Neutral Citation: [2013] IEHC 5

THE HIGH COURT

[2012 No. 8876 P]

BETWEEN/

D.F. (SUING BY HIS TESTAMENTARY GUARDIAN AND NEXT FRIEND, K.M.)

PLAINTIFF

AND

GARDA COMMISSIONER, MINISTER FOR JUSTICE, EQUALITY AND DEFENCE, ATTORNEY GENERAL AND IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 14th day of January 2013

1. Where a plaintiff sues for false imprisonment and intentional trespass to the person along with a claim for negligence, must the ensuing trial always be with a jury? This is the significant procedural point which arises on the defendants' application by motion to this Court for directions as to the mode of trial of proceedings which involves claims by the plaintiff for damages for false imprisonment and negligence.

2. The issue arises in the following way. The plaintiff is a 27 year old young man who, according to his family, is severely autistic. His testamentary guardian, Ms. K.M. - who is herself a special needs assistant - has sworn an affidavit to the effect that the plaintiff is extremely intellectually disabled and that he has a very limited ability to communicate. When not attending an adult learning disability centre, Mr. F. spends much of his days looking at horses as they gambol in a field adjoining his grandparents' house. He rarely moves from this area when he is at home and repetitive behaviour of this kind is, apparently, a feature of his severely autistic condition. In their defence the State defendants plead that they have no direct knowledge of these disabilities and await direct thereof.

3. The incident which gave arise to these proceedings occurred on 24th September, 2010. The plaintiffs testamentary guardian, Ms. M., contends that Mr. F. had taken up his habitual position outside his grandparents' house when he was unlawfully arrested by members of An Garda Siochana at about 5pm in the evening and brought to a local Garda station. It is contended that no effort was made by the Gardai to speak with either his mother or father, both of whom lived close by. I should pause here to say that the plaintiff's mother sadly died in January, 2012. While she was not living with the plaintiffs father at the time of her death, both parents were actively involved in caring for him.

4. According to Ms. M., the arrest of Mr. F. and his detention in unusual surroundings caused him acute and unusual distress. The custody records show that the plaintiff had been detained for just under an hour and that he had been arrested under s. 12 of the Mental Health Act 2001. He was released when his father - a registered medical practitioner- attended (along with the plaintiff's mother) at the Garda station and explained that he suffered from severe autism.

5. The defence filed by the State defendants does not dispute a good deal of this. It is contended, however, that a member of the public saw the plaintiff chase two women with a large stick or a branch of a tree in the general vicinity of the plaintiff's grandparent's house, although neither woman was actually struck. The Gardai were then alerted and, on their arrival, following a minor altercation, the plaintiff was then identified as the individual who had given chase to the two women. When one of the Gardai involved, a Garda Fallon, attempted to speak to Mr. F., he realised that he was suffering from a mental condition, as he was unable to get Mr. F.'s name or any other pertinent details. Garda Fallon arrested Mr. F. pursuant to s. 12 of the Mental Health Act 2001. Mr. F. was then placed in handcuffs and conveyed by the patrol car to the local Garda Station.

6. Upon arrival at the Garda station at around 5.10pm, the Gardai endeavoured to contact some local general practitioners, but to no avail. Recorded messages in both cases suggested that the general practitioners in question would come on duty again at 6 pm. It appears, however, that another member attached to the station recognised the plaintiff, although he could not immediately recall his name. This member then made appropriate inquiries and, having satisfied himself as to the plaintiff's identity, drove to the plaintiffs house where he spoke with the plaintiffs mother and informed her of the arrest.

7. The plaintiff's mother then arrived at the station shortly after 5.30 p.m. and comforted her son. The member in charge, a Sergeant Galvin, was informed by her that her son suffered from severe autism. The plaintiff's father then arrived about twenty minutes later. On being informed that the plaintiff's father was a registered medical practitioner who could confirm that the plaintiff did indeed suffer from severe autism, he was released by Sergeant Galvin at about 6.05 p.m.

