APPROVED **REDACTED**

[2024] IEHC 747

Record No. 2023/3755P

THE HIGH COURT

BETWEEN:

A (A PERSON WITH DISABILITIES) SUING BY HIS MOTHER AND NEXT FRIEND AA

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE AND CORK UNIVERSITY MATERNITY HOSPITAL

DEFENDANTS

Judgment delivered by Ms Justice Hyland on 29 November 2024

Introduction

1. This is an application brought by the defendants by way of motion of 5 March 2024 grounded upon an affidavit of Ms. Joyce, solicitor, to strike out the within proceedings pursuant to the inherent jurisdiction of the court on the basis that it discloses no cause of action and/or is frivolous and vexatious and/or is bound to fail or constitutes and abuse of process.
2. No application is brought pursuant to Order 19, Rule 28 of the RSC to strike out on the basis that it is frivolous and vexatious. Rather the application invokes the inherent jurisdiction of the court. Nonetheless, I should observe that Order 19, Rule 28, which

previously referred to dismissal of a claim for being frivolous and vexatious, has been amended so as to remove that reference (see S.I 456 of 2023 – Rules of the Superior Courts (Order 19) 2023). In the light of that change, I propose to deal with the motion as seeking dismissal on the basis that the proceedings disclose no cause of action, are bound to fail and/or constitute an abuse of process. In any case, this application falls much more obviously into the "bound to fail" category on the basis of a lack of medical evidence than one based on an assertion that the proceedings are frivolous and vexatious (in the legal sense).

3. In the alternative, the defendants seek an Order pursuant to section 10(3) of the Civil Liability and Courts Act 2004 (the "2004 Act") staying or dismissing the plaintiff's claim on the basis of failure to comply with the pleading requirements of the said Act.

4. Separately, there is an application for what is referred to as an "*Isaac Wunder*" order. In the High Court, such orders have the effect that, if granted, a person is restrained from issuing proceedings in respect of specified issues or against identified persons without first obtaining the permission of the President of the High Court. For the remainder of this judgment, I will describe the Order sought as a litigation restriction Order, or "LRO", as that accurately describes the nature of the Order and permits a greater understanding of what is being sought.

5. This motion was heard on 2 July 2024, and having heard the parties, and in particular the application of Ms. AA to put in further medical evidence, by decision of 5 July delivered *ex tempore* I decided to adjourn the application to 15 October to consider any further evidence provided. That evidence was in fact only provided on the adjourned date i.e. 15 October 2024, being a further report from a Dr. Fogarasi of 1 October 2024, who had previously provided two reports. Nonetheless, the defendants

indicated they were in a position to deal with it, and a hearing took place where both parties made submissions on the impact of the new evidence on the application.

6. In respect of the application for a LRO, I made an interim order on 5 July in the following terms:

> *"An order pursuant to the inherent jurisdiction of the Court restraining the plaintiff and [Ms. AA] from instituting any proceedings against the defendants arising from the medical treatment of the plaintiff from the 19th to 23rd January 2003, without the prior permission of the President of the High Court pending the matter returning to this court on 15 October 2024."*

Preliminary

7. Before dealing with the substance of the application, I should address the manner in which this motion has been responded to by the plaintiff. The plaintiff, A, is a young man aged 21, and his mother, Ms. AA seeks to represent him personally. No solicitors are on record in these proceedings.

8. A is not a ward of court nor the subject of an order under the Assisted Decision-Making (Capacity) Act 2015 (the "2015 Act"). He was in court for the hearing in July, and he agreed that his mother could speak for him in court for the purposes of responding to the motion. The matter proceeded on that basis. He was not present in October when the matter returned to court, but no issue was raised by any party. I am content to treat his consent to his mother representing him in July as carrying over to October, given that it is all in respect of the same motion. However, if the matter is to proceed, he should either retain solicitors, or, if he wishes to appear without solicitors, his mother can only assist him *qua* McKenzie friend in accordance with the terms of Practice Direction HC72. If there is a concern about his ability to do this, consideration should be given to making an application under the 2015 Act for the appointment of a co-

decision maker or a decision maker representative.

Factual Background

9. A was born in Erinville Hospital in Cork on 11 January 2003. The complaints made in these proceedings centre around events that took place from 19 January to 23 January. A was born extremely prematurely at 24 weeks and three days, and initially he seemed to be doing well. Unfortunately, eight days after his birth, things took a turn for the worse, and various complications arose. He developed sepsis and, ultimately, he lost part of his heel, part of his foot and his toes on his left foot. A also alleges that he incurred other injuries that resulted in him being diagnosed as being autistic after he reached 18, and were causative of his current depressive disorder.

