

THE HIGH COURT

2006 3876 P

BETWEEN

TIMOTHY McAULIFFE AND TIMOTHY McAULIFFE LIMITED

PLAINTIFFS

AND

MICHAEL O'DWYER, THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

EX-TEMPORE JUDGMENT of Mr. Justice Clarke delivered the 13th May, 2011

1. In this case, the plaintiffs ("Mr. McAuliffe" and "the Company") brought proceedings alleging harassment by the defendants in the shape of the first named defendant ("Mr. O'Dwyer), then a member of An Garda Síochána and a brother in law of Mr. McAuliffe together with the other defendants ("the State Defendants") who were said to be vicariously responsible for then Garda O'Dwyer's actions.

2. The proceedings as and between the plaintiffs and the State Defendants were settled for a sum of €30,000 inclusive of costs. The State Defendants had served a notice seeking contribution or indemnity against Mr. O'Dwyer and it is that issue which has now come on for hearing. The legal basis of the State Defendants' claim for an indemnity against Mr. O'Dwyer is clear and is not in dispute.

3. If it were established that Mr. O'Dwyer engaged in some or all of the activity alleged against him, then it is clear that both he and the State Defendants (being vicariously liable as his employers) would have been concurrent wrongdoers for the purposes of s. 11 of the Civil Liability Act of 1961. In those circumstances, it is accepted on both sides that it is necessary, in order to succeed on this issue, for the State Defendants to establish that the plaintiffs did actually have a claim against Mr. O'Dwyer. However, in the event that the State Defendants do establish that Mr. McAuliffe or the Company had such a claim then it is clear that the test to be applied in assessing the amount of that settlement is a test of reasonableness so that provided the Court is satisfied that the amount of the settlement was, in all the circumstances, reasonable, that settlement can be the subject of an appropriate order for indemnity as a result of s. 22 of the Civil Liability Act 1961.

4. It does, however, have to be noted that, in order to assess the reasonableness of the settlement, it is also necessary to determine the parameters of any claim which might be made out by Mr. McAuliffe or the Company against Mr. O'Dwyer for the amount of any settlement, and its reasonableness, obviously depends on the extent of the issues in relation to which liability has been established. Against that legal background there are really therefore two questions which I have to answer.

5. First, have the State Defendants produced evidence to satisfy me that there is a liability on the part of Mr. O'Dwyer to Mr. McAuliffe and/or the Company? In other words, as a fact was there harassment or other abuse of public office such as was alleged? That is to be determined on the evidence and it is an issue to which I will shortly turn. If the answer to that question is no, then the State Defendants clearly are not entitled to an indemnity; if the answer to that question is yes, then it is necessary to turn to the second question which is as to whether the settlement was, in all the circumstances, reasonable.

6. Before going on to deal with the specific allegations that were made against former Garda O'Dwyer it is important to note what actually occurred at the hearing before me. In the claim that was originally formulated by Mr. McAuliffe and the company a large range of allegations were made against An Garda Síochána with a particular if not exclusive focus on the actions of then Garda O'Dwyer, but also including allegations either against the gardaí generally or other members of An Garda Síochána. It might reasonably be inferred, however, that the allegations against other members were, in substance, allegations that they had been put up to things by Garda O'Dwyer. At the hearing before me it became clear that the State Defendants did not seek to rely on all of the allegations originally made by Mr. McAuliffe and the Company but only on some of them. In that context counsel for the State Defendants helpfully produced a document setting out those of the allegations originally made which the State Defendants sought to stand over, and really that is the battleground in these proceedings.

7. The relevant part of the document in question reads as follows:-

"The State Defendants will maintain:

(a) That, in his dealings as a Garda with the Plaintiff, his company and family, the First-named Defendant was motivated by a sense of grievance about perceived favouritism shown by the Plaintiff's parents towards the Plaintiff over the First-named Defendant's wife, and a desire to secure for himself or his wife a share of the Plaintiff's or the Plaintiff's father's business.

