THE HIGH COURT

[2016 No. 1401 P.]

BETWEEN

NICKY KEHOE

PLAINTIFF

AND

RAIDIÓ TEILIFÍS ÉIREANN

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 21st day of February, 2018

1. These proceedings are brought in defamation and arise from a live broadcast by the Defendant of a current affairs radio programme, "*Saturday with Claire Byrne*" during which certain verbal exchanges which gave rise to these proceedings took place between the presenter and two of the panel participants, Joe Costello T.D and Councillor Eoin O'Broin. The statements about which the Plaintiff complains were made by Joe Costello and have been set out in the Statement of Claim. He was not joined as a Defendant nor were separate proceedings instituted within the period limited prescribed by s. 38 (1) of the Defamation Act 2009 (the Act of 2009). Accordingly, any claim the Plaintiff had against Joe Costello in respect of the impugned statements is now statute barred.

2. In these circumstances, the Defence delivered incorporates a plea pursuant to s.35 (1) of the Civil Liability Act, 1961, (the CLA), as amended. The object and effect of the plea is to fix the Plaintiff with responsibility for the wrongful acts of the Joe Costello, a statute barred defendant, so as to reduce by the extent of that responsibility the amount of the damages, if any, the jury may award to the Plaintiff. In short, s. 35 (1) (i) deems the liability of the statute barred defendant a form of contributory negligence which maybe pleaded against the Plaintiff by way of defence to his claim. The essence of the plea involves identifying the plaintiff with the responsibility for the wrongful acts of the statute barred defendant.

3. Identifications for the purposes of contributory negligence in general are governed by the provisions of s. 35 of the CLA. Subs. (1) (i) is concerned with identification in circumstances where the plaintiff's damage is caused by concurrent wrongdoers and where the plaintiff has permitted the claim against one or more of them to become statute barred.

4. The plea in this case had also been raised in respect of Eoin O'Broin but was abandoned by the Defendant in the course of hearing. He identified the Plaintiff by name on air but spoke out in his defence during the material exchanges, the substance of which has been relied on by the Defendant to meet the claim. The Plaintiff is a senior member of Sinn Féin in Dublin; he makes no complaint against his party colleague. The same cannot be said for Joe Costello who, without mentioning Plaintiff by name, uttered the remarks about which complaint is made and simultaneously published by the Defendant.

5. At the conclusion of the evidence agreement was reached between the parties on all but one of the questions which are to go to the jury; the questions agreed are:

> *1. Did the contents of the broadcast of the "Saturday with Claire Byrne" programme of 24th October, 2015, taken as a whole, mean that:*
>
> *(i) Nicky Kehoe is a senior member of the Army Council of the IRA?*
>
> *Yes.*
>
> *No.*
>
> *(ii) Nicky Kehoe is a member of an illegal criminal organisation?*
>
> *Yes.*
>
> *No.*
>
> *(iii) Nicky Kehoe controls the way in which Sinn Féin Councillors vote in meetings of Dublin City Council on behalf of the Army Council of the IRA?*
>
> *Yes.*
>
> *No.*
>
> *(iv) Nicky Kehoe was involved in a deliberate attempt to control the functioning of a political party and to subvert the operation of Dublin City Council in order to further the aims of an illegal organisation?*
>
> *Yes.*
>
> *No.*
>
> *(v) Nicky Kehoe is not a fit person to be involved in the democratic process?*
>
> *Yes.*
>
> *No.*
>
> *2. If the answer to all parts of question 1 is "No", then proceed no further.*

3. If the answer to one or more parts of question 1 is "yes", is the defendant entitled to the benefit of the defence of fair and reasonable publication?

Yes.

No.

4. If the answer to question 3 is "yes", then proceed no further.

5. If the answer to question 3 is "no", assess damages, including, if appropriate, aggravated damages, and write that amount of damages here .

7. The question in dispute , proposed by the Defendant, arises from the plea pursuant to s. 35 (1) of the CLA and reads:

In the event you assess a sum for damages set out in question 5, you should proceed to determine what percentage, if any, of that sum that RTE should be held liable for and that percentage should be set out here_____.