8. The plaintiff contends that he was subjected to inhuman and degrading treatment by being subjected to "unjustified use of restraints designed to and which did "in fact cause [him] additional and unnecessary suffering." This, however, is expressly denied by the defendants.

9. This is the general factual background to the proceedings. Before determining questions as to the mode of trial, is now necessary to examine the ambit of the plaintiff's pleadings. The relief sought in the plaintiff's general endorsement of claim takes the form of claims for declaratory relief and damages. The first two declarations sought are pleas, in effect, that the plaintiffs arrest and detention were both unlawful.

10. So far as the damages claim is concerned, the major claims are for damages in respect of the nominate torts of false imprisonment and assault and battery. Damages are also sought for negligence and breach of duty. The claims for damages for breaches of constitutional rights -liberty, bodily integrity and the privacy substantially replicate the claims embraced in the nominate torts which have been pleaded on the plaintiffs behalf, even if it is also allowed that the breadth and scope of these claims is perhaps not necessarily as confined as that permitted by the common law in respect of the nominate torts.

11. There are also claims for damages for breach of the plaintiff's rights under the European Convention of Human Rights Act 2003 ("the 2003 Act"); for breaches of the plaintiffs rights under the Charter of Fundamental Rights of the European Union and under the

United Nations Convention on the Rights of Persons with Disabilities 2006 ("the 2006 UN Convention"). For present purposes, however, the latter three claims can safely be discounted for the following reasons.

12. First, the claims under the 2003 Act proceed on the implied premise that the provisions of the European Convention of Human Rights have direct effect in Irish law, the objective breach of which sounds in damages. The Supreme Court has, however, confirmed that the ECHR does not have direct effect in Irish law in this sense: see, e.g., *McD v. L* [2009] IESC 71 and *MD v. Ireland* [2012] IESC 10, [2012] 21.L.R.M. 305. Moreover, s. 3(2) makes it plain that any claim for damages under the 2003 Act can only be claimed "if no other remedy in damages is available". But is plain that many other claims for damages are available in this State to a person who claims that they have been unlawfully arrested and detained: these remedies not only include the nominate torts of false imprisonment and assault and battery, but also the action for damages for breaches of constitutional rights such as personal liberty (Article 40.4.1) and the person (Article 40.3.2). If the plaintiff was, in fact, subjected to inhuman and degrading treatment - a claim which, in fairness, I should again point out is emphatically denied by the defendants- then he could sue for damages for breach of his constitutional right to the protection of the person in Article 40.3.2, since the express constitutional protection of the person necessarily precludes treatment of this sort: *cf* by analogy my own judgment in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 353.

13. It has not been suggested that the remedies available under the common law and the Constitution are in some way inadequate or that they cannot otherwise adequately vindicate the plaintiff's rights. In these circumstances, the claims under the 2003 Act add little or nothing to the present case.

14. Second, so far as the Charter of Fundamental Rights is concerned, it must be recalled that the rights protected by the Charter are engaged only when the Member State in question is "implementing" Union law within the meaning of Article 51(2) of the Charter. Even taken the broadest possible view of the meaning of the phrase "implementing" Union law, it is well nigh impossible to see how the Charter could come into play in relation to events which are wholly internal to this State and in respect of which Union law plays no role or part.

15. Third, the 2006 UN Convention has not been made part of the domestic law of the State by a law enacted for this purpose by the Oireachtas in the manner required by Article 29.6 of the Constitution. In these circumstances, it is not easy to see how the 2006 Convention can in and of itself give rise to any justiciable legal rights or controversies.

16. The plaintiff's case, therefore, when reduced to its bare essentials, is a claim for false imprisonment, assault and battery, negligence and breach of constitutional rights. The plaintiff is undoubtedly entitled to a jury trial in respect of the claim for false imprisonment and intentional trespass to the person. The real questions, accordingly, are, first, whether the plaintiff should be debarred from seeking a jury trial by reason of the existence of *other* claims - such as the claim in negligence - not otherwise attracting the entitlement to jury trial and, second, assuming the answer to the first question is in the negative, the form which that trial should take.

