THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 92

No. 2015/50 Exp

Peart J.
Irvine J.
Hogan J.
BETWEEN/

NOEL LENNON

APPLICANT/APPELLANT

AND
HEALTH SERVICE EXECUTIVE

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 30th of April 2015

1. Where a plaintiff has simultaneously commenced both judicial review proceedings and an action for defamation pursuant to the Defamation Act 2009 ("the 2009 Act"), may that plaintiff be deprived of his right to jury trial in respect of the defamation action by reason of a case management direction made, admittedly for sound and practical reasons, in respect of the hearing of the two cases? This is essentially the issue which we are required to determine in the present appeal and it arises in the following way.

2. The plaintiff is a national school teacher. In 2004 he was placed on administrative leave following the making of a complaint by the parents of a pupil to the effect that their son had been sexually abused. Other serious complaints of a similar nature followed. The plaintiff then commenced judicial review proceedings (2004 No. 1160JR) ("the 2004 proceedings") seek to quash a decision of the HSE (or, more accurately, its statutory predecessor, the Midwestern Health Board) made on 20th July 2004 which had apparently validated on a *prima facie* basis the complaints and which decision had been made in circumstances where he had not been heard.

3. An order was made by consent on 16th June 2005 quashing this decision which had been taken at a child protection conference. The HSE then indicated that it would commence a fresh investigation. The plaintiff then brought a second set of judicial review proceedings (2006 No. 593 JR) ("the 2006 proceedings"). The 2006 proceedings were compromised and by consent the proceedings were struck out by the High Court on 11th December 2006. The effect of this consent order was that the HSE assured the plaintiff that all relevant documentation bearing on the investigation had been furnished to him.

4. Three separate criminal prosecutions followed arising out of these complaints. The plaintiff was, however, acquitted of all charges following three separate criminal trials on 13th May 2009, 7th July 2009 and 15th October 2010. Following these acquittals, the plaintiff then sought to be reinstated to his teaching post. The HSE made clear, however, that it intended to continue its investigation.

5. That investigation concluded with a letter sent by the senior social worker in charge of the investigation, Mr. Bill Hamill, on 14th December 2012 to the Board of Management of the school in question. In that letter Mr. Hamill briefly outlined the history of the matter, including the fact that the HSE had previously deemed the complaints to be credible. Mr. Hamill then referred to the fact that the plaintiff had been acquitted following criminal prosecutions. He then stated:

> "In conclusion, taking into account the social work assessment [of 2004] but having regard to the rejection of all of the allegations made against him, it is still the considered view of the HSE that on balance the outcome of the allegation is inconclusive."

6. In the wake of this letter the plaintiff was then invited to resume his teaching duties which he did on 30th April 2013. The plaintiff maintains, however, that the HSE investigation was seriously flawed and he commenced a third set of judicial review proceedings (2013, 203 JR) ("the 2013 proceedings") seeking to quash the outcome of that investigation. The 2013 proceedings were subsequently amended in circumstances I shall later describe.

7. On 7th November 2013 the plaintiff then issued proceedings claiming damages for defamation under s. 29 of the 2009 Act. He also sought a correction order under s. 30 of the 2009 Act. The gist of the defamation proceedings is to the effect that the plaintiff alleges that on various dates between 14th December 2012 and 25th June 2013 Mr. Hamill conversed with the parents of children attending the school and that in these conversations Mr. Hamill said or implied that the plaintiff was a threat to children attending the school and that he should not have been permitted to return work.

8. On 27th January 2014 the High Court made an order by consent amending the 2013 proceedings. The additional relief and grounds thus added to those judicial review proceedings was to the effect that the HSE had acted *ultra vires* insofar as Mr. Hamill had communicated with the parents and had suggested that the plaintiff should not be allowed to resume his teaching duties. It is clear that there is a considerable overlap between the two sets of the proceedings.