10. In summary, the pleadings, which were drafted without the benefit of solicitor and counsel, allege negligence in respect of A contracting MRSA and sepsis following his birth. The plaintiff also alleges doctoring of medical records, non-disclosure of MRSA infection and fraud. The plaintiff alleges there were delays and errors in relation to the diagnosis and treatment of septicaemia. The plaintiff alleges that exposure to bacteria can cause brain injury, hearing impairment and necrosis of the limb. The plaintiff makes general allegations concerning alleged inappropriate levels of staffing or levels of hygiene, monitoring, investigations, treatment and diagnosis. The plaintiff argues that his all-round growth and development were grossly restricted and complicated. There are 21 particulars of negligence ranging from ones relating to the contraction of MRSA, to alleged deliberate and fraudulent wrongdoing. The losses claimed include damages, loss of earnings, cost of care, apology, and the implementation of the Meenan Report.

Chronology of Proceedings issued to date

11. To adjudicate fairly on both the application to dismiss, the relief pursuant to s.10(3) of the 2004 Act and the LRO, it is necessary to go through the history of these proceedings and related proceedings. Proceedings were issued in 2011, the plaintiff was represented by Kieran Buckley & Co. Solicitors, and the defendant was represented by the current solicitors. The proceedings related to a delayed diagnosis of hearing loss and were settled, which settlement was ruled by the Court on 17 July 2015.

12. AA argues that I should not take those proceedings at all into account when I am considering the history of this matter because they were to do with a delayed diagnosis in relation to A's deafness, but it seems to me that that is not quite correct. That is because of the sequence of events set out in the decision of Simons J. of 21 December 2022, in relation to the next set of proceedings. The judgment sets out in some detail the history of the litigation in regard to the events following A's birth and, at paragraph 7 onwards, one can see that when Ms. AA approached Kieran Buckley Solicitors in June 2003, shortly after A was born, there was at that time an intention to bring proceedings in relation to the injuries identified in these proceedings, quite apart from the deafness. There is a reference at paragraph 10 of the judgment about the first firm of solicitors obtaining medical reports from independent experts during the period 2003 to 2015, and four reports being obtained in respect of the injury to A's left foot. The general consensus of the medical reports was that the insertion of an arterial line had been necessary and appropriate. Three of the four reports concluded there had been no negligence and that the arterial line had been removed in a timely manner when the problem with the foot ischaemia occurred.

13. The author of the fourth report, Dr. Fogarasi, was very critical of the fact there were

two contradictory sets of nursing notes, and he indicated that they may have been tampered with in order to hide medical malpractice in the late removal of the arterial line, and that once the limb had become discoloured or showed other signs of possible necrosis, the arterial line should have been immediately removed. From the report he provided in 2011 his view was that the negligence arose in the delayed removal of the arterial line. At paragraph 15, Mr. Justice Simons records:

> *"A decision was made in or about 2011 to pursue proceedings solely in respect of the delayed diagnosis of the hearing loss."*

14. In the light of that history, it seems to me that the 2011 proceedings are relevant to the sequence of events in relation to litigation regarding the events of late January 2003. Returning to the second set of proceedings the subject of the judgment of Simons J., those proceedings were brought by Ms. AA herself against Elaine McNally, the Law Society, and Kieran Buckley Solicitors. From the judgment, one sees that those proceedings, although not brought by A, were in relation to injuries suffered by him following his birth, the retainer by the plaintiff's mother of Kieran Buckley as his solicitor, and the alleged failure of those solicitors to proceed in relation to the injuries to his foot.

15. At paragraph 31 Simons J says:

> *"The overarching allegation made is that the first and second firms of solicitors were negligent in not advancing a medical negligence action in respect of the injuries caused to [A]'s left foot."*

16. Simons J concludes that if any claim for damages was to be made in relation to the conduct of the solicitors, it was for A and not Ms. AA to progress same and dismissed the claim on foot of a motion to dismiss.

17. A further set of proceedings were issued in 2021. On the face of it these proceedings were issued by Ms. AA, and therefore do not concern A. However, Ms. AA was seeking to litigate on behalf of A in respect of the injuries to his foot following his birth in January 2003. A motion was brought to dismiss the proceedings on the basis they were bound to fail. That motion was heard by O'Regan J and a transcript of her ruling has been provided to me in the course of the motion. O'Regan J struck out the proceedings on the basis they were an abuse of process or bound to fail.

18. During the course of the hearing, the plaintiff's mother sought to have the plaintiff joined as co-plaintiff in respect of the aspect of the proceedings that concerned him. Ms. Justice O'Regan indicated that there was a fundamental problem, being the lack of expert medical opinion or evidence to support the claims made, and ultimately she refused to join the plaintiff to the proceedings in the absence of there being any expert medical evidence before the Court.