Is the plaintiff debarred in the circumstances of the present case from seeking a jury trial?
15. This general issue depends on the construction of s. 1 of the Courts Act 1988 ("the 1988 Act"), particularly as construed by the Supreme Court in *Sheridan v. Kelly* [2006] IESC 26, [2006] 1 I.R. 314. While s. 1 of the 1988 Act abolished the right to jury trial so far as negligence actions were concerned, the traditional right to jury trial in respect of other nominate torts was generally left undisturbed. Section 1(1) and s. 1(3) of the 1988 Act provide in relevant part as follows:

> "(1) Notwithstanding section 94 of the Courts of Justice Act, 1924 or any other provision made by or under statute, or any rule of law, an action in the High Court-
>
> > (a) claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of any such contract or any such provision),
> >
> > (b) [not relevant]
> >
> > (c) [not relevant]
> >
> > or a question of fact or an issue arising in such an action, shall not be tried with a jury.
>
> (2) [not relevant]
>
> (3) 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."

16. It will be seen that the effect of s. 1(1) of the 1988 Act was to abolish the then pre-existing entitlement to jury trial in respect of actions for negligence, while s. 1(3)(b) preserved the right to jury trial in the case of false imprisonment and intentional trespass to

the person. Section 1(3)(c) is, however, in the nature of anti avoidance provision in that this sub-section allows this Court to disregard claims of false imprisonment and intention trespass where, in effect, these claims have been strategically included in the pleadings in order to circumvent the prohibition on the abolition of jury trials. Put another way, a plaintiff cannot overcome the statutory abolition of the right to jury trial in respect of claims in negligence merely by pleading a nominate tort such as false imprisonment as well and joining this claim to a claim in negligence.

17. This was the general background to *Sheridan v. Kelly*. Here the plaintiff claimed damages for sexual assault and negligence against the defendants who were respectively a former principal of a secondary school and the representative of a religious congregation. The essential question for the Supreme Court was whether the fact that the plaintiff also claimed damages for negligence thereby disentitled him to jury trial in respect of the claims based on intentional trespass to the person. In his judgment for the Court, Fennelly J. held that this case came squarely within s. 1(3)(b). In other words, a plaintiff claiming damages for intentional trespass and negligence was still entitled to jury trial under both headings of claim, provided that the damages claims were clearly linked.

18. As Fennelly J. put it ([2006] 1 I.R. 314, 319):

> "It is clear that the core of the plaintiffs claim is that he was sexually assaulted by the first named defendant. Everything alleged can be traced back to that key allegation. Insofar as the claim is simply based on alleged vicarious liability, there is full correspondence between the damages alleged to flow from the acts of the two defendants. However, the subsection allows a plaintiff, in certain cases, and provided he claims damages as a result of one of the two specified causes of action, namely "false imprisonment or intentional trespass to the person," or both also to seek jury trial where he pleads that he has suffered damages caused by, for example, negligence. The subsection requires, however, that these two causes of action be linked by a claim that the damages arose "in respect of the same act or omission." The focus is on the damages and the relevant act or omission which causes them. The same act may give rise to a claim under different legal headings. Acts giving rise to a breach of contract may also, depending on the factual context, constitute negligence or trespass. The subsection does not require that the damages be identical. They may be "claimed in addition, or as an alternative, to the other damages claimed..."
>
> In the present case, the plaintiffs claim is that he suffered personal injury as a result of the assaults committed by the first named defendant. Any act alleged against the second named defendant is claimed to have led to the same damage. I am satisfied that this claim comes within s. 1(3)(b) of the Act of 1988. Therefore, the plaintiff is entitled to have his claim heard by a judge sitting with a jury. I would allow the appeal and substitute an order dismissing the notice of motion of the second named defendant.
>
> Nothing in this judgment affects the normal discretion of the High Court to decide whether the different issues in the case are to be tried separately or together, whether by the application of Order 18, rule 1 of the Rules of the Superior Courts or otherwise."

