THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 290

[2016 No. 311]

The President
Finlay Geoghegan J
Hogan J

BETWEEN

VK

PLAINTIFF

AND

MW, BW, THE HEALTH SERVICE EXECUTIVE

AND JWG

DEFENDANTS

JUDGMENT of the President delivered on 9th February 2018

Introduction
1. In this action, brought by the plaintiff as a personal litigant, he claims that his wife made false allegations that he had sexually abused their 4-year old daughter and that the investigating Garda and the HSE wrongfully pursued enquiries into the matter, which resulted in drastic consequences for him. He sues his wife, the Garda, the HSE and even his daughter individually who is still a minor. On separate preliminary applications made by the Garda and the HSE, contending that the statement of claim disclosed no cause of action, or alternatively, that the action was bound to fail, the High Court, by orders of Binchy J. and O'Regan J., respectively, dismissed the claims against those defendants. This is Mr. K's appeal against each of those orders.

2. The circumstances giving rise to the claim began when the plaintiff's wife made a formal complaint to Garda BW that her husband had sexually abused the couple's four-year old daughter. The Garda referred the matter to the HSE in accordance with established procedure in such cases and childcare professionals investigated the allegation. That included interviewing the child and Mr. K, who protested his innocence at all times, and who maintained that his wife had put the child up to making these false and very serious allegations against him. The outcome of the assessment of the case conducted by the HSE Family Centre is quoted in documents relied on by the plaintiff as "inconclusive however, concerns remain that sexual abuse may have occurred". They were handed over to the Gardaí and specialist officers conducted an interview with the child which was video recorded. They, in turn, put the case back in the hands of Garda BW. He had been kept informed of the progress of the enquiries as they happened. He was in communication with Mr. K's solicitor and he then arranged with Mr. K himself to come to the Garda station for interview. On his arrival, Garda BW arrested Mr. K under s. 4 of the Criminal Justice Act 1984 and interviewed him after the member-in-charge authorised his detention for the further investigation of the complaint. When the interview was completed, Mr. K was released. Garda BW sent a report to the Director of Public Prosecutions who decided that there should not be a prosecution and Garda BW and a colleague duly informed Mr. K. The time from when he was first notified of the complaint to communication of the Director's decision was some 28 months in total.

The Plaintiff's Pleadings

Plenary Summons
3. The summons was issued on 7th September 2015, naming four defendants as follows.

First, is the plaintiff's wife

Second, is Garda BW

Third is 'Health Service Executive South'

Fourth is the plaintiff's minor daughter. Her Date of Birth is 5th September 2002, so she was aged 13 at the date of the summons.

4. The first paragraph pleads that Mr. K was called for interview by Garda BW at a Garda station on 15th September 2009. He went with his nephew and on arrival he was arrested and interviewed by Garda BW and a female Garda. The interview was recorded. Mr. K strenuously denied allegations of sexual abuse of his four-year old daughter. He was photographed with the Case Number and his fingerprints were taken:

"This was totally humiliating situation for the Plaintiff. Plaintiff's life and reputation has been destroyed."

He pleads that Garda BW and another officer informed him at his home on 27th March 2010 that the Director of Public Prosecutions had decided that there should not be a prosecution and the case was not under investigation any more.

5. The plaintiff then sets out a number of matters involving him and his wife including legal issues between her and her parental family that came to litigation which matters are not relevant to these appeals.

6. He pleads that his wife filed papers in the relevant District Court for a barring order against him on 9th January 2007. His wife had restricted his access to the family home from July 2006, but excluded him completely on 24th December 2006 and he has not lived there since then.

7. Although he visited the former family home on occasions between 4th and 15th January 2007 to see his daughter, his wife "never indicated that Plaintiff should not come in and has given him dinner while the Plaintiff was there". I think that this is an error and Mr. K intended to say that his daughter was present at the time.

8. On 3rd April 2007, the plaintiff and his wife settled the District Court proceedings and agreed to live separately and apart and not to attend at each other's residences except for access arrangements for their daughter, as agreed or as ordered by the court.

9. After eight months of separation, the plaintiff's wife "filed alleged child abuse case" with Garda BW and it was investigated by him and the HSE.

10. The plaintiff was interviewed by the HSE on 28th November 2007 when he gave detailed answers and "vehemently denied the allegation".

11. On 24th July 2008, when a HSE Family Centre report was being read before the plaintiff, Mr. K became very distressed, unwell and had unbearable chest pain and an ambulance had to be called to take him to hospital "it was unbearable pain for Plaintiff; Plaintiff's life and reputation was destroyed".

12. Mr. K complains that Garda BW and the HSE "have relied upon the statement of a five-year old Child (Defendant number 4)". The plaintiff then sets out in subparagraphs a) to k) a series of excerpts from the child's interview with the HSE personnel to suggest, apparently, that the statement, insofar as it implicated him, was not reliable. What is clear, however, from these excerpts, which it would be wholly inappropriate to quote, is that the child displayed some knowledge of sexual vocabulary and anatomy and she also gave information that would be a cause of real concern to any investigator of sexual abuse. It would actually cause considerable alarm to any normal person whether he or she had any particular qualification or expertise or not. This material should not have been included in the plenary summons or elsewhere in the pleadings or affidavits and is not furnished in the materials of the defendants. Since it has been provided, it is indicative of the serious nature of the allegations and does not in any way achieve the objective sought by the plaintiff. In fact, as becomes clear, his real case is not that the child did not say these things, but rather that her mother put her up to them for the purpose of damaging him.

13. Mr. K records a note in a report in the HSE documentation in which he stated his belief "that he was 100% sure that [his daughter's name] was trained by his wife".

14. The plaintiff then pleads that after the HSE report, Garda BW started his investigation:

> "Plaintiff came to know that once report of the HSE is inconclusive, Garda's can't start their investigation; especially when Garda took part in the HSE investigation. However, Director Public Prosecution has decided this matter that there shall be no prosecution."

Mr. K says that he is a layman with little income and he is not in a position to engage legal representation. Lack of money and his health provided him filing his defamation court case. He requests that any technical errors may be ignored. He also requests all the records of his wife and of Garda BW relating to the case may be summoned for the matter to be properly adjudicated.

15. Finally, he pleads: "That defamation and additional compensation may this honourable Court deem fit may please be assessed and granted to Plaintiff in the interest of justice. It is requested that €1m may please be granted to me".

Statement of Claim

16. The statement of claim is dated 18th November 2015. The first paragraph is the same as in the plenary summons with the addition of the following sentence:

> "It is believed that Defendant number two failed to inform Plaintiff that he was to be arrested on the site of Garda station and under what section of Law."

17. Paragraph 2 records the visit by the Gardaí to inform Mr. K that there would be no prosecution which occurred on 27th March 2010.

18. Paragraphs 3 to 6 plead wholly irrelevant matters.

19. Paragraph 7 alleges an assault committed by the plaintiff's wife on him in April 2006.

20. Paragraph 8 alleges that the plaintiff's wife intends to get rid of him from her life and their daughter's life.

21. Paragraph 9 is a repeat of matters concerning the exclusion of the plaintiff, as he alleges, from the family home which is a repeat of the plenary summons.

22. Paragraph 10 alleges withdrawal of money by the first defendant from the joint account.

23. Paragraph 11 pleads that the plaintiff's wife filed the barring order papers on 9th January 2007 before the District Court, but she did not mention the alleged child abuse in the court case. He had visited the family home with his wife's consent between 4th and 15th January 2007 a few times to see his daughter. There was also an occasion when his wife asked him to come to the home on 15th January 2007 to fix a problem with the gas and electricity. She did not tell him about the barring order or did not phone the police.

24. Paragraph 14 pleads that Mr. K visited his daughter's school on 2nd March 2007 and spoke to the Principal and the class teacher and apprised them of the family situation and on that occasion he met his daughter also.