19. A further set of proceedings were issued on 29 September 2022. Those proceedings are very similar to the proceedings before me today. They were commenced by a personal injuries summons where A claimed damages for loss of limb and lifelong injuries impacting every area of life, physical and mental loss, damage, distress, upset, deprivation of rights, and inconvenience, on the grounds of alleged breach of duty, trust and care, negligence, and breach of statutory duty. Again, there is a focus on an alleged attempt to hide the mistakes of the defendants and hide the plaintiff's true medical history and current presentation.

20. Those proceedings went a certain distance. The plaintiff served a statement of claim, containing allegations broadly similar to those included in the within pleadings. The defendants issued a motion seeking those proceedings to be dismissed on the basis that they disclosed no reasonable cause of action and amounted to an abuse of process. A

motion was issued on 19 May 2023, and was transferred to the non-jury list. On 25 July 2023, the plaintiff filed a notice of discontinuance and the matter was struck out without any order for costs. No substantive explanation has been offered by Ms. AA or A as to why those proceedings were issued and struck out.

21. Remarkably, that sequence of events was repeated with another set of proceedings. The defendants entered an appearance on 8 June 2023. The pleadings replicated the allegations and claims described in the previous set of proceedings. On 1 September 2023 those proceedings were the subject of a notice of discontinuance by the plaintiffs without any prior notice to the defendants.

22. At the hearing on 2 July, Ms. AA sought an adjournment. Part of the justification for seeking an adjournment was that A and/or Mrs. AA were intending to bring two more sets of proceedings. I refused that adjournment for the reasons given in my *extempore* judgment of 5 July.

23. Prior to the delivery of the judgment, an issued copy of a personal injury summons of 3 July 2024 was provided to me. Those proceedings, although wider than the existing proceedings, encompass the issues the subject of these proceedings and are stated to be a claim by the plaintiff for injuries both physical and psychological, damages, and costs for severe personal injury. It identifies that the plaintiff is a 21-year-old male who lives with his mother and stepfather, and identifies he was born on 12 January, admitted to intensive care at Cork Erinville Hospital, and that there have been investigations in relation to the doctored notes and non-disclosure of MRSA and sepsis, delays in treatment disclosure, explanation for doctored medical notes, diagnosis, and misdiagnosis. At paragraph 7 it is pleaded that the plaintiff has recently learned he was exposed to, and infected with, sepsis, and coag-neg staph, and other bacterium after this initial infection, which led to loss of limb, with the left foot dying

and parts eventually falling off, losing all toes and half his foot, suffered further exposure to hospital acquired infection, all of which entered his bloodstream causing septicaemia, and it is identified that further medical opinion is awaited in this regard.

24. The defendants sought liberty to bring a motion to dismiss those proceedings and I gave liberty to issue a motion returnable to 15 October. On 24 July the plaintiff wrote seeking to amend the statement of claim. On 25 July she wrote indicating her intention to discontinue the proceedings. On 29 July the motion was issued by the defendants. Also on 29 July, the plaintiff served a notice of discontinuance and the proceedings were discontinued with no order as to costs.

25. Finally, the defendants have also averred that judicial review proceedings have been issued. The defendants are unaware of the subject matter of these proceedings, which are listed *ex parte* in the High Court judicial review list on 2 December 2024.

26. The above summary discloses an extraordinary history of repetitive litigation that seeks to raise the same issues over and over again. That is of course highly relevant in the context of the LRO, as well in relation to the application to dismiss.

Motion to dismiss

27. The basis of the motion to dismiss is focused largely on the absence of medical evidence to support the bringing of the within proceedings. Three medical records have been provided by the plaintiff, being those of Dr. Rothburn, Dr. Sweet, and Dr. Fogarasi. Counsel for the defendants made submissions identifying why those reports were not sufficient, either because they did not identify negligence or did not identify causation.

28. In her reply, the plaintiff indicated that she was no longer relying upon the reports of Dr. Rothburn and Dr. Sweet and that exclusive reliance would be placed upon the report of Dr. Fogarasi. For the sake of completeness, I should indicate that

Dr. Rothburn did not identify any negligence, and Dr. Sweet indicated possible negligence, but said it was impossible to establish any causal effect.

29. Dr. Fogarasi has provided two reports, the first from 2011 and the second from 2022, as well as various e-mail exchanges between Dr. Fogarasi and the plaintiff's then solicitors. I found it difficult to identify from the report in 2022 of Dr. Fogarasi precisely the nature of the negligence alleged. He did not identify causation, i.e. that the negligence he identified caused particular specified injuries to A. The most he does is to indicate that had the defendants acted differently, A's outcome would have been better. That is not causation within the legal sense.