19. In my view, the decision in Sheridan clearly governs the present case. The core of the plaintiffs claim is one of false imprisonment following a wrongful arrest. Just as in Sheridan, the claim in negligence is directly linked to and flows from this arrest. Thus, for example, among the particulars of negligence given at paragraph 26(b) of the statement of claim is the contention that there was negligence on the part of the Garda (which can be imputed by law to the defendants) by arresting the plaintiff, a person with obvious special needs, in circumstances "where the defendants had no lawful basis to do so" and where they were under a duty "to make inquiries from his parents, grandparents or neighbours, yet they failed to do so".

20. In these circumstances, the claim for damages for personal injuries caused by the negligence and breach of duty of another falls within the exception in s. 1(3)(b) of the 1988 Act and can, in principle, be tried with a jury.

What form should the jury trial take?

21. The next issue relates to the question of what form should the jury trial take. Would it be appropriate to have separate trials on the false imprisonment and negligence questions? Or should both be tried by a jury, and, if so, should the jury have a role in determining the core issue of whether the arrest under s. 12 of the Mental Health Act 2001 was unlawful? Or should there be a form of hybrid trial, with particular roles and tasks assigned separately to judge and jury? If this is not practical, should the hearing be conducted by a trial judge sitting without a jury?

22. The proposal that there should be separate trials on the issues of negligence and false imprisonment can be immediately discounted. This would be purely wasteful and duplicative of court resources and would simply impose unnecessary costs burdens on the parties.

23. In *Bradley v. Maher* [2009] IEHC 389 the defendant had picketed the offices of the plaintiff firm of solicitors with placards setting out, it was alleged, untrue and defamatory allegations relating to the manner in which the firm had handled the estate of the defendant's uncle. The plaintiff firm then sued for defamation and for an order restraining the picketing of the premises. When the plaintiffs set the matter down for trial without a jury, the defendant sought to have that notice for trial set aside, claiming that he was entitled to a jury trial on the defamation claim.

24. Clarke J. held that, on balance, the most appropriate course of action was to direct trial by judge alone. He noted that there was nothing "inappropriate in the joinder ofthe defamation and the picketing aspects of this case", so that it could not be said:

> "that their joinder was [a] device to deprive Mr. Maher [of] an entitlement to jury trial. Rather it is obvious that both aspects of the claim are real, connected and proper to be decided in one set of proceedings."

25. A critical feature of the case, however, was that the jury could not determine the picketing aspect of the case. Even in a hybrid trial, there would be real difficulties in segregating out the issues which pertained to the defamation claim on the one hand and that which pertained to the negligence action on the other. Clarke J. found that the risk of cross-contamination between the two aspects of the claim was too great and it was this factor which persuaded him to reject a form of hybrid trial in that case.

26. There are, essentially, two reasons why those factors do not apply in the present case. First, it is clear that, unlike the picketing claim in *Bradley*, the negligence claim here is completely interwoven with the false imprisonment claim. Of course, the linkage between the alleged defamation and the picketing in *Bradley* was admittedly strong. Yet it would have been perfectly possible for the plaintiff in *Bradley* to have succeeded in one claim independently of the other, whereas this cannot easily be said of the negligence claim here. Second and more importantly, in view of the directions which I now propose to give regarding the precise form of trial, the potential for cross-contamination between the respective claims can be significantly reduced, if not entirely eliminated.

Directions as to the form of trial
27. Order 36, r. 7 RSC provides:

> "The court may, if it shall appear desirable, direct a trial without a jury of any question of fact, or partly of fact or partly of law, arising in any cause or matter which, without any consent of parties, can be trial without a jury, and such trial may, if so ordered by the court, take place at the same time as a the trial by a jury of any issues of fact in the same cause or matter."

