

THE HIGH COURT**[2012 No. 722 P]****BETWEEN****JOHN FAGAN****PLAINTIFF****AND****GARDA COMMISSIONER, MINISTER FOR DEFENCE, IRELAND AND ATTORNEY GENERAL****DEFENDANTS****Judgment of Ms. Justice Irvine delivered on the 28th day of February 2014**

1. The plaintiff in these proceedings is a married man of 60 years of age who resides with his wife and family at Lower Gardiner Street, Dublin.
2. This claim relates to an incident which occurred on the footpath at Dorset Street, Dublin on 17th May, 2011. The plaintiff maintains that he was negligently injured by a member of An Garda Síochána Public Order Unit which had been deployed to deal with a protest concerning the visit of Queen Elizabeth II to Dublin.
3. The parties are agreed as to the extent of the injuries sustained by the plaintiff should I conclude that they were negligently inflicted. Accordingly I have been asked solely to determine the liability issues between the parties.

The Claim

4. In simple terms, the plaintiff maintains that the gardaí failed to take reasonable care for his safety when exercising policing manoeuvres in response to a riot situation which had developed at Dorset Street, Dublin on the afternoon of 17th May, 2011. He contends that if members of what I will refer to as the riot squad, who were moving forward along the footpath where he was standing, had been using reasonable care that they should have been able to circumvent him rather than knock him to the ground, as he alleges they did. In response to the defendants' plea of contributory negligence to the effect that he failed to take care for his own safety, the plaintiff maintains that he was given no warning that the line of riot police, which had been in a stationary position for some considerable period of time, was about to move forward thus placing him at a risk of being knocked down. He had heard no announcement over any PA system advising him to leave the area. Further, he had not been advised by Gardaí present on the street not to enter Dorset Street which had not been closed off from Gardiner Street.

The Defence

5. The defendants deny that the plaintiff was knocked to the ground by any member of its riot squad. They maintain that if a member of the riot squad did knock the plaintiff over that this did not amount to actionable negligence in circumstances where they were seeking to maintain public order in a riot type situation. In the further alternative the defendants maintained that if they were negligent the plaintiff was guilty of a high degree of contributory negligence for failing to take care for his own safety in the moments prior to his injury and in particular in his failure to move away from the scene of the disturbance at a time when he knew or ought to have known he was at risk of injury.

The Plaintiff's Account of Events

6. On 17th May, 2011, the plaintiff decided that he would collect his 14 year old daughter from St. Vincent's School which is located at the junction of King Street North and Bolton Street, Dublin. He decided to do this because he was aware that there were demonstrations and riots taking place in and around Parnell Square and his daughter normally walked down Parnell Street when making her way home to Gardiner Street.

7. Because of the number of roads that were blocked off, in order to get to his daughter's school the plaintiff had to walk up the entire length of Gardiner Street to the point where it meets Dorset Street. He then turned left and walked along the footpath of Dorset Street in the direction of Bolton Street. There was a significant police presence on Dorset Street and as he walked along he could see a large crowd of protestors to his right at the Eccles Street junction. Bottles were being thrown and missiles and fireworks showered in all directions. He told the court that when he got past this area of particular trouble he walked on some distance before he became aware of the presence of a line of police officers in riot gear spread across the whole width of the street and its footpath. When he noticed the line it was stationary and he concluded that he would not be able to get by. Accordingly, he decided to telephone his daughter to inform her that he would be unable to meet her at the school, as had been agreed.

8. When the plaintiff started making his call he was facing the riot squad. He told the court that in the course of the call he became aware of a commotion behind him and he turned around to see a number of protestors throwing a security barrier into the mouth of Hardwicke Lane, which he had just passed. Within a couple of seconds he was on the ground with an excruciating pain in his knee.

9. In the aftermath of his fall, the plaintiff assumed that it was a member of the riot squad that had knocked him to the ground as when lying on the ground he could see that a number of them had run past him in the direction of Eccles Street. He did not see who knocked him to the ground and neither could he describe whether he was struck forcefully or otherwise. He had no sensation of falling. One minute he was upright, the next minute he was on the ground. His phone and glasses travelled some feet ahead of him as he fell. A young lady picked up his phone and kindly helped him back to his feet.

10. The plaintiff told the court that he had not expected the riot squad to move forward towards the protestors as it had been stationary at St. Joseph's Place for all of the time he had been observing it. He did not feel that he was at any particular risk from the demonstration as there were plenty of other people going about their activities on the street and no one had stopped him or advised him not to walk down Dorset Street. Neither had he heard any announcement over a PA system advising people to leave the area.

11. Under cross examination the plaintiff agreed that there was an indication of trouble when he got to Dorset Street but he did not

feel it necessary to turn back. He felt he was safe to proceed up Dorset Street towards Bolton Street once he had gone beyond the unruly protestors at the Eccles Street junction. He accepted that missiles and fireworks were being showered in all directions as he made his way along the street. As to the circumstances surrounding his fall, he denied that he could have fallen due to having become disorientated or that he could have lost his balance in the confusion of what was taking place. He felt that he had hit the ground with force.

12. Mr. Desmond Kirwan Browne, Consulting Engineer called on the plaintiffs behalf, told the court that the footpath where the plaintiff was standing at the time he was injured was 12 feet wide in total. The distance between the line of bollards on the edge of the footpath and the wall was approximately 9.6 feet. He advised that it could accommodate four or five people tightly across its width. He agreed with counsel for the plaintiff that from still image number 10 it did not appear that there was anybody either side of the plaintiff as he fell and that given those circumstances there was, in his opinion, no impediment to somebody getting around the plaintiff without striking him.

