

THE HIGH COURT

[1997 No. 2363P]

BETWEEN

ANN OSBOURNE

PLAINTIFF

AND

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Clarke delivered 13th April, 2006.**1. Introduction**

1.1 This case concerns an incident which took place on 15th August, 1995 when a number of members of An Garda Síochána were engaged in activities at Fitzgerald Park, Mounttown, Dun Laoghaire. There is no doubt but that an incident occurred on the occasion in question but there is considerable controversy as to certain important aspects of the facts and, in particular, facts relevant to this case. Arising out of the incident the plaintiff ("Ms. Osbourne") claims that she suffered significant personal injuries and claims damages (including aggravated damages) for such injuries and for what she claims were breaches of her constitutional rights.

1.2 As indicated above there is a significant controversy over certain aspects of the incident. However some aspects of what occurred can, on the evidence, be stated to be uncontroversial.

2. The Uncontested Facts

2.1 The Gardaí had an interest in a Robert Merrigan who lived in an apartment at Fitzgerald Park. It would appear that Mr. Merrigan was, at the relevant time, suspected of having committed a burglary at a house in Woodland Park which is a short distance from Fitzgerald Park. It would appear that a watch and a sum of money had been stolen from the house concerned and that the description of one of those allegedly involved matched that of Robert Merrigan.

2.2 On foot of that information an application was made on the 14th August, 1995 to a Peace Commissioner, Mr. Fergus Nestor, for a number of search warrants. Some controversy surrounds those search warrants and that is, therefore, an issue to which I will have to return.

2.3 In any event relying upon the search warrants a number of Gardaí attended at Fitzgerald Park on the evening of 15th August for the purposes of executing those search warrants. The warrants included one in respect of No. 44 Fitzgerald Park at which it would appear that a cousin of Robert Merrigan resided. A second warrant related to No. 45 Fitzgerald Park which is the property in which Ms. Osbourne lived. Both No. 44 and No. 45 are two storey dwellings within an apartment block. The front access is from a first floor external corridor. In both cases there is a rear balcony and it seems that it is relatively easy to go from one balcony to the next. There was thus relatively easy access at the rear from No. 44 to No. 45.

2.4 It does not appear to be in dispute that the Gardaí attempted, initially, to gain access to No. 44. It would seem on the evidence that Robert Merrigan was present at the relevant time in No. 44, that the Gardaí sought to execute the warrant in respect of that premises, that they were initially refused access and were preparing to break in the door to No. 44 when that door was opened allowing the Gardaí to enter. It would also appear that just as the Gardaí were entering Robert Merrigan left through the rear balcony and appeared to enter into the neighbouring dwelling at No. 45.

2.5 In those circumstances it would appear that the Garda in charge (then Sergeant now Inspector Hogan) went back to his car to obtain the warrant in respect of No. 45 which he had left in the car. While Inspector Hogan was engaged in that process two Gardaí would appear to have been left in No. 44 for the purposes of apprehending Mr. Merrigan in the event that he should come back into that property. A number of other Gardaí (probably 3) remained in the corridor outside of both Nos. 44 and 45.

2.6 When Inspector Hogan returned with the warrant in respect of No. 45 it would appear that Robert Merrigan was present in No. 45 when the Gardaí knocked at the door. Robert Merrigan asked the Gardaí whether they had a warrant and was informed that that was indeed the case. Notwithstanding this Robert Merrigan did not open the door and the Gardaí proceeded to break in.

2.7 Thereafter an attempt was made to arrest Robert Merrigan within No. 45 with a struggle ensuing between two Gardaí and Mr. Merrigan. It is also common case that the mother of Robert Merrigan, Frances Merrigan, arrived as the Gardaí were attempting to subdue Mr. Merrigan. It is common case that after a period Mr. Merrigan was subdued and was taken from the property under arrest by a number of Gardaí.

