

THE HIGH COURT**[2004 No. 4524 P]****BETWEEN****CARMEL ROSE O'REILLY McCABE****PLAINTIFF****AND****THE MINISTER FOR JUSTICE AND
PATRICK CUSACK SMITH AND COMPANY
(AGENTS OF THOMAS McCABE, WARD OF COURT AND MINOR)****DEFENDANTS****Judgment of Mr. Justice Murphy dated 29th June, 2006.****1. Motions**

1.1 Three notices of motion were returnable before the court on 21st and 22nd June last as follows:

A motion filed 15th February, 2005 and returnable for 7th March, 2005 by the first named defendant for an order dismissing the action on the grounds that the plaintiff had no reasonable cause of action and/or that her claim must fail against the first named defendant; for an order staying or dismissing the action on the grounds that the proceedings are vexatious and/or an abuse of process of the court and an order restraining the plaintiff from making any further application without first seeking the leave of the court.

The application for the third order was not proceeded with at this stage.

1.2 The second motion filed on 31st March, 2005 by the second named defendant, who had acted for the plaintiff's husband in a road traffic accident proceedings (1966: No. 650P), was for a similar order and for an order, further or in the alternative, directing the trial of a preliminary issue as to whether or not the plaintiff's claim, if any, as against the second named plaintiff was statute barred. An order restraining the plaintiff from instituting any further proceedings against the second named defendant and/or Joan Smith, the principal of the second defendant without the leave of the court was not proceeded with at this stage.

1.3 The third motion, that of the plaintiff, filed on 7th September, 2005 and originally returnable for 10th October, 2005, was for an order striking out the defence of both defendants for failure to make discovery of documents pursuant to an order of the court dated 26th April, 2005 and for an order for direction as to the trial of the issues of fact having regard to the fraudulent concealment alleged and/or found against the defendants and for an order that the papers be directed to the office of the Director of Public Prosecutions.

The applicant, and respondent to the first and second motions, appeared in person.

It, accordingly, is necessary to consider the proceedings in their entirety in order to assess the alleged failure to make discovery and to assess whether the plaintiff has a reasonable cause of action.

2. Plenary Proceedings

By plenary summons dated 14th April, 2004, the plaintiff claimed as follows:

"The plaintiff's claim is for Negligence and for the wrongful birth of five children."

By notice of motion for judgment in default of defence returnable for 11th October, 2004, the plaintiff applied for judgment in relation to the breach of her human rights in the action.

3. Statement of Claim

3.1 The statement of claim, undated, claims that the defendants owed the plaintiff and her five children a duty of care to disclose the legal status of Thomas McCabe who suffered post-traumatic organic brain damage following a road traffic accident in 1965, whereupon he was taken into wardship as a minor, which they did not disclose and are consequently in breach of the duty which they owed to the plaintiff and her five children. The plaintiff claimed that the defendants had caused the defendant loss and damage and that she was unable to enforce any of her marital rights and that there was an undisclosed legal impediment to the marriage which was foreseeable.

She claimed that Thomas McCabe was abandoned by his legal guardians and the funds paid into court for his benefit were misappropriated.

It was further claimed that in 1981 the second named defendants acted for Thomas McCabe in the transfer of property comprising part of the family home.

A separate grounding affidavit for judgment in default of defence substantially repeats the matters claimed in the statement of claim.

3.2 The particulars of loss and damage are stated as follows:

1) The plaintiff has initiated matrimonial proceedings. However, because of her husband's legal status, she is unable to obtain financial relief in the form of a property adjustment order, maintenance, pensions order or any other financial relief from his estate. The plaintiff claims for these losses.

2) The plaintiff claims damage for the loss of her rights over the family home at Lisduff, Kells, County Meath in the Republic of Ireland. This property is valued at approximately €1.4 million and the plaintiff claims this amount. (No further particulars were given).

3) The plaintiff claims damage for the loss of her right to maintenance for her children for their education from the period 1992 to 2004 as referred to in a schedule annexed to the statement of claim.

4) The plaintiff claims damage for the loss of her rights to the ongoing maintenance which is derived from her marital status, including pension rights, and health costs for the rest of her life.

5) The plaintiff claims personal injury damage for her sons, Thomas Patrick Paul McCabe and James Ultan Gerard McCabe, who have been diagnosed as having schizophrenia. (No further particulars were given).

6) The plaintiff claims personal injury damages for her daughter Anne Mary McCabe who has been diagnosed as having dyslexia.

4. Plaintiff's Affidavit

The grounding affidavit, sworn 22nd June, 2004, sets out the background to and the loss following from this unusual claim. The plaintiff deposed, *inter alia*, to matters occurring in 1965 to 1967 before her meeting the plaintiff in 1971 and their subsequent marriage on 23rd September, 1972 as follows:

1) Thomas Joseph Patrick McCabe was involved in a road traffic accident in 1965 in which he sustained post-traumatic organ brain damage and developed schizophrenia as a result of the head trauma he sustained. (Reference was made to the diagnosis which was not exhibited in the affidavit but is otherwise included in the several files of papers relating to previous applications before this Court. (Reference was also made to a note of a Dr. Joyce S.H.O. of St. Davnet's Hospital Monaghan, dated 12th September, 1983 regarding the diagnosis of her husband).

2) His claim for personal injuries was settled in the High Court in Dublin upon an order of compromise dated 1967. Reference was made to the consent. (These proceedings were 1966 No. 650P).

3) Patrick Cusack Smith and Company were appointed guardians and assumed control of his person and estate. Reference was made to an order of Mrs. Justice Denham, dated 20th November, 1992, compelling service of matrimonial proceedings on the guardians of Thomas McCabe, who are Patrick Cusack Smith and Company.

4) In 1967 Patrick Cusack Smith and Company produced documents to Thomas McCabe purporting to be his personal injuries settlement which detailed minor physical injuries in a settlement of some £2,000. (Mrs. McCabe complained that sum was paid by Mr. Cusack to her husband in a public house in or about February 1967).

5) Thomas McCabe was never informed and was unaware of any legal procedures which were initiated by the defendant for and on his behalf.

6) Thomas McCabe was abandoned by his legal guardians and the funds paid into court for his benefit were misappropriated (no particulars were given).

