Neutral Citation Number: [2009] IEHC 416

THE HIGH COURT

2008 351 P

BETWEEN

TERENCE GAMMELL

PLAINTIFF

AND

WILLIAM DOYLE T/A LEE'S PUBLIC HOUSE

AND

DAVID WHITE

DEFENDANTS

JUDGMENT of Mr. Justice Hanna delivered on the 28th day of July, 2009

1. The plaintiff in this case is a labourer and resides at 25 Cedarwood Crescent, Kilcoole in the County of Wicklow. The first named defendant is the owner of public house situated in Kilcoole. The second named defendant is a road haulage operator. He resides at 44, The Crescent, Greystones in the County of Wicklow.

2. The incident giving rise to this case is simply described. On 26th December, 2005, the plaintiff was in the first named defendant's licensed premises at Kilcoole. After a sequence of events, which was the matter of much controversy at the hearing of this action, the second named defendant punched the plaintiff in the face, thereby causing him to suffer a significant injury. There is no dispute that the second named defendant assaulted the plaintiff. No issue arises as to the fact that the plaintiff had inflicted upon him a fracture of the left cheekbone. Mr. White pleaded guilty to a charge of assault on 17th July, 2007, and received a sentence of two and a half years' imprisonment which was suspended.

3. Much controversy raged during the trial concerning the status of the plaintiff in the said licensed premises and his general demeanour, state of inebriation and behaviour prior to the punch administered to him. The plaintiff denied that there was any question over his right to be present in the pub, denied any allegations of misconduct on his part and contended that the punch administered to him, quite literally, came out of the blue.

4. Prior to this matter coming on for trial, the plaintiff entered into a settlement with the first named defendant, Mr. William Doyle. Therefore, Mr. Doyle involved himself as a witness only when the matter proceeded before me for two days. At no point were we told the amount of this settlement but it was acknowledged by Mr. Declan McGovern S.C. for the plaintiff that the second named defendant was entitled to credit for any payment made to the plaintiff.

The Evidence

5. The plaintiff, who is 52 years of age and describes himself as a builder's labourer, said that on St. Stephen's Day, 2005, he went into Lee's Public House to see his daughter. His youngest daughter, Laura, worked there; his older daughter, Emma, drinks there. The plaintiff had earlier been in two pubs in Bray. He arrived at approximately seven p.m. The plaintiff said that he went into the lounge; his daughter Emma was not there. The plaintiff ordered a drink. He spoke to the owner of the pub and the owner's daughter. He spent one hour in the lounge and had two pints. He then went around to the bar to see if his eldest daughter was there. There was a crowd in the bar because of the Tighe funeral. The deceased was a young man. The plaintiff said that he knew the deceased very well. Their employers in the building trade were brothers, although not in business together.

6. He checked around for Emma. He did not see her. Mr. David White, the second named defendant, called him over and bought him a drink. He was sitting in the corner near the hatch. There were four people there including Mr. White's wife. She was there with another woman sitting to her right. Both ladies were sitting and the plaintiff was on Mr. White's left-hand side; they were sitting on bar stools.

7. The plaintiff had a conversation with Mr. White. He enquired of Mr. White if he had had a good Christmas and enquired after his business. It was noisy and busy in the pub. There was no conversation with Mr. White concerning his wife or the other lady. The plaintiff says he just said "hello." He knew Mr. White and his wife's family fairly well. Maybe Mr. White took up something wrong. The plaintiff says he had turned around to say hello to a Mr. Coyne but Mr. White punched him on the left-hand side of his face. He was turned to the right at the time; he was facing the toilets. He fell to the floor and was dazed.

8. The barman, Mick Doherty, came over and took him outside. His daughter, Laura, also came out. He made his own way home. He felt terrible and was bleeding and sick. The next morning his son brought him to Loughlinstown Hospital. After initial treatment there, he was referred the following Friday to St. James's Hospital where he came under the care of Professor Stassen. The plaintiff had suffered a significant fracture of the left cheekbone. The professor operated upon him. The plaintiff was discharged the following evening. He was experiencing considerable pain for which he took pain killers. He had also received stitches.

9. Subsequent to this, when he was on the way to visit his doctor, he met Mr. White who apologised to him and remarked, according to the plaintiff, words to the effect of "I hear you are going to take me to the cleaners." Mr. White allegedly went on to say "fuck you, I don't care what you do" or words to that effect. The plaintiff says he went to his solicitor Mr. Neville Murphy the next day. At the District Court, prior to the matter being sent forward for trial, the plaintiff said that Mr. White asked if they could sort it out and the plaintiff said it was too late.

