money was available but were not provided because the money was not available. Of course in any given case the money for any given thing sought could be provided. On the other hand, the services available to John Dempsey are available in the context of the Minister's obligations to all persons in education, including those with special needs. In that sense all educational and health related provision is subject to the financial constraints brought about by the many competing demands for the available resources. Resources available to Ministers are in turn a reflection of the allocation to Ministers of resources by the Oireachtas.

It is for this reason as in all other cases that having regard to the separation of powers it is contended by the defendant that the court will not inquire into the allocation of resources in deference to the doctrine of the separation of powers. It is essentially a matter of distributive and not commutative justice."

10. An issue has arisen between the plaintiff and the defendants as to whether the plaintiff is entitled to discovery of two categories of documents, which are set out in paras. (f) and (g) of the plaintiff's notice of motion dated 27th September, 2005 applying for discovery. Those categories are as follows:

"(f) All documentation in respect of the funding provided by the Defendants to the Health Board in relation to the provision of occupational therapy, physiotherapy, speech and language therapy or behavioural therapy or music therapy to the Plaintiff in order to meet the Plaintiff's special needs in its functional area since the coming into force of Sections 6 and 7 of the Education Act, 1998 together with such documentation as may be in the possession of the Defendant in relation to the request for such funding, and the information furnished to the Defendants by the Health Board when seeking such funding, how such funding was computed and the amount of such funding actually allocated by the Defendants to the Health Board.

(g) All documentation (post dating the coming into force of Sections 6 and 7 of the Education Act, 1998) in respect of the funding provided by the first and second named Defendants to any of the facilities at which the Plaintiff attended (and in which he received either education or therapies) during any period in which the Plaintiff attended any such facility together with any documentation in relation to the application for or request for funding with supporting documentation attached to such request and applications together with all documentation setting out precisely how such funding is computed together with details of how such funding was allocated."

11. By order dated 25th January, 2006 the Master refused the application for discovery in relation to categories (f) and (g). That order is under appeal to this Court pursuant to a notice of motion dated 31st January, 2006 and the appeal is still pending. That notice of motion provoked this application.

The application

12. This is an application on behalf of the defendants for either of the following orders:

(1) An order pursuant to O. 34, r. 2 of the Rules of the Superior Courts, 1986 (the Rules) directing that a preliminary issue be determined in these proceedings in respect of the following points of law:

- (a) whether any damages could be awarded to the Plaintiff on the basis of a failure by the State to allocate resources specific to the Plaintiff's particular needs;
- (b) whether an award of damages arising from the failure by the State to allocate resources to the Plaintiff would constitute a breach of the principle of the separation of powers;
- (c) whether, having regard to the provisions of s. 6 of the Act of 1998, the court has a jurisdiction to adjudicate on the allocation of resources in the context of making available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people;
- (d) whether, for the purposes of s. 7(1)(a) of the Act of 1998, and having regard to the provisions of s. 7(4)(a)(i), the court enjoys a jurisdiction to consider the allocation by the Minister of the resources available and the allocation to the Minister by the legislature of those resources;
- (e) whether the delimitation of the objects of the Act of 1998 (and, in particular, s. 6(1)(b) thereof) by reference to the regard to be had to the resources available, precludes the court from investigating questions of the adequacy of the allocation of resources or adjudicating on same in the context of the case made on behalf of the plaintiff; and
- (f) whether the delimitation of the functions of the Minister as provided for in s. 7 of the Act of 1998 by reference to the obligation to have regard to resources available precludes the court from investigating questions of the adequacy of the allocation of resources or adjudicating on same in the context of the case made on behalf of the plaintiff.

