Louise O'Keeffe

Plaintiff

v.

Leo Hickey
The Minister for Education and Science
Ireland
The Attorney General

Defendants

SUPREME COURT

[2008] IESC 72

(19 December 2008)

Judgment of Ms. Justice O'Rourke delivered the 19th day of December 2008

Introduction

This case concerns the repeated sexual assault of an eight-year-old girl, Louise O'Keeffe, by her primary school Principal, Leo Hickey, while attending Dunderrow National School in 1973.

The issue which Ms O'Keeffe appeals to this court is whether the State can be held vicariously liable for either the actions of Mr Hickey or the inaction of the acting Manager of the National School, a Fr O'Ceallaigh, who failed to respond to a prior complaint of sexual assault by Mr Hickey in 1971.

The relationship between Church and State in Ireland since the 19th century has assumed critical importance in this case. My learned colleagues in the majority find that the State's historical arrangement of outsourcing the provision of primary education to the Catholic Church and some other private organisations, which persists to this day, prevents vicarious liability from attaching to the State for the behaviour of either Mr Hickey or Fr O'Ceallaigh. The majority holds that, because the State decided to pay the Church to manage and provide primary education to the nation's children, and because this was approved by Article 42 of the Constitution, no relationship of employment or sufficient control exists between the State and National School teachers or Managers to enable a finding of vicarious liability. Thus, the vicarious liability claims fall at the first hurdle (the second hurdle being the relationship between the tortious act and the nature of the employment).

In effect, the majority judgments say, the less control the State chooses to take over the provision of primary education in Ireland, the less responsibility the State will shoulder for criminal and/or tortious maltreatment of children in National School.

I cannot accept that the State has absolutely no relationship of sufficient control over either teachers or Managers of National Schools for the purpose of imposing vicarious liability. I

find that vicarious liability should be imposed upon the State defendants for the inaction of Fr O'Ceallaigh. The legal arrangements regarding Managers of National Schools and the wording of the 1965 Rules for National Schools support this finding. So too, surely, does the State's obligation under Article 42.3.2° of the Constitution, "as guardian of the common good, [to] require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social".

I am unable to attach vicarious liability to the State for the actions of Mr Hickey, however. This has been a difficult decision. I find that the common law doctrine of vicarious liability in its current form does not stretch to cover the circumstances at hand, where there is no employment relationship between the State and Mr Hickey and the State has deliberately renounced a great deal of control over teachers in National Schools. It may be arguable that the law of tort has failed to provide an effective remedy to Ms O'Keeffe for violations of her constitutional rights (particularly her right to freedom from torture and ill-treatment). I would have welcomed further engagement with the Constitution in the arguing of this appeal.

Factual background

The eight-year-old girl at the centre of this case, Louise O'Keeffe, began to have one-to-one music lessons with the Principal of her National School, Mr Hickey, in January 1973. The lessons took place during play-breaks or after school. During the second lesson, Mr Hickey began to rub Ms O'Keeffe's stomach. By the fifth lesson, Mr Hickey had progressed to digitally assaulting Ms O'Keeffe. The abuse continued until the end of the academic year in 1973, on approximately 20 occasions.

As an eight-year-old pupil, Ms O'Keeffe was extremely vulnerable. She lacked control over whether or not she would attend school each day. She was confined within the school premises between specified times. She was unable to escape to a place where Mr Hickey would not be able to find her. She was visible to Mr Hickey while at school. She lacked the knowledge which would have enabled her to recognise what was happening and to seek help. She had no power whatsoever to stop the abuse.

Mr Hickey, as the Principal of a two-teacher National School, held enormous power over Ms O'Keeffe and the other children in the school, including the power to keep them under surveillance and confined to the school premises during specific times. Mr Hickey's music lessons gave him further power to confine a child alone, which allowed him the opportunity to perpetrate sexual abuse.

Ms O'Keeffe's schooling was disrupted at the time that she was being abused by Mr Hickey. She became fearful, watchful and anxious, and she withdrew from playing with her friends as she sought places to hide from Mr Hickey during break times. The long-term effects of the abuse impacted Ms O'Keeffe right into adulthood, causing harm to her well-being, relationships and family life.