10. At this point in the evidence in chief the plaintiff's counsel, Mr. Declan McGovern S.C., put to the plaintiff certain particulars of negligence and breach of duty on the part of the plaintiff and acts by him of provocation of the second named defendant which were set out in Mr. White's defence. The first particular alleged that the plaintiff was provocative towards the second named defendant on a number of occasions, asking him about his past sexual experiences with local women. The plaintiff denied this and says that there was no conversation at that level at all. A second particular was then put to him alleging that he was provocative towards the second named defendant in that he made lewd and/or improper and/or sexual references and/or threats and/or suggestions in relation to the second named defendant's wife. "No, not at all" was the plaintiff's reply. Finally, when the allegation was made that he was provocative towards the second named defendant in that he pushed his face into the side of the second named defendant's face, so too did he deny that. He expressed the view that the second named defendant might have taken something up wrong.

11. Under cross-examination by Mr. Mel Christle S.C., who acted for Mr. White, it was queried whether he just had two pints in Bray. The plaintiff said he was seeing friends in Bray. He was asked was he not there for any other reason. It was put to him that he was banned from Lee's Public House. The plaintiff denied that this was the case. Nobody had told him he was barred from Lee's Public House. Had he not seen this allegation in the first named defendant's defence, Mr. Christle enquired? The plaintiff persisted in saying that nobody had told him he was barred from Lee's Public House. He was not aware of this fact. He said he had two pints in a pub in Bray. He got to Bray around five p.m. and started drinking there around five fifteen p.m. and he had returned to Kilcoole by bus around six p.m. He had not been drinking before he went to Bray.

12. He went in looking for Emma. He had two pints in the lounge before he went to the bar. When asked why he did not check for her in the bar he said he knew that she would not be there.

13. He referred to the wake. He said that around that time he had lived approximately 500 yards from Mr. Tighe, the deceased. Under cross-examination, the plaintiff claimed that that was as much as he knew of Mr. Tighe. I should comment at this point that this is at variance to what the plaintiff said in giving his evidence-in-chief. He accepted it was a sad death. Lee's, as well as being a public house, was also an undertakers. The plaintiff said that his eldest daughter hung around with Mr. Tighe's sister. He had arranged to go to the funeral the next day and would have paid his respects if he had seen any one of the family. He denied that he was drunk when he entered the bar. He denied that his state of inebriation became noticeable when he spoke to Mr. White. The plaintiff said that he was called over and bought a pint by Mr. White and said that he said "thanks."

14. A certain number of crude suggestions allegedly made by the plaintiff were then put by Mr. Christle to Mr. Gammell. Did he not enquire of Mr. White if he was "riding the babysitter"? The plaintiff denied this. Did he not look at the defendant's wife and remark that she was looking well and that he "wouldn't mind getting into her knickers"? Again the plaintiff denied this. It was put to the plaintiff that Mr. White asked him to leave the bar after the remarks and the plaintiff said no, that didn't happen. It was also put to him that his daughter Laura asked him to leave such was his aggressive nature. The plaintiff denied this. Neither daughter was there. It was then put to Mr. Gammell that he leaned into Mr. White, as it were, invading Mr. White's space. The plaintiff denied this. Laura again asked him to leave and, again, he refused and recommenced the invective. Again, the plaintiff denied this.

15. The plaintiff then said words to the effect "you all think you're big lads driving around in big jeeps and cars. You're a shower of wankers." The plaintiff then allegedly turned his invective on the family of Mr. Tighe, referring to them as knackers and said that they were probably at home drunk; this, according to Mr. Christle, notwithstanding the fact that members of the family were walking in and out. All of this the plaintiff denied. He did accept that the funeral parlour was accessible from the public house.

16. He then, according to Mr. Christle, leaned into the second named defendant, Mr. White, again, and started poking him on his shoulder. At this point, Mr. White asked him to leave or else he would "lose it". No such thing happened, said the plaintiff. It was suggested that he kept poking at Mr. White and invading Mr. White's body space and, furthermore, that he was very drunk. It was put to him that both Mr. and Mrs. White had asked him to leave and again all of this was denied. The assault occurred subsequent to all of this.

17. Evidence was given by a member of the gardaí attached to Greystones' Garda Station that the second named defendant pleaded guilty to assault on 17th June, 2007, and was sentenced, as noted above, on 20th December, 2007. He confirmed that the defendant demonstrated contrition and that he had no previous convictions for assault or drink related matters.