9. On 24th November 2014 the respondent applied by motion to the High Court for an order consolidating the 2013 proceedings with the defamation proceedings and for general case management directions as to the mode of trial. In a ruling delivered on 15 January 2015 McCarthy J. held that the 2013 proceedings be listed together with the defamation proceedings, ruling that it was a matter for the trial judge whether to hear the cases together or successively. In the course of that ruling McCarthy J. said as follows:

> "I think that the right to trial by jury is not an absolute one. There is an inherent jurisdiction in the Court to regulate its own procedure. There is indeed a jurisdiction or at least a duty on the Court to so regulate it to ensure that constitutional justice is afforded to all parties. It may also take into account another aspect of the public interest. There is always a public interest in affording constitutional justice to parties. Procedural issues in considerations such as the use of court time are entirely secondary to substantive issues of merit and must always take second place, notwithstanding the greater emphasis on such matters in more recent times on a practical level. However, it is not in the public interest that there be a multiplicity of trials where one trial would do justice between the parties. It is not in the public interest to use up or expend the time of the court unnecessarily. It is not in the public interest that parties be either put to the

hazard of having orders for costs against them or, in the first instance, incur costs which they may or may not recover.

One can see, in other words, that there are sound reasons why a discretion is vested in the courts to direct cause of actions or proceedings to be heard even at the price, so to speak, of the exclusion of an entitlement to trial by jury."

10. On an appeal to this Court, the single issue was whether the High Court was thereby entitled to make a case management direction which had the effect of depriving the plaintiff of his right to jury trial in respect of the defamation proceedings. It may be acknowledged at the outset that case management decisions of this nature should but rarely be upset on appeal. As Clarke J. pointed out in *Dowling v. Minister for Finance* [2012] I.E.S.C. 32:

> "The trial court must retain a very large measure of discretion over the directions which are appropriate and the measures to be adopted in the event of failure to comply. There would be no reality to the achievement of the undoubted advantages which flow from case management if this Court were, on anything remotely resembling a regular basis, to entertain appeals from parties who were dissatisfied with either the precise directions given or orders made by the Court arising out of failure to comply."

11. It may next be accepted that there is a considerable overlap between the issues raised in both sets of proceedings. From the perspective of convenience and the avoidance of duplication of costs, the order made by McCarthy J. – whereby he directed that the two cases were to be heard either together or successively – has a very great deal to commend it. In the context of where there are two separate, overlapping proceedings, the entitlement of trial by jury in respect of the defamation proceedings presents considerable practical problems in terms of the efficient handling of the two cases. If, for example, the jury were to determine that the Hamill letter was not defamatory of the plaintiff, how would that impact on the judge's assessment of not dissimilar questions which arise in the 2013 judicial review proceedings?

12. The existence of these and other similar practical difficulties were not really at issue in this appeal. The only real issue before the Court was whether the plaintiff's right to jury trial in respect of the defamation action could properly be set aside on this account for reasons of efficient case management. It is, accordingly, first necessary to examine the nature of a party's right to jury trial in defamation proceedings.

The right to jury trial in civil matters

13. The historical practice of the common law courts (as distinct, generally speaking, from the courts of chancery) was to provide for jury trial in civil matters. This is reflected in the 7th Amendment of the US Constitution (1791) which provided that "in suits at common law…the right of trial by jury shall be preserved." In this jurisdiction, however, the right to jury trial in respect of common law actions was gradually eroded throughout the 19th century. The creation by statute of new courts with professional judges meant that many actions in what corresponds to the modern Circuit Court were now to be tried by judge alone. While the right to jury trial in actions for greater than £20 was preserved by s. 100 of the Civil Bill Courts (Ireland) Act 1851, nevertheless, given monetary values at the time, this meant that the majority of even common law actions heard by the then County Court were by judge alone. At around the same time court procedure for the common law courts was revolutionised by the Common Law Procedure (Amendment) Act 1856 ("the 1856 Act"). Section 4 of the 1856 Act allowed the parties in common law actions to agree that issues of fact – which heretofore the preserves of civil juries – might be determined by a judge alone.

