THE COURT OF APPEAL

CIVIL

Record Number: 2015/452

Finlay Geoghegan J.
Peart J.
Irvine J.

BETWEEN:

GHEORGE PISTA (A PESON OF UNSOUND MIND NOT SO FOUND) SUING BY HIS SISTER AND NEXT FRIEND, ELENA PISTA
PLAINTIFF/RESPONDENT

- AND -

GERARD SWEENEY

FIRST NAMED DEFENDANT

- AND -

NATIONWIDE CONTROLLED PARKING SYSTEMS LIMITED

SECOND NAMED DEFENDANT/APPELLANT

JUDGMENT OF MR JUSTICE PEART DELIVERED ON THE 18TH DAY OF MARCH 2016

1. In these proceedings the plaintiff sues the defendants for damages for personal injuries which he sustained when during the course of his employment as a clamper of vehicles unlawfully parked in an off-street car park he was struck violently on the head with a lump hammer by the first defendant on the 14th November 2009 on whose vehicle he was in the process of placing a clamp. His injuries can be classified as catastrophic.

2. His claim for damages against the first defendant is brought on the basis of assault and trespass for which he is entitled to a trial before a judge and jury, and against the second defendant, his employer, on the basis of negligence, breach of duty, including breach of statutory duty, and breach of contract, which if not associated with a claim based on assault would be heard by a judge sitting without a jury.

3. The issue on this appeal, which is essentially whether, in circumstances where the plaintiff has already obtained judgment in default of appearance against the first defendant and awaits only an assessment of damages against him, he retains his right to have those damages assessed by a jury, and if so, whether the trial of the action against his employer, based as it is on claims in negligence, breach of duty and breach of his contract of employment, should take place also before the jury, or whether both matters should be heard before a judge sitting without a jury. On the 15th July 2015 Kearns P. refused the second defendant's motion to set aside the notice of trial which the plaintiff filed and served seeking to have both matters heard by a judge and jury.

4. In June 2013 the plaintiff had served Notice of Trial seeking a trial without a jury, which appears to have lapsed in some way. Perhaps it was never filed. But one way or another, the plaintiff served a further Notice of Trial in September 2014 in which a trial with a jury was sought. As it happens that Notice of Trial was struck out when it appeared in a jury list to fix dates because there was no appearance in court on behalf of the plaintiff. Thereafter there was some correspondence between the respective solicitors in which the second defendant took issue with the plaintiff seeking to have a trial with a jury, and indicated that if another notice of trial was served seeking to have the matters heard with a jury it would seek to have such notice of trial set aside.

5. On 21st April 2015 the plaintiff duly served a further Notice of Trial seeking a hearing before a judge and jury of his claims against both defendants that against the first defendant being confined to an assessment of damages since he already had obtained judgment against that defendant in default of appearance on 16th January 2012. On receipt of the Notice of Trial served on 21st April 2015, the second defendant issued a Notice of Motion dated 27th April 2015 seeking an order setting it aside, as well as an order directing that the trial take place before a judge sitting alone. It was contended that the plaintiff is not entitled to a hearing before a jury having regard to the provisions of s. 1(1)(b) of the Courts Act, 1988, or alternatively that the Court should exercise its jurisdiction under O. 36, r.7 RSC to direct a trial of the proceedings before a judge sitting alone. As I have indicated already the President of the High Court (Kearns P.) heard that motion on the 15th July 2015 and refused the order sought. It is against that refusal that the second defendant now appeals to this Court.

6. The approved note of the President's ex tempore decision includes the following by way of conclusion:-

> *"The allegations against the first defendant [were] straightforward. Judgement was obtained against the first defendant. The facts were clear. The second defendant argues that the allegations against it really alleged negligence in training and security practices and seeks a trial without a jury. Case law was opened before me including the Supreme Court's decision in Sheridan and Kelly, and Mr Justice Charleton's decision in D. F. v. The Commissioner of An Garda Siochana delivered on 15.5.2015 paragraphs 18 and 19. At paragraph 18 it states:*
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> > *"Joining other causes of action to false imprisonment or intentional trespass to the person, assault, may preserve*

the entitlement to a jury trial but only where there is one act or omission at issue in the trial."

