

## THE HIGH COURT

[2002 No 11224 P]

BETWEEN

M.O'C.

PLAINTIFF

AND  
THE K L H

FIRST NAMED DEFENDANT

AND  
M D

SECOND NAMED DEFENDANT

**Judgment of Ms. Justice Dunne delivered on the 22nd day of June 2006**

1. The first named defendant by notice of motion dated 8th June, 2006, seeks an order setting aside the notice of trial by a judge and jury herein dated 14th March, 2006. The notice of motion herein is grounded upon an affidavit of Caroline Keane solicitor on behalf of the first named defendant.

2. The basis upon which it is sought to strike out the notice of trial herein is that the matters at issue in these proceedings are not such as should proceed before a jury. As set out in the affidavit of Caroline Keane, it is claimed that the plaintiff's claim herein is pursuant to contract and that insofar as the right to a jury is based on a claim for assault by the second named defendant it is not a matter that should proceed by way of trial by jury. Some correspondence passed between the solicitors for the first named defendant and the plaintiff in regard to this issue which reached no conclusion on the issue but I do not think it is necessary to refer to that correspondence.

3. A replying affidavit was sworn by the solicitor acting for the plaintiff. Save that the solicitor for the plaintiff Patrick O'Riordan complains of the delay in bringing this application there is nothing else of relevance or of assistance contained in the affidavit to which reference need be made.

4. Mr. Callanan SC on behalf of the first named defendant referred to s. 1(1) of the Courts Act, 1988. It provides as follows:

1.(i) Notwithstanding s. 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) under s. 48 of the Civil Liability Act, 1961 or

(c) under s. 18 (inserted by the Air Navigation and Transport Act, 1965) of the Air Navigation and Transport Act 1936, or a question of fact or an issue arising in such an action, shall not be tried with a jury.

5. Section 1(1) therefore abolished the right to a jury in actions for damages for personal injuries caused by negligence, nuisance or breach of duty. A limited saver was provided by subs. 3 which provides as follows:

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

(a) an action where the damage is claimed consist only of damages for false imprisonment or intention of 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 (where 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 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, ...

6. The action herein is not one which comes within the scope of s. 1(3) (a). At issue between the parties herein is the question of whether the action herein comes within the scope of s. 1(3) (b). Mr. Callanan SC in his submissions stated that the statement of claim herein contained a multiplicity of claims including breach of contract, negligence, breaches of employment law, inter alia. The matters complained of range over not just one incident or one type of incident but consist of claims in respect of other matters as well. Accordingly, a jury would be dealing with a number of separate incidents not just flowing from incidents of sexual assault or assault simpliciter. Accordingly, he submitted that the statement of claim herein ranged too widely from the exception provided by s. 1 (3) (b).

7. It may be useful to consider the statement of claim herein. Paragraph 5 of the statement of claim sets out in detail the alleged express and or implied terms of the plaintiff's contract of employment. Without going through all of those in detail it would be helpful to refer to the first alleged term namely:

"That the first named defendant, its servants or agent would not subject the plaintiff to sexual assault, sexual harassment, intimidation, victimisation, bullying, harassment, unreasonable and arbitrary treatment."

8. Para. 6 of the statement of claim outlines details of an alleged sexual assault on the plaintiff by the second named defendant, a co-worker of the plaintiff employed by the first named defendant. It is alleged subsequently that the second named defendant was acting in the course of his duties at the time of the alleged assault and that consequently the first named defendant is vicariously liable for the matter complained of. I think I should also quote paras. 8 and 9 respectively of the statement of claim in full.

"8 Further or in the alternative the first named defendant in failing to take any action against the second named

defendant and in pre-judging the complaint made by the plaintiff against the second named defendant, subsequently acquiesced in the second named defendant's behaviour and accordingly is estopped from denying responsibility for same.