8. The Court is tasked by the parties with determining whether such a question or a question in similar terms should be included on the issue paper. The resolution of this issue is principally dependent on the answer to the following, (a) whether Joe Costello and RTE are concurrent wrongdoers and, if so, (b) whether the provisions of s. 35(1) (i), apply to the tort of defamation. The conclusion of the Court is that each of these should be answered in the affirmative for the reasons that follow.

9. The focus of contention between the parties centred on the nature of a defamation action and the applicability of the statutory provision on which the plea in question is founded. The Plaintiff contends that the question should not be put at all because s. 35(1) (i) has no application to the tort of defamation; the plea on its face is bad in law. The Defendant's case is that the provision applies to all torts, a priori this includes the tort of defamation; the plea is thus well founded...

Relevant Statutory Provisions
10. Oral submissions, summarised later, were made on behalf of the parties from which it became immediately clear that there are a number of statutory provisions which have a direct or indirect bearing on the resolution of issue under consideration; the relevant provisions are set out below.

The Civil Liability Act 1961
11. The relevant provisions of the CLA are contained in sections 2, 11, 12, 14, 34 and 35. Section 2 provides for interpretation generally. '*Wrong'* is defined as meaning "a tort, *breach of contractor breach of trust, whether the act is committed by the person to whom the wrong is attributed* or by one for whose act he is responsible, *and whether or not the act is also a crime*, and whether or not the wrong is intentional".' *Wrongdoer'* is defined as meaning "*a person who commits* or is otherwise responsible for a wrong". [emphasis added]

12. The legal concept of concurrent fault is a central feature of the CLA and is provided for in Part 3 of the act. Apposite to the argument on the issue is the observation that in the statute law of England and Wales and several other common law jurisdictions there are no provisions relevant to the plea corresponding to those contained in Part 3. It follows that case authority and commentaries by learned authors on the law of defamation in those jurisdictions relating in particular to judgements against joint and several tortfeasors must be viewed with this distinction in mind.

13. The meaning of concurrent wrongdoing and those who are to be considered concurrent wrongdoers is provided for by s. 11 as follows:

(1) For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person *(in this Part called the injured person or the plaintiff)* for the same damage, *whether or not judgment has been recovered against some or all of them.*

(2) Without prejudice to the generality of subsection (1) of this section—

(a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;

(b) the wrong *on the part of one or both* may be a tort, *breach of contract or breach of trust, or any combination of them;* [emphasis added]

(c) it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive.

(3) Where two or more persons are at fault and one or more of them is or are responsible for damage while the other or others is or are free from causal responsibility, but it is not possible to establish which is the case, such two or more persons shall be deemed to be concurrent wrongdoers in respect of the damage.

(4) […]

(5) Where the same or substantially the same defamatory statement *or injurious falsehood* is published by different persons, *the court shall take into consideration the extent to which it is probable that* the statement in question was published directly or indirectly to the same persons, and to that extent may find the wrongdoers to be concurrent wrongdoers. [emphasis added]

(6) For the purpose of any enactment referring to a specific tort, an action for a conspiracy to commit a tort shall be deemed to be an action for that tort.

(7) *In this section* 'defamatory statement' *has* the same meaning *as it has in* the Defamation Act 2009. [emphasis added]

14. The extent of the liability of concurrent wrongdoers is governed by s.12. Subs (1) provides that subject to the provisions of

sections 14, 38 and 46, "*concurrent wrongdoers are each liable for the whole of the damage in respect of which they are concurrent wrongdoers".*

15. The nature and type of judgements against concurrent wrongdoers is governed by s.14. Subs (1) provides that "*where judgement is given against concurrent wrongdoers who are sued together, the court may give judgment against the defendants* together *or against the defendants* separately *and, if the judgment is given against the defendants* together, it shall take effect *as if it were given against them* separately." [emphasis added]

