FOIL Ireland Learning Event

2020 – A year like no other?

This talk was presented on 16 February 2021 by **David Boughton BL.** David is a junior counsel, specialising in personal injury, clinical negligence and product liability claims.

Surprisingly, notwithstanding Covid, reported cases relating to personal injury were only down about 20% in 2020, although a relatively large proportion of the reported decisions came from interlocutory hearings, rather than full judgments.

Minors' claims

Dunne (a minor) v. Stapleton [2020] IEHC 1High Court (Simons J.), 13 January 2020

This was an *ex parte* application. The next friend had accepted a PIAB award but counsel took the view that it was too low because the medical evidence suggested that further treatment would be required in the future. Unusually, therefore, the court was being asked to reject the PIAB assessment.

Probably with costs in mind, the judge agreed to deal with the case, even though he took the view that it should have been brought in the Circuit Court. He then found that where a PIAB assessment was rejected, there was no obligation on the plaintiff to bring the matter before the court (notwithstanding that it is common practice to do so). Nevertheless, the judge rejected the assessment but found that the appropriate costs order was no order as to costs, reflecting the factors that the application should not have been made at all and should not have been brought in the High Court.

Austin (a minor) v. Hallmark Building Contractors [2020] IEHC 288 High Court (O'Connor J.), 4 March 2020

The 10-year-old plaintiff climbed on a wall and railing and was injured on spikes. She was residing with her grandmother, who was also the next friend. It is not possible to allege contributory negligence against the alleged supervisor in a child case and so the defendant sought to join the grandmother as a third party for failing to properly supervise.

The grandmother resisted the application on the bases that if joined, she would not be able to afford legal representation and also, she would be under pressure to prosecute the child's claim with "*independence of mind*"

O'Connor J. granted liberty to issue and serve the third-party notice noting that the trial judge and plaintiff's solicitor and counsel would be able to ensure that there was no compromise to the child's interests.

There are costs risks in proceeding in this way and defendants should ensure that they have the evidence to back it up.

Section 12 Orders

These allow a plaintiff to seek the preservation of evidence even while the case is still in PIAB and they were initially very popular as a way of building costs.

Tayyad v Rilta Environmental [2020] IEHC 251

This was the first substantive consideration of S12 of the PIAB Acts. MacGrath J. held that it should be strictly construed and that a preservation order should only be made where satisfied it is *bona fide* and for the sole purpose of ensuring the fair and just disposition of proceedings and required for that purpose. In this case, a preservation was ordered of the Accident Report Form, CCTV, and cleaning roster for the area the plaintiff was working at the time of the fall.

It is difficult for a defendant to oppose such an application on the grounds that it is not *bona fide* but they often arise where the defendant fails to respond to a letter calling for the preservation of evidence. This gives rise to unnecessary and avoidable costs.

Amendments to PIAB Authorisations

Du Plooy v. Sport Ireland [2020] IEHC 669 High Court (Meenan J.), 10 September 2020

This was a personal injury claim for damages suffered on a waterslide in the National Aquatic Centre on 8 March 2013. A claim was made to PIAB on 6 March 2015; requests for amended authorisations were made on 18 February 2019 and 11 April 2019 (due to mistakes as to the correct corporate entity); and proceedings were issued on 13 May 2019, i.e., six years after the initial accident.

The defendant challenged the legitimacy of this but Meenan J. applied the decision of the Supreme Court in *Renehan v. T&S Taverns Ltd.* to the effect that the clock was stopped from the first application to the PIAB to six months after the last authorisation and held the proceedings were issued in time. This means that effectively the standstill position can go on and on.

Notably, the judge held that any question over PIAB's entitlement to apply S46(3) ("*genuine oversight or ignorance of all the facts"*) would have to be made in a challenge to PIAB (i.e., judicial review).

It should be noted, however, that S50 of the PIAB Acts was amended with effect from **3 April 2019** so that each application leading to an authorisation is treated separately but it only applies to S11 applications made **after** that date. If this case had been brought now, it would have been statute barred. There are many cases in the system to which the *Renehen* decision will still apply.

Reilly v. Campbell Catering Ltd. [2020] IECA 222 Court of Appeal (Whelan J.), 4 August 2020

The plaintiff fell on a stairwell in the course of her employment in a hospital coffee shop on 11 June 2015. On 30 January 2019, the she learned the identity of the correct cleaning contractor (ISS) and obtained a S46(3) authorisation on 14 February 2019. An amended PI Summons was issued on 18 April 2019.