It transpires that eight-year-old Louise O'Keeffe was far from Mr Hickey's only victim. In September 1973, Ms O'Keeffe's parents were approached by a group of other parents in the

school who were concerned about allegations of sexual abuse by Mr Hickey. The parents met with the Manager of Dunderrow National School, Fr O'Ceallaigh, following which Mr Hickey went on sick leave. Fr O'Ceallaigh never reported the allegations against Mr Hickey to any State authority, and Mr Hickey went on to teach at a different National School until retirement.

The allegations concerning Mr Hickey in 1973 were not the first to have been made to Fr O'Ceallaigh. Fr O'Ceallaigh had received and failed to take any action in response to a complaint of sexual abuse by Mr Hickey in 1971, from the mother of another child in Dunderrow National School.

In 1998, Mr Hickey was charged with 386 counts of sexual abuse over a 10 year-period at Dunderrow National School. He pled guilty to sample charges relating to 21 girls and received a three-year prison sentence.

The present appeal

Following the conclusion of criminal proceedings against Mr Hickey in 1998, Ms O'Keeffe initiated civil proceedings against Mr Hickey and the Minister for Education, Ireland and the Attorney General ('the State').

Mr Hickey having failed to enter a defence, Ms O'Keeffe obtained judgment in default against him in 1999 and an award of damages in 2006. She has encountered great difficulties in enforcing this judgment.

The High Court trial in Ms O'Keeffe's case against the State defendants took place in March 2004. As my learned colleague Hardiman J sets out, Ms O'Keeffe's claim against the State fell under the following headings:

> (1) Negligence on the part of the State arising out of the failure of the State defendants to put in place appropriate measures and procedures to protect and to cease the systematic abuse which the first-named defendant had on the evidence embarked from 1962 in Dunderrow National School of which she was very much one of the latter victims;
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> (2) Vicarious liability in relation, not merely to the first-named defendant but also in relation to the curate Fr. O'Ceallaigh who was the *de facto* acting manager, to whom the evidence established that a complaint of sexual abuse of a pupil by that girl's mother was made in or about 1971 on foot of which Fr O'Ceallaigh took no action; and
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> (3) The constitutional role and responsibility of the State defendants in the provision of primary education arising under Article 42 of the Constitution and the measures which the second-named defendant, the Minister, had adopted and the steps put in place to discharge those responsibilities.

I note from the High Court judgment of de Valera J that Ms O'Keeffe also claimed damages from the State arising from an interference with her constitutional rights to bodily integrity and privacy.

During the March 2004 trial, de Valera J non-suited Ms O'Keeffe's claim in negligence. Ms O'Keeffe did not appeal this order. The learned judge declined the State's application for non-suit regarding the vicarious liability and constitutional issues, however, and the court heard legal argument on those issues.

On 20 January 2006, de Valera J delivered judgment dismissing Ms O'Keeffe's remaining claims against the State. The judge held that vicarious liability did not attach to the State for the tortious acts of Mr Hickey, applying the reasoning of O'Higgins J in *Delahunty v South Eastern Health Board and Others* (High Court, 30/07/03), where it was held that the State did not exercise sufficient (or any) management functions with respect to an industrial school for vicarious liability to attach. I do not find *Delahunty* relevant to the case at hand because it was not concerned with, nor did it consider in detail, the legal arrangements regarding National Schools. The judgment of O'Higgins J is curious, perhaps, in light of the State apology in May 1999 to victims of childhood abuse in industrial schools and the government's decision in 2002 to indemnify the Church past the sum of €128 million in relation to Residential Institutions Redress Board claims.

Mr Justice de Valera did not address the question of vicarious liability for the inaction of Fr O'Ceallaigh in 1971. Nor did de Valera J address the issue of the State's constitutional obligations regarding education under Article 42. De Valera J dismissed Ms O'Keeffe's claim for damages for interference with her constitutional rights to bodily integrity and privacy on the basis that the law of tort applied to Ms O'Keeffe's claim. De Valera J applied the judgment of Costello P in *W (No 2) v The Attorney General* [1997] 2 IR 141 to find that "no action lies for breach of a guaranteed constitutional right where, as in this matter, existing laws protect that right". I set out my views on *W (No 2) v The Attorney General* and the Supreme Court decision that preceded it, *Hanrahan v Merck Sharp and Dohme* [1988] ILRM 629, at some length below.