13. Mr. Seamus Gallagher, a security consultant, told the court that from his viewing of certain video material relevant to the claim it seemed to him that there was relatively free access to the location where the plaintiff was injured. People could be seen standing in doorways and walking up and down. He thought approximately 30- 40 people were involved actively in the violence on the street. He felt the riot squad had moved forward quickly in response to the throwing by one of the rioters of a metal security barrier. He told the court that the general guidance given to members of a riot squad when approaching a serious disturbance was to try to manage the situation while insuring that they did not injure anyone, although he accepted that this could happen at times.

14. Mr. Gallagher also produced to the court a series of black and white, what I will call "stills", which he extracted from the videos and to which I will now refer.

Video Evidence

15. The parties agreed to admit into evidence two pieces of video footage relevant to this claim and these have been run together in a continuous sequence that lasts 2 minutes eleven seconds. The first runs for the period 00.00 until 01.20 and was taken by a member of the public using a hand held camera [RC1 Hand Held] from the roof or a second floor window close to Hardwicke Lane. The second section of Video runs from 01.20 until 02.11 and this was taken by a fixed on street camera [21cCP] which monitors activity at the junction between Dorset Street and Eccles Street. However, it is important to note that both sections of the video cover the period relevant to the plaintiffs fall. In this regard the most relevant pieces of the video are from 00.25-00.38 and 01.52-02.05. Both of these excerpts cover the period commencing with the throwing of the metal barrier just referred to and conclude a moment or two after the plaintiffs fall.

16. The aforementioned video evidence was shown in court and the parties agreed that I should be given copies of the videos which I have had the benefit of reviewing numerous times. From the timing bar on the video it is a straightforward task to determine the interval between a number of the important events that transpired around the time the plaintiff sustained his injuries. I have referred to some of these timings later in this judgment.

The Defendants' Evidence

17. Detective Inspector Downey gave impressive evidence regarding the setting up of the Public Order Unit in Ireland in 2003 and as to his own involvement in the training and rolling out of this new specialist force. However, it is not necessary for me to go into the detail of matters such as the amount of training received by those selected to participate in this unit as it is not particularly relevant to the circumstances surrounding the present claim.

18. At some stage on the day of the Queen's intended visit to the Garden of Remembrance, Detective Inspector Downey was informed by the Chief Superintendent that there were demonstrations taking place on Dorset Street and he was directed to provide assistance to the Public Order Unit at the junction of Dorset Street and North Frederick Street. A decision was later made to drive protestors away from town towards Drumcondra using a line of 18 gardaí from the Public Order Unit. These were dressed in riot gear and took up position across the full width of Dorset Street including its pavement. One sergeant was positioned behind each group of six riot police. Detective Inspector Downey travelled behind the line of officers and sergeants in a van driven by Garda Brian Daly and it was his duty to convey commands to the three sergeants who in turn were responsible for transmitting these to their six men. The intention was to move the entire unit forward in a line reclaiming short stretches of the street in the course of each advance.

19. Inspector Downey said it took well over an hour for the riot squad to travel the distance between North Frederick Street and Hardwicke Place. Each member was carrying a shield to their left side, normally supported by two hands. He told the court that the unit would jog forward for short distances in unison thus forcing protestors to retreat as it advanced. The unit stopped about five times over this distance and every time it stopped a standard warning was given by Garda Daly over the van's PA advising people to leave the area. He said that the unit had remained under fairly constant attack from the rioters as it made its way slowly in the direction of the Eccles Street junction.

20. Having viewed the video footage relevant to the plaintiffs fall, Detective Inspector Downey was of the opinion that if Mr. Fagan had been knocked down by one of the riot squad, particularly the member second out from the wall, it was probable that he would have fallen towards his left rather than his right, as had occurred, due to the fact that the shields are carried by officers on their left side. He said it was difficult to keep the line of a riot squad straight as it advanced. Officers get tired and become less attentive the longer the manoeuvre goes on. Some sergeants may take a little longer than others to pass on instructions to their six men and it happens all of the time that some members moving in formation may get ahead of others in the line. Missiles were not usually a problem for an advancing line but obstructions and people caused difficulty in this type of manoeuvre.

21. Under cross examination, Inspector Downey said that when the riot squad line was stationary before the plaintiff's injury that it was about 20-30 meters back from the protestors who were concentrated at Hardwicke Lane. He agreed that the line had been stationary for at least 15 minutes before it moved off to secure the Eccles Street junction. He denied that it had been the throwing by protestors of the security barrier at the Gardaí stationed at the opening at Hardwicke Lane that had caused the squad to run forward. The squad only moved forward on his instructions and it just happened that the throwing of the barrier closely coincided with his command to the inspectors to move the unit forward.

