



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 23

Appeal No. 2019/130

**Birmingham P.
Baker J.
McGovern J.**

BETWEEN/

X. Y.

PLAINTIFF/ RESPONDENT

- AND -

MICHAEL SHINE

DEFENDANT

- AND -

DOREEN MCEVOY AND THE HEALTH SERVICE EXECUTIVE

DEFENDANTS/ APPELLANTS

JUDGMENT of Ms. Justice Baker delivered on the 29th day of January, 2020

1. This is the appeal of the second appellant from the order of Ní Raifeartaigh J. of 8 February 2019, made after delivery of a written judgment on 25 January 2019, *X. Y. v. Shine* [2019] IEHC 64, by which she determined that the plaintiff was entitled to have his claim tried by a judge sitting with a jury. The question at issue in the appeal concerns the meaning and effect of s. 1 of the Courts Act 1988 ("the 1988 Act") which entitles a plaintiff to a trial by a judge sitting with a jury in civil actions where the action seeks damages for false imprisonment or intentional trespass to the person, or both. The issue before the High Court was whether the actions against the second defendant and first appellant, Dorian McEvoy, and the third defendant and second appellant, the Health Service Executive ("HSE") were properly to be characterised as a cause of action in respect of intentional trespass to the person within the meaning of the exception contained in s. 1(3)(b) of the 1988 Act.
2. This judgment concerns the appeal of the first appellant only as, after the appeal was heard, but before judgment was delivered, we were informed that the proceedings against the second appellant had been compromised.

Facts

3. The plaintiff's claim arises from events pleaded to have occurred in 1975, when he claims he was sexually abused by the first defendant, Mr Michael Shine. Mr Shine has taken no part in the proceedings or in the motions which gave rise to the order and judgment of Ní

Raifeartaigh J. and it is the manner in which the trial against the second defendant is to be prosecuted that falls for consideration here.

4. The plenary summons issued on 17 April 2014 claims damages for personal injuries by reason of what is described as the “wilful assault and battery, trespass to the person, negligence and breach of duty (including breach of statutory duty, breach of trust and breach of the plaintiff’s constitutional right to bodily integrity) by the first defendant his servants or agents”. That claim taken alone is one which a plaintiff is entitled to have tried by a civil jury.
5. The second defendant is sued in a representative capacity on behalf of the Medical Missionaries of Mary, a religious congregation (“the Congregation”) which at all material times operated Our Lady of Lourdes Hospital in Drogheda, County Louth (“the Hospital”) in which it is pleaded that Mr Shine was employed as a consultant surgeon. The Congregation denies that it employed Mr Shine in the Hospital and, without prejudice to its general denials, further denies that the events complained of happened in the Hospital premises, or in part of the Hospital in its ownership, control, or supervision.
6. Whether the plaintiff is entitled to have his claim tried by a civil jury is to be assessed on an analysis of his pleaded cases, as no argument was made that the claim was not reasonably pleaded on that basis.

The legislation

7. Section 1 of the 1988 Act removes the previous entitlement of a plaintiff to elect to have a claim for damages for personal injury caused by negligence, nuisance or breach of duty tried by a judge and jury. The Act provides for a general rule that a civil trial is to be conducted by a judge sitting alone, save with regard to those actions for which exception is made in s. 1(3), which provides as follows:

“Subsection (1) of this section does not apply in relation to—

- (a) an action where the damages claimed consist only of damages for false imprisonment or intentional trespass to the person or both,
- (b) an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and damages (whether claimed in addition, or as an alternative, to the other damages claimed) for another cause of action in respect of the same act or omission, unless it appears to the court, on the application of any party, made not later than 7 days after the giving of notice of trial or at such later time as the court shall allow, or on its own motion at the trial, that, having regard to the evidence likely to be given at the trial in support of the claim, it is not reasonable to claim damages for false imprisonment or intentional trespass to the person or both, as the case may be, in respect of that act or omission, or
- (c) a question of fact or an issue arising in an action referred to in paragraph (a) or (b) of this subsection other than an issue arising in an action referred to in

the said paragraph (b) as to whether, having regard to the evidence likely to be given at the trial in support of the claim concerned, it is reasonable to claim damages for false imprisonment, intentional trespass to the person or both, as the case may be, in respect of the act or omission concerned.”