25. Paragraph 17 pleads that Mr. K's wife and daughter visited his office on 15th May 2007.

26. Then there is some repetitious matter as contained in the plenary summons and the plaintiff pleads that on 11th November 2007,

he and his wife and daughter were together at a Diwali party.

27. Then, at para. 23 of the statement of claim, Mr. K sets out once again the obviously confidential material concerning the interview with the child.

28. At paras. 26 and 27, the following is pleaded:

> "That it is Plaintiff's opinion that my daughter Defendant number four was so EXPLICIT in her description of the sexual acts, sexual organ of the male body for a child of 4/5 years age and as having joint custody at the time of Child and to present date both my Child's Human Rights were violated under the UNITED NATIONS and my Constitutional Rights under the Irish Constitution.

27. That due to long investigation of 28 months (November 2007 to March 2010) by Defendants numbers 2 and 3, Plaintiff lost the parental connection to the Child Defendant number 4 having made several applications for visitation rights."

29. At para. 28, the plaintiff pleads allegations that the wife did not sign consent forms on 28th November 2007 or on the following day for recording of the interview with her daughter. He goes on to plead that on 4th December, she signed the consent form.

30. Paragraph 29 is a repeat of the plenary summons concerning the plaintiff's reaction to the Family Centre report of 24th July 2008.

31. Paragraphs 30 to 33 deal with the supply of records and documents.

32. Paragraph 35 says:

> "That cause of action arose on 15 September 2009 when Plaintiff was arrested and released without charges. Finally, it was decided not to prosecute Plaintiff by the DPP. Moreover, Plaintiff has unblemished records throughout life except this case. Plaintiff feels that this case is within statutory time limit and in case there is delay in filing the same may kindly be condoned."

33. In the prayer for relief at para. 36, the plaintiff claims damages for defamation; loss of physical and mental health; loss of communication and relationship with his child who now resides outside the State and the plaintiff has no knowledge of her whereabouts. He claims damages for loss of employment; loss of income; loss of ability to work and loss of family ties. Then, he claims as follows:

> "(i) Damages, including exemplary and punitive damages for the breach of the Plaintiff right under the Constitution and under common law;
>
> (j) in the alternative, damages pursuant to the European Convention on Human Rights Act 2003;
>
> (k) the costs of the within proceedings."

He makes a number of other pleas for understanding in respect of any technical deficiencies and for production of all relevant records of the second and third defendants.

34. Finally, he seeks "that Plaintiff's good name may please be revived".

The Applications to Dismiss

35. Garda BW's defence raises the preliminary objection that the pleadings do not disclose a cause of action and promises the motion to dismiss. In his grounding affidavit, he describes his role in the matter of the complaint made by the plaintiff's wife concerning his daughter. On 11th September 2007, he received a written signed complaint from the plaintiff's wife with allegations of sexual abuse perpetrated on her 5 year-old daughter by the plaintiff before and during Christmas time 2006. He referred the matter to the HSE through Garda channels and he was kept informed of the progress of their investigation. Garda child specialists interviewed the child on 25th June 2009 and sent a report to Garda BW on 16th July 2009. He also reviewed the recording of the interview. On 14th September 2009, the Garda informed the plaintiff's solicitor that he wished to interview Mr. K in relation to the allegations and the solicitor confirmed that he had told the plaintiff. He then contacted Mr. K and arranged to meet him at the Garda station on the following evening. Garda BW describes the events of 15th September 2009 and subsequently as follows:

> "9… I met with the Plaintiff as arranged at 7pm outside A Garda station and I again explained to him that I wished to interview him in relation to the allegations and I then informed the Plaintiff that on the basis of reasonable suspicion that he had committed the offence of sexual assaults on his daughter, and I did so at 7.04pm. I say that I cautioned the Plaintiff by saying 'you are not obliged to say anything unless you wish to do so but anything you do say will be taken down in writing and may be given in evidence' I say that the Plaintiff said 'Yeah, I understand'.
>
> 10. I say that the Plaintiff said that he did not think he would have to be arrested but I explained to him that these allegations were very serious and that he would have to be questioned whilst under arrest and that there would be compliance with the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, and there would be the recording of the interview. I brought the Plaintiff into the member in charge of the station. I subsequently made an application to the member in charge to detain the Plaintiff pursuant to s. 4 of the Criminal Justice Act 1984, for the proper investigation of the alleged offences for which he was arrested, which application was granted by the member in charge at 7.40pm.
>
> 11. I saw that I was present when the member in charge, entered the details of the Plaintiff into the Custody Record; read and explained the notice of rights to the Plaintiff, and handed the Plaintiff a copy of the notice of rights form C72s (which the Plaintiff acknowledged by signing the said custody record). I say that the Plaintiff availed of an opportunity to speak to a solicitor in private prior to interview.
>
> 12. I say in the course of his detention the Plaintiff was interviewed, the interview commenced at 7:45pm and was recorded. I say that the interview ended at 10:17pm. I say at 10:43pm The Plaintiff signed a voluntary consent form to be fingerprinted, palm printed and photographed and this happened. I say subsequently at 11:04pm the Plaintiff was

released from the s.4 detention without charge.

13. I say that on the 20th of November, 2009, the full investigation file was submitted to the Office of the DPP, and on the 12th of March 2010 the Office of the DPP directed no prosecution.

14. I say that at all material times I carried out my duties in the course of investigating these allegations in a bona fides manner in accordance with law, and I say in particular that the arrest, detention and interviewing of the Plaintiff on the 15th of September, 2009, was carried out in accordance with the procedures proscribed in the Criminal Justice Act 1984 and the Custody Regulations made thereunder."

Plaintiff's Replying Affidavit to Garda BW's Grounding Affidavit

36. Mr. K avers as follows in his replying affidavit of 11th April 2016 in a series of lettered paragraphs. I have followed his paragraphs and language as far as possible and convenient to convey the meaning but this is not a precise repetition.

a. He was wrongfully arrested on 15th September 2009

b. That it is believed that Garda failed to inform the Plaintiff, he was to be arrested on the site of the Garda Station and under what section of Law

c. Human Rights and Constitutional Rights of the plaintiff and his daughter have been violated and the father/daughter relationship has been forever destroyed due to

(i) prolonged wrongful investigation lasting in total more than 28 months

(ii) one-sided

(iii) the child does not want to talk to her father any more

d. DPP found no evidence for prosecution

e. That it is believed there was absolutely no reasonable cause to suspect that Plaintiff was guilty of an offence

f. That it is believed no medical/psychological evidence produced by plaintiff's wife to support the allegations

g. No psychological reports were ordered by Garda BW or the HSE during the investigations in respect of the plaintiff, his wife and his daughter

h. That the child was not fully legally represented as guardian ad litem was not appointed

i. That since Christmas Eve 2006 Plaintiff has not lived at Family Home and the Plaintiff has no independent access to the child

j. Garda BW and the HSE did not consider the delay of eight months in reporting the complaint, that is, from December 2006 to September 2007 and the Plaintiff does not know under what circumstances and when his daughter told her mother

k. That it was the Plaintiff who on 02 March 2007 and 18 April 2007 informed his daughter's school about the family situation

l. That prior to the arrest on 15 September 2009, Plaintiff was not given opportunity of being heard by Garda BW

m. That it was not mandatory for Garda BW to arrest the Plaintiff when he had cooperated with the investigation and was available whenever called – [for interview by the HSE]

n. At a strategy meeting held on 04 December 2008 the HSE discussed the daughter's needs and recommended supervised access for her father – the plaintiff does not see why he was arrested on 15 September 2009, having regard to this discussion and recommendation

o. HSE and Garda did not consider the facts that/the plaintiff's allegations that: –

(i) plaintiff categorically stated he was innocent

(ii) child was tutored

(iii) his wife had filed the complaint for an ulterior purpose

(iv) the child was used as a pawn

(v) the wife wished to manipulate the plaintiff's return to India so he would not be able to pursue complaints of money laundering and passport frauds against her parental family and claim his share under matrimonial law

