

## THE HIGH COURT

Record Number: 2008 No. 3162P

**Between:****Mark Rodgers****Plaintiff****And****J.A.C.K.S Taverns Limited****Defendant****Judgment of Mr Justice Michael Peart delivered on the 18<sup>th</sup> day of July 2012:**

1. The defendant owns a licensed premises known as The Balally Inn, of which at the relevant time the plaintiff was a regular patron, including on the 28<sup>th</sup> October 2006.
2. The plaintiff's niece is Kerry Ann Pegman. Ms. Pegman, then aged 16, had despite her age worked as a part-time worker at this pub for a couple of years up to August 2006. She says that on this particular night, while she was attending a fancy dress night at the pub with her friends, the manager had asked to if she would help out and work the night in question as the pub was extremely busy, and that she reluctantly agreed. The manager in question denies that he asked her to work that evening, and denies that she was working.
3. Leaving aside that issue for the moment, it is Ms. Pegman's evidence that close to midnight on Saturday 28<sup>th</sup> October 2006 she told the bar manager that she wanted a cigarette break. Her manager seems to have told her that she could, provided that she smoked outside. She went out the side door of the pub where other smokers were gathered, and lit a cigarette. As she was talking to a couple of 'locals' outside, a man approached her and asked for a light. She obliged by giving him her own cigarette for that purpose. No sooner had she done so than this man's wife emerged from the pub, smashed his head off the door of the premises, then grabbed Ms. Pegman by the hair, forced her to the ground, picked her up again and threw her against the door of a car which was parked adjacent to pathway outside the door in question. At that point another girl arrived on the scene and held Ms. Pegman by the arm, followed by two more. Ms. Pegman fell to the ground once more, whereupon she was kicked and beaten by these women, all the time holding her own hands up to her head in order to gain what protection she could against her assailants. Ms. Pegman says that these women were members of a traveller family living locally, members of which had to her knowledge been previously barred from this licensed premises on more than one occasion but had apparently been allowed back by the management.
4. The plaintiff happened to be exiting the pub by the main door (not that outside which this incident occurred) while this incident was in progress, and says that having looked down to his right towards the side door, he saw that his niece was under attack there. He went down to where the melee was taking place, pushed the several women away as best he could, and threw himself on top of his niece to protect her. He then heard glass breaking, whereupon a man stuck a broken bottle into his face. The plaintiff got up from the ground, a scuffle broke out whereby the plaintiff tried to grab the broken bottle, and he was struck in the face again by the same man with the broken bottle and close to his right eye. More people apparently emerged from the pub at this stage and the fight seems to have enlarged. Nevertheless, and in spite of his injuries, the plaintiff succeeded in pinning his assailant down on the bonnet of a nearby car. However, this man again struck the plaintiff with the broken bottle, this time pushing it into his mouth area, cutting his lip and gums. While these injuries were being inflicted, other persons, male and female, set about assaulting him also, including a girl with another broken bottle who struck him with it in the left side of his neck. Needless to say he was gravely wounded by these assaults and was bleeding profusely. The fighting appears to have expanded beyond its original participants, and some idea of the scale of it can be gleaned from the evidence of D/Garda Barron who was first on the scene, and who radioed for assistance when he saw what was going on. He stated that in total some 32 members of An Garda Siochana were mobilised to the scene in order to deal with the situation.
5. At some point this fight abated and the plaintiff was taken away to the safety of a nearby doorway. He was provided with a T-shirt to stem the bleeding while the Gardai and ambulances arrived. The plaintiff and others were attended to at the scene in relation to injuries. The plaintiff refused to go to hospital in an ambulance, as it would be bringing him to the same hospital to which members of the opposing group were also being brought by ambulance. Instead, he was given a lift by a relative to a different hospital.
6. The plaintiff sues the defendant for damages for negligence in respect of his injuries. His complaint of negligence against the defendant, as articulated by him in his evidence, is that the management of the pub who knew or ought to have known that this particular group were known to cause trouble and who had been previously been barred and allowed to return, should have employed security men on the door of the pub on this busy Halloween fancy dress night in order to ensure that this sort of incident did not occur. The defendant on the other hand makes the point, firstly, that the fight did not take place in the pub, but outside on the pavement, and secondly, that in any event there had been no warning throughout the afternoon and evening of any trouble, that the incident happened suddenly, spontaneously and without any prior warning, and that in those circumstances the pub could not be reasonably expected to have anticipated it. Accordingly, the defendant pleads that it was not in breach of its duty of care to the plaintiff, who, in any event, was not the person first assaulted by patrons, since the assault upon him occurred only when he decided to intervene by going to the rescue of his niece.
7. The plaintiff's case depends upon his evidence, and that of Ms. Pegman who had worked in the pub on a part-time basis over the previous two years, that the persons who assaulted Ms. Pegman and the plaintiff who came to her rescue were known troublemakers, had been barred previously, and allowed back again. This is the basis on which the plaintiff contends that the management of the pub ought to have anticipated that on this night there might be trouble and have taken the precaution, in the interests of its patrons' safety, of engaging security staff. It is contended that had they done so, the injuries to the plaintiff would not been sustained. It is not clear to me whether the plaintiff's contention is that the employment of such security would have served to prevent that group of

