

## THE HIGH COURT

[2012 No. 755 P]

## BETWEEN

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

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE

DEFENDANT

**JUDGMENT of Ms. Justice Baker delivered on the 4th day of June, 2014**

1. The plaintiff is the husband and personal representative in the estate of Dolores Hewitt, deceased, who died on 23rd June, 2010. By personal injuries summons dated 25th January, 2012, he issued proceedings pursuant to s. 7 of the Civil Liability Act 1961, and proceedings on behalf of himself and the other statutory dependants of the deceased for wrongful death pursuant to s. 48 of the Act of 1961.

2. The defendant has, by motion, sought that this Court would determine as a preliminary issue in these proceedings whether the plaintiff's action is barred by the Statute of Limitations Act 1957 to 2000 (as amended). Certain facts are uncontroverted and may be briefly summarised.

3. 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.

4. It has been accepted by counsel for the plaintiff and the defendant 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, and accordingly the two year statutory limitation period expired in July 2009. No action for personal injuries was commenced by the deceased in her own personal capacity prior to her death. The defendant submits that these actions commenced by the plaintiff as personal representative of the deceased were statute barred at the time of the institution of the proceedings.

5. Different legal considerations apply to the question of the running of the Statute of Limitations for each action commenced by the plaintiff, and I will deal with each in turn.

**The action under s. 7 of the Civil Liability Act 1961**

6. The defendant concedes that the deceased would, for two years after she discovered the failure of the hospital in July 2007, 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 instituted and it common case, and cannot be doubted, that had proceedings been instituted, they could have been continued by the personal representative after the death of the deceased pursuant to s. 7 of the Civil Liability Act 1961. The relevant provisions are:

7.-(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.

7. It is clear that s. 7 enables 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.

8. What s. 7 does is to preserve causes of action: the 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.

9. It is argued by the defendant 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.

10. The plaintiff 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.

#### **Section 48 of the Civil Liability Act 1961**

11. The revised s. 48 is as follows:

48. (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.

12. The plaintiff also maintains an action under s. 48 of the Act of 1961, an action generally called a fatal injury action or an action for wrongful death. This is a specific statutory cause of action which may be maintained on behalf of the dependants of a deceased person. Section 48 creates a cause of action, and in this it differs from s. 7 which merely preserves a cause of action commenced or entitled to be commenced by a person before his or her death. It displaced the then common law rule that "the death of a human being could not be complained of as an injury", explained in *Baker v. Bolton* [1808] 1 Camp. 493, and discussed at para. 42.01 of McMahon & Binchy, *Law of Torts*, 4th Ed. (Dublin, 2013). Early mitigation of the harshness of this rule was found in Lord Campbell's Act of 1846. The current statutory right is contained in ss. 47 to 51 of the Act of 1961, as amended by the Civil Liability (Amendment) Act 1996. The class of person on whose behalf such an action may be brought was defined by legislation and extended by the Civil Partnership and Certain Rights and Obligations of Co-Habitants Act 2010. A dependant is now defined under legislation to be a spouse, civil partner, parent, grandparent, step parent, child, grandchild, stepchild, brother, sister, half-brother or half-sister of the deceased.

13. The dependants may claim in respect of *solatium* and for lost financial dependency if they can show the loss of a financial benefit which might reasonably have been expected, including household or other direct financial contributions, mortgage contribution, etc. and what might be called money's-worth services such as housekeeping and childminding. Jurisprudence has evolved in assessing the quantum of such lost financial dependency. In *Quinn v. Cashin* [2005] IEHC 214, O'Donovan J. favoured a discount to account for a possibility that a plaintiff might marry in the future and accepted that the dependants could recover damages for services that the deceased would have provided "as a housekeeper, cleaner and general factotum around the house". The dependants are also entitled to claim vouched funeral-related expenses. Hardiman J. *obiter* in *Grant v. Roche Products (Ireland) Ltd. & Ors.* [2008] 4 I.R. 679, expressed the possibility that the dependant could recover the costs incurred in investigating the cause of a fatal injury, in that case, the costs of expensive research in preparation for an inquest into the deceased's death, which allegedly resulted from a condition caused by a prescription drug.