28. In my judgment, it would be appropriate that all issues concerning the legality of the plaintiffs arrest (including questions as to the legality of the arrest and whether the defendants were negligent in effecting the arrest) should be determined by the judge alone, while leaving all other issues (including, for example, any issues should they arise- in relation to allegations of ill-treatment of the plaintiff while in custody and, where appropriate, damages in respect of all claims) for the determination by the jury in accordance with the usual practice. I have come to this conclusion because it would be inappropriate for the jury to pronounce on issues which are essentially issues of law, at least where those issues do not rest on the judgment and good sense of the community of which the jury are but representatives and in respect of which the jury are, either expressly or impliedly, designated arbiters by law. Thus, for example, the legality of an arrest is a matter of objective law in respect of which the jury have no expertise or function, even if antecedent factual issues will also have to be determined by the trial judge in the process of determining this issue.

29. The same is true- at least in this case- of the negligence claim, which is interwoven on these facts with the false imprisonment claim.

30. Of course, I do not overlook the fact that as a matter of established legal history and practice, juries were (and are) given a role in determining issues of law. But this was (and is) always in a context where the jury had a role in determining the appropriate community values and standards. Thus, for example, ever since the Libel Act 1792 (Sir Charles Fox's Act), the issue of libel or no libel in a prosecution for criminal libel was declared by statute to be a matter for the jury and the thinking behind this legislation has clearly historically been applied by analogy to civil claims in defamation as well.

31. Likewise, prior to the enactment of the 1988 Act, juries did pronounce on essentially legal questions in negligence: did, for example, the employer provide the employee with a safe system of work. But this was all in a context where the jury's input into the practical application of the law of negligence was a reflection of these community values and standards and where this role had been assigned by law to the jury. The Oireachtas has seen fit to dispense with this following the enactment of the 1988 Act and inasmuch as the jury can now hear a claim in negligence, it is merely as ancillary to a claim in respect of an intentional nominate tort such as false imprisonment and assault and in order to avoid the inconvenience of separate trials in respect of the distinct causes of action. Critically, however, the jury no longer has been given a role as arbiter of the community's values in negligence matters. This was a decision taken by the Oireachtas for policy reasons and it would be therefore inappropriate for that role to be resurrected in the present case simply by reason of the joinder of the negligence claim to a claim in false imprisonment.

32. If, therefore, it falls to the trial judge to determine the legality of an arrest in a false imprisonment claim, then no greater role for the jury could now be claimed in relation to a subsidiary claim in negligence. All of this simply means that the jury cannot be restored to their previous pre-1988 role in respect of negligence claims as arbiter of community standards and norms in respect of the appropriate standard of care, *merely* because that claim has been joined to a claim for false imprisonment and *even* if that joinder is entirely appropriate on the facts and not simply a pleader's stratagem to secure a jury trial on the negligence question.

33. The same conclusion can be arrived at by an examination of the matter by reference to first principles and such authority on the point as there is. While it is true that, generally speaking, all questions of fact are determined by the jury, this rule is itself subject to "numerous and important exceptions": Salmond: *Jurisprudence* (11th ed.) (ed. Glanville Williams)(at p. 68). This passage from Salmond- which was itself quoted with approval by Henchy J. in *The People (Director of Public Prosecutions) v. Conroy* [1986] I.R. 460, 486-587- continues thus:

> "Though there are no cases in which the law (in the sense, at least, of the general law of the land) is left to a jury, there are many questions of fact that are withdrawn from the cognisance of a jury and answered by the judge. The interpretation of a document may, for example, may be, and very often is, a pure question of fact, and nevertheless falls within the province of a judge. So the question of reasonable probable cause for a prosecution- which arises in actions for malicious prosecution- is one of fact and yet one for the judge himself. So it is the duty of a judge to decide whether there is any sufficient evidence to justify a verdict for the plaintiff; and if he decides that there is not, the case is withdrawn from the jury altogether; yet this is a mere matter of fact, underdetermined by any authoritative rule of law. By an illogical though convenient usage of speech, any question which is thus within the province of the judge instead of the jury is called a question of law, even though it may be in the proper sense a pure question of fact. It is called a question of law because it is committed to and answered by the authority which normally answers questions of law only."