(b) That the First-named Defendant "tailgated" and otherwise drove in an intimidatory fashion towards the Plaintiff. (As evidenced by Plaintiff and pleaded in respect of events of 25 January 2003, 28 April 2003)

(c) Subject to the evidence of two former drivers for the Plaintiff (Tony Hegarty and Adrian Costigan) – who are witnesses under subpoena – the First-named Defendant intimidated them by "tailgating" and otherwise driving in an intimidatory fashion (See statement of Claim in respect of events of 18 January 2003, 23 April 2003)

(d) That the First-named Defendant spoke in a threatening, intimidatory and provocative way towards the Plaintiff in his dealing with him in uniform

(e) That the First-named Defendant falsely alleged and commenced a prosecution against the Plaintiff for an assault alleged to have occurred on 6 January 2006 (for the avoidance of doubt, the State Defendants take a neutral position in relation to the public order and obstruction allegations in the Summonses arising from the events of 6 January 2003)

(f) That the acts and conduct of the First-named Defendant in relation to the events of 1 November 2002 and 6 January 2003, and the prosecutions arising therefrom, were malicious. It is not maintained that the offences alleged in any of the Summonses issued were not committed. However, the State Defendants will maintain that the First-named Defendant was ill-motivated (as set out above) as corroborated by the following additional facts, which the State Defendants will prove:

(i) The First-named Defendant disobeyed the direction of his superior, Superintendent Hayes not to proceed with prosecutions of the Plaintiff, and – by furnishing a prosecution statement to Sergeant Lomasney and failing to inform him of the direction of Superintendent Hayes – the First-named Defendant procured the institution of the said prosecutions.

(ii) The First-named Defendant without authority, contrary to normal practice and without going through the proper channels (i.e. at Superintendent level), represented to the insurers of the Plaintiff's trucks that the Plaintiff had committed numerous offences.

(iii) The First-named Defendant allowed the events of 6 January 2003 to influence his decision whether or not to procure the issuance of Summonses in relation to the events of 1 November 2002 (and in the process override the direction of Superintendent Hayes).

(iv) The First-named Defendant procured the issuance of Summonses relation to the events of 6 January 2003 in the name of Garda Bernard Rohan without their knowledge or consent.

(v) The First-named Defendant – while entitled to prosecute for "overweight" in relation to the events of 1 November 2002 – disregarded a practice among Gardaí of issuing a caution instead of a Summons where the vehicle was overweight by less than 2,000kg."

8. The State Defendants, therefore, assert a number of separate items which they say are supported by the evidence and from which it should be inferred that then Garda O'Dwyer acted with malice towards Mr. McAuliffe and the company. The question which I have to answer first is as to whether those allegations or some of them are made out. I propose dealing with them in turn in the order in which they were set out by counsel for the State Defendants, but before approaching the detail of each of the allegations there are a number of brief comments which I want to make about the evidence both of Mr. McAuliffe and of Mr. O'Dwyer.

9. To an extent, some of the allegations which I have to address come down to questions of the credibility of those two witnesses. I am satisfied that Mr. McAuliffe's evidence was, at least in some respects, exaggerated. It is not necessary for me to determine whether that was due to a deliberate misrepresentation of events by Mr. McAuliffe or whether it is simply that he has come to believe things in a somewhat exaggerated way and now genuinely believes the truth of matters which he gave in evidence. I emphasise that I am not rejecting all of his evidence, but simply indicating that I do not accept that all of the evidence which he gave actually represents a correct account of what happened.

10. Likewise, I am not satisfied that all of the evidence given by Mr. O'Dwyer is correct, particularly where that evidence comes in to conflict with other witnesses who are not directly involved in the contentious issues in these proceedings.