Although ISS only learned of the claim four years after the accident, *Renehan* prevented any defence under limitation. However, ISS brought an application to dismiss on the basis of delay, citing irremediable prejudice (including loss of documents) and the High Court dismissed the claim against ISS.

The Court of Appeal allowed the appeal on the basis that the trial judge had intermingled different concepts (pre-commencement delay, post-commencement delay, statute of limitations). The trial judge had placed significant reliance on S8 (dealing with the prompt notification of claims), which it was held was wholly irrelevant to an interlocutory motion but considered that the plaintiff's reporting obligation was satisfied by her reporting of the accident to her supervisor and managers. (The speaker doubted this on a literal reading of the Act but warned that these applications are notoriously difficult for defendants).

Limitations

Coughlan v. Minister for Defence [2020] IECA 53 Court of Appeal (Noonan J.), 4 March 2020

The plaintiff claimed injuries from exposure to toxic chemicals in the course of his employment between 1994 and 2004. Proceedings were issued in 2013 and plaintiff claimed a date of knowledge in 2011 when he received a verbal opinion from a clinical toxico-pathologist.

The High Court (Meenan J.) heard an application to determine the statute on affidavit only and dismissed the proceedings. The evidence included medical records, which the defendant had exhibited.

On appeal, Noonan J. held: *"It is relatively unusual for 'date of knowledge' issues to be determined without the benefit of oral evidence … When there is a live issue about what the plaintiff knew and when he or she knew it, it is in the normal way difficult to see how this can be resolved by the Court on affidavit, save perhaps in the clearest of cases."*

Another issue that arose was the defendants' reliance on medical records and a report that were claimed to establish a much earlier date of knowledge. The Court of Appeal held that exhibited documents were inadmissible as hearsay evidence (and must be proved) but that, in any event, fair procedures demanded that they should have been put to the plaintiff in oral evidence.

The case was remitted to the High Court for determination, to which the next case is relevant.

Fennell v. Minister for Defence [2020] IEHC 236 High Court (Meenan J.), 28 April 2020

The plaintiff claimed damages for bullying and harassment dating back to 1983. The defendant relied upon the statute and sought the trial of a preliminary issue.

Meenan J., who had been overturned in the previous case held: *"I do not think that a court could reach a conclusion either in favour of the plaintiff of the defendants without having heard oral evidence on the matter. The plaintiff will have to give evidence as to what his state of knowledge was at the relevant time and, should he so wish, all other evidence. As against this, the defendants are entitled to have an opportunity to cross-examine the plaintiff and any other witnesses the plaintiff may choose to rely upon and also to call their own evidence which, in turn, may be subject to cross-examination by the plaintiff. It is only after this process has been gone through that the Court may validly reach a conclusion."*

The result was an oral hearing differing little from a trial (rather than the trial of a preliminary issue), with both parties able to call whatever evidence they wanted.

This raises the questions of whether a motion is cost effective and whether it is better to leave the issue of limitation, where date of knowledge is relied upon, to be dealt with at the trial.

Medical Records

The next case has caused changes in practice in relation to medical records.

Doyle v. Donovan [2020] IEHC 11 High Court (Simons J.), 17 January 2020

This was a Circuit Court appeal for an RTA (rear ending while the plaintiff was pulling in to assist a broken-down motorist on a slip road). The defence pleaded contributory negligence including that the plaintiff deliberately causing the collision.

The plea was not pursued at hearing in the Circuit Court and liability was conceded on appeal.

At the appeal, the cross examination of the plaintiff involved the putting of various aspects of his medical records, which had been discovered, to suggest that earlier accidents had not been disclosed to the clinicians who prepared medical reports for the case and that the plaintiff had prior similar symptomology.

Simons J. disregarded the cross examination on the basis that the status of the records was in doubt; this was because (a) the claimant's affidavit of discovery was not sworn in the proper form (i.e., itemised) and (b) the content of the document had not been proved or otherwise agreed (citing the Supreme Court in *RAS Medical v. RSCI*). This casts doubt on what has been common practice in both the Circuit and High Courts, where defendants put to plaintiffs various aspects of their medical records. The contents of the records must be proved or agreed before they can be used.