22. Inspector Downey told the court that he expected the unit to move forward causing minimal harm. He said that a riot squad moving forward at running line speed would step around any obstacles in their way including poles, bollards or people. He agreed that the unit was carrying out a pre-rehearsed manoeuvre at the time the plaintiff was apparently knocked down and that it was not acting in what was described by counsel for the plaintiff as "an agony of the moment situation" or trying to sanction any of those involved. He said that having regard to the width of the pavement, he would have expected the riot police to be able to jog past the plaintiff without knocking him over. He agreed with counsel that from the video it looked as if there was sufficient room for the

members of the riot squad to get safely past the plaintiff. Inspector Downey also accepted that a member of such a unit, although dressed in riot gear, ought nonetheless to feel the impact of colliding with someone. He stated that members of the squad would not mow people down nor decide to proceed forward pushing people out of their way. Their approach would be to step around an individual. If they knocked somebody down they would not be permitted to stop and the consequences would be left to be dealt with by one of the follow up gardaí. He said that there might not be a lot of room on the path if you were to look face-on at the three officers as they came toward you on the pavement, but he went on to agree that they should not have knocked the plaintiff over, if that is what happened.

23. Garda Daly, the driver of the garda van in which Inspector Downey was travelling, said that each time the riot squad came to a standstill he read out a standard warning directing people to leave the area and that he repeated this warning at approximately 10 - 15 minute intervals.

24. Sergeant Feehily who was the officer in charge of the three members of the riot squad travelling on the path of Dorset Street and who was following behind on the roadway said that he did not remember seeing the plaintiff on the ground in the course of the operation.

25. Garda Jim Carr, who was the riot squad member travelling closest to the wall as it made its way up towards Eccles Street said that before he had started that last manoeuvre, the squad had been stationary for about 15-20 minutes. Under cross examination he said he saw the barrier being thrown and that there was a lot of activity around the area, particularly from protesters and photographers. Garda Carr stated that he received an order to move forward to Eccles Street immediately after the barrier was thrown. He did not see anyone making a phone call standing on the footpath as he moved forward. When asked how a pedestrian like that could have been missed he stated that there was so much going on you could not recall every single person in front of you. He said it would be the objective of any riot squad member to move around any obstacles that were in their way while advancing towards their destination and they would not just bang into people in order to achieve that objective. He told the court that he felt he would have known about it if he had collided with the plaintiff during the advance.

26. Garda Mark Murphy, who was member of the riot squad positioned second out from the wall, said he did not remember knocking into anyone or seeing anyone fall. He agreed that as a member of the unit if you knocked somebody to the ground you would not stop and they would be dealt with by the line of ordinary members of An Garda Síochána who were travelling behind them. He said there were a small number of people on the footpath in his path and stated that he would have made it his objective to get to Eccles Street without interfering with them. He could not remember the plaintiff obstructing his path and he would have tried not to interfere with anyone as he moved forward. He said that if a pedestrian was knocked down from a standing position that this should not have happened.

27. Garda Michael Pilkington, who was the third member of the squad travelling along the pavement nearest the roadway, said that he did not knock the plaintiff down and that if a member had knocked him down that the person concerned ought to have been aware of that fact. He said that if a pedestrian is in your way in the course of such a manoeuvre, you would try to go around them and you do not just push them out of the way.

Findings of fact

28. Before moving on to consider the legal submissions made by the parties in this claim, I have decided to first of all deal with my findings of fact based on the evidence submitted by the parties.

29. I am satisfied that approximately two hours prior to the plaintiff's injury there was a significant public order disturbance at the junction of North Frederick Street and Dorset Street. I am also satisfied that at the time the plaintiff entered Dorset Street from Gardiner Street, probably about 15 minutes before he sustained his injuries, that there were several hundred of what he described in his statement to the gardaí as "thugs" a significant number of whom were throwing missiles such as bottles, bricks and fireworks at uniformed police near the junction of Eccles Street and Dorset Street. While there was a high police presence evident on Dorset Street as the plaintiff arrived, I accept that nobody approached him to advise him not to enter the street.

30. I am satisfied that as the plaintiff passed the group of rioters at the junction of Dorset Street and Eccles Street there was a stationary line of police in riot gear spanning the width of the street relatively close to St. Joseph's Place which is approximately halfway between Eccles Street and North Frederick Street. I accept Inspector Downey's evidence that it had taken this unit well in excess of one hour to make its way to that location from North Frederick Street during which time it cleared and recovered possession of the street by forcing protestors and rioters to retreat in the direction of Drumcondra. I also accept his evidence that the unit had moved forward in a line on a stop-start basis and that it had stopped in formation as often as five times and for periods of at least 15 minutes before it reached St. Joseph's Place.

31. Having regard to the fact that there was regularly a ten minute interval between warnings broadcast by Garda Daly over the PA system advising people to leave the area, I am prepared to accept the plaintiff's evidence that he did not hear any such warning prior to his injury.

32. I am satisfied from the plaintiff's oral evidence and from his subsequent written statement to the gardaí that he was standing on the footpath facing the line of riot police when he went to telephone his daughter to advise her that he would not be able to collect her. I am also satisfied that later in the course of that call he turned around in the other direction with the intention of walking back in the direction of Eccles Street as only seconds prior to his fall he is to be seen walking slowly, well out from the wall, in that direction while holding the telephone to his left ear as is clear from the section of video that runs from 01.56 to 02.02.

33. I am satisfied that the plaintiff was about 25 yards on the Drumcondra side of the entrance to Hardwicke Lane when he telephoned his daughter, as is evident from still number 8 in Mr. Gallagher's report. In that image two gardaí wearing neon flak jackets are to be seen either side of a metal crash barrier at the mouth of the laneway.

34. I am satisfied as a matter of probability, and I believe this borne out by still no. 2 in Mr. Gallagher's report, that immediately before the security barrier was thrown there were at least ten other people scattered across the pavement several yards ahead of the plaintiff, all of whom were facing the same direction as him. There was also another group of people further along the pavement in the Eccles Street direction who were looking back in the direction of the plaintiff.