34. In *Conroy* the issue was whether the question of the admissibility of a contested statement made while in custody should be determined by the judge who presided at the trial of an accused or whether, alternatively, all such issues should be determined by a jury. In the earlier decision in *The People (Director of Public Prosecutions) v. Lynch* [1982] I.R. 64 the Supreme Court had suggested that the latter option was the correct one.

35. That aspect of *Lynch* was overruled by the Supreme Court in its later decision in *Conroy*. Henchy J. not only approved the above passage in Salmond, but held that questions of the admissibility of evidence are "reserved exclusively for the judge even though such questions may involve or rest entirely on questions of fact." Any suggestion to the contrary was "novel" and "not supported by either statutory or judicial authority".

36. It is true that some of his reasoning rested on the application of Article 38.1 and Article 38.5 of the Constitution to criminal trials and the manifest unfairness that might attend the trial if prejudicial evidence - later held to be inadmissible - could nonetheless be ventilated before a jury on a *voir dire*. As Henchy J. himself explained ([1986] I.R. 460, 488):

> "A jury thus informed of the circumstances and contents of the rejected statement would lack the characteristics of an impartial jury for the trial of guilt or innocence. A verdict of guilty thus resulting could not be allowed on appeal to stand."

37. While accepting that this later aspect of *Conroy* has no direct application to a civil action such as the present one, the decision is nonetheless of considerable importance in that it delineates the proper division which must otherwise attend the prospective roles of judge and jury even in civil actions. This is especially so given that the issue of the respective roles of judge and jury in false imprisonment actions of this kind is largely bereft of direct authority. It may be noted in passing, however, that in another false

imprisonment action, *Walshe v. Fennessy* [2005] IESC 51, [2005] 3 I.R.516, the trial judge (Quirke J.) accepted that all issues of fact as well as law relating to whether the arrest of the plaintiffs by members of An Garda Síochana under s. 30 of the Offences against the State Act 1939 had to be determined by judge alone and were not permitted to be determined by the jury. On appeal to the Supreme Court, Geoghegan J. noted that no appeal had been taken against that determination and that he was "assuming that the accepted procedure was correct in law": see [2005] 3 I.R. 516, 519.

38. But returning to the reasoning of Henchy J. in *Conroy*, it would seem to follow from that judgment that questions as to the validity of an arrest are matters which fall directly within the province of a judge alone. It would, for example, be illogical if questions of the admissibility of evidence in general and statements made in Garda custody in particular were reserved for the trial judge alone, yet the jury could pronounce on the validity of an arrest. For a start, the admissibility of a statement made while in custody while often turn on the validity of an arrest. Just as importantly, however, *Conroy* is really authority for the proposition that mixed questions of law and fact - the admissibility of evidence, whether there was probable cause in a malicious prosecution and so forth - are matters for the trial judge alone and not the jury. Judged by this standard, one cannot discern any principled basis by reference to which issues bearing on the validity of an arrest could be left to the jury.

39. All of this means is that the legal issues in the trial- whether the arrest and detention was lawful, whether the defendants were negligent and so forth - will be exclusively matters for the trial judge to determine. This also means that the issue of any declaratory relief in relation to the validity of the arrest and detention will be exclusively a matter for the trial judge to determine. All other matters (including the question of damages in respect of all claims, should this arise) remain, in principle, at any rate, matters for the jury.

Conclusions

40. It follows from the foregoing that the plaintiff is entitled to jury trial in respect of the claims contained in the general endorsement of claim. I will, however, direct pursuant to 0. 36, r. 7 that all issues touching on or concerning the legality of the arrest and detention of the plaintiff on 24th September, 2010, by members of An Garda Siochana (including the claims for negligence and breach of duty) are to be determined by the trial judge alone, with the remaining issues to be determined, subject to the appropriate directions of the trial judge, by the jury.