THE HIGH COURT

[2015 No. 7922 P.]

BETWEEN

GILES KENNEDY

PLAINTIFF

AND
DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 14th day of June, 2018

Introduction

1. After exhaustive court processes and the ultimate imposition of a €3,000 fine on the plaintiff for the failure to give a breath sample at a garda checkpoint on 25th April, 2007, the net issue in this application is whether the plaintiff has sufficient standing to maintain his claim for the following two declarations involving the Road Traffic Act 1994 ("the 1994 Act") that:-

> (i) Section 12(3) of the 1994 Act as substituted by s. 3 of the Road Traffic Act 2003 ("s. 12(3)") is inconsistent with the provisions of the Constitution; and
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> (ii) Section 12(3) is incompatible with the obligations of the State under the European Convention on Human Rights ("ECHR").

2. A second basis for the motion issued on behalf of the defendants to strike out these proceedings relies on estoppel and abuse of process defences on the grounds that the plaintiff should have raised the points in earlier judicial review proceedings which he prosecuted.

Background

3. The plaintiff, who describes himself as a "*semi-retired solicitor*" in his sole affidavit for this application sworn on the 4th March, 2017, was stopped at East Wall Road in Dublin on the 25th April, 2007. In 2007, s. 12(3) provided that a motorist could be arrested by a garda without warrant if the garda formed the opinion that the motorist had committed an offence by refusing or failing to give a breath sample. Section 13 of the Road Traffic Act 2003 (as amended) ("s. 13") obliged a motorist to provide a specimen at a Garda Station. Conviction for an offence under s. 13 attracted more severe penalties than for a conviction under s. 12.

4. Section 23(1) of the 1994 Act ("s. 23 defence") provided for a defence to a s. 13 prosecution only, which allowed an accused "*…to satisfy the court that there was a special and substantial reason for his refusal or failure and that as soon as practicable after the refusal or failure concerned he complied (or offered but was not called upon to comply) with the requirement…*" to provide a specimen.

Chronology

5. This Court makes no comment at this stage on the following litany of litigation events:-

> 25.04.2007 The plaintiff was charged with separate offences under s. 12 and s. 13.
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> 26.04.2007 The prosecution came before the District Court and an order was made to disclose the evidence available to the prosecutor which is often called "*a Gary Doyle order*" having its origins in *DPP v. Doyle* [1994] 2 I.R. 286.
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> 13.04.2011 Following many adjournments including those granted to await the judgment in *Dowling v. Judge Brennan* [2010] IEHC 522, which concerned the limits for disclosure, the plaintiff was convicted of offences under s. 12 (failure at roadside) and s. 13 (failure at the Garda Station). There is no controversy between the parties that the defence based on systemic delay was rejected. The plaintiff was the only witness to give evidence about his deteriorating hearing in the District Court.
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> 18.04.2011 This was the date of the plaintiff's notice of appeal from his convictions to the Circuit Court.
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> 23.02.2012 The Circuit Court made a disclosure order in respect of a garda manual as requested by the plaintiff.
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> 24.02.2012 The *de novo* appeal hearing was adjourned to 18th October, 2012.
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> 23.05.2012 The plaintiff obtained leave to bring judicial review proceedings challenging the disclosure order made on 23rd February, 2012.
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> 24.03.2014 The High Court (O'Malley J.) refused to grant any relief to the plaintiff in the said judicial review proceedings [2014] IEHC 200.
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> 30.05.2014 McKechnie J. for the Supreme Court refused the plaintiff's application for a stay on the further prosecution in the Circuit Court pending the Supreme Court's determination of his appeal from the judgment and order of O'Malley J. The unreported judgment identified that "*the central issue between the parties related to the making available of documentation relative to the apparatus which the appellant was asked to exhale into*".
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> 18.06.2014 The plaintiff applied to the Circuit Court for an adjournment of his appeal pending the determination by the Supreme Court of his appeal from the judgment and order of O'Malley J. Paragraph 18 of the plaintiff's affidavit sworn on 8th March, 2017, refers to his intention to prosecute this appeal for the purposes of costs in the judicial review proceedings although he mentions mootness in view of the disclosure subsequently granted by the Circuit Court.
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> 18.12.2014 The plaintiff sought a consultative case stated by the Circuit Court on whether a defence was available for the s. 12 offence and if not whether the absence of such a defence was constitutional.
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> 20.03.2015 A draft consultative case stated was served on behalf of the plaintiffs.