7) On 23rd September, 1972 the plaintiff went through a service of marriage with Thomas McCabe and resided with him at Lisduff, Kells, County Meath, in the Republic of Ireland.

8) During the years 1973 to 1980 the plaintiff gave birth to five children.

9) In 1981 Patrick Cusack Smith and Company acted for Thomas McCabe in the transfer of property comprising part of the family home. The plaintiff was not part of the transaction which is contrary to the provisions of s. 3 of the Family Home Protection Act, 1976. (Reference was made to the contract for sale which was not exhibited). The deponent said that that act caused loss and damage to the plaintiff.

10) The defendants have admitted liability by certifying in a letter dated 24th April, 1978 that "they were aware of their own knowledge that the provisions of the Family Home Protection Act did not apply". (That letter was not exhibited).

11) The plaintiff issued a writ for negligence and person injury on behalf of her five children in 1985 re No. 1476. The plaintiff wants to proceed with this claim now on behalf of her children.

12) Thomas McCabe is a person who has sustained brain damage and developed schizophrenia following head trauma in 1965. This illness is a hereditary disease. Two of the plaintiff's children have inherited this disease from their father. This risk of inheriting this mental illness was foreseeable and this injury to the plaintiff's children was caused by the defendant's negligence. As a consequence of the defendant's negligence, the plaintiff and her children have sustained loss and damage.

13) In the year 1992 the plaintiff separated from Thomas McCabe and commenced matrimonial proceedings.

14) From the years 1994 to 2004 the plaintiff maintained four of her children through university. She was unable to avail of her legal entitlement to maintenance for her children because of Thomas McCabe's legal status.

15) The plaintiff obtained a decree nisi in matrimonial proceedings in September, 2004. She claims damages as she is unable to proceed any further with this matter as there is a legal impediment on the marriage certificate.

5. Responses

5.1 Defence of the first named defendant

By defence delivered 14th October, 2004, the first named defendant refers to previous proceedings No. 1992/1640P commenced on 5th March, 1992 between the plaintiff, the first named defendant and Ireland and the Attorney General. The claim in the said action was pleaded to be substantially the same cause of action as that alleged in the present action. On 22nd July, 1992 the court found that the plaintiff had no reasonable cause of action against the defendants and ordered that those proceedings be stayed. In the circumstance the plaintiff is estopped and precluded from maintaining her claim in this action against the first named defendant.

The plenary summons in the statement of claim disclosed no reasonable cause of action against the first named defendant. The plaintiff's action was frivolous or vexatious and/or an abuse of the court.

Without prejudice the first named defendant maintained that the plaintiff's claim is statute barred; that the plaintiff had not standing to bring the action on behalf of her adult children; denied that Thomas McCabe was taken into wardship as a minor as alleged or at

all; denied that the first named defendant owed the plaintiff and/or her five children a duty of care as alleged or at all or that that defendant was guilty of the alleged or any negligence or breach of duty.

Without prejudice to the generality it was pleaded that the first named defendant did not initiate any legal procedures for or on behalf of Thomas McCabe nor did they misappropriate any funds paid into court on his behalf.

The first named defendant had not admitted any liability as alleged in para. 10 of the particulars of negligence in relation to the provisions of the Family Home Protection Act which was alleged to have been made in a letter of 24th April, 1978.

As to the exhibits of affidavits the court has allowed reference to be made to those in other affidavits where the relevant exhibits are missing or incomplete.

However, in the papers before this Court that letter is not exhibited with the statement of claim.

The defence of the first named defendant denied that any injury to the plaintiff's children was caused by the negligence of the first named defendant, denied that the plaintiff suffered the alleged or any loss or damage as alleged by the plaintiff and was a stranger to the matters pleaded in relation to the plaintiff's marriage in 1972.

5.2 A notice for particulars of the claim was replied to on 25th October, 2004.

The reply to that notice for particular the plaintiff stated that Thomas McCabe was a ward of court and he could not legally marry; that the marriage resulted in a nullity as he could not consent and that the Registrar for Wards of Court and Minors had written to her explaining that Thomas McCabe was not a ward of court.

Notwithstanding, the plaintiff affirmed that Thomas McCabe was taken into wardship. The plaintiff referred to proceedings 650P of 1966 without furnishing same. These proceedings were in respect of the plaintiff's claim in 1965, *Thomas McCabe v. James Phillips* where there is no indication of wardship. The reply referred to the first and second named defendants having the documents in question at the Office of Wards and Minors which was the subject of the discovery motion.

In relation to the plaintiff being unable to avail of her legal entitlement of maintenance, reference was made to proceedings 41M of 1992 which was issued on 31st July, 1992 and in respect of which a citation was issued on 10th November, 1992.

Proceedings for maintenance were also issued in Northern Ireland on 17th May, 1995, which were dismissed on 16th February, 1996.

5.3 Proceedings 1640P of 1992 as against the first named defendant

In her statement of claim delivered 1st April, 1992 in *McCabe v. Minister for Justice, Ireland and the Attorney General* (1992 No. 1640P it is claimed as follows:

"9. The defendant, his servant and agents did maintain at all material times thereafter two files pertaining to Thomas McCabe with addresses of Lisduff, Kells, County Meath and Lisduff, Virginia, County Cavan concurrently for unlawful purposes.

10. The defendant, his servant and agents have sustained as and from 1966 a file No. 650P at the offices of the High Court, all of which is fraud inter alia with a file at the offices for Wards of Court and Minors, the latter being truly representative of the status of Thomas McCabe which the defendant has and is continuing to conceal from the plaintiff.

11. The defendant, his servant and agent in the person of the General Solicitor for Wards of Court and Minors has failed to confirm or deny the plaintiff's claim despite numerous correspondence by registered post.

12. The plaintiff claims the defendant, his servant and agent has accepted the existence of the order of compromise and the defendant, his servant and agent is deliberately and without just cause withholding the said order from the plaintiff.

13. The defendant on numerous occasions through correspondence has deliberately concealed the plaintiff's cause of action by not following a certain course of action."