11. Against that background I turn to the specific points relied on by the State Defendants. The first contention is that in dealing as a garda with Mr. McAuliffe, Mr. O'Dwyer was, it is said, motivated by a sense of grievance about perceived favouritism shown by Mr. McAuliffe's parents towards Mr. McAuliffe over Mr. O'Dwyer's wife who is, of course, a sister of Mr. McAuliffe and, therefore, a daughter of the same parents. That sense of grievance is said to have arisen out of the fact that Mr. McAuliffe was given his father's, admittedly at the time small, haulage company and a suggestion that Mr. O'Dwyer was aggrieved by the fact that no similar provision had been made for their daughter, his wife. In that regard it is necessary to consider the evidence of Mrs. Catherine McAuliffe, the mother of Mr. McAuliffe and the mother-in-law of Mr. O'Dwyer.

12. Two incidents were related in her evidence; one concerned a question of a suggestion that a sum of money would be made available by her to Mr. McAuliffe, to use a neutral term. On Mrs. McAuliffe's account, it would appear that it was her understanding that Mr. O'Dwyer sought a loan, or something of that nature, of a significant sum of money. On Mr. O'Dwyer's account, he merely identified a possible investment opportunity into which he was inviting Mrs McAuliffe to put money. It seems to me that it is probable that the parties were somewhat at cross purposes on this issue and I am not satisfied, on the balance of probabilities, that Mr. O'Dwyer actually sought a loan of money on the occasion in question.

13. The second incident is, perhaps, more directly relevant to the issues which arise in this case. Mrs. McAuliffe recounted an incident where complaint was made to her, she says, by Mr. O'Dwyer, arising out of the fact that her husband's business had been given to Mr. McAuliffe and that no comparable provision had, at the time, been made for his wife. I am satisfied that something along the lines of what was described by Mrs. McAuliffe did in fact occur on that occasion. I am satisfied, therefore, that there was a tension in the family arising out of a perception on the part of Mr. O'Dwyer that fairness had not been done and that Mr. McAuliffe had been given something with nothing comparable being done for his wife. It may well be that it was not Mr. O'Dwyer's view that his wife necessarily should have been given a share in the Company itself, but that something should have been done for, as it were, her side when something at the same time was being done for Mr. McAuliffe. I am satisfied, therefore, that there is substance in the allegation that there was a degree of grievance on the part of Mr. O'Dwyer arising out of the circumstances in which the Company came to be handed over to Mr. McAuliffe.

14. The next item that is alleged concerns two incidents when it is said that Mr. O'Dwyer, in his capacity as a garda, tailgated or otherwise drove in an intimidatory fashion towards Mr. McAuliffe, specifically on the 25th of January, 2003, and the 28th of April of the same year. The second incident concerns an allegation on the part of Mr. McAuliffe that he was followed for a considerable period of time by a garda on a garda motorbike. He was not able to identify the garda concerned and it is said on behalf of the State Defendants that the appropriate inference to draw is that it was in fact Mr. O'Dwyer. The first incident concerns an event when it is said that Garda O'Dwyer drove his car in a rather strange fashion blocking off Mr. McAuliffe's lorry and engaged in a discussion with him, of a slightly aggressive variety, including references to whether he was enjoying "the summonses". On the balance of probabilities I am not satisfied that the events described at paragraph (b) occurred in the manner alleged by Mr. McAuliffe. First,

there is considerable confusion about the date of that event. Second, whether it happened on the date on which Mr. McAuliffe says it happened, that is the 25th of January, or an earlier date described by Mr. O'Dwyer, at that stage no summonses had been served on Mr. McAuliffe nor was there any basis for Mr. McAuliffe necessarily believing that summonses had been served or had been issued. It seems to me that it is not, therefore, possible to accept the detail of Mr. McAuliffe's account of the events. I am not satisfied, therefore, that the allegations under item (b) are, on the balance of probabilities, made out.

15. Item (c) was expressly abandoned by the State Defendants in the course of the hearing and it is not necessary to deal with that issue.

