Neutral Citation: [2013] IEHC 317

THE HIGH COURT

Record No. 2005 2109P

Between/

ESHWARPRASADH KESSOPERSADH AND PATRICIA KESSOPERSADH

Plaintiffs

-and-

GEAROID KEATING, DESMOND MCNALLY, GARY BIGLEY, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

Defendants

Judgment of Ms. Justice Iseult O'Malley delivered the 9th July, 2013.

Introduction

1. The plaintiffs are a husband and wife who have lived in Templeogue in Dublin for over 30 years. The first named plaintiff is an orthopaedic surgeon, now retired from surgery but still seeing patients in his home. The plaintiffs have eight children, all of whom are adults, who grew up in the family home in Templeogue.

2. On the 14th March, 2004 the plaintiff's son Roshen, then a young man of 22, was involved in a road traffic accident which, tragically, caused the death of a pedestrian named Laurence O'Neill.

3. This action for damages arises, in essence, from the actions of the first, second and third named defendants, who are all members of An Garda Síochana, at and in the home of the plaintiffs on the morning of the 11th August, 2004. It is common case that these defendants entered and, to some extent at least, searched the dwelling of the plaintiffs and that they did so without consent. The central issue in the case is whether they did so lawfully.

4. In summary, the case on behalf of the defendants is that the Gardaí entered the house because the first named defendant, Sergeant Keating, had the lawful purpose of arresting Roshen Kessopersadh on suspicion of having committed the offence of dangerous driving causing death. As it happened, Roshen was not there when they called and his parents told the Gardaí so. However, the defendants maintain that the Gardaí were entitled to enter and search the house to verify that this was true.

5. The second and third named defendants were members of the Traffic Corps, who took no part in the investigation and were present at the plaintiffs' house to assist the first defendant.

6. The plaintiffs contend that, firstly, suspicion as to the guilt of their son for the offence in question could not have been reasonably formed or held. In this regard they point, primarily, to the state of the evidence in relation to the accident. Ultimately, Roshen was charged only with the lesser offence of careless driving and was acquitted on that charge. Secondly, they say that the Gardaí should have been aware, because they had been previously informed and were told again by the plaintiffs on that morning, that Roshen was in fact abroad when the Gardaí came to the house.

7. It is a feature of the case that different Gardaí took different views as to the appropriate course of action available to them in the light of the evidence. It may therefore be necessary to point out at this stage that the issue to be determined by the court is not who was right as to whether Roshen Kessopersadh had in fact committed the arrestable offence of dangerous driving causing death. Rather, the first issue is whether or not the officer who intended to arrest him suspected with reasonable cause that he had done so. To answer this question it will be necessary to examine the evidence in some detail.

8. If that question is answered in the affirmative, the issue then arises as to whether the statutory conditions for entering a dwelling without the consent of the occupiers were fulfilled.

Background

9. Early in the morning of the 14th March, Roshen Kessopersadh was driving a Volkswagen Golf near his home on Templeogue Road in Templeogue. He was apparently on his way to collect his sister from a dinner party. Mr. Kessopersadh was fully licensed and insured and there is no suggestion that he had been drinking. At about 1.20 am he was involved in the fatal collision with Mr. Laurence O'Neill.

10. A taxi driver named Mr. McCabe, who did not see the accident but heard it, was the first person at the scene. A Dublin Fire Brigade ambulance arrived soon after and took Mr. O'Neill to hospital. Garda Brian Plunkett, who had been on patrol in the area, was the first Garda on the scene. Garda Plunkett spoke to Roshen Kessopersadh, who gave him his details. According to Garda Plunkett's contemporaneous note, Roshen said "I was driving along Templeogue towards Terenure, I didn't see him he just stepped out, I think from the middle of the road." He also said that he had been on his way to collect his sister. Roshen made no further statement in the investigation, a fact that will be considered below. The plaintiffs arrived at the scene and he went home with them.

11. Inspector James Flood, who was deployed as Patrol Officer that night, arrived about 3 am. He and Garda Plunkett made various observations in relation to the location of the collision by reference to the position of the car and debris from it, the location of Mr O'Neill's cap and other material.

12. At 5.30 am the death of Mr. O'Neill was confirmed.

13. At about 7.30 that evening Inspector Flood and Garda Plunkett called to the plaintiffs' house. According to the plaintiffs, the Gardaí spoke to their son in their presence and made some notes but it is common case that they did not take a statement. Mr. Kessopersadh Sr. thinks the conversation lasted 30 to 40 minutes, while Mrs. Kessopersadh says it was about 20. It appears that they had contacted their solicitor, Mr. Noel O'Hanrahan, during the day. At some stage, but perhaps not on that day, he advised them that Roshen should not make a statement. Mr. Kessopersadh says that the Gardaí did say that Rosh en would have to go to

Terenure Garda Station to make a statement. He and his wife both say that they told the Gardaí that evening that Roshen would be going to New Zealand at some stage to visit his sister, and that they were told to notify the Gardaí when the dates were confirmed.

14. Garda Plunkett has denied being told that at any stage and there is no reference to it in his notes. He says that he explained to Roshen Kessopersadh what way the investigation would proceed, that he was responsible for taking statements and putting the file together. It is agreed that he requested Roshen to come to the station and make a statement.

