

## The HIGH COURT

[2006 No. 2566 P.]

BETWEEN

P.R.

PLAINTIFF

AND

K.C. LEGAL PERSONAL REPRESENTATIVE OF THE ESTATE OF M.C. DECEASED

DEFENDANT

**JUDGMENT of Ms. Justice Baker delivered on the 11th day of March, 2014**

1. The plaintiff commenced these proceedings by plenary summons on 8th June, 2006, in which he claimed damages arising from alleged negligence, breach of statutory duty, assault, battery and breach of his constitutional right to bodily integrity. The statement of claim delivered on 28th November, 2007 pleads more narrow heads of claim and claimed damages including aggravated and exemplary damages for assault, battery, trespass to the person, breach of the constitutional rights of the plaintiff and for the intentional infliction of emotional suffering and distress.

2. As a matter of law, a general endorsement of claim on a plenary summons is just that, a general statement of the nature of the claim brought by a plaintiff and it is the pleas in the statement of claim that may more properly be characterised as setting out the true nature and basis of a particular claim. Order 20 Rule 6 of the Rules of the Superior Courts allows a plaintiff to alter, modify or extend a claim made in the general endorsement of claim.

3. By motion dated 4th July, 2013 judgment was sought against the defendant in default of defence. It was agreed between the legal representatives of the plaintiff and the defendant that a preliminary issue had now arisen and it was appropriate that it should be determined by me prior to hearing the motion concerning default of pleading. This preliminary issue is whether the proceedings are barred by virtue of s. 12(1) of the Personal Injuries Assessment Board Act 2003 ("Act of 2003"), by reason of the fact that the plaintiff did not seek and obtain an authorisation pursuant to the Act prior to bringing these proceedings.

4. The question accordingly addressed in this judgment is whether the Act of 2003 applies to the class of claim in this action. The plaintiff argues that as the claim is one for damages for assault that it is not one covered by the Act of 2003, and that a prior authorisation is not required. The defendant asserts that this is a civil action for personal injuries to which the Act applies.

5. The Act of 2003 came into force on 28th December, 2003 and s. 3 provides that it applies to civil actions as defined in the four subsections of that section:-

*"(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 first three subsections have no application in this case as they concern civil actions arising in the course of employment, road traffic cases and an action against a person arising from that person's occupation of land. The defendant asserts, however, that the claim in these proceedings falls within the category at s. 3(d) of the Act, being a civil action not falling with any of the preceding paragraphs.

6. Section 4 of the Act defines a "civil action" as:-

*"an action intended to be pursued for the purpose of recovering damages, in respect of a wrong, for-*

*(a) personal injuries, or*

*(b) both such injuries and damage to the property (but only if both have been caused by the same wrong). "*

7. It follows, therefore, that not all civil actions are included within the Act of 2003. Certain exclusions apply under s. 4(1) of the Act and the two classes of action which are relevant to the present case are as follows:-

*"(i) an action intended to be pursued in which, in addition to damages for the foregoing matters, it is bona fide intended, and not for the purpose of circumventing the operation of section 3, to claim damages or other relief in respect of any other cause of action, ...*

*(iii) an action intended to be pursued in respect of an alleged breach by the State or any other person of a provision of the Constitution. "*

8. The plaintiff asserts that this present action is excluded from the operation of the Act and is not a civil action to which the Act applies because, in essence, this is not a personal injuries action and that the cause of action is assault. It is also asserted that the action is one where the plaintiff seeks damages for a breach of constitutional rights, specifically a breach of the right to bodily integrity.

9. It is clear from the case of *Sherry v. Primark Limited and Grosvenor Cleaning Services Limited* [2010] IEHC 66, [2010] 1 I.R. 407, that s. 12(1) of the Act of 2003 is a jurisdictional provision such that the courts do not have jurisdiction in a case to which the Act applies unless the procedures under the Act have been exhausted. It is because of this jurisdictional precondition that the defendant brings this motion. It is not in issue that a PIAB authorisation was not sought by this plaintiff. Absence of 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.

### **The Case Law on PIAB Authorisation**

10. In *Campbell v. O'Donnell & Ors.* [2008] IESC 32, [2009] 1 I.R. 133 the Supreme Court considered the question of whether a claim against the Motor Insurers' Bureau of Ireland ("MIBI") to recover damages in respect of a wrong committed by the first and second named defendants constituted a civil action as defined by s. 4 of the Act of 2003. The primary cause of action in that case was one that clearly fell within the definition of the Act and the claim arose as a result of a road traffic accident where damages were claimed by the plaintiff for personal injuries and other loss.