There follows claims in respect of inhibitions, transfers, loans and matters relating to title and pleas in relation to the Family Home Protection Act in relation thereto and, finally, a claim that the defendants have made no serious attempt to address the injustices and fraud wreaked upon this plaintiff and her children other than a casual visit by his servant and agent.

5.4. Affidavit of First named defendant

5.4.1. The application was grounded on the affidavit of Pamela Hanley, who referred to the general endorsement of claim and to the action commenced on 5th March, 1992, entitled "The High Court, Record No. 1992/1640P between Carmel McCabe and the Minister for Justice, Ireland and the Attorney General, defendants" which was substantially the same cause of action as alleged in the statement of claim. The issues raised in the proceedings were substantially the same as those raised in the present action. On 22nd July, 1992 the court found that the plaintiff had no reasonable cause of action against the defendant and ordered that the proceedings be stayed. The deponent referred to the 1992 proceedings and to the order of Mr. Justice Costello dated 22nd July, 1992 where the court found that the plaintiff had no reasonable cause of action against the defendants and that, accordingly, it was ordered that the proceedings be stayed.

5.4.2. The deponent referred to the Northern Ireland actions, 1995/2031 between the same parties. In respect of the 1995 Northern Ireland proceedings the plaintiff's action was dismissed in its entirety by the High Court in Belfast on 16th February, 1996.

5.4.3. Reference was also made to the Registrar of Wards of Court confirmation by letter of 7th June, 1995, that Thomas McCabe was not, and had not been at any time, a Ward of the High Court. The deponent referred to a letter of Mr. Frank Lyons dated 21st June, 1995, enclosing copy correspondence from the Registrar, Office of Wards of Court.

5.5 The second named defendant's position.

The affidavit of Mrs. Joan Smith, principal of the second named defendant, sworn the 10th March, 2005 and practising as a solicitor for upwards of fifty years deposed to her purchasing the practice in October 1971. She referred to "a long line of proceedings" and to Dr. Joyce's note to an unnamed doctor of 12th September, 1983 relied on by the plaintiff which was eighteen years after the accident in 1965. The settlement in 1967 of the 1966 proceedings was made when Mr. McCabe was of age. She referred to a letter from Mr.

Dalton, registrar of Wards of Court office of 24th November, 1992. She referred to the admission that any schizophrenia of her husband and her children was hereditary.

Ms. Smith says that she was threatened and harassed by the plaintiff and her husband since the issue of proceedings in 1984. In 1985 she reported the matter to the Garda Síochána. Mr. McCabe assaulted a Garda and was prosecuted. She was informed that Mr. McCabe, who had been in the Congo, would use his gun on her. No gun was found in a Garda search.

The deponent believed the proceedings to be frivolous and vexatious, an abuse of the process of the court and an attempt to open up issues from previous sets of proceedings.

6. Previous related proceedings against second named defendant.

Mrs. Smith had deposed to four related proceedings from 1984 to 1999 between the plaintiff and the second named defendants herein. These are as follows:

6.1 Thomas P.J. McCabe and by order *Carmel R. McCabe v. Patrick Cusack Smith and Company and the Incorporated Law Society of Ireland* and by order the Guardian Royal Exchange Insurance Company.

The High Court, 1984 – Record No. 3620P.

The plaintiffs' claim was for damages for gross misconduct and negligence by the first and second named defendants. The affidavit of Joan M. Smith grounded a preliminary issue. By order of 5th July, 1985 the High Court (Murphy J.) found that the plaintiffs' claim was barred by virtue of the provisions of the Statute of Limitations, 1957 and ordered and judged that the defendant to the issue recover from the plaintiffs the costs of the issue.

6.2 *Carmel O'Reilly McCabe v. Minister for Justice and Patrick Cusack Smith and Company*, Solicitors and Agents for Thomas McCabe, ward of court.

The High Court (Northern Ireland) 1995 – Record No. 2031.

By plenary summons dated 17th May, 1995 the plaintiff claimed child maintenance due and owing by the defendants in respect of five children of a void marriage to a Ward of Court of the Defendants in which matrimonial proceedings, Record No. 41M of 1992 and proceedings 1640 remained stayed due to "wilful neglect of the first named defendant failing to deliver a defence and the second named defendant's non-co-operation in the proceedings of the relevant documents despite the existence of a High Court order ordering them to do so".

By order of Master Kennedy of the Queen's Bench Division dated 7th February, 1996, it was ordered that the writ of summons therein be set aside for the want of jurisdiction and because the statement of claim disclosed no cause of action against the defendants. There was no order as to the costs of the application.

A notice of appeal dated 9th February, 1996 appeared on the file.

6.3 Thomas Patrick Paul McCabe (infant) (and for other infants) suing by their mother and next friend Mrs. Carmel Rose McCabe v. Patrick Cusack and Company.

The High Court, 1985 – Record No. 1476P.

By plenary summons dated 14th February, 1985 the plaintiffs claimed damages for gross misconduct and negligence by the first named defendants (sic). The Incorporated Law Society of Ireland as a second named defendant, was deleted. A statement of claim dated 25th April, 1988 alleged that the father of the infants had been taken into wardship.

By notice of motion entered for 6th November, 1988 the plaintiffs sought to join Thomas Joseph Patrick McCabe, father of the infants, in the proceedings and, by notice of motion dated 30th May, 1989, for appointment of a guardian *ad litem* of the infants.

There are no further references to these applications.

6.4 By Equity Civil Bill dated 18th November, 1991: *Thomas McCabe and Carmel McCabe v. Margaret Brady, James Brady, James Cahill and Patrick Cusack Smith and Company*.

The Circuit Court – Record No. E.38/1991.

The plaintiffs claimed that they were at all material times the registered owner of certain lands known as Castlerahan, Lisduff, in the County of Cavan and registered on Folio 2409F and Folio 1798F of the Register of Freeholds as and from 1994. It was further claimed that as and from 12th January, 1991 the defendants took up residence in the dwelling and had not any title thereto and failed to give up possession. The plaintiffs claimed for the loss of letting, for an order for possession, for an order for sale and for an order restraining the defendants from interfering with the plaintiffs themselves and for retention of cattle to satisfy loss and damage.

