[2019] IEHC 64

**THE HIGH COURT**

**[2014/3938]**

**BETWEEN**

**X.Y.**

**PLAINTIFF**

**AND**

**MICHAEL SHINE, DOREEN MCEVOY AND HEALTH SERVICE EXECUTIVE**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 25th day of January, 2019**

**Nature of the Case**

1. This judgment concerns the question of whether the plaintiff's claims against the second and third defendants should be tried with or without a jury. It arises on foot of motions brought on behalf of the second and third defendants seeking to set aside the plaintiff's notice of trial whereby the plaintiff sought the trial of proceedings before a jury. The overall context is that the plaintiff claims to have been sexually abused by Dr. Michael Shine, the first defendant, on one occasion in 1975. The second defendant is sued in a representative capacity for the Congregation which owned the hospital in which Dr. Michael Shine worked at the relevant time, although it may be noted that in this particular case, the allegation relates to an act of sexual abuse said to have taken place at the private clinic of Dr. Shine. I will refer to the second defendant in this judgment as "the Congregation". The HSE, the third defendant, is the statutory successor to the North Eastern Health Board which, in 1975, had certain statutory duties in relation to healthcare at the time of the alleged abuse. The NEHB purchased the hospital in 1997. The HSE was established in 2004. Dr. Shine had retired in 1997.

**The pleadings in the substantive case**

2. The plaintiff issued a plenary summons on 17th April, 2014 against all three defendants, claiming damages for personal injuries by reason of the wilful assault and battery, trespass to the person, negligence and breach of duty (including breach of statutory duty), breach of trust, breach of dominant position and breach of the plaintiff's constitutional right to bodily integrity on the part of the first named defendant, Michael Shine, who was a consultant at the hospital owned by the Congregation at the relevant time. The plenary summons pleaded negligence as against the second and third named defendants, but (perhaps curiously) pleaded vicarious liability with regard to the HSE and not the Congregation.

3. The original statement of claim was delivered on the 2nd October, 2014, but an amended statement of claim was delivered on 13th February, 2017. Counsel on behalf of the HSE submitted that the amendments were likely to have been fuelled by the increasing awareness of the plaintiff's legal advisers of the frailty of any vicarious liability claim against the HSE in circumstances where neither it nor its predecessor, the NEHB, had been the owner of the hospital while Dr. Shine was working there. This fact that had been repeatedly pointed out in correspondence to the plaintiff by the solicitors for the HSE and ultimately a motion to dismiss was filed at the same time as a motion seeking to have the cases admitted to case management. The motion to dismiss has never been heard, but

there is no doubt that the amended statement of claim contains considerably more material relevant to a claim for negligence against the HSE than the original statement of claim. For example, paragraph 10 refers to both the second and third defendants being vicariously liable for the acts of Dr. Shine but goes on to claim that the second and third named defendants "are also liable in negligence and breach of duty in connection with the activities of the first named defendant". Paragraph 11 then goes on to recite a number of matters relating to the establishment of the HSE in 2004 and the transfer of functions to it, the establishment and subsequent dissolution of the North Eastern Health Board, various statutory matters such as the agreements and arrangements entered into as between the North Eastern Health Board and the Congregation as regards the running of the hospital and then claims that the third named defendant i.e. the HSE, its predecessors and/or servants or agents are and were at all times materially liable for the acts and omissions of the second defendant. It claims that the Congregation was, at all times, the servant or agent of the HSE or its predecessors in connection with the discharge by the HSE or its predecessors of its duties owed to the plaintiff. At paragraph 12, which is new, it asserts that the plaintiff was owed, by the HSE and its predecessors, duties under the Constitution and the European Convention on Human Rights "which duties included the duty to provide him with the health services to which he was entitled in a manner which was safe, properly supervised and appropriately managed so as not to afford the first named defendant the opportunity to assault him as a child". Paragraph 13, which is also new, claims that the HSE and/or its predecessors had the duty and necessary powers to conduct inspections of the manner in which the hospital was being operated but failed to do so. Paragraph 14 claims that the HSE and/or its predecessors for which was vicariously liable for the acts or omissions of the persons including the doctor who were employed at the hospital in connection with the fulfilment of its statutory duties owed to the plaintiff. Paragraph 15, which is also new, claims that in or about 1997, when the North Eastern Health Board acquired the hospital from the Congregation, it acquired liability for the acts and omissions of the Congregation including the acts or omissions of the Congregation for the conduct of Dr. Shine.

4. It does seem clear from the above that the substantial new material in the amended statement of claim was designed to strengthen the claim of negligence against the HSE, a claim which is quite separate to the one founded on vicarious liability for the sexual assault. I think it is fair to say that this is a substantial part of the case against the HSE, if not the primary one.

