

**THE HIGH COURT****JUDICIAL REVIEW****2006 2304 P****BETWEEN****BELINDA LOCKWOOD****PLAINTIFF****AND****IRELAND****AND****THE ATTORNEY GENERAL****AND****THE COMMISSIONER OF AN GARDA SÍOCHÁNA****DEFENDANTS****JUDGMENT of Kearns P. delivered the 10th day of December, 2010**

The plaintiff was the complainant in a prosecution for rape brought against J.W. by the Director of Public Prosecutions. The accused was arrested on the 22nd July, 1999 and the case was ultimately heard by the Central Criminal Court in May, 2003. It emerged during the course of the evidence at trial that, as a consequence of the unlawful arrest of J.W., certain admissions made by J.W. whilst in garda custody could not be placed before the jury. This difficulty arose because J.W. was arrested pursuant to the common law power of arrest for rape. However, at the time of the arrest, s. 3 of the Criminal Law Act 1997 had abolished the distinction between felonies and misdemeanours with the consequence that a garda member no longer had any common law power to arrest in respect of felonies. Thus whilst J.W. could have been arrested under s. 4 of the Criminal Justice Act 1984, this power was not exercised by the arresting garda on the occasion of the arrest. The learned trial judge (O'Higgins J.) thus held that J.W. was held in illegal custody in breach of his constitutional right to liberty and that any evidence obtained during the course of this illegal detention was, as a result, inadmissible in the proceedings before the Court.

The plaintiff understandably felt extremely aggrieved that, having been subjected to rape, and having undergone the ordeal of a trial in which she gave evidence, the prosecution's case collapsed as a result of such a basic error on the part of the arresting garda.

As a result these proceedings were commenced by plenary summons on the 26th May, 2006. In the proceedings, the plaintiff claims damages arising from the alleged negligence and breach of duty of the defendants, notably the servants or agents of the third named defendant, in invoking a power of arrest that did not exist at the time of the purported arrest. The plaintiff asserts that the State has failed to vindicate her constitutional right to bodily integrity and to ensure that justice was achieved in her case.

Following the bringing of the proceedings, the defendants brought a motion to this Court for an order directing the trial of preliminary issues which effectively request that the Court should dismiss these proceedings on two grounds as follows:-

(1) The time limit for bringing the claim in question is statute barred by virtue of the Statute of Limitations 1957 as amended; and

(2) In the absence of *mala fides* in the performance of their investigative and prosecutorial functions, the Garda Síochána cannot be held liable in damages to the plaintiff in circumstances such as arose in the present case.

**SUBMISSIONS MADE ON BEHALF OF THE PLAINTIFF**

It was submitted on behalf of the plaintiff that her cause of action only accrued on the 28th May, 2003, when it became apparent to her for the first time during the course of the trial that the common law power of arrest had been wrongfully exercised in this case. She could not have known she had a cause of action until then and as the proceedings were issued within three years of that event, they could not be considered to be statute barred.

In relation to any supposed immunity from suit on the part of the Garda Síochána, counsel on behalf of the plaintiff submitted that where a citizen's constitutional rights are infringed, a right to seek damages for such a breach exists when no other effective or sufficient remedy may be found (see *The State (Quinn) v. Ryan* [1965] I.R. 70; *Byrne v. Ireland* [1972] I.R. 241; and *Meskeil v. Córas Iompair Éireann* [1973] I.R. 121).

Counsel further submitted that there was no doctrine of immunity available to the Garda Síochána which would afford a shield to them in all circumstances. It was submitted that the dictum of Costello P. in *W. v. Ireland (No. 2)* [1997] 2 I.R. 141 had been overtaken by more recent cases, including *D.P.P. v. Cash* [2007] I.E.H.C. 108; *Hanahoe v. Hussey* [1998] 3 I.R. 69; *Gray v. Minister for Justice* [2007] 2 I.R. 654; and *Shortt v. Commissioner of An Garda Síochána* [2007] 4 I.R. 587. Counsel for the plaintiff also placed reliance upon the recent decision of the European Court of Human Rights in *McFarlane v. Ireland* (no. 31333/06, 10 September 2010) as supporting the proposition that a claim for damages was sustainable on facts such as those which arose in the instant case.