9 Wrongfully and in breach of the contractual terms set out above, commencing in December, 1998, and continuing until 2001, when the plaintiff was forced to resign from her position with the first named defendant, the plaintiff was subjected to ongoing harassment, victimisation, intimidation and isolation by the defendants and each of them and/or their respective servants or agents. Furthermore and in further breach of the terms set out above the first named defendant, its servants or agents systematically ignored complaints made by the plaintiff and exposed her to an ongoing risk of injury, loss and damage by reason of their deliberate refusal to deal with same."

10. Thereafter lengthy particulars are furnished as to the matters complained of by the plaintiff. The plaintiff goes on to plead that as a result of the matters complained of she has suffered severe personal injuries, loss and damage and further particulars are then given of the alleged personal injuries, loss and damage. The statement of claim goes on to plead that the said personal injuries, loss and damage were caused by the negligence and breach of duty of the first named defendant, its servants or agents and again particulars are given in regard to that.

11. Paragraph 12 of the statement of claim relates to the manner in which the first named defendant is alleged to have dealt with complaints made by the plaintiff in respect of the first named defendant and in relation to a loss of statements made by the plaintiff in relation to the said incidents. Again that aspect of the plaintiff's claim is referred to for the purpose of seeking aggravated damages or exemplary damages.

12. Ms. Donnelly SC appeared on behalf of the plaintiff herein. She argued that the proceedings herein had been mischaracterised by Mr. Callanan. This was not a breach of contract case as he suggested. On the contrary it was an assault case. She referred to the decision of the Supreme Court in the case of *Sheridan v. Kelly & McDonnell* (Unreported, Supreme Court, 6th April, 2006). That case concerned an allegation of assault including sexual assault against a Christian Brother at a school in which the plaintiff was a student. In that case the plaintiff served a notice of trial for judge and jury. The second named defendant served a notice of motion to have the case transferred to the personal injuries list to be tried by a judge sitting alone. In the High Court, Kearns J. made an order granting the reliefs sought because the plaintiff had joined another cause of action with his claim for damages for "intentional trespass to the person." Ms. O'Donnell placed particular emphasis on a passage from the judgment of Fennelly J. at p. 4 thereof in which it was stated as follows:

"Mr. O'Donoghue argued that the damages were not, however, claimed 'in respect of the same act or omission' as the damages in respect of the assault. To consider this proposition, it is relevant to recall that the statement of claim, as summarised above, commences by alleging that the first named defendant committed sexual assaults on the plaintiff; then alleges that the plaintiff suffered personal injury by reason of those assaults and then that the second named defendant was vicariously liable for those assaults. The personal injuries particularised in the statement of claim are alleged to have been suffered 'as a consequence of the matters complained of herein..'. Mr. O'Donoghue placed reliance on certain particulars of negligence alleged against the second named defendant apparently going somewhat beyond the simple allegation of vicarious liability. For example, it is pleaded, as mentioned above, that the second named defendant 'failed to have in place the procedures or measures appropriate for the regulation and supervision of [its] members...'"

I do not think that any of these matters take this case outside the scope of subsection (3) (b). It is clear that the core of the plaintiff's 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 the 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...."

13. In the circumstances it was held that the claim came within s. 1(3) (b) of the Act of 1988. On the basis of that authority, Ms. Donnelly submitted that the focus was on the damages that flowed from the acts complained of. She said that there had been in this case a series of intentional acts of trespass.

14. It will be seen from the passage above quoted from the judgment of Fennelly J. in the *Sheridan* case that the facts of the present case go far beyond what was considered by the Supreme Court in that case. Clearly a plaintiff can seek a jury trial provided damages are claimed for either false imprisonment or intentional trespass to the person or both where he also pleads that damages have been caused by negligence or indeed, breach of contract. However it is clear from that case that if more than one cause of action is claimed, the claim for damages must arise in respect of the same act or omission. As was stated by Fennelly J. therein

"the focus is on the damages and the relevant act or omission which causes them."

