



THE COURT OF APPEAL

[2014 1306]

[Article 64 Transfer]

Irvine J.
Hogan J.
Mahon J.

BETWEEN

JOSEPH HEWITT AS LEGAL PERSONAL REPRESENTATIVE OF THE ESTATE OF DOLORES HEWITT (DECEASED)

PLAINTIFF /

RESPONDENT

- AND -

THE HEALTH SERVICE EXECUTIVE

DEFENDANT /

APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 28th day of June 2016

1. This is an appeal brought by the Health Service Executive ("HSE") against the decision of the High Court of 4th June 2014: see *Hewitt v. Health Service Executive* [2014] IEHC 300. In a very careful and thoughtful judgment Baker J. held that the fatal claim brought by the plaintiff on 25th January 2012 pursuant to s. 48 of the Civil Liability Act 1961 ("the 1961 Act") following the death of his late wife, Ms. Dolores Hewitt, was not statute-barred. Ms. Hewitt sadly died from cancer on 23rd June 2010.

2. The HSE have now appealed this decision, contending that as any action for negligence which might have been brought by the plaintiff's wife on that date had she been alive would itself have been statute-barred, it must follow that the action brought by the plaintiff husband is also statute-barred. For his part, Mr. Hewitt ("the plaintiff") contends that the fatal claim brought under s. 48 of the 1961 Act must be regarded as a stand alone claim and that once these proceedings were brought within the two year statutory period from the date of his wife's death (as they were), then the proceedings cannot be regarded as statute-barred.

3. This appeal clearly presents a novel and difficult point of statutory interpretation which is of considerable importance. It is, however, necessary first to set out the background facts.

4. The plaintiff respondent, Mr. Hewitt, is the husband and personal representative in the estate of his late wife, Ms. Dolores Hewitt. By a personal injuries summons dated 25th January, 2012, Mr. Hewitt issued proceedings pursuant to s. 7 of the 1961 Act and proceedings on behalf of himself and the other statutory dependants of the deceased for wrongful death pursuant to s. 48 of 1961 Act. In the High Court it appears to have been agreed that the issue as to whether the plaintiff's action is statute barred would be determined as a preliminary issue.

5. In her judgment Baker J. set out the sad turn of events as follows:

"The deceased had a history of breast cancer and was treated in 2001 at Our Lady's Hospital, Navan following which she made a full recovery. For monitoring purposes, she was required to attend at the hospital for review. She attended for radiological review in February 2007, when an ultrasound disclosed the existence of two lesions in her liver. Due to inadvertence on the part of the hospital no action was taken on foot of this report until a chance meeting with her surgeon five months later led to further scans which revealed further lesions in her liver. The deceased was treated for her secondary cancer, but sadly, eventually died from the cancer on 23rd June 2010."

6. In the High Court the parties agreed that the deceased had sufficient knowledge of the wrongful act of the defendant for the purpose of s. 6(1) of the Statute of Limitations (Amendment) Act 1991 ("the 1991 Act") in July 2007 so that, accordingly, the two year statutory limitation period expired in July 2009. Critically, however, no action for personal injuries was commenced by the deceased in her own personal capacity prior to her death.

The claim under s. 7 of the 1961 Act

7. In her judgment Baker J. dealt first with the claim brought under s. 7 of the 1961 Act. In that context it was not disputed that for two years after she discovered the failure of the hospital in July 2007 to act on the radiological review the deceased would have had a cause of action for personal injuries arising from the delay of five months in acting upon the abnormal ultrasound. No proceedings were admittedly instituted. Of course, had such proceedings been instituted by the deceased, they could have been continued by the husband qua personal representative after the death of the deceased pursuant to s. 7 of the 1961 Act. The relevant provisions are:

"(1) On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) vested in him shall survive for the benefit of his estate.

(2) Where, by virtue of subsection (1) of this section, a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include exemplary damages, or damages for any pain or suffering or personal injury or for loss or diminution of expectation of life or happiness.

(3) Where:-

(a) a cause of action survives by virtue of subsection (1) of this section for the benefit of the estate of a deceased person, and

(b) the death of such person has been caused by the circumstances which gave rise to such cause of action,

the damages recoverable for the benefit of his estate shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(4) The rights conferred by this section for the benefit of the estate of a deceased person are in addition to the rights conferred on the dependants of deceased persons by Part III of the Act of 1936 and Part IV of this Act."