3. The Disputed Facts

3.1 In addition to the fact that there are issues about the search warrant used on the occasion in question there are number of factual disputes between the parties. On Ms. Osbourne's case she was sitting in a common area of the apartments with a number of friends drinking tea when a significant force of Gardaí arrived. She gave evidence that after a period she was informed that the Gardaí were "kicking our door". She gave evidence that she went up the ramp which leads to the outdoor corridor but that when she got to her apartment "the door was on the ground". She says that she then went into the apartment and found Robert Merrigan on a couch in the living room with his mother lying over him and two "very large policemen beating him with batons". She says that she asked the Gardaí to leave as her children were crying outside the door but was told to "f-off". She then says she was thrown against the mantelpiece in her living room and in the course of being manhandled out of the premises she "got a kick in the leg" and one the Gardaí stood on her foot. Two other witnesses were called on behalf of Ms. Osbourne who, at least in part, corroborated her account though in respect of one of those witnesses, Frances Merrigan, there was a significant difference of recollection as to whether she (Mrs. Merrigan) or Ms. Osbourne first arrived at the apartment.

3.2 The Garda account is quite different. None of the Gardaí present indicated that they had any recollection of seeing Ms. Osbourne. It would appear to be common case that a crowd gathered in the corridor near Ms. Osbourne's apartment as the incident developed. The precise size of that crowd and the extent to which it was, as asserted in the Garda evidence, hostile to the Garda operation are a matter of some controversy. It is accepted on behalf of the defendants that Ms. Osbourne may well have been present outside her apartment. In addition while the Garda evidence was to the effect that the crowd was significantly hostile to their presence there is no evidence which suggests hostility on the part of Ms. Osbourne.

3.3 Furthermore the Garda evidence was to the effect that no one was permitted to enter the apartment after the Gardaí had broken

down the door, with the exception of Francis Merrigan whom, it was said, was permitted to enter with a view to her speaking to her son for the purposes of attempting to calm him down. On the basis of the Garda evidence, therefore, it is contended that Ms. Osborne never entered her apartment on the occasion in question. While there is no direct evidence from the Gardaí present as to any involvement on the part of Ms. Osborne it is accepted that it might have been possible that she received an injury in the course of the scuffles which the Gardaí contend occurred as Mr. Merrigan was being led from the apartment under arrest.

4. The Issues

4.1 The issues which arise in this case are, therefore:-

- (a) The validity of the warrant under which the Gardaí forcibly entered Ms. Osbourne's apartment;
- (b) The consequences, for the purposes of this action, of such a warrant being invalid (if that should be the case);
- (c) Whether, as a matter of fact, Ms. Osbourne was injured, as she contends, while being physically removed from her apartment;
- (d) Whether, if it should be found to be the case that she was so injured, same occurred in a manner giving rise to a claim in damages as against the Gardaí concerned;
- (e) If necessary damages.

4.2 I propose dealing with each of those matters in the order in which I have set them out.

5. The Validity of the Warrant

5.1 Each of the relevant warrants was issued under s. 42(1) of the Larceny Act, 1916. The section provides as follows:-

"If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or possession or on his premises any property whatsoever with respect to which any offence against this act has been committed, the justice may grant a warrant to search for and seize same."

5.2 As indicated above then Sergeant Hogan had in his possession four warrants relating to different premises in the Fitzgerald Park area and in particular warrants in respect of both Nos. 44 and 45. His stated basis, as given in evidence, for seeking warrants in respect of each of the premises was that it was his experience that Robert Merrigan attempted to move from one premises to another whenever he found himself being sought by the Gardaí. Given that the property which had been stolen was movable property (in particular the watch) then Sergeant Hogan indicated that it was his belief that the property was likely to be found on Robert Merrigan. In those circumstances he stated that he had a belief that the stolen property would be found wherever Robert Merrigan was found. His stated basis for believing that it was possible that the property would be found at No. 44 was the fact that a cousin of Robert Merrigan lived there and that he (Robert Merrigan) was known to frequent that property. His stated basis for a belief that the property might be found at No. 45 was the *modus operandi* of Robert Merrigan, to which I have referred, coupled with the easy access from the balcony at the back of No. 44 to the balcony at the back of No. 45 as a means of escape.