30. There are very strict rules in relation to the identification of appropriate expert evidence in medical negligence cases, identified *inter alia* by Clarke J. in the case of *Greene v Triangle Developments Ltd* [2008] IEHC 52, where he emphasised the importance of having expert evidence in advance of commencing proceedings in professional negligence. At paragraph 4.3, he said:

> *"It is, of course, the case that no party should issue proceedings without having a credible basis for so doing. That situation applies with particular force in cases where it may be considered appropriate to maintain a claim for professional negligence. It would be most inappropriate for any party to issue proceedings alleging professional negligence or join a third party against whom professional negligence was to be alleged, without having a sufficient expert opinion available that would allow an assessment to be made to the effect that there was a stateable case for the professional negligence intended to be asserted."*

31. In my decision of 5 July I indicated that the evidence of Dr. Fogarasi did not reach that threshold, in particular because of the lack of any evidence of causation. Following the decision of Baker J. in *Gallagher -v- Letterkenny General Hospital* [2017] IEHC

212, I decided to adjourn the matter to permit the plaintiff to see if she could obtain additional evidence.

32. When this matter was discussed with Ms. AA in court, she indicated she was getting further medical reports from Dr. Fogarasi and in that context, indicated there was a whole new area of negligence she wished to obtain a report on, being alleged negligence in relation to open-heart surgery that A received in February 2003. I indicated that the adjournment was being granted only to obtain evidence in relation to the causes of action pleaded and not in respect of a totally new cause of action. In the additional medical report, material is included in relation to cardiac issues but no application has been made to amend the Statement of Claim and the adjournment was explicitly not for this purpose. Accordingly, I do not propose to consider that evidence at all in the context of this application.

Additional Medical Report of Dr. Fogarasi

33. At the hearing on 15 October 2024, a medical report by Dr. Fogarasi of 1 October 2024 was provided to me by Ms. AA. It was not put on affidavit, but no objection was taken to its production by the defendants. Given that the plaintiff is a litigant in person I am prepared to accept the report and to consider its contents. Dr. Fogarasi is described as a paediatrician, child neurologist, clinical neurophysiologist, teacher for the handicapped, and healthcare manager at Bethesda Children's Hospital, Budapest, Hungary. The report is on the note paper of Bethesda Children's Hospital the department of Neurology. He identified that the report was regarding A's left foot necrosis and partial amputation due to sepsis and intra-arterial line insertion/ monitoring as well as an opinion on A's diagnosis of autism spectrum disorder, cardiac and infection issues. He indicated he was asked to highlight breaches of duty

and causation, in particular the relationship if any between A's loss of limb, PDA surgery and autism spectrum disorder and infections. He identified documents used in the preparation of the report, including a report from Dr. Rothburn, microbiologist of 2020 and a report from Dr. Sweet, neonatologist of 2021. He also referred to the medical management plan of the Erinville Hospital, the nurses' notes from the Erinville Hospital and the drug charts, laboratory reports and blood culture reports from the Erinville Hospital. He referred to his diagnosis of cerebral palsy, microcephaly, autism diagnosis. He noted that A received the diagnosis of ASD in 2022.

34. He provided that it is impossible to prove the causality of sepsis and ASD in a case like A's. He observed that given that A was born at 24 weeks with a very low birth rate, Apgar scores of four/ six, as well as neonatal illness, he opined that prematurity and its consequences were the most important etiological factors in his current state. He referred to the delay in diagnosing ASD and said that had A received appropriate timely diagnosis and treatment he may have had much less suffering due to autism and the lack of knowledge and it. He also referred to A having a persistent depressive disorder. He said this is a result of lack of access to or provision of any rudimentary treatment for his education, social and practical needs. He then referred to the data on A's foot. I summarise those parts that appear to me important in relation to the decision as to whether or not to dismiss the proceedings.

35. Under the heading "*Global Comments and Opinion*", Dr. Fogarasi set out some general conclusions. He observed that, "*according to the general conditions of A (emergency caesarean section due to maternal APH at 24th weeks + 3 days, low birth rate (725 grams), poor Apgar scores (4 /6) as well as neonatal illnesses - IRDS, persistent pulmonary hypotension, severe infections, cardiological problems and*

ROP -the monitoring of vital parameters by IA line insertion was a proper indication in his case."

36. He referred to the medical notes that identified the insertion of a long line at 6pm on 20 January, inserted via back of leg by Dr. Ballagh, and that the x-ray position was satisfactory. The notes also identified that at 9.30pm the long line was flushed by Dr. Ballagh, and that there was "*moderate pressure but flushing",* that at 11pm "*long line clamped as not happy with same pressure reading 275*" and Dr. Ballagh was informed, and that at 11.30pm a long line was removed by Dr. Ballagh, and that A was at rest. He referred to the fact that there are two sets of notes for this period that do not record the same matters. He noted there is no copy of the result of the x-ray.

37. The medical notes provided that a further line was inserted at 12pm on 21 January 2003 and the x-ray showed the position to be satisfactory. At the time of the insertion, A remained off ventilation. Dr. Forgrasi provided from the notes that, at 8pm, A was reported to be pale in appearance and did not tolerate handling, furthermore his left foot was deep purple and mildly warm to touch.