8. The issue for determination in the present appeal is whether the action against the Congregation falls within the exception in s. 1(3)(b) of the 1988 Act, that is whether the plaintiff’s action against the Congregation is one for damages for intentional trespass to the person or for “another cause of action in respect of the same act or omission”.
9. The test, as Ní Raifeartaigh J. said, is if the claim is for damages “for another cause of action in respect of the same act or omission”.

The claim pleaded against the Congregation

10. The claim against the Congregation is pleaded as arising by reason of its vicarious liability for the acts of Mr Shine and in negligence. The issue paper prepared after case management identifies the material issues as whether the Congregation was vicariously liable for the pleaded acts of assault by Mr Shine, and whether it was negligent for allegedly allowing or permitting the alleged abuse to continue.

The authorities

11. The exception created by the section has been the subject of a number of decisions of the Superior Courts which were analysed by Ní Raifeartaigh J. in her judgment. It is useful to first consider these before examining the pleaded case against the second defendant.
12. In *D. F. v. Commissioner of An Garda Síochána* [2015] IESC 44, [2015] 2 IR 487, Charleton J. analysed the correct approach to the interpretation of s. 1(3)(b) of the 1988 Act. That case concerned a claim arising from the arrest of an autistic person by a member of An Garda Síochána, framed as one for damages for false imprisonment, assault, battery, negligence, and for damages for breach of constitutional rights.
13. The High Court had held that the plaintiff was entitled to have a trial by a judge sitting with a jury in respect of all aspects of the claim, save that concerning the legality of the arrest and detention of the plaintiff which was directed to be tried by a judge sitting alone. The Supreme Court allowed the appeal and determined that all aspects of the claim were to be tried by a judge sitting with a jury. Charleton J. approached the matter by positing a test of whether the substance and nature of the case was one within the exception and whether the claim was connected with, or subsidiary to, the act or omission in respect of which the claim was brought. It was apparent that certain issues which would fall for determination in the course of the trial would not, taken alone, give rise to a trial by jury, but having regard to the provisions of s. 1(3)(b) of the 1988 Act, he held that the trial of those issues did entitle the plaintiff to a trial by jury if they arose from the same act or omission.
14. The test is set out at para. 18 of his judgment, described by Ní Raifeartaigh J. at para. 20 of hers as “[t]he most important paragraph of his judgment”:

“Clearly, actions for false imprisonment and assault are within the province of a jury trial in the High Court. Joining other causes of action to false imprisonment or intentional trespass to the person, assault, may preserve the entitlement to jury trial but only where there is one act or omission at issue in the trial, consisting in terms of the external facts of an assault or of false imprisonment, or both, and the subsidiary torts are allegedly based on that assault or on that false imprisonment. ”