(2) An order pursuant to O. 25, r. 1 of the Rules to determine as a preliminary issue:

- (a) whether, insofar as the reliefs sought herein involve a claim for damages against the defendants, the plaintiff is entitled to the same to the extent that such award of damages as sought is predicated upon the court forming the view that in the past the legislature and/or executive has failed or failed appropriately to distribute those resources in the manner which the court might regard or might have regarded as appropriate; and

(b) whether in utilising and allocating limited resources the defendants are exercising an executive power as sanctioned by the legislature in consequence of which the court, by granting relief directing the defendants as to the manner in which those resources should be allocated, would be acting in breach of the principle of the separation of powers.

13. The application is grounded on the affidavit of John P. Kelly, an assistant principal officer in the Department of Education and Science, sworn on 22nd February, 2006. The only factual averment in that affidavit is that the making of discovery of the documents sought in categories (f) and (g) would involve the preparation and consideration of a large quantity of documentation and would be onerous.

The Rules

14. Order 34, rule 2 of the Rules provides:

"If it appear to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, ... the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

15. Rule 4 of Order 34 provides that no special case in any cause or matter to which an infant is a party shall be set down for argument without leave of the court, the application for which must be supported by sufficient evidence that the statements contained in the special case, so far as the same affect the interest of the infant are true. That requirement has not been addressed on this application.

16. Order 25, rule 1 provides as follows:

"Any party shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

17. Rule 2 deals with the consequences of the decision on a point of law so tried. If the court is of opinion that it substantially disposes of the whole action or any distinct cause of action, ground of defence or reply, the court may dismiss the action or make such order as may be just.

Submissions

18. The court has had the benefit of comprehensive written submissions from each side. I do not detect any real divergence between the parties as to the correct principles of law to be applied on this application. In fact, as was submitted on behalf of the plaintiff, referring the court to Delaney and McGrath on *Civil Procedure in the Superior Courts*, the law as to when a preliminary trial of an issue or issues may take place is settled. The second edition of this text (Thomson Round Hall 2005) at pp. 505 to 514 contains an up-to-date outline of the relevant legal principles, which it is unnecessary to restate here. The parties did, however, disagree fundamentally on the application of the legal principles to the circumstances which give rise to this application.

Preliminary observations

19. The discovery issue which arises on the pending appeal from the Master has arisen before this Court in a number of other similar cases. I need only refer to one of those cases: *O'Connell v. Minister for Education and Science and Others* (Record No. 2002 No. 13444 P). In that case, in an order of the Court (Quirke J.) dated 9th June, 2005, discovery of documents similar to the documents covered by categories (f) and (g) was not ordered, and the question of costs was deferred until the preliminary issues in the terms of a notice of motion dated 7th June, 2005 had been decided in respect of those documents. This Court was informed that that motion was identical to this application. Although the plaintiff in that case was represented by the solicitor who represents the plaintiff in this case and the State defendants, who brought the motion, were represented by the Chief State Solicitor, no agreed statement as to what happened to the application was put before this Court. However, it is clear that the plaintiff consented to the preliminary issue being tried. When the preliminary issue came on for hearing before the court (Murphy J.), it was not proceeded with. I have not seen the relevant order disposing of the matter. My understanding is that at the hearing a question arose as to what were the agreed underlying facts by reference to which the points of law were to be answered. As I understand it, that difficulty was not resolved and ultimately did not have to be resolved because the application effectively became redundant by the State defendants indicating that they would not pursue defences on the lines of paras. 21 and 22 of the defendants' defence in this case and the plaintiff indicating that he would not pursue his quest for discovery of documents similar to categories (f) and (g) in this case. Even if my understanding of how the application in the *O'Connell* case came about and was disposed of is not entirely correct, in my view, that application, which was set down by consent of the parties, and its outcome can have no bearing on the determination of the issues on this application.

20. The court's attention was properly directed to the import of O. 34, r. 4 by the plaintiff. However, I did not understand counsel for the plaintiff to submit that this application should be dismissed out of hand because it is not supported at this juncture by sufficient evidence of the type stipulated in rule 4.