Mr Justice de Valera having given judgment on 20 January 2006, the order of the High Court was perfected on 24 October 2006. It is this order that Ms O'Keeffe appeals against. As my learned colleague Hardiman J puts it at paragraph 37 of his judgment, Ms O'Keeffe's only remaining claim relates to vicarious liability "alleged to exist for the criminal and plainly unauthorized acts of the first defendant, but also for the alleged negligence of the curate Fr O Ceallaigh who was the *de facto* acting manager in respect of his alleged failure to take any step on foot of a complaint made to him of a similar nature, in relation to another child, in 1971."

Legal arrangements regarding National Schools

The legal structure of Dunderrow National School was typical of National Schools in Ireland to this day. It was owned by the trustees of the Catholic diocese of Cork and Ross. The Patron of the school was the Bishop of Cork and Ross. The Manager of the school was an Archdeacon Stritch P.P. Archdeacon Stritch being elderly, however, the actual functions of management were carried out by Fr. O'Ceallaigh at all material times. The salaries of the teachers in Dunderrow National School were paid by the State. However, the teachers, of

which Mr Hickey was one, were employed under contracts with Fr O'Ceallaigh, rather than the State. Fr O'Ceallaigh did not receive a salary from the State.

This tripartite arrangement for the funding, management and ownership of National Schools in Ireland was permitted by Article 42.4 of the Constitution, which was worded so that the State would be obliged not to educate children itself but instead to "provide for" free primary education. This wording was designed to allow for the continuation of a practice, in place since 1833, whereby the government funded a system of national primary education that was managed and delivered by private (mainly religious) institutions who wanted to run schools according to their own ethos.

The Catholic Church was determined to have control over the appointment of teachers in its national schools. In evidence before the High Court, Professor Coolahan, who is the author of the standard work on the history of the Irish educational system, described the debate between the Church and State authorities after the inception of the Irish Free State thus:

> "…It had to be Catholic Schools under Catholic management, Catholic teachers, Catholic children..."

Professor Coolahan went on to discuss a dispute which arose in the early 1950s, when the Irish National Teachers' Organisation sought the establishment of local committees to take responsibility for the maintenance and repair of school buildings and similar management functions. The attitude of the Catholic Church was described as follows:

> "Eventually Cardinal Dalton took a very strong view on this issue and said there should be no interference whatever with the inherited tradition of managerial rights of schooling and it did not matter, because it was the thin edge of the wedge in his view, if local authorities [only] took control of the maintenance of schools. In due course, he said, *it might intrude into other aspects of the Manager's authority vis-à-vis the appointment and dismissal of teachers which was of course the key concern that had been fought for and won over the years."* (My emphasis)

Despite the great degree of control given to religious institutions to manage and deliver national primary education, however, their power was not absolute. The Constitution gave a right to children, through Article 42.3.2°, to "receive a certain minimum education, moral, intellectual and social". Indeed, Kenny J held this to be the case in *Crowley v Ireland* [1980] I.R. 102 at 126.

The 1965 Rules for National Schools and a great body of Department of Education Circular Letters laid down extensive minimum standards, presumably designed to meet this constitutional entitlement of children. Rule 30 of the 1965 Rules for National Schools provided for the withdrawal of recognition from a national school for non-compliance with the Rules. An inspection regime was also established, which, according to Professor Coolahan, always formed a crucially important part of the system of State oversight and maintenance of standards.

Vicarious liability for Fr O'Ceallaigh's inaction

As set out above, I am of the opinion that the legal relationship between the State and Fr O'Ceallaigh is sufficient for the imposition of vicarious liability. This finding chimes with Article 42.3.2° of the Constitution.

McMahon and Binchy introduce the doctrine of vicarious liability as follows (in chapter 43 of the *Law of Torts*, 3rd Edition, (Dublin, 2000) at p 1091):

> "The law is sometimes prepared to hold one person liable for the wrong committed by another person even though the person held liable is not at fault in the accepted sense of the word. Thus, the law may hold the employer liable for the wrongs of an employee, the principal liable for the wrongs of an agent or the firm liable for the wrongs of its partner in spite of the fact that the employer, the principal or the firm may not have been at fault in any way. When the law imposes liability in these circumstances we speak of an employer, principal or firm being 'vicariously liable'."