14. The procedural fusion of the chancery and the common law courts into one High Court which was effected by the Supreme Court of Judicature (Ireland) Act 1877 ("the 1877 Act") also weakened in practice the pre-eminent role which juries had previously enjoyed in common law actions. This was in part because there was now one unified High Court whose jurisdiction was governed by statute, but also because there was now effectively for the first time a procedure where common law and equitable claims could be combined in one set of proceedings which could be adjudicated by a judge sitting alone. Save in rare and special cases, there was in practice no entitlement to jury trial in the Courts of Chancery prior to the 1877 Act. Even then, however, s 48 of the 1877 Act provided that:

> "…nothing in this Act, or in any rule made under its provisions, shall take away or prejudice the right of any party to any action to have questions of fact tried by a jury in such cases as he might heretofore of right have so required…..Provided also, that such right may be enforced by motion in the High Court of Justice…."

15. There is no question, however, but that immediately prior to the coming into force of the 1877 Act any party to defamation proceedings had the right to have such questions of fact tried by a jury.

16. The right to jury trial in civil matters was further eroded following independence as a consequence of s. 94 of the Courts of Justice Act 1924 ("the 1924 Act") which provided:

> "Nothing contained in this Act shall take away or prejudice the right of any party to any action in the High Court or the Circuit Court (not being an action for a liquidated sum, or an action for the enforcement, or for damages for the breach of a contract) to have questions of fact tried by a jury in such cases as he might heretofore of right have so required in the Supreme Court of Judicature in Ireland, and with like directions as to law and evidence, but no party to an action in the High Court or the Circuit Court for a liquidated sum, or an action for the enforcement or for damages for the breach of a contract or in an action for the recovery of land shall be entitled to a jury unless the judge shall consider a jury to be necessary or desirable for the proper trial of the action, and shall of his own motion or on the application of any party so order. Subject to all existing enactments limiting regulating, or affecting the costs payable in any action by reference to the amount recovered therein, the costs of every civil action, and of every civil question and issue, tried by a jury in the High Court or the Circuit Court shall follow the event, unless, upon application made, the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct; and any order of a Judge as to such costs may be discharged or varied by the appellate tribunal."

17. Section 94 of the 1924 Act was itself amended by s. 20 of the Courts of Justice 1928 to provide that there was no right to jury trial in actions for breach of contract or for liquidated sums or in action for the recovery of land save where the court itself considered that this was "necessary or desirable" for the proper trial of the action.

18. The effect of s. 94 of the 1924 Act was in practice to remove the right to jury trial in actions for breach of contract, while otherwise preserving the right to jury trial which had in turn been previously preserved by the 1877 Act. As Clarke J. said in *Bradley v. Maher* [2009] I.E.H.C. 389. there is "no doubt but that a right to trial by jury in defamation proceedings existed as of that time and was, therefore, continued in force by reason of that Act."

19. Two other important statutory changes from the 1970s and the 1980s respectively are also relevant to this question. First, s. 6 of

the Courts Act 1971 ("the 1971 Act") abolished the right to jury trial in all civil actions in the Circuit Court. This led to the situation for the first time where the Circuit Court heard defamation actions by a judge sitting alone. Second, s. 1 of the Courts Act 1988 abolished the right to jury trial in respect of personal injuries matters, save for claims for trespass to the person and false imprisonment.

20. The law in this matter as it stood immediately prior to the 1988 Act was thus helpfully summed up by McWilliam J. in *McDonald v. Galvin* [1976-1977] I.L.R.M. 41, 43:

> "This leaves the present position such that a party has a right to a jury in all cases in which he had such a right prior to 1924 except in claims for breach of contract or for liquidated sums or for the recovery of land or for the recovery of land or claims in the Circuit Court."