(vi) plaintiff had strained relations and litigation with his wife

p. The plaintiff does not know whether the HSE or Garda BW took any action on his allegation that the child was tutored

by her mother; the investigation was one-sided

q. At the time of his arrest on the 15 September 2009 the plaintiff was provided with a solicitor on the telephone but he wished to discuss his situation in person with the solicitor and due to language problems he could not converse properly. The solicitor was not present at the Garda Station

r. In paragraphs r. to x. the plaintiff repeats the suggestions of unreliability in the accounts given by the child at interview as to what happened to her.

y. Documents supplied under FOI record that on 19 June 2008 the child was not distressed in school and that there were no child protection concerns; and 4 December 2008 it is mentioned that she was very distressed; the Social Worker confirmed that she did not show any evidence of distress when attending interviews at the Family Centre

z. That it seems to the Plaintiff, the Second Named Defendant [Garda BW] did not have correct information regarding the contact of the Plaintiff with his Child because it states at page 40 of the FOI documentation supplied by the HSE that "as far as Garda BW is aware he does not have any contact with children.

aa. The plaintiff's daughter at the age of 4 – 5 was given knowledge of sex by his wife, which is itself child abuse. Mr. K offers as evidence of this statement by Garda BW that he was in receipt of a written and signed complaint made by the wife of sexual assaults allegedly perpetrated on her daughter by her husband before and during Christmas time 2006. Mr. K also appears to rely on the statement by the Garda that he was kept aware of the progress of the investigation.

bb. Another point is made here that seems to go back to the same thing. In the HSE records there is a note referring to the complaint and saying that the allegation was that he was touching his daughter in an inappropriate manner LAST CHRISTMAS 2006.

cc. The point now becomes clear: Mr. K is questioning whether the complaint refers to a time before and during Christmas time 2006 or last Christmas 2006

dd. Mr. K questions whether Garda BW and the HSE have considered the school attendance record of the child during the time of the alleged offences. [It strikes me that the reference to the time period may well be to school holidays at Christmas]

ee. The plaintiff does not know whether the Garda investigated the wife for filing a false complaint after the DPP's decision not to prosecute

ff. The plaintiff does not know whether the mother or the Garda/Garda authorities or the HSE took action on the complaint filed by the older daughter of the mother which the plaintiff cited in the Statement of Claim – [and which I considered to be entirely irrelevant but will now return to for confirmation] – on which he makes the observation that in this case the second and third defendants focused all their attention on him

gg. The plaintiff does not know if the wife has challenged the decision of the DPP – the implication being that if she has not done so it fortifies his contention of innocence

hh. This is repetition of complaints: – defamation, unnecessarily prolonged investigations, failure to have a fair and transparent investigation instead of a totally one-sided process, for the/daughter relationship has been forever destroyed and the child does not want to talk to him any more."

37. The plaintiff asserts that he has not lived at the family home since Christmas Eve 2006, and so the time of the alleged behaviour as being before and during Christmas time 2006 cannot be correct.

38. The plaintiff's wife did not raise the allegation of abuse of his daughter in the barring order proceedings in the District Court. Although she contacted the Gardaí on Christmas Eve 2006, the mother did not mention the alleged abuse. As mentioned above, the plaintiff refers to a request that he says his wife made to him to come to the home to fix the gas and electricity on 15th January 2007.

39. The plaintiff refers to the fact that the child was interviewed by Garda Child Specialist Interviewers on 25th June 2009, complaining about the number of interviews previously conducted by the HSE and the long time that had elapsed from the date of the alleged abuse.

40. Mr. K agrees that the Garda told him about the interview but he says: "It is believed that Defendant No. 2 failed to inform Plaintiff that he was to be arrested on the site of Garda Station and under what section of Law."

41. He repeats that it was not mandatory for the Garda to arrest him for the purpose of interview.

42. He repeats the complaint about the solicitor only being available on the phone and not in person.

43. He complains that he informed Garda BW at the time when he was being photographed and fingerprint that he was feeling humiliated and says that "it is believed Plaintiff wrote on the back side of the consent form",.

44. In a second affidavit dated 11th April 2016, Mr. K responded to Garda BW's Defence, making the same points as above and submitting that there was "absolutely no evidence with their Second Named Defendant against the Plaintiff. Plaintiff was not given opportunity to cross-examine the complainant, First Named Defendant."

45. The plaintiff said in respect of photographs and fingerprints that he "was informed that in case he does not give consent minimal force will be applied by the Second Named Defendant."

46. Mr. K complains about the damage to his life and reputation and the ongoing stigma.

47. In a further affidavit dated 9th June 2016, Mr. K sought discovery of all documents in the possession of the Gardaí and the HSE including materials from the records of the Garda Bureau of Fraud Investigation of complaints made by his wife of money laundering

and passport frauds against her family.

The HSE Application
48. This party's application for the dismissal of the proceedings is stated in its notice of motion to be based on a series of grounds, including that the claim discloses no reasonable cause of action against the HSE; that it is frivolous and vexatious; that it should be dismissed under the inherent jurisdiction of the court; delay; O. 122, r. 11; that it is statute-barred. The grounding affidavit is sworn by Mr. Cunningham, solicitor.

49. Mr. Cunningham refers to some of the chronology mentioned above. He also treats with proper caution and reservation the matters that I have mentioned, that Mr. K has cited from materials that were confidentially given to him and that contain intimate details of matters discussed by the infant complainant with the HSE professionals. He endeavours while observing these cautions to analyse the statement of claim with a view to identifying the case that Mr. K seeks to make against the HSE.

50. Mr. Cunningham says at para. 18 of his affidavit, that the reliefs claimed by the plaintiff "appear to centre on defamation and injury to his health and loss of communication with his daughter, the fourth named Defendant, who now appears to reside in the UK and with whom he has no contact". He contends that these are personal, if not family law proceedings, concerning allegations made by his wife and involving his daughter and some of the matters that Mr. K refers to go back more than 12 years.

51. He then says the following at paras. 20 and 21 of his affidavit: –

> "20. I cannot locate any wrongdoing or allegation of wrongdoing as against the third named defendant, the HSE. I can only presume that in some way the Plaintiff seeks to assert that the HSE, in carrying out its functions in 2007 following an allegation made by the Plaintiff's wife at that time, has behaved wrongly. It appears that the third named Defendant's involvement and all those matters would have ceased in 2008 on completion of the Family Centre report in July 2008. I can only surmise the above from the Statement of Claim which is rather disjointed. I say further that it appears from the Statement of Claim that the report of July 2008 and/or associated documents were sold by the Plaintiff years ago under the Freedom of Information Acts and that access to them is refused in the public interest on more than one occasion.
>
> 21. I say that the involvement of the HSE as a Defendant in what is particularly a family matter between the Plaintiff and his wife is inappropriate and/or can only relate to it carrying out its statutory function to investigate and report on an allegation of child abuse. I say and believe that no cause of action is identified and that any that can be extrapolated would be merely frivolous or vexatious and indeed statute-barred."

52. Mr. K filed a brief affidavit on 27th January 2016, in which he reiterates the complaint of a one-sided investigation and maintains that the Garda investigation was ongoing until 15th April 2010, which is obviously a response to the contention as to the Statute of Limitations.

Jurisdiction to Dismiss
53. The jurisdiction to dismiss proceedings is firstly under O. 19, r. 28 of the Rules of the Superior Courts and, secondly, in the inherent power of the courts in respect of claims that are bound to fail. O. 19, r. 28 states:

> "a. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in 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 judgement to be entered accordingly, as may be just."

Rule 28 is applied narrowly and only where it can be shown that the plaintiff's summons or statement of claim discloses no reasonable cause of action or that the action is frivolous or vexatious. A statement of claim will be dismissed if it fails to disclose a cause of action. This means that if the plaintiff were to prove every fact set out in the statement of claim, he would not succeed because he had not made out any claim recognised by law. The court may take into account any amendment that might reasonably be considered or allowed. If an amendment might be made that would save the statement of claim from dismissal then that is a reason for refusing to stop the action: *Sun Fat Chan v. Osseous Ltd* [1992] 1 I R 425, 428 per McCarthy J. The court considers the pleadings, ignoring any affidavit evidence when considering whether to accede to an application based on rule 28: *D.K. v. King* [1994] 1 I R 166, 170 per Costello J.