The investigation
15. There were no independent witnesses at the scene. A Garda checkpoint at the location and public appeal for information did not result in anyone coming forward. Mr. McCabe, the taxi driver who had been in the vicinity, made a statement in which he described hearing a bang and knowing that it was an accident. It is of some relevance that he did not refer to hearing the sound of braking.

16. Fire Officer Paul O'Reilly also made a statement in which he described measuring 11 paces "from the tonnage restriction sign on Templeogue Road to where the casualty was lying" and a further 5 paces to the rear of the Golf.

17. It transpired that Mr.O'Neill had been out with his two brothers that evening. Since it was too late for him to get a bus it was presumed that he was walking home. According to witnesses he had drunk about four or five pints. The toxicology tests showed a blood alcohol level of 350mg per 100ml and a urine alcohol level of 268mg per 100 ml. Although he was obviously well over the limit for driving, witnesses from the bar he had been in said that he had not shown any sign of incapacity.

18. Mr. O'Neill was wearing a black jacket, brown trousers and black shoes.

Garda findings in relation to the collision
19. A report on the collision was prepared by Sergeant Calm P. Finn of the Accident Investigation Unit, Regional Traffic Division, who attended at the scene on the 15th March, 2004.

20. Sergeant Finn noted that at the time of the accident the weather was fine although it had been raining earlier and the road was still wet.

21. As a result of his observations, he reached the view that the pedestrian crossed the road from the driver's right-hand side and was struck by the car on its side of the road. The driver then braked and the pedestrian was thrown forward. Damage to the car was concentrated on the driver's side.

22. Referring to the statements of the Fire Officer and the taxi driver, Sergeant Finn concluded that the pedestrian was struck on the offside front of the car near the driver and that there had been no skidding or braking before the impact.

23. The road itself was described as being primarily a single lane carriageway with a special speed limit of 30 mph. There is street lighting but Sergeant Finn noted a shadow on the road near the collision locus.

24. Sergeant Finn calculated the speed of the car at the instant of impact as being between 25mph and 31mph. He estimated, having regard to his age (56) and by reference to research carried out on walking speeds, that the late Mr. O'Neill was walking at three mph. Having regard to the evidence as to the point of impact and the relative speeds of the persons concerned he was of the view that Mr. O'Neill had walked seven metres on the road and that this took him 5.4 seconds. The driver of the car would have been between 60.48 and 73.82 metres back from the point of impact when the pedestrian commenced crossing the road. The impact took place at or near the centre white line.

25. By reference to the position at which the car came to a stop Sergeant Finn calculated that driver's reaction time was between 1.3 and 2 seconds. The average driver reaction time, he says, is 1.5 seconds.

26. At the hearing of this action no issue was taken with these calculations.

27. In the opinion of Sergeant Finn, there was sufficient time and distance for the driver to react and avoid a collision.

28. Sergeant Finn's report is undated and it is not entirely clear when the investigating Gardai received it.

29. The Volkswagen Golf driven by Roshen Kessopersadh was examined by Garda Seamus Bonar, a Public Service Vehicle Inspector. Apart from the damage caused by the impact, the vehicle was in good mechanical condition with no defects.

Contacts between the Kessopersadhs. their solicitor and the Gardai
30. Garda Plunkett's evidence was that on some date that he cannot now remember, within a couple of weeks of the accident, he made an appointment for Roshen Kessopersadh to meet him at the station to make a statement. Mr. Kessopersadh did not turn up, but when subsequently contacted he said that he would be making his statement through his solicitor.

31. Garda Plunkett said that he made contact again, possibly a week later. Mr. Kessopersadh told him that he had made a statement to his solicitor. The Guard's response was that he would have to bring his statement to the station so that he could be cautioned. The caution would then be added to the statement and Mr. Kessopersadh could sign it in Garda Plunkett's presence. However, after this conversation, he received a phone call from the solicitor, Mr. O'Hanrahan, who said that his client would not be making a statement and that he, Garda Plunkett, was not to make further contact with him.

32. Mr O'Hanrahan's evidence was that he told Garda Plunkett, in the course of three phone conversations calls that he was prepared to come to the station with his client so that Mr. Kessopersadh could indicate there, in his presence, that he would not be making a statement. His last record of a call to that effect was on the 21st May, 2004. He made a subsequent call, recorded in a note by the Guard who took it, in which he expressed annoyance at Garda Plunkett's efforts to contact his client directly.

33. The second plaintiff, Mrs Kessopersadh, said that she rang the station in July and left a message for Garda Plunkett telling him the dates when Roshen would be abroad. He left for New Zealand on the 4th August.

34. Garda Plunkett denies having received such a message.

Internal Garda reports
35. An initial, preliminary report was prepared by Garda Plunkett three days after the accident.

36. On the 5th June, Inspector Flood reported to Superintendent Moore that the investigation file was not yet ready. He also reported that Roshen Kessopersadh had confirmed in the past week that on the advice of his solicitor he would not be making a statement. At that stage Sergeant Finn's report had not been received.