21. The net effect of these various statutory changes is that over 150 years the right to jury trial in civil matters has been gradually whittled away. Yet it is equally plain that the right to jury trial in respect of defamation actions in the High Court which existed immediately prior to the 1877 Act has not been altered by subsequent statutory changes. That right was preserved by s. 48 of the 1877 Act and, save for the abolition of the right to jury trial in the Circuit Court by s. 6 of the 1971 Act, that right has never otherwise been altered or diluted by the Oireachtas.

22. Indeed, it is clear, moreover, from the terms of 2009 Act that the Oireachtas assumed that all defamation actions would be tried in the High Court with a jury. Thus, for example, s. 14(1) of 2009 Act empowers the court in a defamation action to give a direction as to whether the statement in question is "reasonably capable" bearing the imputation asserted by the plaintiff. Assuming the answer to that question is in the affirmative, then the court is required to determine whether "that imputation is reasonably capable of bearing a defamatory meaning". What is significant for present purposes is that s. 14(3) of the 2009 Act provides:-

> "An application under this section shall be brought by notice of motion and shall be determined, in the case of a defamation action brought in the High Court, in the absence of the jury."

23. It is plain, therefore, that the Oireachtas assumed that all defamation actions heard in the High Court would be tried by a jury.

24. Against that background, therefore, the question is whether a right to jury trial in defamation proceedings which was preserved by s. 48 of the 1877 Act and a series of other enactments can be compromised or set aside by a case management direction. It is true that there are two High Court decisions, *Bradley v. Maher* [2009] I.E.H.C. 389 and *Kerwick v. Sunday Newspapers Ltd.,* High Court, 10th July 2009 which suggest that this question should be answered in the affirmative. We may now examine these decisions in turn.

The decisions in Kerwick v. Sunday Newspapers and Bradley v. Maher

25. In *Kerwick v. Sunday Newspapers Ltd.* High Court, 10th July, 2009 the plaintiff concerned brought proceedings for defamation, a breach of her constitutional right to privacy, and negligent infliction of emotional distress. Dunne J. determined that, notwithstanding the fact that, in the ordinary way, the defamation claim brought by the plaintiff concerned would have been tried by a jury, nonetheless, in all the circumstances, the interests of justice required that there be a single trial of all issues and that such a trial could not be before a jury. Dunne J outlined the difficulties of separating the claims into separate proceedings as follow:

> "Imagine that this case was set down for trial without a jury and that the plaintiff made an application to have the trial of two of the causes of action heard at the same time and the trial of the third cause of action held at a later time. Imagine that there would be two separate assessments made in respect of damages. There would be a duplication of evidence, the case would take longer, the costs would be greater and it is arguable that there could be an overlap in respect of the damages that might be awarded. It is difficult to see how such an approach could be permissible in any circumstances."

26. Clarke J. took a similar view in *Bradley v. Maher*. In that case the plaintiff solicitor contended that the defendant had engaged in an unlawful picket of the plaintiff solicitor's offices and, furthermore, that the placards used by the defendant were defamatory. The plaintiff accordingly sought an injunction to restrain the picketing along with damages for defamation. Clarke J. observed that this was not a case:

> "Where there is anything inappropriate in the joinder of the defamation and picketing aspects of the case so that it could be said that their joinder was a device to deprive Mr. Maher from an entitlement to a 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."

27. Although the defendant contended that he was entitled to a jury trial in respect of the defamation portion of the claim, Clarke J. ruled that it was in the interests of justice that the entire action be tried by a judge sitting alone:

> "Against that background it seems to me that the following general principles seem to apply. In the ordinary way, a plaintiff or defendant is entitled to a jury trial in this Court in defamation proceedings. However, that entitlement is not absolute. Where a single set of proceedings involve more than one cause of action, the court has to exercise a discretion as to the appropriate way in which all issues in the case can be disposed of. That discretion arises even in cases where no question of a right to trial by jury exists. For example, the question of whether all issues in a single case which is to be tried by a judge alone should be determined at a single unitary hearing, or in two or more separate hearings, is a matter over which the court retains a discretion which should be exercised, as should all judicial discretion, on a principled basis.