5. Defences and replies were exchanged in due course, as well as notices for, and replies to, particulars.

**Case Management and Notice of Trial**

6. This case was admitted to case management before me along with a large number of other cases in respect of the same defendants (approximately seventy altogether). In the course of this case management, various events took place, including the making of orders for discovery, the selection of certain "lead" cases, and the identification of issues to be determined in the cases. I will return to these "issue lists" below. A notice of trial

was served by the plaintiff on 5th July, 2018, seeking trial with a jury. The motions, the subject of the present applications, seek to set aside that notice of trial.

7. The two motions the subject of this judgment issued in October 2018. The motion on behalf of the Congregation seeks an order pursuant to the inherent jurisdiction of the Court setting aside the plaintiff's notice of trial of proceedings before a jury and an order giving directions as to the proper mode of trial. The motion on behalf of the HSE seeks an order pursuant to Order 36, rule 3 RSC and/or inherent jurisdiction setting aside the notice of trial or amending it to provide notice of trial by judge without a jury. It also seeks an order pursuant to Order 18, rule 1 RSC and/or inherent jurisdiction directing trials of the causes of action against the HSE which are separate from the other cases of action of the plaintiff and/or or such other order as may be necessary or expedient for their separate disposal; and an order pursuant to Order 36, rule 7 RSC and/or inherent jurisdiction directing a trial without a jury of the questions of fact and law which arise in the proceedings against the HSE.

8. The motions were grounded on affidavit in the normal manner and accompanied by written submissions. The hearing of the motions took place on the 20th December, 2018.

**The issue lists**

9. In the course of the case management process, issue lists were drawn up and agreed between the parties in order to summarise all of the issues arising on the pleadings as between the parties; these constitute a total list of the issues arising across all of the cases, although only some of the issues arise in individual cases. They are of some assistance in identifying the issues, as a stepping-stone to characterising the nature of the claim for the purpose of s. 1(3)(b) of the Courts Act 1988.

10. The issue list in respect of the second named defendant includes the following matters:

    (i) Whether the plaintiff was abused by Dr. Shine;

    (ii) Whether, if the abuse occurred, the plaintiff suffered the injuries complained of;

    (iii) Whether the Congregation is vicariously liable for the acts of Dr. Shine;

    (iv) Whether the Congregation was negligent in permitting and/or allowing the abuse to occur;

    (v) Whether the Congregation was in breach of statutory duty and, if so, whether this was actionable by way of a claim for damages;

    (vi) Whether the cases are time-barred by virtue of the Statute of Limitations 1957;

    (vii) Whether the case should be preventing from proceeding by reason of delay or laches; and

    (viii) the effect, if any, of a deed of indemnity and charge executed between the Congregation and the NEHB in April 1997.

The above is an abbreviated summary of the issue list which provides considerably more detail. I note that as regards the issue of negligence, there were further sub-issues as follows; (a) Were the hospital authorities/board of managers, or any servant or agent of the hospital, on notice or ought to have been on notice of the first named defendant's propensity to abuse?; (b) the systems/protocols which were in operation in the said hospital at the time of each incident of abuse; (c) whether any incident of abuse against any of the plaintiffs occurred following receipt by the hospital authorities/board of managers or any servant or agent of the hospital of complaints regarding the actions of the first named defendant; and (d) in cases where the plaintiff was abused on multiple occasions, could, after the first occasion of abuse, the hospital authorities/board of managers have taken steps to prevent any of the further episodes of abuse?

11. As regards the issue list in respect of the HSE, these include the following: -

    A. Issues relating to the ownership and operation of the hospital during the period when the defendant was alleged to have acts of abuse perpetrated against him (in this case 1975).

    B. Statute of Limitations, delay and laches.

    C. Alleged personal injuries, assault, battery, sexual assault, abuse, nervous shock, mental distress, loss and damage.

    D. Alleged negligence.

    E. Alleged breaches of statutory duty.

    F. Alleged breach of fiduciary duty.

    G. Alleged breach of trust and breach of dominant position.

    H. Alleged breach of constitutional duty.

    I. Alleged breach of the European Convention on Human Rights.

    J. Causation.

    K. Liability in respect of the alleged acts and/or omissions of Dr. Shine and the Congregation.

    L. Deed of indemnity and charge.

    M. Reliefs.

12. This issue list runs to eight pages and there are numerous questions within each of those headings. For example, under heading (A), relating to the ownership and operation of the hospital, there are questions as to whether the hospital was owned or operated by the NEHB at any stage; what role it had in connection with the operation or management of

the hospital or in connection with the control or supervision of consultant surgeons practicing in there; and what statutory functions the NEHB had in connection with the provision of health services at the hospital including any duty to conduct inspections during the relevant period. It also includes the question whether the purchase of the hospital on 15th April, 1997, by NEHB meant that the latter assumed any liability of the Congregation arising out of the acts of the Congregation prior to that date.