37. It is apparent from the papers that Superintendent Moore sent Inspector Flood a minute on the 8th June. The document itself appears to have gone missing but a copy of the Inspector's response was put into evidence. It reads in full as follows:-

> *"With reference to your minute of the 8th inst Mr Kessopersadh has not been arrested for dangerous driving causing death.*
>
> *There were no witnesses to the accident: therefore, there is no evidence of the manner of Mr Kessopersadh driving prior to the accident. Without independent evidence that his driving was in some way dangerous, within the meaning of Section 53 Road Traffic Act, 1961 as amended there are, in my opinion, no grounds on which to base an arrest. This position may change when we receive Sergeant Calm Finn's report on his investigations.*
>
> *For the reasons outlined above Mr Kessopersadh has not been dealt with under Section 4 CJA 1984."*

38. The reference to "section 4 CJA" is a reference to the powers of detention under s. 4 of the Criminal Justice Act, 1984.

39. Garda Plunkett sent a further report on the 17th July, 2004 to his Sergeant, John Clifford. He attached thereto the findings of Sergeant Finn and Garda Bonar. In forwarding the report, Sergeant Clifford recorded his own view that there was sufficient evidence that Roshen Kessopersadh was driving the vehicle in question and the fact that he chose not to make a statement on the advice of his solicitor did not alter that fact. He went on: -

> *"One could ask the question if he was arrested for section 53 [dangerous driving causing death] would it affect the situation. I would answer that in the negative having regard for the likely outcome that a prosecution for section 53 would not succeed. An appropriate charge would be section 52 driving without due care and attention for the following reason. There are no witnesses who can indicate the manner of driving. The vehicle was examined and found to be roadworthy. It is presumed that the deceased pedestrian had consumed alcohol on the night. This can be confirmed by the Toxicologist's report. The driver was driving between 25 and 31 mph according to Sergeant Calm Finn's expert analysis.*
>
> *To apportion culpability, I suggest that excessive speed was not a factor in this instance but rather a lack of observation and care. There is no doubt that the driver of the car has a case to answer."*

40. The report then went to Inspector Flood, who forwarded it to Superintendent Moore with a memorandum setting out his own assessment. He opines that the only significant evidence is the expert investigation and report by Sergeant Finn. He notes that Mr Kessopersadh was driving close to the centre line of the road and says in that regard:

> *"This would be close to the optimum driving position in the lane, as the more immediate hazard is to the drivers near side, and gives him or her more time to react to a hazard emerging onto the road from the near side. Gardaí on Driving Courses are taught to "Centralise your Hazards': i.e. to drive close to the centre line of the road and when the road ahead is clear of traffic to drive with the broken white line running through the centre of the steering wheel."*

41. Inspector Flood gives it as his opinion that, without diminishing Mr. Kessopersadh's responsibility, Mr. O'Neill should have seen the approaching car on the opposite side of the road from the side from which he was crossing. He notes the dark clothing worn by Mr. O'Neill, which would have reduced his visibility, especially with the shadow on the road. He concludes however that the driver should have seen him and been able to avoid the collision.

42. Under the heading "Recommendations" the Inspector says:

> *"Having examined the available evidence I find no evidence to indicate that Mr. Kessopersadh was driving in a dangerous or reckless manner. Therefore, I am not of the opinion that Mr. Kessopersadh's driving, on the occasion, amounts to Dangerous Driving.*
>
> *I do believe; in view of the fact that he did not see Mr O'Neill, until his car struck him, that his driving falls within the definition of Section 52 Road Traffic Act 1961 (Driving without due Care and Attention). Accordingly I recommend Mr. Roshen Kessopersadh be prosecuted for the offence of Driving without due Care and Attention contrary to Section 52 Road Traffic Act 1961 as amended."*

43. Superintendent Moore responded on the 20th July raising a number of queries, many of which are not material for present purposes. What is relevant is the view expressed in his concluding remarks:

> *"We, An Garda Sfochcina are obliged to carry out a full investigation into how Mr. O'Neill met his death. He was struck by a car which resulted in him receiving fatal injuries.*
>
> *Mr. Kessopersadh has chosen to remain silent and not to make any statement. Yet, there doesn't seem to have been any attempt made by Garda Plunkett to interview Mr. Kessopersadh.*
>
> *I fail to understand as to why the provisions of the Criminal justice Act 1984 have not been implemented in the investigation of this man's death. There is an onus on us, the Garda Síochana to establish all facts surrounding this man's death. We cannot assume that the deceased contributed to his harm by his own negligence. It is highly unlikely that the deceased 'Just stepped out- in the middle of the road".*
>
> *I would appreciate if this matter was finalised without further delay."*

44. Inspector Flood replied to this communication in a letter which bears the date of the 29th June, 2004 but which was obviously written after receipt of the Superintendent's minute. In it he deals with the queries raised. Responding to the comments quoted above he reviews the communications between Garda Plunkett, Roshen Kessopersadh and his solicitor Mr. O'Hanrahan and says:

> *"Following his conversation with Mr O'Hanrahan Garda Plunkett discussed the situation with me. I reviewed the available*

evidence and gave him my opinion, that there being no independent evidence of Mr Kessopersadh's driving and more so no evidence anything of a dangerous nature about his driving, that there was insufficient evidence on which to ground an arrest under section 53 Road Traffic Act 1961.