By notice of motion for summary judgment dated the 28th day of November, 1991, Carmel McCabe sought judgment against the defendants notwithstanding the appearance entered on their behalf. By affidavit filed 2nd December, 1991, Mrs. McCabe said that the late James Keogan of Lisduff, Kells, County Meath, signed a voluntary transfer consolidating all of the land comprised on Folio 3639 with the lands comprised on Folio 3621 pursuant to s. 25 of the Land Act, 1965 and in April, 1974 such lands were then registered on Folio 2401 and Folio 1798, which were issued to the first named plaintiff, Thomas McCabe. She referred to her marriage with Thomas McCabe on 23rd September, 1972 and swore that the validity of the marriage had been cancelled on occasions in the past by the fourth named defendant in relation to s. 3 of the Family Home Protection Act, 1976.

Security for costs was sought by notice of motion dated 13th January, 1992, grounded on the affidavit of John M. Smith of Patrick Cusack Smith and Company, which referred to the fourth action by Thomas and Carmel McCabe, two of which were dismissed with costs against the plaintiffs and the third was not pursued by the plaintiffs. The last dismissal of the High Court was on 14th October, 1992.

By defence of the fourth named defendant dated 25th February, 1992, it was denied that that defendant was in control or possession or in occupation or had trespassed on any lands of the plaintiffs and denied that the second named plaintiff was the owner or occupier and counterclaimed in respect of previous vexatious and frivolous proceedings.

6.5 The court has also considered a fifth proceeding by the plaintiff against Dolan Cosgrave and Company (1991) 6351P relating to Folio 3639 where Lynch J. delivered judgment on 14th October, 1991 (see below 8.3.4).

7. Present Claim

7.1 In the present proceedings, Mrs. McCabe, as plaintiff, submitted that in reliance of the first named defendant stating that her husband was not a ward of court, the High Court in Belfast held there was no entitlement to relief having regard to the evidence adduced and the exhibits and having regard to the legal status of Thomas McCabe. She submitted that the defendants defeated her claim by invoking Civil Jurisdiction and Enforcement of Judgements Act, 1991.

Mrs. McCabe argued that her present position, was that she was not legally married to her husband. That was the primary substantive issue of fact raised by her the answer to which could only be found in compelling the defendants to comply with the Master's order for discovery of the documents in the possession and procurement of the defendants.

Mrs. McCabe said that she had entered in good faith into an apparently valid marriage and was misled and deceived by the first named defendant in the issue of a marriage certificate and that the defendant had full knowledge that such marriage certificate had no legal significance. She said that that defendant's motion should be struck out on the grounds of concealed fraud. For that defendant to be seen to benefit from concealed fraud would be an abuse of the court.

She says that the court was required to consider all the relevant documentation which was before it, and the documents which the defendants had failed to produce, as they were continuing to conceal from the court and from the deponent the result of such concealment which was to deny a trial of the factual issue which she said was a scandalous abuse of the process of the court and was not in accordance with the Rules of the Superior Courts.

7.2 Matters relied on to prove Wardship

Fundamental to the plaintiff's claim is that her husband was made a ward of court as a result of the injury the subject of the personal injuries claim in the 1966 proceedings. The claims in relation to property transactions and, indeed, to her subsequent marriage on 23rd September, 1972 and, indeed to the birth of her five children, originate from the wardship.

She referred to the provisions of O. 22 – 10.

She exhibited the medical opinion of Mr. John Lannigan of 4th November, 1965, and Dr. Moloney's reports of 21st January, 1996 and 8th February, 1966.

Dr. Moloney, FRSCI, submitted a medical report on 21st January, 1966. His examination of the central nervous system revealed no abnormalities really, apart from exaggerated tendon jerks. He stated:

"On examination on this occasion very little really could be found clinically, but in view of his story I had his lower dorsal spine, his lumbar spine and his pelvis X-Rayed and these were all reported on as normal.

I did not have this young man's skull X-Rayed here in February, 1965 because it would be useless attempting to do so, it would take two or three men to hold him down during his stay in here anyway, it would only upset him at the time, but now in view of the headaches I think it would be very advisable to have this man referred back here so that I may have his skull and cervical spine X-Rayed; Dr. Hession states that he carries his head to one side – I did not notice this when he was seen here in December. However, please ask him to attend at the Surgical Hospital, Cavan on Friday morning, 28th January, I will have the necessary X-Rays carried out and will let you have a further supplementary report."

By report dated 8th February, 1966 Mr. Moloney recorded the complaints as being pain in the centre of the back at the left of the first lumbar vertebrae; pain lower down in the back over the sacrum, occasional frontal headaches, stiffness in the neck and a catch in his speech when he gets excited.

"On examination his back looks normal, and the movements of his back are, I must say, within normal limits. Examination of his skull revealed no abnormalities, his fundi are normal and there is nothing much to be discovered clinically."

The report concludes that his main complaints were his back.

Mrs. McCabe referred to reports from Drs. Cherry and O'Donovan, neurosurgeons. As is clear from the discovery of the second named defendant, both were in fact the defendant's specialists who had examined the defendant in the presence of the defendant's general practitioner, Dr. Harry Hession.

7.3 She relied on the correspondence relating to the action of Mr. McCabe against James Phillips, to Mr. McCabe being a ward of court. In particular she relies on the letter of Mr. Andrews, Barrister, dated 8th March, 1966; the extensive instructions from Mr. McCabe's solicitor of 5th May to Mr. Andrews and of 31st October to Mr. Griffin S.C. from Patrick Cusack; the letter from the defendants' solicitor, T.P. Robinson and Company of 14th June, 1966 and the letter of Mr. Cusack to the defendants' solicitor giving particulars of negligence and of injuries. These do not give any indication of Mr. McCabe being a ward of court or of being made a ward of court.

Moreover, neither the pleadings nor the settlement make any reference to O. 22, r. 10.

7.4 Mrs. McCabe also relied on the letter from O'Reilly Thornton to Mrs. McCabe of 29th April, 1985 exhibited by the plaintiff refers to Mrs. McCabe's call of 26th and interview with Mr. Thornton where she indicated that she did not want that firm to act for her and requested a return of papers, contains the following paragraph:

"As you know, it was only very recently that we have been made aware that Mr. McCabe was a ward of court. We do not know precisely what his status is and without knowing this it would be unwise for us to conduct business for him even on your instructions. In any event, you have indicated that you do not wish us to represent you any further.