14. What are clear are the constituent elements of the statutory claim. The claim is brought by the dependants of a deceased person. It is limited to a measured amount for mental distress, funeral or other similar-type expenses, and damages calculated to compensate the dependants for their loss of financial dependency. In no sense is the quantum of damages true compensation to the deceased, nor does the measure of damages reflect the actual losses incurred by a deceased arising from the wrongful act. It is loss to the dependants that is actionable, not loss to the deceased or his or her estate. This distinction is so, even when one takes into account that by virtue of s. 7(2) of the Act of 1961, the cause of action which survives the death of a deceased does not include any claim for damages for pain or suffering or personal injury. A claim under s. 7 is a claim which may be maintained in respect of loss of earnings or medical expenses already incurred by the deceased at the date of death. But such a claim is not capable of being

maintained under s. 48. An action by the dependants is a different cause of action. The loss of pecuniary benefits is the loss of those benefits which the dependants can show were their losses, and not the loss of the deceased.

15. The personal representative has a right to commence such an action. If an action is not commenced by the personal representative within six months of the death of the deceased, the action may be brought by all or any of the dependants. This is because the action is not one on behalf of the estate, but rather the action of the dependants for redress following the death of a loved one, and it is set out in s. 48(4); the action by whomsoever it is brought enures for the benefit of all the dependants, and the damages recoverable do not fall to be distributed in the estate, but as directed by the court.

16. The statutory fatal injuries claim is wholly statutory in origin and is not found in the common law. To borrow the words of Lord Blackburn dealing with the broadly similar s. 1 of the Fatal Accidents Act 1846 in the *Vera Cruz* 1884 10 App Cas 59 at 70-71 it is "*new in its species, new in its quality, new in its principle, in every way new ....*"

17. Extraordinarily, and notwithstanding that legislation providing for a form of fatal injury action by statutory dependants has been in place since the middle of the nineteenth century, there is no decided case in the courts of England and Wales, or in Ireland, as to whether the running of a statutory time limit against a deceased would also bar the fatal injuries claim by the dependants.

18. McMahon and Binchy at para. 42.13 of their text *Law of Torts*, 4th Ed., suggest that the question could be decided either way:

*"A question which has not been decided in the Irish courts as yet is whether the dependants' action is lost if the deceased's action has been settled or lost through becoming statute barred when he or she dies....Section 48(1) does not address the problem explicitly and the matter would appear to be open under the legislation."*

19. White in *Irish Law of Damages for Personal Injuries and Death*, Vol. 1 (Dublin, 1989) at para 8.3.08 suggests 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."*

### **Express statutory time limits**

20. The Act of 1961, as amended, itself provides an express and clear statutory limitation period. Section 6 of the Statute of Limitations (Amendment) Act 1991, provides that an action under s. 48 of the Act of 1961 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.

The three-year period was subsequently reduced to two years by s. 7 of the Civil Liability and Courts Act 2004, but the date from which the cause of action is stated to accrue was not changed. That date is either the date of death or the date of knowledge of the dependant. The legislation makes no reference to the date of *accrual* of the cause of action as is found in other provisions in the Statute of Limitations, including s. 3 of the Act of 1991. The original s. 48(6) merely stated that the action "shall be commenced within three years after the death". Again, there is no reference to or mention to the accrual of the cause of action or the date of knowledge of the person injured.

21. The express statutory limitation provisions link the running of time to the date of death or knowledge of the dependants, not of the deceased. It says nothing to link the running of time to any operative limitation that would have run against the deceased. It is argued by counsel for the defendant that this link is made in s. 48(1) itself and I turn now to examine this in detail.

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

22. 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 had the deceased 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.

The expression "wrong" is defined in s. 2(1) of the Act of 1961, as meaning a tort, breach of contract or breach of trust. The action by the dependants must be justiciable; it must be an action in respect of a wrong known to law. The Act does not create a different class of action unknown to exist between persons or corporate bodies during their personal or corporate lives. The death of itself, even if a causative connection can be shown between an act and the death of the deceased, does not give rise to a cause of action in itself, but the section creates a statutory cause of action only if it can be shown that the action causing the death is wrongful in the sense that it is recognised as wrongful in law.

23. 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.

24. 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.

25. Counsel for the parties have furnished me with cases which, they submit, are authoritative although it is conceded that there is

no Irish decision which is directly on point.

