

**THE HIGH COURT**

**[2015 No. 8405 P]**

**BETWEEN**

**PATRICK WHEARTY**

**PLAINTIFF**

**AND**

**MICHAEL LANIGAN PRACTISING UNDER THE STYLE AND TITLE OF POE KIELY HOGAN  
LANIGAN SOLICITORS**

**DEFENDANT**

**JUDGMENT of Mr. Justice Meenan delivered on the 21st day of May, 2020**

**Introduction**

1. This is an application by the defendant, a Solicitor, for an order pursuant to O.19, r.28 of the Rules of the Superior Courts (RSC) and/or pursuant to the inherent jurisdiction of the court to strike out the plaintiff's proceedings on the grounds that they disclose no reasonable cause of action, are unsustainable, are frivolous and vexatious, are bound to fail and amount to an abuse of process.
2. It is not disputed that the defendant acted on behalf of the plaintiff for a period between 19 May 2008 and 3 June 2010 in relation to a number of criminal prosecutions taken against him by the Gardaí, as follows: -
  - (i.) On 19 May 2008, a charge of driving without insurance. The plaintiff was convicted, fined a sum of €700 and disqualified from driving for two years. On that date he was also convicted of failing to produce a valid driver's licence and fined the sum of €150. The defendant was instructed to appeal this decision;
  - (ii.) On 16 June 2008, the plaintiff was convicted of failing to produce insurance and failing to have a driver's licence. He was fined the sum of €300 in respect of these offences. The plaintiff did not instruct the defendant to appeal;
  - (iii.) On 2 July 2008, the plaintiff was charged and convicted of speeding and was fined a sum of €150. The defendant was not instructed to appeal;
  - (iv.) On 7 July 2008, the plaintiff was charged for non-display of tax and was fined the sum of €300. The defendant was not instructed to appeal;
  - (v.) On 16 June 2009, the plaintiff was charged for driving without insurance, driving without a valid driver's licence, and for having no NCT Certificate;
  - (vi.) On 21 July 2009, the plaintiff was charged in relation to three separate offences of driving without insurance. On that date the District Court Judge took an exceptionally serious view of the multiplicity of prosecutions being made against the plaintiff and remanded him to appear in custody on 27 July 2009. On that date the plaintiff was fined the sum of €400 for using the vehicle without an NCT certificate, €200 for driving with a defective front lamp, €250 for driving without a valid driver's licence and a further five month concurrent prison sentence for driving without insurance and a concurrent disqualification for six years;

- (vii.) On 20 October 2009, the plaintiff was charged with two charges of making false declarations concerning car insurance. He was convicted and was fined €1,000, sentenced to four months' imprisonment and was disqualified from driving for six years. The plaintiff was not advised to appeal as he had not revealed his previous convictions to the insurance company involved; and
  - (viii.) On 15 December 2009, the plaintiff was prosecuted for driving without insurance and for drug driving contrary to s. 49 (1) of the Road Traffic Act, 1961 as amended. The defendant was instructed by the plaintiff to enter pleas of guilty to try to reduce the penalties. In the event, the plaintiff was sentenced to four months' imprisonment and disqualified for six years in respect of the drug driving offence and for the no insurance offence he was sentenced to five months' imprisonment and disqualified for six years. The sentences and disqualifications to run concurrently.
3. In addition to the above, the plaintiff had a number of other convictions for charges when he was not represented by the defendant. These are as follows: -
- (i.) 2 July 2008: charged with speeding, fined the sum of €160;
  - (ii.) 2 February 2009: charged with non-display of road tax and was fined the sum of €450;
  - (iii.) 3 March 2009: driving without insurance, the plaintiff was fined the sum of €1,200 and disqualified for two years. On that date the plaintiff was also fined the sum of €450 for non-display of tax;
  - (iv.) 16 March 2009: charged with non-display of tax and was fined the sum of €450;
  - (v.) 20 April 2009: charged with non-display of tax, fined €450;
  - (vi.) 2 June 2009: charged with non-display of road tax and was fined the sum of €500;
  - (vii.) 15 June 2009: charged with driving without insurance. The plaintiff was fined the sum of €1,200 and disqualified for two years for driving without an NCT certificate and was fined €500 for driving without a valid driver's licence; and
  - (viii.) 14 July 2009: charged with driving without insurance. The plaintiff was fined the sum of €2,500, disqualified for four years and for driving without an NCT certificate was fined €600 and for non-display of an insurance disc was fined the sum of €350 and for driving without a valid driver's licence received a further fine of €600 and a concurrent four year disqualification.
4. The defendant represented the plaintiff on a number of appeals which arose out of the convictions in the District Court and various interlocutory applications in connection with these appeals. A number of these appeals were successful, which resulted in the relevant convictions and sentences being set aside.