16. Item (d) represents an allegation that Mr. O'Dwyer spoke generally in a threatening, intimidatory and provocative way towards Mr. McAuliffe in his dealings with him in uniform. It seems to me that it is more appropriate to deal with that allegation in relation to the more specific items to which I will shortly have to turn.

17. Item (e) involves an allegation that Mr. O'Dwyer falsely brought a prosecution against Mr. McAuliffe for an assault arising out of an event on the 6th of January, 2003. As that allegation is intimately connected with a series of events arising out of two incidents that occurred on the 1st of November, 2002, and the 6th of January, 2003 (which are in my view at the heart of these proceedings), I will deal with it in the context of those matters.

18. On the 1st of November, 2002, there was an incident when it would appear that a lorry operated by Mr. McAuliffe or the Company was somewhat overweight to the extent of 1,900 kilograms, a level of overweight which it would appear was within the bounds of discretion often enjoyed by the gardaí not to prosecute in marginal cases in the sense that the weight of the lorry was 33.9 tonnes when the allowed weight was 32 and the difference was within an allowable margin. It would appear that there was an acrimonious telephone call between Mr. McAuliffe and Mr. O'Dwyer later that evening, but that nothing much further happened about that event until a further incident occurred some two months later on the 6th of January.

19. On that later occasion another lorry operated by Mr. McAuliffe or the Company was brought to a weighbridge and was in the course of being weighed when Mr. McAuliffe, who was not the driver on the occasion in question, arrived. There was, on any view, a most acrimonious event between Mr. McAuliffe and Mr. O'Dwyer on the occasion in question. Strong language was undoubtedly used on both sides. Both allege a minor assault on the other. There was another garda present being Garda Bernard Rohan who corroborated the fact that there was a strong exchange of views (to put it mildly) between the two others, but that he was aware of their relationship, did not want to get involved and absented himself from the main scene of events such that he was not present when either of the alleged assaults took place.

20. In circumstances in respect of which there is a conflict of evidence it is clear that, first, Mr. McAuliffe made a complaint to An Garda Síochána the following day to a Superintendent William Hayes, since retired. It is also clear that Superintendent Hayes had a conversation about the event with Mr. O'Dwyer. Mr. O'Dwyer says that he immediately reported the event (which had occurred in the relatively early hours of the morning) to Superintendent Hayes as soon as Superintendent Hayes came in. Superintendent Hayes says that did not happen and that he only discussed the matter with Mr. O'Dwyer after he had received a complaint from Mr. McAuliffe the following day. Of perhaps greater direct relevance to the issues which I have to consider, Superintendent Hayes gave clear evidence that, on the occasion in question, having regard to the relationship between the parties and his concern, therefore, as to the inappropriateness of Garda O'Dwyer having difficult dealings with his brother-in-law, he gave a clear direction to Mr. O'Dwyer not to proceed with any prosecution arising out of those events. I have, on the balance of probabilities, come to the view that Superintendent Hayes's evidence on these matters is to be preferred. It seems to me that he gave clear evidence. These are matters which would have been of quite a reasonable level of concern to him in his position as Superintendent involving, as it did, not just a routine garda event, but an event which was potentially sensitive having regard to the relationship between the parties. I, therefore, find as a fact that Superintendent Hayes gave a direction to Mr. O'Dwyer to the effect that there were not to be any prosecutions arising out of those events. In so doing, I also accept Superintendent Hayes's account which denied the fact that it was Mr. O'Dwyer who had first brought the matter to his attention. I accept Superintendent Hayes's account that he only spoke with Mr. O'Dwyer after the matter had been raised with him by Mr. McAuliffe. What happened thereafter needs to be seen in the light of the fact that Superintendent Hayes had given that direction.