16. Section 14(6) makes provision for a saver in respect of entitlement to mitigation of damages in a defamation action under the Act of 2009. In circumstances where one of concurrent tortfeasors *"…would have been entitled to a mitigation of the damages payable by him had he been a single tortfeasor, but another of the said tortfeasors would not have been so entitled, the first-mentioned tortfeasor shall be entitled to the said mitigation of damages and shall not be compellable to make contribution except in respect of the amount of damages payable by him; and the judgment against him may be given accordingly."*

17. Whereas s. 34 is concerned with the apportionment of liability in the case of contributory negligence s. 35 is concerned with identifications for the purposes of determining contributory negligence ; in this regard subs.(1) (i) provides:

> "*where the* plaintiff's damage was caused by concurrent wrongdoers *and the* plaintiff's claim against one wrongdoer has become barred *by the Statute of Limitations or any other limitation enactment*, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer" [emphasis added].

Commenting on the rational for this provision in *Hickey v. McGowan and Anor.* [2017] IESC 6 [2017] I.R. 196 O'Donnell J. stated at para. 63 of his judgement:

> *"It is in my view certainly open to argument that s.35 (1) (i) operates too harshly. The underlying theory however is clear, and in principle at least, sensible. One of the main provisions of the 1961 Act was to allow the allocation of liability (and consequently damages) between defendants and indeed other concurrent wrongdoers responsible for the damage suffered by the plaintiff. If a plaintiff did not sue one such wrongdoer (with the consequence then that such wrongdoer may not be available for a claim of contribution by other concurrent wrongdoers who have been sued), then the Act through s.35 requires that the plaintiff must bear that loss."*

Subject to certain provisos which are set out therein and to the provisions of subsection (2), subs (1) of s. 34 provides:

> "*where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by* the negligence or want of care *of the plaintiff* or of one for whose acts he is responsible [emphasis added] *(in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant"*

The Defamation Act, 2009

16. The Act of 2009 amalgamated or fused the torts of libel and slander into one tort henceforth to be described as the tort of defamation, s. 6 provides:

> *"(1) The tort of libel and the tort of slander—*
>
> *a) shall cease to be so described, and*
>
> *b) shall, instead, be collectively described, and are referred to in this Act, as the "tort of defamation".*
>
> *(2) The tort of defamation consists of the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person), and "defamation" shall be construed accordingly."*

17. It is self-evident from the provisions of this section that these proceedings are brought in respect of the tort of 'defamation' in response to which the defence delivered incorporates a number of pleas, including the plea under consideration together with a plea pursuant to s. 26 of the Act of 09 which provides for the defence of fair and reasonable publication on a matter of public interest, a new statutory defence on foot of which question 3 of the issue paper is based.

18. Finally, the limitation period for the bringing of a defamation action is provided for by s.38 (1) of the Act of 09 which amends s. 11(2)(c) of the Statute of Limitations 1957, as follows:

> *"(c) A defamation action within the meaning of the Defamation Act 2009 shall not be brought after the expiration of---*
>
> *(i) one year, or*
>
> *(ii) such longer period as the court may direct not exceeding 2 years from the date on which the cause of action accrued."*

The jurisdiction of the court to extend the period and the basis upon which that jurisdiction maybe exercised is also provided for in s. 38(1) but these provisions are not germane to the matters under consideration; a period in excess of two years has already elapsed Plaintiff's since the cause of action arose.

Summary of the Submissions

19. The Defendant contends that if the impugned statements are found to be defamatory they were made by Joe Costello during what he knew to be a live broadcast to a very large audience of approximately 238,000 listeners. It followed that as the statements were published simultaneously by the Defendant to the same listeners the requirements of s. 11 (5) were satisfied and the Court should find Joe Costello to be a concurrent wrongdoer.

20. The Plaintiff's un-contradicted evidence was that although he considered Joe Costello to be at fault as the author of the impugned statements he did not institute proceedings against him because he considered it was the Defendant who had published or, to use his words, who 'had let the statements out'. The Defendant argues that whatever the reason for the failure to institute proceedings within the limitation period, the effect of s. 35(1) (i) is to deem Joe Costello's liability as a statute barred defendant to be a form of contributory negligence which may be pleaded against the Plaintiff in reduction of the damages, if any, which the jury may award. The Court was referred to the judgment of O'Donnell J. in *Hickey v. McGowan & Anor* [2017] I.R. 196 at 239 et seq, in support of this proposition.