### UK cases

26. There are two decisions of the old English Court of Appeal which are of note. 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 within a period of six months pursuant to the Public Authorities Protection Act 1893. No such action was brought by the deceased, but following his death in December 1904, his widow instituted proceedings under the Fatal Accidents Act 1846 in February 1905 to recover damages arising out of the death of her husband. It was held by the 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 the following at p. 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."*

No express argument had been made 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. There is express provision in Irish law to the contrary, and s. 7(4) of the 1991 Act expressly provides that an action under s. 7 on behalf of the estate is in addition to the rights conferred on the dependants under s. 48.

27. In *Nunan v. Southern Railway Company* 1924, 1 K.B. 223, Scrutton L.J. stated obiter the following at pp. 227 - 228:

*"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."*

28. The House of Lords considered the question in the case of *Pickett v. British Rail Engineering Ltd.* [1980] A.C. 136, and referred expressly to *Nunan v. Southern Railway Company* and *Williams v. Mersey Docks and Harbour Board*. Lord Salmon pointed out that the issue as to whether a claim under the Fatal Accidents Act could be defeated by reason of the fact that the deceased had, in his or her lifetime, been barred by the Statute of Limitations had not yet been decided but took the view that the assumption that the action would be defeated "*which has held the field for upwards of 100 years is probably correct*". Again his comments were obiter and *Pickett v. British Rail Engineering Ltd.* was a case where the deceased had already commenced the action during his lifetime and the action was reconstituted to name his widow as administrator of his estate. The action was akin to an action under s. 7 of the Act of 1961 and not an action under s. 48.

29. These decisions, while persuasive, are not binding on me and the decisions of the old 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.

### Irish Authorities

30. In *Mahon v. Burke and the Midwestern Health Board* [1991] 2 I.R. 495, the deceased had brought an action for negligence against the defendant but settled this 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., on appeal from a Circuit Court order which allowed the plaintiffs claim in part, dismissed the appeal of the plaintiff and refused to award damages under the fatal injuries claim. Lavan J. expressly relied on *Read v. Great Eastern Railway Company Ltd.* [1868] L.R. 3 and *Pickett v. British Rail Engineering Ltd.*

31. Lavan J. considered the meaning and purpose of s. 7 of the Act of 1961, and described it as having abolished "*the general common law rule that causes of action for tort vested in a person before his death do not survive his death*." Lavan J. is correct in this analysis and held that because the deceased had compromised his action for negligence against his employers prior to his death, that no action was vested in him at the date of his death that could be continued under s. 7. Lavan J. then considered the fatal injuries claim and held that such a claim could only arise if it was "*vested in the deceased before his death which he had not compromised or sued to judgment*."

32. 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.

33. Lavan J.'s decision was made by him as a High Court judge hearing a Circuit appeal and his decision is not binding on me. Further, the point was argued before him on the question, relevant only to a claim under s. 7, whether the right of action was "*vested in the deceased before his death*". There is no requirement in s. 48 that the cause of action be vested in the deceased and the word "*vested*" is not used in that section at all.

34. In *Farrell v. Coffey* [2009] IEHC 537, Dunne J. heard a motion on behalf of 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 proceedings, it was clear that she had a terminal illness. These proceedings were re-constituted in the name of her widower and personal representative and continued under s. 7 of the Act of 1961 but he brought a motion seeking 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*". 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 could not be permitted.

35. 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.

36. While the precise dates are not clear from the judgment, it is 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. says 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". She 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. The deceased herself was statute barred at the date of her death but Dunne J. took the view, albeit obiter, that the fatal injury claim would not have been statute-barred, and her obiter view was that time began to run at the date of death.

### Analysis

37. It seems to me that the cause of action, being one that can only accrue at the date of death of the deceased, cannot be one that becomes statute-barred before the date of death. The action and the cause of action in s. 48 is one created by statute and is an action of a different type from one which may be maintained by a person arising from a wrongful act during his or her life. The claim under s. 48 is a claim that may be maintained by the dependants of Mrs. Hewitt for *solatium* and damages insofar as they can show she would have provided either direct monetary or indirect service benefits to them during her life. Such an action may be maintained only if the person, making the contribution or whose death has caused the mental anguish, has died.