21. A number of additional matters occurred over the following month. First, it is accepted as a fact that Mr. O'Dwyer contacted the insurance brokers who provided insurance to Mr. McAuliffe's trucks. In particular a statement of a Mr. John McCarthy was admitted in evidence without the necessity of him being called. An ordinary reading of Mr. McCarthy's statement would suggest that the purpose of the call in question was to attempt to cause harm to Mr. McAuliffe and the Company in that details of various offences were conveyed to Mr. McCarthy and various other matters about the record of Mr. McAuliffe were told to him such that when Mr. McCarthy reported the matter internally to others within the same insurers, he described Mr. McAuliffe as a serial offender. I do not think that there is any evidence that that was a phrase used by Mr. O'Dwyer, but nonetheless it was the interpretation placed by Mr. McCarthy on the events as described to him by Mr. O'Dwyer. It is clear, on the basis of the garda evidence, that it is not normal practice for gardaí to go to insurance brokers and, as it were, inform them of prosecutions and the like against their insured. There may be legitimate circumstances where a garda may need to contact the insurers or brokers of a person for the purposes of obtaining information which might be relevant to deciding whether a prosecution should be brought. Mr. O'Dwyer describes the conversation which he had with Mr. McCarthy as such an information gathering exercise in which he was seeking information about whether the relevant insurance would be valid in the light of the fact that there had been previous convictions and certain other matters. However, the statement of Mr. McCarthy does not at all read like it was a conversation of that type. It was also accepted by Mr. O'Dwyer in evidence that he was very annoyed on the occasion in question. I am satisfied as a fact that the actions of Mr. O'Dwyer in contacting the insurers of Mr. McAuliffe were motivated by malice and not by a genuine desire to obtain information which he would need for the ordinary processing of possible criminal prosecutions. That deals with the first two items mentioned in para. (f).

22. The third item mentioned under this heading is that Garda O'Dwyer is said to have allowed the events that had occurred on the 6th January to influence his decision as to whether or not to issue or procure the issuance of a summons in relation to the events on the 1st November. It will be recalled that no summonses had been issued in relation to that earlier event. I am not sure that this question in itself adds very much to the overall issue. It is part really of the next allegation which stems from the fact that it is clear on the evidence that Garda O'Dwyer arranged for the issuing of summonses, both in respect of the events of the 6th of January and of the 1st of November of the previous year, over the following month. He arranged for those summonses to be issued in the names of other garda; Garda Rohan, to whom mention has already been made, in respect of the events of the 6th of January and Garda O'Gorman in respect of the events of the 2nd of November. I am satisfied, on the evidence of both of those gardaí, that, with the exception of one of the summonses, that is, a summons in respect of the 6th of January in relation to overweight which Garda Rohan did approve the issuance of, the circumstances were such that the garda concerned had not agreed to allow his name to be used.

23. Therefore, it seems to me that the issuing of those summonses was wrong on two fronts. First, Mr. O'Dwyer had a direct order

from his line superior, Superintendent Hayes, not to do it. Second, save with that one exception, he went behind the backs of other gardaí to issue the summonses in their name. I am satisfied that this was done out of malice towards Mr. McAuliffe with a desire to get around the problem of the fact of his relationship with him, but to ensure that summonses were issued in any event. For completeness it is necessary to also note that, because of operational divisions, the final decision on the issuing of the summonses relating to the 6th January did not fall to Superintendent Hayes, but was dealt with by Superintendent Sheehan who was in charge of the district in question. There is no doubt that Superintendent Sheehan approved the issuing of most of the relevant summonses although it is clear that an additional summons was added by Mr. O'Dwyer in relation to obstructing the gardaí in the course of his duty without any authority. However, Superintendent Sheehan was not informed of the fact that Superintendent Hayes had earlier directed that there be no prosecutions and it seems clear on the evidence that, at a minimum, had Superintendent Sheehan been so informed, he would have consulted with Superintendent Hayes and would have then had to make a final decision or seek directions from higher authority. To the extent, therefore, that there may have been, as it were, an independent view as to whether the summonses should be issued, that independent view is of less value in circumstances where Superintendent Sheehan was not told the full facts when he authorised the issuing of the summonses.