8. As Baker J. explained in her judgment, it is clear that the effect of s. 7 of the 1961 Act is to enable:

".....the personal representative of a deceased to continue an action already commenced by a deceased prior to his or her death. In that case, the personal representative will apply for an order substituting the personal representative as plaintiff in place of the deceased in the action already commenced. Section 7 also allows for the commencement by the personal representative of an action vested in the deceased at the date of death. Section 7(3) limits the class of damages which may be recovered by the personal representative on behalf of the estate and damages are to be calculated without any loss or gain to the estate consequent on death, except that a sum in respect of funeral expenses may be included. There is also an express exclusion by s. 7(2) such that no damages for pain, suffering, personal injury, loss or diminution of expectation of life or happiness, or exemplary damages may be claimed in such proceedings."

9. Baker J. went to observe that s. 7 of the 1961 Act simply preserved causes of action, so that a personal representative may continue an action already commenced by a deceased, or commence proceedings which the deceased could have commenced:

"The personal representative brings the action on behalf of the estate of the deceased and any damages will fall into the estate to be distributed under the rules of intestate or testate succession, as the case may be. The personal representative's claim is not as broad as that which might have been maintained by the deceased during his or her lifetime and the action may not be continued in respect of personal injuries and the other classes excluded by s. 7(2), but is an action on behalf of the estate and preserves the rights of action of a deceased not concluded or litigated prior to death."

10. Baker J. went on to find that the cause of action which was vested in the deceased at the time of her death was already statute-barred at the date of death:

"The relevant time period for the institution of those proceedings was two years from the accrual of the cause of action or her date of knowledge, if later. This flows from the combined provisions of s. 3 of the Statute of Limitations (Amendment) Act 1991 (as amended by s. 7 of the Civil Liability and Courts Act 2004). The "date of knowledge of the plaintiff", as defined by s. 2 of the Act of 1991, was July 2007. This was the date when she became aware of the error which had occurred and of the fact that her condition had deteriorated between the time of the first scan in February 2007, and the date she became aware that the results of that scan showed an abnormality. By the time the second set of investigations was carried out in July 2007, the secondary cancerous lesions had become widespread in the liver of the deceased. It has been accepted by counsel for the plaintiff that the deceased did have knowledge of her injuries, that the injuries were significant, and that the spread in the secondary cancerous lesions was attributable to the actions of the hospital in failing to notify her of the lesions found in February 2007, and in the failure to treat her between February and July 2007.

The [deceased] did have the requisite knowledge in July 2007 and from the date of that knowledge, time began to run against her for the purposes of commencing an action for damages, and the statutory time limit expired in July 2009. She did not commence proceedings within the time limited by statute and accordingly there existed at the date of her death no action which could be continued by the personal representative, nor was there vested in her any cause of action which could have been commenced by her personal representative on her behalf and on behalf of her estate. The plaintiff's claim under s. 7 of the Act of 1961 must fail, the action being statute barred."

11. No appeal has been taken against this aspect of the decision which provides a valuable insight into the nature of the distinct – yet interlinked – nature of the causes of action provided for in s. 7 and s. 48 respectively. While the s. 7 issue therefore strictly does not arise for consideration, I cannot but observe that Baker J. was entirely correct so far as this aspect of the decision is concerned.

Section 48 of the Civil Liability Act 1961

12. At the heart of the present appeal lies the question of whether the plaintiff's fatal claim under s. 48 of the 1961 Act can be maintained if any claim which the late Ms. Hewitt might have brought immediately prior to her death would also have been statute-barred. Section 48 of the 1961 Act (as amended) provides:

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

(2) Only one action for damages may be brought against the same person in respect of the death.

(3) The action may be brought by the personal representative of the deceased or, if at the expiration of six months from the death there is no personal representative or no action has been brought by the personal representative, by all or any of the dependants.

(4) The action, by whomsoever brought, shall be for the benefit of all the dependants.

(5) The plaintiff shall furnish the defendant with particulars of the person or persons for whom and on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered."

13. A key part of the plaintiff's case is that s. 48 of the 1961 Act serves to create a separate cause of action from s. 7 itself. It is said that one effect of this is that the time limits applicable to these separate causes of action are necessarily different and, accordingly, the plaintiff merely has to satisfy the two year requirement in s. 48 itself.