I accept that the manager of a national school is not in an employment relationship with the State. It is not so easy to dismiss the existence of a relationship of agency between the State and Fr O'Ceallaigh, however.

The relationship of agency in its orthodox sense is a creature of contract law; it is concerned with circumstances in which one party may enter into a binding contract with another. Insofar as remuneration of National School teachers is concerned, the manager of a National School is in a position akin to an agent of the State (if not an agent in the ordinary contract law sense): once the Manager enters into a contract of employment with a teacher, the State is obliged to pay that teacher's salary. According to Rule 18(1)(a) of the 1965 Rules for National Schools, the manager must obtain Departmental approval before appointing his or her chosen teacher. Rule 18(2) then requires the manager, on appointment of the teacher, to "enter into an agreement with the teacher on one of the official forms provided for the purpose" whereupon the State will be liable to pay the teacher's salary.

In addition to the orthodox contractual relationship of agency, however, there have been cases, including *Moynihan v Moynihan* [1951] 1 I.R. 192 in this court and *Scarsbrook v Mason* [1961] 3 All ER 767 in the Queen's Bench Division of the English High Court, where a more general form of agency was found sufficient for the imposition of vicarious liability.

In *Moynihan*, this court held a grandmother vicariously liable for the negligence of her daughter in pouring tea in the grandmother's house. In *Scarsbrook*, a passenger in a car was held liable for the driver's negligence, having contributed money towards petrol.

As McMahon and Binchy note of the *Moynihan* case, at p.1094:

> "The decision is important because it clearly indicates that the control concept is used, not as a justification for vicarious liability, but rather as a test to determine the persons for whose actions liability will be imposed on the defendant. In other

words *if the control element is high then even in the absence of other features the subordinate may be considered a de facto employee and provided the "controlled person's" acts relate to the "controller's" business the latter will be vicariously liable for injury caused to third persons by such acts.*" (My emphasis)

Evidence of sufficient control

I turn now to the evidence of the State's control over National School Managers.

In *McEneaney v Minister for Education* [1941] I.R. 430, Murnaghan J acknowledged that, in the period before the 1965 Rules for National Schools, "the duties and functions of the manager were *minutely* provided for in Rules and Regulations made by the Board." (My emphasis) The 1965 Rules continued this trend: the Rules prescribe the manager's duties in relation to teachers' conduct; school time-tables; school hours, school meetings and roll-call; the prescribed period of secular instruction per day; maximum permitted vacation time and school closing days; the age of enrolment of children; choice of school books; and the conditions of repair, heating, cleaning and painting of schools (amongst other things).

The wording of Rule 15(1) is striking: "The manager of a national school *is charged with* the direct government of the school, the appointment of teachers, subject to the Minister's approval, their removal and the conducting of the necessary correspondence." (My emphasis) Furthermore, each manager is required by Rule 15(4) to give to the State "an undertaking in writing that the Rules for National Schools shall be complied with."

Rule 16 dictates that "Managers should visit their schools frequently, and should satisfy themselves that the Rules for National Schools are being complied with." According to Rule 15(9), "The minister may withdraw recognition from a manager for failure to observe the Rules or if it should appear that the educational interests of the district require it".

It is clear that the manager's primary function, for which he is recognised as manager by the State, is to implement the constitutionally required minimum education on the State's behalf rather than to act primarily in the interests of the religious institution that owns the national school.

Under the 1965 Rules, managers have the authority and obligation to ensure that teachers comply with minimum standards of conduct set out in the Rules. Each of the functions which under Rule 15(1) the manager of a national school "is charged with" (the direct government of the school; the appointment of teachers, subject to the Minister's approval; their removal; and the conducting of necessary correspondence) applies to teachers' conduct as much as anything else under the Rules.

