Neutral Citation Number: [2007] IEHC 33

THE HIGH COURT

BETWEEN

BRENDAN O'NEILL JUNIOR

PLAINTIFF

AND
DUNNES STORES

DEFENDANT

Judgment of Mr. Justice Kelly delivered on the 21st day of February, 2007

Introduction
1. On the evening of 4th July, 2002, the plaintiff was assaulted by a man called Ciaran McCormack. The assault took place at a shopping centre in Thurles, Co. Tipperary. The plaintiff contends that the circumstances of that assault are such as to give rise to a liability on the part of the defendants to compensate him in respect of the injuries sustained by him. In order to appreciate how such a claim comes to be made it is necessary to set forth the facts of the matter in some detail.

The Plaintiff
2. The plaintiff is now 34 years old. At the time of the assault he was, and indeed continues to be, employed as a store man by a company called Premier Foods at Thurles, Co. Tipperary.

The Defendant
3. The defendant is the principal tenant of the shopping centre at Thurles, Co. Tipperary. It conducts a drapery, grocery and off-licence business there.

The Incident
4. At about 8.00 p.m. on 4th July, 2002, the plaintiff went to the defendant's store. Whilst there he decided to telephone his grandmother to see if she wanted him to do any shopping for her. He went to a pay phone which is located at the back of the shopping centre. As he approached the rear entrance of the building a woman whom he did not then know said to him "help there's been a robbery". He subsequently learned that this lady is called Sadie Stapleton and was a cleaner in the shopping centre.

5. Responding to her cry and not knowing what to expect he continued to the rear of the building. There he saw Mr. Keith Byrne, a security officer employed by the defendant, involved in a struggle and holding a man named Alexander Colville against a wall outside the building.

6. He saw Colville reach for a bottle which he had in his pocket. The plaintiff said that Mr. Byrne called to him for assistance, a fact denied by Mr. Byrne.

7. In any event the plaintiff went to Mr. Byrne's assistance. He thought that Colville was larger than Mr. Byrne. He went and assisted in holding Colville against the wall. Colville continued to struggle. The plaintiff prevented him from getting the bottle out of his pocket.

8. Mr. Byrne told him that the police had been notified and indeed that was so.

9. A Garda Delaney arrived on the scene.

10. The reason why the security officer was apprehending Colville was because he had witnessed Colville and McCormack (the assailant) whilst in the off-licence department of the defendant. He saw them taking bottles from the shelves and secreting them in the pockets of their jackets. He approached them and asked them for identity and explained that they were not entitled to be in the off-licence department since they both appeared to be under 18 years. McCormack produced a bogus identification document. Colville said that he would retrieve his from a car and ran from Mr. Byrne. He ran towards the rear of the shopping centre and was followed by Mr. Byrne. He caught up with him at the rear doors which were automatic and unable to accommodate Colville because of the speed at which he was running. Colville attempted to strike Mr. Byrne, who detained him. He put Colville's arm behind his back and got him out of the shopping centre. It was at that stage that Colville attempted to take the bottle out of his jacket and to strike Mr. Byrne.

11. In his direct evidence Mr. Byrne told me that he saw Sadie Stapleton whilst apprehending Colville and shouted to her to get the manager to help him. In cross examination he said that he asked her to get him help. The version given in cross examination is more probably correct because it accords with Ms. Stapleton's recollection of him saying "go and get help and call the guards". In any event Ms. Stapleton then communicated with the plaintiff as I have already described and he responded to that call.

12. When Garda Delaney arrived on the scene at about 8.25 p.m. he found Colville being restrained by both Mr. Byrne and the plaintiff. Meanwhile McCormack had arrived at the scene but left more or less at the time of the arrival of the guard. The guard went after him and asked him to return, which McCormack did. The guard then proceeded to take particulars. Colville was very aggressive and was kicking and threatening and indeed struck the guard. Garda Delaney called for police backup. While all this was going on the plaintiff was helping to restrain Colville. McCormack interfered and tried to pull the guard away from Colville. He was directed by the guard to go away and he did so. The guard continued to try and deal with Colville, who was being held by Mr. Byrne, assisted by the plaintiff, when McCormack returned, this time brandishing a motorcycle chain. He drew out with the chain, swung it and struck the unfortunate plaintiff on the face. He drew out a second time, but missed on this occasion. At this stage police backup arrived and McCormack and Colville were arrested.

13. I am satisfied from the evidence that the assault on the plaintiff took place after the police backup arrived and not as was originally said in his evidence by Mr. Byrne, before that event. The version which I prefer is consistent with the account given by the guard and indeed with the statement made by Mr. Byrne on 5th April, 2002.

14. I must now consider certain factual matter which is pertinent to the defendant's contention made both at the conclusion of the plaintiff's case and at the end of the evidence to the effect that it bears no liability to the plaintiff for what occurred.