persons generally or certain particular members of it from entering the pub in the first place, or whether the presence of security men outside the main door of the pub would simply have prevented this fracas breaking out at the side door where this incident took place. Neither is it clear whether it is being contended that security men should have been placed outside both doors, and/or perhaps inside the premises as well. There was no expert evidence called as to what would have been an appropriate level of security on this night to have prevented the assault on Ms. Pegman, and, by extension, the plaintiff.

8. This pub was the plaintiffs 'local' for about ten years by the date of this accident. It was where at that time he would regularly go for a drink and he knew the premises well and the staff who worked there. It appears that he would go there about twice a week, though the defendants say he was there seven days a week. This particular night was a Saturday night on the Halloween weekend, and there was some sort of fancy dress event being organised there. The plaintiff decided to go along to the event as some of his friends would be there. He says he got there somewhere between 9.30pm and 10pm. He says also that he was not drinking alcohol at that time. The defendants do not accept that evidence. They say he was in the premises from the afternoon, when he was watching football on the television. They say that he was not drinking orange juice as he has stated, but was drinking lager. They also say that he had left the pub about 40 minutes before this incident took place. One of the barmen stated that in fact the plaintiff, when exiting the premises about 40 minutes before the incident, had said 'goodnight' to him.

9. The plaintiff did not know the members of this traveller family group personally, but knew who they were. He also stated that he knew that they had been barred from the pub in the past. It is not clear whether by this he means that particular members of that family had been barred or whether the entire family group had been barred. But he could not understand how they were allowed back into the pub and were being served alcohol that evening. He said that there were frequent such incidents at this premises. The only specific incident he related was one where somebody is said to have ridden a motor bike through the premises. He agreed during cross-examination, that he had never raised any concerns himself to any of the bar staff. He also agreed that if he had serious concerns about safety at the pub he need not have frequented it. In answer he stated that he went there that night because some friends were going. But it has to be said nevertheless that he was a regular visitor to the premises at that time and for many years prior to it. He must have known the pub, the type of clientele, and the staff there very well indeed.

10. Ms. Pegman as I have said worked at this pub on a part-time basis for a couple of years. She says that her mother did not like her working there at such a young age, but she did so nevertheless as she wanted to earn some money. She had stopped working there by the time of this incident, but says that on this particular night she had gone as a patron because some of her friends were involved in the fancy dress event. But she says that during the evening she was asked by the manager to help out because they were so busy, and that reluctantly she agreed to do so. The bar manager denies that she was asked to work that night at all. Nothing in particular turns on that, though it is a curious controversy. She has stated that she knew the pub well from her time working there. She knew the clientele who frequented there, and she knew the staff. She stated that this was not a quiet pub, and that it lost many customers as a result. She described it as an unruly pub. She stated that there were frequent arguments and not many rules. She stated that there were frequent fights also, which usually resolved themselves. She described a few incidents which she recalled. She stated also that the Gardai had been called on a number of occasions when there was trouble which the management could not deal with themselves. However, there has been evidence also from D/Garda Barron from Blackrock Garda Station. He has stated that he had never been personally involved in any other incident at this premises during the 5 years he had been stationed at Blackrock. As far as he is concerned, the premises did not have a bad reputation with An Garda Siochana.