13. Under the heading of alleged negligence (D) on the part of the third defendant, there are questions relating to whether the NEHB owed any duty of care to the plaintiff and if it did, whether the HSE is liable to the plaintiff, as well as whether the NEHB ought to have been on notice of the alleged propensity of Dr. Shine to abuse children. There are questions relating to the specific statutory provisions such as agreements under s. 12 of the Health Act 1947 and arrangements pursuant to s. 26 of the Health Act 1970, as well as the question of any statutory duty under the Childcare Act 1991. The foregoing is not a comprehensive account of the issues set out in the issues list, which was prepared carefully and by agreement between the relevant parties. I set out the above merely to give a flavour of the issues in the case which have now been identified and which must feed into the question of what the substance of the case is as against each of the defendants who have brought these motions for present purposes.

**Section 1(3) of the Courts Act, 1988**

14. Section 1(1) of the Courts Act 1988 provides for the general rule in actions claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty, which is that the action or a question of fact or an issue arising in such an action "shall not be tried with a jury". Thus, the general rule is for trial by judge alone in personal injury cases. The exception to this is dealt with in s. 1(3) which provides as follows: -

> (3) Subsection (1) of this section does not apply in relation to—
>
> (a) an action where the damages claimed consist only of damages for false imprisonment or intentional trespass to the person or both,
>
> (b) an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and *damages (whether claimed in addition, or as an alternative, to the other damages claimed) for another cause of action in respect of the same act or omission*, unless it appears to the court, on the application of any party, made not later than 7 days after the giving of notice of trial or at such later time as the court shall allow, or on its own motion at the trial, that, having regard to the evidence likely to be given at the trial in support of the claim, it is not reasonable to claim damages for false imprisonment or intentional trespass to the person or both, as the case may be, in respect of that act or omission, or
>
> (c) a question of fact or an issue arising in an action referred to in paragraph (a) or (b) of this subsection other than an issue arising in an action referred to in the said paragraph (b) as to whether, having regard to the evidence likely to

be given at the trial in support of the claim concerned, it is reasonable to claim damages for false imprisonment, intentional trespass to the person or both, as the case may be, in respect of the act or omission concerned.

15. The key words which fall for interpretation and application are the words in s. 1(3)(b) within the italicised portion above: "damages…for another cause of action in respect of the same act or omission".

**Authorities**

16. An important statement of general principle was made in *Lennon v. HSE* [2015] IECA 92. The case concerned a teacher against whom a sexual abuse allegation had been made and which was investigated by the HSE. He brought defamation proceedings against a social worker in respect of conversations had with parents at the school where the child was attending, as well as judicial review proceedings seeking to quash the HSE's decision following its investigation of the allegation. The HSE applied by motion to the High Court for an order consolidating both sets of proceedings and for general case management directions. The High Court (McCarthy J.) held that the proceedings should be listed together on the basis that the right to trial by jury was not an absolute one and that the trial judge could give directions as to how the case should be tried. The sole issue before the Court of Appeal was whether the High Court was 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. The Court of Appeal (judgment delivered by Hogan J.) examined in some detail the history of jury trials in civil actions and the various statutory provisions contained in legislation including the Civil Bill Courts (Ireland) Act 1851, the Common Law Procedure (Amendment) Act 1856, the Supreme Court of Judicature (Ireland) Act 1877, the Courts of Justice Act 1924, the Courts of Justice Act 1928, the Courts At 1971 and the Courts Act 1988, and held that the High Court has no jurisdiction to dilute a plaintiff's right to jury trial where it applies. It said that when a party is entitled to jury trial as of right, that entitlement cannot be abrogated by judicial order under any circumstances, even if the step contemplated is for the most understandable reasons of efficiency and case management. The court also examined the decisions in *Kerwick v. Sunday Newspapers Limited* (High Court, 10th July, 2009) and *Bradley v. Maher* [2009] IEHC 389. Hogan J. had considerable sympathy for the approach of the trial judges in those cases, as well as in the case before him, in terms of the considerations of practicality and efficiency, but said that they had wrongly proceeded from the premise that the right to jury trial in defamation proceedings could yield to the demands of case management and the efficient operation of the administration of justice. At para. 32, he said that the High Court has no jurisdiction to create what, in effect, would amount to a discretionary exception to a common law right which had been copper-fastened by legislation, even for very understandable reasons of efficiency and case management. He said that "insofar as the decisions in *Kerwick* and *Bradley* suggest otherwise", they were "wrongly decided and should not be followed".

17. Accordingly, it is clear that I must decide upon the present motions solely on the basis of whether or not the case against each of the second and third defendants falls within s. 1(3)(b) of the Courts Act 1988 or not, and that considerations as to case management

are not relevant. The complexity of the negligence case against the HSE, for example, is not a matter which I can take account of in deciding whether all of this case goes to jury trial or not. All depends on the interpretation of s. 1(3)(b) and the application thereof to the claims in the present case.