15. One of the difficulties that emerged in the course of argument in this case was how to categorise the matters complained of by the plaintiff that occurred between 1998 and 2001. The plaintiff has sought damages in respect of incidents complained of during that period. Whilst there may be a separate cause of action in respect of the complaints made by the plaintiff during that period, any damages which flow from the matters complained of during that period clearly could not be said to flow from the alleged sexual assault or indeed the subsequent physical assault alleged to have taken place. Ms. Donnelly referred to the claim for damages for the intentional and/or reckless infliction of emotional upset and mental distress, harassment, victimisation, and argued that they amount in practical terms to intentional trespass to the person of themselves and thus in respect of those incidents they constitute separate causes of action for which the plaintiff is entitled to have a jury trial. These matters were more particularly described in para. 9 of the statement of claim and in the particulars furnished in that paragraph. In support of her argument in this regard she referred to McMahon and Binchy on the *Law of Torts* (3rd Ed.) at para. 22.28 where the learned authors stated:

"Where a person intentionally or recklessly inflicts emotional suffering on another, he may be guilty of a tort. The precise scope of the tort is somewhat uncertain."

16. The authors in support of that contention referred to a decision *Wilkinson v. Downton* [1897] 2 Q.B. 57. In that case the

defendant as a practical joke told the plaintiff that her husband had been injured in a road accident, that he was lying on the ground with both legs broken and that she was to go to fetch him. The plaintiff suffered a violent shock resulting in severe injuries. At para. 22. 29 the authors go on to describe the manner in which the court held for the plaintiff :

"The action did not fit easily into any established categories, but as the court

"obviously had no love for the defendant; and as in many another hard case, the enormity of the outrage overthrew the settled rule of law."

17. Liability was imposed on the basis that the defendant had:

"Wilfully done an act calculated to cause physical harm to the plaintiff, that is to say, to infringe her legal right to personal safety, and have in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. The wilful *injuria* is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

18. Ms. Donnelly then referred to a decision of the House of Lords in the case of *Wainwright v. Home Office* [2003] 3 W.L.R. 1137. That was a case in which a mother and son were stripped searched for drugs on a prison visit. The search was not conducted according to prison rules and the claimants were humiliated and distressed. The second claimant developed post traumatic stress syndrome. They claimed damages for trespass and in addition damages for battery. The trial judge held that trespass to the person consisting of wilfully causing a person to do something to himself which infringed his right to privacy had been committed against both claimants and further that trespass to the person consisting of wilfully causing a person to do something calculated to cause harm to him, namely, infringing his legal right to personal safety, had been committed against the second claimant as had battery. Damages were awarded. The Court of Appeal allowed the Home Office Appeal against the finding of trespass dismissed the first claimant's claim and reduced the award of damages to the second claimant. On appeal by the claimants the House of Lords held that there was no common law tort of invasion of privacy; that insofar as there might be a tort of intention to cause harm under which damages for distress which did not amount to recognised psychiatric injury might be recoverable the necessary intention was not established on the facts of the case. The House of Lords in that case distinguished the case of *Wilkinson v. Downton*. At para. 41 Hoffman L.J. stated

"commentators and counsel have nevertheless been unwilling to allow *Wilkinson v. Downton* to disappear beneath the surface of the law of negligence. Although, in cases of actual psychiatric injury, there is no point in arguing about whether the injury was in some sense intentional if negligence will do just as well, it has been suggested (as the claimants submit in this case) that damages for distress falling short of psychiatric injury can be recovered if there was an intention to cause it. This submission was squarely put to the court of appeal in *Wong v. Parkside Health NHS Trust* [2003] 3 All .E.R. 932 and rejected. Hale L.J. said that before the passing of the Protection from Harassment Act, 1997, there was no tort of intentional harassment which gave a remedy for anything less than physical or psychiatric injury. That leaves *Wilkinson v. Downton* with no leading role in the modern law."

19. Hoffman L.J. went on to say at para. 44:

"I do not resile from the proposition that the policy considerations which limit the heads of recoverable damages in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be very careful about what you mean by intend. In *Wilkinson v. Downton*, Wright J. wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in *Janvier v. Sweeney* [1919] 2 K.B. 316, that the plaintiff should succeed whether the conduct of the defendant was intentional or negligent. But the Victorian Railway Commissioners case, 13 A.C. 222, prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go.