The issues

21. Having considered the submissions of the parties, it seems to me that two issues fall for consideration on the procedural question as to whether the court should direct the trial of the points of law raised by the defendants as a preliminary issue. The first is whether, having regard to the established jurisprudence, the circumstances are such that it would be appropriate to give such a direction, there being a discrete question of law which is susceptible of determination and can conveniently be determined without any evidence being adduced. The second is whether adopting that course would entail any saving of time and expense.

22. Before dealing with those issues, however, it is necessary to distil from the pleadings the substantive issue which the court would be required to address on the preliminary issue. It seems to me that the components of the substantive issue are the following:

(a) whether, as the plaintiff alleges, the defendants are in breach of their constitutional obligations and/or their statutory obligations under the Act of 1998 in failing to provide adequate and proper education for the plaintiff suitable to his needs;

(b) the defendants' contention that they are not, in that they contend that they have complied with their obligations under the Constitution and under statute (per the replies to the notice for particulars) and have provided what was

appropriate (per the letter dated 18th November, 2005);

(c) the defendants' added assertion that the obligations of the defendants both under the Constitution and under statute are circumscribed by what is reasonably practicable, so that even if further provision could have been made for the plaintiff, whether it should have been involves the making of a judgment as to how the resources of the State should be utilised and allocated which, having regard to the doctrine of the separation of powers, is a matter on which the court cannot pronounce; and

(d) the joinder of issue by the plaintiff on each of the defendants' grounds of defence summarised at (b) and (c).

23. I have a number of general comments to make arising out of that analysis.

24. If at the trial of the action the court were to decide that the provision which the defendants have made to meet the plaintiff's educational needs is adequate and proper as the plaintiff contends the law requires, or appropriate, as the defendants contend the law requires, that should dispose of the action and the issue raised by the assertion at (c) should not arise. But, if the court were not to so find, so that that issue would come into play, what the court would be concerned with in determining that issue would be the application of constitutional principles.

25. Counsel for the defendants characterised the issue raised by the assertion at (c) as a question of jurisdiction, suggesting, as I understand the argument, that, if the defendants raise the issues of resources in this type of case, the matter is not justiciable at all. In my view, that proposition has such profound implications that it would be inappropriate to express any view on an application of this nature.

Discrete triable question of law

26. In my view, the defendants have not established that the circumstances of this case are such that it would be appropriate to direct the trial, as preliminary issues, of the points of law itemised on the notice of motion for a number reasons.

27. It is well settled that a preliminary issue of law cannot be tried *in vacuo* but must be tried in the context of established or agreed facts and, if the relevant facts are not agreed, the moving party must accept, for the purpose of the trial of the preliminary issue, the facts as alleged by the opposing party (*McCabe v. Ireland* [1999] 4 I.R. 151). The defendants say that for the purposes of the trial of the preliminary issue the facts alleged by the plaintiff in the statement of claim can be assumed to be true. I feel constrained to ask: what facts? If it is that the defendants have failed in their constitutional and statutory duties to make adequate and proper provision for the plaintiff's educational needs, in my view, that is a mixed question of fact and law, because when it falls to be determined it will involve measuring what the defendants have actually provided, which is a question of fact, against the standard of provision which the law requires of them, which is a matter of legal principle and interpretation. Alternatively, if it is that the defendants have failed to make adequate and proper provision for the plaintiff's educational needs without measuring the provision made against the required standard laid down in the Constitution or by statute, in my view, that is a meaningless basis for examining the allocation of resources issue. On that basis, I have come to the conclusion that the approach advocated by the defendants is conceptually flawed. Having regard to the other issues raised on the pleadings, the points of law outlined in the notice of motion are not susceptible of determination as discrete "stand alone" issues of law on the basis of assumed facts.

28. That conclusion is justified if one considers the approach advocated in the context of the defendants' statutory duties and by particular reference to the questions posed in sub-paras. (c) to (f) of para. 1 of the notice of motion. Section 6 of the Act of 1998 sets out the objectives of the Oireachtas in enacting that Act and requires every person concerned in the implementation of the Act to have regard to those objectives. The objective enunciated in para. (b) is –

"to provide that, as far as practicable and having regard to the resources available, there is made available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people."