11. She has stated also that the particular family group involved in the attack upon her and the plaintiff that night had been barred previously. She stated that the barring had at some point been lifted, and had also again been re-imposed. She seemed to recall that the last barring of this group had happened after trouble broke out at the premises when the group were there after a funeral "*the previous September*". As she had not been working at the pub since August 2008, I am unclear whether she means September 2007, or whether she had just heard that the family had been barred in September 2008. The evidence does not clarify that. But she could not give any detail as to the dates upon which this had happened. She stated also that during the times she had been working at the premises she had never previously been hurt in any way or attacked.

12. When describing the incident in which she was attacked, she stated that within a few seconds of her giving the man a light his wife had attacked him and that "instantaneously" this woman had grabbed Ms. Pegman by the hair. She said that she did not expect or anticipate this occurrence and indeed admitted that she could not see how anybody else could have anticipated this occurrence either.

13. James Kavanagh, the assistant manager at the Balally Inn has given evidence. He is an experienced barman having spent over 20 years in the trade. He has worked at the Balally Inn for twelve years, and says that he would not be working at these premises if they were as rough and prone to trouble as the plaintiff is asserting. He denies that the pub has a reputation as an unruly premises or has any sort of rough reputation. He disputes that the plaintiff arrived at the pub only at 9.30-10pm, and says that the plaintiff was there during the afternoon. There is clearly a conflict of evidence in that regard which I cannot resolve conclusively. Neither can I resolve the conflict of evidence as to whether the plaintiff was drinking orange juice that evening or lager, as contended for by Mr Kavanagh. Neither can I resolve the conflict of evidence as to whether Ms. Pegman was or was not asked to work that evening. However, I do not believe that any of those particular issues are crucial for my determination of the plaintiffs claim

14. Mr Kavanagh remembers the night in question well. He had no concerns that there might be trouble that evening. He states that he knows all the regular customers very well having worked there for so long. His evidence is that late into the evening while he was working in the premises he noticed five or six persons making their way to the front door of the premises. His attention was drawn to this immediately, since it was unusual for five or six persons to suddenly get up and leave their drinks on the table. Mr Kavanagh says that he then went to the main door himself and he saw a row between two females. He tried to break it up, but in the end he closed all the doors and windows and called the Gardai, who appear to have arrived quite quickly. He stated that he had no way of anticipating that this sort of incident would occur.

15. There was some controversy surrounding the existence of an Incident Book at these premises. Mr Kavanagh stated that there was such a book kept, and that he would enter details of any incident where the Gardai were called to the premises. He was certain that this particular incident was recorded in the book. However, he did not have the Incident Book for 2006 in Court. He was asked to make arrangements for somebody to bring it to Court. He attempted to do so, but apparently whoever was asked to locate it and get it to Court in the afternoon could not locate it. While I was not at all happy with the evidence of effort made to find the Incident Book and bring it court, at the end of the day that matter is not determinative. Although it prevents the Court from knowing what details are in the book, and prevents the plaintiff from seeing if there is any reference to the group in question being known trouble-makers, or whether it describes other incidents involving this group which might be considered to have placed an obligation on the owners of the pub to employ security personnel or take any other precautions for the safety of patrons, its absence cannot in my view to be so sinister as to attract an adverse inference for the veracity of Mr Kavanagh's evidence.

16. The absence of the Incident Book was argued by the plaintiff to be relevant to a plea at paragraph 7 in the defendant's Defence that the plaintiff himself in fact had instigated this incident. Mr Kavanagh does not know from where that allegation emanated. It was not he who swore the Defendant's affidavit of verification, but his employer, Mr Foran. While Mr Foran was in Court, he was not called to give any evidence. He had not been present at the premises on the date of this incident. No evidence was led by the defendant to support that plea. In my view it ought not to have been made, and it is right that it was not pursued in cross-examination. Had it been, and if the plaintiff was to succeed in obtaining an award, it could have been argued that such a plea should attract an element of aggravated damages as a result of the manner in which the case was defended.

17. Mr Kavanagh was asked about what policy existed in relation to barring a person or persons from the premises. He stated that there was such a policy. But it seems to be an unwritten policy, without any specific criteria as to what behaviour would result in a barring. He indicated that if a person was fighting in the premises he/she would not be served. He explained also that simply because a person was involved in an argument in the premises would not necessarily result in that person being barred. Even the use of abusive language would not automatically result in a barring. It seems that in the main a person will be barred from the premises if he or she was fighting in the premises. He stated that if a person was barred, it meant that the person would not be readmitted and served again. In his own words "if you are barred you are barred". That conflicts with the evidence of the plaintiff and of Ms. Pegman both of whom stated that they were aware that the group involved in the incident this night had been barred on a couple of occasions and allowed back in again. It would appear that there is no written book or other record as such of who is barred at any particular time. That information seems to be only within the actual knowledge of whichever member of staff told a person he/she was barred. In such circumstances it is unclear to me how any staff besides the person who had actually barred the person would know that a particular person could or could not be served if they entered the premises. It seems to be an informal system.