### **The proceedings**

5. On 16 October 2015, the plaintiff issued a plenary summons claiming that he "*received appallingly substandard legal representation and unprofessional legal advice, aid and support from the defendant..*" He also claimed the defendant "*acted in consort with the DPP*" which resulted in him, the plaintiff, receiving three five month prison sentences in 2009. He also claimed that he was illegally imprisoned in December, 2009, was deprived of his driving licence, deprived of his livelihood, deprived of access to his family and was "*physically, mentally and emotionally damaged*". The general indorsement of claim seeks the sum of €25 million in damages, being €5 million for each of the following five headings: -
  - (i.) False imprisonment;
  - (ii.) Mental health damages resulting from being in prison;
  - (iii.) Loss of livelihood;
  - (iv.) Loss of family home and partner; and
  - (v.) Pain and suffering from lack of emotional support "*of my daughter and immediate family*".
6. Subsequently, the plaintiff delivered a Statement of Claim where he repeats his claim of professional negligence against the defendant and expands his claim to include breach of the European Convention for the Protection of Human Rights and breach of the Sale of Goods and Supply of Services Act, 1980. In respect of his convictions and sentences dated December, 2009, the plaintiff alleges that there was a failure to appeal the prison sentence and a failure to make an application for *habeas corpus* in respect of his alleged false imprisonment.
7. The defendant sought particulars of the matters alleged in the Statement of Claim, including particulars of each occasion upon which it was alleged that the defendant was negligent and/or the services provided were inadequate. In response, the plaintiff identified the following dates: 3 March 2009, 15 June 2009, 16 June 2009, 14 July 2009, 21 July 2009, 27 July 2009, 20 October 2009, 8 December 2009 and 15 December 2009. It can be seen that in respect of some of the dates which the plaintiff identified that, in fact, the defendant was not instructed by the plaintiff.
8. The plaintiff also gave particulars of a number of successful appeals from convictions in the District Court. A number of these successful appeals related to matters in which he was not represented by the defendant. In respect of the convictions of 27 July 2009, these appeals were allowed insofar as the plaintiff was given a disqualification from driving but with no custodial sentence. This also appears to have been the outcome in respect of his appeal from the convictions of 20 October 2009. The plaintiff was not successful in other appeals, in particular, his conviction on 15 December 2009, which resulted in a sentence of four months' imprisonment and a six year driving ban. It should

be noted that one of the plaintiff's claims against the defendant was a failure to appeal this conviction.

9. A full Defence was delivered on 8 February 2019. The defendant pleaded, *inter alia*, that the plaintiff's claim was frivolous and vexatious and that much, if not all, of the claim was statute barred.

#### **Complaint to the Law Society**

10. The plaintiff made a complaint to the Solicitors Disciplinary Tribunal about the professional services provided to him by the defendant. The complaint was considered by the Solicitors Disciplinary Tribunal and it was found that there was no *prima facie* case of misconduct on the part of the defendant.

#### **Application before the Court**

11. The application of the defendant is grounded on an affidavit by Michael Murphy, Solicitor of Holmes O'Malley Sexton who are instructed by the defendant. This comprehensive affidavit sets out the background to the claim and exhibits relevant documents including the proceedings and decision of the Solicitors Disciplinary Tribunal. Also exhibited in the affidavit is an expert report from Mr. James MacGuill, a Solicitor engaged on behalf of the defendant to examine the claims made by the plaintiff and give an expert opinion as to any liability on the part of the defendant.
12. The report from Mr. MacGuill sets out, in considerable detail, the defendant's professional involvement with the plaintiff and identifies the appropriate professional standards. Mr. MacGuill concludes: -

"In my professional opinion having practiced in the criminal courts for in excess of 30 years and being familiar with the processes in the District and Circuit Court and the attitude of members of the bench to road traffic offences, I believe that the outcomes that arose in the prosecutions concerning Patrick Whearty were entirely within the generally expected norms.

If anything, I would be of the view that the outcome on appeal was result orientated in the context of cases which had by that stage become stale and where the penalties imposed were considered by the judges on appeal to be adequate if reduced to disqualification. In my view the complaints made by the plaintiff and the explanations provided by Mr. Lanigan I have come to the conclusion that Mr. Lanigan acted appropriately throughout his instructions."