5.3 In those circumstances the reason why then Sergeant Hogan indicated that he believed that stolen property might be found at No. 45 had nothing to do with any insinuation in respect of the character of Ms. Osbourne (who was the occupant of that property) but concerned the possibility that Mr. Merrigan might go from No. 44 to No. 45 carrying the stolen property with him.

5.4 While now Inspector Hogan's evidence was challenged in that regard I am satisfied that he was of the belief which he stated and that he had reasonable grounds for being of that belief. The separate sworn informations grounding the applications for the warrants in respect of both Nos. 44 and 45 states the following:-

"On 9th August, 1995, a nearby house, 8 Woodland Mounttown was broken into by two youths who left when disturbed. They had climbed a drain pipe and left rear open window. They took €20 cash and a silver gent's watch. One of the culprits fits the description of Robert Merrigan."

5.5 The Peace Commissioner also gave evidence that then Sergeant Hogan had supplied additional information on oath to him, on applying for the warrants concerned, which satisfied him of the link between the stolen watch and the premises at 44 or 45 Fitzgerald Park. I am satisfied on the evidence that then Sergeant Hogan gave an explanation to the Peace Commissioner in terms similar to that which he gave to the court. I am therefore satisfied that the Peace Commissioner issued each of the relevant search warrants on the basis of an account given by then Sergeant Hogan both in writing and verbally but in both cases on oath and corresponding, in general terms, with the account to which I have referred above.

5.6 Having concluded that then Sergeant Hogan genuinely had the beliefs which formed part of that account and had a reasonable basis for those beliefs I must conclude that the warrants were *bona fide* sought and *bona fide* granted by the Peace Commissioner.

5.7 There is, however, a further technical issue concerning the validity of the warrants. Both s. 42 itself, and the standard form of information used, refer, in the present tense, to the individual concerned having in his custody the relevant property at a specified premises. In those circumstances it does not seem to me to be the case that the section permitted the issuing of a warrant in circumstances where the most that could be said was that there was a possibility that the premises concerned might be used as an escape route. Such a possibility does not seem to me to be consistent with the clear wording of the statute. In those circumstances I am not satisfied that the warrant was valid. Equally I am satisfied that then Sergeant Hogan in seeking the warrant acted *bona fide*, gave an accurate account of his beliefs to the Peace Commissioner, and believed that it was open to him to obtain a warrant based upon that information. I am not satisfied that there is any substance to the contention that then Sergeant Hogan acted in a *mala fide* way in seeking the warrants concerned. Equally I am satisfied that the Peace Commissioner *bona fide* believed that he was entitled to issue the warrants sought on foot of the information on oath given to him by then Sergeant Hogan.

5.8 The warrant was also defective in a technical sense in that the Peace Commissioner failed to cross out the alternative description of, "District Judge" as a potential author of the warrant and it was not, therefore, clear as to the capacity in which the person issuing the warrant had acted.

5.9 While such a practice is undoubtedly undesirable for the reasons indicated in the *People (D.P.P.) v. Edgeworth* [2001] 2 IR 131 it is a mis-description in the sense in which that term was used in *Edgeworth*. At p. 137 Hardiman J. commented on the mis-description in that case in the following terms:-

"The mis-description, and that is the most it can be called, involved in the use of the heading "the District Court" is not a breach of any condition or criterion imposed by the legislature and is simply an error. In my view there is no basis in law for the proposition that this error invalidates a document which accords with all specified requirements of the law."

5.10 In those circumstances I am not satisfied that the error in question invalidated the warrants. Even if I am wrong in that view, there was no basis on the evidence for any reason to believe that any of the Gardaí involved in the execution of the warrant were aware of any such technical deficiency and their actions could not, on that ground, be described as being knowingly wrongful.