35. From the video evidence, I am satisfied that during the time when the plaintiff was on the telephone to his daughter, two critical events occurred. The first of these was a very serious and dangerous public order incident which took place on the pavement directly in front of the plaintiff and the first group of people to whom I have just referred and concerned the throwing by a number of rioters of a metal barrier at three uniformed gardaí who were standing in the mouth of Hardwicke Lane. The barrier was in the air at 00.26

and crashed to the ground at 00.28 seconds, according to the video.

36. The second important event that occurred was that the line of members of the riot squad started to jog or run forward in the direction of Eccles Street on the instructions of their commanding officers. It is clear from the plaintiff's evidence and from that captured on the later of the two sections of video that this manoeuvre commenced several seconds after the barrier hit the ground. The squad can be seen starting their advance in the second section of the video at 02.00. I am satisfied as a fact that the combination of these two events created a degree of concern and confusion for those on the footpath where the plaintiff was positioned who were taking note of proceedings. There was complete mayhem of the footpath in the eight seconds leading up to the plaintiff's injuries as can be seen by viewing the video over the period 01.50 to 02.04. Pedestrians, recognising the danger of the situation are seen scampering for cover. One particular woman in a blue top, on noticing the sudden advance of the riot squad is seen almost throwing herself to her right across the pavement to seek refuge at the wall.

37. I am satisfied from the video evidence that the plaintiff fell to the ground exactly eight seconds after the aforementioned barrier landed on the ground and the time at which he fell was 00.36 according to the first section of the video. He can be seen in the later section of the video [01.58 to 02.04] that he is on his telephone for all of the six seconds that he is captured on video immediately prior to his fall.

38. It is irrelevant, in my view, as to whether Inspector Downey instructed the riot squad to move forward in response to the throwing of the barrier or whether his instructions were coincidentally given immediately after the barrier was thrown. But, lest anything turn on it, I accept his testimony that he did not command the unit to move forward in response to the throwing of the barrier which I accept he could not have seen from his position in the Garda van.

39. The eight second interval between the landing of the crash barrier and the plaintiff's fall, is not captured by the camera which had been trained on the mouth of Hardwicke Lane as it cuts out to the street to follow the activities of the member of An Garda Síochána who ran out from the laneway at 00.32 with his baton raised to force the rioters who had thrown the barrier to retreat. However the movement of pedestrians on the footpath in the seconds leading up to the plaintiff's fall is captured in the second section of video particularly the section that starts at 01.55 when the barrier is thrown and shows the plaintiff on his telephone amidst the relative chaos on the footpath as the riot squad start to advance at about 02.00.

40. I am quite satisfied from the last mentioned section of video footage that during the eight second period prior to the plaintiff's fall the people who were seen in still no. 2 and who are seen standing or walking some feet ahead of the plaintiff scattered from their earlier positions. Even from the still images it is clear that at the moment the plaintiff falls a number of the people who had been ahead of him on the footpath are to be seen with their backs flat up against the wall. It is relatively easy by reference to still number 8 to identify people also seen earlier in still no. 2 such as the man with the white sports hat and the girl in the blue to whose movements I have earlier referred. Further, cameramen are to be seen running all over the place, clearly in the expectation of capturing on film events that might prove to be newsworthy.

41. I accept that at the time the plaintiff sustained his injuries the riot squad was carrying out a routine and well practiced drill. However, I am also satisfied that at the time they commenced their manoeuvre, which involved them running or jogging in a line to the Eccles Street junction, they were faced with something of an evolving obstacle course as people formerly on the footpath moved right or left or simply fled due to the combined risk of injury from further missiles such as the metal barrier, which had just been thrown, or from the advancing riot squad. My impression of the overall evidence leads me to conclude that the stills numbered 8 and 10, which capture the position of people at the moment of the plaintiff's fall, give a sterile and artificial impression of what faced the members of the riot squad as they set off up the pavements towards Eccles Street. From the second section of video evidence commencing at 01.52 and ending at 02.05 it is clear that the eight seconds between the landing of the metal barrier on the footpath and the plaintiff's fall were moments of high activity for those on the pavement recognising, as they must have done, the risk to their own safety caused by the escalation in the violence and the fact that they were positioned between the demonstrators and the swiftly advancing cordon of riot police.

42. Regardless of the silence of the three members of the riot squad on the issue, I am satisfied from the second section of video evidence that due to the throwing of the barrier onto the footpath and the consequential scattering of pedestrians, those officers had to carry out their manoeuvre along the footpath in conditions far more difficult and complicated than those faced by their colleagues on the roadway, particularly over the first couple of seconds of their advance as they made their way as far as where the plaintiff was positioned.

43. Even though it is possible that the plaintiff could have tripped or fallen while performing a manoeuvre such as that carried out by the woman in the blue top to whom I have already referred in an effort to get out of the way of the advancing gardaí, or that for some other reason he became destabilised and fell to the ground, I think it is more probable that one of the members of the Public Order Unit knocked into him as they moved swiftly along the footpath and that he fell as a result. In the second section of the video the plaintiff is to be seen on his telephone apparently oblivious to what was happening around him and I see no evidence of him taking any action in response to the unfolding events. Further, from the still numbered 16 and 18 and from my viewing of the video itself, there appear to be no other likely suspects. While there are several other people in the relevant clip of video, all of these have their backs up against the wall, probably as a result of their efforts to get out of the way of the advancing squad. The only other person is a cameraman who is seen passing the plaintiff subsequent to his fall and who for this reason must be excluded. On the balance of probabilities, I believe it was the second member of the unit who was travelling up the central portion of the footpath who made contact with the plaintiff. Having viewed the video evidence, I think it is probable, given his position on the ground after his fall, that the two members of the Public Order Unit who were closest to the wall were probably travelling either side of him and that one of them made contact with him as they went by.