11. The claim against the MIBI, the third named defendant in those proceedings, was *inter alia* for a declaration that the plaintiff was entitled by virtue of the 1998 MIBI Agreement to enforce against the MIBI any award made by the court against the other defendants who were uninsured. The MIBI raised a preliminary objection in its defence that the proceedings were not properly before the court as a PIAB authorisation had not issued. The High Court, and on appeal the Supreme Court, upheld this objection and held that the plaintiff was not entitled to issue proceedings against the third named defendant without a PIAB authorisation. The Supreme Court stressed in particular that while the relief claimed by the plaintiff against the MIBI was pleaded as a prayer for a declaration or for specific performance of the MIBI agreement itself, the proceedings were in substance an action to recover damages in respect of a wrong committed by the first and second named defendants. The action was described by the Supreme Court as a "derivative action" triggered by the negligence of the first and second named defendants and no independent cause of action arose between the plaintiff and the MIBI such as would exclude the plaintiff from the Act of 2003. The judgment of the Supreme Court was given by Kearns J. (as he then was) and he identified the following central proposition, at para. 34, of the judgment:-

*"There is no cause of action properly so called as between the plaintiff and the third defendant .... Any cause of action arising in the plaintiff is purely a derivative cause of action which enables a plaintiff to recover the amount of damages or compensation to which he is found entitled as against the wrongdoers, in this case the first and second named defendants. "*

12. The court held, at para. 37, that the claim against the MIBI was not a "new, separate or 'stand alone' cause of action" and that it was the negligence of the uninsured defendants which triggered the proceedings and without which the proceedings could not have been maintained. The Court held, following the judgment of Finnegan P. in the High Court, that the action against the MIBI was the same as that against the other defendants, and that, while the relief claimed was framed as a prayer for a declaration or a specific performance, the action was an action to recover such damages for negligence as might be awarded against the uninsured defendants and "nothing else."

13. It is true that in *Campbell v. O'Donnell & Ors.* the Supreme Court gave a wide definition to the phrase "in respect of" in s. 4 of the Act. Yet the Court essentially asked a simple question, namely, was there a cause of action against the MIBI which could have or did in fact arise independently of the cause of action arising from the road traffic accident? It being common case that the road traffic proceedings did come within the ambit of the Act of 2003, the finding of law that there was no separate cause of action meant that the Act equally applied to the action against the MIBI.

14. The court in *Campbell v. O'Donnell & Ors.* took a purposive approach to its interpretation of the Act and looked in effect to the substance of the cause of action and not to the way in which the relief sought was pleaded.

15. The issue of PIAB authorisation also came for consideration in a later case of *Cunningham v. North Eastern Health Board and by order Monaghan County Council* [2012] IEHC 190. In *Cunningham* the proceedings were commenced by the plaintiff against the North Eastern Health Board arising from an alleged assault which took place when the plaintiff was a patient in Monaghan General Hospital. Some years after the proceedings were commenced, Monaghan County Council was joined as a co-defendant on the basis that it was at all material times the owner occupier operator and manager of that hospital. No authorisation from PIAB was obtained by the plaintiff to bring proceedings against Monaghan County Council and the County Council brought a motion seeking to strike out the claim against it, on the grounds that the court did not in the circumstances have jurisdiction to hear and determine the claim. Hedigan J. held that the plaintiff could not maintain its action against the County Council, stating in the first place that the application to join the County Council was, as a matter of law, the bringing by the plaintiff of new proceedings against that co-defendant and that although the original action predated the Act of 2003, the Act was applicable to this intended action against this co-defendant. The court then considered whether the proceedings were a civil action within the meaning of s. 4 of the Act of 2003 and noted that the plaintiff pleaded for assault, trespass to the person and declarations in the original pleadings, but that the claim also sought damages for personal injuries.

16. The court took the view that while a claim for declaratory relief did not come within the Act of 2003, the action commenced by the plaintiff did not constitute a separate or independent cause of action for declaratory relief, but that, as stated at para. 9:-

*"the entire nature of this case is one of personal injury and no other cause of action is being referred to when the plaintiff refers to trespass to the person or declarations. "*

In particular it was noted that the plaintiff alleged against Monaghan County Council that it owed to a duty of care which was breached and as a result whereof the plaintiff sustained the personal injury of which he complained. A direct link was made between the breach of duty and the suffering of an injury in respect of which the claim was brought. These other pleas were as the High Court put it, at para. 9, "different ways of seeking the same thing, i.e., damages for personal injury."