54. The courts also possess an inherent power to strike out or stay proceedings if it is clear that the plaintiff's claim must fail. The test to be applied in an application for dismissal on the ground that the statement of claim does not disclose the cause of action is different from that which is employed when the criterion is whether the action is bound to fail. The court takes the plaintiff's case at its highest, assuming that all relevant matters as pleaded will be established at the trial. In exercising this jurisdiction, the court is free to hear evidence on affidavit relating to the issues in the case. The threshold is high and the court is slow to conclude that the case is doomed. If the essential facts are in dispute, the claim cannot be dismissed, but it is not necessary that there be accord on insignificant facts. See *Price v. Keenaghan Developments Ltd* [2007] IEHC 190 per Clarke J. The facts that are agreed or not disputed are the basis of the examination. It is not necessary to have agreement on everything, but the evidence on which the decision depends must be clear for the court to exercise this jurisdiction. In other words, the central elements of the case that are necessary to establish that the action must fail have to be beyond dispute.

The High Court Judgments
55. On 13th June 2016 Binchy J. in the High Court ordered that the proceedings against Garda BW be dismissed. In his ex tempore judgment, the judge held as follows:

> "I am of the opinion that as far as the complaints relate to the Gardaí they are no more than that the Garda investigation may have been one-sided and may have taken too long. Neither would give rise to a cause of action. For that reason Garda BW is entitled to the Order sought. In my view this claim has no prospect of success against the Gardaí. They do not amount to allegations that Garda BW had acted maliciously.
>
> I am satisfied that no cause of action was made out as against Garda BW.
>
> I am quite satisfied to dismiss the action as against Garda BW pursuant to Order 19, Rule 28 on the basis that the pleadings do not disclose any reasonable cause of action against Garda BW. Moreover, if my view was incorrect on this basis, I have conducted an analysis of the pleadings and it is an appropriate case also to dismiss the action as against Garda BW pursuant to the inherent jurisdiction of the High Court, on the basis that I am satisfied that the plaintiff's action

as against Garda BW is bound to fail."

56. On 27th June 2016, O'Regan J. ordered that the plaintiff's claim as against the third named defendant, the HSE, be dismissed and expressed her reasons in an *ex tempore* judgment as follows:

> "I have read the papers and particularly the pleadings in this action. I have read the Affidavits and listened to both sides.
>
> Having considered the matter, it seems to me that the plaintiff's claim must be dismissed.
>
> If there was any concern with regard to the investigation of complaints, that may have been a matter in respect of a judicial review application; no such application was made and it is long since statute-barred.
>
> In relation to the plaintiff's complaints in the within plenary proceedings, they do not disclose a cause of action that can succeed. Such bodies carry out their normal functions and there is no claim of malice. In the circumstances, the plaintiff's claim against the HSE is bound to fail.
>
> Having heard what is offered in relation to costs, the court ordered that the costs of the motion be awarded against the plaintiff."

The Appeal

57. Mr. K's grounds include complaints that he was denied documents that he sought under the Freedom of Information Act and that were necessary to establish a cause of action. He claims to be entitled to an amendment of his claim, but it does not specify any amendment. He says that he did not have legal representation at the time of his arrest and incarceration. He says that he was not told that he was going to be arrested. He also maintains that Garda BW did not have reasonable grounds to arrest him.

58. In response, for Garda BW it is submitted that the trial judge was correct, that Mr. K has not furnished any basis for overturning the decision, that the plaintiff did not seek any amendment of his claim and that any issue regarding a Freedom of Information request is irrelevant in respect of this defendant.

59. In his notice of appeal in respect of the order of O'Regan J., Mr. K repeats the points that he covered in his affidavits, emphasising his claim that his relationship with his daughter "has been forever destroyed due to the prolonged wrongful, one side, investigation which lasted in total more than 28 months, and the child does not want to talk with me anymore." He claims that he was deprived of documentary evidence. He reiterates the case that in the circumstances that existed, there was no basis for either the Garda or the HSE to suspect him of child abuse.

60. The HSE rejects all the plaintiff's grounds in a detailed response document.

61. Mr. K, in his submissions, makes in summary some relevant points that he previously covered in other documents, but there are some additions to be noted. He also provides a chronology of relevant dates and entries in the HSE documents, but some of the latter are incomplete – his references to the conclusion of the enquiry as being fully encapsulated in the word inconclusive and also his reliance on the child's general practitioner's records. These are mentioned below but they are in fact of limited relevance.

62. He emphasises that there was "no material before the HSE and the Garda to act against the appellant and their malicious/malfeasance intent was obvious". The basis of this contention is contained in the material above cited. He complains that he has not had access to documentary evidence "DISCLOSING REASONABLE CAUSE OF ACTION, TO PUT SPECIFIC ALLEGATIONS OF MALICE". And he submits that there was no reasonable cause to suspect that the plaintiff was guilty of an offence in the "absence of medical/psychological report, eye witness or circumstantial evidence to show that the appellant was in any way involved in alleged sexual abuse of 4 years old daughter".

63. On behalf of Garda BW, the second defendant, it is submitted that he simply carried out his duties bona fide and in accordance with law: "To that end, he carried out an arrest, detention and interviewing of the Plaintiff on 15 September 2009 in accordance with the procedures prescribed in the Criminal Justice Act 1984 and the Custody Regulations made thereunder".

64. It is submitted that the pleadings do not disclose a cause of action as against Garda BW and Mr. K did not make any application to amend: "The pleadings do not amount to allegations that the Respondent had acted maliciously, and they do not disclose any malice or other circumstances as would potentially entitle the Appellant to maintain proceedings as against the Respondent or for that matter any other member of An Garda Siochana". There are no special features are circumstances in the case that would justify imposing a duty of care and reliance is placed on public policy as excluding such a duty in the absence of malice: cases cited are *Lockwood v Ireland* [2011] 1 IR 374; *Smyth v Commissioner of An Garda Siochana* [2014] 2 IR 1; *Kelly v Commissioner of An Garda Siochana* [2015] IEHC 19. The High Court was correct to conclude that Mr. K's complaints in regard to Garda BW amounted to no more than that the investigation was one-sided or may have taken too long and that neither of those matters gave rise to a cause of action.

65. A similar position is taken up by the HSE. In carrying out its functions, it is argued that the HSE has the same protection as that afforded to a Garda as recognised in the authorities. The pleadings do not allege malice on the part of the HSE or any other circumstances that would enable the plaintiff to maintain the case. No facts or circumstances are pleaded that could lead to such an inference. The court should confine its analysis to the pleadings. However, if the circumstances of the case are considered to be relevant the real dispute concerns the relationship between the plaintiff and his wife and daughter. Procedures were available to Mr. K in family law proceedings in which she could have sought access or other appropriate relief. The plaintiff is guilty of delay.

The Law

66. Before considering the law as it applies to the specific circumstances of this case, I think it is useful to begin with the legal liability of the Gardai to victims or complainants of crime in respect of allegedly negligent investigations. Although there are obvious differences between the positions of victims of crime and those of suspects, they nevertheless share some features of foreseeability and proximity that make their legal rights at least analogous. Obviously, when I speak of a victim I mean a person who complains that he or she has been the victim of a crime.

67. Until recently, the legal position was clear and consistent and was not the subject of judicial uncertainty or reservation. However, in a 2015 judgment – LM *v Commissioner of Garda Siochana & Ors; Lockwood v. Ireland & Ors* [2015] 2 IR 45, the Supreme Court has

drawn attention to the complexity of the factual and legal issues that can arise in the wide variety of encounters between victims of crime and Gardai. The court did not lay down any new rule but it was sceptical whether a simple general rule could be justly invoked in all cases and whether it was procedurally appropriate to determine such litigation by way of preliminary issue. The court reversed decisions of the High Court made on preliminary applications and sent the cases back for full plenary hearing. One of the decision is the subject of appeal contains a statement of law to which I refer below. I will consider the judgment of the Supreme Court in this case in due course to see whether and in what way it is relevant to this appeal.

