



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2020:000094

**Clarke C.J.,
O'Donnell J.,
MacMenamin J.,
Dunne J.,
Charleton J.**

Between/

P McD

Appellant

-and-

The Governor of X Prison

Respondent

Ruling of the Court on Costs, delivered on the 4th day of October, 2021.

1. In these proceedings, this Court upheld the Court of Appeal's decision overturning the finding of the High Court that the defendant Governor had been negligent, and awarding damages to the plaintiff ([2021] IESC 65 – Unreported, Supreme Court, 17th September, 2021). The decision of this Court was unanimous, albeit that members of the Court differed as to the precise reasoning leading to that conclusion. The Court, by a majority, also refused to make any declaration in relation to the conditions of the plaintiff's detention in prison,

and the operation of the complaints system. The starting point, therefore, as fairly acknowledged by the representatives of the plaintiff/appellant (who is now sadly deceased) is that the proceedings must be considered to have been wholly unsuccessful, and that the normal rule, now set out in s. 168 of the Legal Services Regulation Act 2015 (“the 2015 Act”), is that costs follow the event unless the Court should otherwise order. The respondent (hereinafter referred to as “the Governor”) relies on this statutory rule, embodying as it does previous practice, to argue that the appropriate order is that the Governor should be entitled to recover the costs of the proceedings in the High Court, Court of Appeal and this Court against the plaintiff’s estate, albeit that it seems probable that the estate would have no assets with which to meet such an award.

2. The representatives of the plaintiff/appellant argue that there were a number of unusual features of this case that would justify the court in making “a partial award of costs”.
3. In the usual case, costs follow the event. The event here was clear and decisive. The plaintiff’s claim failed. However, this is far from a usual case, and it is those factors which make the case unusual which must be considered on this application and the Court must consider if the admittedly unusual features of this case could justify the Court in departing from the usual rule.
4. The genesis of this case lay in earlier proceedings commenced not by the plaintiff but rather by the Prison Governor seeking a declaration in relation to the duties of the Governor and the prison staff in circumstances where the plaintiff had embarked upon a hunger strike that threatened his life. The Irish Penal Reform Trust (“IPRT”), a charity concerned with prisoner welfare, contacted the solicitors now acting, and asked them to represent the plaintiff. They agreed to act, and instructed counsel to appear at short notice. It was clear from the outset that the plaintiff did not have any resources to pay for the representation which was provided for him.

5. It is apparent, even from the papers in this case, that the proceedings were not merely dramatic but also quite tense. Initially, the plaintiff remained on hunger strike while the Governor's proceedings were heard at short notice. Inevitably, the investigation of the legal rights and obligations of the respective parties in relation that hunger strike involves some consideration, at least in the circumstances which had led the plaintiff to commence his hunger strike. However, those matters could not be explored fully in the Governor's proceedings, and it was logical, or at least not surprising, that if these matters were to be considered, then it would require separate proceedings, and indeed that the legal team retained to act for the plaintiff would also act in those proceedings. It cannot be ignored that, in addition to pursuing the normal purpose of determining the rights, duties and obligations of the respective parties, these proceedings, together with the Governor's proceedings, afforded an opportunity and forum which might lead to the plaintiff being persuaded to cease his hunger strike. The existence of the proceedings, the representation afforded to the plaintiff, and the attention and care given by the trial judge, all contributed to resolving what was a very difficult situation for all concerned, created by the plaintiff's decision to commence hunger strike, and resulted in the plaintiff deciding to end that hunger strike in circumstances where his grievances could be pursued in this litigation.
6. This result in itself was undoubtedly of considerable benefit to the prison authorities facing as they were an extremely difficult situation. However, the proceedings also shone a spotlight on the prison authority's system of dealing with complaints in the prison and highlighted issues . This too was of benefit to the authorities, and of more general public benefit. Furthermore, the legal issues addressed on the appeal to the Court of Appeal and on further appeal to this Court raised issues of importance in respect of the legal relationship between prison authorities and prisoners, and also important issues relating to the test for the existence of a duty of care more generally.

7. There can be little doubt therefore that this case, both in relation to the circumstances giving rise to its commencement, and to the retaining of representation for the plaintiff and the manner in which it proceeded, contained features sufficiently unique to mark the case out as unusual and perhaps extraordinary, and which can certainly justify the Court in departing from the normal rule that costs follow the event. It would, however, be inappropriate to allow the plaintiff to recover costs of an appeal to the Court of Appeal and to this Court in which the plaintiff wholly failed, and which appeal was necessitated by what must now be considered to be an erroneous decision on the law in the High Court. It is relevant, however, that the arguments which succeeded in the Court of Appeal and this Court were not advanced in the High Court. This Court considers that it was not unreasonable in the unique circumstances of this case to have commenced the proceedings, and that the High Court proceedings required a careful assessment of the facts surrounding the plaintiff's condition and his imprisonment and that, in the particular and unusual circumstances of this case, it would be appropriate to direct that the plaintiff recover 50% of the costs of the High Court proceedings to be taxed in default of agreement, and that no order should be made in relation to the costs of the appeal to the Court of Appeal or this Court.