A number of English cases were also opened to the Court, including *Desmond v. The Chief Constable of Nottinghamshire Police* [2009] E.W.H.C. 2362 (Q.B.). While successive decisions of the House of Lords beginning with *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53 had held, as a matter of public policy, that police were immune from actions for negligence in respect of their activities in the investigation and suppression of crime, Wyn Williams J. observed as follows in *Desmond* at para. 42:-

*"It seems to me that the following principles can be distilled from the authorities cited above. First, the police are immune from an action in negligence at the suit of an individual if the damage complained of was caused by an act or omission in furtherance of the investigation or suppression of crime (the core principle in Hill). Second, if the core principle is not engaged a duty of care may be imposed upon the police upon 'ordinary principles' if the police are directly involved in causing actionable damage to an individual. Third, the police can be held liable in negligence for damage (including pure economic loss) if they have assumed a responsibility to the individual in question to act with reasonable care."*

The plaintiff relied on this passage as supporting the proposition that the fact of gross negligence in the instant case was such as would entitle her to compensation.

Finally, counsel argued that in the case of *Osman v. United Kingdom* [1998] 29 E.H.R.R. 245, the European Court of Human Rights held that an immunity which the British police enjoyed from suit was incompatible with the guarantee of a fair hearing provided by Article 6 of the European Convention on Human Rights. Counsel further asserted that the present case was not one which could be seen as having the effect of encouraging defensive policing, but was instead a straightforward instance of negligence principles which every garda about to effect an arrest must be presumed to know. Nor were the present proceedings a collateral attack upon the verdict or acquittal. The plaintiff was not seeking to overturn the verdict in the criminal proceedings, but rather to obtain a remedy from the Court in respect of the State's failure to ensure a proper arrest and trial.

### **SUBMISSIONS ON BEHALF OF THE DEFENDANTS**

Counsel on behalf of the defendants adverted to three relevant dates in relation to the argument that the plaintiff's claim was statute barred. The date of arrest of the accused was the 22nd July, 1999. The ruling of the Central Criminal Court to the effect that the arrest was unlawful was made on the 28th May, 2003. The plenary summons only issued on the 26th May, 2006. It was submitted on behalf of the defendants that time should be deemed to run from the date of the impugned arrest in 1999. If that contention was correct, the present proceedings had been brought outside the basic limitation period for a civil negligence claim.

In relation to the potential liability to suit of the Garda Síochána, it was the defendants' submission that no liability arose because of the absence of a duty of care to the plaintiff in the particular circumstances rather than any immunity. Counsel submitted that the observations of Clarke J. in *Osbourne v. Minister for Justice* [2009] 3 I.R. 89 made it clear that, absent *mala fides*, a person against whom a power of arrest or search is exercised cannot successfully sue the gardaí for damages.

Counsel also noted various dicta in *Glencar Exploration plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84; *Kennedy v. Law Society of Ireland (No. 4)* [2005] 3 I.R. 228; and *Keating v. Crowley* [2010] I.E.S.C. 29 in support of the argument that no cause of action for negligence lies against a public body in the absence of *mala fides*. A claim based on a complaint that there had been a failure to secure a conviction of an accused person was an entirely novel claim and it was submitted that no duty of care to prevent such an occurrence taking place could be said to exist.

Counsel for the defendants argued that, while every citizen is entitled to a fair system for the investigation of criminal offences, this could never amount to a guarantee of a perfect system, or one that would be error free. Equally, the State could not guarantee that every person who commits a crime would be successfully convicted at the end of a criminal trial. In this regard, counsel stressed that recognition of this fact was evidenced by the fact that there is a tort of malicious prosecution but not a tort of negligent prosecution.