23.07.2015 Submissions were made on behalf of the first named defendant ("DPP") to the Circuit Court that it was not possible to challenge the constitutionality of legislation by way of case stated and that the plaintiff was estopped by omission in not incorporating the issue in the judicial review proceedings for which leave had been granted in May 2012. The Circuit Court determined that it would not state a case as requested and set 11th November, 2015, for the hearing of the appeal.

02.10.2015 The plaintiff issued the plenary summons in these proceedings followed by the delivery of a statement of claim. It is worth noting that para. 8 of the statement of claim delivered prior to the Circuit Court appeal hearing pleads that "*[t]he District Court judge in convicting the Plaintiff did not accept the evidence of the Plaintiff*".

11.11.2015 The defendants issued the notice of motion which is now before this Court grounded with an affidavit of a solicitor in the office of the DPP.

11.11.2015 The plaintiff's appeal commenced before Her Honour Judge Codd who resumed hearing it on 19th February, 2016 and 12th May, 2016.

12.05.2016 The transcript of the hearing before Judge Codd as exhibited and accepted as accurate in the meaning attributed by the defendants in the supplemental affidavits sworn on 23rd January, 2017, reveals that the plaintiff's application for a direction in respect of the s. 13 charge (refusal at station) was granted on the basis that the plaintiff had offered to provide a blood/urine sample just before he was charged. The plaintiff was convicted of the s. 12 charge and fined €3,000 with three months to pay and fourteen days' imprisonment in default of paying. The plaintiff, his wife and an audiologist gave evidence at the Circuit Court about the plaintiff's impaired hearing but Judge Codd found that he was not impaired to the extent that he did not understand what he was required to do at the roadside.

23.01.2017 A solicitor in the office of the DPP swore the supplemental affidavit already mentioned and averred that the defendants' hope that the plaintiff would discontinue these proceedings had not been realised.

04.03.2017 The plaintiff swore a five-page replying affidavit accepting many of the averments and conclusions about the issues resolved by Judge Codd, while insisting that the ruling of Judge Codd "*must be put in context that the learned trial judge had been made aware of the fact that s. 12 of the Road Traffic Act 1994 provided for no defence and appeared to be an absolute liability offence*". He effectively disputes the contention for the defendants that there is no factual basis to maintain these proceedings now.

I. The locus standi issue

The Kernel
6. The *locus standi* point centres on the submission for the defendants that both the District Court and the Circuit Court have found facts which deprive the plaintiff of the opportunity to rely on a defence based on a s. 23 defence if such a defence existed for a s. 12 prosecution. In other words, the facts as established do not avail the plaintiff because the plaintiff's hearing impairment did not cause his refusal or failure to provide the breath sample as required at the roadside under s. 12.

7. These findings of fact are *res judicata* having undergone the rigours of a trial in the District Court and a completely new trial with additional witnesses in the Circuit Court. Counsel for the defendants submitted that the plaintiff "*cannot borrow someone else's facts*" or "*cannot invent a set of facts […] in life there is one set of facts any litigant can ever rely on…*".

Interest in Litigation
8. The Court accepts that the first rule to be applied is whether the plaintiff has an interest in this litigation. Undoubtedly, the plaintiff was prosecuted and convicted under the impugned section; the plaintiff is not a random person who thinks that he would like to get a ruling about whether a section is constitutional or not, irrespective of whether he has come within or will engage with the section in real life.

Ius Tertii
9. Counsel for the defendants urged the Court to apply the second rule which applies in assessing whether a litigant has standing; are the facts relied upon in the challenge applicable to the plaintiff? This Court asked counsel about the position where a motorist is incapable of hearing the garda requesting a breath test. The reply was that the plaintiff never told the gardaí that he had a hearing problem or that he did not know what was requested; he simply did not have the incapacity which he now advances to challenge the legislation.

10. Counsel for the plaintiff clarified for the Court that at least two other cases have been commenced which challenge the modern day equivalent of s. 12 which is s. 9 of Road Traffic Act 2010 ("s. 9 of 2010") due to the lack of a s. 23 type defence for a roadside request. Section 22 of the Road Traffic Act 2010 provides for a defence along the lines of a s. 23 defence but it likewise does not avail someone accused of failing to give a breath test on the roadside.