I reviewed the evidence again when Sergeant Finn's report was to hand and while it confirmed that Mr Kessopersadh should have seen Mr O'Neill on the road before the collision I was of the opinion that it did not contain any evidence to indicate dangerous driving on the part of Mr Kessopersadh. In fact it showed, by scientific calculation that Mr Kessopersadh was driving at between 25mph and 31mph and as I pointed out in my report of the 16th inst, for all intents and purposes within the Built Up Area Speed Limit The weather conditions were dry, after earlier rain, with the road not excessively wet and I am of the opinion that a speed of 25mph to 31m ph was not excessive for the prevailing conditions. Mr Kessopersadh's arrest, for the offence of Dangerous Driving, was necessary to invoke the provisions of the Criminal justice Act 1984: in my opinion as stated here and in my report of the 16th ult, under Recommendations, I was not and am not of the opinion that Mr Kessopersadh was driving dangerously on the occasion. And, as I recommended, I am of the opinion that he was Driving without due Care and Attention (Section 52 Road Traffic Act 1961, as amended) based on the fact that he failed to see Mr O'Neill prior to the collision."

45. In evidence, Inspector Flood (now retired) confirmed his views as expressed in the reports. He had no further dealings with the file until he received directions on the 8th September, 2004 from the Director of Public Prosecutions to charge Mr. Kessopersadh with careless driving. He applied for the summons on the same day. As noted above, Mr. Kessopersadh was ultimately acquitted on that charge.

The review by Inspector Gannon and Sergeant Keating

46. At some stage in late July or early August, 2004 the file was passed by Superintendent Moore to Inspector Joseph Gannon. In evidence, Superintendent Moore (now retired) said that he wanted Inspector Gannon, who was in charge of the Traffic Unit in the Dublin Metropolitan Region South, to review the file with Sergeant Keating in relation to all aspects of the file. He said that the Gardaí were dealing with a motorist who, on the information available to him, was not cooperating with the Gardaí. He did not agree with Inspector Flood's view of the situation. In particular, Superintendent Moore stressed that the Gardaí were obliged to carry out a full investigation and they did not have the driver's account. He therefore gave the file to Inspector Gannon to see what else could be done. He denied having given any order for arrest.

47. Inspector Gannon, (who is now a Superintendent and whom I will therefore refer to as such) did not write any report in relation to the matter. His evidence was that he acquired a copy of the investigation file including all the minutes referred to above. He discussed it with Sergeant Gearoid Keating (the first named defendant), one of his traffic sergeants. He was aware of the concern of Superintendent Moore that there was no account from the "principal" involved in the accident, Roshen Kessopersadh.

48. Superintendent Gannon said that he had grave concerns about the manner and quality of the investigation up to that point. When asked by Counsel for the defendants did he form any opinion or suspicion in relation to the commission of a crime upon reading the file, he replied "*Not entirely on reading the file*" but that he decided on a course of action having read it. That course of action was to visit the scene at a similar time of night. He did so on the 9th August, 2004 with Sergeant Keating.

49. After visiting the scene, he said, he formed a view that the occurrence of the accident remained unexplained, particularly having regard to the width of the road, the relatively straight alignment and the street lighting. He felt that Sergeant Finn's finding that the driver would have been 60 to 70 metres away when the pedestrian commenced crossing the road was significant. In essence, he thought that the reason the driver did not see the pedestrian was that the driver had engaged in some act which caused him not to keep a proper lookout.

50. Superintendent Gannon went on to say, not in relation to any question asked of him, that he had a concern when he read the file about "*the influence that it seemed to me that the driver of the car was having on the direction of the investigation up to that point*". He explained that by this he meant that the driver had initially seemed willing to give an account and then changed course and failed to keep appointments.

51. The witness then said that after the visit, he formed a view that there were reasonable grounds to suspect that the driver of the car had engaged in an act of dangerous driving causing the death of Laurence O'Neill. Sergeant Keating agreed with him. He discussed the matter with Sergeant Keating, who decided to arrest Roshen Kessopersadh two days later, on the 11th August.

52. The Superintendent said that he had possible explanations for the accident at the back of his mind but these could not be explored unless the principal gave an account. In the absence of any account, he said that

"there was only one option and that was to utilise a legal provision available for that purpose to compel a person or a principal involved to give an account of what occurred when they're involved in an incident."

53. It became apparent that what he meant by this was the utilisation of legislative provisions regarding the drawing of inferences from failure to answer questions when a person is arrested and questioned. There was in fact no such provision available in 2004 in relation to offences of this nature.

54. Superintendent Gannon said that he did not write any report in relation to the matter because the proper time to do so would have been after the arrest. In the event, he was notified at some stage on the 11th August by Sergeant Keating that Roshen Kessopersadh had not been at home and was in fact in New Zealand. In those circumstances, he said, there was nothing he could do to "enhance the prospects of the investigation" or to "improve its quality".

55. In cross-examination the Superintendent was pressed on the issue as to whether there was any evidence, other than the fact of failure to see Mr. O'Neill, indicating that Roshen Kessopersadh had engaged in dangerous driving. He repeated that it was a wide, relatively straight road with good lighting and said he wanted the driver to explain what had happened. Superintendent Gannon repeated that if Mr. Kessopersadh had failed to give an account voluntarily there was legal provision to compel him. He went on to assert that he felt that Mr. Kessopersadh

"was having an undue influence on the thrust of the investigation by what appeared to be initially going to volunteer an account of what occurred and then changing his mind. I'm well aware that it's his legal right to remain silent, but then that's why there exists a legal provision."