The court also declined to award aggravated damages regarding the plea of contributory negligence which had not been pursued, on the basis of (a) the availability of criminal sanctions for swearing a false or misleading verifying affidavit, (b) the fact that the plea was not pursued at trial, and (c) because there was no reciprocal measure available to defendants.

However, in a subsequent judgment on costs ([2020] IEHC 119, 28 February 2020), Simons J. held that the inclusion of the plea without an apparent evidential basis for it (or explanation being proffered) warranted costs being awarded on a solicitor-client basis to mark the court's disapproval.

Defendants therefore risk adverse costs orders if making unsubstantiated please but also aggravated damages in some cases (see *Keating* below).

Costs

Skeffington v. Ireland [2020] IEHC 296 High Court (Pilkington J.), 19 May 2020

The High Court rejected the constitutional challenge to section 51B of the PIAB Acts where the applicant claimed to be entitled to recover her fees and expenses arising from the PIAB process (for the most part, a solicitors' instruction fee of €2,000). Such costs will not be allowed in the ordinary course of events but could be awarded in the event of misconduct.

Keating v. Mulligan [2020] IEHC 47 High Court (Cross J.), 24 January 2020

This was a personal injuries assessment arising from an RTA. The defendant made a S26 application on the basis of alleged suppression by the plaintiff of a prior and a subsequent accident.

Cross J. refused the S26 application and determined it was unmeritorious and went far beyond what was required or supported by the evidence. Applying the various decisions in which he had warned that such applications would be dealt with by an award of aggravated damages, he awarded €10,000 in aggravated damages (on top of €70,000 for compensatory damages).

Documents in Evidence

Some of the problems highlighted above may now be addressed through the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020, which commenced on 21 August 2020.

Part 3, Chapter 3 makes provision for the use of "business records and other documents" in civil proceedings. Business is defined extremely widely: *"includes any trade, profession or other occupation carried on, whether for profit or otherwise, either within or outside the State and includes also the performance of functions by or on behalf of"* publicly funded persons/bodies, charities, EU institutions, foreign national or local authorities, and international organisations. This is a very wide definition and will cover most documents routinely featuring in personal injury cases.

Documents can be admitted into evidence **and** the information contained therein can also be admitted.

All that has to be proved is that: (i) they were compiled in the ordinary course of business, (ii) the information was supplied by a person who may reasonably be supposed to have had personal knowledge of the matters (e.g., a doctor), and (iii) the information in non-legible form was reproduced in permanent legible form in the normal course of operation of the system.

There are some exclusions (e.g., privileged documents) but the benefit is that information in a document can be admitted if (a) a copy has been served on the other party or parties **or** (b) notice is given of the intention to do so along with a copy of the document 21 days before commencement of trial.

The other party can object by notice given 7 days before commencement of trial and the court has discretion in relation to the time limits and the admission of documents/information.

Notwithstanding the wording set out above, it may be good, belt and braces practice to serve a notice on the plaintiff in respect of his/her documents but this provision now enables the defendant to rely on its documentation without further proof.

Particulars

Crean v Harty [2020] IECA 364 22 December 2020

The speaker saw this as a further erosion of the decision in *Armstrong v. Moffatt.*

The plaintiff claimed that his hip replacement had been carried out without informed consent of various risks. The defences included denials of liability and denials they failed to obtain informed consent and the plaintiff sought particulars arising from the defences. The plaintiff relied upon S13(1)(b) of the Civil Liability and Courts Act 2004 which requires a defence to contain "*full and*

detailed particulars of each denial or traverse, and of each allegation, assertion or plea, comprising his or her defence".

The defendants argued that particulars should not be ordered on a denial and that the requests were matters for evidence. The Court of Appeal considered the decision in *Armstrong v. Moffatt* and pointed out that the comments of Hogan J. about particulars were qualified by the statutory requirements regarding proper pleading. The court also noted that particulars of a denial would be ordered if the denial amounted in substance to a positive plea and emphasised the overriding principle that a party must know the case they need to meet at trial. The court also held that the intervention of the Oireachtas in the area of pleading was significant and was not just intended to enshrine existing principles; accordingly, parties in personal injuries actions were required to "*plead with greater precision and particularity*".