11. This Court can only deal with this application to strike out these proceedings for not having the relevant facts to challenge. The height of the plaintiff's case is that s. 12(3) or its modern day equivalent will be struck down at some stage if the right applicant comes along with the required facts. In that way, the plaintiff should not be prosecuted under a section which is inherently flawed according to the plaintiff.

The Law
12. Henchy J. in *Cahill v. Sutton* [1980] I.R. 269, in the context of a constitutional challenge to the Statute of Limitations 1957 which had not provided for a date of knowledge proviso about the cause of action stated at p. 280:-

> *"…the argument formulated on her behalf is not that she is unjustly debarred from suing because of the alleged statutory defect but that a person to whom the suggested saving provision would apply if it had been enacted could claim successfully in the High Court a declaration that s. 11, sub-s. (2)(b) [Statute of Limitations 1957], is unconstitutional because the suggested saving provision is not attached to it. Therefore, the plaintiff is seeking to be allowed to conjure up, invoke and champion the putative constitutional rights of a hypothetical third party, so that the provisions of s. 11, sub-s. (2)(b), may be declared unconstitutional on the basis of that constitutional jus tertii—thus allowing the plaintiff to march through the resulting gap in the statute."*

13. Henchy J. at p. 286 stated:-

> *"The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected, by the operation of the statute."*

14. In *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88, the appellant was convicted of the offence of unlawful carnal knowledge of a fifteen-year-old girl contrary to s. 1(1) of the Criminal Law (Amendment) Act 1935, after pleading guilty to the offence. He sought to challenge his conviction on the basis that there was no 'mistake of age' defence available under the legislation. Hardiman J. stated (at p. 165):-

> *"…a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see Cahill v. Sutton [1980] I.R. 269. In other words, he is confined to the actual facts of his case and cannot make up others which would suit him better."*

15. In that case Mr. A. was not entitled to rely upon a defence of reasonable mistake as to age because of the admitted facts of the case. The applicant in the earlier case of *C.C. v. Ireland* [2006] 4 I.R. [2006] IESC 33, had this standing.

16. In *Shirley v. O'Gorman* [2012] 2 I.R. 170, the plaintiffs sought to challenge the constitutionality of s. 10(2) of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 which set out conditions in order for a lessee to compulsory acquire the fee simple in a tenement from a lessor. It contained a presumption as to who had erected the buildings in question.

17. Fennelly J. giving the judgment of the Supreme Court stated that:-

> *"The standing of the plaintiffs to challenge the constitutionality of provisions of the ground rents legislation depends entirely on them being affected by the impugned provisions." (p. 187)*

18. On the facts of the case, the plaintiffs were unable to do this:-

> *"…the section, when interpreted in the light of the presumption of constitutionality, and the double construction rule, would have enabled the second plaintiff to point to the fact that, as of the date of grant of the leases of 1919 and 1945, its predecessor in title had gathered into their ownership all prior rights whether of lessor or lessee. It would thus have been able to rebut the presumption in s. 10(2) of the Act of 1978, that the permanent buildings had not been erected by the lessor or its predecessor in title and defeat the application of the first defendant for the purchase of the fee simple in the property. The section, properly construed, would not, therefore, have affected the second plaintiff, and it would not have any standing to challenge the section as being repugnant to the Constitution." (p. 196)*

19. In *Director of Public Prosecutions v. Lawel* [2014] IECCA 33, the applicant challenged the search of a parcel containing cocaine that had been purportedly sent by the South African Embassy in Caracas, Venezuela and which was addressed to a fictional person, namely "*Tony Tuto, Honorary Consul of the Republic of South Africa*". The applicant had collected the parcel. The Court of Criminal Appeal held that the applicant could not assert the rights of a non-existent person. The court held:-

> *"It is not open to the respondent to assert a jus tertii right on the part of a non-existent person. This is a classical instance of a 'conjuring up' in Henchy J.'s memorable phrase in Cahill v. Sutton [[1972] I.R. 269], of a right to which the respondent is not entitled. The constitutional right of privacy inheres only in an individual, be that individual corporate or personal, who is cognisable by the courts. A fictitious person does not come within that category. A fictitious person cannot assert or bestow a constitutional right. That fictitious person's right cannot be affected adversely." (para. 60)*

20. In *Waxy O'Connor's Limited v. Judge Riordan* [2016] IESC 30; [2016] 1 I.R. 215, the Supreme Court stated:-

> *"On the authority of the judgment of this court in C.C. v. Ireland [2006] 4 I.R. 1, a powerful case can be made, therefore, that, absent the necessary testimony from such a barman, the appellant has no locus standi to raise a constitutional issue, and is impermissibly seeking to assert a jus tertii. There was no evidence of 'due diligence', in any shape or form, by a barman who engaged in sale, delivery or supply to A.B. As a matter of law, it is not open to the appellant to advance a constitutional challenge based on jus tertii." (para. 23; para. 25)*

Reconciling the judgments of Hogan J.