This case is in that category as set out by Mr Justice Charleton. There is a single act and there is no separate claim against the employers since that date.

At paragraph 19 it states:

> *"It is clear that the core of the plaintiff's claim is that he was sexually assaulted by the first defendant. Everything alleged can be traced back to that key allegation. Insofar as the claim is based on vicarious liability, there is full correspondence between the damages alleged to flow from the acts of the two defendants."*

It is exactly the same in this case even though there was no vicarious liability – a defective work system there will be a spirited defence no doubt [sic].

The focus is on the damages and the relevant act that caused them. If you are to separate the two defendants the damages would be precisely the same. Everything alleged to have occurred in this case can be traced back to the same event. I have no hesitation in directing a trial by judge and jury. Costs to the plaintiff with a stay until the cases disposed of."

7. Section 1 of the Courts Act, 1988 as relevant provides:

"(1) Notwithstanding section 94 of the Courts of Justice Act 1924 or any other provisions 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) …*
>
> *(c) …*

or a question of fact or an issue arising in such action shall not be tried with a jury.

(2) …

(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) …*

(4) …

(5) …

(6) …

(7) … " [emphasis added]

8. Order 36, r. 7 RSC provides:

> *"(7) the Court may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which, without any consent of parties, can be tried without a jury, and such trial may, if so ordered by the court, take place at the same time as the trial by a jury of any issues of fact in the same cause or matter."*

9. The second defendant seeks to escape the provisions of s. 1(3)(b) relied upon by the plaintiff, by contending that the claims being advanced in the statement of claim against it, and by reference to additional particulars of claim provided, are different to the claims made against the first defendant, and therefore do not constitute "a cause of action in respect of the same act" since claims arising from an allegedly unsafe system and place of work and a failure to provide the plaintiff with adequate training, control, supervision and management of work practices, and security arrangements, and this such a cause of action is to be distinguished from the cause of action pleaded against the first defendant which is confined to trespass, assault and battery. It is submitted that this clear distinction is underlined by the nature of the discovery of documents which the plaintiff sought against the second defendant in respect of, for example, training records and training provided, protective equipment provided, safety instructions and manuals, safety assessments and so forth.

10. It is submitted that although it is undisputed that the plaintiff was in the employment of the second defendant on the date that

this assault occurred, and that it occurred during the course of that employment, since the first defendant was never in the employment of the second defendant. Accordingly, it is submitted that the two cases relied upon by the plaintiff in his submissions, namely *Sheridan v. Kelly* [2006] I.R. 314 and *D.F. v. Commissioners of An Garda Siochana* [2013] IESC 44 where vicarious liability was pleaded, are distinguishable.

11. It is also submitted that while the injury to the plaintiff is the same injury for which he seeks to recover damages from the first defendant, the acts or omissions alleged against the second defendant are totally distinct and separate from the act of assault alleged against the first defendant, and occurred, as they must have in respect of some of the alleged omissions (*e.g.* insufficient training) on separate dates, and for which no vicarious liability is alleged, and that this takes the case outside the scope of s. 1(3)(b) of the Act of 1988.

12. The plaintiff on the other hand submits that this case is indistinguishable from both *Sheridan v. Kelly*, and *D.F. v. Commissioner of An Garda Síochána*, and that the question of vicarious liability arising in those cases was incidental, and not a determining factor in the judgments. He submits that essentially this is an action for damages for trespass of the person *i.e.* assault and *"for another cause of action in respect of the same act or omission",* namely negligence, and therefore satisfies the test in s. 1(3)(b) as set forth above. His submission in this regard is conveniently summarised in written submissions at paragraph 11 thereof as follows:

> *"It is submitted that this is an action for damages for trespass to the person and for another cause of action namely negligence in respect of the same act or omission. It is submitted that the damages suffered by the respondent due to negligence arise from the same factual circumstances as the assault, namely an assault on the respondent in the course of his employment with the appellant. Full particulars of negligence and breach of duty have been pleaded in the statement of claim and as can be seen therefrom, the trespass, assault and battery on the part of the first named defendant was carried out inter alia in circumstances whereby the respondent was instructed by the appellant not to remove clamping devices without first receiving payment regardless of threats to the respondent's safety (see paragraph 7* [sic- in fact it is paragraph 8]*. Furthermore, at paragraph 9, it is pleaded that the injuries were additionally caused by negligence in the management of work practices and security arrangements in the said car park."*