14. There can be no question but that s. 48 is an entirely separate cause of action which is statutory in nature, since the common law did not provide for such an action in respect of wrongful death.

15. So far as the statutory limitation period applicable to actions taken under s. 48 of the 1961 Act, s. 48(6) had originally provided that the action "shall be commenced" within three years after the death. The limitation period was altered by s.6 of the Statute of Limitations (Amendment) Act 1991 ("the 1991 Act") which provided that an action under s. 48 of the 1961 Act shall not be brought after the expiration of three years from:

(a) the date of death, or

(b) the date of knowledge of the person for whose benefit the action is brought, whichever is the later.

16. The three-year period specified in s. 6 of the 1991 Act was subsequently reduced to two years by s. 7 of the Civil Liability and Courts Act 2004, but, as Baker J. noted in her judgment, the date from which the cause of action is stated to accrue was not changed. The date in question is either the date of death or the date of knowledge of the dependant.

The meaning of the requirements in s. 48(1)

17. It is clear from the express language of s. 48(1), that the action by the dependants under s. 48 of the Act of 1961, may be maintained by the personal representative only if the deceased had been entitled to "maintain the action and recover damages in respect thereof." The plaintiff has a cause of action if it can be shown:

(a) that death was caused by the wrongful act of another, and

(b) that the action is one which the deceased would have been entitled to maintain during his or her lifetime and

(c) the deceased could have recovered damages for the wrongful act.

18. In the High Court Baker J. considered that:

"The action must be one that the party injured, but for his death, could have "maintained". That phrase does no more than require that the cause of action must be one which gave rise to liability on the part of the defendant to the deceased i.e. the wrongful act would have been actionable and be a cause of action known to law.

Further, the test is stated in the conjunctive and the Act requires that the deceased could have recovered damages in the action had it been brought in his or her lifetime. Thus the statutory requirement is that the cause of action must not only be one justiciable by the deceased, but be in respect of a class of action for which damages are recoverable at law, that the form of redress for the wrong is damages, and that the deceased could have established liability and recovered damages. The conjunction is stated to require not merely that the cause of action be one recognised by law but that the deceased would have on the facts of an individual case recovered an award of damages. It is not sufficient then to show for example that the death was caused by a negligent act, one must show that negligence caused a loss capable of being measured in damages."

19. In my view, however, it is the following words in s. 48(1) ("... such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof...") which are critical and this is where I respectfully part company from the reasoning and conclusions of Baker J. In other words, I take the view that s. 48(1) goes further than simply requiring that the action was in respect of a justiciable controversy measurable in damages which the deceased was capable of commencing during her lifetime: it also requires proof that the deceased would have succeeded in the action but for the death.

20. Accordingly, while s. 48 is certainly a separate cause of action, the Oireachtas has clearly linked recovery to the entitlement of the deceased – but for her death – to have sued in her own right. This is underscored by the use in the sub-section of a past conditional tense ("...such as would have entitled...") and the consequential requirements that the decision would have been entitled to maintain the action and recover damages in respect thereof.

21. This obliges us in the circumstances of the present appeal to ask whether the late Ms. Hewitt could have maintained an action for negligence as of the date of her death on 23rd June 2010 and recovered damages in respect thereof? In my view, this question can only be answered in the negative given that the late Ms. Hewitt's action would long have been statute-barred by that date.

22. It is, of course, true that the Statute of Limitations is a matter of defence and does not, generally, at least, operate as a jurisdictional bar. To that extent one might say that Ms. Hewitt would have been entitled to maintain an action for negligence had she commenced proceedings immediately prior to her death, since the pleading of the Statute would have been a matter for the defence. But it cannot realistically be said that she could have satisfied the other requirement of s. 48(1), namely, that she had an entitlement "to recover damages in respect thereof." She had no such entitlement, because the action could – and would – have been defeated by the defendant through the simple expedient of pleading that it was statute-barred. Any other conclusion would have the somewhat startling implication that a cause of action which was statute-barred during the lifetime of the deceased could, in effect, be revived (admittedly by means of a separate and distinct caused of action) after her death by permitting the personal representative (or, as the case may be, the appropriate family member) to maintain a fatal claim under s. 48(1), provided, of course, that the proceedings were commenced with two years of death or the relevant date of knowledge.