18. In *D.F. v. Commissioner of An Garda Síochána, The Minister for Justice, Equality and Defence, The Attorney General and Ireland* [2015] 2 I.R. 487, the Supreme Court (Charleton J.) discussed how a court should approach the task of deciding whether or not s. 1(3)(b) of the Courts Act 1988 applies. This arose in the context of the arrest by the Gardaí of a severely autistic man. He was arrested under mental health legislation arising out of a public order incident and detained at a local Garda Station for approximately one hour, but released when his father attended at the station and explained that his son was suffering from this condition. The plaintiff through his guardian and next friend instituted proceedings seeking damages for false imprisonment, assault, battery and negligence, as well as damages for breach of constitutional rights. Another of the claims was that his complaint to the Garda Siochana Ombudsman Commission had been negligently dealt with. The defendants issued a motion seeking directions as to the mode of trial to determine whether or not the plaintiff was entitled to a jury trial. The High Court had held that he was entitled to a jury trial but directed that all issues concerning the legality of his arrested detention be determined by a judge sitting alone, with the remaining issues to be determined by a jury subject to the appropriate directions from the trial judge. The Supreme Court allowed the appeal, holding that all matters were for the jury, appropriately instructed as to the law by the trial judge.

19. At para. 9, Charleton J. (who delivered the judgment of the court) characterised the claim in the following manner: -

> "The incident was simple: the core issue is whether there was a lawful arrest and a lawful detention. It is really about whether Desmond was unlawfully arrested. When Gardaí arrest someone they usually place them in a squad car or use reasonable force to usher them into a garda station or a cell. That involves unwanted touching. Hence false imprisonment and intentional trespass to the person, assault, are connected torts. Apart from that, a *subsidiary issue* may arise on the pleadings in this case as to whether the statutory mechanism for dealing with complaints was not followed by the State and as to whether, as a matter of law, this gives rise to an entitlement to damages." (emphasis added)

20. In the course of his judgment, Charleton J. referred to the relationship between the Supreme Court of Judicature Act (Ireland) 1887 and the Rules of the Supreme Court 1891, which were succeeded by the Rules of the Superior Courts 1986, and in particular Order 36, rule 7. He pointed out in his judgment that the rules could not be considered to be superior to the legislation, and accordingly the question for the court concerned the interpretation of the statute. He referred to the various issues which would arise in the case; those relating to whether or not the man had been unlawfully arrested and detained, which clearly required trial by jury, as well as other issues, which did not give

rise to a right to jury trial. He said the latter were in respect of (1) the complaints made in the aftermath of the release of Desmond and (2) the elements of the constitutional torts claimed to be integral to the case by counsel on behalf of Desmond. The most important paragraph of his judgment concerning the correct approach where actions requiring jury trial are joined with other causes of action is at para. 22, where he said: -

"Clearly, actions for false imprisonment and assault are within the province of a jury trial in the High Court. Joining other causes of action to false imprisonment or intentional trespass to the person, assault, may preserve the entitlement to jury trial *but only where there is one act or omission at issue in the trial, consisting in terms of the external facts of an assault or of false imprisonment, or both, and the subsidiary torts are allegedly based on that assault or on that false imprisonment*. An example would be where it is alleged that as well as an action for deprivation of liberty taking place contrary to the statutory defence offered by a defendant, the application of the power of arrest was negligent: though here it must be added that this may be a more than unhelpful conflation of separate torts. This is not to state that any such pleading is possible. As to whether adding allegations of other torts to false imprisonment and assault is reasonable having regard to the circumstances determines the balance as to whether the result should be a trial by a judge sitting alone or a trial by a judge sitting with a jury. *The reform in s. 1 of the Act of 1988 is not to be subverted. This is a matter of assessment by the trial judge as to where, in substance, the nature of the claim lies*. What is clear is that the Oireachtas decided that issues of false imprisonment, which are predominantly cases brought by citizens against the State for alleged wrongful arrest by Gardaí, and assault cases, which may include such cases or in more recent times have involved allegations of sexual violence, should be tried by a judge with a jury. It *is only if the joinder of other torts or causes of action takes the substance and nature of the case* away from those core jury-trial torts that a trial should take place with a judge sitting alone." (emphasis added)

21. Charleton J. went on to consider the decision in *Sheridan v. Kelly* [2006] IESC 26, [2006] 1 I.R 314. He then said at para. 24: -

> "Were the argument of counsel for the State on this appeal to be correct, it would mean that by making a core allegation of false imprisonment but pleading various other wrongs based upon the facts that consisted of that alleged wrong in the guise of different torts, the matter would be placed outside the exemption from the abolition of jury trial. That is not what the legislation provides for."