6. The Consequences of Invalidity

6.1 I therefore turn to the question of the consequences of the invalidity of the warrant in the light of my finding that it was *bona fide* sought and granted. In the *People (A.G.) v. O'Brien* [1965] IR 142, a search warrant for a premises was deemed to be invalid because an error was made in filling in the address of the house to be searched on foot of the warrant. The case concerned the admissibility of evidence at a criminal trial, where the evidence was obtained on foot of the execution of the warrant.

6.2 At p. 162 Kingsmill Moore J. stated the following:-

"Walsh J., in the judgment which he is about to deliver, is of the opinion that where evidence has been obtained by the State or its agents as a result of a deliberate and conscious violation of the constitution (as opposed to the common law) rights of an accused person it should be excluded save where there are "extraordinary excusing circumstances", and mentions as such circumstances the need to prevent an imminent destruction of vital evidence or rescue of a victim in peril, and the seizure of evidence obtained in the course of and incidental to a lawful arrest even though the premises on which an arrest has been made without a search warrant."

6.3 The passage from the judgment of Walsh J. that Kingsmill Moore J. was referring to reads as follows:-

"In the present case it is abundantly clear from the evidence that it was through an error that the wrong address appeared on the search warrant and that the searching officers were unaware of the error. There was no deliberate or conscious violation of the right of the appellants against arbitrary intrusion by the Garda officers. The evidence obtained by reason of this search is not inadmissible on the constitutional ground."

6.4 *O'Brien* has the merit of being a case dealing specifically with a search warrant. While it is concerned with the admissibility of evidence there is no reason, in my view, not to apply the overriding principle to the question of the consideration of any other consequences of reliance upon an invalid warrant. I am therefore satisfied that no claim in damages (whether for breach of constitutional rights or in tort) can be brought in respect of actions taken on foot of a warrant which though apparently valid was technically infirm, but was not relied upon in circumstances which amounted to, as Walsh J. put it in *O'Brien*, a "deliberate or conscious violation" of the rights concerned. There could, of course, be a deliberate or conscious violation of rights where a false basis was put forward for obtaining the warrant or where a basis was put forward which, while correct on the facts, was one which the person seeking the warrant knew did not justify the grant of the warrant. Furthermore it is implicit from the judgments in *O'Brien* that reliance on a warrant which is subject to a technical defect but where that defect was known, prior to the execution of the warrant, by those involved in its execution might also amount to a deliberate or conscious violation of rights.

6.5 Such an overall view of the entitlement to damages arising from the consequences of the execution of a warrant which is technically defective is, in my view, consistent with the jurisprudence of the courts in the analogous area of breach of statutory duty by officials or others charged with carrying out public functions. In such circumstances it is now well settled that damages do not arise in the absence of a deliberate and knowing breach of statutory obligation.

6.6 Applying those principles to the facts of this case I am not satisfied that it can be said that there was any deliberate or conscious violation of the rights of Ms. Osbourne. For the reasons which I have analysed above I am satisfied that then Sergeant Hogan put forward as a basis for seeking the warrants a reasonable belief as to the circumstances in which stolen property might be found on No. 45 Fitzgerald Park. I am not satisfied that he was aware that there might be a technical difficulty with using such a basis as the means for obtaining a warrant in respect of a potential escape route. I am equally, therefore, satisfied that there is no basis for suggesting that he was aware that the warrant might be subject to a defect on that basis. In all those circumstances I am not satisfied that any defect in the warrant is such that enables Ms. Osbourne, on that ground alone, to recover damages. The circumstances surrounding the execution of the warrant are, of course, controversial and that is an issue to which I must now turn. However it follows from my findings in respect of the warrant that those circumstances need to be examined on the basis that no claim can be brought which stems from any invalidity in the warrant itself. Those circumstances need to be examined, therefore, on the basis that the Gardaí had in their possession an apparently valid warrant in respect of No. 45 Fitzgerald Park and that any infirmity in respect of that warrant was not a matter which those executing it were aware of at the relevant time.