15. The court is to assess where, in substance, the nature of the claim lies. If the joinder of other torts or causes of action takes the substance and nature of the case away from those core jury trial torts, a trial should take place with a judge sitting alone.
16. Ní Raifeartaigh J. noted, by reference to the judgment of Charleton J., that the focus of the analysis was to ascertain the substance and nature of the case and whether “the act or omission at issue in the trial” was the assault, intentional trespass to the person, or false imprisonment.
17. The judgment of Charleton J. is the most recent authority of the Supreme Court on the correct approach to the 1988 Act and from it a number of principles may be discerned. The first and important principle is that there be one act of omission, and by this I consider that Charleton J. meant that there be one assault or series of assaults which singly or together comprise the act or omission giving rise to the claim for damages. Second, more than one cause of action may be pleaded from the one assault, and Charleton J. gives the example of a plea in negligence where it is claimed that a member of An Garda Síochána exercised his or her power of arrest in a negligent way. The claim is still one for damages for an assault even if the torts may be variously described as the tort of assault, of trespass to the person, or of negligently permitting or allowing an assault to occur.
18. Fennelly J., in *Sheridan v. Kelly* [2006] IESC 26, [2006] 1 IR 314, took the same approach, viz. that the claims need not be identical and there may be additional or alternative heads of claim. That plaintiff had sued in respect of sexual abuse at the school which he attended as a young boy. The claim was pleaded in assault and trespass to the person and the plea against the school framed as one in negligence for failing to become aware of and prevent the abuse. It was therefore based on a plea of vicarious liability. The Supreme Court reversed the decision in the High Court and ordered a civil jury trial.
19. Fennelly J. considered that the correct approach was to look to the “core” of a claim and whether the balance of the claim as pleaded arose from that core claim, or, as he put it, could be “traced back to that key allegation”, at para. 16 of his judgment. The claim was pleaded in vicarious liability and Fennelly J. noted that whilst the negligent claim did “go beyond a simple allegation of vicarious liability”, at para. 15, the actions and omissions of the defendant are claimed “to have led to the same damage”, and that the core claim was still one for damages for assault.
20. Fennelly J. posited a requirement of a link between the negligence claim and the act of assault, whether the relevant assault could be linked in a causative way to the core claim.

At para. 16, he made the following statement which has been quoted in subsequent cases:

“The focus is on the damages and the relevant act or omission which causes them.”

21. Charleton J., at para. 20 of his judgment in *D. F. v. Commissioner of An Garda Síochána*, was careful to keep the focus on the identification of the “core” allegation and considered that the right to a civil jury trial could be preserved notwithstanding that a claim had pleaded “various other wrongs based upon the facts that consisted of that alleged wrong in the guise of different torts”.
22. Both *D. F. v. Commissioner of An Garda Síochána* and the earlier judgment of the Supreme Court in *Sheridan v. Kelly* posit a test of a causative connection between the act or omission and the injury, whether the core action is an action for assault or false imprisonment or intentional trespass to the person, and whether the other claims or causes of action are subsidiary to the core assault claim. The question is the nature of the claim and not the injury.
23. A similar approach was taken by Hedigan J. in the High Court in *Bookey (A Minor) v. Links Creche Southside Ltd* [2015] IEHC 562, where it was held that the plaintiff was entitled to a trial with a jury where the claim pleaded was in assault and negligence. The approach of Hedigan J. was to identify the substance or nature of the claim, or, as he put it at para. 8 of his judgment, to ascertain the “dominant aspects” of the case.
24. The final judgment which Ní Raifeartaigh J. considered in detail was the judgment of the Court of Appeal in *Pista v. Sweeney* [2016] IECA 94. The plaintiff sued for damages for personal injuries alleged to have been sustained during the course of his employment as a clumper of vehicles unlawfully parked in an off-street carpark. The claim arose from an incident when he was struck violently on the head with a lump hammer by the first defendant whose vehicle he was in the process of clamping. His claim for damages against the first defendant was a straightforward action for damages for assault and trespass to the person and no real dispute arose regarding the entitlement of the plaintiff to a trial by jury in respect of that claim. The second defendant was the employer of the plaintiff and was sued in negligence, breach of duty, and breach of contract, but there was no claim that the employer was vicariously liable for the actions of the assailant, or, as Ní Raifeartaigh J. noted at para. 39, there was not the “close connection” feature of the employer-employee relationship.
25. Peart J. accepted the argument of the plaintiff that the injury to him arose from the same factual circumstances, as the assault had occurred in the course of his employment.

Application to the facts

26. Ní Raifeartaigh J. expressed some hesitation regarding the application of the test in particular to the claim against the HSE but considered herself bound by the decisions of the Supreme Court and of the Court of Appeal and held that as the claim against the HSE was, in substance, broadly similar to the claim in negligence in *Pista v. Sweeney*, viz. that

the alleged negligent and wrongful act of the HSE and its predecessors in title caused injury to the plaintiff, the same conclusion should follow.