It held that "*straight denial*" or a "*bald denial*" was precisely what S13(1)(b) was targeted at. Dealing with the objection that the particulars sought evidence, the court held the line between facts (the what) and evidence (the how) was not always distinct referring to the Supreme Court decision in *Quinn v. PriceWaterhouse Coopers*. Finally, the court dismissed the objection that the defendant knew the case (or would know if after exchange of reports) on the basis that it is well-established that an assertion that the other party knows a relevant fact is rarely a sufficient answer to a proper request for particulars. The defence was ordered to provide details of the basis of its (double negative) denial.

Pleadings in personal injuries must set full and detailed particulars of the case being made, by both sides to the litigation.

Humphreys J has expressed some disquiet about *Armstrong* in two decisions.

Griffin v. Irish Aviation Authority [2020] IEHC 113 High Court (Humphreys J.), 26 February 2020

This was a discovery application where the request for the personnel file was met with an objection that the plaintiff could obtain it by way of data access request. Humphreys J. expressed dissatisfaction with parties being sent off on "*wild goose chases*" and with the approach of Hogan J. in *Armstrong v. Moffatt.* He pointed out that just because a party does not include a detail does not mean that detail is irrelevant (citing a request to state the time of an accident)

"While Hogan J.'s judgment concludes with a homely suggestion to practitioners to be more discriminating in requests for particulars, the other side of the coin is that a certain interrogation of a case in advance can clarify issues and lay the ground for settlement where appropriate. It can also save costs."

Somers v. Cosgrave Developments (Dublin) Ltd. [2020] IEHC 255 High Court (Humphreys J.), 18 May 2020

Humphreys J. again expressed dissatisfaction with *Armstrong v. Moffatt* "*where Hogan J. refused what I respectfully say seem to me to be some reasonable requests for particulars on the basis that the defendant should have pursued interrogatories, a singularly inappropriate method to answer some open-ended questions*".

"*The court should not collude in the sort of procedural merry-go-round that can arise in these kinds of situations. If information is going to have to come out at some point, parties should really be encouraged (and if encouragement fails, order) to just provide it at the earliest opportunity*."

The application was for intra-defendant discovery and the court rejected the argument that pleadings were not closed because one defendant had not delivered its defence; the relevant pleading for the purpose intra-defendant discovery was the Notice of Indemnity/Contribution.

Discovery

Micks-Wallace (a minor) v. Dunne [2020] IECA 282 Court of Appeal (Murray J.), 19 October 2020

This involved a 12-year-old plaintiff injured in an RTA. The defendant sought discovery for three years pre-accident medical records, which were provided voluntarily. The plaintiff was then diagnosed with Hypermobile Eher's Danlos Syndrome, a rare genetic connective tissue disorder and delivered further particulars which brought that condition into the causation picture.

The defendant then sought further discovery of post-accident records which proceeded to a motion and an order was made for some documents with the door left open for further and better discovery.

Following SI 391 (the exchange of medical reports), the defendant sought eight categories of further post-accident records which were refused by Cross J.

Murray J. on appeal held that further requests for discovery must be treated as applications to vary either an agreement or order for discovery and, in addition to showing relevance and necessity, a party must show "*good reason*" why the discovery was not originally sought. The bulk of the third request discovery was refused for a number of grounds including the failure to explain why it had not been sought earlier.

There was also a useful discourse on situations where an expert says that they require certain documents including that it is not enough to simply record what the expert has requested and that it is for the Court, not the expert, to determine relevance and necessity.

It is therefore important for defendants to consider the timing of discovery applications, so as to avoid the risk of falling afoul of this ruling.

Liability

Sheehan v. Bus Eireann/Irish Bus [2020] IEHC 160 High Court (Keane J.)

This was a claim for psychiatric injuries for a driver who came upon the scene of a collision. The question for determination was whether duty of care existed for the category of victim of the plaintiff.

Keane J. ultimately held that the plaintiff was a primary victim because she was "*a motorist within the radius of flying debris from the collision*" and was therefore a participant in the accident, albeit on the periphery (note: the plaintiff did not see collision itself)

It is interesting that significant doubt was cast over the primary/secondary victim distinction (flowing from English case law), whereby a secondary victim cannot claim damages absent a close relationship with the primary victim.