...

As regards Mr. O'Reilly, we have put him on notice of a possible claim against him and if we have a reply from him we will pass on same to you.

Finally, we would repeat our advice that you should allow a solicitor to deal with these matters for yourself and your husband and not undertake to press the claims yourself."

Despite the reference to same at the foot of the letter no enclosure is in fact included. No source of Mr. Thornton's awareness is indicated.

7.5 She also relies on the decision of Mrs. Justice Denham of 20th November, 1992 in the matrimonial proceedings 1992 No. 41M. This refers to an order in relation to the service of the notice of motion only.

7.6 Mrs. McCabe also claimed that a James Fitzpatrick and a John Lynch were trustees acting on behalf of Mr. McCabe, her husband. Superintendent M.P. Staunton of the Garda Síochána, by letter of 11th December, 1992 to Mrs. Joan Smith of Patrick Cusack Smith and Company stated that Superintendent Staunton had called on James Fitzpatrick and John Lynch on 2nd December and that neither of them had any connection with Thomas McCabe and had no idea of how their names came to be linked with the matter. He also stated that the Registrar of the Wards of Court Office had confirmed in writing that Thomas McCabe "is not and has not been at any stage a ward of the High Court".

8. Decision of the Court

8.1 Plaintiff's motion

The plaintiff's motion is for an order striking out the defendants' defences for failure to make discovery as ordered by the court.

It seems clear that the documents so categorised and sought in discovery are those relating to the alleged wardship of Mr. McCabe. No other documents have been identified. These are the documents which the plaintiff says went to the core of her case. No particular complaint was made in relation to the extensive discovery of transfers and charges in the Land Registry. Moreover, no motion for further or better discovery was made.

Mrs. McCabe's extensive submissions, affidavits, from this and, in ease of the plaintiff, from previous proceedings, and exhibits thereto have been considered by the court.

In her submissions on the motion she analysed the wording of the affidavit of discovery of Denis Byrne of the Policy Division of the Department of Justice and maintained that the schedules thereto were incomplete and that certain documents were fraudulent. These appear to be the pleadings and consent order in her husband's claim against Mr. Phillips, (1966) 650 P. She says that the second part of the First Schedule is non compliant and that the Second Schedule is deficient.

However no Privilege is not claimed. No documents which were and are not in the possession of the deponent are indicated.

The plaintiff says that Mrs. Joan Smith's affidavit is similarly incomplete and that Mrs. Smith dishonestly withheld or destroyed the documents. The plaintiff submits that the privilege claimed in the second part of the First Schedule "is non compliant".

Each of the defendants has relied upon the evidence of the Registrar of the Office of Wards of Court, who has confirmed in writing and an affidavit that Thomas McCabe was not, and had not been at any time, a Ward of Court.

8.2. Defendants' motion

The first and second named defendants' motions are that the plaintiff's case ought to be struck out as showing no reasonable cause of action, was bound to fail, was vexatious, that the statement of claim disclosed no reasonable cause of action and that the plaintiff's continuous recourse to the courts in relation to the matters alleged amounted of an abuse of process.

These proceedings are at least the third set of proceedings issued by the plaintiff relating to the cause of action alleged in the statement of claim herein. On 5th March, 1992, the plaintiff commenced an action against the first named defendant, Ireland and the Attorney General. The claim of the plaintiff in the said action was in respect of the same, or substantially the same, cause of action as that alleged in the instant statement of claim and the issues raised in the pleadings in the said action were the same, or substantially the same, as those raised in this action. On that basis, it should be noted that on 22nd July, 1992, this Court held that the plaintiff had no reasonable cause of action against the defendants and ordered that those proceedings be stayed.

Subsequently, in 1995, the plaintiff commenced a further action against the same defendants herein but on that occasion in the High Court of Justice in Northern Ireland Queen's Bench Division. The plaintiff's claim in the said action was "for child maintenance due and owing by the defendants in respect of five children of void marriage a Ward of Court of the defendants". The plaintiff's action was dismissed in its entirety at the High Court in Belfast on 16th February, 1996. The court held that it did not have jurisdiction to hear the case and further opined that even if it did have the necessary jurisdiction, the plaintiff's statement of claim showed no cause of action as against the defendants.

However, on 14th April, 2004, the plaintiff issued fresh proceedings regarding identical matters despite these issues having already been determined by courts both in this jurisdiction and in Northern Ireland.

8.3 Key elements of the plaintiff's claim

The court considers, in some detail, the following matters.

Firstly, the claim for damages resulting from the accident on 8th February, 1965, *Thomas McCabe v. James Phillips* [1966] No. 650P which encompasses the issue of wardship and the positions of Patrick Cusack as litigation friend; James Fitzpatrick of Crubany, County Cavan and John Lynch of Aughnaskerry, County Cavan, as trustees.

The second key element is the allegation that a new identity was given to Mr. McCabe at Lisduff, Virginia, County Cavan where his address was at Lisduff, Kells, County Meath.

Consequent on the issue of wardship is the question of the validity of marriage and the transfers of property. The issue of the Family Home Protection Act and the allegation of Mrs. McCabe being a common law wife is also relevant.

The court should also examine, under this key element, the claims for invalidity of marriage and the suit against the two defendants for fraud in relation thereto and, on the other hand, the claims for maintenance on the basis of that marriage.

Finally, the last issue is that of the extent to which the present claim has already been determined by the previous proceedings in relation to which the plaintiff was a co-plaintiff and plaintiff on her own.

8.3.1. Thomas McCabe v. James Phillips

This action (1966) No. 650P commenced by way of plenary summons dated 11th March, 1966.

Significantly the plaintiff is described as a farm manager residing at Lisduff, Virginia. The accident occurred on 8th February, 1965 on the Virginia/Cavan road in the direction of Kells.

The plaintiff's claim for special damages included a claim for hospital fees (£17.00) and Dr. Hession G.P.'s fees of £42.7.0.

Full instructions were given on 5th May, 1966 to David Andrews, Barrister, and on 31st October, 1966 to Frank Griffin S.C.