21. The Plaintiff could have sued Joe Costello but chose not to do so. Whether or not he was legally correct in his view is immaterial, the plain fact of the matter was that he had failed to institute proceedings within the relevant limitation period; more than two years having elapsed since the accrual of the cause of action an extension of time to institute proceedings was no longer possible.

The Plaintiff's Submissions
22. It was submitted on behalf of the Plaintiff that defamation is a tort of strict liability. Hickey was not an authority for the proposition advanced on behalf of the Defendant. The judgment was nuanced: it was apparent from the text that the potential difficulties and consequences arising from the section identified in the judgement had not been argued in any detail. The section had only arisen because it had been necessary on the facts of the case to consider the underlying rational of the provision.

23. Accepting that s. 35(1) (i) was a deeming provision, it was argued that the provision had no application to the tort of defamation, a tort of strict liability in which the intention of the tortfeasor was irrelevant. Furthermore, negligence and/or contributory negligence plays no part in the tort of defamation; the provision was confined to breaches of contract, trusts and to intentional torts. This most likely explained the dearth of case authority on the question at issue; the plea on its face was bad in law.

24. Furthermore, there had been an incomplete cause of action which only became complete on publication of the Plaintiff's name when he was identified by his colleague Eoin O'Broin yet the Defendant had sought to defend the case on the basis that having identified the Plaintiff by name he had spoken out in the Plaintiff's defence. Having adopted this course the Defendant had been forced to drop the plea under s.35 (1) in so far as it related to Eoin O'Broin because it could not use his intervention to meet the claim while at the same time seeking to cast him as a wrongdoer.

25. The Plaintiff took a pleading point, namely, that the Defendant had pleaded s.35 (1) without specifically identifying subs. para. (i), accordingly the jury were being required to consider all of the incidents of identification set out in s.35 (1) (a) to (k) inclusive upon most of which no evidence had been led. Accordingly, it was not now open to the Defendant to confine its case to s. 35(1) (i) alone. In any event the Defendant had not laid the groundwork on foot of which the jury could

26. If that proposition was incorrect, the Plaintiff contended that s. 35(1) (i) had no application to the tort of defamation because each publisher is strictly liable for the whole of the damage caused. Where two or more defendants are sued in respect of the same defamatory statement there can only be one verdict and one judgment against all for the total damages. The jury may not discriminate between them by awarding separate damages against different defendants. The Court was referred to *Gatley* 12th Ed. on Libel and Slander at para 9.35 where the Irish decisions in *Dawson v. McClelland* [1899] 2 I.R. 486, Johnson v. Larkin & Anor [1926] I.R. 640 and the English decision in *Veliu v. Mazrekaj* [2007] 1 W.L.R 495 are cited as authority.

27. These Irish cases are also cited by *Cox & McCullough* on Defamation at Chapter 14.260 in support of what appears to be the same proposition. It was submitted that the commentary on the law set out in that work was to be preferred to the view expressed by McDonald on Defamation at p. 269 to the effect that the common law rules, for which the same Irish cases are cited as authority, have been abolished by the CLA.

Reply
28. In reply, it was submitted that the decision in *Hickey* was not confined to intentional torts; on the contrary, it was quite clear from the provisions of s. 2 of the CLA that 'tort' includes non-intentional torts. If there was any doubt about whether the relevant provisions of the CLA applied to the tort of defamation that was put to bed by the wording of s. 11 subs. (5). If Joe Costello's statement was defamatory he and the Defendant were concurrent wrongdoers because they were responsible to the Plaintiff for the same damage arising from a simultaneous publication to the same listeners.