17. The approach taken by Hedigan J. is similar to the approach taken by the Supreme Court, and the High Court, in *Campbell v. O'Donnell & Ors.*, namely that the court should look to the substance of the claim and not to the pleadings as such. Hedigan J. took the view that as the substance of the claim was a claim for damages for personal injuries suffered as a result of the breach of duty allegedly owed to the plaintiff, and that "[a]ssault and trespass to the person in the context of these proceedings seem to be

included in the description of personal injury" (emphasis added).

18. O'Neill J. in *Gunning v. National Maternity Hospital & Ors.* [2008] IEHC 352, [2009] 2 I.R. 117, also took a purposive approach to the interpretation of the Act. Section 3(d) of the Act excludes from the Act civil actions in the medical sphere. In determining the question raised by the first 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 the subsection, at para. 8, as:-

*"[A]pplying 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. "*

19. The court held that to do otherwise could result in two aspects of the same personal injury complaint proceeding in parallel in two jurisdictions, i.e., the action against the hospital in the courts and the action against the supplier of certain medical equipment used in a medical procedure before the PIAB Board. The court held that the factual circumstances out of which the plaintiff's personal injury claim arose occurred in the course of a medical surgical procedure which the plaintiff alleged was performed negligently. Again O'Neill J. looked at the factual circumstances of the case, and this is the same approach adopted by the Supreme Court in *Campbell v. O'Donnell & Ors.* and the High Court in *Cunningham v. North Eastern Health Board* and by order *Monaghan County Council*, both of which I have considered above.

20. Hedigan J. also considered the question of the characterisation of medical negligence proceedings in *Carroll v. Mater Misericordiae Hospital* [2011] IEHC 230. In that case the plaintiff alleged that she was injured when she was an in-patient in the 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. The court followed *Gunning v. National Maternity Hospital & Ors.* and looked "to the factual circumstances." While accepting that nursing care or medical care can be differentiated, the court said that they can and were in that case linked and both could, and did, fall within the rubric of medical care. The court held that the claim did not arise from the management and maintenance of the hospital but rather from the nursing or medical care given to the plaintiff and that the claim was one that arose from the mix of nursing care and medical treatment. 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.

### **The Question**

21. The question this court must ask is whether the civil action commenced by this plaintiff is in substance a civil action for personal injuries. The court must, in the light of the jurisprudence outlined above, answer this question by looking to the substance of the action and not merely to way in which it is pleaded. The question really resolves itself to this: is this in reality an action for trespass to the person and assault or civil action for personal injuries?

22. The cases mentioned above are not directly on point. In each case, the claim was framed as a claim for personal injuries arising from alleged negligence or breach of duty and the court held that other heads of claim were ancillary claims. I have found little assistance in the textbooks but I note that in the recent text Jennings, Scannell and Sheehan (*The Law of Personal Injuries*, Roundhall, 2011), it suggested, at para. 1.74 ff, that an argument can be made that since a plaintiff who seeks damages for assault is entitled to claim damages *per se*, the proceedings are not personal injury proceedings. This argument is that the plaintiff is entitled to damages merely on account of having been subjected to the trespass and that in those circumstances, the plaintiff does not have to show that any injury in fact flowed from the assault. In those circumstances, a claim for damages to personal injuries could be seen as being ancillary to the claim for damages arising from the trespass to the person itself.

### **An Action for Trespass to the Person or Assault**

23. Having regard to the clear authority to the effect that this court must look to the substance of a claim in determining whether PIAB authorisation is required, I now turn to examine the nature of a claim for trespass to the person and assault. A claim for damages for assault is actionable *per se*. The essence of a claim for assault and battery and trespass to the person is the intentional affliction of injury to that person. No proof of actual damage is required for a plaintiff to succeed in recovering damages arising from the tort of trespass to the person or assault. This legal consequence is well established as a matter of law and it is explained in brief terms in *Letang v. Cooper* [1964] 2 Q.B. 53, 59 where Elwes J. stated that "the action for trespass as it survives is lineally descended from its ancestor, a cause of action resulting from a direct injury actionable *per se* without proof of damage."