The Defendant's Security Arrangements
15. The only evidence adduced by the defendant in relation to its security arrangements came from Mr. Byrne.

16. He is no longer employed by the defendant and now works as a bodyguard in Haiti.

17. He served in the defence forces for a period of three years. During that time he was attached to an infantry division but had special forces training dealing*, inter alia*, with unarmed combat.

18. The only training which he received from the time that he joined the defendant was confined to procedures to be followed by reference to a written protocol. The protocol was not put into evidence. That training was given on the job over a period of 12 months whilst he worked at the defendant's Clonmel store. No training was given in Thurles. There may have been a similar protocol in Thurles but he never had occasion to refer to it. At the time of the incident he had been in Thurles for one and a half years. He said he knew the terms of the protocol by heart.

19. He accepted that the protocol provided that, if outnumbered, a security officer should get help.

20. Normally three security personnel would be on duty at the store. They consisted of the security manager, Mr. Byrne and a part-time security officer.

21. On the evening in question he was the sole security officer on duty. This was so despite the fact that the store was open for late night shopping on that occasion. The security manager had gone off duty at about 6.00 p.m. and there was no part-time security officer on duty.

22. As sole security officer he had responsibility for all three parts of the defendant's store. That is to say drapery, grocery and off-licence.

23. When more than one security person is on duty each is equipped with a two-way radio. That permits of communication between the security staff at the touch of a button. As Mr. Byrne was on his own he was not carrying such equipment since there was nobody with whom to communicate. Consequently the only way in which he could communicate with any member of the defendant's staff was by means of a mobile phone. That provides a much slower method of communication. He used his mobile phone on the evening in question to contact the police.

24. He admitted that the whole incident took about 20 minutes during which time he was unable to effectively communicate with anyone of the defendant's staff. Neither did he receive any assistance from any member of such staff. The only help he got came from the plaintiff.

Conclusions on the Evidence

25. The security arrangements which the defendant had in place on the evening in question were substandard. To ask one person to take responsibility for the security of the entire of the defendants shop consisting of drapery, grocery and off-licence was not reasonable.

26. The absence of a two-way radio was a considerable impediment to Mr. Byrne being able to carry out his duty and deprived him of the ability to call for backup from the defendant's personnel as a matter of urgency.

27. Mr. Byrne attempted to do his duty as best he saw it. Given that he was dealing with two intoxicated persons he would have been more prudent not to have attempted to detain Colville. He was alone and outnumbered. They were armed with bottles. It was very likely that the already violent Colville would be joined by McCormack when he was being arrested. Both were intoxicated.

28. Under the terms of the protocol he ought to have sought help rather than attempt an arrest.

29. I am satisfied that when he found himself dealing with a violent and resisting Colville he shouted to Sadie Stapleton to get help and to phone the guards. He also, I find as a fact, called on the plaintiff to assist him.

30. The plaintiff responded to that call and assisted Mr. Byrne in the manner described. He did so at the requests of Mr. Byrne and Ms. Stapleton, who made her request on the directions of Mr. Byrne.

31. Mr. Byrne was certainly in need of help. He was dealing with a violent and aggressive person who was armed with at least one bottle and was endeavouring to use it on Mr. Byrne. Colville was engaged in a joint endeavour with McCormack and although the latter was not present in the immediate vicinity of the arrest he was likely to arrive there very quickly and indeed did so.

The Legal Position

32. It is common case that the plaintiff went to the rescue of Mr. Byrne. Both sides agree that the case falls to be determined by reference to the law on rescuers. Both sides quoted passages from *McMahon and Binchy's Law of Torts (3rd Edition)* in support of their respective arguments.

33. For the plaintiff it was pointed out that the legal position of the rescuer has undergone a transformation in recent years. No longer the Cinderella of the law he is now it's darling, counsel contends, with acknowledgement for that colourful description to Fleming's Law of Torts (9th Edition, 1998), p. 186. The plaintiff relies upon a passage from the judgment of Cardozo J. in *Wagner v. International Railroad Company* [1921] 232 N.Y.S. 176 where he said:-

> "Danger invites rescue. The cry of distress is the summons to release. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."

34. The defendant contends that liability attaches to it only in circumstances where it has been guilty of negligence in creating the situation of actual or apparent peril. It says it was not guilty of any negligence on this occasion.

35. At the conclusion of the plaintiff's case I declined to accede to an application for a non-suit taking the view that there was a prima facie case made out against the defendant. Having heard the defendant's evidence and submissions I conclude that the plaintiff is entitled to succeed in his claim against it. I do so because I am satisfied that the defendant was guilty of negligence for the following reasons.