38. The comment of Dr. Fogarasi after this entry is as follows: -

> "*It is this line that caused [A]'s injury as it was not removed despite its colour and coolness and should have been removed immediately. It was likely removed the next day 22 January at 13.35* having regard to the notes that refer to "*left foot and toes discoloured and dusky with no capillary refill noted arterial line removed…*

39. He further observed that *"a secondary negligence happened with the transfer of coagulase negative staphylococcus from [A]'s skin through one of these lines and/ or during reintubation it is not possible to say which one. But that on the next day the 22nd [A]'s blood tested positive again for methicillin*

resistant coagulase negative staphylococcus …Therefore, we can assume there was a breach of duty in the delayed removal of the malfunctioning/ misplaced line long as well as failure of taking/ evaluating the X-ray and a long delaying its removal. In this case had [A] be reintubated Sunday or early Monday and screened for sepsis before use of limb, the injury could have been avoided. And in the failure to reintubate after self-extubation, the unrecognised MRSA and sepsis, poor placement of long line might create the need for arterial line. It was inserted in the same limb after the long line 6pm Monday 20th and on the 21st at 6.20pm an arterial line was inserted. Had limb been given time to recover screening done the injury could have been avoided."

40. He referred to unrecognised infections with MRSA and methicillin resistant coagulase negative staphylococci of the eyes on and before January 21 and says this is a separate negligence and that the combination of these, and the failure to screen A on the 18th-21st and take adequate precautions is substandard care. He noted there was also likely failure to properly insert lines i.e. confirm correct positions by x-ray, failure to monitor lines and to avoid contamination, alongside failure to recognise the evolving sepsis infection with methicillin resistant coagulase negative staphylococci. He noted that all this led to very poor outcomes for A. He goes onto observe that intra-arterial lines might cause decreased or even a stop of blood, which can compromise arterial circulation and result in limb threatening soft tissue necrosis. He notes that there are certain steps that ought to be taken to minimise complications and that the contradictory documents suggest that these might not have happened for A.

41. He then referred to A having "*a staphylococcus sepsis according to the microbiological result on 22January*" and that this "*sepsis could have a role in his leg injury on the 20th/ 21st of January due to inflammation and/or an injury due to malposition of first line long line on the 6pm and delay in removing this line.*" He referred to the nurse's notes on the 22nd at 4.15am that "*foot appears improved with mild warmth, toes remain black"* and that this line should have been "*removed immediately when noted by staff at 20hrs to be purple and cool to avoid losing 4 toes and heel*."

42. Dr. Fogarasi did not indicate why he believed there was a malposition of the first long line on 20 January. Nor is it clear why he appears to be of the view that there was a failure to adequately monitor the line through x-rays, given that there is a reference to an x-ray being taken. Given that the line was inserted at 6pm and removed at 11.30pm, it is not clear why he believed there was a delay in removing the line or what indications existed suggesting the line ought to have been removed earlier. It is not clear when he says the line ought to have been removed. Nor is it clear whether he believed the line ought not to have been inserted at all, or the problem was solely delayed removal.

43. In relation to the insertion of the line on 21 January at 12pm, which was removed the following day, again it is not clear when he says it ought to have been removed or what the clinical signs were indicating removal, although he did refer to nursing notes that the left foot was deep purple and mildly warm to the touch. He appears also to have indicated that had A been intubated during the placing of both lines that the outcome might have been different. He did not explain why this should be so.

44. In relation to the sepsis and/ or staphylococcus, he did not address the report by Dr. Rothwell which says that no injury was caused to A by the sepsis. Moreover, there

remains serious issues with causation because he observed the sepsis could have eroded his leg injury but does not commit to that. He also referred to the fact that there were duplications on the nurses' notes and the duplications did not contain the same information and he said, "*one might think that one of these copies was created later in order to change the original information on patients care which is in itself a breach of duty*". No causation is identified nor is it alleged that the issues with the notes had led to an injury.

45. In relation to the MRSA infection, he said that the reason there were multiple infections was his prematurity. However, he concluded that neonatal infections or sepsis do not cause long term problems after recovery except central nervous system infection like meningitis or encephalitis. This seems to contradict his earlier observation that the sepsis could have had a role in his leg injury, and it is difficult to know what precisely is being said in relation to this issue.