24. The essence of the tort of assault or trespass to the person is that a plaintiff may be awarded damages even in the absence of actual injury to that person. The quantum of damages ultimately awarded by the court may depend on the fact and nature of injury suffered, but it is not a prerequisite to the bringing of an action arising from this tort that actionable injury be suffered.

25. If a plaintiff claims as his or her primary cause of action damages for assault or trespass to the person or infringement to that person's constitutional right to bodily integrity (Article 40.3.1) and protection of the person (Article 40.3.2), the primary or substantive claim is a claim for damages arising out of these torts and not a claim for damages for personal injuries. Personal injuries may well have resulted from the tortious conduct, but the essence of the tort is not one which would require as a matter of law that injury, or more specifically personal injury, be caused to that person. The claim is a claim which the law recognises as one by which a plaintiff seeks to uphold a fundamental right of a person to bodily integrity.

26. In *Dullaghan v. Hillen* [1957] Ir. Jr. Rep. 10 at 13, the court stated the rationale of the tort of assault as follows:-

*"Security for the person is among the first conditions of civilized life. The law, therefore, protects us, not only against actual hurt and violence, but against every kind of bodily interference and restraint not justified or excused by allowed cause, and against the present (immediate) apprehension of any of these things. "*

27. The essence of the tort and the rationale behind the tort is to protect what was described by the court in that case as the first, and, one must assume, essential and necessary, conditions of civilised life. Such a tort is one which is a matter of policy and in order to protect this fundamental feature of civilised life not one which requires actual physical injury but which is actionable merely on account of the happening. In that respect the common law may be regarded as a realisation of the constitutional command in Article 40.3.2 that the State must protect and vindicate the person.

28. Having regard to this characterisation of an action for trespass to the person, I am of the view that the action is not one for damages for personal injuries.

### **The Civil Liability and Courts Act 2004**

29. The Civil Liability and Courts Act 2004 introduced a new procedural regime for the bringing of actions to recover damages for personal injuries. There is expressly excluded from the definition of a "personal injuries action" an action where the damages claimed

include damages for false imprisonment or trespass to the person. The actions which come within the Act of 2004 must now from the date of the commencement of that Act be brought within two years. Neither that Act nor any other statute has altered the six year statutory time limit for the bringing of actions for trespass to the person.

30. The Act of 2004 does not require the use of a personal injuries summons in a claim arising from an assault.

31. Furthermore, it has been held in *Devlin v. Roche* [2002] 2 I.R. 360, that a claim for damages arising from trespass to the person is not a personal injuries claim under the Statute of Limitations (Amendment) Act 1991, and that the relevant statutory time limit is six years for such a claim.

32. While it is true that there is no direct provision providing for the collective interpretation of the Act of 2003 and the Act of 2004 as if they were one Act, nevertheless, as both items of legislation are substantially *in pari materia*, it seems to me that it would be quite unrealistic to interpret one Act without any regard to the other. This would be especially so when to ignore the definition of "personal injuries action" in the Act of 2004 when this court comes to interpret the Act of 2003 could lead to an absurd result. A civil action for personal injuries for the purposes of the Act of 2003, which would include a claim for trespass to the person, would be required to be processed through the PIAB procedure, but would then, if the claim was not dealt with by PIAB and an authorisation to take court proceedings issued, be subject to a six year and not a two year time limitation, be capable of being commenced by plenary summons and statement of claim without the need for a personal injury summons, and is one that would be capable of being heard by a jury.

These consequences, while of significance for the conduct of the action, do not of themselves mean that the action is not one which comes within the Act of 2003.

33. The Oireachtas did not expressly say that the Act of 2003 and the Act of 2004 should be read together, but it is clear looking at the long title of both the Acts of 2003 and 2004 that the purpose of the combined legislation was to make procedural and other changes to the way in which a litigant sought damages for personal injuries. The inevitable consequence of ignoring the Act of 2004 results in an anomaly similar to that identified by Kearns J. in *Campbell v. O'Donnell & Ors.*, namely that a claimant whose action for damages arising from alleged trespass to the person is rejected by PIAB finds himself or herself in an entirely different procedural and other regime from that which would arise were the action to be one for personal injuries. I do not accept that the Oireachtas can have intended this anomalous result and this view enforces my conclusion that a claim for trespass to the person is not one to which the Act of 2003 applies or was intended to apply.