29. Section 7 sets out the functions and powers of the first defendant and sub-s. (4) of s. 7 stipulates that the first defendant, in carrying out those functions, shall have regard to certain factors, including –

"(i) the resources available."

30. The extent of the defendants' statutory duty to a person in the position of the plaintiff is determined by the provisions of the Act of 1998, including the provisions of ss. 6 and 7. The availability of resources is one of the factors which delimit the parameters of the defendants' statutory duties. It seems to me that the availability of resources is such an intrinsic part of the core issue raised in these proceedings – whether the provision actually made for the plaintiff's educational needs meets the statutory requirement – that it is not possible to segment out the allocation of resources issue from the overall determination of the State's liability to the plaintiff in any meaningful manner.

31. Even if, contrary to the view I formed, the allocation of resources issue can be meaningfully segmented out from the other issues raised on the pleadings, to try that issue first, in effect, would be trying a moot and would be doing so by the application of constitutional principles. That is impermissible under the so called "rule of self-restraint", which, for present purposes, is conveniently illustrated by the decision of the Supreme Court in *Murphy v. Roche* [1987] I.R. 106. The plaintiff in that case wished to sue an unincorporated members' club of which he was a member for damages for injuries he incurred as a result of a fall in the club premises, which he alleged was caused by the negligence of the club. Two preliminary questions arose: whether at common law he was estopped from suing the club; and, if so, whether the common law rule was repugnant to the Constitution. In delivering the judgment of the Supreme Court, Finlay C.J. said (at p. 110):

"There can be no doubt that this Court has decided on a number of occasions that it must decline, either in constitutional issues or other issues of law, to decide any question which is in the form of a moot and the decision of which is not necessary for the determination of the rights of the parties before it. Secondly, it has also clearly been established that where the issues between the parties can be determined and finally disposed of by the resolution of an issue of law other than constitutional law, the Court should proceed to consider that issue first and, if it determines the case, should refrain from expressing any view on the constitutional issue that may have been raised.

These principles, however, must, of course, be subject in any individual case to the overriding consideration of doing justice between the parties."

32. Issues will arise in the plaintiff's case, including in all probability issues of constitutional law, which may finally dispose of the case

without recourse to the doctrine of separation of powers. On the established jurisprudence, the court must consider those issues first.

Saving of time and expense

33. The primary objective of the defendants in seeking to have a preliminary trial of the legal points raised on the notice of motion is to avoid having to make discovery of documents which fall within categories (f) and (g), if the court on the pending appeal from the Master were to order discovery of those categories. In my view, the potential saving which would result from avoiding having to make such discovery would probably be wholly disproportionate to the potential increase in cost of adopting the approach advocated by the defendants. Viewing the probable outcomes at a very basic level, it may be that, if this application is refused, the points raised on the notice of motion will never fall for determination, having regard to the manner in which the other issues raised in the plaintiff's case will be decided. I do not find it necessary to spell out the permutations of possible outcomes, in terms of the number and length of hearings in this Court and in the Supreme Court, of adopting or not adopting the approach advocated by the defendants, as they were spelt out by Finlay C.J. in *Murphy v. Roche* at p. 111. In short, if the approach advocated by the plaintiff were possible and permissible, I am not satisfied that one can predict that there would be any true savings of time or cost involved in acceding to the plaintiff's application.

Determination of other litigation

34. It was submitted on behalf of the defendants that the determination of the issues raised on this application will establish a precedent for determining identical issues which have been raised in other similar cases and will truncate disputes in relation to discovery, as well as disputes as to various remedies open to the court in other similar actions. The plaintiff is a minor who is suing by his mother and next friend. As I understand it, the plaintiff's parents are people of modest means. I do not think it is consonant with justice to expect them to bear the burden of creating a precedent.

Decision

35. The defendants' application is dismissed.