Counsel also relied upon the judgment of Costello P. in *W. v. Ireland (No. 2)* [1997] 2 I.R. 141 as providing compelling public policy reasons why the Court should conclude that no existence of a duty of care arose as the result of the particular performance of a public function. Such had been the view of the House of Lords in *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53 and counsel submitted that the core principle of that case represents the law in this jurisdiction and had not been diluted by subsequent case law. In fact, the principles established in *Hill* were upheld by the House of Lords in *Brooks v. Commissioner of Police of the Metropolis & Others* [2005] 1 W.L.R. 1495. In that case, the House of Lords held that, as a matter of public policy, police did not generally owe a duty of care to victims or witnesses in respect of their activities when investigating crime.

While it was true that the case of *Osman v. United Kingdom* [1998] 29 E.H.R.R. 245 suggested that striking out a tort claim against the police amounted to a violation of Article 6 of the European Convention on Human Rights, the decision in question was less than authoritative. In *Z. & Ors. v. The United Kingdom* [2002] 34 E.H.R.R. 3, the same court accepted that its ruling in *Osman* was based on an understanding of the law of negligence "*which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably by the House of Lords*".

Counsel concluded by noting that the law did not purport to deprive the plaintiff of a remedy, given that at all times it was open to the plaintiff to sue the accused directly for damages in a civil case.

### **DISCUSSION AND DECISION**

The recent decision of the High Court (Clarke J.) in *Osbourne v. Minister for Justice* [2009] 3 I.R. 89 is of particular interest in determining whether or not a cause of action arises against the Garda Síochána in the absence of *mala fides* in the performance of their duties and functions. In that case, Clarke J. stated (at pp. 96-97):

*"While it (The People (Attorney General) v. O'Brien [1965] I.R. 142) 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 the 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. 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."*

In *Kennedy v. The Law Society (No. 4)* [2005] 3 I.R. 228, the Supreme Court applied the ruling in *Glencar Exploration plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 to restate that, as a general rule there is no remedy in damages for an *ultra vires* act by a local authority outside of a claim for misfeasance in public office. As Geoghegan J. stated in the Supreme Court at p. 259 of his judgment:-

*"As a general proposition, it can safely be said that, apart from exceptional circumstances, a body such as the first respondent, carrying out a public function in pursuance of a public duty, is not liable to a private individual in tort unless the authority, in so acting, has committed the tort of misfeasance in public office. I will be explaining this tort in more detail later on in this judgment but subjective mala fides is an essential feature of it. To allow damages to be awarded for breach of an alleged duty of care owed to the individual on the basis of what a reasonable person might have done (and therefore an objective test) would be to undermine the clear limits attached to the tort of misfeasance in public office."*

The case of *W. v. Ireland (No. 2)* [1997] 2 I.R. 141 also considered the nature of the duty of care to victims of crime. In that case the plaintiff and members of her family were victims of sexual abuse perpetrated by Fr. Brendan Smith. The offences were alleged to have been committed by the accused in Northern Ireland between 1982 and 1987. Extradition warrants had been forwarded from the authorities in Northern Ireland to the Garda Commissioner for execution. However, the Attorney General was required to give a direction that the Commissioner not execute the warrants unless the Attorney General considered there was a clear intention to prosecute and such an intention was founded on sufficient evidence as required by the Extradition Act 1965 as amended. The Court held that the Extradition Acts imposed no common law duty of care on the Attorney General in relation to the plaintiff. Furthermore, it was held that no statutory duty was imposed upon the Attorney General by virtue of the Extradition Acts in relation to the victims of crimes referred to in the warrant. At p. 160 of his judgment, Costello P. stated:-