56. The superintendent finally realised, whilst giving evidence, that he was wrong in relation to the availability of the legal provisions

he had in mind. He then said that an arrest would have enabled the Gardaí to ask Mr. Kessopersadh whether there was anything that distracted him. They would have been able to take his phone and analyse it, to see if he had been using it.

57. The witness did not accept that what he was saying amounted to an assertion that the Gardaí were entitled to arrest on the basis that Mr. Kessopersadh was not cooperating. Asked why he had not submitted a report, given that he disagreed with Inspector Flood's conclusions, he said that he would not feel competent to go into the law in such depth. Given that the arrest had not taken place, he felt he had "nothing to contribute" to the file. He said that he felt he had "failed in his mission". He left the file back to the administrative office of Superintendent Moore, with no covering letter or note.

58. Ultimately, the file ended up with Inspector John Jennings, who at the time was Acting Superintendent in the absence of Superintendent Moore. He forwarded it to the DPP with a recommendation for a prosecution for dangerous driving causing death. Although, obviously, Inspector Jennings' report post-dates the events giving rise to this action, it is worth noting its content. In it he referred to Sergeant Finn's calculations as to the relative speeds of the car and the pedestrian. He noted the fact that s. 53(3) of the Road Traffic Act provides that, on a charge under the section, it is not a defence to show that the accused was not driving in excess of the speed limit. His own view was that

> *"Templeogue Road is a long straight and wide stretch of roadway and it beggars belief that Roshen Kessopersadhfailed to see the deceased on approach which leads me to the conclusion that either he was not watching the roadway in front of him or was otherwise distracted, culminating in this tragic accident."*

The evidence of Sergeant Keating as to his state of mind

59. At the time of these events, Sergeant Keating was in charge of the Divisional Traffic Unit for the South City. He recalled reading the file and subsequently going to the location of the accident with Inspector Gannon. They considered the width of the road and the lighting. Sergeant Keating said that he formed an opinion with reasonable cause that Roshen Kessopersadh was guilty of the offence of dangerous driving causing death.

60. When asked what he considered to be significant in the report of Sergeant Finn, Sergeant Keating said that the first thing that struck him was the distance that the car was from the point of impact when the pedestrian started crossing the road. It was a very long wide road, well lit up, it had not been raining at the time and it seemed to the Sergeant that there was ample time for the driver to see the pedestrian and to avoid hitting him. From that fact; from the statement of Roshen Kessopersadh that the pedestrian had "just stepped out in front of him" and from the fact that the taxi driver, Mr. McCabe, had not heard the sound of brakes, he drew the inference that the driver did not see the pedestrian pre impact.

61. Sergeant Keating summarised the view of Inspector Flood as being based primarily on the fact that the driver was within the speed limit and the pedestrian was wearing dark clothing and had drink taken. His own view was that this was too narrow an approach and that taking everything into account he was of the opinion that Roshen Kessopersadh was guilty of dangerous driving causing death. As a result he felt that Mr. Kessopersadh should be asked certain questions for the proper investigation of the offence. The questions he had in mind were: -"Was he making a phone call or sending a text? Was the windscreen properly de-misted? Was he manipulating the radio?"

62. In cross-examination Sergeant Keating clarified his evidence as to his state of mind and said that he had reasonable cause to suspect the commission of dangerous driving causing death, rather than being of the view that it had been committed. He said that he was not influenced by the views of any of the officers who had considered the file and did not feel that he was expected to make an arrest.

63. The main issue pursued in cross-examination was whether Sergeant Keating could point to any feature of the evidence indicating culpable driving other than the failure of the driver to see the pedestrian. He consistently responded that the failure to see the pedestrian was part of the circumstances and that this gave him reasonable grounds for suspicion. He said that he did not have sufficient evidence to sustain a prosecution for dangerous driving and pointed out that if he had, he would not have been entitled to take the course of action he did.

64. Asked if could not have arranged to arrest Mr. Kessopersadh by appointment, he said that he was aware from the file that there had been two failures to attend for appointments.

65. Sergeant Keating did not make any written report before or after the 11th August and made no note of the events of that day.

The search of the house

66. There was a considerable amount of disagreement, and not a little confusion, as to the precise detail of what occurred on the morning of the 11th August, 2004. However, I am satisfied that, for the most part, very little turns on the areas of disagreement. I do not consider it necessary, in the circumstances, to set out the evidence in any great detail.

67. It is common case that the Gardaí arrived early in the morning, whether it was shortly after 6 o'clock, as the Gardaí say, or 6.30, as the plaintiffs insist. The first plaintiff says that he communicated with the Gardai for several minutes through the glass door of his porch, asking them did they have a warrant. He says that they kept "roaring" that they wanted Roshen, to take him to the station. When he eventually opened the door, they came against his wish. They told him that they did not need a warrant. According to both of the plaintiffs, they told the Gardaí that Roshen was not there, that he was visiting his sister in New Zealand, but the Gardaí would not accept that they were telling the truth. They say that one Garda went upstairs and, accompanied by the second plaintiff, looked in every bedroom in the house. Eventually the Gardaí left, saying that Roshen should contact the station when he came home.