38. In that regard, the statement in the decision of the Supreme Court of South Dakota in *Rowe v. Richards* 35 S.D. 201, was referred to by counsel for both parties:

*"We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action-one which has not then accrued; one which may never accrue; and one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favour of his wife and be based solely upon a violation of a right vested solely in the wife."*

39. As a matter of logic, the action under s. 48 of the Act of 1961 is one that comes to exist in the dependants at the death of the deceased, and is not an action which could be barred by any time that might run before that date. The clear words of s. 6 of the Statute of Limitations (Amendment) Act 1991 provide that time runs at the date of death, or knowledge of the dependants, and does not link limitation to the knowledge of the deceased, or to other factors that might have barred her. For the reasons I have outlined I am not persuaded that this clear limitation period is altered or supplemented by the interpretation canvassed by counsel for the defendant as to the meaning of s. 48(1).

40. I prefer the interpretation that the provisions of s. 48(1) define the cause of action, and do not provide a limitation period linked to that which barred the deceased. Furthermore the decisions of the old Court of Appeal and of Lavan J. in *Mahon v Burke and the Midwestern Health Board* concern the risk of double recovery and no such concern arises in this case.

### The Constitutional Dimension

41. The law of tort is, in certain circumstances, an important tool for the vindication of constitutional rights, as explained by Hogan J in *D.F. v Garda Commissioner and Ors.* [2014] IEHC 213 and my own judgment in *P.R. v K.C.* [2014] IEHC 126. In the light of the interplay between the Constitution and the law of torts, be they statutory or other torts, it seems to me that the statutory remedy afforded to the dependants of a deceased under Part IV of the Act of 1961, may properly be understood and interpreted in a manner which is consistent with the Constitution by considering that the cause of action arises on the death of the deceased and that action cannot have become statute-barred before the death of the injured person, as an alternative construction could mean that the action could become statute barred by an event or happening over which the dependants had no control.

42. In *Grant v. Roche Products (Ireland) Ltd.* [2008] IESC 35, a claim was brought by the statutory dependants of a deceased whom, it is alleged, died by his own hand as a consequence of taking a prescription drug, Roaccutane. The defendants had offered to settle the case for its full worth which the plaintiff rejected. The defendants brought a motion to strike out the proceedings as being pointless or an abuse of court process. Hardiman J. pointed out that Part IV of the 1961 Act must be construed in a manner compatible with the Constitution and said that the "plangent words" of Article 40.3 did require the right to life of each individual citizen, including the deceased whose dependants had brought the action, to be vindicated. He said that the obligation to vindicate the right of the deceased could include the right on the part of his dependants to seek that the court would determine the liability of the defendant for that death, and to pronounce such determination. He quoted with approval the dictum of Henchy J. in *Hanrahan v. Merck Sharpe & Dohme (Ireland) Ltd.* [1988] I.L.R.M. 629, and pointed to the role of the law of torts in implementing the State's duty under Article 40.3 and the Personal Rights Articles of the Constitution.

43. The fatal injuries claim created by the s. 48 of the Act of 1961, and recognised in s. 7(4) as being a separate right of the dependants, must be broadly interpreted in the light of the constitutional imperative so as not to exclude the persons entitled to bring a claim under the section by events which occur before the cause of action could have accrued.

### Further constitutional consideration: fairness to a defendant

44. The action under s. 48 may be brought only if a causative connection can be shown between the death and the alleged wrongful act of a defendant. The fact of the causative connection will be tested by the evidence and as a matter of reason the longer the time that passes between the death and the alleged action causing the death the less likely the action is to succeed. Further the courts have evolved a considerable jurisprudence to deal with the question of fairness arising from a perceived delay on the part of a plaintiff in commencing an action, and that jurisprudence, and the jurisdiction of the court to strike out a claim offers ample protection to a defendant in the case where there is a long, unexplained and unjustified time lapse between the events giving rise to the cause of action and the commencement of proceedings

### Conclusion

45. In the circumstances, I conclude that the cause of action under s. 48 of the Act of 1961 is a separate cause of action, different from that which might have been maintained by the plaintiff on behalf of the estate of the deceased under s. 7 of the Act of 1961. The action under s. 7 is statute-barred and was statute-barred before the death of the deceased. However, the action under s. 48

arose and came into existence only on the happening of the death of Mrs. Hewitt on 23rd June, 2010. Her statutory dependants had the right to bring a claim against the defendant in respect of her wrongful death up to two years after her death, and that action, having been commenced within the statutory time limit, is not statute-barred.