29. The proposition advanced by *Cox & McCullough* was not concerned with and did not address the consequences of s. 35(1) (i). The same proposition advanced by *Gatley*, for which the two Irish authorities are also cited as authority, had to be viewed in the absence of similar statutory provisions in England and Wales. On the other hand, *McDonald* was concerned with and was commenting upon the effect of the CLA on the pre-existing common law rules, accordingly, that view was to be preferred.

30. Evidence had been led on foot of which the jury will be entitled to consider the question in dispute. During cross examination the Plaintiff had accepted that he considered Joe Costello to be at fault as the author of the impugned statements and that it had been pleaded he was readily identifiable from the statements before he was named by his party colleague. If there was a tort, it was already complete before the Plaintiff was identified by name. Proceedings could have been issued but the Plaintiff chose not to do so within the prescribed limitation period. Having regard to the circumstances of the case it could not have come as a surprise to the Plaintiff that in pleading s. 35(1) the relevant provision on foot of which the Defendant intended to rely was s. 35(1)(i).

Decision
31. I find the submissions made by Mr Ferriter on behalf of the Defendant compelling; on the face of it sections. 11(5) and (7) as well as 14 (6) as amended by the Act of 09 apply to defamation actions, that much is clear. With regard to the submissions made by Mr Hogan on behalf of the Plaintiff, I cannot accept the proposition that because the Defendant failed to plead subs (1) (i) the Plaintiff has come to meet a case where the jury will be required to consider all of the instances of identification provided for in s. 35(1) on which no evidence has been led and that it is too late for the Defendant to change its position and seek to rely on subs (1) (i) alone.

32. The s. 35 (1) plea must be viewed in context. It was apparent or ought to have been apparent from the pleadings read as a whole, the circumstances of the case and the particular wording of the plea that the s. 35 identification upon which the Defendant seeks to rely is subs (1) (i). Had there been any doubt about that a notice for particulars would in all likelihood have been raised; none such appears from the pleadings or the correspondence made available to the Court.

33. It is evident from the wording of Clause 5 of the statement of claim, the substance of which was given in evidence by the Plaintiff, that although he considered himself to have been defamed by Joe Costello and that his identity had been discernible from the content of the impugned statements before he was identified by his party colleague, he had not issued proceedings because it was the Defendant who had broadcast the statements or, to use his words, who had let the broadcast out to the public at large and was

thus responsible.

34. The Plaintiff's view, in so far as it is a view of the law at all, is not well founded, indeed, it was not in question between counsel in argument, subject to any defence under s. 26 of the Act of 09, that where a person utters a statement while participating in a live broadcast which is found to be defamatory, the broadcaster and the person uttering the statement are each strictly liable in the tort of defamation.

35. It was accepted that there is a dearth of direct case authority on the point to assist the Court in reaching a determination; the provisions of s. 35(1) (i) do not appear to have been considered by any of our Superior Courts in the context of a defamation action. I have read and considered the decisions in *Hickey, Dawson*, and *Johnson*, together with the relevant statutory provisions and the extracts from the academic legal texts opened to the Court and upon which reliance was placed during argument.

36. In these circumstances I think it appropriate to repeat the observation that since independence cases decided in the Superior Courts of England and Wales or for that matter other common law jurisdictions cited in support of a proposition where on the face of it the law is the same as that in this jurisdiction are considered to have persuasive authority; certainly they are not binding precedent. A similar observation maybe made with regard to decisions of the Irish Courts prior to independence, moreover, the Court must in any case adopt a cautious approach to any authority whether pre or post-independence to ensure it has not been reversed by a subsequent decision or the *ratio decidendi* has not been overturned, altered or otherwise modified by a subsequent act of the Oireachtas or applicable EU legislation.

37. Academic legal texts no matter how learned, erudite, well researched and useful as source material on the law about which they are written are precisely that; they do not equate to case authority although I should observe that extracts from such works containing statements of the law are increasingly cited with approval in court judgements. As the submissions in this case demonstrate, when it comes to the works of authors who are writing about and are concerned with the law of other common law jurisdictions the Court must take particular care to satisfy itself that any given statement on the law is correct and applicable in this jurisdiction.