#### **The Claim for Damages for Breach of Constitutional Right**

34. The statement of claim also claims damages for breach of the plaintiff's constitutional rights. The constitutional right identified in para. 3 of the statement of claim is the plaintiff's right to bodily integrity. The Act of 2003 expressly excludes from its operation in s. 4(1)(iii) any action intended to be pursued in respect of an alleged breach by a person of a provision of the Constitution. The exclusion of such claims is unconditional and does not depend on the court being satisfied that the claim is made *bona fide*, as in the case of the exclusion ins. 4(1)(i) of the Act.

35. There has been much discussion among academic writers as to the impact of the Constitution on the law of tort. McMahon and Binchy (*Law of Torts*, 4th ed., Bloomsbury, 2013) noted, at p. 898, that commentators had pointed to a real possibility that the torts of battery, assault, intentional or reckless infliction of emotional suffering and false imprisonment will be supplemented by a jurisprudence of constitutional infringement. The learned authors suggest that the Supreme Court has "evinced reluctance to rewrite the ingredients of torts in the light of constitutional guarantees," but suggested that the courts can supplement particular torts with the parallel remedy for infringement of the constitutional right, especially where the existing law of torts is inadequate fully to vindicate the constitutional right at issue: see, e.g., *Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd.* [1988] I.L.R.M. 629 and *Sullivan v. Boylan (No.2)* [2013] IEHC 104. The claim for damages for breach of constitutional rights, then, is one that exists independently of other causes of action at common law, but the jurisprudence may evolve as noted.

36. When this point was raised in the course of argument before me, counsel for the defendant suggested that if a plaintiff was entitled to circumvent the Act unconditionally merely on account of a plea that the actions of the defendant breached his or her constitutional rights, a plaintiff who was injured in a road traffic accident could, for example, plead that his or her constitutional rights of bodily integrity were infringed by virtue of the injuries he or she received. It seems to me that that argument has little merit for a number of reasons. In a case where a plaintiff suing for the negligent driving of a motor vehicle also pleads breach of his or her constitutional rights, the claim will fairly be met with the argument that the claim for breach of constitutional right is no more than an ancillary claim, or to use the language of the case law, another way "of seeking the same relief." Furthermore, in that type of case, the class of action which more properly may be characterised as a breach of the plaintiff's constitutional right is the class of action identified by the English Court of Appeal in *Letang v. Cooper* [1965] 1 Q.B. 232, i.e., trespass to the person which arises from an intentional act of a defendant. In such a case where the injury to the plaintiff is caused by the defendant's intended act, the cause of action is trespass to the person. As Lord Diplock said at p. 243 of that case, the evolution of categories of form of action by the courts since the Judicature Act 1873 has meant that the court now uses the name of a form of action merely as a "convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the court a remedy against another person." Where a cause of action arises in a particular factual situation other than as a result of an intentional act by the defendant, that action is now an action in negligence. An action for damages arising from a road traffic accident which was caused intentionally by a defendant is a very rare form of action, and while one can contemplate that circumstances might arise which would give rise to a cause of action, it would not be the usual type of road traffic case, and would sound primarily in trespass to the person.

#### **The Instant Case**

37. The plaintiff claims damages for assault allegedly carried out by the defendant and the plea is that the defendant wrongfully sexually assaulted and abused the plaintiff. This is the primary cause of action and the plaintiff seeks damages for such assault and for battery, trespass to the person and the intentional infliction of emotional suffering and breach of the plaintiff's constitutional right to bodily integrity. The claim is pleaded to take account of the legal essence of the tort.

38. In the circumstances I conclude that the substance of the action commenced by this plaintiff is not a civil action for personal injuries. It is an action by which the plaintiff seeks to vindicate his personal and constitutional right to bodily integrity and the person, as explained by Hogan J. in *F.H & Ors. v. Staunton & Ors.* [2013] IEHC 533.

39. It is accordingly an action which is founded in a tort which is actionable per se and without proof of actual damage or injury. This plaintiff has pleaded the case in the alternative, in the first place pleading the essence of tort of trespass to the person and then going on to plead the alleged consequences of such trespass in the form of physical injury and emotional suffering. As the plea in substance is a plea for damages for the tort of trespass to the person, it is one which does not as a matter of law require the plaintiff

to establish personal injury.

40. Furthermore, the plaintiffs claim is excluded from the operation of the Act of 2003 by s. 4(1)(iii), being an action for breach of the plaintiffs constitutional rights and not one ancillary to the claim for trespass to the person.

41. In the circumstances I hold that the claim is not one for which prior PIAB authorisation was required.