18. Mr Kavanagh stated that he did not consider the Balally Inn to be a rough pub or one with any sort of bad reputation. In support of that belief he stated that this case was the first occasion on which he had had to come to a court. He also stated that there had never been any objection to the renewal of the intoxicating licence, by the Gardai or by others. There was also evidence given by Garda Barron that he was not personally aware of any other incident in these premises prior to the date of this incident or in the three years subsequent to it. He stated that these premises did not have "a reputation". I take this to mean that it was not known to be a pub where there was likely to be trouble or where there were frequent incidents to which the Gardai were called.

19. John O'Reilly, a barman at the premises, also gave evidence. He denied that this was an unruly premises, and stated that if it was, he would not be working there. In relation to patrons who might cause trouble he stated that they would be spoken to and asked to leave, and given a warning. But such persons could be allowed back to the premises after two weeks. On the other hand if there was a punch thrown or other fighting, such persons would be barred permanently. Again, there was no evidence of how such action was recorded for the benefit of other staff who may not have been at the premises when the barring occurred, or indeed for the benefit of new staff who may become employed at some later date and who, for obvious reasons, would not be aware of who was barred. There is quite clearly some looseness in the whole area of rules relating to barring, and the recording of such incidents.

20. Mr O'Reilly stated that as far as he was aware the particular family group referred to by the plaintiff and Ms. Pegman had never been barred from these premises.

21. Mr O'Reilly did not see the incident in which the plaintiff was injured outside the premises, though he had observed the five or six people who had suddenly gone outside leaving their drinks behind them. At that point he made to go out himself to see what was happening, but he was told by Mr Kavanagh to stay behind the bar. He says that about a minute later Mr Kavanagh told him to telephone the Gardai, and he did that.

22. There are many conflicts of evidence in this case. There is disagreement as to whether the plaintiff had been in the pub during the afternoon, or whether he went there only at 9.30pm. There is disagreement as to whether or not he left the pub 40 minutes or so before the incident occurred, and had returned. There is disagreement as to whether he was drinking orange as he states, or lager as the barman says. None of this matters really, and in particular in relation to the last point, nobody has said that the plaintiff was intoxicated or drunk. There is disagreement as to whether or not Ms. Pegman was asked, while she was there as a patron, to work that evening as she says because the pub was so busy. Again that does not seem to matter.

23. There is disagreement as to whether particular members of the traveller family alleged to have been involved in this incident, or the entire family group, had or had not been barred from the pub. There is disagreement as to whether or not the pub is an unruly pub with frequent incidents of rowdiness, rows and fighting. The only evidence that certain persons may have been barred and readmitted from time to time is the evidence of Ms. Pegman. I am quite satisfied that her evidence is honestly given, and that she may believe that from time to time certain people were barred, and maybe even certain members of this particular family group. But there has been no evidence that the entire family group was barred, and no evidence that the particular members who attacked the plaintiff and Ms. Pegman were persons who had been barred. Also, I would have thought that if this pub was one which attracted a rough crowd, and where there were constant incidents of this kind, or even incidents of lesser seriousness, An Garda Síochána would be aware of it. The evidence has been that this pub is not one in relation to which the Gardai have concerns, or have been called in relation to incidents.