13. In a replying affidavit sworn by the plaintiff, he sets out his complaints. However, significantly, the plaintiff does not identify any report from an independent suitably qualified expert to substantiate any or all of his claims.

#### **Principles to be applied**

14. The defendant is, at an interlocutory stage, seeking to have the plaintiff's action struck out on the grounds that it is unsustainable, frivolous and vexatious and bound to fail. Further, it is alleged that the plaintiff's proceedings are an abuse of process. As the

plaintiff enjoys a constitutional right of access to the courts, the jurisdiction to strike out proceedings at an interlocutory stage only arises in clear cases. The defendant also enjoys a constitutional right to his good name, all the more so when faced with a professional negligence action such as this. The costs of defending such an action, both financially and in terms of personal stress, should not be understated. Where the right of access to the courts is being exercised not for the purpose of vindicating a right or asserting a valid claim but rather to attack, without justification, the reputation of another, the courts must step in to prevent this. I refer to the following passage from the judgment of Costello J. in *D.K. v. A.K.* (High Court, 1990 No. 5306 P, 2 October 1992) where he stated: -

“The principles on which the court will exercise its inherent jurisdiction to strike out a plaintiff’s action can be shortly stated. Basically, the jurisdiction exists to ensure that an abuse of the court’s process does not take place. If it is established by satisfactory evidence that the proceedings are frivolous or vexatious or if it is clear that the plaintiff’s claim must fail, then the court may stay the action. But it will only exercise this jurisdiction sparingly and in clear cases (*Barry v. Buckley* [1981] I.R. 306, *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425).”

15. It is well established that to initiate and maintain professional negligence proceedings there must be a supportive report or advice from a suitably qualified expert. I refer to the oft cited passage from the judgment of Denham J. (as she then was) in *Cooke v. Cronin & Neary* [1999] IESC 54: -

“Counsel for the respondents submitted that this case was run on a wing and a prayer. He informed this Court that he had brought to the attention of the Learned High Court Judge the statement of Barr J. in *Reidy v. The National Maternity Hospital* unreported judgment delivered on 31st July, 1997, where he stated at p. 15:

‘It is irresponsible and an abuse of the process of the court to launch a professional negligence action against institutions such as hospitals and professional personnel without first ascertaining that there are reasonable grounds for so doing. Initiation and prosecution of an action in negligence on behalf of the plaintiff against the hospital necessarily required appropriate expert advice to support it.’

He pointed out that this had been endorsed by Kelly J. in *Connolly v. James A. Casey and Laura Murphy (Trading under the style and title of Casey and Murphy) and Michael Fitzgibbon*, unreported, High Court, Kelly J., 12th June, 1998. That was an action where the Defendants, who were solicitors, were sued for damages for professional negligence. Kelly J. stated at page 19:

‘I have no difficulty in endorsing the views of Barr J. that the commencement of proceedings alleging professional negligence is irresponsible and an abuse of the process of the Court unless the persons advising such proceedings have reasonable grounds for so doing.’

While bearing in mind the important right of access to the Courts I am satisfied that these statements of law are correct. ...”

16. As it is clearly an abuse of process to initiate a professional negligence action without the report or advice from an appropriate expert, it follows that it must also be an abuse of process to continue to prosecute the proceedings without such advice or report.

**Application of principles**

17. As mentioned, the plaintiff appeared in person. The plaintiff confirmed to the Court that he does not have, nor ever had, any advice or report from an appropriate expert in support of the claims he is making against the defendant. The defendant produced to the Court his own expert report, which is supportive of both the advice given and the manner in which the plaintiff represented the plaintiff when he was facing multiple prosecutions on numerous occasions in the District Court. On this basis, the defendant is entitled to the reliefs sought.
18. However, being mindful that the plaintiff appeared in person when the matter came before the Court on 16 January 2020, I gave the plaintiff an opportunity to obtain either advice or a report from an appropriate expert to support the claims he was making. I allowed him some six weeks to obtain this so the application was adjourned to 28 February 2020.
19. On 28 February 2020 the Court was informed that no such advice or report had been received by the plaintiff. Therefore, the plaintiff’s claim for professional negligence was and remains unsupported by an appropriate expert. It follows that to allow these proceedings to continue would be an abuse of process.

**Conclusion**

20. By reason of the foregoing, I will grant the relief sought by the defendant and strike out the plaintiff’s claim.
21. As this judgment is being delivered electronically, I invite the parties to make submissions as to any consequential orders, including the matter of costs.