Turner v. The Curragh Racecourse [2020] IEHC 76 High Court (Keane J.), 21 February 2020

The plaintiff was running at the Maddenstown Gallops at the Curragh when he was collided with by a galloping racehorse. Keane J. rejected the contention that a sign should have been erected to warn

recreational users ("where would the duty begin and end?") and referred to the inherent dangers of being in outdoor terrain.

The Court was satisfied that the accident was caused entirely by the plaintiff's negligence: "*In his evidence, Mr. Turner contrasted the proper lookout he keeps when crossing a public roadway with, to borrow a horse racing expression, the blinkers that he asserts he is entitled to wear, figuratively speaking, when running on the Curragh*."

It is interesting, that the court held that listening to music through headphones as a pedestrian or jogger in a public place was not negligent conduct but that it remained a proximate cause of the accident, together with failing to keep a proper lookout.

Damages

McKeown v. Vocella [2020] IECA 242 Court of Appeal (Noonan J.), 11 August 2020

This was a simple personal injury claim: an RTA, involving rear ending; for assessment only, with specials and medicals agreed. The plaintiff was the only witness at trial and there was no issue on exaggeration.

O'Hanlon J. awarded €70,000 (plus €6,000) for soft tissue injuries to the back where the plaintiff missed 6 weeks' work and an MRI showed some low-grade degenerative changes (pre-existing and asymptomatic).

The Court of Appeal reduced general damages to €35,000 (plus €6,000). The court noted that "*It cannot be fair to either plaintiff or defendant that the value of their case depends on the identity of the trial judge. Personal injury litigation should not be a lottery and plaintiffs and defendants alike are entitled to reasonable consistency and predictability*."

The court also endorsed a practice of addressing the trial judge on damages: "*It is perhaps a somewhat remarkable feature of personal injury litigation in this jurisdiction that it was, until relatively recently at any rate, pretty well unheard of to address the court on the proposed level of the award. It is difficult to see in principle why this was so.*"

The Court of Appeal judgment refers to the insurance burden and places great emphasis on the Book of Quantum:
The Book of Quantum has been with us since 2004 but it has had a surprisingly limited impact on the level of awards, particularly when one considers the fact that courts are mandated to have regard to it …
It is perhaps to be viewed as a guide and in many cases, its value may be limited for a wide variety of reasons. However, it does at least recognise that there are different categories of severity of injury, each of which has an approximate band of values.
The successful operation of any personal injuries litigation system is highly dependent on predictability. The Book of Quantum seeks to introduce a measure of predictability …
The relatively recent and long overdue updating of the Book of Quantum in 2016 has made it considerably more relevant, as damages have in recent years become more static …
The importance of consistency in awards is a major factor underlying the passage of the recent Judicial Council Act 2019, and in particular, the forthcoming introduction of Personal Injuries Guidelines under that act. The Guidelines will replace the Book of Quantum but have the same

objective, identified in s. 90(3)(d) of the 2019 Act as the need to promote consistency in the level of damages awarded for personal injuries.

The Guidelines will be extremely important and may see some heads of damage reduced significantly. The Guidelines may also render lower value cases uneconomical for lawyers to run.

Q&A

A plaintiff is required under S10(2)(e) of the 2004 Act to provide particulars of special damages claimed. Defendants should insist of the provision of this information. However, whether or not it is then worth a motion, is doubtful, as many judges take the view that, in practice, details of special damages are often supplied later. Non-compliance can be highlighted in the defence and representations made as to costs at a later stage. In appropriate cases, there might be cause to compel a plaintiff to provide particulars of special damage.

The speaker was not aware of any cases where a plaintiff had been penalised for non-compliance with S8 of the 2004 Act. In *Baldwin v The National Museum* the issue was raised in relation to CCTV evidence but the point was ultimately decided against the defendant and the court actually drew an adverse inference against the defendant for failing to call evidence from the person who had viewed the CCTV prior to its destruction. The best type of case in which to make an application would, for example, be where a plaintiff slips and falls on a petrol station forecourt but does not report the incident and then goes to a solicitor many months later. The only real evidence, CCTV, would almost certainly have gone.

The new Guidelines on quantum are will likely be applied retrospectively for cases in being but probably not for pending appeals. There is an ongoing obligation on plaintiffs to ensure they are in the correct jurisdiction so they cannot regard the position at the time of issue of the proceedings as being definitive. Little else is known at this stage about what they will contain but the reductions are reported to be significant.