68. The courts in Ireland and in England have consistently held that a policeman does not owe a duty of care to the complainant or victim of a crime in respect of an investigation. The principle is that the Gardaí or the police have public duties to discharge in investigating crime and this does not impose on them a duty to individual victims or witnesses. The Gardaí are not immune from civil liability but the heading of potential liability is not negligence but misconduct in public office. In this respect, they are in the same position as others who carry out statutory or public functions. An essential feature of this established liability is the requirement that the plaintiff must prove malice. It is not sufficient that the defendant was allegedly incompetent in his or her duty or made a mistake; the default must have a malicious character before the claimant can succeed. Earlier cases in both jurisdictions spoke in terms of immunity but the more correct analysis is the absence of a duty of care to the victim of crime because the obligation of the policeman is public and general and not personal and particular. It follows that if the same principle applies to Mr. K, he must establish malice on the part of Garda BW and that Binchy J. and O'Regan J. were correct to focus on whether the statement of claim alleged that the Garda acted maliciously or contained material that could give rise to that conclusion.

69. In *W. v. Ireland (No. 2)* [1997] 2 I.R. 141 at p. 160, Costello P. rejected a claim by the applicant that the Attorney General owed him a duty of care. He alleged that the Attorney General breached his duty of care and/or his constitutional and statutory duties by failing to process speedily the extradition of Father Brendan Smyth to face charges of sexual assault against him. Costello P. said that:

> "The denial of a right of claim for damages for negligence on the grounds of public policy arises from the functions which the Attorney General is called upon to perform in the public interest and the consequences for his ability properly to perform them, should the alleged duty exist. By conferring an important role on him in the extradition process, the Oireachtas has involved him in a significant way in ensuring that proper compliance with the State's international obligations in the field of extradition is achieved. The Act requires him to weigh the information made available to him relating both to the intention to prosecute the person named in the warrant, and also the evidence on which the intention to prosecute is based, and should the information he obtains not be sufficient, he is required to request further information. If in carrying out this function, he is also under a duty of care to the victim of the crime referred to in the warrant not to delay, there is a risk, which I do not think it is in the public interest he should be asked to run, that a conflict may arise between the proper exercise of his public function and the common law duty of care to the victim which might result in an improper exercise of his statutory functions.
>
> There are further compelling reasons why, in the public interest, the duty claimed by the plaintiff in this action should not be allowed. If a duty under the Act of 1965 exists it must logically follow (a) that the Attorney General would be under a similar duty in respect of any prosecutorial functions conferred on him by s. 5 of the Prosecution of Offences Act, 1974 and (b) that in exercising his prosecutorial functions under that Act, the Director of Public Prosecutions would owe a like duty to all victims of crimes in the cases in which he is considering the institution of prosecution. Because of the inhibiting effect on the proper exercise by the Attorney General and the Director of Public Prosecutions of their prosecutorial functions, it would be contrary to the public interest that a duty of care at common law be imposed on them. So to conclude is not to submit to a 'flood gates' argument of doubtful validity, it is to accept the logical consequences, should the duty of care at common law be imposed in the execution by the Attorney General of his functions under the Act of 1965."

70. In *Kennedy v. Law Society of Ireland (No. 4)* [2005] 3 I.R. 228, the Supreme Court per Geoghegan J said that:

> "As a general proposition, it can safely be said that, apart from exceptional circumstances, a body such as the first respondent, carrying out a public function in pursuance of a public duty, is not liable to a private individual in tort unless the authority, in so acting, has committed the tort of misfeasance in public office. I will be explaining this tort in more detail later on in this judgment but subjective mala fides is an essential feature of it. To allow damages to be awarded for breach of an alleged duty of care owed to the individual on the basis of what a reasonable person might have done (and therefore an objective test) would be to undermine the clear limits attached to the tort of misfeasance in public office." [At p. 259]

71. In *Lockwood v. Ireland* [2011] 1 I R, one of the cases mentioned above in which the Supreme Court allowed the appeal against judgment given on preliminary motion and sent the case back to the High Court for full hearing, Kearns P. reviewed the authorities and concluded as follows:

> "A claimant must establish mala fides to bring her claim within the law of tort within this jurisdiction, I am satisfied to conclude that no duty of care arises in respect of bona fide actions and decisions carried out by An Garda Síochána in the course of a criminal investigation and/or prosecution. Any other view would have quite alarming consequences. One might begin by inquiring where the duty of care would begin or end. Would the victim of a crime, such as that perpetrated on the plaintiff in the present case, be the only person with an entitlement to sue, or would any such entitlement extend to immediate members of her family or perhaps to some person who might have been a witness in the trial or a witness to the event itself? By the same token, the inhibiting nature of any such duty would effectively cripple the capacity of An Garda Síochána, or any other police force for that matter, to carry out its duties effectively and with expedition. It would be unacceptable that those charged with responsibility for the investigation and prosecution of crime should have to take legal advice at every hand's turn in respect of every step in the criminal process. Any such approach would simply render the present system, struggling as it is with the multiple obligations imposed on An Garda Síochána in respect of those suspected of crime, to constraints of unimaginable proportions."

72. Clarke J. in *Osbourne v. Minister for Justice* [2006] IEHC 117, [2009] 3 I.R. 89 made it clear that, absent mala fides , a person against whom a power of arrest or search is exercised cannot successfully sue the Gardaí, holding that "no claim in damages (whether for breach of constitutional rights or in tort) can be brought in respect of technically infirm actions unless they represented deliberate, conscious violation of the rights concerned" [at para 28]. This was consistent with the general policy of the courts:

> "[28] Such an overall view of the entitlement to damages arising from the consequences of the execution of a warrant which is technically defective is, in my view, consistent with the jurisprudence of the courts in the analogous area of

breach of statutory duty by officials or others charged with carrying out public functions. In such circumstances it is now well settled that damages do not arise in the absence of a deliberate and knowing breach of statutory obligation."

73. The English courts adopted an equally firm view that the police do not owe a duty of care to victims in respect of investigation of crime. The classic exposition of the principle is in *Hill v Chief Constable of West Yorkshire* [1988] 2 WLR 1049. The plaintiff was the mother of the last victim of Peter Sutcliffe (the Yorkshire Ripper). She claimed that the police investigation was negligent and that if a proper investigation had been carried out Sutcliffe would have been apprehended sooner and her daughter would not have died. The House of Lords struck out the claim on the ground that there was no cause of action since no duty of care was owed by the police in the detection of crime. Lord Keith of Kinkel in a famous passage said at p. 63:-

> "A potential existence of such liability may in some instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would not be uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes.
>
> While some such actions might involve allegations of a simple and straightforward type of failure - for example that a police officer negligently tripped and fell while pursuing a burglar - others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell L.J., in his judgment in the Court of Appeal in the present case [1988] Q.B. 60, 76, was right to take the view that the police were immune from an action of this kind."

74. A series of cases in the English courts followed and applied the principle established by Hill, albeit with some variation of the legal concept underlying the rule. In light of criticisms expressed by the European Court of Human Rights in *Osman* [1998] EHRR 101 of a principle of general immunity from suit, the House of Lords in Brooks in 2005 said that the true basis for rejection of such claims was to be found not in the avoidance of the rules of liability but in their application. It was not that the police were immune from legal liability, but rather that they did not owe a duty of care to victims in the investigation and detection of crime.

75. In *Brooks v. Commissioner of Police* [2005] UKHL 24, Lord Steyn discussed *Hill v. Chief Constable* in some detail and commented on its current status. In that case Lord Keith noted that a police officer may be liable in damages for "assault, unlawful arrest, wrong imprisonment and malicious prosecution, and also for negligence". However, he went on to say that there was no duty of care towards individual members of the public. Indeed, Lord Keith also highlighted the public policy reasons which resist the idea of allowing actions in negligence against the police.