68. The plaintiffs were upset by the fact that the three Gardaí arrived at such an early hour dressed in dark clothing, rather than uniform, and in an unmarked car. The first plaintiff remarked on the fact that they were all rather bigger than him and he found their manner intimidating. In particular, they were and are upset that the Gardaí would not take their word for it that their son was not there.

69. Sergeant Keating said that he had decided the day before that, having regard to the area and the sort of people involved, it would not be necessary or appropriate to use a conspicuously marked Garda vehicle, or to wear full uniform with stab-proof vest. The hour was chosen as being one when people were likely to be at home but they would not draw the attention of neighbours. He and the other two Gardaí dressed in what he called "half uniform" - that is, he wore navy blue trousers and a fleece, while the other two wore their motorbike leather trousers and Garda sweatshirts.

70. The defendants denied shouting outside the house, or that Mr. Kessopersadh communicated through the glass for several minutes.

71. The three Gardaí accepted that it was clear to them that they were in the house without the consent of the occupiers. They did explain that they did not need a warrant. There was no shouting or roaring, outside or inside the house. Sergeant Keating said that he could not leave just because he was told that Rosh en was not there, but had to verify this for himself. He said that he went upstairs accompanied by one other Garda and looked into two rooms. In one of them he was shown bank documentation belonging to Roshen. The room was not in current use. He thereupon decided not to search further.

72. Mrs. Kessopersadh suffers from epilepsy and she and her husband have given evidence that her condition worsened in the aftermath of the incident. I have not, however, been given any medical evidence in this regard.

73. As far as the conflict of evidence is concerned, I think it is probably the case that there was a degree of communication through the door and that voices may at that stage have been raised to some extent but I do not accept that there was several minutes of "roaring". On the other hand, I see no reason to disbelieve Mrs. Kessopersadh when she says that all of the bedrooms were looked into, since the whole logic of the presence of the Gardaí in the house was that they had to check for themselves.

Power to arrest without warrant
74. It is expressly admitted by the defendants that they entered the house without the consent of the plaintiffs. They were, therefore, trespassing unless they can establish that their actions were authorised by law.

75. The authority relied upon is the power to arrest a person suspected of an arrestable offence and for that purpose to enter without warrant the premises where he is suspected to be and where he is ordinarily resident.

76. Section 4(3) of the Criminal Law Act, 1997 provides as follows:-

> *Where a member of the Garda Síochana, with reasonable cause, suspects that an arrestable offence has been committed, he or she may arrest without warrant anyone whom the member, with reasonable cause, suspects to be guilty of the offence.*

77. Dangerous driving causing death is and was at the time an arrestable offence, carrying as it does a maximum penalty of 10 years.

78. Section 6(2) of the same Act provides that

> *"For the purpose of arresting a person without warrant for an arrestable offence a member of the Garda Síochana may enter (if need be, by the use of reasonable force) and search any premises (including a dwelling) where that person is or where the member, with reasonable cause, suspects that person to be, and where the premises is a dwelling the member shall not, unless acting with the consent of the occupier or other person who appears to the member to be in charge of the dwelling, enter that dwelling unless*
>
> > *a) Omitted*
> >
> > *b) Omitted*
> >
> > *c) Omitted*
> >
> > *d) The person ordinarily resides at that dwelling."*

79. It is also relevant to note that the provisions of s. 4 of the Criminal Justice Act, 1984, which would have been invoked by Sergeant Keating had he made the arrest. In order to detain an arrested person, the member in charge of the Garda station to which he is brought must be satisfied that there are reasonable grounds for believing that his detention "is necessary for the proper investigation of the offence".

80. On the facts of this case the questions that arise are as follows: -

> 1) Did Sergeant Keating suspect that the offence of dangerous driving causing death had been committed? (In this case, such a suspicion could only have related to Roshen Kessopersadh.)
>
> 2) If so, did he have reasonable cause for that suspicion?

81. The three matters to be considered under this heading are, therefore, the elements of the offence of dangerous driving, the meaning of "suspicion" and the basis on which "reasonable cause" may be established.

Dangerous driving
82. Dangerous driving is defined by s. 53 of the Road Traffic Act, 1961as amended as driving in a public place in a manner:

> *"(including speed) which, having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected to be in it) is or is likely to be dangerous to the public."*

83. The classic instruction given to juries in cases of dangerous driving causing death, as endorsed by the Court of Criminal Appeal, is that given by His Honour Judge Ó Briain in *People v Quinlan* (1962) ILT & SJ 123, where the judge described it as

> *"Driving in a manner which a reasonably prudent person, having regard to all the circumstances, would recognise involved a direct, immediate and serious risk to the public."*

84. Careless driving, which at the time of the accident in the instant case was a summary-only offence, was provided for ins. 52 as follows:-

> *"A person shall not drive a vehicle in a public place without due care and attention."*

85. It is obvious that in this area of law comparing one case to another is not necessarily helpful, since each case must turn on its own facts and the certainly possible to say that, within each of the offences - careless and dangerous driving - there are degrees of carelessness and dangerousness.