44. The fact that all three officers said that they had no recollection of knocking the plaintiff down or of having noticed him on the ground does not mean that they did not or could not have collided or impacted with him in some way. Clearly, if they had knocked down an oncoming pedestrian I would have expected them to have been aware of that fact. However, in this case, just before the plaintiff fell he was actually moving in the same direction as the riot squad. In the light of the volatile situation on the street, I do not believe they would necessarily have been aware of making some relatively modest contact when moving past a pedestrian such as the plaintiff who may have been in or even stepped into their path of travel. It would have been very easy for one of the riot squad to accidentally bump into a pedestrian such as the plaintiff, as I believe occurred here, particularly where that pedestrian was engrossed in a telephone conversation to the extent that unlike every other pedestrian, he seemed unaware of the advance of the riot squad and was unable to take any evasive action.

45. The fact that the plaintiff fell to the ground injuring his knee and shoulder does not necessarily mean that he fell as a result of any particular force. The fact that his glasses, on his own evidence, went forward two feet to three feet in the fall and his phone

perhaps four feet is of little evidential weight. Given that the plaintiff was moving in the same direction as the riot squad at the time he fell this was to be expected. Further, he had his back to the advancing unit and in these circumstances would have been providing no resistance to any potential contact, unlike the scenario that would pertain if the two parties to the impact had been moving in opposite directions. Likewise, the position of the plaintiff on the ground in the aftermath of the event proves nothing about the nature of the impact. From the plaintiff's evidence he suffered excruciating pain as his knee took the weight of his fall. In such circumstances, it is easy to see how he ended up lying on the pavement as depicted in still number 10.

46. I am also satisfied that whatever contact was made between the member of the riot squad and the plaintiff that this did not arise as a result of any deliberate force, or any dangerous, aggressive, reckless or ill-disciplined manoeuvre on the part of the member concerned. It was asserted that the three members on the footpath may have been moving dangerously quickly along the footpath in an effort to catch up with the rest of the unit, given that they had lost formation at the time of the plaintiff's fall and had fallen a little behind their colleagues on the roadway. I have to say I think that is an unlikely scenario and having carefully viewed the second section of the video several times I think it is much more probable that the loss of formation occurred because of the difficulty they had getting along the path immediately after the barrier was thrown, a time at which a significant number of pedestrians were clearly moving to the protection of the wall or running away. Further, if there had been any intentional force, ill-disciplined behaviour or recklessness on the part of the offending member as he moved to get past the plaintiff I believe any such action would have been noted by one of the many bystanders who would surely have made their identity known to the plaintiff. In this regard still no. 18 shows several members of the public standing up against the wall as the members of the riot squad made their way past him.

47. What I now must decide, having regard to the submissions of the parties, is whether or not the facts as found are sufficient to permit the plaintiff to succeed in his action for negligence against the defendants

The Submissions of the Parties

48. Mr. Callanan, S.C., on the defendants' behalf, submitted:-

1. That the plaintiff had not discharged the burden of proof in establishing that he was knocked over by an agent of the defendants.
2. That the defendants did not owe a common law duty of care to the plaintiff as to the manner in which they exercised their public order function.
3. That if the defendants did owe a duty of care to the plaintiff when exercising their function to maintain public order, the standard of proof required by any plaintiff would have to be high in order to reflect their operational requirements. He submitted that only proof of something as serious as malice or gross recklessness would suffice.
4. Finally, if the court were to find the defendants to have been negligent then it should conclude that the plaintiff was guilty of a very high degree of contributory negligence.

49. In urging the court to conclude that gardaí should be afforded an immunity in respect of injuries which might otherwise be considered negligent were it not for the fact that they were exercising their function to maintain public order, Mr. Callanan relied, *inter alia*, upon the decision of the House of Lords in *Hill v. Chief Constable of West Yorkshire* [1989] 1 A.C. 53, the decision of Kearns P. in *Lockwood v. Ireland* [2011] 1 I.R. 374 and that of Hedigan J. in *L.M v Commissioner of An Garda Síochána & Ors* [2012] I.L.R.M. 132. These decisions are all authority for the proposition that members of a police force (in this case the gardaí) are immune from actions for negligence in respect of their activities concerning the investigation, prosecution and suppression of crime.

50. In further support of his argument for an immunity from suit in the law of negligence, or alternatively some abatement in any duty of care deemed to be owed by the gardaí to members of the public when exercising their public order functions, Mr. Callanan relied upon the decision in *Glencar Explorations v. Mayo County Council (No.2)* [2002] 1 I.R. 84, in which the court concluded that a public authority could not be sued in negligence in relation to any decision made by it when exercising its statutory duties, unless it could be established that any such decision had been made in the context of some wrong or improper motivation.

51. On the plaintiff's behalf, Mr. Byrne, S.C. accepted that the gardaí are immune from suit for negligence in respect of their conduct when carrying out their prosecutorial or investigative functions in relation to the commission of a crime. However, that specific immunity could not, he maintained, by analogy be extended to their other operational duties.