22. The emphasis of Charleton J. on identifying the 'substance and nature of the case', and his contrast between that and 'subsidiary claims', may be noted.

23. In *Sheridan v. Kelly,* the Supreme Court had dealt with the interpretation of s. 1(3)(b) of the Courts Act 1988 in the context of a claim for damages for sexual abuse allegedly carried out by a Christian Brother who was the principal of a primary school. The second defendant was sued as a representative of the Congregation of Christian Brothers. At para. 15 of his judgment, Fennelly J. characterised the pleadings in the following manner: -

> "Counsel for the second defendant 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 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 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'. Counsel for the second defendant placed reliance on certain particulars of negligence alleged against the second defendant apparently going somewhat beyond a simple allegation of vicarious liability. For example, it is pleaded, as mentioned above, that the second defendant 'failed to have in place procedures or measures appropriate for the regulation and supervisions of [its] members'."

24. In those circumstances, Fennelly J. held that the case was not taken outside the scope of s. 1(3)(b), saying as follows: -

> "It is clear that the core of the plaintiff's claim is that he was sexually assaulted by the first defendant. Everything alleged can be traced back to that key allegation. Insofar as the claim is 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 a 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'.
>
> In the present case, the plaintiff's claim is that he suffered personal injury as a result of the assaults committed by the first defendant. Any act alleged against the second defendant is claimed to have led to the same damage. I am satisfied that this claim comes within s. 1(3)(b) of the Act of 1988. Therefore, the plaintiff is entitled to have his claim heard by a judge sitting with a jury."

25. More recently in *Bookey v. Links Crèche Southside Limited* [2015] IEHC 562, the High Court (Hedigan J.) held that the appropriate form of trial was a trial with a jury in a case involving claims of assault and negligence. The background facts arose from a broadcast on RTE Primetime which featured footage in premises investigated by an undercover

reporter. The footage showed staff engaging in activities such as shouting or swearing at and mishandling young pre-verbal children who had been left in their care. Proceedings were commenced on behalf of the infant plaintiff in respect of alleged assault, battery and mistreatment. The five defendants were the Links Crèche Southside Limited, the Links Crèche and Montessori Limited, Deirdre Kelly, Padraig Kelly and Health Service Executive. The application to set aside notice of trial by judge and jury appears to have been made on behalf of all defendants.

26. Having considered the *D.F.* case, discussed above, the High Court held that the substance of the case lay in the allegations of assault: -

> "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."

27. In *Pista v. Sweeney & Nationwide Controlled Parking Systems Limited* [2016] IECA 94, the plaintiff sued for damages for personal injuries which he sustained when, during the course of his employment as a clamper of vehicles unlawfully parked, he was struck violently on the head with a lump hammer by the first defendant on whose vehicle he was in the process of placing a clamp. His claim for damages against the first defendant was brought on the basis of assault and trespass. His claim against the second defendant, his own employer, was on the basis of negligence, breach of duty, including breach of statutory duty, and breach of contract. At para. 9 of the judgment delivered on behalf of the Court of Appeal, Peart J. noted the submissions made on behalf of the second defendant, namely that the claims did not constitute a "cause of action in respect of the same act" on the basis that the claims arising from an allegedly unsafe system and place of work and a failure to provide the plaintiff with adequate training, control, supervision and management of work practices and security arrangements were to be distinguished from the claim of assault against the first defendant. It was also submitted that this distinction was underlined by the nature of the discovery of documents which the plaintiff sought against the second defendant in respect of, for example, training records and training provided, protective equipment provided, safety instructions and manuals, safety assessments and so forth. It was submitted that the cases of *Sheridan v. Kelly* and *D.F.* were distinguishable because the first defendant was never in the employment of the

second defendant. It was also submitted that while the injury to the plaintiff was the same injury for which he sought to recover damages in both cases, the acts or omissions alleged against the second defendant were totally separate and distinct from the act of assault alleged against the first defendant, and occurred, as they must have in respect of some of the alleged omissions, such as insufficient training, on separate dates and for which no vicarious liability was alleged. Many of those submissions were echoed in the submissions of the defendants in the case before me.

28. At para 13, Peart J. referred to the difficulties which would arise if cases such as that before him led to a judge and jury to separately assess damages in respect of each defendant, saying: -

> "One can envisage certain obvious difficulties in a case such as the present one where a jury might be asked to decide the quantum of damages against the first defendant, and the judge separately, having decided the liability issue in respect of the claims against the second defendant, would have to assess damages against that defendant in respect of precisely the same injuries and loss. Does he/she do so prior to the jury's assessment so that he is not aware of the jury's assessment? If he does so, may the jury then be told of the judge's award for the same injury and loss? If not, is there a risk of inconsistent awards? Posing even these questions, and there may be more, indicates that pragmatism alone requires that however it is done, the assessment of damages should be made by the same assessor be that a jury or a judge, given that it is the very same injury and loss that is under assessment".