21. The following excerpts from the three judgments of Hogan J. when he was in the High Court which referred to each other and which are relied upon by counsel for the plaintiff:-

> (i) paragraphs 7 and 8 in *Salaja (A Minor) v. Minister for Justice* [2011] IEHC 51 ("Salaja");
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> (ii) paragraphs 21 and 22 of *Douglas v. Director of Public Prosecutions & Ors* [2014] 1 I.R. 510, [2013] IEHC 343 at pp. 520-521 ("Douglas"); and
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> (iii) paragraph 15 of *McInerney v. DPP* [2014] 1 I.R. 536, [2014] IEHC 181 ("McInerney").

are in my opinion informative but are peculiar to the circumstances arising in each of those three cases. They cannot be viewed as changing the law established by the Supreme Court and the Court of Criminal Appeal which are identified earlier in this judgment.

22. Salaja concerned a Nigerian national with a study visa who had formed a relationship with a woman from Northern Ireland and they had two children together. He challenged the legality of the defendant Minister's refusal to take account of his new family circumstances. The defendant Minister maintained that the proceedings were moot because of later applications made by Mr. Salaja.

23. Mr. Douglas was charged with causing scandal and injuring the morals of the community under s. 18 of the Criminal Law (Amendment) Act 1935 (as amended) ("1935 Act"). He challenged the constitutionality of that section on the grounds that it was not sufficiently precise as to meet the test for legal certainty in criminal matters.

24. In *McInerney,* Hogan J. declared s. 18 of the 1935 Act to be inconsistent with the Constitution because the offence of offending modesty was hopelessly vague.

25. In conclusion, the said elaborate paragraphs of Hogan J. relied upon by counsel for the plaintiff do not change the law concerning the long-established standing test.

C.C. v. Ireland
26. Counsel for the plaintiff also cited para. 15 of the judgment of Denham J. in *C.C. v. Ireland* [2006] 4 I.R. 1; [2006] IESC 33 at pp. 9-10 and emphasised the last phrase in particular:-

> *"The facts in this case are somewhat hypothetical. However, the kernel issue is clear and it is the query as to the availability in law of a defence as to whether a mistaken belief by an applicant as to the complainant's age is a defence under the law. Consequently, while the facts are not yet established and have yet to be found and no part of this judgment should be read as in any way taking from the jury the decision-making power on the facts, this court is in a position to consider the law and construe the statute and determine whether under the law such a defence is available."*

27. In C.C., the applicants sought declarations arising from the absence of a defence based on mistaken belief of age. The circumstances there were very different to the factual details established at the hearings leading to the plaintiff's conviction. I do not interpret Denham J. as establishing a right to challenge legislation pursuant to which one may be prosecuted based on facts which cannot impact directly on the accused's convictions.

Determination
28. This Court determines that the plaintiff does not have standing to seek a declaration that s. 12(3) is inconsistent with the provisions of the Constitution or is incompatible with the obligations of the State under the provisions of the ECHR. As those are the only reliefs sought by the plaintiff in his statement of claim, there is no purpose in allowing these proceedings to proceed to a plenary hearing. I, therefore, make an order striking out the proceedings in their entirety for failing to disclose a reasonable cause of action.

II. Estoppel by Omission/Abuse of Process

Submissions for the Defendants
29. Counsel for the defendants submitted that it is unfortunate that the plaintiff is still litigating his road traffic prosecution "*which had such a good result for him at the end of the day*". He asked "*how far will [this litigation] go […] it can go to the Court of Appeal, […] to the Supreme Court […] to Strasbourg*." He rhetorically asked "*is there ever a point in which litigation ends and which one takes a sensible view and says: look, I gave this my best shot. I tried to run the idea of incapacity. Two judges have now disbelieved me.*" It was in that context that I was urged to deal with the estoppel by omission argument. In short, it is contended that the plaintiff could have litigated this issue regarding incapacity in his judicial review proceedings.