28. Clarke J. then proceeded to give immensely practical reasons as to why a unitary trial presided over by a single judge was the most practical and efficient method of disposing of this case. Judged from the perspective of case management and efficiency, one could not possibly dissent from that conclusion. It was these very self same considerations which prompted McCarthy J. to make the order which he did.

29. Nevertheless, where I respectfully differ from the approach taken by the High Court in *Kerwick and Bradley* and in the present case is that in each of these three cases, the court proceeded from the premise that the right to jury trial in defamation proceedings was not something to which the party was entitled to as of right and that any such pre-existing right should yield to the demands of case management and the efficient operation of the administration of justice. With respect, however, I do not believe that the High Court enjoys any such jurisdiction.

30. As we have seen, any party to defamation proceedings had the unquestioned right at common law to opt for jury trial. That right pre-existed the enactment of the 1877 Act and, as we have seen, was expressly preserved by s. 48 of that Act. Section 48 of the

1877 Act further provided that such right could be enforced by the High Court by motion. That statutory right has never been diluted in any way by any subsequent legislation (save for the abolition of the right to jury trial in the Circuit Court by s. 6 of the 1971 Act) and nor has the Oireachtas created any discretionary exceptions to that right. Indeed, as we have seen, s. 14 the 2009 Act provided that in defamation proceedings certain preliminary matters (such as whether the publication was capable of having a defamatory meaning) should be determined by a judge alone. The Oireachtas has not elected to set out any further circumstances in which a defamation action in the High Court (or any feature thereof) could be tried otherwise than by a jury.

31. Indeed so far as cases such as *Bradley* are concerned, it may be observed that, prior to the 1877 Act, the plaintiff would have had no entitlement to combine a claim for an equitable remedy such as an injunction with the quintessentially common law claim in defamation in one set of proceedings. Although the 1877 Act permitted this to be done, s. 48 expressly preserved the right to jury trial at common law which had heretofore existed. It follows that the plaintiff's right to bring hybrid common law and equitable claims in a single set of proceedings – which by now is so common and standard that we have almost forgotten that it was not possible prior to the enactment of the 1877 Act – nevertheless derives from that 1877 Act. Yet, as we have seen, s. 48 of the 1877 Act expressly provided that "nothing in this Act" should be taken as compromising any party's pre-existing right to jury trial. It follows, therefore, that a plaintiff's right to combine a claim for defamation and an injunction in single proceedings (which was permitted by the 1877 Act) could not prejudice a defendant's entitlement to opt for jury trial in respect of the defamation claim by reason of s. 48 of that self same Act.

32. In these circumstances, the High Court simply has no jurisdiction to create what in effect would amount to a discretionary exception to this common law right which has been copper-fastened by legislation, even if this was done for the very understandable reasons of efficiency and case management. Insofar as the decisions in *Kerwick and Bradley* suggest otherwise, I believe that, with respect, they were wrongly decided and should not be followed.

33. In any event, quite apart from the issue of principle, I consider that this conclusion is supported by other authority: see Delany, *The Courts Acts 1924-1997* (Dublin, 2000) at 59-60. We may commence with a pre-1924 Act authority, *Magill v. Magill* [1914] 2 I.R. 55. This was a case where the plaintiff had sued for damages for breach of contract and the High Court had directed that the case be heard without a jury. While the case is somewhat inadequately reported, the headnote to the Irish Reports records the (former) Court of Appeal as having held that, in the absence of consent, the High Court had no jurisdiction to make such an order.

34. In *McDonald v. Galvin* [1976-1977] I.L.R.M. 41 the plaintiff sued the defendant for assault and battery which was alleged to have been perpetrated on the plaintiff in the drawing room of the defendant's house. The defendant sought to have the action remitted to the Circuit Court, but the plaintiff contended that this would deprive him of his right to trial by jury.

