

THE HIGH COURT**JUDICIAL REVIEW****[No. 2004 2102 P]****Between:****AIDAN CUNNINGHAM****PLAINTIFF****v.****NORTH EASTERN HEALTH BOARD AND BY ORDER MONAGHAN COUNTY COUNCIL****DEFENDANT****Judgment of Mr. Justice Hedigan delivered the 15th of May 2012**

1. The second defendant Monaghan County Council seek the following reliefs:

(1) An order striking out the plaintiff's claim against Monaghan County Council for failure on the part of the plaintiff to first seek an authorization from the Personal Injury Assessment Board pursuant to Section 11 of the Personal Injury Assessment Board Act 2003.

(2) Such further and other Orders as the Court thinks fit.

(3) Costs.

2. On the 19th February, 2004 proceedings between the plaintiff and the North Eastern Health Board were commenced by way of Plenary Summons. The plaintiff's claim arises out of an alleged assault which took place in 1963 when the plaintiff was a patient in Monaghan General Hospital. On the 9th November, 2009 Monaghan County Council were joined as a co-defendant by the plaintiff on the basis that it was at all material times the owner, operator, occupier and manager of Monaghan General Hospital. The plaintiff did not have on the date of moving its motion to join Monaghan County Council to the proceedings or at any time thereafter an Authorization from the Personal Injury Assessment Board to bring proceedings against Monaghan County Council. The second defendant argues that pursuant to the Personal Injury Assessment Board Act 2003, (hereinafter referred to as the PIAB Act) unless and until an application is made to the Board in relation to the relevant claim and then only when the bringing of those proceedings is authorized no proceedings may be brought in respect of that claim. The second defendant maintains the plaintiff failed in its legal obligation to obtain an authorization from the Personal Injury Assessment Board in relation to Monaghan County Council and therefore the proceedings against Monaghan County Council are not properly before the Court.

The plaintiff argues that as is evident from the amended Plenary Summons, Monaghan County Council was effectively joined to proceedings dated the 19th February, 2004, albeit that joinder occurred in November 2009. These proceedings pre-date the coming into effect of the PIAB Act 2003 (Commencement) (No.2) Order 2004. As such the provisions of the PIAB Act do not apply to these proceedings which are prosecuted by way of Plenary Summons and Statement of Claim. Without prejudice to this submission the plaintiff argues that the instant claim seeks various declaratory reliefs which exclude it from the provisions of the PIAB Act. This is evident from Section 4 of the Act which defines a 'civil action' as one where damages are sought to be recovered for Personal Injuries but does not include an action intended to be pursued which in addition to damages for the foregoing matters it is *bona fide* intended and not for the purpose of seeking to circumvent the operation of section 3, to claim damages or other relief in respect of any other cause of action. It is submitted that in the instant claim the plaintiff seeks various declaratory reliefs not appropriate to be determined by the PIAB provisions. The claim also seeks to recover damages in respect of breach of fiduciary duty, assault, trespass and intentional infliction of emotional distress. Section 2 of the Civil Liability and Courts Act specifically excludes an action for trespass to the person in the definition of a Personal Injuries Action. It is also submitted on behalf of the plaintiff that the Court has by virtue of Order 15 Rule 13 of the Rules of the Superior Courts an inherent jurisdiction in relation to the adding of a defendant or plaintiff in any matter. In the present case the 2nd named defendant was not joined or sued in the first instance by virtue of the fact that the first named defendant by letter dated the 26th August, 2003 identified themselves as the appropriate defendant in answer to an initiating letter from Mc Mahon O'Brien Downes Solicitors dated the 29th July, 2003.

Decision of the Court

3. The PIAB Act 2003 Act sets out to regulate the processing of complaints of personal injuries resulting from the torts referred to in the Act. If a claim is one to which the Act applies, then it is subject to processing under the mandatory procedural framework contained in that Act. This will result in the assessment of damages or the issuing of an authorization to bring court proceedings. Section 12(1) of the 2003 Act stipulates that an application first be submitted to PIAB for an authorization before court proceedings may be brought. It contains a statutory prohibition on actions being instituted at all unless and until an application is made to PIAB and an authorization is issued; only then can court proceedings be brought.