18. No further evidence was called on behalf of the plaintiff; medical reports having been agreed. I must observe that I found it rather surprising that neither of the plaintiff's daughters, particularly Laura, were called to give evidence since it was apparent, not least during the plaintiff's cross-examination, that such evidence could have been of considerable assistance to this Court. The absence of such evidence was properly commented upon by Mr. Christle S.C.

19. The next witness to give evidence was the second named defendant Mr. David White. He stated that he was 47 years of age and lived in Kilcoole. He has been married to his wife, Josephine, for 25 years. They have three children. He had studied for one year at Blackrock Technical College. He runs a haulage business.

20. He knew Mark Tighe very well. His death was a shock to the whole community. The body was brought to the funeral home attached to Lee's Public House. The deceased was only 33 years of age. He and his wife were in company with others in Lee's. He was there approximately one hour before the plaintiff came in. There were around 100 people there. He noticed Terence; he offered to buy him a pint. He knew that he was barred. The barman, Michael Doherty, served the drink and Mr. White handed it to Mr. Gammell. He observed that the plaintiff was drunk. He made the remark above referred to concerning the babysitter. The defendant answered that she was down in Wexford. He then made the remark about the defendant's wife and the defendant tried to pass it off lightly saying words to the effect "you will have to ask her." He carried on with the conversation in the manner as put by Mr. Christle to the plaintiff in cross-examination. He described the Tighes as "alcoholics and knackers." The defendant was straining to deal with what the plaintiff was saying. At this stage, he told the plaintiff, in his own words, to "fuck off back to the lounge." At this point, Laura came over and the witness believed she asked the plaintiff to leave. He did not leave. He turned and tried to ignore the plaintiff. He was listening to the plaintiff and Laura. The defendant's wife told the plaintiff to "get lost."

21. He was listening to the plaintiff and Laura. The defendant's wife told the plaintiff to "get lost". Then the plaintiff came

back with his remarks about cars and jeeps etc. The defendant realised that the plaintiff was very drunk. The defendant was getting very upset. They were there to wake Mark Tighe, but the plaintiff only repeated his remarks about the Tighes. He started prodding the defendant and put his face up against the defendant. He told him to move away but the defendant did not. He then punched the plaintiff.

22. He went out the back to calm down. He came back, organised a taxi and went home. The defendant admitted that he simply "lost it" as a result of the plaintiff's conversation and conduct. John Coyne was not there when he struck the plaintiff.

23. The next day he rang his brother-in-law who suggested that an apology would sort matters out. On 4th January, he met the plaintiff at a bus stop and apologised to him. He said he would sort out the medical bills to which the plaintiff agreed. The next thing, a solicitor's letter arrived. He denied saying that he did not care etc. He called to the plaintiff's house. It is there that the plaintiff said that matters rested in the solicitor's hands.

24. Under cross-examination, he admitted that he was a strong man, although great strength is not required now to drive modern trucks. He admitted that he struck the plaintiff and that he had been provoked into doing so by what the plaintiff had said. He moved away to calm down. He admitted he was a bit drunk. He was provoked because of what he said. The plaintiff had no regard for the people in there.

25. The next person to give evidence was Mrs. Josephine White. Her husband had been with Mr. Tighe's family over the Christmas period following upon the death of Mark Tighe. The plaintiff lives about five minutes walk away from the Tighes. When in the pub, she heard raised voices. She asked the plaintiff to leave. He was very "narky." She had heard what the plaintiff had said about her. She decided to ignore him and asked him to go. She heard him talking about the Tighes. She saw him poking David. It was horrible. David could not take it any more. She maintained stoutly under cross-examination that the plaintiff did say all of the things that were attributed to him.

26. Michael Doherty, the barman, was next to give evidence. He said he had been a barman for 15 years. Mr. and Mrs. White were seated at the end of the bar. The plaintiff was standing beside the defendant. The defendant ordered a drink for the plaintiff. The plaintiff had been barred from the pub. He had been instructed to this effect. He saw the defendant giving the drink to the plaintiff. The undertaker's business was adjacent to the pub. There was an unwritten rule when there was a funeral that people who were barred were allowed in to sympathise with the family of the deceased. He hoped that the plaintiff would not have another drink. That would be a problem.

27. He saw the plaintiff and the defendant talking but he did not know what they were talking about. The plaintiff was standing to the defendant's left-hand side. They were more or less standing side by side. He felt that they were talking for between five and ten minutes. He heard Dave say "you can't say that." He saw the plaintiff prodding the defendant and he saw the defendant hit the plaintiff. Approximately two or three minutes elapsed between the commencement of the prodding and the defendant hitting the plaintiff. Laura went to the plaintiff. She then came back and said that the plaintiff had gone home. The waking continued. Under cross-examination he said that he knew the plaintiff's daughter Emma and that she drank in the lounge more likely than in the bar. He did not see the plaintiff in the lounge. Mr. Doyle, the owner of the pub, was not there.