Regarding the conduct of teachers, Rule 121(1) requires that "Teachers should act in a spirit of obedience to the law and loyalty to the State". Other relevant requirements under Rule 121 are as follows:

> "(2) Teachers should pay the strictest attention to the morals and general conduct of their pupils, to the development of a patriotic spirit and outlook and lose no opportunity of inculcating the principles of truth, temperance, unselfishness and politeness, and regard for property, whether public or private.
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> (3) Teachers should promote both by precept and example, cleanliness, neatness and decency…
>
> (4) Teachers are required to take all reasonable precautions to ensure the safety of the pupils, and to this end shall carry out all lawful instructions issued by the manager…"

A Guidance Note of 6 May 1970 concerning complaints against teachers shows that the State relied upon the manager to convey to it the information required to set in motion the State's own disciplinary functions under the Rules. According to the 1970 Guidance Note, a person wishing to complain about a teacher was to be informed that the matter was one for the manager, in the first instance, and asked to clarify whether the complaint had been notified to the manager. The manager had to obtain observations from the relevant teacher and forward those observations, together with the manager's own views, to the Department. The deputy chief inspector within the Department would then identify whether an investigation was required. If so, the inspector was to interview the manager, the teacher and parents. If an inquiry led to relevant findings against the teacher, Rule 108 could be set in motion, whereby the Minister could discipline a teacher (including through prosecution, withdrawal of recognition, or withdrawal of salary).

Fr O'Ceallaigh's conduct

Once a relationship of agency has been established, the next questions are whether Fr O'Ceallaigh's conduct was tortious and, if so, whether the tortious conduct was within the scope of or sufficiently closely connected to what Fr O'Ceallaigh was authorised to do by the State to attract vicarious liability.

In order to determine whether Fr O'Ceallaigh's failure to take any action in response to an allegation of sexual abuse by Mr Hickey in 1971 was tortious, I turn first to the question of whether Fr O'Ceallaigh owed a duty of care to Ms O'Keeffe. As McMahon and Binchy note (at p. 441), and I agree:

> "Clearly teachers and those involved in the management of schools have a duty of care in relation to pupils who attend the school. The elements of proximity of relationship and foreseeability of potential injury could scarcely be more pronounced."

The standard of care owed by school authorities is to take such care of pupils as a careful parent would take of their children. This was recognised by O'Dalaigh CJ in *Lennon v McCarthy & Anor*, an unreported judgment of this court of 13th July 1966 and, more recently, approved by this court in *Murphy v County Wexford VEC* [2004] 4 IR 202.

Fr O'Ceallaigh's failure to respond in any way to the 1971 complaint was as far from the behaviour of a careful parent as one can imagine. A careful parent would have listened to the complaint that was coming from a young child (in this case through her mother) and recognised its seriousness, both in terms of the need to investigate and the need to minimise the risk of further abuse.

In acting as he did, Fr O'Ceallaigh failed to comply with his explicit obligations under the Department of Education Guidance Note of 6 May 1970 and the 1965 Rules for National Schools more generally. Therefore, I also find that the tortious conduct was within the scope of what Fr O'Ceallaigh was authorised to do – and was "charged with" doing – by the State.

The rationale behind the doctrine of vicarious liability

The doctrine of vicarious liability goes against the general scheme of the common law, whereby liability for a wrong is imposed upon the wrongdoer only. In *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, Lord Nicholls explored the rationale behind the continuation of the doctrine as follows:

> "9. Whatever its historical origin, this common law principle of strict liability for another person's wrongs finds its rationale today in a combination of policy factors. They are summarised in Professor Fleming's *Law of Torts*, 9th ed, (1998) pages 409-410. Stated shortly, these factors are that *all forms of economic activity carry a risk of harm to others, and fairness requires that those responsible for such activities should be liable to persons suffering loss from wrongs committed in the conduct of the enterprise*. This is 'fair', because it means injured persons can look for recompense to a source better placed financially than individual wrongdoing employees. It means also that the financial loss arising from the wrongs can be spread more widely, by liability insurance and higher prices. *In addition, and importantly, imposing strict liability on employers encourages them to maintain standards of 'good practice' by their employees.* For these reasons employers are to be held liable for wrongs committed by their employees in the course of their employment." (My emphasis)

McLachlin J, of the Supreme Court of Canada, gave a similar description of the rationale in *Bazley v Curry* (1999) 174 DLR (4^{th}) 45:

> "Fleming [*The Law of Torts* (9^{th} edn, 1998)] has identified [the] policies lying at the heart of vicarious liability. In his view two fundamental concerns underlie the imposition of vicarious liability: *(1) provision of a just and practical remedy for the harm; and (2) deterrence of future harm*. While different formulations of the policy interests at stake may be made (for example, loss internalization is a hybrid of the two), I believe that these two ideas usefully embrace the main policy considerations that have been advanced." (My emphasis)