38. Turning then to the apparent conflict between the respective propositions advanced in the academic texts relied on by the parties; the first step is to ascertain whether what is involved here concerns concurrent wrongdoing. Once established the answer to resolving the issue, in my judgement, is to be found in the provisions of sections 12 (1), 14 (1) and (6) of the CLA set out earlier in this judgement.

39. When the words of s. 14(1) in particular are given their ordinary and natural meaning they warrant the proposition advanced by *McDonald* on Defamation that the effect of the provision was to reverse the common law rule that where joint tortfeasors are sued together in respect of the same defamatory statement no more than a single judgment for the total amount of the damages can be rendered against those defendants found liable, a rule for which the Irish decisions in Dawson and in *Johnson* are cited as authority by *Gately*.

40. The absence of corresponding statutory provisions in England and Wales no doubt explains the reason for the difference between the two authors. While these cases were also cited by *Cox & McCullough* at para 14.260 as authority for the rule, I note that this was not in the context of a consideration of the relevant provisions of the CLA whereas clearly this was expressly addressed by *McDonald*.

41. The provisions of s. 14(1) follow logically from s. 11 which abolishes the distinction between joint and several tortfeasors and shifts the focus from the role played by the defendants in the commission of the wrong to the damage caused, provided each contributed to causation. The wording of s. 14(1) makes it abundantly clear that where judgment is given against concurrent wrongdoers who are sued together, judgment may be given against them separately or together and that if judgment is given against them together such is to take effect as if it were given against them separately; in short, judgements against concurrent wrongdoers are to be several.

42. An important distinction is made in defamation where there are concurrent tortfeasors. In general the plaintiff is entitled to recover judgment against each wrongdoer for the whole amount subject, in the case of defamation, to the entitlement of a concurrent tortfeasor, where it arises, to a mitigation of damages. In such circumstances the concurrent tortfeasor so entitled cannot be compelled to make contribution except in respect of the amount of damages payable by him; '*and the judgement against him maybe given* accordingly'. See s. 14(1) (6). In such circumstances judgements for different amounts maybe given against concurrent tortfeasors.

43. While it is clearly a matter for the jury to determine whether the impugned statements are defamatory, on my view of the evidence Joe Costello knew or ought to have known when he made the impugned statements in the course of the programme that they were being broadcast live by the Defendant, statements which were thus directly published simultaneously to the same listeners; accordingly, I am satisfied that the requirements of s. 11(5) of the CLA have been satisfied.

44. It follows that Joe Costello could have been joined as a co-defendant in these proceedings as an alleged concurrent wrongdoer and that if the statements are found to be defamatory his would have been a liability as such. As it is he was not joined nor were separate proceedings brought against him within the relevant limitation period, the Plaintiff's cause of action having accrued on the occasion when the statements were broadcast and thus published. If the Plaintiff is successful in these proceedings his success will come about in circumstances where he will have permitted his claim against Joe Costello to become statute barred.

45. Whilst there are some attractions to the submissions made as usual in a very cogent and forceful fashion by Mr. Hogan on behalf of the Plaintiff, I can find no basis in authority or in the relevant legislative provisions referred to above which would warrant the Court in coming to the conclusion that in an appropriate case, such as the present, it is not open to the Defendant to plead and rely on s. 35(1) (i) by way of defence in an action brought for the tort of defamation.

46. Nor can I accept the submission that *Hickey* has no application. That case must be seen in the context of the causes of action under consideration by the Supreme Court. In so far as the judgement of the Court was concerned with the construction of s. 35(1) (i), I find it to be of considerable assistance. When referring to specific causes of action I do not understand O'Donnell J., to have intended that the provision was one of limited application, confined to or concerned only with actions such as intentional torts, breaches of trust or breaches of contract, quite the contrary.

47. It had been argued in *Hickey* that contributory negligence was confined to acts of negligence or want of care by virtue of the provisions of s. 34(1), accordingly, the apparent breadth of s. 35 was said to be limited because it is stated to be an attribution of liability for the purposes of determining contributory negligence and therefore the only acts or omissions for which a Plaintiff may be

made responsible are acts constituting "*…negligence or want of care of the plaintiff or of one for whose acts he is responsible"* and not any other wrongdoing, an argument which was rejected.