76. Following the case of *Z v. UK* [2001] 34 EHRR 97 involving the death of a man due to the unnecessary and disproportionate use of force by an RUC officer, Lord Steyn noted that the Hill principle needed to be reformulated as an absence of a duty of care as distinct from blanket immunity. It was emphasised that a more "sceptical approach" was to be taken when examining the exercise of a public function [paras.27-29].

77. It was accepted that a distinction should be drawn between the ethical standards outlined in the Police Conduct Regulations and those obligations imposed by law. Lord Steyn went on to say:

> "A retreat from the principle in Hill would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in Hill, be bound to lead to an unduly defensive approach in combating crime." [Para.30]

78. The House of Lords, in so holding, recognised that this may cause individual injustice in leaving some citizen without a private law remedy, but this was the cost of upholding the rule of law [para.31]. It was also accepted that there could be some circumstances wherein some "outrageous negligence" may go beyond the *Hill* principle, but Lord Steyn remained silent and refused to speculate on what that may involve [para.34].

79. The latest confirmation of the Hill principle is in the decision of the majority of the UK Supreme Court in *Michael & Ors (FC) v. The Chief Constable of South Wales Police & Anor*. [2015] 2 WLR 343.

80. Another English case that should be noted is *Elguzuoli-Daf v. Commissioner of Police of the Metropolis* [1995] 1 QB 335 which Costello J. said in *W v. Ireland* [at p. 159] was "of particular relevance to the issues in this case" where "it has been held in England that, on grounds of public policy, the Crown Prosecuting Service cannot be sued in negligence". The reasons why this immunity should be granted were explained as follows (at p. 349):

> "That brings me to the policy factors which in my view argue against the recognition of a duty of care owed by the CPS to those it prosecutes. While it is always tempting to yield to an argument based on the protection of civil liberties, I have come to the conclusion that the interests of the whole community are better served by not imposing a duty of care on the CPS. In my view, such a duty of care would tend to have an inhibiting effect on the discharge by the CPS of its

central function of prosecuting crime. It would in some cases lead to a defensive approach by prosecutors to their multifarious duties. It would introduce a risk that prosecutors would act so as to protect themselves from claims of negligence.'"

81. The plaintiff in that case had sued the Crown Prosecution Service in circumstances where he was held in custody on a charge of rape for some 22 days beyond the time when the prosecution authorities had learned that the semen sample he provided did not match that found on the victim.

82. In this jurisdiction, we have the views of the Supreme Court in the appeal in the two cases mentioned above which were heard together and are reported: *LM v. Commissioner of Garda Siochana & Ors*; and *Lockwood v. Ireland & Ors* [2015] 2 IR 45. The two cases were brought by persons who made complaints of rape alleging negligence against the Gardaí and others. One prosecution was dismissed on the ground of prosecutorial delay. In the other case, the trial court excluded inculpatory statements as inadmissible in circumstances that gave rise to the allegation of negligence. The High Court in each case dismissed the claims on preliminary issue hearings on the ground that the Gardai did not owe a private law duty of care to the plaintiff complainant. The Supreme Court allowed the appeals against the dismissal is of the actions and directed that they should each proceed to trial in the High Court. The Supreme Court judgment by O'Donnell J. carefully reviewed the basis on which the claims were advanced, against the background of a legal regime that the judge held was insufficiently fixed, clear and of general application to enable a decision to be made on a preliminary basis. The court did not reach conclusions on the issues of duty of care or in what circumstances liability might attach in claims by plaintiffs alleging inadequacy of investigation or prosecution. O'Donnell J. did, however, illustrate the complexity of the issues involved in light of the international jurisprudence and learned commentaries.

83. It is important, therefore, in considering the law as it applies to this case to bear in mind the caution that is necessary in light of the views of the Supreme Court. The facts of the case and the law must be clear of the jurisdiction to dismiss without full oral hearing is to be exercised. The court leans against dismissal and in favour of the case proceeding and the onus is on the defendant applicant to demonstrate how the test is met. While the existing, well-established jurisprudence has not been overruled by the Supreme Court, as O'Donnell J. was careful to point out, it is nevertheless proper in light of this judgment to consider the law as being subject to the possibility at least of further and significant development went particular circumstances call for that as a matter of justice.

84. The instant case is different in material respects from the cases with which O'Donnell J. and the Supreme Court were dealing. This case concerns a person who was accused of committing a serious crime, not wanting claim to be the victim of a crime. Those victim cases were based on errors, acts or omissions that amounted, prima facie, to negligence, assuming that the plaintiffs succeeded in establishing that the defendant sold them a duty of care. The basis of this claim is not only inconsistent with those proceedings, but is in conflict with the principles there asserted; if the Gardaí owed a suspect a duty to subject a complaint to critical analysis before investigating it that would put them in an impossible position. It would be unfair to victims. It would give rise to many claims of inadequate investigations which would place a stranglehold on police work.

85. The head note of the report of the Supreme Court judgment in the two cases mentioned says that "a point to be tried as a preliminary issue should raise a clear issue to which it was possible to give a clear answer, or have a possible value as a precedent in governing future cases". Such a point tried as a preliminary issue "should have the possibility of either terminating the claim or saving significant time and costs". This case admits of preliminary process decision because these conditions are fulfilled and, moreover, because the same conclusion arises not only by reference to whether a duty of care exists, but also on the assumption of the existence of such a duty.

Discussion

86. The issues on the appeal are whether the decisions of the High Court were correct, specifically: does Mr. K's statement of claim, as it stands or as it might reasonably be amended, disclose a cause of action? Independently of that question, is the action bound to fail? It is clear from his judgment that Binchy J. addressed these questions separately, answering them negatively and affirmatively in turn in regard to Garda BW. O'Regan J. considered the case as a whole as it affected the HSE and concluded that it could not succeed but she does not appear to have discretely analysed the statement of claim for a cause of action.

87. Mr. K is a litigant in person who requests the court not to apply technical procedural rules to his detriment. He demonstrates a passionate sense of injustice that he claims was done to him by his wife and the present respondents in so far as they went along, as he sees it, with the allegations for as long as they did. He is entitled to the benefit of the rule in *Sun Fat Chan v. Osseous Ltd.* [1992] 1 IR 425 that the case may be saved from dismissal if an amendment could supply a deficiency that would otherwise be fatal - per McCarthy J. at 428. He does not seek any particular amendment as it happens. Having regard to this principle and to the basis on which the HSE application was decided, it seems to me that the proper way to consider the appeal is to see whether the case falls to be dismissed on the basis that it is bound to fail. A simple consideration of the plenary summons and statement of claim would not I think be an adequate basis for a decision on dismissal.

88. In my judgment, the judges of the High Court were correct, for reasons which I will summarise and then expand. A series of Irish and English cases has held that the Gardai are not liable to the victim in negligence in respect of the investigation of a crime (the same restriction applies to errors that occur in prosecution of the case at trial). The reason is that there is an important public interest in the investigation and prosecution of offences on behalf of and in the interest of the public generally and the Gardaí do not owe a duty of care to the victims. It is not that Gardaí are immune; the better way to express the point is the absence of a duty of care. A person may succeed in an action for misconduct in public office against bodies or persons such as the Gardaí who are exercising public statutory functions, but that requires proof of malice. Negligence is not sufficient. The same principle applies to the HSE in respect of its investigation. Although the position of a suspect is different, it is subject to the same or analogous reasoning. There could be a claim for misconduct in public office, but that requires malice. There is not a case of malice made out here. The plaintiff does not actually make a case of false arrest, but rather a complaint that he was not told in advance that Garda BW was going to arrest him for questioning.