The action was compromised by consent dated 10th February, 1967 where it was received and made a rule of court on 16th February, 1967.

There is no indication of the plaintiff being a ward of court or suing by his next friend nor, indeed, any evidence of the order being made under O. 22, r. 10 of the Rules of the Superior Courts which requires approval of the court where monies are paid in to court for a person of unsound mind or an infant.

Though she did not meet her future husband until 1971, one of the complaints of Mrs. McCabe is that the settlement figure of £2,000 was paid to her husband by Mr. Cusack in a pub in February, 1967. Mr. Cusack's practice was taken over by Mrs. Joan Smith who replied to the allegations in respect of the second named defendant.

Two specialists made reports in respect of Mr. McCabe: Dr. Lanigan and Dr. Moloney, between 1st April, 1965 and 3rd February, 1966. Dr. Harry Hession M.B., the G.P. who had accompanied Mr. McCabe on the visits to see those specialists in Dublin, also made a report which was considered by counsel.

Mrs. McCabe indicates that "two neurosurgeons" Dr. Cherry and Dr. O'Donovan, also examined her husband. Indeed the discovery papers from the second named defendant referred to appointments on 1st December, 1965 and 19th August, 1965 with Dr. Cherry in the presence of Dr. O'Donovan and Dr. Hession. It is clear that Dr. Cherry and Dr. O'Donovan, referred to as neurosurgeons by the plaintiff, were appointed by the defendants.

87. The plaintiff, in this action, refers to the note of Dr. J. Joyce of 12th September, 1983, possibly to Mr. McCabe's general practitioner. This note was written, of course, some sixteen and a half years after the consent and, indeed, over eighteen years after the accident. It was in respect of an attendance at St. Davnet's Hospital in Monaghan by Dr. Joyce who was then Senior House Officer. His diagnosis of Mr. McCabe's condition as post-traumatic organic brain damage and a disturbance of emotions secondary to stress at work has to be seen in the light of the date of that note. There is no report from Dr. Youssif who appeared to be Mr. McCabe's consultant.

8.3.2. Wardship

Mrs. McCabe alleges that her husband, Thomas McCabe, was a ward of court and a minor as appears from the pleadings themselves where Cusack Smith and Company are described as agents of a ward of court and minor.

Moreover, Mrs. McCabe, the plaintiff in the present case, by affidavit of 11th February, 1983 (in previous proceedings) at para. 10 said that she visited the Wards of Court office on 17th January, 1985 and was shown and index card in the name of Thomas Patrick Joseph McCabe of Lisduff, Kells, and was told that he was deceased. She also referred to a letter of Bridget Pearse of 13th April, 1985, who says that she accompanied Mrs. McCabe and heard that Thomas McCabe was deceased.

The second time the matter arose was when Mrs. Smith of the second named defendants wrote to Mrs. Thomas McCabe on 17th January, 1986, saying that there was no evidence that Thomas McCabe had been a ward or was a ward.

The third item that the court has considered is a comprehensive letter dated 14th March, 1981 of J. Brendan Fitzpatrick, Registrar of Titles to Thomas McCabe of St. Martins, Lisduff, Virginia, County Cavan in the matter of: Re: Folios 1798, 3621, 3272, 3281, 3271, and 3409. In that letter the Registrar of Titles said that Mr. McCabe was not a ward of court; that Mrs. Joan Smith was not his guardian and that the folios and documents relating to lands referred to are in order as he was previously told.

The fourth matter the court considers is the letter dated 24th December, 1992 of John Dalton to Cusack Smith re Thomas McCabe with a reference JMS/LT.MC 66, confirming that Mr. McCabe was not taken into wardship. He also referred to having received a letter from the Gardaí in Baileboro and confirmed the position to him in that regard. Significantly, that reference of MC 66 relied on by Mrs. McCabe as indicating a file relating to wardship would appear to be the solicitor's file reference in relation to Mr. McCabe's case.

The fifth document considered was a letter of 7th June, 1995 from John Dalton to Frank Lyons, Courts Division of the Department of Justice, who had been directed by the Minister for Justice and the Chief State Solicitor to enquire regarding the wardship position. The letter was headed, Re Thomas McCabe and said that several communications from various parties had been received and that Mr. Dalton confirmed that he was not and had not been at any time a ward of the High Court. He further said that McCabe v. Phillips had been settled before the Master on 16th February, 1967 and was made a rule of court. He said that this might have been taken by Mr. McCabe that he had been made a ward of court.

The sixth document is a letter from Noel Doherty, Registrar of Wards of Court, dated 7th May, 2004 to Avril McCabe, daughter of Mrs. McCabe, under the Freedom of Information Act, where he confirmed "Your father was never either as a minor or as an adult taken into wardship".

This was followed by an affidavit of Noel Doherty sworn 10th October, 2005, where Mr. Doherty said that he had examined the files from 1924 and that Thomas McCabe was not then, nor never had been a ward of court in this jurisdiction.

James Fitzpatrick and John Lynch were contacted by the Garda Síochána and both said that they had no knowledge of why they were regarded as trustees. Mr. Patrick Cusack does not appear to have been a litigation friend or guardian ad litem for Mr. McCabe.

In any event, many of these matters complained of occurred before the marriage of Mrs. McCabe, the plaintiff herein, to Thomas McCabe, which marriage on 27th September, 1972 was five years after the settlement and seven years after the accident.

It is clear that the question of validity alleged depends on the proof of wardship. It is a matter of public record that Mr. Thomas Patrick Joseph McCabe was not a ward of court and, accordingly, any claim in respect of invalidity of marriage on that ground falls. Moreover, there is an inconsistency in claiming that there was a marriage and claiming damages for the invalidity of marriage on the basis of wardship.

In relation to the plaintiff's submissions regarding the Family Home Protection Act. The Registrar of Titles referred to all of the material folios and believed they were in order.

The plaintiff claimed that part of the family home at Lisduff, Kells, had been transferred improperly in 1981 (see paragraph of her statement of claim above). However, it is clear that the Family Home Protection Act only applies to the family home and curtilage and not to any other property.

The family home was not identified to the court with any particularity and, moreover, would seem to have been the subject of previous proceedings.