36. First, the employment of a single security officer to cover the entire of the premises on an occasion of late night shopping was inadequate. There was no security back up for him. Secondly, the only method of communication that he had with other members of the defendant's staff was a mobile phone. That was much less efficient than the two-way radio which would have been in operation had other security personnel been on duty at the time. Thirdly, Mr. Byrne conscientiously attempted to do his duty in circumstances where it would have been more sensible to have adopted a different approach. When confronted with two drunken louts, both with bottles in their jacket pockets, it would have been safer to have contacted the police before endeavouring a citizen's arrest of Colville. The police station is next door to the shopping centre and closed circuit television was in operation in the defendant's store. The protocol which I was told about does not require a security officer to attempt an arrest in circumstances where he is outnumbered. Mr Byrne negligently breached that protocol and the defendant is vicariously liable for that act. The situation requiring assistance of a rescuer was reasonably foreseeable and was brought about by a combination of Mr. Byrne's non-adherence to the protocol and the defendant's failure to provide appropriate backup for Mr. Byrne.

37. Counsel for the defendant indicated that if I were to find in favour of the plaintiff it would mean that security officers should not attempt to detain suspected shoplifters and so I would be writing a shoplifters' charter. I haven't the slightest intention of doing so nor does my decision amount to such. There would have been little difficulty in bringing the situation under control if the defendant had a sufficient number of security personnel with the appropriate two-way radio equipment in operation on the evening in question. Alternatively the protocol could have been observed, the police called, the suspects observed and arrested afterwards.

Damages
38. The plaintiff was struck in the face with a heavy link chain with such force that he fell back against a wall. When Colville and McCormack had been arrested the plaintiff was taken to the nearby police station. His face was cleaned up by members of the force. He was taken by ambulance to Cashel Hospital, where he was x-rayed. The following day he went to Waterford Regional Hospital. On examination he had a laceration over the nasal bridge and a swelling over the right cheek. He was found to have suffered an injury to his nose with a possible fracture of his nasal bones. He also had a swelling of his right cheek and epistaxis from the right side of his nose. Analgesics were prescribed and he was advised to attend the Ear, Nose and Throat department concerning the nasal injury. He did so. He was found to have a laceration to the nasal dorsum. There was a fissure fracture affecting the tip of the nasal bones shown on x-ray. He was seen again later in July complaining of pain in his neck and the back of his head. He was diagnosed as having soft tissue injury to his neck secondary to the injuries to his face. He was prescribed analgesia for this.

39. When he was reviewed in February, 2004, he continued to complain of soreness to the top of his nose and intermittent blockage of the nose. He also complained of pain on the right side of his upper jaw which came on about six weeks after the incident. It was recommended that the pain in the upper jaw be investigated by a maxillo facial specialist.

40. He went to see Professor Sleeman who is such a specialist. Professor Sleeman found that he certainly had a problem in his jaw in that he couldn't open it to any satisfactory degree. He suspected a problem with his right temporo mandibular joint which would require surgery. Before doing so, however, he required a CT scan to be done. The results of that suggested that the plaintiff had a problem with the joint which would be amenable to surgical management. Accordingly an orthrocentesis was carried out in February, 2005. It did not solve the plaintiff's problem. Consequently an exploration of the joint was carried out by Professor Sleeman. His examination found little pathology present and all seemed to be normal. However, he directed that an MRI scan of the joint be done to see if that would help inform him as to why the plaintiff had pain and reduced movement in the joint. That examination showed a dislocated thinned incompletely reducing disc on the right hand side.

41. Apart from the nose and jaw injuries the plaintiff also complained of the injuries to his neck and shoulder. He was seen by an orthopaedic surgeon in respect of those complaints. He took the view that the plaintiff's neck and shoulder injuries should heal fully in time. Any ongoing pain is likely to subside in the future and the plaintiff will not suffer any permanent deficit in his neck, lower back or shoulder as a result of the assault.

42. As a result of the injuries the plaintiff lost a good deal of time from work. He had an accident at work in November, 2002, which gave rise to injuries resulting in him being off work for about two to three months. Apart from that period I am satisfied that his other absences were as a result of the assault in suit and have been medically certified. He is at present having physiotherapy and I think it likely that he will return to normal work within the next few months.

43. The plaintiff had a horrible experience which gave rise to substantial injuries to his jaw, nose and neck. He has had to have two operations carried out in relation to his jaw and is still having ongoing treatment for the neck injuries. His ability to participate in sport (which he enjoyed greatly) has been much diminished.

44. I assess damages as follows:-

(1) For pain and suffering to date €40,000;

(2) For pain and suffering into the future €10,000;

(3) Nett loss or earnings to date and for the next few months €28,000;

(4) Agreed special damages €3,201.

(5) Total €81,201.

45. In conclusion, I cannot but comment on the shabby way the plaintiff was treated by the defendant. Despite his bravery in going to the assistance of one of its security men he received not a word of thanks or acknowledgement from Dunnes Stores until the commencement of his cross examination in this case, four and a half years after the event. No real effort was made to make any contact with the plaintiff to enquire as to his welfare or to thank him for what he had done.

Result
46. The plaintiff succeeds and there will be judgment in his favour for €81,201 and costs.