*"There are further compelling reasons why, in the public interest, the duty claimed by the plaintiff in this action should not be allowed. If a duty under the Act of 1965 exists it must logically follow (a) that the Attorney General would be under a similar duty in respect of any prosecutorial functions conferred on him by s. 5 of the Prosecution of Offences Act 1974 and (b) that in exercising his prosecutorial functions under that Act, the Director of Public Prosecutions would owe a like duty to all victims of crimes in the cases in which he is considering the institution of prosecution. Because of the inhibiting effect on the proper exercise by the Attorney General and the Director of Public Prosecutions of their prosecutorial functions, it would be contrary to the public interest that a duty of care at common law be imposed on them. So to conclude is not to submit to a 'flood gates' argument of doubtful validity, it is to accept the logical consequences, should the duty of care at common law be imposed in the execution by the Attorney General of his functions under the Act of 1965."*

The Court thus held that even if there had been a sufficient relationship of proximity and even if the kind of injury of which the plaintiff complained was reasonably foreseeable, it would be contrary to public policy to impose a duty of care on the Attorney General. Costello P. was at pains to point out in his judgment that the function conferred on the Attorney General by the statute created no relationship of any sort between him and the victims of crime referred to in the warrants under consideration. Costello P. was satisfied that it would be contrary to public policy to impose on the Attorney General a duty of care towards the plaintiff's victims. Nor was there any constitutional duty to do so because the exigencies of the common good justified the court in declining to grant to the plaintiff a claim for damages for breach of duty not to infringe a right to bodily integrity in those particular circumstances.

I am satisfied that no action arises in the circumstances of this case for negligence against the gardaí in the absence of *mala fides*. I am satisfied also that within tort law a duty of care does not arise such as would create an entitlement to damages arising from the manner in which the gardaí conduct an investigation. As Barrington J. pointed out in *McDonnell v. Ireland* [1998] 1 I.R. 134 (at p. 148):

*"[C]onstitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules. If the general law provides adequate cause of action to vindicate a constitutional right it appears to me that the injured party cannot ask the court to devise a new and different cause of action."*

It was quite clear in the present case that there had been no *mala fides* and thus no cause of action in negligence. Therefore, there could be no basis for creating a cause of action based on alleged infringement of constitutional rights. As Murray C.J. pointed out in *Keating v. Crowley* [2010] I.E.S.C. 29:-

*"It is undoubtedly the case that in certain circumstances the State is liable to pay compensation to individuals for breach of their constitutional rights. This may be particularly so when the State at the time the damage was caused, was acting unlawfully and with mala fides or in misfeasance of public office."*

Given that it is my view that a claimant must establish *mala fides* to bring her claim within the law of tort within this jurisdiction, I am satisfied to conclude that no duty of care arises in respect of *bona fide* actions and decisions carried out by An Garda Síochána in the course of a criminal investigation and/or prosecution. Any other view would have quite alarming consequences. One might begin by enquiring where the duty of care would begin or end. Would the victim of a crime, such as that perpetrated on the plaintiff in the present case, be the only person with an entitlement to sue, or would any such entitlement extend to immediate members of her family or perhaps to some person who might have been a witness in the trial or a witness to the event itself? By the same token, the inhibiting nature of any such duty would effectively cripple the capacity of An Garda Síochána, or any other police force for that matter, to carry out its duties effectively and with expedition. It would be unacceptable that those charged with responsibility for the investigation and prosecution of crime should have to take legal advice at every hand's turn in respect of every step in the criminal process. Any such approach would simply render the present system, struggling as it is with the multiple obligations imposed on the Garda Síochána in respect of those suspected of crime, to constraints of unimaginable proportions.

I have no hesitation therefore in granting the relief sought by the defendants in respect of this particular issue and holding that the plaintiff's claim should be dismissed.

Insofar as the Statute of Limitations point is concerned, I would hold with the plaintiff's contention that the clock could not be

deemed to have commenced to run on any cause of action she might have had until such time as the plaintiff became aware of the particular error which gave rise to her complaint.