The UK authorities

23. While it is accepted that there is no authority directly on point, this conclusion is, I think, also supported by UK authority. In *Williams v. Mersey Docks & Harbour Board* [1905] 1 K.B. 804, the deceased suffered an injury in December 1902 which would have entitled him to institute proceedings against the harbour board within the special statutory period of six months pursuant to the Public Authorities Protection Act 1893. No such action was brought by the deceased, so that this action was statute-barred.

24. Following his death in December 1904, his widow instituted proceedings under the Fatal Accidents Act 1846 (which was the precursor of s. 48 of the 1961 Act) in February 1905 to recover damages arising out of the death of her husband. It was held by the English Court of Appeal that the action could not be maintained, as the right of action of the deceased, if he were still alive would

have been barred by the provisions of the Act of 1893 which fixed a six-month time limit from the happening of the event. Mathew L.J. stated ([1905] 1 K.B. 804, 808):

"The cases appear to establish the general principle that, where an action could not have been brought by the deceased person, it cannot be maintained in respect of the same accident by his representative. In this case the deceased could not have maintained an action against the defendants at the time of his death, or at any time more than six months after the neglect which was said to have caused the injury to him."

25. In her judgment Baker J. thought it significant that "no express argument" had been advanced in that case "that a different cause of action had been given to the personal representative under the Fatal Accidents Act 1846, under which the widow sought to claim damages." It is true that as Baker J. pointed out, there is express provision in Irish law to the contrary, as s. 7(4) of the 1991 Act expressly provides that an action under s. 7 of the 1961 Act on behalf of the estate is in addition to the rights conferred on the dependants under s. 48. I nevertheless do not see this difference as dispositive.

26. In *Nunan v. Southern Railway Company* [1924] 1 K.B. 223, 227-228 Scrutton L.J. stated:

"The Fatal Accidents Act has, I think, been interpreted by authorities which are binding on us, to mean that the dependants have a new cause of action, yet cannot recover on that cause of action unless the deceased had at the time of his death a right to maintain an action and recover damages for the act, neglect or default of which they complain. He may have lost such a right in a number of ways; he may have been guilty of contributory negligence; he may have made a contract by which he excluded himself from the right to claim damages Again he may have lost his right from failure to make a claim within the period limited by some statute; or he may have lost it by reason of a release by accord and satisfaction. In all these cases, if he could not have brought an action at the time of his death neither can his dependants."

27. The final British authority is that of *Pickett v. British Rail Engineering Ltd.* [1978] UKHL 4, [1980] A.C. 136. Here the plaintiff had contracted mesothelioma of the lung following exposure to asbestos dust. He had commenced an action during his lifetime, but had died from his symptoms after a favourable decision from the High Court. By the stage the case reached the House of Lords one of the issues which arose was whether his estate was entitled to the damages for loss of expectation of life which he would have received had he not died during the course of the litigation.

28. That case was not, therefore, a case about fatal claims at all. The following comments of Lord Salmon ([1980 A.C. 136, 152) are nonetheless of interest:

"Although the point has never been considered by your Lordships' House, it is generally assumed that should the plaintiff accept a sum in settlement of his claim or obtain judgment for damages in respect of the defendant's negligence, his dependants will have no cause of action under the Fatal Accidents Acts after his death. This assumption is supported by strong authority; see *Read v. Great Eastern Railway Company* (1868) L.R. 3 Q.B. 555; *Williams v. Mersey Docks and Harbour Board* [1905] 1 K.B. 805, *C.A. and Murray v. Shuter* [1972] 1 Lloyd's Rep. 6,7. No point about the correctness of this assumption arises for decision in this appeal and therefore I express no concluded opinion about it. I think, however, that the assumption which has held the field for upwards of 100 years is probably correct and that, for present purposes, it must be accepted. In the overwhelming majority of cases a man works not only for his personal enjoyment but also to provide for the present and future needs of his dependants. It follows that it would be grossly unjust to the plaintiff and his dependants were the law to deprive him from recovering any damages for the loss of remuneration which the defendant's negligence has prevented him from earning during the 'lost years'. There is, in my view, no principle of the common law that requires such an injustice to be perpetrated."