48. It is not without significance that the definition of concurrent wrongdoers includes circumstances where the wrong on the part of one or more potential concurrent wrongdoers under s. 11(2) (b) "*may* be a tort, *breach of a contract, or breach of trust, or any combination of them"* [emphasis added]. Commenting on the application of that sub section O'Donnell J. stated at para 64:

> "*Once it is accepted however that intentional tortfeasors, contract breakers and trust breachers are* also *concurrent wrongdoers from whom contribution might be sought, it would make little sense to read the identification provisions of s.35 as* only *having a practical effect in relation to those acts of a concurrent wrongdoer which constitute negligence or want of care*."[emphasis added]

49. In *Hickey*, the Court considered that the potential outcome of the defendant's argument would have been more than peculiar. The combined effect of ss. 34 and 35 would have been that certain acts such as want of care which would be contributory negligence if committed by the Plaintiff could not be treated as contributory negligence through the vehicle of s.35 since such acts would not necessarily amount to concurrent wrongdoing. Commenting on the peculiarity of the argument at para. 65 the learned judge went on to observe:

> "*On the other hand, while the plaintiff must be identified under s.35 with the acts of the concurrent wrongdoer not sued for the purposes of contributory negligence, certain of those acts* (torts other than negligence, breaches of contract, breaches of trust), *would nevertheless not constitute contributory negligence, even though, if the same concurrent wrongdoer is sued in the proceedings by the plaintiff, or joined as a third party*, contribution in respect of those acts of concurrent wrongdoing *would be available to the other defendants. There would have to be symmetry or harmony between the provisions of s. 35(1) (i) and the contribution provisions if that were to be the case".*

50. O'Donnell J. considered that s. 35(1) (i) is best understood as a deeming provision which he described at para. 66 as one which gives:

> "*…a meaning to something for a particular purpose which it would not otherwise have more generally. Breach of contract or an intentional tort is not normally contributory negligence if committed by the plaintiff, but when committed by a concurrent wrongdoer not sued and now protected by the Statute of Limitations, it is deemed to be so for the limited purposes of the identification provisions of the 1961 Act."*

Conclusion

51. Applying *Hickey* in so far as it is concerned with s. 35 and having regard to the other relevant statutory provisions discussed earlier, the construction which the Court places on s. 35(1) (i) is that this provision extends to all wrongs involving concurrent wrongdoing whether intentional or unintentional and thus captures all torts, including the tort of defamation. The restrictive interpretation urged on the Court is neither warranted nor sensible when regard is had to the wording of the provision and the legislative framework in which it appears notwithstanding that the consequences of application in certain circumstances may well produce a harsh or extreme outcome.

52. If the Oireachtas had wanted to restrict the operation of the provision to certain wrongs it would have been necessary for express provision to have been made to that effect. Giving the words of subs (1) (i) their ordinary and natural meaning the intention of parliament is clear; no restriction is placed on the type or category of concurrent wrongdoing involved.

53. Where a plaintiff permits his claim against any concurrent wrongdoer to become statute barred the effect of the provision is to deem the liability of the statute barred defendant a form of contributory negligence which maybe pleaded against the plaintiff in reduction of the award of damages. The Plaintiff permitted his claim against Joe Costello, a concurrent wrongdoer, to become statute barred. It follows that the Defendant is entitled to rely on the plea pursuant to s. 35 (1) (i) by way of defence to the Plaintiff's claim.

Ruling

54. The ruling of the Court upon the foregoing is that this plea should go to the jury in the form of a question to be considered and decided by them either in the terms proposed by the Defendant or in like terms as may be agreed between the parties. If required, the Court will facilitate a short adjournment to allow for consideration of any alteration or amendment to the wording of the question proposed by the Defendant. If such are to be made, the thrust of the question should be the same as that in the form proposed.