52. Mr. Byrne submitted that the ordinary principles of the law of tort ought to be applied by the court. He agreed with Mr. Callanan that there were circumstances in which the liability of the gardaí for injury might be abrogated, such as if they injured someone in the course of carrying out a life saving manoeuvre or, as he put it, in an "agony of the moment" situation.

53. However, on the facts of the present case, given that Inspector Downey had stated that the riot squad had not injured the plaintiff when responding to the escalation in violence generated by the throwing of the metal barrier or any desire to apprehend the culprit, Mr. Byrne submitted that no such latitude should be afforded to the defendants. The manoeuvre being carried out at the time the plaintiff was injured was a routine drill which did not fall into such a category.

Decision

54. All of the arguments raised by the parties can, I believe, be disposed of by answering the following questions:

- (i) Do members of An Garda Síochána owe a duty of care to members of the public when carrying out their public order functions?
- (ii) If such a duty exists, what is the test to be applied? Is it the standard test or is some higher threshold required to establish liability?
- (iii) Was there a breach of any such duty?

55. As to the alleged immunity from suit of gardaí when involved in public order duties, the court was not furnished with any case law to support that proposition. Neither did the defendants produce any written authority to this effect from any of the authors of the very many formidable texts on the law of torts. And, of course, there is no statutory provision which confers any special protections on the gardaí when exercising such functions.

56. In supporting the claimed exemption the best Mr. Callanan was able to do was to seek to benefit, by way of analogy, from a

range of decisions which apply only in very specific circumstances and for very clear reasons.

57. I reject the defendants' submission that by analogy I can apply the reasoning of the court in *Glencar* to the facts of this case. In *Glencar Explorations .v. Mayo County Council (No.2)*, the plaintiff, a mining company, brought a claim for damages for negligence against the local authority in respect financial losses which it sustained as a result of a decision made by the Council to adopt a new development plan. That decision had previously been held to be *ultra vires* the powers of the local authority by the High Court (Blayney J.) and the section of the development plan that contained the mining ban was therefore null and void: *Glencar Explorations .v. Mayo County Council (No.1)* [1993] 2 I.R. 237. In *Glencar Explorations .v. Mayo County Council (No.2)*, in deciding whether a claim for damages could be maintained in such circumstances, the High Court (Kelly J.) concluded that public authorities would be brought to an inevitable paralysis in their ability to take decisive action in the administration of public affairs if they were to be liable for damages in respect of any error made in the exercise by them of their statutory functions. It was held that in order for a plaintiff to succeed in such circumstances, they would have to prove some type of misfeasance on the part of the decision maker such as malice and that the public interest would not be served unless decisions made in good faith were afforded protection. The decision of Kelly J. was subsequently affirmed by the Supreme Court.

58. In comparing the facts of the present case with those of *Glencar*, the first thing to note is that gardaí when carrying out public order functions, unlike the County Council in *Glencar*, are not acting in pursuance of any statutory obligation. Further, in my view, it cannot be argued that to impose a duty of reasonable care on gardaí when exercising their public order functions would paralyse them in their capacity to achieve public order or would otherwise render them ineffective in carrying out those functions. The public order functions of the gardaí are very wide ranging. In many instances they are carried out in circumstances where there is no significant risk to innocent members of the public or indeed to themselves. If a blanket immunity were to be afforded in respect of the actions of all gardaí when exercising any public order function that would be to give them a latitude extremely disproportionate to their needs. Indeed such immunity could readily be abused by the use of excessive or unnecessary force, something that would not be in the public interest.

59. I also reject Mr. Callanan's submission that because gardaí are immune from actions for negligence in respect of their activities when engaged in the investigation or prosecution of crime they should enjoy a similar immunity from suit in respect of injuries caused by them in the performance of their public order functions. There is nothing in the authorities which he relied on which would encourage me to that view. Given that the courts have consistently been asked to consider the circumstances in which gardaí may enjoy an immunity from suit in the law of negligence, such as when they are carrying their prosecutorial role, surely it must follow that in all other circumstances they are liable for acts of negligence.

60. The first authority relied upon in this regard was the decision of the House of Lords in *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53. That case concerned an alleged culpable delay on the part of the West Yorkshire Police in the prosecution of Peter Sutcliffe, the Yorkshire Ripper, by the mother of a young woman who was killed by him. She lost her claim in negligence on a number of grounds which, apart from the public interest point, included the insuperable difficulties that would be faced by a court if forced to try a case of negligence relating to the investigation of a crime. At page 64 of his judgment, Templeman L.J. gives a good insight into such potential difficulties:-

"The question for determination in this appeal is whether an action for damages is an appropriate vehicle for investigating the efficiency of a police force. The present action will be confined to narrow albeit perplexing questions, for example, whether, discounting hindsight, it should have been obvious to a senior police officer that Sutcliffe was a prime suspect, whether a senior police officer should not have been deceived by an evil hoaxer, whether an officer interviewing Sutcliffe should have been better briefed, and whether a report on Sutcliffe should have been given greater attention. The court would have to consider the conduct of each police officer, to decide whether the policeman failed to attain the standard of care of a hypothetical average policeman. The court would have to decide whether an inspector is to be condemned for failing to display the acumen of Sherlock Holmes and whether a constable is to be condemned for being as obtuse as Dr. Watson. The plaintiff will presumably seek evidence, for what it is worth, from retired police inspectors, who would be asked whether they would have been misled by the hoaxer, and whether they would have identified Sutcliffe at an earlier stage. At the end of the day the court might or might not find that there had been negligence by one or more members of the police force. But that finding would not help anybody or punish anybody."