29. He went on to quote from the judgment of Charleton J. in *D.F*. and added that a proper interpretation of s. 1(3)(b) avoids "the possibility of the undesirable consequence of separate assessments of damages in respect of the same injuries and loss to which I have just referred". He continued: -

> "Section 1(1) of the Act does not apply where the plaintiff claims damages for an intentional trespass to the person i.e. an assault, and at the same time claims damages for another cause of action (in this case, negligence) in respect of the same act. Damages for another cause of action in respect of the same act must include damages for negligence or breach of contract giving rise to the same injury as in the assault. The fact that the second defendant did not actually assault the plaintiff is not the point. The point is that the claim which is made against the second defendant is that *but for* its negligence, breach of duty and breach of contract, this assault would not have occurred. The plaintiff would not have been injured. *In this way the two causes of action are inextricably connected by their alleged causation of the same injury*. In this way, they in my view come within the exception provided by s.1(3)(b) of the Act of 1988." (emphasis added)

I note in particular the use of the "but for" test and the reference to causation in the passage above.

**Submissions of the parties**

30. The plaintiff seeks a trial by jury in his claims for damages against each of the three defendants. It was argued on his behalf that the sexual assault perpetrated upon him was at the heart of the case and that he is entitled to a jury in respect of all his claims against all defendants because of this. It was submitted that the plaintiff must prove that he was sexually assaulted in order to bring home his claims against each of the defendants; that it is an essential ingredient of each of the claims articulated by him, and therefore that the 'substance' of all the claims is the sexual assault. The plaintiff was entitled to trial by jury unless the substance of the case had nothing to do with the sexual assault.

31. The second and third named defendants submit that the non-vicarious liability claims against them are based on omissions or failures (a failure to prevent the sexual abuse, for example by failing to act on knowledge of Dr. Shine's propensities, or by failing to have proper procedures in place and so on) which are, both in their nature and in terms of their time-frame, quite separate and distinct from the act which forms the basis of the sexual assault against the first defendant, and therefore that the condition relating to the "same act or omission" in s.1(3)(b) is not met. It was submitted that merely because proof of the sexual assault is one of the proofs required does not mean that the substance of the case is one of sexual assaults, in other words, just because the sexual assault was the "terminal point" of the negligence case did not mean that the negligence case was "in substance" a sexual assault case. Counsel on behalf of the HSE in particular emphasised the remoteness of the HSE, a body which was only established in 2004, from the alleged assault of the plaintiff in a private clinic in 1975, and said that the essence of the plaintiff's claim against the HSE was a novel and hybrid form of negligence claim which sought to channel the statutory duties of a public authority into a private law claim sounding in damages, and that it could not possibly be classified as being 'in substance' a sexual assault claim. It was submitted that the plaintiff's argument conflated the damages claimed for the injuries suffered with the acts or omissions underlying the causes of action and that the statute only referred to the latter.

**Decision with regard to the HSE**

32. I turn first to the language of the statutory test in s. 1(3)(b) of the Act of 1988. It provides that the general rule of trial without a jury in s. 1(1) does not apply to "an action where the damages claimed consist of damages for [assault] and damages for another cause of action in respect of *the same act or omission*". At first sight, this wording might seems to suggest that there must a single or sole act or omission which forms the basis for the various causes of action in question. All lawyers are familiar with the concept of a single act or omission giving rise to different legal consequences. Vicarious liability is a case in point; a particular act by an employee might give rise to (a) liability for an assault on the part of the employee as well as (b) vicarious liability for the employee's assault on the part of the employer. How does this conceptual paradigm sit with the negligence claim against the HSE in the present case?

33. I should say that I am not entirely sure of the precise route which the plaintiff's legal advisers hope to establish negligence liability against the HSE, but it is clear that the

following matters would have to be woven together somehow to complete a tapestry of liability:

- Proof that the plaintiff was sexually assaulted and suffered injury at the hands of Dr. Shine in his private clinic;

- Some relevant connection between Dr. Shine's activities at the private clinic and the hospital such that the owner of the hospital/employer of Dr. Shine owed a duty of care to at least some patients attending the private clinic;

- The establishment of a duty of care to patients in the hospital, from the statutory duties inhering in the NEHB prior to and including the date of the assault in 1975;

- A demonstration that the NEHB failed in its duty of care by failing to act on information or failing to have appropriate procedures to prevent sexual abuse generally or Dr. Shine's abuse in particular, prior to 1975;

- The inheritance of the HSE of liability by reason of the transfer of duties and functions from the NEHB to the HSE by statute in 2004.