29. The logic of these admittedly entirely obiter comments of Lord Salmon in *Pickett* nonetheless imply that the right of the dependants to bring a fatal claim is itself contingent on whether the deceased would have had a similar right had he or she not died.

30. These authorities were also discussed by Baker J. in her judgment where she observed:

"These decisions, while persuasive, are not binding on me and the decisions of the [English] Court of Appeal were given in a context where there was no statutory time limit expressly provided for the bringing of the fatal injuries claim. Such an express statutory provision exists in Ireland."

31. While all of this is true, I cannot help thinking that the presence of an express statutory provision providing for a limitation period in this jurisdiction could not be regarded as decisive. The important and material consideration is that the s.48 cause of action has been made entirely dependent on the right of action which might have been taken by the deceased during his or her lifetime.

The Irish authorities

32. While the Irish authorities – such as they are – do not directly address the limitation issue in respect of fatal claims, they nevertheless demonstrate how the right to bring a fatal claim is entirely dependent on the right of action which the deceased would have had but for death. In *Mahon v. Burke* [1991] 2 I.R. 495, the deceased had brought an action for negligence against the defendant but settled this action before his death. His widow then brought proceedings under s. 48 of the 1961 Act in which she claimed damages for funeral expenses, mental distress, and loss of consortium and for loss to the dependants of the deceased arising from his death. Lavan J. refused to award damages in respect of the fatal injuries claim, holding that the underlying action of the deceased had already been extinguished when the principal action had been settled by the deceased during his lifetime. He observed ([1991] 2 I.R. 495, 499) that a fatal claim under s. 48 of the 1961 Act could only be maintained if a right of action had been "vested in the deceased before his death which he had not compromised or sued to judgment."

33. In her judgment Baker J. analysed the reasoning of Lavan J. in *Mahon* saying:

"Lavan J. did not consider the question which has been raised before me in this case, namely, whether, if a deceased had not compromised or sued to judgment the wrongdoer prior to death, his dependants could sue under s. 48 of the Act of 1961. His focus was on the fact that the cause of action had already been compromised which meant that the deceased was no longer entitled to bring the action. Lavan J.'s reason for this conclusion is critical. He said that to now allow the dependants to sue in respect of a wrongful act for which compensation had already been received would 'subject a defendant to two actions arising from one cause of action.' His reasoning arose from considerations of *res judicata* and the fundamental principle that a defendant may not be sued twice in respect of one wrongful act."

34. While not disagreeing with this analysis, for my part I would take the reasoning in *Mahon* a stage further. The decision of Lavan J. clearly shows that a fatal claim cannot be maintained where the underlying action had been settled by the deceased during his lifetime. While this is partly explained by the doctrine of *res judicata*, it also provides impressive evidence of the wider proposition that the fatal claim is actually made inter-dependent with and upon the original action which the deceased might have brought during his or her lifetime.

35. The remaining Irish authority is the decision of Dunne J. in *Farrell v. Coffey* [2009] IEHC 537, a case with some similarities to the present one. This concerned an application by a plaintiff to amend a statement of claim in proceedings commenced by a deceased prior to her death. The action was for medical negligence in respect of an alleged misdiagnosis of a cancerous condition. At the time of the commencement of the proceedings it was clear that her illness was terminal. The proceedings were re-constituted in the name of her widower and personal representative and continued under s. 7 of the Act of 1961. The widower also sought liberty to amend the statement of claim to include a claim under s. 48 and as Dunne J described it, "transform the original personal injuries claim into a fatal injuries claim on his own behalf and on behalf of the statutory dependants."

36. Dunne J. refused to allow the amendment. She held that the plaintiff was attempting, by means of the proposed amendment, to "set up an entirely new case, *i.e.*, a fatal injuries case, using the vehicle of the personal injuries case". Such a change would have been a change "of significance in the nature of the proceedings" and accordingly could not be permitted. Dunne J. analysed the nature of a fatal injuries claim and indicated that it was "different to" a personal injuries claim, even if the claim arises out of the same facts. This is so, she said, not merely because the nature of the claim is different, but also because the damages that flow from the facts are different.