46. Under the conclusion section he observed as follows:

> "*There have been many breaches of duty of care and negligence in this case, together having a very negative effect for [A]. If [A] had been reintubated and screened earlier, these events must likely would not happen. [A] should have been better monitored. Had his sepsis been diagnosed on time and earlier treated with (both proper screening, antibiotics and reintubation on the 20th when first signs of deterioration began,) his outcomes would have been better. This is also the case for MRSA infection: whose mother should have been informed and [A] should have been isolated. Had the lines inserted on the 20th-21s*[t] *been monitored properly and removed when noted to be cold and purple, [A] could have avoided partial autoamputation. Had [A]'s infections been noted on time as well as results and treated with appropriate*

antibiotics, he could also have avoided the need for emergency PDA ligation".

47. I must consider whether this medical report can be treated as a report that meets the criteria identified by Clarke J. in *Green* i.e. one that allows an assessment to be made that there is a stateable case for the professional negligence intended to be asserted. I think the position is extremely borderline: I have explained the reservations I have about this report above, and it suffers from a distinct lack of clarity. However, it does appear to assert that the insertion of the line in A's left leg ought to have been removed earlier than it was, and, had it been removed, the damage to A's left foot could have been avoided i.e. that the delay was causative of the damage. That appears to me to just about meet the threshold required. In those circumstances, I refuse the application to dismiss the claim as disclosing no cause of action and/or being bound to fail.

Section 10(3) relief of 2004 Act

48. My decision to refuse the above relief brings into play the second relief claimed i.e. an Order under s.10(3) of the 2004 Act requiring that the personal injury summons comply with the requirements of the Act.

49. Section 10 provides in relevant part as follows:

> *"(1) Proceedings in the High Court, Circuit Court or District Court, in respect of a personal injuries action, shall be commenced by a summons to be known as and referred to in this Act as a "personal injuries summons".*
>
> *(2) A personal injuries summons shall specify—*
>
> > *... (d) the injuries to the plaintiff alleged to have been occasioned by the wrong of the defendant,*

(e) full particulars of all items of special damage in respect of which the plaintiff is making a claim,

(f) full particulars of the acts of the defendant constituting the said wrong and the circumstances relating to the commission of the said wrong,

(g) full particulars of each instance of negligence by the defendant.

(3) Where a plaintiff fails to comply with this section—

(a) the court may—

(i) direct that the action shall not proceed any further until the plaintiff complies with such conditions as the court may specify, or

(ii) where it considers that the interests of justice so require, dismiss the plaintiff's action …

50. At present, unsurprisingly, the personal injury summons does not reflect Dr.. Fogarasi's most recent views, since it was drafted before those were provided. Moreover, it includes matters that are not supported by his report, for example it claims that A's treatment caused him to be diagnosed as autistic. No medical evidence is identified for that claim. Equally, various claims about the role that sepsis and/or MRSA are made, which are not supported by Dr. Fogarasi's conclusions in his recent report. In particulars of negligence, loss and damage delivered, claims are made for hearing loss, depression and developmental delay, despite the fact that no medical evidence for same has been provided. In the circumstances, this case cannot proceed on the basis of the current pleadings, given the narrowing of the case based on Dr. Fogarasi's most recent report. I am therefore going to make an Order staying

the proceedings under s.10(3) pending the delivery of an amended personal injury summons that complies with the requirements of s.10(3) and in particular, provides:

- full particulars of the acts of the defendant constituting the said wrong and the circumstances relating to the commission of the said wrong, and;
- full particulars of each instance of negligence by the defendant.

51. This must be done by reference to the most recent report of Dr. Fogarasi i.e. only particulars of negligence that are alleged to have been causative of A's foot injury by Dr. Fogarasi may be included. There must be precision in the pleadings as required by s.10(3). I will give the plaintiff three months from the date of this judgment to deliver the amended personal injury summons to the defendants and I will adjourn the matter to the personal injuries list on 14 March 2025. At that stage, if the parties are in agreement, an Order permitting amendment can be made on consent. If there is no agreement, an application can be made to the judge in charge of the personal injury list by either party.

Litigation Restriction Order

52. Turning to the application for a LRO, the defendants sought this Order having regard to the long history of litigation in relation to the circumstances of A's birth, and the multiple sets of proceedings that have been issued by A and/or Mrs. AA. In Mrs. AA's replying affidavit of 10 April 2024, she asserted as follows at paragraph 22:

> *"I say it is absolutely horrific considering the issues already highlighted that the defendants would seek the courts assistance to further hinder, remove and breach the plaintiff's right in requesting an Isaac Wunder order, as no prior case was deemed frivolous or vexatious. However, we trust the courts will rely, as per his right, on judicial support to prevent this, as it would be a further aggravation and*

injury. This would be a travesty alongside an atrocious waste of the taxpayers' money and time, let alone hours in the courts thus far… To say these matters are frivolous and vexatious is horrific, as is the implication that we are here as a nuisance. [A]'s presence here and the behaviour of all involved in not only our issue, but issues for the State."