24. I cannot be satisfied on the balance of probabilities that this is a pub where frequent incidents occur such that the owners and management ought to have considered that particular security measures should be taken for the protection of patrons. I imagine like any other pub in a small residential area there are incidents occasionally which the staff have to deal with. Unfortunately, it seems to be normal for people to drink to excess, and there is an inevitability that occasionally this will lead to rows and disagreements of one kind or another and may lead to some violence breaking out either in the pub or outside it. But the nature of these premises is different to a pub or hotel which also has a disco, and from which a great many people will emerge at about the same time i.e. when the disco ends. That was the kind of situation which was addressed in the judgment of Herbert J, in *Meagher v. Shamrock Public Houses Limited trading as The Ambassador Hotel*, unreported, High Court, 16<sup>th</sup> February 2005. That was a case where a disco was run by a hotel at its premises and which had a permitted capacity of 850 persons. It was a premises where according to the evidence assaults and public order offences occurred every two or three weeks. The plaintiff in that case was assaulted in the car park after the disco had ended at about 3.30am and while he and his wife were awaiting a taxi to take them home. A great number of patrons had exited into the car park area at the conclusion of the disco. The plaintiff was assaulted outside the main hotel entrance, and while there was some security presence at the door of the disco, those personnel could not see the main door of the hotel itself. It was suggested by the plaintiff in that case that the presence of clearly identifiable security staff at the hotel entrance should have been employed by the defendant. It is the case also that in that case the incident in which the plaintiff was injured was over in less than a minute, and that there had been nothing that would have caused the defendants to consider that such an assault would take place. There was expert security evidence given on the plaintiffs behalf which supported the submission that security at the main hotel door could have prevented this assault occurring. Herbert J. on the evidence in that case found that the defendant was aware of the danger of rowdiness and of assaults on its premises during and after functions at the disco. Accordingly he was of the opinion

that it was foreseeable by the defendant that unless reasonable care was taken by it to prevent such behaviour, visitors such as the plaintiff might be assaulted and thereby suffer injury. He stated that the defendant's duty was to take reasonable care to protect patrons, and that the duty could not be such that the defendant was not in the position of an insurer.

25. The present case there was no reliable evidence of previous incidents of a kind that should have alerted the defendant to the danger to patrons. There is, I appreciate, the recollection by Ms. Pegman that this family was barred previously. But it is not evidence which I can rely on given its lack of certainty, and also the fact that it is unclear who exactly had been barred. We do not know if it was particular members of this family or the entire clan, for example.

26. This case is different also because it is not a late night disco where many hundreds of young patrons congregate until the early hours of the morning and then spill out en masse into a car park to await their transport home. The defendant's pub is in a relatively quiet residential area. The clientele are for the most part regulars and from the immediate catchment area of the pub. The plaintiff knows the pub well, and the barmen know most of the patrons. It is a very typical suburban pub, which has not come to the attention of An Garda Síochána in any adverse way. That has been the evidence from Garda Barron in this regard, and I have no reason to doubt his evidence. Given that lack of a relevant history of violent incidents, there is no basis in my view for a conclusion that the defendant ought to have considered that on this evening there was a likelihood or even a reasonable risk that there would be violence or behaviour which warranted, on an exceptional basis, the employment of security personnel.

27. The assault on the plaintiff in this case, when he went to the rescue of his niece, and he is to be highly commended in that regard, is an assault upon him, and her for that matter, which happened "out of the blue". I accept that there had been no warning throughout the day, and particularly the evening that such an incident might take place. In my view the duty of care owed by the defendant to its patrons is to take all reasonable steps to safeguard patrons on their premises. I would extend that to a duty to safeguard patrons immediately outside the premises also. But the duty is to guard against risks and dangers that are foreseeable. I do not consider that it was reasonably foreseeable, or indeed foreseeable at all, that somebody such as the plaintiff would be assaulted in the manner he was when he went to the rescue of his niece who in turn had been assaulted by a member or members of a particular family, after one of them had asked his niece for a light. The fact that the people concerned were in the pub, and presumably drinking there, does not automatically make such an assault foreseeable. To hold that it did would mean that every public house in a quiet suburban area would need to have security personnel both inside and outside its premises just in case an incident of assault might occur, even where there was no history of such occurrences. I do not believe that there was any reason for the defendant to foresee that there could be trouble on this particular evening, notwithstanding that it was a Halloween weekend. What occurred was a spontaneous eruption of violence which the defendant could not reasonably be expected to have anticipated and to have tried to prevent in advance by the hiring of security personnel. There has been no professional evidence of what type or quantity of security personnel might be required to have prevented this assault, or where they might have been located.

28. The plaintiff showed great courage when he went to his niece's rescue on this occasion. The behaviour of those involved in these assaults was criminal, and is utterly reprehensible, and to be condemned by every right thinking person. But the fact that such is the case does not mean that the owner of the premises has been negligent or in any way responsible for what happened. I admire the plaintiff's courage, but I am afraid that my admiration is an insufficient basis for a finding of negligence against the defendant, and I must dismiss the plaintiff's claim.