34. There may also be a version of the claim which turns on the acquisition in 1997 (the date of the sale of the hospital to the NEHB) of the liabilities of the Congregation, which may be argued to include vicarious liability of the Congregation for the acts of Dr. Shine, although this would probably not be characterised as a negligence action. In any event, the acts, omissions and events which have to be established by the plaintiff in order to bring home a claim in negligence such as that described above appear to span a much greater time-frame than the date of the alleged sexual assault (and indeed take place both before and after the assault) and consist of a much broader range of events (primarily omissions, as well as legislative changes) than the assault itself. Indeed, the great range of documents ordered and agreed in the discovery process in this case tends to underline this point. Does this lead to the conclusion that s. 1(3)(b) does not apply, because the negligence claim against the HSE cannot be characterised as an action for damages "for another cause of action in respect of the same act or omission" as the action for sexual assault"? Even taking account of the fact that one of the essential matters which must be proved is the sexual assault? After all, the statutory test does not say "another cause of action based upon acts or omissions which include the same act or omission" as the action for damages for assault; it refers to "the same act or omission", as if there were only one act or omission grounding liability. Nor does it refer to damages for the "same injuries" suffered by the plaintiff. On this initial reading of s. 1(3)(b) in light of the nature of the negligence claim against the HSE in the present case, one might be tempted to find that the claim does not satisfy the condition in s. 1(3)(b) if its wording is taken literally.

35. However, this interpretation does not appear to be supported by authorities referred to. For example, in *Pista*, it was held that s. 1(3)(b) did apply, such that the claim against the perpetrator of the assault and the claim against the clamping company (the plaintiff's

employer) should be tried together by jury. Yet if the plaintiff's employer, the clamping company, were ultimately to be found negligent, the basis of its liability would be its failures and omissions (such as a failure to properly train the plaintiff) within a period of time prior to the date of the assault, being a period of weeks, months or years, (even though the period of course terminates a period on the date of, and with the assault, itself), unlike the act of the first defendant, the man who attacked the clamper with the lump hammer, which took place on the specific date of the assault. Further, the basis of the employer's liability would be an omission (such as the absence or inadequacy of its training) whereas the nature of the perpetrator's liability would be an act (the positive act of striking the plaintiff with a lump hammer). And, as was submitted on behalf of the clamping company in that case, it was not even the employer of the perpetrator. Perhaps even more strikingly, in *D.F.*, s. 1(3)(b) was held to apply notwithstanding that any false imprisonment of the plaintiff would have taken place on a specific date and by means of positive acts of the Gardai in their arrest and detention of him, whereas any negligence of the Garda Siochana Ombudsman Commission in handling his complaint must have been subsequent to the date of the assault and of a different nature. It is therefore necessary to look more closely at the construction being placed upon s. 1(3)(b) by the Court of Appeal and the Supreme Court.

36. In *Pista*, as seen above, Peart J. interpreted s. 1(3)(b) to encompass a 'but for' test i.e. but for the negligence of the employer, the injury to the plaintiff would not have occurred. This is essentially a causation test. I note also that Peart J laid emphasis on the pragmatic matter of the need to avoid inconsistent awards of damages, which might happen if the causes of action were severed and dealt with by judge and jury separately. In *D.F.*, Charleton J. did not use the language of causation but instead cautioned that a court should analyse the nature of the claims in question to determine what their essence consists of, using language such as determining the 'substance' of the claim and contrasting this with 'subsidiary' claims, as seen above.

37. It may also be recalled that the Supreme Court in *Sheridan* took the view that the claim in negligence against the Congregation did not take the case against the Congregation outside the parameters of s. 1(3)(b); and that this conclusion was reached even though any such negligence would necessarily have had to be based on omissions over a period of time leading up to and including the date of the alleged sexual assault. On one view of the statutory phrase 'in respect of the *same act or omission'*, the interpretations in *Sheridan*, *DF* and *Pista* may appear puzzling because there are various combinations of acts and omissions in play rather than one single act or omission grounding the different causes of action. It seems to me, therefore, that the authorities must be interpreting the words s. 1(3)(b) of the Courts Act, 1988 broadly i.e. along the lines of 'another cause of action which is based on the same act or omission *or* is causally connected with that act or omission' or 'another cause of action which is subsidiary to the cause of action for the assault' and/or 'where the damages for both causes of action would fall to be assessed with reference to the same injury to the plaintiff'.