35. McWilliam J. approved a statement from Wylie's *Judicature Acts* (1905) with regard to the statement of the pre-1877 Act law to the effect that ([1976-1977] I.L.R.M. 41, 43) that:

> "In common law courts a party had a right to trial by jury in all cases except certain cases concerning accounts and that, in the Court of Chancery a party had no right to a jury except in a very few cases…This is an action at common law and, no argument having been advanced to the contrary, I am satisfied that, for whatever reason or on whatever principle, *the plaintiff would be entitled to a jury in the High Court as of right.*" (emphasis supplied).

36. Ultimately, however, McWilliam J. held that this did not avail the plaintiff because he was satisfied that the maximum damages which the plaintiff might recover in the circumstances were well below the maximum which the Circuit Court was then entitled to award and the action was then remitted to the Circuit Court. Nevertheless, this decision constitutes an impressive authority for the proposition that where the High Court is properly seized of a common law action such as defamation or assault, then a party to such litigation is entitled to a jury trial as of right.

37. A similar conclusion had been reached by the Supreme Court in a series of (pre-1988 Act) cases dealing with the question of whether the plaintiff was entitled to a jury trial in respect of a claim in negligence. Thus, for example, in *Cox v. Massey* [1969] I.R. 243 Ó Dálaigh C.J. said ([1969] I.R. 243, 248) that as the plaintiff had sued in negligence for personal injuries:

> "The plaintiff…had a right to have his action tried by a jury. Section 48 of the Supreme Court of Judicature (Ireland) Act 1877 preserved this right and s. 94 (as amended) of the Courts of Justice Act 1924, continued it in force."

38. Similar views were expressed in *Finlay v. Murtagh* [1979] I.R. 249, a case where the plaintiff had sued his solicitor in both negligence and for breach of contract. In the High Court D'Arcy J. had refused to set aside the plaintiff's notice of trial with a jury and this conclusion was upheld by the Supreme Court. The judgments delivered by Henchy, Griffin and Kenny JJ. all held that the action was in substance an action in negligence. It is significant, however, that all three judgments proceed on the basis that the plaintiff was entitled to trial by jury as of right.

39. This point was expressly made by Griffin J. who said ([1979] I.R. 249, 263) that as the action was one in negligence "the plaintiff is entitled as of right to have his action tried before a judge and jury". Kenny J. spoke to the same effect ([1979] I.R. 249, 264)) when he stated that "the plaintiff has sued in tort [for negligence] and so is entitled to have his case tried by a jury: see s. 94 of the Courts of Justice Act 1924." Subsequently in another negligence case, *Holohan v. Donohoe* [1986] I.R. 45, 49, Finlay C.J. observed that s. 94 of the 1924 Act gave "to a plaintiff in certain types of cases, of which this is one, the right in the High Court to trial involving the determination of questions of fact by a jury."

40. While it is true that this right to jury trial was removed by the 1988 Act so far as actions in negligence is concerned, this does not take from the underlying principle which emerges from cases such as *McDonald* and *Finlay*, namely, that the effect of both s. 48 of the 1877 Act and s. 94 of the 1924 Act is that where a party to common law litigation had a right to jury trial prior to the operation of the 1877 Act and that right was not subsequently altered or diluted by statute, then that party was entitled to a jury trial as of right.

41. This case-law further re-inforces the conclusion that the High Court simply has no jurisdiction to dilute the plaintiff's right to jury trial in respect of this defamation action. It is accordingly clear that the plaintiff is entitled by virtue of these statutory provisions to jury trial as of right and that entitlement, where applicable, cannot be abrogated by judicial order under any circumstances, even if (as here) the step was taken for the most understandable reasons of efficiency and case management.

Conclusions

42. For the reasons just stated, therefore, I would accordingly allow the appeal and declare that the plaintiff is entitled to a jury trial in respect of the defamation proceedings.