In this case, the imposition of vicarious liability upon the State defendants for Fr O'Ceallaigh's negligence satisfies the policy concerns which underpin the modern doctrine. It is just and fair because the State holds an obligation towards children under Article 42.3.2° to ensure that they "receive a certain minimum education", and the State's own Rules for National Schools envisage teachers behaving lawfully and with regard for the safety of children as part of the minimum required educational standards. In addition, the State is constitutionally obliged under Article 42.4 to respect the rights of parents with regard to the "religious *and moral* formation" of their children. The plaintiff's parents – and all parents of children in national schools – had and have a right to expect that the State will exercise sufficient control over the treatment of their children in national schools so as to ensure that they are not suffering criminal abuse which a manager knows or should know about.

In addition, it seems to me that the State created a risk when it allowed religious or other private institutions and groups to deliver national primary education, and in particular when it gave those institutions the power to appoint teachers of their own choosing. I commented earlier on the insistence of the Catholic Church that it should retain control over the appointment of teachers. The more importance the Church attached to that power, the more likely it became that situations which may have called into question the Church's abilities in this regard would be suppressed, or covered up, by the institution.

It is a common feature of institutions in general that the desire to self-preserve and individual members' loyalties can sometimes take precedence, whether people are conscious of it or not, over conflicting duties and responsibilities. We need look no further than the Ferns Report and the testimonies that prompted the State apology to industrial and reformatory school survivors and the creation of the Commission to Inquire into Child Abuse for evidence of institutional cover-up of widespread child abuse in Ireland. When Fr O'Ceallaigh was made aware of an allegation of child sexual abuse against Mr Hickey in 1971 – and again when he was informed of numerous similar allegations in 1973 – he was faced with a conflict of interest. Reporting the allegations, which he was obliged to do under the Rules and 1970 Guidance Note, would reflect negatively, at however slight a level, upon his and his superiors' employment and supervision of Mr Hickey and general ability to run Dunderrow National School.

The remaining policy concern behind the principle of vicarious liability – the encouragement of good practice amongst employees or agents – also applies to the case at hand. Through its ability to create legislation and policy, the State is in a position and should be encouraged to ameliorate standards and behaviours which constitute a threat to the wellbeing of children and the realisation of their constitutional right to receive a minimum education.

Vicarious liability for Mr Hickey's actions

I turn now to the claim against the State for the actions of Mr Hickey.

Although I am troubled by the implications, I am unable to find that vicarious liability attaches to the State for the actions of Mr Hickey on the basis of the pleaded case. I agree with the judgment of Fennelly J, with whom Murray CJ and Denham J concur, where they

find that no employment relationship existed between Mr Hickey and the Minister for Education. As my learned colleagues note, although Mr Hickey's salary was paid by the State, and Mr Hickey was licensed to teach by the State and the State held the power to revoke his license at the end of a lengthy disciplinary process, Mr Hickey was not employed by the State. Mr Hickey was hired by the Manager of the National School, and the State did not have the power to dismiss him. On a day-to-day basis, the power to direct Mr Hickey's behaviour and the responsibility for ensuring that Mr Hickey complied with the Rules for National Schools lay with the Manager. In general, I am persuaded by the approach adopted in the recent Australian, Canadian and English cases where vicarious liability has been imposed (more flexibly than before) in relation to acts with a sufficiently "close connection" to the employer's work. However, I accept that in all of these cases an employment relationship has still been present.

Had the court received submissions on Louise O'Keeffe's constitutional right to be free from torture or cruel, inhuman or degrading treatment, the outcome might have been different. The court may have found itself grappling with the question of whether the law of tort offered an effective remedy to Louise O'Keeffe. I am aware of the General Comment No 2 issued by the United Nations Committee Against Torture earlier this year, which highlights the particular responsibility of States to prevent torture and ill-treatment by agents, private contractors and others acting on behalf of or in conjunction with the State in all contexts of custody or control, including schools.