61. At p. 65 of his judgment he referred to further consequences of permitting a claim for damages in such circumstances:-

"Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties."

This action is in my opinion misconceived and will do more harm than good."

62. The aforementioned decision was followed by Keams P. in *Lockwood v. Ireland*, where the plaintiff, who was the complainant in a prosecution for rape which floundered as a result of the unlawful arrest of the accused, claimed damages for negligence. In dismissing her claim, Keams P. stated (at para. 24) that a claimant must establish *mala fides* to bring her claim within the law of tort in this jurisdiction, and concluded "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". A similar conclusion was reached by Costello P. in *W v. Ireland & Ors (No. 2)* [1997] 2 I.R. 141, a case in which the plaintiff claimed that the Attorney General wrongfully neglected to endorse the extradition warrants for Fr. Brendan Smyth and that as a result of his neglect, the plaintiff had suffered shock, distress, loss and damage.

63. Regardless of the aforementioned body of case law, it cannot, in my view, be argued that without affording gardaí a similar type of immunity when performing their public order functions that the court would find itself in the same difficulties as were described by Templeman L.J. in *Hill*. Each case would turn on its own merits and ought to be capable of being dealt with in a relatively straightforward manner such as occurred in the present case. No particular evidential difficulties should arise. Neither can it be stated that the ability of the gardaí to perform their public order duties would be brought to an effective standstill or that their time available to deal other duties would be significantly adversely affected if members of the public had the right to maintain claims for damages for negligence in such circumstances. Further, the threat of such litigation should not, I believe, interfere with their likely efficiency in the conduct of their overall garda duties. Indeed the fact that there is no case law to be found in this jurisdiction dealing with the duty of care owed by gardaí to the public when carrying out even their regular duties would tend to support these conclusions.

64. Notwithstanding the fact that the decision in *Hill* was relied upon by the defendants to contend for an immunity from suit for

police officers performing public order functions, that decision is far from a supporting authority. In fact, Keith L.J. at para. 59 states precisely the opposite:-

"There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence."

65. Even drivers of emergency vehicles, who may be exempted from ordinary speed limits, are not exempted in terms of liability for negligence. They are not given *carte blanche* to drive without due care. However, in determining whether due care was taken, the court is entitled to give the object of the journey due weight. If this category of defendant is to be held potentially accountable in the law of tort, it would make no sense to conclude that gardaí when performing public order duties could be deemed to be under any less of an obligation in terms of the duty of care which they owe to members of the public.

66. Neither do I accept that, having found that no such immunity from suit in negligence as claimed exists, I should conclude that that there is some higher threshold which the plaintiff must establish, such as malice or recklessness, so as to succeed in liability. That again would involve me affording a different albeit lesser type of immunity than that already discussed which is not provided for by statute and in respect of which no legal authority has been produced.

67. Simplistic as it may appear, I believe that all of the defendants' concerns as to the ability of gardaí to carry out their public order functions without the fear of unreasonable claims for damages being brought against them are more than adequately catered for by the application of the standard principles of the law of tort. Those principles which have at their core the concept of reasonableness are sufficiently flexible to take into account the interests of the gardaí and the public alike.

68. It is clear that in assessing whether conduct complained of amounts to negligence the court is entitled to look at a range of factors. It must look at the overall facts of the case when considering what is reasonable and in this regard I have already set out in my findings of fact the circumstances which I believe to be relevant. The court is also entitled to include in its considerations the probability of an accident if reasonable care is not used, the gravity of the threatened injury and the social utility of the defendants' conduct at the relevant time.

69. While it was agreed by a number of the witnesses for the defendants that the plaintiff was struck during what was described by them as a routine and well rehearsed manoeuvre rather than, for example, in the course of an emergency to avert a risk of a fatality or to apprehend a dangerous criminal, that is only one of the many relevant considerations. Of much greater importance was the extent of the difficulties faced by the defendants when performing that operation.

70. The macro backdrop to this so-called routine manoeuvre was a fierce and continuous violent disturbance involving hundreds of protestors in the course of which the riot squad remained under constant attack from missiles of all sorts on a continuous basis and at a time when it was trying to push the protestors, little by little, back towards the junction of Eccles Street and further out of the city centre.

71. The micro backdrop to the manoeuvre was that in the eight to ten seconds before the plaintiff was struck, a sudden and extremely dangerous escalation of events took place only perhaps 20- 30 yards in front of where he was standing on the footpath. Shortly thereafter, the riot squad started moving swiftly forward trying to hold formation along that pathway. It is irrelevant that the riot squad did not, according to Inspector Downey, move forward in response to this escalation of violence generated by the throwing of the barrier. The fact of the matter is that there was an escalation of violence and the consequence of the two aforementioned events was that everyone on the footpath who had been ahead of the riot squad, with the exception of the plaintiff, scattered to positions of greater safety. Some pushed themselves up against the wall or into doorways to avoid injury and to avoid the squad which was then on the move. The video evidence available covering the period 01.50-02.05 makes this very clear.