Conclusions

13. It is quite clear that the plaintiff is entitled, should he so choose, to have his damages claim against the first defendant based on the tortuous assault assessed by a jury. That is absolutely clear from the terms of s. 1(3)(a) of the Act of 1988. The question arising on this appeal then is whether by reason of the inclusion by him of another cause of action, this time a claim for damages for negligence, breach for duty and breach of contract but in respect of the same injuries, he has either disentitled himself to a hearing before a jury at all, or whether he retains his entitlement to an assessment of damages for the assault by a jury, but must have his claim for damages for negligence in respect of the same injury against the second defendant decided by a judge sitting alone. One can envisage certain obvious difficulties in a case such as the present one where a jury might be asked to decide the quantum of damages against the first defendant, and the judge separately, having decided the liability issue in respect of the claims against the second defendant, would have to assess damages against that defendant in respect of precisely the same injuries and loss. Does he/she do so prior to the jury's assessment so that he is not aware of the jury's assessment? If he does so, may the jury then be told of the judge's award for the same injury and loss? If not, is there a risk of inconsistent awards? Posing even these questions, and there may be more, indicates that pragmatism alone requires that however it is done, the assessment of damages should be made by the same assessor be that a jury or a judge, given that it is the very same injury and loss that is under assessment.

14. In his judgment in *D.F.* referred to, Charleton J. stated at paragraph 18 of his judgment:

> *"18. 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. An example would be where it is alleged that as well as an action for deprivation of liberty taking place contrary to the statutory defence offered by a defendant, that the application of the power of arrest was negligent: though here it must be added that this may be a more than unhelpful consolation of separate torts. This is not to state that any such pleading is possible. As to whether adding allegations of other torts to false imprisonment and assault is reasonable having regard to the circumstances determines the balance as to whether the result should be a trial by a judge sitting alone or a trial by a judge sitting with a jury. The reform in section 1 of the Act of 1988 is not to be subverted. This is a matter of assessment by the trial judge as to where, in substance, the nature of the claim lies. What is clear is that the Oireachtas decided that issues of false imprisonment, which are predominantly cases brought by citizens against the State for alleged wrongful arrest by Gardai, and assault cases, which may include such cases or in more recent times have involved allegations of sexual violence, should be tried by a judge with a jury. It is only 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 that a trial should take place with a judge sitting alone."*

15. I respectfully agree with these remarks of Charleton J. which in any event are binding upon this Court. In my view, a proper interpretation of s. 1(3)(b) of the Act of 1988 in accordance with what is stated avoids the possibility of the undesirable consequence of separate assessments of damages in respect of the same injuries and loss to which I have just referred. Section 1(1) of the Act does not apply where the plaintiff claims damages for an intentional trespass to the person *i.e.* an assault, and at the same time claims damages for another cause of action (in this case, negligence) in respect of the same act. Damages for another cause of action in respect of the same act must include damages for negligence or breach of contract giving rise to the same injury as in the assault. The fact that the second defendant did not actually assault the plaintiff is not the point. The point is that the claim which is made against the second defendant is that but for its negligence, breach of duty and breach of contract, this assault would not have occurred. The plaintiff would not have been injured. In this way the two causes of action are inextricably connected by their alleged causation of the same injury. In this way, they in my view come within the exception provided by s.1(3)(b) of the Act of 1988. As stated by the trial judge (Kearns P.) in the approved note of his decision *"there is a single act and there is no separate claim against the employer since that date".*

16. There is nothing intrinsically problematic about a unified trial of the liability claims against the second defendant assessment followed by an assessment of the damages which must take place whether or not liability is found against the second defendant. Depending on that liability finding judgment will be entered for the amount assessed either against the first defendant alone or against both defendants. Neither is there any difficulty in the trial judge directing the jury on any issues of law it will have to decide before it can find the second defendant to have any liability. These issues are not complex on the facts of this case. The trial judge can easily direct them as to findings of fact which they will need to make, and can direct them also on issues of proximity, foreseeability and

causation, and any other legal issues that arise.

17. In my view the trial judge was correct to refuse the second defendant's motion, and I would dismiss the appeal.