53. At the hearing in July she made oral submissions to the same effect. Following the hearing in October, where submissions were made by both parties in relation to Dr. Fogarasi's additional medical evidence, I requested the parties through the registrar to provide the details of the issuing and/or discontinuance of any proceedings post 5 March 2024 (being the date of the issuing of the motion to dismiss the plaintiff's proceedings).

54. The defendants filed an affidavit setting out details of the filing of proceedings post 5 March 2024, identified above. Ms. AA did not file an affidavit but sent an email to the registrar on 31 October which included the following passage:

"[A] does not wish to take any further proceedings and likely will not due to the very unusual situation where we cannot secure legal representation. Therefore an Isaac Wunder order would not be necessary. Prior cases were taken by myself with enormous effort and trial and error and discontinued for very obvious and acceptable reasons including the pending death of my mother last year and to save the court's time as some of the pleadings were not correct…. I feel it relevant and hope it saves time in bringing this matter to conclusion to state an Isaac Wunder Order is not necessary as [A] will not be taking any further action without a solicitor. I intend to reissue a personal injury matter pertaining to my own and very separate matter of PTSD if my health permits as a matter of principle. That we are separate individuals with

separate legal matters and should be seen as such in our own rights. I had issued my own case for PTSD originally in the 2021 record number 2021/5558P but it was in a manner I believe to be unlawful dismissed on the grounds of the summons stating it was a medical negligence matter however I had lodged it as a personal injury matter …"

55. Through the registrar, it was explained that any material that she wished to put before the Court should be put on affidavit but no affidavit was received. No response to the above email was received from the defendants, understandably because it was not on affidavit. Nonetheless, I think the content referred to above is so obviously relevant to the question of a LRO that I should take it into account.

56. That email indicates a further intention to take proceedings by Mrs. AA herself. In relation to A, she indicates he is not intending to take further proceedings. However, as identified above, Mrs. AA is not either A's committee in wardship, nor a co-decision maker or decision maker representative under the 2015 Act. Therefore, she cannot bind him into the future as to what proceedings he will take. Given the history of litigation, it is not possible to exclude the bringing of further proceedings relating to his birth, treatment following his birth, and/or linked matters. At this point, including the within proceedings, the plaintiff and/or the plaintiff's mother have litigated on eight different occasions relating to his birth, treatment following his birth, and/or linked matters. Three of these proceedings have been issued, have necessitated a response from the defendants, and then a notice of discontinuance has been served.

57. Counsel for the defendants identifies the burden placed upon the defendants by this repeated litigation, and points to the belief of the plaintiff and/or Ms. AA, that it is simply the way in which the proceedings are formulated that is causing the difficulties that she is having, and that if she keeps issuing fresh proceedings she will eventually

circumvent those issues. The oral submissions made by Ms. AA supported that contention. That does not reflect the reality of the situation.

58. The law on an Isaac Wunder orders is that such an order may be made where there are repeated attempts to re-open litigation or to pursue litigation which is plainly groundless and vexatious. I am satisfied, based on the evidence that I identified earlier in this decision, that there have been repeated attempts to litigate the issue of the events following A's birth and whether the medical actions at the time caused him loss and damages, both in relation to his alleged loss and damage, and the psychological harm allegedly caused to Mrs. AA through his medical treatment. This is despite the fact that Ms. AA did not have sufficient medical evidence to bring many of those proceedings, and despite the fact that she had been advised by a solicitor in relation to the bringing of these claims and, when represented, had obtained medical evidence that did not support the claims of negligence or did not establish any causation. As Simons J noted in 2022, the first firm of solicitors retained by her obtained four medical reports from independent experts during the period 2003 to 2015 in respect of the injury to A's left foot and the general consensus of the medical reports was that the insertion of an arterial line had been necessary and appropriate. Three of the four reports concluded there had been no negligence and that the arterial line had been removed in a timely manner when the problem with the foot ischaemia occurred. Despite that, these proceedings were launched in 2023 in circumstances where at that time, Dr. Fogarasi, although very critical of the defendants in general terms, had not identified any causative link between those acts and A’s injury.

59. Ms. AA’s pleadings also disclose that she has also made complaints to HIQA in relation to the circumstances of A’s birth and an investigation was carried out from 2014 to 2017, which conclusions Mrs. AA disagrees with. Mrs. AA then complained

to the Medical Council about Drs. Boylan and Murphy who had been involved in the HIQA investigation, and an investigation took place from 2019 to 2021 which does not appear to have resulted in any findings against those doctors.

60. It is not appropriate to seek to litigate the same events over and over again in different sets of proceedings. It is imposing a huge burden on the defendants both in terms of legal costs but also in terms of the time of their employees, and independent experts. Indeed, the duplication of allegations and the multiplicity of proceedings is, in and of itself, hugely time consuming to deal with as it is almost impossible to disentangle the various allegations made at different times, and the extent to which they have already been dealt with previous judgments, or remain extant. This burden is demonstrated in part by the fact that the grounding affidavit on which the motion is based runs to 1,316 pages simply because of the sheer volume of exhibits.

