

THE HIGH COURT

[2014 No. 1795 P]

BETWEEN

MEGAN WALSH BOOKEY (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND JULIANNE CULLEN

PLAINTIFF

AND

THE LINKS CRECHE SOUTHSIDE LIMITED, THE LINKS CRECHE AND MONTESSORI LIMITED, DEIRDRE KELLY, PADRAIG KELLY
AND HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Hedigan on the defendant's motion delivered the 7th day of August, 2015

1. In this application the defendant's seek the following relief:

- (a) An order setting aside the notice of trial by a judge and jury herein dated the 12th of May 2015;
- (b) An order transferring the within proceedings to the personal injuries list for trial by judge sitting alone;
- (c) If necessary an order extending time for the making of the within application and
- (d) Costs.

2. The proceedings herein are one of a number of sets of proceedings which arise from the alleged assault, battery and mistreatment occasioned to young children including the infant plaintiff whilst they were attending the first and second named defendant's childcare facility, "Links Abington Malahide". Most, but not all, of the children on whose behalf these various sets of proceedings have been issued attended that part of the crèche known as the "wobbler room". The plaintiff in these proceedings attended the wobbler room between October 2012 and May 2013.

3. As is set out in the pleadings herein, this crèche was one of three premises which were the subject of a broadcast by the RTE Primetime programme on the 28th of May 2013. This programme entitled "Breach of Trust", featured footage which had been recorded on RTE's behalf in each of the premises investigated by an undercover reporter. The footage recorded in the crèche, the subject matter of these proceedings, was filmed in or around March of 2013 and showed what has been described in the defence delivered herein as "inappropriate" behaviour whereby some of the first to fourth named defendant's staff yelled, swore at, pulled, flipped, or pushed and generally mishandled the young pre-verbal children who had been left in their care. As is set out in the statement of claim, the first to fourth named defendant appear to have been alerted to the various incidents of assault, unwarranted bodily interference and/or restraint, mistreatment and intimidation which had been witnessed by the undercover reporter, some of which were covertly filmed and ultimately broadcast during the course of the programme aired by RTE on the 28th of May 2013.

4. Proceedings were commenced on behalf of the infant plaintiff by plenary summons dated the 31st of January 2014 and thereafter a statement of claim was delivered on the 28th of August 2014. As appears in the title of the proceedings, in addition to the first and second named defendant who were the operators of the crèche, the third and fourth named defendants have been sued in view of the significant control that was exercised by them over the operation of the crèche and the activities of the staff employed therein. Proceedings have also been commenced against the fifth named defendant in its capacity as the statutory body charged with the supervision of pre-school services. Pleadings and particulars have been exchanged between the parties and a defence was delivered on the 28th of February 2015. Notice of trial was served on the 12th of May 2015 and the matter was set down for trial by judge and jury on the 12th of May 2015. As noted above,

5. The statutory framework:-

Section 94 of the Courts of Justice Act 1924 preserved, in the courts established by that Act, the right to trial by jury in any case where a right to trial by jury had previously existed. This section however was qualified by section 1 (1) of the Courts Act 1988 the effect of which was to largely abolish the right to trial by jury in civil cases. Certain categories of action remained however whereby an entitlement to trial by jury continued. For the purposes of this action intentional trespass to the person was one of these exempted forms of action. This was provided at section 1 (3) as follows;

"(3) Subsection (1) of this section does not apply in relation to –

(a) An action where the damages claimed consists 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 seven 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 a 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..."

6. The plaintiff argues that the case is predominantly one based on assault. The claim of negligence is based on the failure to properly supervise. That failure allowed or permitted the assault to occur. The defendants argue that there is significant doubt as whether the conduct contended for might reasonably constitute intentional trespass. They claim the whole case is about the failure of the

defendants to properly manage the crèche and thus care for the plaintiff. The plaintiff on the other hand argues that everything is based upon the assault and battery and that without that there is no case. They argue that the principle or predominant cause of the action is what the court should look at. The defendants argue the claim is really one of negligence, the plaintiff argues that the claim is predominantly one of assault and battery.

7. The most helpful and recent authority is that of *DF (suing by his next friend K McE) v. the Commissioner of An Garda Síochána* [2015] IESC 44 where the plaintiff was found to be entitled to trial by judge and jury. He had been the subject of an arrest and detention by An Garda Síochána which, it was claimed, was unlawful. The proceedings in addition to claims for assault, battery and/or false imprisonment comprised other causes of action to include negligence in respect of his arrest and detention. Giving judgment for the court Charleton J. stated at para. 18 of the judgment as follows:

"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...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."

8. So where in substance does the nature of this claim lie? In my judgment the allegations of assault are the dominant aspects of this case. The parents saw images on TV of their daughter being, they allege, shouted at, pulled and pushed roughly. This for a mother, in whose name these proceedings are brought, is, in my view, the most shocking aspect of the whole affair in which the defendants agree the plaintiff was subjected to inappropriate behaviour by their staff. The alleged negligence pleaded arises from and is closely linked to the claim for assault and any damages that arise do so in respect of the same act or omission. The first and dominant claim from which the greatest part by far of the plaintiff's case arises is the alleged assaults. The existence of further incidents of negligence cannot displace that originating incident or its dominance. This being so, in my judgment the right of the infant plaintiff to a jury trial has been preserved and the application to set aside the notice of trial before a judge and jury must be refused.