86. In *DPP v O'Dwyer* (Court of Criminal Appeal, 28th July, 2005), the court was dealing with an appeal against sentence in a careless driving case, where the accused had been acquitted of dangerous driving causing death. (Again, it must be remembered that this pre-dates the introduction of the offence of careless driving causing death.) The focus of the judgment is on the question whether the sentencing judge should have taken account of the death in imposing sentence, but part of the analysis is relevant to the circumstances of this case.

87. At paragraph 9 of the judgment, it is said that

> *"It is important to draw attention to the difference between the offence of dangerous driving causing death and the offence of careless driving simpliciter. The constituents of the offences are very different, as are the penalties.*

88. At Paragraph 16: -

> *"The concept of careless driving covers a wide spectrum of culpability ranging from the less serious to the more serious. It covers a mere momentary inattention, a more obvious carelessness, a more positive carelessness, bad cases of very careless driving falling below the standard of the reasonably competent driver, and cases of repeat offending. However, since even a mere momentary inattention in the driving of a mechanically propelled vehicle can give rise to a wholly unexpected death, the court always has to define the degree of carelessness and therefore culpability of the driving."*

89. Finally, at paragraph 20, the Court said:-

> *"...As stated previously, there is a world of difference between a mere momentary inattention in the driving of a mechanically propelled vehicle, which unexpectedly and tragically causes a loss of a life, and grossly careless driving, which, though still short of dangerous driving, hardly surprisingly results in a fatal collision."*

Suspicion and reasonable cause to suspect

90. The question whether a particular suspicion existed in the mind of the arresting officer is a question of fact, to be determined in the light of his sworn evidence and the surrounding circumstances- see *The People(DPP) v Quilligan* [1986] I.R. 495. The existence of reasonable cause is a mixed question of fact and law.

91. In his work Criminal Procedure Walsh defines suspicion by reference to the judgment of Lord Devlin in *Hussein v Chong Fook Kam* [1970) A.C. 942, where it is said

> *"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove." Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."*

92. However, it is clear that the permitted scope of conjecture or surmise is limited to what is reasonable in the circumstances. In *Walshe v Fennessy* [2005) 3 I.R. 516, the Supreme Court considered the suspicion grounding arrests under s. 30 of the Offences Against the State Act, 1939. Kearns J. noted that the suspicion grounding the arrest, to be "not unreasonable" must

> *"find some objective justification from the surrounding circumstances and the information available to the arresting officer."*

93. In the case of *DPP v O'Driscoll* (Supreme Court, 1st July, 2010) the Court endorsed the following principles: -

> *a. The reasonable cause to suspect must be fair and reasonable and honestly held on the basis of the information available to a member of An Garda Síochana at the relevant time.*
>
> *b. The reasonable cause to suspect must be referable to facts or information which would satisfy an objective observer: it is an objective test.*
>
> *c. The objective test requires that the basis for the reasonable cause to suspect be examined by reference to the time and the circumstances in which the power was exercised.*
>
> *d. The facts or information grounding the reasonable cause to suspect may be either what the member of the Garda Síochana has observed or information that he has received. The information acted on by the member need not be based on his own observations since he is entitled to have a reasonable cause to suspect based on what he is told.*
>
> *e. The reasonable cause to suspect may be based on information from any source including an anonymous source. Since it is only the information that is in the mind of the member of An Garda Síochana that is relevant it is unnecessary to investigate what was known to an informant or whether the information is true. If the information grounding the reasonable cause to suspect turns out to be ill-founded the lawfulness of the entry will not be impugned. What is relevant is the information available to the member of the Garda Síochana at the relevant time.*
>
> *f Material grounding a reasonable cause to suspect need not satisfy the same threshold as is required to lay a charge nor is it necessary that it constituted admissible evidence.*

94. Finally, it must be stressed that the requirement to establish the existence of a reasonable suspicion is a pre-condition to an arrest. The exercise of powers of arrest cannot be justified "solely by the desire to interrogate" - *Quilligan*.

Conclusions on the arrest

95. Applying these principles to the instant case, it seems to me that the avowed state of mind of Sergeant Keating fell far short of an objectively justifiable suspicion. I accept his evidence that he formed his own view, based on the file and on his visit to the scene, that something was missing from the explanation as to how the accident happened. However, having regard to the analysis of the

distinction between careless and dangerous driving set out in *O'Dwyer,* it is clear that none of the potential explanations that he considered could have brought the case beyond the category of carelessness and up to the level of dangerousness.

96. The car was in good order and was driven within the speed limit. It was on its correct side of the road at the time of the collision. There was no alcohol involved and no loss of control of the vehicle. One might reasonably have suspected that the driver was guilty of a momentary inattention, perhaps even gross carelessness, if he had switched his attention to his phone or the radio, but on the facts of the case it could only have been for an extremely short period of time. There is absolutely nothing to support a theory that the windscreen was fogged and that he drove without being able to see through it.

97. It is quite clear that all of the Gardai involved in the investigation, to a greater or lesser extent, felt some frustration that Roshen Kessopersadh exercised his right not to make a voluntary statement.