Constitutional rights arguments in tort cases

There seems to be a general reluctance on the part of litigants and the judiciary to engage with the Constitution when arguing or deciding claims based on tort law, which derives perhaps from the decision of this court 20 years ago in *Hanrahan v Merck Sharp and Dohme* [1988] ILRM 629.

In *Hanrahan*, Henchy J laid down the principle that a plaintiff will not be allowed to argue or base a claim on breach of a constitutional right if there exists a statutory or common law cause of action which can be said to protect that right. This court in *Hanrahan* held that where there is an existing tort upon which the plaintiff can base her claim, she "is normally confined to the limitations of that tort" (at 636). An exception would only arise "if it could be shown that the tort in question is basically ineffective to protect [her] constitutional right." (at 636)

Hanrahan was applied by Costello P in *W v Ireland (No 2)* [1997] 2 IR 141, and it was the *W v Ireland (No 2)* judgment which de Valera J relied upon in dismissing Ms O'Keeffe's claim in the High Court for interference with her constitutional rights to bodily integrity and privacy. There has been no discussion in this court as to whether the existing law of tort, including its doctrine of vicarious liability, provides effective protection for Ms O'Keeffe's constitutional rights.

I am of the opinion that this court in *Hanrahan* misinterpreted the constitutional role of the courts in holding that they should not consider constitutional rights arguments save where

existing statutory or common law causes of action are "basically ineffective" or "plainly inadequate to effectuate the constitutional guarantee in question" (*Hanrahan* at 636). This approach surely fails to ensure full protection for the constitutional rights of the individual.

The *Hanrahan* judgment appears to fly in the face of the judgment of this court in *Meskell v CIE* [1973] IR 121, which held that the existence of a constitutional right implies a right to a remedy for its breach:

> "…if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right that person is entitled to seek redress against the person or persons who have infringed that right." (at 133)

If there is any gap between the rights protection afforded by existing causes of action and the rights protection demanded by the Constitution, I do not see why the courts should not intervene to fill that gap. Indeed, I think it a constitutional imperative that they do.

Reluctance to litigate Constitutional rights may have a disproportionately negative impact on the most vulnerable, or marginalised, in our society. The Constitution is their bulwark, where necessary, against the tide of popular opinion or belief. It is not difficult to think of systems which have enjoyed official and widespread societal approval, as well as some degree of legislative authority, while trampling upon the constitutional rights of vulnerable individuals caught up in them. The nation's Magdalene Laundries are one such example.

Procedure

Before concluding, I wish to acknowledge the toll that these proceedings have, no doubt, taken upon Ms O'Keeffe. It is not easy to litigate against the State knowing that the full force of the State's resources will be brought to bear in defence of one's claim. It takes a deep sense of being wronged and an even deeper desire to see justice done – often not just for oneself but for others in the past and future – to pursue an action to this stage of appeal. Even if I were not to find in Ms O'Keeffe's favour, as the majority has not, I would recognise that she has clearly pursued an issue of immense public and constitutional importance. Hers is a test case on the question of State liability for abuse of pupils by National School teachers, and there are over 100 similar cases awaiting the outcome of this appeal.

I find it regrettable that these proceedings have taken over 10 years to reach this court. Our system must do better for litigants who may have suffered grave injustices and who decide to undertake the emotionally and financially difficult step of pursuing their case, as is their right, through the courts. Litigants in Ms O'Keeffe's position deserve to have their actions dealt with expeditiously. If the judicial system can be resourced so that commercial claims are managed efficiently, the same should apply to claims such as Ms O'Keeffe's.

It is more regrettable still that Ms O'Keeffe has had to bear the enormous psychological burden of not knowing whether or not she will be held liable for the State's costs until she reaches the very end of proceedings. At the conclusion of the High Court proceedings, Ms O'Keeffe was ordered to pay the State's costs, which amounted to €500,000. It has not escaped my notice that this court is now delivering its substantive judgment less than a week

before Christmas, to a survivor of inhuman and degrading treatment (if not torture) and a mother of two small children, without making any judgment on the issue of costs. The State intends to apply for an order for costs. Ms O'Keeffe will have to wait until well into next year to discover whether or not she will be held liable.

I am of the view that in a case against the State such as this, which is not merely a personal injury claim but also involves important constitutional questions and is a test case, a protective costs order should, in principle, be available to the plaintiff from the outset.