72. Of some further albeit marginal relevance in this case is that the probability of an accident occurring in the event of a member of the Public Order Unit failing to proceed with due care in the circumstances that pertained was, I believe, quite small. In trying to predict the likelihood of injury I feel any member of the riot squad moving along the pavement just after the barrier was thrown should have been entitled to assume that anyone on the footpath would notice their advance and would be able, with several seconds' notice, to get out of their way. I am also satisfied that the gravity of any threatened injury to a pedestrian from a member of the Public Order Unit who did not notice them when moving forward at jogging pace was likely to be very low.

73. As to the court's entitlement to give more indulgence to a defendant when its activities can be stated to have a high social utility, the fact that the defendants in this case were carrying out a very significant public order function at the time of the plaintiffs injuries, regardless of whether the drill in progress, was one which was routine for riot situations or not, must, in my view, weigh heavily when considering whether the defendants acted with reasonable care. At the time of the accident, the riot squad was attempting to maintain public order by reclaiming the streets from certain protestors whose unlawful violent actions may have potentially caused grave injuries to members of the public, including the plaintiff, or to visiting dignitaries who were conducting an official state visit to this jurisdiction.

74. I am satisfied that it would be a wholly artificial exercise to decide what amounted to reasonableness in terms of the defendants' conduct by freezing events at the instant the plaintiff was struck and to say that because at that precise moment the footpath beside and immediately beyond him appears to be unobstructed that the offending officer was necessarily negligent in failing to avoid making contact with him. Further, while Inspector Downey, Mr Kirwan Browne and several members of the public order unit accepted from the measurement of the footpath and the images presented to them in court that it should have been possible for the officer concerned to have circumvented the plaintiff without knocking into him, it does not necessarily follow that having collided with the plaintiff the officer concerned was guilty of negligence.

75. To conclude that members of a riot squad, whose objectives included the clearance of rioters from a street, something which is achieved by advancing at jogging speed in a closely knit line formation, while under attack from missiles are culpable if they fail to carry out such a manoeuvre without accidentally knocking into somebody would be to set the standard of care required of them unreasonably high. This is particularly so in the circumstances of this case where I believe they ought reasonably have been entitled to assume that anyone who decided to stay on the street during this period of danger would notice their advance and be able to take evasive action.

76. I believe that if I were to hold the defendants liable for an innocent collision between a member of the riot squad and a man making a phone call, albeit entirely well motivated, who had placed himself between demonstrating rioters and a line of riot squad police officers and who because of that telephone conversation remained oblivious to their advance and was rendered incapable of

taking any evasive action, would be grossly unreasonable.

77. For all of the aforementioned reasons I have come to the conclusion that the plaintiff was injured accidentally and his injuries were not due to any negligence or any breach of duty on the part of the defendants.

78. If I had found the defendants guilty of negligence I would then have had to consider the extent to which the plaintiffs conduct, in the sense of blame worthiness, contributed to his injuries, a task of which I am now relieved. However, given the complexity of the legal issues in the case and the possibility that I have decided them incorrectly, I think I should express, in a general way, my view as to the plaintiffs conduct on the day in question.

79. As was clear from the evidence, the plaintiff is clearly a devoted father with a very high sense of parental responsibility. Regrettably it was these latter traits that, on the 11th May, 2011, led him to take a number of risks with his own safety that he might otherwise not have taken.

80. Every citizen is obliged to take reasonable care in carrying out their day to day activities in public places. The level of care that they must take for their safety clearly depends upon the circumstances in which they find themselves.

81. When the plaintiff left his home on 17th May, 2011, he certainly knew that there was trouble in the vicinity of Parnell Street. By the time he got to Dorset Street it should have been clear to him that he was walking into a potentially dangerous situation. There were, according to his own statement, hundreds of "thugs" a substantial number of whom were throwing missiles at that junction. As soon as he got past the rioters at the junction of Eccles Street and Dorset Street and started walking towards Bolton Street he should have noticed the line of riot police blocking both the roadway and the footpath and it ought to have been immediately clear to him that he would not be able to get past the cordon. He should have retreated at that stage knowing that as long as he remained between the rioters and their intended target, the riot squad he would be at risk of injury from any number of sources including missiles such as bricks, bottles and fireworks which were being thrown by the protestors at the riot squad and also from any potential escalation in violence between the two adversaries.

82. I do not think it was reasonable for the plaintiff to conclude that he would be safe just because Dorset Street had not been cordoned off and he had not been advised by the gardaí who were present leave the area. As an intelligent adult, he should have been able to foresee the potential range of dangers to which he was exposing himself.

83. Regrettably, and again for the most worthy of reasons, the plaintiff decided to make a telephone call from the centre of the footpath. He didn't make his call having sought the protection of a doorway. Neither did he stand with his back to the wall, a position which would have allowed him keep any eye out for potential missiles and for any engagement between the protestors and their target, the riot squad. The video and still images establish that the plaintiff was the only member of the public who did not respond to the escalation in the violence and the movement of the riot squad along the footpath. Eight seconds after a barrier was thrown onto the footpath in front of him, the plaintiff is still on his telephone in the middle of that footpath. Every one else managed to retreat to the protection of the wall or elsewhere.

84. Given that I have concluded that the plaintiff's injuries were not caused by any negligence on the part of the defendants but rather as a result of a modest accidental collision between himself and a member of the Public Order Unit of an Garda Síochána while carrying out duties in a riot situation, I am thankfully absolved from ascribing any specific degree of blame worthiness to the Plaintiffs own actions.

85. For all of the aforementioned reasons I must dismiss this claim.