27. The concerns expressed by Ní Raifeartaigh J. do not fall for further analysis here as the claim against the Congregation with which this appeal is concerned is broadly similar to the claim against the second defendant in *Sheridan v. Kelly* who was sued as a representative of the owner or manager of the school where the alleged assailant was the principal. The claim was grounded in vicarious liability.
28. In its essence a claim arising from vicarious liability is not a subsidiary claim but one that the vicariously liable defendant is responsible at law for the acts of another. The claim for damages arising from vicarious liability is for that reason a "core" claim for damages for assault.
29. Whilst the claim against the Congregation is broadly pleaded and the issue paper identifies not merely a claim of vicarious liability but a claim for direct negligence in permitting or allowing the abuse to occur, I consider that the claim against the Congregation may readily be characterised as closely connected to the cause of action of assault or intentional trespass to the person and is subsidiary to the core claim. Primarily, the claim against the Congregation is a claim arising from vicarious liability and, insofar as the claim contained an element of non-vicarious liability, it is based on omissions and failures broadly speaking sufficiently closely connected to meet the test explained by the Supreme Court in *Sheridan v. Kelly*. The "core" claim is one arising by virtue of the pleaded assault.
30. I am satisfied that the trial judge was correct, and that the plaintiff is entitled to a civil jury trial against the second defendant. The connection to the primary claim is direct, being that between the assault and the alleged negligence. The appeal of the second defendant, therefore, is squarely met by the decision of Fennelly J. in *Sheridan v. Kelly* and I am satisfied that the facts and pleas against the Congregation are sufficiently similar to those made in *Sheridan v. Kelly* and would lead to the same result.
31. I would therefore dismiss the appeal of the Congregation on that basis.

Practical considerations

32. In his judgment in *Pista v. Sweeney*, Peart J. considered that some difficulty could arise were a court to be faced with the prospect of a civil trial for damages against different defendants giving rise to different results or different and inconsistent award of damages. The correct approach to the statutory test, however, does not, it seems to me, readily admit of an approach concerned with either case management difficulties or the risk that there be inconsistent award of damages or results. Charleton J., in *D. F. v. Commissioner of An Garda Síochána*, was not prepared to decide the matter on grounds of practicality of the ease of running a trial, while he noted that the matter was not one where a right to a trial by jury had a constitutional foundation. That is the preferred approach, in my view.

33. A similar approach was taken by Hogan J. in *Lennon v. HSE* [2015] IECA 92, [2015] 1 IR 92, where he allowed an appeal against the decision of the High Court that the plaintiff was not entitled to a jury trial in respect of defamation proceedings. He accepted that, from the perspective of convenience and the avoidance of duplication of costs, the decision of the trial judge seemed correct, but he considered that, as the issue was an issue of statutory right, the plaintiff's right to jury trial was not to be altered or diluted by case management considerations, at para. 41.
34. For this reason, I am not persuaded that the practical question would lead me to the view that the claim against the Congregation is not to be tried by a civil jury.

Time

35. A matter which featured in the judgment of Ní Raifeartaigh J. was her observation that some of the actions and claims against the Congregation and the HSE were pleaded to have occurred over a period of time and that, as she put it in para. 34, as regards the claim against the HSE, "the acts, omissions and events which have to be established by the plaintiff" at least appear "to span a much greater timeframe than the date of the alleged sexual assault and indeed take place before and after the assault" and consist of a much broader range of events "primarily omissions, as well as legislative changes, than the assault itself". For the reasons outlined above, I do not consider it necessary to determine this appeal by reference to the broad timeframe within which the claim is drafted.

Conclusion

36. Accordingly, for the reasons stated I consider that the appeal of the Congregation, the first appellant, should be dismissed, as whilst the action against the Congregation is for damages based both on vicarious liability and in direct negligence for the assault and intentional trespass pleaded against the first defendant it is closely connected with the "core" claim for assault in the manner identified in the authorities.