37. While, as Baker J. noted in her analysis of this decision, the precise dates are not clear from the judgment in *Farrell*, it is nonetheless clear that Mrs. Farrell had died on 24th October, 2005. Expressing the view that the fatal injuries proceedings would have been statute-barred at the issue of the notice of motion, the 31st March, 2008, Dunne J. said that no explanation had been given as to why the plaintiff sought to reconstitute the proceedings instead of issuing new fatal injuries proceedings "within an appropriate time." Dunne J. said that had this happened, those proceedings would not have been statute-barred. The plaintiff's cause of action was one that arose in May 2001, when the incorrect diagnosis was made, and the relevant statutory time limit at that time was three years from that date. Although, therefore, the deceased's action was statute barred at the date of her death, but Dunne J. also appears to have suggested that the fatal injury claim would not have been statute-barred had the appropriate proceedings been commenced in time:

"By contrast, in these proceedings, it seems to me that the plaintiff is attempting by means of the proposed amendment to set up an entirely new case, *i.e.* a fatal injuries case, using the vehicle of the personal injuries case. In effect, the plaintiff is seeking, by amendment of the original proceedings, to bring a new claim on his own behalf and on behalf of the statutory dependants. If permitted to do so, the defendant would be deprived of his right to rely on the statute.

The amendments sought to be made in this case would bring about a change of significance in the nature of the proceedings. Accordingly, in my view, allowing the amendments in the circumstances of this case would prejudice the defendant. There is no explanation of any kind as to why the plaintiff sought to reconstitute these proceedings instead of issuing new proceedings to bring a fatal injuries claim pursuant to statute within an appropriate time. Had that been done, such proceedings would not have been statute barred. In the circumstances, it seems to me that the proposed amendments cannot be permitted."

38. There is no doubt but that these comments of Dunne J. in *Farrell* provide authority for the plaintiff's claim in the present appeal. These comments were nonetheless *obiter* and it is not at all clear that the rather complex issues of interpretation of s. 48 of the 1961 Act were ever before the court. For my part, I would nonetheless respectfully decline to follow this decision insofar as it suggests that a s. 48 action may be maintained after death even though the underlying action which had vested in the deceased would have been statute-barred had it been commenced immediately prior to death.

39. In arriving at this conclusion, I have not overlooked the following comments of Dr. White S.C., *Irish Law of Damages for Personal Injuries and Death*, Vol. 1 (Dublin, 1989) at para. 8.3.08 where he suggested that:

" [t]he fact that the deceased's personal injuries claim in respect of the fatal injuries is statute-barred prior to his death is irrelevant. To hold otherwise could result in the dependants' action being barred before their cause of action for wrongful death accrues."

40. It is true that the construction of s. 48 which it is proposed in this judgment could well have the effect feared by Dr. White and, indeed, the facts of the present case provide an illustration of this. But this conclusion is the inevitable consequence of the linking by the Oireachtas of the survivors' right to sue under s. 48 to the underlying right of action which was vested in the deceased prior to death. If that action is compromised or is statute-barred, then any claim which the survivors might otherwise have brought under s. 48 simply falls away.

Conclusion

41. In summary, therefore, I must reluctantly disagree with the conclusions of Baker J. on this difficult point of statutory interpretation. While I fully agree with her that the cause of action under s. 48 of the 1961 Act is a separate cause of action which is different from that which might have been maintained by his late wife immediately prior to her death, this cannot take from the fact that the two causes of action are nonetheless inter-linked. It is clear from the language of s. 48(1) of the 1961 Act that the right to recover under s. 48 is dependent on showing that the deceased could have, but for death, successfully maintained that action and recovered damages in respect thereof. These conditions are simply not satisfied where the underlying cause of action is itself statute-barred immediately prior to the death of the deceased.

42. It follows, accordingly that if, as here, that underlying action which the late Ms. Hewitt might have brought was itself statute-barred (or, for that matter, as in *Mahon v. Burke*, compromised), the personal representative of the deceased cannot maintain the s. 48 proceedings, even if these proceedings were (as here) brought within time. Any other conclusion would mean, in effect, that a cause of action which was statute-barred during the deceased's lifetime would *de facto* be revived through the mechanism of a s.48 claim, even if allowance is made for the fact that the s. 48 claim is, of course, a separate cause of action.

43. In these circumstances, I believe that the Court must allow the appeal and hold that the plaintiff is not entitled to maintain these s. 48 proceedings.