24. Insofar as it is said that Mr. O'Dwyer was in breach of a garda practice in prosecuting the events of the 1st of November even though the amount of overweight was within the normal range that allows a garda discretion to issue a caution instead of issuing a summons, I am not satisfied that that, in itself, is a particularly material matter. That issue was brought to Superintendent Sheehan's attention and he authorised the issuing of the overweight summons and, therefore, that matter in itself does not seem to me to add to the case although, for the reasons which I have already set out, I am satisfied that Superintendent Sheehan was not told all the necessary facts before he made his decision.

25. In summary, therefore, I am satisfied that, in three particular respects, in perhaps descending order of importance, Mr. O'Dwyer acted with malice towards the plaintiffs and was in breach of his duties as an officer of An Garda Síochána. First, he went ahead with issuing summonses when he had been expressly instructed not to do so and did so in the names of gardaí who had not allowed their names to be so used, save in one limited respect. Second, in breach of proper practice and motivated by prejudicial malice, he informed the insurers of Mr. McAuliffe and the Company of events, not for the purposes of making genuine inquiries or genuinely furthering legitimate garda business, but rather with a view to doing down Mr. McAuliffe. And third, but perhaps least importantly, he added the offence of obstruction, without authority, to the summonses which he had been authorised by Superintendent Sheehan to issue.

26. I am, therefore, satisfied that a case of misfeasance of public office has been made out by the State Defendants such that Mr. McAuliffe would have been entitled to succeed against Mr. O'Dwyer had the case against Mr. O'Dwyer run. It next follows that I have to consider whether the settlement was reasonable in all the circumstances and, of course, as I have earlier pointed out, the reasonableness of the settlement has to be seen in the light of the matters actually established against Mr. O'Dwyer. Clearly, if all of the allegations which Mr. McAuliffe made in his case had been established to the satisfaction of the Court, an amount well in excess of €30,000 would have been awarded. What I have to decide is, was that amount a reasonable settlement in circumstances where the issues which I have now indicated I am satisfied occurred were the only matters established against Mr. O'Dwyer.

27. It must be recalled that this was a so-called "all in" settlement where the settlement was inclusive of costs. Mr. McAuliffe and the Company had brought the proceedings in the High Court, but the level of damages awarded are damages which could have been awarded in the Circuit Court. In addition there is the possibility that, had the case run and Mr. McAuliffe been awarded relatively modest damages, the State Defendants might have been able to obtain an order under the Courts Acts that they be compensated for having had to defend the proceedings in the High Court rather than in the Circuit Court. In all the circumstances it seems to me that, taking a broad view, it is perhaps appropriate to treat this case as one of damages of the order of €15,000 to €20,000, given that the costs would have been probably Circuit Court costs with some reduction to reflect the fact that the State Defendants should only have had to defend proceedings in the Circuit Court.

28. However, in the light of the quite serious findings that I am satisfied can properly be made against Mr. O'Dwyer, I am satisfied that a settlement of that order is reasonable. Clearly the issuing of summonses in breach of order and going behind proper garda channels to inform insurers are significant matters which would warrant a significant award of damages even if there was no financial loss. In the circumstances, therefore, I am satisfied that the amount paid by the State Defendants was reasonable in the light of the findings which I have made. It seems to me that it was a prudent course of action for the State Defendants to adopt to settle these proceedings. The State Defendants by no means accepted everything that Mr. McAuliffe said and the settlement reflects that fact. It was a sensible settlement on the part of the State Defendants, but it was also a reasonable settlement in the sense in which that term is used in the Civil Liability Act.

29. In all the circumstances I am, therefore, satisfied that the State Defendants have made out a case for an indemnity against Mr. O'Dwyer and logically it seems to me that the order should be, therefore, that the State Defendants, on foot of that indemnity, a) recover the sum of €30,000 paid in settlement and b) are entitled to an indemnity from Mr. O'Dwyer in respect of the costs which the State Defendants incurred in defending the proceedings brought by the plaintiffs.