30. The defendants relied upon the oft quoted statement of Wigram V.C. in *Henderson v. Henderson* [1843] 3 Hare 100 at 115:-

> *"…I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

31. The defendants submitted that this rule is aimed at preventing abuse of the court's process and to protect parties from being subjected to harassment by successive proceedings dealing with the same subject matter.

32. The principles summarised by Charleton J. in *Gallagher v. ACC Bank plc* [2011] IEHC 367 were cited:-

> (a) the protection of individuals and public bodies from vexatious and frivolous litigation;
>
> (b) the finality of litigation;
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> (c) the efficient and economic use of court time; and
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> (d) relevance.

33. The defendants also submitted that the plaintiff could not have hoped and cannot hope to succeed in these proceedings. They cited the following statement by McCracken J. in *Fay v. Tegral Pipes Limited* [2005] 2 I.R. 261; [2005] IESC 34 as two reasons for not allowing the alleged abuse of process:-

> *"Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes, and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complaint in law. The second, and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed." (p. 266)*

34. It was, therefore, submitted that the plaintiff ultimately cannot succeed in his claim. In those circumstances, it would be an abuse of process.

Submissions of the Plaintiff
35. While the plaintiff accepted the principles derived from *Henderson v. Henderson*, it was urged that the plaintiff is not "*guilty*" of "*keeping points over from one legal proceedings to another*" in the fashion described by way of example in *McFarlane v. DPP* [2008] 4 I.R. 117.

36. It was argued for the plaintiff that the constitutionality point only occurred to the plaintiff and his legal advisers following the judgment of the Supreme Court in *DPP (Keoghan) v. Cagney* [2013] 1 I.R. 493, (11th March, 2013) and this post-dated the leave to bring judicial review proceedings.

Abuse of Process

37. Abuse of process is different from malicious prosecution which is not alleged by the defendants. The defendants effectively submit that the plaintiff, who practised as a solicitor and may continue to do so, is now misusing the court process. He should have made the claims made in these proceedings in his 2012 application seeking leave for judicial review. If this Court had to determine the defence based on *Henderson v. Henderson* or abuse of process, it would prefer to afford the plaintiff an opportunity in person to explain why he did not pursue the constitutional and ECHR claims in his application for leave seeking judicial review in 2012. I am conscious that the consequences for the plaintiff from a finding of misusing the court process could be more detrimental than such a finding for a litigant who is not a solicitor.

38. The Court cannot determine based on the affidavit evidence presented in these applications whether the plaintiff has or had an unlawful ulterior motive in prosecuting these proceedings or whether the proceedings have been instituted for a purpose which the law does not recognise as a legitimate use of the remedy which has been sought.

39. The plaintiff may have exhibited signs bordering on obsession with litigating an issue that arose over a decade ago. The plaintiff has had the privilege of being a solicitor and has had the benefit of representation by experienced counsel throughout all of his forays in the various courts. The Court cannot but be concerned with the time and resources expended which have allowed the plaintiff to exhaust every conceivable cause of action and remedy to right the plaintiff's perception of wrongdoing on the part of the State in applying and enforcing the road traffic legislation. Nevertheless, I am not in a position without further evidence to make any order based on the defendant's submissions other than the order already made striking out the proceedings for the reasons given.

Conclusion

40. The notion that one can start new proceedings as legal concepts and jurisprudence evolve following the determination of earlier proceedings might have some traction if some significant injustice arose. It is difficult, if not wrong for this Court to describe the circumstances where judgments in other cases might allow new claims following earlier unsuccessful judicial review proceedings. The plaintiff does not advance any good reason whether based on justice or constitutional principles to depart from the long-established *Henderson v. Henderson* principles. However, having made that point, it is this Court's preference to afford the plaintiff the opportunity to plead and give evidence about his state of knowledge which he now seeks to rely upon if it had to make a decision on the estoppel by omission or abuse or process submissions made on behalf of the defendants.

41. The Court has proceeded to deal with the estoppel by omission and abuse of process arguments in order to ensure that any further prosecution of the plaintiff's claims in this court will incur limited time and expense. Bluntly, the plaintiff cannot prosecute these proceedings further if he does not succeed on setting aside my earlier order striking out same.