89. Even if negligence were available, and it is assumed that it was sufficiently pleaded, I agree with the judges in the High Court that the case is bound to fail. Mr. K was the subject of an investigation, based on a complaint of serious crime made in a written, signed statement. There was reason to believe there was substance in the allegation because of the child's responses at interview. Mr. K's allegation that his wife maliciously schooled the 5-year old child was wholly insufficient to justify aborting the enquiry and focusing on the mother instead. The HSE did not prevent the plaintiff from having access to his daughter; it advised him to keep away during its first phase of investigation, but then made a recommendation for access. As for Garda BW, he could not have questioned Mr. K informally in circumstances ion which he considered him as the suspect. And he had to consider him as such. If Kumar made admissions, the Garda would be open to severe criticism if the interview was not conducted in accordance with the powers and protections provided by statute and regulations. The reasons that led the Supreme Court to send the Lockwood/LM cases back for

full hearing do not apply in this appeal.

90. The matters in dispute in the case concern inferences, conclusions and legal consequences, not facts, arising out of the investigation of a complaint that a grave offence had been committed.

91. The essence of Mr. K's case is that the complaint by his wife, the child's mother, was insufficient to ground a reasonable suspicion by Garda BW in circumstances which included: that there was no confirmation of the allegation; that there were indicia of normality on the part of the child in her behaviour at school and to her general practitioner; that there was no report from a psychologist; Mr. K had complained of fabrication by his wife but that had not been investigated and, not only that, he had furnished reasons why false allegations were made. He protested his innocence at all times. He also appears to be alleging that Garda BW did not notify Mr. K that he intended to arrest him for questioning: the Statement of Claim says "It is believed that Defendant No. 2 failed to inform Plaintiff that he was to be arrested on the site of Garda Station and under what section of Law". Mr. K's position is that Garda BW and the HSE were wrong to give credence to the statement made by the young child in answer to questions that the HSE personnel asked her. Mr. K's contention was that his wife had put the child up to making false and very serious allegations against him. He maintains that the Garda and the HSE did not carry out a proper investigation by exploring his case that the whole thing was a fabrication by his wife in order to damage him. He suggests that these defendants are also at fault for an inordinate length of time of investigation. Garda BW should not have arrested him under s. 4 of the Criminal Justice Act 1984 and questioned him by that procedure.

92. Three points should be noted at the outset about the factual basis of Mr. K's claim. First, he highlights the fact that the report of the Family Centre used the word "inconclusive", but there was more to the conclusion in the words that followed, namely, "inconclusive however, concerns remain that sexual abuse may have occurred." The second point is Mr. K's reference to the child's doctor and the words "No record of sexual abuse was found". The reference in the documents supplied is a note by the Social Worker dealing with the case which is dated 4th December 2008, and which appears to record a phone conversation with the child's doctor, which notes a small number of minor illnesses and then has the words "advised that he has not seen the child often enough to offer an opinion on child protection concerns". Thirdly, the information that Mr. K relies on to make his case that he should not have been suspected comes in large part from the investigation itself.

93. Mr. K's position as a litigant is not that of victim of crime, but of a person who was the subject of a complaint of a serious crime and the views of the Supreme Court in *LM/Lockwood* do not immediately fall to be applied to a person in his position. Indeed, the nature of any duties owed to victims or complainants will necessarily impact upon persons accused or suspected. The role of law as a balance between competing interests including the undeniable public interest in the investigation and prosecution of crime is highlighted by a consideration of the different and competing claims that may be made by victim and suspect in respect of an investigation. Having said that, a claim brought by a person suspected or accused of crime who is acquitted subsequently or against whom the case is dropped or is not brought, which is the situation with Mr. K, is analogous to actions by victims. Just like the victim of a crime, the person accused is clearly affected by incompetent investigation. He may indeed suffer gravely as a result. In the case of a suspect, that may happen even as a result of a competent, efficient and speedy investigation. It is very unpleasant for a person to be accused of serious crime, as Mr. K was. But that does not mean that suspecting him and questioning him amounted to a legal wrong.

94. It was proper to have this matter thoroughly investigated. The plaintiff's wife made a very serious complaint against him that he had sexually abused their daughter. She provided a written, signed statement setting out the complaint. As Mr. K makes clear in his pleadings and affidavits, the child supplied information of a shocking nature about alleged interference. His case is that his wife put the child up to making these complaints. There is no basis for saying that an investigation into the alleged child sexual abuse should not have taken place. The authorities, Garda BW and the HSE, would have been failing in their legal and statutory obligations if they did not investigate. These matters which are not in dispute reveal a situation where there was something very important to be investigated and that was done by the HSE and then handed over or back to the Gardai and ultimately it returned to Garda BW for his investigation to continue.

95. The manner of investigation, that is, the reference by Garda BW to the HSE is not challenged and it would appear to have been done in accordance with settled procedure that is followed in cases of this kind. Whatever about that, there is nothing in the case to suggest any complaint in that respect.

96. It is wrong to suggest that when Mr. K responded by saying that the allegations were a fabrication by his wife the HSE and/or the Garda should have re-directed their enquiries to this alleged wrongdoing rather than pursuing the child abuse case. Any parent whose spouse makes such a claim is in a difficult situation. There are powerful interests in the balance. Due process for the person accused is an essential requirement. Protection of the child is a priority. Maintenance of the parent/child relationship is difficult to achieve until the accusation is ultimately resolved and even then it cannot be assured of reinstatement. A significant point is that Mr. K does not contend that the child did not report abuse to the investigators but he suggests that his wife put the child up to making false allegations. It is unreasonable, impracticable and full of risk to propose that when a person accused responds by alleging malicious prosecution and fabrication the focus of the investigation must shift away from the alleged crime reported to the motivation and credibility of the reporter and the alleged victim.

97. Mr. K complains about a prolonged investigation over a period of 28 months from November 2007 to March 2010. This time period covers the initial investigation by the HSE and the subsequent Garda enquiries until the plaintiff was informed of the decision of the DPP on 27th March 2010. In his replying affidavit of 11th April 2016 to the application by Garda BW, Mr. K refers to a meeting with the HSE on the 4th December 2008 that was noted in the records as follows: "At a strategy meeting held on 04 December 2008 the HSE discussed the daughter's needs and recommended supervised access for her father". His point in that regard was that this recommendation represented a reason why he should not have been arrested on 15th September 2009. However, the significance as it seems to me is that at a stage that is no more than 13 months from the initiation of the HSE investigation, that body was looking at a way for access to take place. It cannot be said therefore that the HSE by its investigation or otherwise prevented Mr. K from having access to his daughter. Neither can Garda BW be held responsible at this time because his role was merely being kept informed of the progress of the HSE investigation.

98. It is also apparent that questions of access of parents to children are matters for the courts in case of dispute. The plaintiff does not in fact suggest that either the HSE or Garda BW purported to prohibit him from having contact with his daughter. It is obvious, however, having regard to the complaint that there would have been resistance to access. This recommendation would have been helpful to Mr. K in any application that he made to court. For the purpose of this appeal, the HSE position at this stage means that there was no official opposition to a form of contact between parent and child.

99. We have to consider the possible headings of claim that might arise in the circumstances of this case. Mr. K mentions defamation, breach of constitutional rights and breaches of the European Convention on Human Rights. It is also clear that we must consider

negligence. In addition, an issue arises about the fact that Garda BW arrested Mr. K under s. 4 for the purpose of questioning him at the Garda Station. In regard to the HSE, we have to look at the delay about which Mr. K complains and the claim he makes that the investigation or investigations carried out by the Garda and the HSE between them destroyed his relationship with his daughter.

100. Defamation does not arise for Garda BW or the HSE. The matter was reported to the Garda in a signed, written statement and he passed it on to the HSE in accordance with well-established procedures in line with Children First principles and guidelines.

101. The Constitution and the Convention are not a fail-safe net for a claim that does not succeed under existing applicable tort law. It is not a situation where common law or domestic law generally fail to provide a remedy. Allowing for Mr. K's lack of legal qualification, it is still not open to the court to seek to craft a specific remedy out of the provisions of these overarching protections.