4. In *Sherry v Primark and Cleaning Services Limited* [2010] IEHC 66 O'Neill J. stated at paragraph 5.3 as follows:-

"...the purpose of the Act as gleaned from the preamble and the general scheme of the Act... strongly suggests that the intention of the Oireachtas was to prevent or prohibit the commencement of court proceeding until the procedures set out in the Act of 2003 were followed leading to an assessment of damages or the issuance of an authorization. Thus in my view the correct conclusion is that s.12(1) operates as a jurisdictional rather than a procedural provision, so that a court does not have jurisdiction to permit the commencement of proceedings in respect of a relevant claim, until the foregoing procedures under the Act of 2003 have been exhausted."

5. This means that if the provisions of the PIAB Act apply, this court has no jurisdiction to deal with the case.

6. The defendant Monaghan County Council who are the moving party claim, and it is not denied that when the plaintiff applied to join them he did not have the required authorization from PTAB. On this basis they argue the claim should be struck out.

7. The plaintiff argues firstly that because the original proceedings were issued on the 9th February 2004, some three months prior to the commencement of the PIAB Act, the Act does not apply. Secondly, the plaintiff argues that s.4 of the PIAB Act defines a civil action as one where damages are sought for personal injuries but does not include an action intended to be pursued to claim damages or other relief in respect of any other cause and action. This exclusion does not apply if the bringing of it is not *bona fide* and is intended to circumvent s.3. The plaintiff argues that the original proceedings included claims not just for damages for personal injuries but also for declarations. These non personal injury claims are the plaintiff argues therefore not civil actions and are not covered by the PIAB Act requirement. They cannot moreover be described as not *bona fide* or intended to circumvent s.3 because they were pleaded before the Act came into existence.

8. Are these proceedings subject to the PIAB Act and not excluded from it because the original proceedings were commenced prior to the 1st June, 2004. In *Allied Irish Coal Supplies v Powell Duffryn* [1984] 2 LR. the Supreme Court held that a court would not permit a person to be made a defendant in an existing action at a time when he could rely on the Statute of Limitations to bar the proceedings. Murphy J held as follows at 533:-

"It is a well established rule of practice that a court will not permit a person to be made a defendant in an existing action, at a time when he could rely on the Statute of Limitations as barring the plaintiff from bringing a fresh action against him (see *Liff v. Peasley* [1980] 1 W.L.R 781 and *Kettman v. Hansel Properties Ltd* [1987] A.C. 189".

Thus the nature of the application to join Monaghan County Council is that of new proceedings. This being so, the PIAB Act is applicable even though the original proceedings predate the Act.

9. Are the proceedings a 'civil action' within the meaning of s. 4. Is this an action in which, in addition to damages for personal injury, it is intended to claim damages or other relief in respect of any other cause of action. It must be accepted that the circumvention and *bona fide* exceptions do not apply because the plaintiff pleaded for assault, trespass to the person and declarations in the original pleadings before the PIAB Act commenced. Assault and trespass to the person in the context of these proceedings seem to be included in the description of personal injury. Declarations do not but the question to ask is do these non personal injuries claims constitute a claim for damages or other relief in respect of any other cause of action. It seems to me that the entire nature of this case is one of personal injury and no other cause of action is being referred to when the plaintiff refers to trespass to the person or declarations. The plaintiff alleges against Monaghan County Council that it owed him a duty which it breached as a result whereof he sustained the personal injury of which he complains. It seems to me that the other matters raised in the pleadings are just different ways of seeking the same thing i.e. damages for personal injury.

10. To summarize, the joinder of Monaghan County Council is a form of new proceeding which was initiated when application was made to the High Court to join them in 2008. As such it was subject to the requirement for authorization by PIAB. This is a jurisdictional matter and without this authorization this court has no jurisdiction to entertain the new proceedings. The proceedings are a civil action within the meaning of s. 4 of the PIAB Act and are not excluded by s.4 (1)(i). The case against Monaghan County Council must be dismissed.