8.3.3. The address of the plaintiff's husband

The plaintiff claimed that her husband had been provided with a new identity in Lisduff, Virginia, County Cavan, where his address (and, presumably, family home) was at Lisduff, Kells, County Meath. Many references are made to Lisduff, Virginia, County Cavan:

1. plenary summons 650P of 1966 gives the plaintiff's address as Lisduff, Virginia, County Cavan;
2. marriage certificate of 23rd September, 1972 describes Thomas McCabe (28) as of Lisduff, County Cavan;
3. Folio 3621 describes Thomas McCabe as of Lisduff, County Cavan;
4. the letter of Dr. Joyce, SHO, of 12th September, 1983 refers to Thomas McCabe of Lisduff, Virginia;
5. the letter from the plaintiff herself to Mrs. Smith of the second named defendant's firm of 30th September, 1985, in relation to documents are written from St. Martin's, Lisduff, Virginia, County Cavan and signed by Carmel O'Reilly McCabe for and on behalf of Thomas Patrick Joseph McCabe;
6. the letter of Cusack Smith to Dr. Cherry and Thomas McCabe also gives the address of Thomas McCabe as of Virginia (letter dated 10th August, 1966).

On the other hand, both Dr. Moloney and Dr. Lanigan refer in their respective letters of 3rd March, 1966 and 4th November, 1965 as McCabe of Lisduff, Kells.

There is no evidence of Mr. McCabe being given a new identity by way of the addresses or otherwise by reference to the Virginia address which had been used by Mr. McCabe and by the plaintiff herself.

8.3.4. Previous proceedings

The previous proceedings in this case comprise joint actions by Thomas and Carmel McCabe, actions by Mrs. McCabe against the first named defendant and against both defendants herein in relation to their dealings and other actions relating to matrimonial matters both in this jurisdiction and in Northern Ireland.

In an action by Carmel McCabe against Dolan Cosgrave and Company, (1991) No. 6351P re folio 3639, Lynch J. delivered judgment on 14th October, 1991, having referred to the case being very confusing and difficult to follow, held that it was not for him to determine the issues as to the ownership of lands formerly the property of James Keogan for whom the defendant solicitors were acting. The defendants successfully sought an application to strike out the action with costs as the defendants therein were never her or her husband's solicitors.

Proceedings 1984 No. 3620 against the second named defendant were determined by an order that the plaintiff's claim was statute barred.

The proceedings 1992 No. 1640 involved substantially the same essential cause of action as the present proceedings. The statement of claim at 6 above in the former proceedings seems to be based on the same presumption of the plaintiff's husband being a ward of court. On 22nd July, 1992 the High Court determined that the plaintiff had no reasonable cause of action against the first named defendant.

In proceedings in Northern Ireland High Court (1995 No. 2031) that court, by decision of 16th February, 1996, dismissed a similar action in its entirety against the second named defendant.

The remaining actions against the second named defendants referred to above have either been determined or are stale.

8.4 Findings of fact

I am satisfied from the evidence of the Registrar of Titles, Mr. Fitzpatrick, Mr. Dalton, Registrar of the Office of Wards of Court and Neil Doherty, subsequently Registrar, in a comprehensive affidavit that Thomas McCabe was not made a ward of the High Court in 1965 or at any time thereafter. Therefore, no issue in relation to any possible duty of disclosure on the part of the first or second named defendant, his servant or agent arise. I am satisfied that there is no evidence whatever that the discovery is incomplete or that any documents have been suppressed.

These proceedings would seem to be the third time the plaintiff has alleged that the first and second named defendant, its agents or servant were negligent and/or in breach of duty in not disclosing the alleged legal status of Thomas McCabe. Substantially the same cause of action was raised in the plaintiff's action against the Minister for Justice, Ireland and the Attorney General ((1992) no. 1640P) and in the proceedings in Northern Ireland already referred to. The allegation that Thomas Ward was made a ward of court in 1965 and that this fact was not disclosed to the plaintiff, resulting in her suffering loss, was held to comprise no reasonable cause of action by this Court. Moreover, in the proceedings in Northern Ireland, the High Court indicated that no cause of action in relation to the facts alleged could be identified.

The plaintiff's pleadings and her averments are accordingly, incapable of constituting a cause of action against the first named defendant.

It follows, that Mr. McCabe has not the legal disability contended by the plaintiff. Indeed, subsequent to his accident in 1965, he has been the co-plaintiff with Mrs. McCabe in two of the proceedings ((1984) No. 3620P and Circuit Court (E38 of 1991)).

It is clear that all three sets of proceedings initiated by the plaintiff have arisen by virtue of her and her husband's belief that Thomas McCabe was made a ward of the High Court in 1965. On a number of previous occasions, including in two previous sets of litigation, the first named defendant has attempted, without success, to correct this misunderstanding on the part of the plaintiff. However, the plaintiff continues to make grave allegations against both defendants on the basis of her mistaken belief. This Court finds that these allegations are unfounded.

The plaintiff has made allegations that certain transfers to and by Mr. McCabe and, indeed, a bank charge and subsequent discharge were void, fraudulent and based on forgeries in that her name was, unknown to her, indicated thereon and that the provisions of the Family Home Protection Act were not complied with.

The court is not satisfied that there is evidence to substantiate the allegation of fraud or forgery. No evidence was adduced in relation to the plaintiff's purported signature.

The court is unable to come to a conclusion in relation to the Family Home Protection Act as there is no proof nor clear indication given as to whether the transfer and charge involved a family home.

The court notes that in many of the transfers it was certified by the second named defendant that the provisions of the Family Home Protection Act did not apply. The matter of the transfer in relation to the folios had, of course, been referred to in the letter of Mr. Fitzpatrick, the Registrar of Titles.

The court considers that the making of serious allegations against a party without any or any adequate foundation for same is an abuse of process.

8.5 The applicable law

In *Ó Siodhacháin v O'Mahoney*, unreported, Supreme Court, 7th December 2001, the Supreme Court concluded that the High Court had been correct in dismissing proceedings where the statement of claim disclosed no cause of action and held that same amounted to an abuse of the process of the court. Keane C.J. said that the court was satisfied that the allegations made could not be substantiated on the basis of the facts alleged. In the present case similar considerations arise.