61. I am conscious that the Isacc Wunder order is an exceptional jurisdiction and should only be invoked in cases where it is proportionate and necessary. Isaac Wunder orders will only be justifiable when they are made against applicants whose repeated vexatious litigation impacts the private rights of the defendants and/or impacts the resource management of the courts. While a person may have a right of access to the courts, they must also have regard to the private rights of defendants to be protected from the stress of harassment and the expense of excessive vexatious litigation being brought against them, and the important public interest of the finality of litigation. As noted in *Irish Aviation Authority v. Monks* [2019] IECA 309, in addition to the private rights of rights of persons to be protected from vexatious claims, any right to litigate must be construed in light of the obligation of the courts to use resources prudently, as there is an important *public* interest in avoiding limited court resources being taken up in dealing with such claims.

62. In *Kearney v Bank of Scotland* [2020] IECA 92, Whelan J. at paragraph 132 outlines a broad range of circumstances which the court will have regard to, and notes that an order shall be made where a clear case has been made out that demonstrates the necessity of making an order as follows. Following her approach, I have had regard to the history of the litigation. I am satisfied that the defendants have incurred significant costs over the years of litigation. I have sought to balance the rights of the parties and I am mindful that the Order I propose to make will not prevent the plaintiff or Mrs. AA from litigating outright but rather will simply act as an "*early stage compulsory filter*" i.e. the President of the High Court, or a judge delegated by him, will be able to consider any proceedings proposed to be brought and see whether it is appropriate whether leave should be given for same, having regard to factors such as the necessity to avoid duplication.

63. I have sought to observe the principle of proportionality when making the Order, and have accordingly formulated the Order in the least restrictive terms possible having regard to the aims sought to be achieved. I have borne in mind the importance of the right of access to the courts. However, I am satisfied that being required to seek leave does not preclude the right to access to the court, but merely regulates it in accordance with law. Any decision refusing leave to issue proceedings is subject to the usual obligation to give reasons and there is a right of appeal against any such decision. Indeed, the requirement to obtain leave to litigate is a feature of judicial review under Order 84 of the Rules of the Superior Courts and is far from unknown in our system of law. Of course there are differences between leave for judicial review, and leave where a LRO had been made (see Collins, J. in *Monks* in this respect) but nonetheless the concept of leave from a court cannot be treated as denying a person a right of access to the courts *per se.*

64. I am aware that Mrs. AA is unrepresented and I am satisfied that, as summarised above, she has had ample opportunity to object to the making of the Order and has explained why she does not agree with same. Whelan J. observed in *Kearney* that an Isaac Wunder order may have serious implications for the party against whom it is made as it potentially stigmatises such a litigant by branding her or him as, in effect, "*vexatious*" and this may present a risk of inherent bias in the event that a fresh application is made for leave to institute proceedings in respect of the subject matter of the order or to set aside a stay granted in litigation. Given the nature of these proceedings, and the unfortunate history of A's birth and subsequent problems, I would like to emphasise that I have no doubt that Ms. AA believes she is acting in the best interests of A, that her actions are motivated by her wish to achieve what she perceives as justice for him, and that there is no bad faith on her part.

Conclusion

65. Having regard to all of the above factors, I will make an Order in the following terms:

- I refuse the application to dismiss the proceedings;
- I will stay the proceedings pursuant to s.10(3) to give the plaintiff an opportunity to comply with his obligations to amend the personal injury summons;
- The proceedings are adjourned to the personal injury list on 14 March for further orders to be made in relation to any such amendment or any related matter, including the nature of A's representation;
- I will make a litigation restriction order in the following terms:

  An Order pursuant to the inherent jurisdiction of this Honourable Court restraining the plaintiff and the plaintiff's mother and any person purporting to act on behalf of the plaintiff from instituting further proceedings against the defendants arising from the medical treatment of the plaintiff on any date subsequent to the date of his birth

without the prior permission of the President of the High Court or such judge as may be delegated by him.

- The defendants having been unsuccessful in one of the reliefs sought (but only in circumstances where the plaintiff provided additional medical evidence after an adjournment provided for that purpose, and where without such additional evidence the defendants would have been successful), and wholly successful in two of the reliefs, I propose to award the defendants 75% of their costs with a stay on same up until 14 March, with liberty to make an application to lift that stay before the personal injury judge should the defendants wish to do so. I think it appropriate that the personal injury judge should deal with any application in relation to the stay simply because it is not clear what course this case will take after 14 March. If either party wishes to contest that Order, written submissions of no more than 2,000 words should be provided to the registrar no later than Friday 13 December. Failing the provision of any submissions, an Order in the above terms will be made on Friday 13 December.