38. I pause to consider the word 'reasonable' within sub-section 1(3)(b) and the procedure envisaged, which appears to require a judge to consider the evidence to support pleadings if requested to do so. It seems to me that the objective was to prevent plaintiffs from engaging in artificial and tactical pleading moves, in order to shoe-horn a case which is not really a jury trial into a trial before a jury. Thus, where a motion is brought as envisaged, the court is to assess the evidence in the case to see if the jury-attracting claim is reasonable in the sense that there is evidence to support the claim. Presumably if a court takes the view that it was unreasonable to plead the jury-attracting claim, the outcome is a trial by judge alone. I also assume this is the context for the comment of Charleton J. in DF when he said: "*As to whether adding allegations of other torts to false imprisonment and assault is reasonable having regard to the circumstances determines the balance as to whether the result should be a trial by a judge sitting alone or a trial by a judge sitting with a jury*". There is no suggestion, however, by the defendants in the case before me that there was an unreasonable claim of sexual assault. The only question which arises is that discussed above, namely whether the claims in negligence against the Congregation and the HSE do or do not amount to "*an action where the damages claimed consist of damages for another cause of action in respect of the same act or omission*".

39. It seems to me that if I were to apply a literal construction of s. 1(3)(b), the HSE would succeed in its motion because a substantial part of the case, and indeed perhaps the primary claim, against the HSE is not based on the same act or omission as the sexual assault but rather on a number of omissions, acts and legal events albeit that one of the acts which must be proved is the act constituting the alleged sexual assault. On this view, it probably could not be said that the 'same act or omission' is in question for the claim of sexual assault against Dr. Shine and the claim of negligence against the HSE, at least from a strictly literal point of view. However, I am clearly bound by the decisions of the Supreme Court and the Court of Appeal, and the facts of both *Sheridan* and *Pista* are similar to the present case insofar as there were negligence claims of a similar nature (i.e. consisting of an alleged failure to prevent the assault) which, it was decided, should be tried before a jury with the sexual assault and assault claims, respectively. I appreciate that the negligence claim against the HSE, if established, would be somewhat different from the usual employer's negligence claim. If it arises as the plaintiff claims, it arises from its predecessors' statutory duties rather than the usual "close connection" feature of the employer-employee relationship. Nonetheless, the similarity arises from the fact that the essence of the claim is that the failures of the body in question (to act on information received and/or to put in place adequate procedures) have a causal connection with the sexual assault which later (allegedly) took place. This is similar in kind to the negligence claim in *Sheridan* and *Pista*. In *D.F.*, Charleton J. referred to *Sheridan* and clearly took the view that it was an example of a case where the 'substance' of the case was one of sexual assault. Further, the rationale concerning the need for a single decision-making body to assess damages where the injuries under each cause of action are the same, as discussed in *Pista*, applies with equal force to the case before me. I am satisfied that there is a causal connection between the causes of action, applying the test articulated by Peart J. in *Pista*. Accordingly, it seems to me that I must find that the plaintiff has the

right to trial with a jury not only against the first defendant but also against the HSE because of the manner in which s. 1(3)(b) of the Act has been interpreted by the authorities.

**Decision in respect of the Congregation**

40. If the above is correct as regards the HSE, the same applies, if anything with greater force, to the claims against the Congregation. The necessary route to be taken by the plaintiff in order to establish negligence (as distinct from vicarious liability) on the part of the Congregation is a more straightforward one than the negligence claim against the HSE; it would involve establishing matters such as that the Congregation, prior to 1975, was on notice of the propensities of Dr. Shine and/or that it had a duty as a hospital owner to put in place systems for preventing the abuse of patients and failed to do so. This would be similar to the type of negligence alleged in the *Sheridan* case against the Christian Brothers who ran the primary school and the *Pista* case against the clamping company who employed the plaintiff, being failures alleged to have taken place during a period pre-dating the alleged assault. The relationship between the negligence and assault claims in those cases seems to me to parallel the negligence and assault claims in the present case. By analogy with the outcomes in *Sheridan* and *Pista*, the negligence claims against the Congregation in the present case should be held to fall within s. 1(3)(b) of the Act of 1988 and should also be tried with the sexual assault claims before a jury.

**Conclusion**

41. Accordingly, I refuse the reliefs sought in both of the motions.

42. I might perhaps add that I do not consider this outcome to be entirely satisfactory and that it may be that the wording of s. 1(3)(b), provided I have correctly interpreted it in accordance with the authorities, is deserving of some further consideration by the Oireachtas. Modern litigation may involve numerous defendants and multiple causes of action based upon complex issues of law and this can give rise to certain practical challenges in terms of trials as well as potential inefficiencies in the process. Equally, there are policy issues such as the extent of the right to jury trial in a certain type of case, together with pragmatic issues concerning the need to avoid judges and juries awarding overlapping or inconsistent damages if cases are tried separately. A balance must be held between these various considerations, but I am somewhat doubtful whether the current wording of s. 1(3)(b) is an ideal formulation of how a court should strike the appropriate balance. I would respectfully suggest that it seems to be premised on a rather simple model of causes of action which does not reflect the complex reality of modern litigation, and that the provision might benefit from some attention and possible re-wording in the future.