In *Fay v. Tegral Pipes Limited* [2005] 2 I.R. 261 at 265 the Supreme Court (McCracken J.) considered the court's jurisdiction to strike out pleadings and to stay or dismiss actions. That court held:

"There is no serious dispute between the parties as to the principles applicable to Motions of this nature. It is accepted that there are two bases upon which such an application may be brought. The first is pursuant to the provisions of Order 19, Rule 28 of the Rules of the Superior Courts which reads:

"The Court may order any pleading to be struck out, on the grounds that it discloses no reasonable cause of action or answer and in any such case or in the case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or Judgment to be entered accordingly, as may be just."

In addition to this provision, the Court has an inherent jurisdiction to stay, strike out or dismiss pleadings where no cause of action is disclosed or if the claim is frivolous or vexatious. This was explained by Costello J. in *Barry v. Buckley* [1981] IR 306 at page 308 where he said:

"But, apart from Order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on Affidavit relating to the issues in the case: see Wylie's Judicature Acts (1906) at pp 34-37 and the Supreme Court Practice 1979) at para 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically this jurisdiction exists to ensure that an abuse of the process of the Court does not take place. So if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley LJ in *Goodson v. Grierson* at p765.

This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice'."

The constitutional right of access to the courts is generated by Article 40.3. it is, of course, a right to litigate claims which are justiciable (*O'Brien v. Manufacturing Engineering Limited* [1973] I.R. 344, 364).

There is a balance between such right and the right of defendants not to be forced to defend proceedings that are not justiciable.

The inherent jurisdiction of the court and O. 19, r. 28 give courts the power to strike out proceedings which can be shown to be insubstantial, frivolous, vexatious or an abuse of process. There may, of course, be considerable overlap in the grounds relied on.

An application to strike out can only succeed where the facts "are not reasonably disputable as in certain cases regarding the conclusion of contracts of the interpretation of contractual documents". Insofar as there is a conflict of fact, this must be resolved in favour of the party against whom the application to strike out has been brought. A claim will be struck out where, on admitted facts or undisputed evidence, it is clearly unsustainable or bound to fail.

The plaintiff has made averments as to her belief that her husband was made a ward of court, but these averments as to her belief are not based on any basis other than the plaintiff's own averments. Indeed, far from offering proof, the plaintiff in her own affidavit, exhibits letters and an affidavit of the former and present Registrar of Wards of Court.

It is clear to this Court that the fact as to whether a person is or was a ward of court is a matter of public record. An official in the office responsible for maintaining that public record has made averments regarding the relevant matter of public record, and no evidence has been put forward by the plaintiff to challenge or contradict those averments, even on a *prima facie* basis. I agree with counsel for the first defendant that the facts regarding the status of the plaintiff's husband as a ward of court are not "reasonably disputable", and the evidence on this matter is in reality "undisputed evidence". In the circumstances the plaintiff's claim should be struck out as clearly unsustainable and bound to fail.

In relation to the defendant's submissions that the present proceedings are vexatious and further amount to an abuse of process and should be struck out, the decision of Ó Caoimh J. in *Riordan v. Ireland* (No. 5) [2001] 4 I.R. 463 is particularly pertinent. Ó Caoimh J. noted at p. 465 as follows:

"...Where the court is satisfied that a person has habitually or persistently instituted vexatious or frivolous civil proceedings against parties to those earlier proceedings without prior leave of the court. In assessment of the question whether the proceedings are vexatious, the court is entitled to look at the whole history of the matter and is not confined to a consideration as to whether the pleadings disclose a cause of action. The court is entitled in the assessment of whether proceedings being brought are being brought without any reasonable ground or have been brought habitually and persistently without reasonable ground."

Moreover, in *Riordan* Ó Caoimh J. referred with approval to a decision of the Ontario High Court in *Re Lang Michener and Fabian* (1987) 37 D.L.R. (4th) 685, 691. The principles set out therein as tending to show that proceedings that proceedings were vexatious. The following extract was approved and seems to this Court to characterise the present and previous litigation in this case:

- "(a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;
- (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
- (c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- (d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
- (e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

where the respondent persistently takes unsuccessful appeals from judicial decisions."

8.6 Statute of Limitations

Finally I should consider the issue of the statute of limitations raised by both defendants in their motion.

The court has already determined in 1984 No. 3620 that the plaintiff's then claim was statute barred. The plaintiff's claim relates to Wardship in 1966/67; to her marriage in 1972 and to transfers made to and by her husband and to a bank charge and discharge made in the 1970's and 1980 the court has found that there is no evidence of fraud, which not pleaded with particularity, (much less any ground to substantiate any criminal offence). Accordingly neither sections 44 or 71 of the Statute of limitation would seem to apply. The court does not feel it is necessary to divert that directions as to the trial of this issue is warranted.

8.7 Conclusion

The applications to the court necessitated a consideration of the plaintiff's claim. This is not the trial of that action notwithstanding the findings of the court which are based solely on the affidavits in this and in related actions. The findings of fact are not controverted merely by assertions.

The court considers that there are no grounds, in the circumstances of the above findings, to accede to the plaintiff's application to strike out the defences for want of compliance with the order for discovery. No privilege is being claimed by the Minister. No indication is made of any deficiency of documents save those alleged to relate to what the court has found to be non-existent wardship proceedings.

The court consequently refuses to direct the trial of issues of fact as it has not been established that there was any fraudulent or other concealment with regard to the status of the plaintiff's husband nor was there any evidence sufficient to substantiate any criminal activity. The court does not make any order that the papers be diverted to the Office of the Director of Public Prosecutions.

The court has jurisdiction to strike out an action to avoid injustice having balanced the constitutional right of access to the courts guaranteed by Article 40.3 and the right of defendants not to have to litigate actions which show no cause or to relitigate actions which have been already determined. The court takes into account that such jurisdiction is exercised sparingly. On the basis of pleadings and on the evidence on affidavit relating to the issues, the facts are not reasonably in dispute.

The court considers that this is a case having regard to the findings by the court, it should make the orders sought by the first and second defendant.