98. I find it of some significance that neither Sergeant Keating nor Inspector Gannon (as he was at the time) wrote a report after the 11th August, to give the benefit of their views to whoever would have to make the final recommendation on the file. They were aware that Roshen Kessopersadh would be returning from his trip abroad within the next few weeks, but there was no proposal that a further effort should be made to arrest him at that point.

99. In all the circumstances, I have come to the conclusion that there was no reasonable cause for a suspicion that Roshen Kessopersadh was guilty of the offence of dangerous driving causing death. I also consider that the intended arrest was for the purpose of finding out what he might say, rather than being based on a genuinely held suspicion. That is not a proper ground for arrest.

Damages
100. The plaintiffs in this case seek damages including aggravated or exemplary damages.

101. Reliance is placed on the decisions of the Supreme Court in *Conway v Irish National Teachers Organisation* [1991] 2 I.R. 305 and *Shortt v Commissioner of An Garda Síochana* [2007] 4 I.R. 587.

102. *Conway* concerned the appropriate measure of damages for a school student who had been deprived of her constitutional right to free primary education by the actions of the defendants. The defendant union had instituted a withdrawal of labour from all schools in a particular parish, because of a dispute with the parish priest and others involved in the running of schools in the parish. After some months it issued a directive to its members in all schools in surrounding areas to refuse to accept for enrolment any children from that parish. The plaintiff was, as a result, wholly without school education for almost a year. The trial judge found that the teachers in the surrounding areas acted with the purpose of depriving the children of primary education in order to put pressure on the parish priest and that this amounted to the use of unlawful means to deprive the children of their constitutional right. In the appeal on the issue of liability, O'Higgins CJ said that there was no justification for seeking to harm, not those with whom the union was in dispute, but "*innocent children who had nothing to do with it*."

103. In the appeal on damages, Finlay CJ laid down the following principles in respect of damages in tort or for a breach of a constitutional right: -

> *"1. Ordinary compensatory damages being sums calculated to recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience, or other harmful effects of a wrongful act andjor for monies lost or to be lost andjor expenses incurred or to be incurred by reason of the commission of the wrongful act.*
>
> *2. Aggravated damages, being compensatory damages increased by reason of*
>
> > *(a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or*
> >
> > *(b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or*
> >
> > *(c) conduct of the wrongdoer andjor his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action.*
>
> *Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant.*
>
> *3. Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he or she has suffered. I have purposely used the above phrase "punitive or exemplary damages" because I am forced to the conclusion that, notwithstanding relatively cogent reasons to the contrary, in our law punitive and exemplary damages must be recognised as constituting the same element."*

104. In submissions on this aspect of the case, Counsel for the plaintiffs has referred to the case of *Shortt v Commissioner of An Garda Síochana* [2007] 4 I.R 587. In that case, the plaintiff had been convicted of a serious drug-related offence and had served a significant period of imprisonment because of the maliciously untrue evidence of certain Gardaí. As summarised by the headnote, the Supreme Court held

> *"... there were especially grave features of this case which had particular relevance to the quantum of aggravated and exemplary damages, including the malice and dishonesty of the garda members involved including their concealment of evidence, the abuse of power, conduct calculated to undermine a fair trial, the cruel treatment of the plaintiff when imprisoned concerning compassionate leave, the physical and psychological effects of*

imprisonment which were exacerbated by the belief, which was correct, that his conviction and imprisonment had not been brought about by some dreadful error or mistake but by the mala fide machinations of the garda members involved. Furthermore, the consequences included degradation of his family circumstances, public degradation in the eyes of the community, at least some of which was engendered by deliberate exploitation of the case for the purposes of publicity and self advancement by a garda officer. The whole course of events changed permanently the course of the plaintiffs life and at an age where, and in circumstances where, even on release or ultimate vindication, it would never return to its normal course to any serious extent.

... general damages or ordinary compensation was designed to compensate the direct effects of the wrong on the person who suffered it. Aggravated damages represented an augmentation of the ordinary compensatory damages by reason of the manner in which the wrong was committed and the conduct of the wrongdoer at the time and subsequent to the commission of the wrong or wrongs involved."

Conclusions

105. I do not consider that this is a case where exemplary or punitive damages are called for. The wrong done to the plaintiffs does not bear comparison with that suffered by, for example, the plaintiff in *Shortt* I have found that the state of mind of the would-be arresting officer did not satisfy the requirements of a lawful arrest but beyond that I do not see anything particular in the behaviour of the Gardai at the plaintiffs' house worthy of condemnation. I accept that their approach, in an unmarked car and dressed in "half uniform", was a reasonable one and I do not think that the plaintiffs would have been happier if they had turned up in a more noticeable fashion.

106. I realise that the plaintiffs found the whole experience very upsetting, especially because the Gardai would not accept their word. I think that their reaction is a natural one for any parent in such circumstances, but that is not the same as finding that the Gardai behaved in a particularly oppressive, arrogant or outrageous way. Nor has the defence of the action been run in such a way as to, for example, cast aspersions on the character of the plaintiff's. There has been a failure to apologise, but I do not think that that on its own can entitle a plaintiff to aggravated damages.

107. What the plaintiffs are entitled to, therefore, is compensatory damages for the trespass and entry into their home, other than in accordance with law, and for distress and anxiety caused thereby. I assess those damages at €50,000.