If on the other hand one is going to draw a principled distinction which justifies abandoning the rule that damages from mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not. ...

In my opinion, therefore, the claimants can build nothing on *Wilkinson v. Downton* [1897] 2 QB 57. It does not provide a remedy for distress which does not amount to recognised psychiatric injury and so far as there may be a tort of intention under which such damage is recoverable, the necessary intention was not established. I am also in complete agreement with Buxton LJ [2002] QB 1334, 1355 to 1356, paras. 67-72, that *Wilkinson v. Downton* had nothing to do with trespass to the person."

20. In support of her argument, Ms. Donnelly also referred to the provisions of the Non-Fatal Offences Against the Person Act, 1997 which creates a criminal offence of harassment. Accordingly she argued that the matters complained of by the plaintiff herein at paragraph 9 of the statement of claim and in respect of which damages are claimed for ongoing harassment, victimisation, intimidation and isolation come within the definition of intentional trespass to the person.

21. Mr. Beatty responded on behalf of the first named defendant. He disagreed with the contention that the matters relied on by Ms. Donnelly, namely harassment victimisation etc., constitute intentional trespass to the person. He pointed out that there was no authority to support that contention. He added that the scheme of the section was such as to exclude from the scope of the Act actions where assault and battery had been pleaded in order to have a jury trial in what was an action for damages for personal injuries caused by negligence. In the present case a number of heads of damages were claimed in respect of a number of causes of action. He argued that this was clearly not what was intended to be permitted by the exception contained in subs. 3.

22. Having regard to the Supreme Court decision in the case of *Sheridan v Kelly and McDonnell* referred to above, it is clear to me that insofar as the claim herein is for damages for a sexual assault together with assault simpliciter, it would be open to a plaintiff in such circumstances to seek damages under the heading of breach of contract and negligence provided that that claim for damages arose out of the same act or omission. In this case the claims made by the plaintiff go far beyond that. There are a number of separate causes of action in respect of separate incidents and an ongoing pattern of behaviour. As such I do not think that the subsequent matters complained of by the plaintiff could be said to be within the scope of s. 1(3) (b).

23. A further argument was made by Ms. Donnelly to the effect that the matters complained of between 1998 and 2001 which are

severally described as victimisation, isolation; harassment and so on could come within the definition of intentional trespass to the person. Not only is there no authority to support that contention, her argument is premised on the slim foundation provided by the decision in the case of *Wilkinson v. Downton*. I find the comments of Hoffman LJ to the effect that *Wilkinson v. Downton* has nothing to do with trespass to the person to be a persuasive authority. If one looks briefly at the particulars given by the plaintiff at paragraph 10 of the statement of claim herein as to the effect of the matters complained of in paragraph 9 of the statement of claim it may illustrate the extent of the problem I have in accepting that the matters complained of amount to intentional trespass of the person:

"The plaintiff was greatly distressed and upset by the various incidences of sexual assault, intimidation, harassment and victimisation to which she was subjected during her employment with the first named defendant. The plaintiff felt greatly isolated as a result of the failure of any person in the first named defendant to address adequately or otherwise the various complaints made by her. The plaintiff was affected with feelings of guilt arising out of the incidents referred to above and could not understand why no action had been taken on foot of her complaints. The plaintiff ultimately attended Ms. V B, psychotherapist in March, 2002 and related to her that for the period referred to above her quality of life and day to day living deteriorated significantly."

24. The plaintiff then set out further particulars of the symptoms she alleges she suffered from during that time.

25. It seems to me to be impossible to reach the conclusion contended for by Ms. Donnelly that the matters complained of by the plaintiff amounting to intimidation, harassment and victimisation can come within a definition of intentional trespass to the person. I am not of the view that on their own or considered together perhaps under the heading of harassment, they could be considered as a tort as opposed to a heading of damages in negligence or breach of contract but it is not necessary to come to a final view on this issue.

26. In the circumstances I think that the notice of trial herein should be set aside.