102. The Garda considered that Mr. K was a suspect. He arrested him on reasonable suspicion of committing a serious offence, namely, sexual assault on his infant daughter, on the basis of the complaint made by the child's mother and the material that he had from his specialist interview colleagues. The Garda also had the report of his colleagues and the statements and he viewed the video of the child being questioned. Although Mr. K may have been surprised that he was arrested, and he complains that he was not notified in advance that that was going to happen, that cannot form the basis of a claim of false arrest or false imprisonment if the Garda was entitled to come to his conclusion. In fact, it may be that Mr. K's solicitor failed to mention what was going to happen or was likely to occur but the reality is that it was inevitable that Garda BW would invoke that statutory provision. Had he not done so, any admissions made by Mr. K would have been open to objection as being inadmissible. The fact that he was arrested afforded Mr. K the statutory protections in the Act itself and in the Regulations, including limitation of the time permitted in which he might be detained. Mr. K's arrest under s. 4 of the Criminal Justice Act 1985 was not only proper but also inevitable. His solicitor would have been under no misapprehension that this procedure would be adopted. This meant that the officer in charge of the Garda station had to be satisfied to order detention of the suspect under the legislation and that the regulations protecting persons in custody would apply. This regime was introduced to replace the uncertainties of the previous common law of arrest on suspicion and the requirement of caution when the Garda decided to charge. Mr. K himself has provided information in his affidavit in response to the motion and to Garda BW's grounding affidavit as to the answers given by the child in describing the alleged assaults. His account reveals his shock and dismay at the nature and detail of the allegations. It is true that Mr. K accuses his wife of having influenced and indeed inspired these answers. Whatever about that, it was, in my view, incumbent upon Garda BW to consider that Mr. K was a suspect, that it was legitimate and proper for the Garda to have reasonable suspicion sufficient to justify arresting Mr. K for questioning. It would have been extraordinary and unjustified for Garda BW to have rejected the complaints or to have set them aside for future attention while he embarked on the exploration of the genesis of the allegedly false accusations. If he had not done that in the circumstances and if the suspect made admissions, the Garda would have been open to severe criticism if not internal disciplinary sanction. Under s. 6 of the Act, the powers of An Garda Síochána in relation to a person who is detained pursuant to s. 4 include that a Garda may: (a) demand of him his name and address; (b) search him or cause him to be searched; (c) photograph him or cause him to be photographed and (d) take, or cause to be taken, his fingerprints and palm prints.

103. I do not think that Mr. K's complaints about his treatment by Garda BW and specifically his arrest could constitute false imprisonment. I will discuss unlawful arrest in a moment but I do not see how false imprisonment can arise in light of the statutory scheme contained in the 1984 Act. The Garda member who arrests a suspect must bring him to the member in charge of the Station and it is the latter who authorises the detention of the suspect for the purpose of the investigation, which means in practice that the person will be questioned. Therefore, on this point I do not think that Garda BW can be held accountable. In other words, it was not he who actually authorised the detention in the Station of Mr. K.

104. In regard to the lawfulness of the arrest, that depended on the Garda's having a reasonable suspicion in regard to Mr. K. One could suggest that the Garda would have been negligent if he had not harboured reasonable suspicion or if he had not pursued the matter by seeking to question the suspect. There was a complaint of a serious crime, the child victim had made statements about it at several interviews by specialist personnel, whether health board or Gardai and the other circumstances of the case described above meant that there is serious crime had reported, a suspect had been identified because the child's mother had named him, the interviews had not yielded decisive evidence one way or the other but left a cloud of suspicion at least, investigation was warranted not only by the HSE but from a criminal point of view by the Garda with a view to forwarding a file to the DPP for a decision on a prosecution. In my view, there is no issue of fact to be decided; the question is what inferences are to be drawn from the facts as we know them and which are not disputed. It is clear in my judgment that there is no basis for criticising the Garda for arresting Mr. K and seeking his detention for the purpose of questioning him in furtherance of the investigation.

105. There is no basis for a claim of misconduct in public office, an essential element of which is malice. Although Mr. K mentions the word malice and endeavours to include a claim based on it, the reality is that there are simply no facts pleaded or established that would lead to an inference or conclusion that these parties were actuated by malice.

106. I turn then to negligence. It seems to me that Mr. K could potentially establish proximity and foreseeability. Some jurisdictions have held the police liable in negligence on these grounds. Common law jurisdictions take different views in regard to the rights of victims of crime to claim in respect of police negligence. The position of suspects is less recognised but in principle a suspect may assert such a claim on essentially the same neighbour principle. A suspect may suffer severe damage to his reputation or other aspects of his life by reason of a negligent investigation that resulted in his being identified as a suspect in a criminal investigation. The Canadian Supreme Court has recognised such a claim in principle. Having said this, our courts have adopted a consistent position on the rights of victims, which is that the Gardaí do not owe them a duty of care in respect of investigation and detection of crime. The same rule has been either held or recognised as applying to suspects. These decisions in our jurisdiction are mirrored by cases in the English courts. It is not that the courts lack sympathy for persons who are as adversely affected by mistakes in investigation and prosecution of crimes. It is rather that the courts view the alternative as being a quite unacceptable state of affairs that would redound to the disadvantage of society as a whole by flattering the capacity of police officers to carry out their work. Any change to this legal situation would represent a radical departure from the existing regime.

107. In a claim in negligence, the issue in regard to Garda BW would again be the arrest and questioning of Mr. K and for reasons mentioned above I do not think that he could succeed. The position of the HSE would I think be secure on its role in initiating the investigation and the only potential negligent behaviour is that which resulted in a prolonged investigation. However, on that ground there are substantial difficulties for the plaintiff. The loss that he alleges is his relationship with his daughter but the HSE did not prevent him from having any access. It is true that officials suggested that it would be prudent for Mr. K to stay away from his daughter during the time that they were investigating but when that came to an end they made clear at a meeting when Mr. K was present that they favoured resumption of access with presence of another independent person. Mr. K does not suggest that the HSE did anything to order him to keep away from his daughter but I do think it would be reasonable to look at the period when the recommendation was operative. There is nothing in the case as presented to suggest that such period was excessive or unreasonable or outside of the ordinary for such enquiries to be completed. Indeed that is true of the whole of the period of Mr. K's complaint. From

beginning to end, Mr. K puts the time of investigation at 28 months which is undoubtedly a long time and a particularly unfortunate period of separation of a parent from a young child. However, the HSE was not responsible for the period of separation that happened after its recommendation was given. Mr. K was entitled to apply to court for access to his daughter.

108. O'Donnell J. in *LM/Lockwood* acknowledges the utility of the procedure of trial by way of preliminary issue in many cases. It is a valuable mode of doing justice and can protect a party against unfair procedural pressure and waste of resources in defending hopeless litigation. But the mechanism is not to be overused and can be unsatisfactory. The bias should be in favour of full hearing unless the issues are clear and admit of such disposal. The decision in the present appeal as to which side of the line the case falls on is to me clear on the law and the known, undisputed facts. Court time is a scarce resource.

109. A lengthy action postpones the hearing of other cases. There is an increasing consciousness of the obligation on the courts to monitor their processes to ensure that justice is available within a reasonable time. An unfocussed claim involving multiple defendants occupies valuable court time and may take specialist personnel away from important work; in the instant case the people involved are childcare experts. There is no basis in this case for any finding of malice, on the part of the Garda or the staff of the HSE. The action must accordingly fail as against them. In my view, to hold otherwise would be to cause a substantial amount of court time to be expended on hopeless litigation, thereby holding up hearings of deserving cases. It would also divert Garda and HSE personnel away from their other important duties.

110. In circumstances where I think that the law is clear, the essential facts are not in dispute and I am satisfied as to the inferences that must be drawn, I think that this is an appropriate case for decision by preliminary hearing and that the judges of the High Court were correct in their decisions to strike out the proceedings against Garda BW and the HSE.

111. I would accordingly dismiss the appeals.