7. The Execution of the Warrant

7.1 It is unfortunate that such a lengthy period of time has elapsed since the events giving rise to these proceedings. It is undoubtedly the case that in the ten and a half years that elapsed between the events in question and the giving of evidence before the court, memories have faded.

7.2 In assessing the evidence I should state that I found Ms. Osbourne to be a witness whom, in my view, gave an account of the events as she now believes them to have occurred. Nothing that I have to say should be taken as implying that she, in any way, sought to mislead the court. However, there are a significant number of matters in the accounts given both by her, and certain of her witnesses, at various stages throughout the process, which must cast doubt on whether the account now given to the court actually reflects what occurred on the occasion in question. In a reply to particulars dated 4th June, 2003 (in response to a request as to the basis upon which it was contended that the Gardaí concerned were actuated by malice) the following was stated:-

"The Gardaí proceeded to kick and smash in her hall door, notwithstanding the fact that she was standing beside them holding the key to same and requesting them desist so that she could open the door for them."

7.3 In evidence at the trial it was clear that the Gardaí had entered into Ms. Osbourne's premises quite some period before she arrived at the door. There was no evidence which substantiated that complaint as made in the reply to particulars to which I have referred. Nor was any adequate explanation given as to how such an assertion could have been made if it were not on the basis of clear instructions from Ms. Osbourne to that effect.

7.4 Secondly, there is a clear conflict of evidence between the account given by Ms. Osbourne and that given by Ms. Merrigan. It appears to be common case that Ms. Merrigan was alerted to the fact that her son was being pursued by the Gardaí at no. 44/45

Fitzgerald Park soon after the incident began to develop. It is equally common case that she went to no. 45 and was permitted to enter by a Garda who was hopeful that she might exercise a calming influence on her son. On her account, however, Ms. Osbourne was already in the property before she arrived. However, both Ms. Osbourne and Mr. Michael Kenny (who gave evidence on her behalf) stated that Ms. Osbourne arrived after Ms. Merrigan had gone in. Indeed it was a central feature of Ms. Osbourne's evidence that, when she went into her dwelling, the first thing she saw was Ms. Merrigan attempting to protect her son from the two Garda in question. I am also satisfied, on the consistent Garda evidence, that a crowd, at least a significant number of whom were hostile to the Garda operation, gathered outside no. 45 while the incident was occurring inside. I am satisfied that physical abuse was used against the Gardaí as they left with Mr. Merrigan under arrest. In those circumstances I also find Mr. Kenny's account unsatisfactory by virtue of his denial of any such hostility or physical action on the part of the crowd against the Gardaí.

7.5 In all the circumstances I am not satisfied that I can place reliance upon the account of Ms. Osbourne and her witnesses where same is divergent from the account given by the Gardaí. I am prepared to accept that Ms. Osbourne now believes that she suffered her injuries in the manner which she described in evidence. I am not satisfied that that is in fact what occurred. There is little doubt on the evidence that Ms. Osbourne is of a nervous disposition. There can be little doubt, therefore, that the whole event was of a most traumatic nature for her. In those circumstances I am satisfied that she has come to believe that she suffered her injuries while being manhandled by Gardaí within her dwelling. As a matter of probability I am satisfied that what in fact occurred was that she was outside of her property attempting to gain access and came to be injured in the course of the hostile physical action being taken by other persons against the Gardaí as they attempted to leave.

7.6 In those circumstances it does not seem to me that the manner in which the warrant was executed could give rise to any claim in damages on the part of Ms. Osbourne. Given that I have also concluded that the presence of a technical defect in the circumstances leading to the making of the warrant does not, either, give rise to a claim in damages, it seems to me that her claim must fail.