28. The witness was later recalled to say that the plaintiff was barred from other pubs in the area.

29. Mr. John Coyne then gave evidence. He noticed the defendant at the counter. He was not in that corner prior to the plaintiff being struck. He does not recall the plaintiff being struck. He heard about it after all the commotion. He knows the plaintiff to see; he is not a friend of the plaintiff.

30. A Mr. Michael Nolan gave evidence. Due to the fact that I disallowed evidence that had not been put to the plaintiff, Mr. Nolan's evidence did not advance matters.

31. Mr. Shay Fahy gave evidence. He was the father of the late Mark Tighe. He was a retired machine driver. He had been in the public house. There was a big crowd. He had been there earlier in the day and had gone home. People went in and out of the funeral parlour. He was not told of what happened for a long time afterwards. The defendant was a close friend of the family and was with the family over the Christmas period after Mark's death.

32. Evidence was then received from Mr. William Doyle, the owner of the public house in which these transactions occurred. He came from outside Wicklow Town. He was the owner of the pub since July, 1991. In that year, he barred the plaintiff from the pub. It was not true that the plaintiff was unaware that he had been barred. In 2004, he had seen the plaintiff gain entry to the pub and had him removed. He was also barred from two other licensed premises in Kilcoole. He was also barred from two pubs in Greystones and two in Delgany. Mr. Doyle owned four pubs.

33. Family funerals were an exception; people otherwise barred were allowed into premises to commiserate. This was confined to family members. When it was suggested to him that the plaintiff said he spoke to him, that is on the 26th December, 2005, he emphatically asserted that he was not in the pub at the time. He would have passed through it between the hours of nine and ten o' clock at night, but he was definitely not there when the plaintiff was there.

34. He said he knows Mr. White. He said the plaintiff had attempted to gain access to other premises from which he was barred. Under cross-examination, he confirmed that Laura was working for him. He also knew the plaintiff's daughter Emma. She was normally in the lounge area. For funerals, strictly persons within the family circle who had been barred from the pub were allowed in. He accepted that the plaintiff was in the bar. He disputed the fact that the plaintiff had been in the lounge for two hours. There was a large staff turnover. Sometime people who were barred would "chance their arms." Maybe staff did not know the plaintiff.

35. Mr. Doherty started working the pub in 2004. The pub was knocked down and rebuilt. Mr. Doherty was aware that the plaintiff came to Mr. Doherty's attention when he came into the bar. The aim was not to make a scene. If a barred person had a drink they let them finish the drink and then have a word. If they didn't leave, it would then proceed to the next step. The main objective was that the person would leave without creating a hullabaloo. If Mr. Doherty had seen the plaintiff earlier he would not have got a drink. He remembers that night very well. He did not know how many people were there. To access the bar, the plaintiff would walk in through a hallway around the bar into the bar area. There was a minimum of one or two floor staff. When asked under cross-examination how he was able to walk all the way around, Mr.

Doyle expressed the view that perhaps the staff in there did not know the plaintiff. Mr. McGovern S.C. asked that if the plaintiff being barred would not create difficulties for his daughter Laura. Mr. Doyle denied this. Mr. McGovern S.C. persisted in putting the case that the plaintiff was not barred from the pub. Mr. Doyle stated that he was. On re-examination, he said that Laura knew that her father was barred from the pub.

36. That concluded the oral evidence in the case. The case was then adjourned to enable the parties to prepare written submissions since a number of legal matters had arisen. For the plaintiff, Mr. McGovern S.C. contended that if the plaintiff's version of events was accepted then he must succeed. Even if the defendant's version of events was accepted, the court should still find in full for the plaintiff. Self-defence was not being pleaded, neither had any such case been made in oral evidence. Even if insulting language was used, this could not justify an assault. The defendant could have sued; he could have walked away. Referring to *Lane v. Holloway* [1968] 1 Q.B. 379, Mr. McGovern said the provocation could only be material when considering the issue of aggravated damages but should not affect the assessment of pecuniary damages. Providing the Australian authority of *Fontin v. Katapodis* [1962] 108 C.L.R. 177, Lord Denning M.R. said, at p. 378:-

> "The defendant has done a civil wrong and should pay compensation for the physical damage done by it. Provocation by the plaintiff can properly be used to take away any element of aggravation; but not to reduce the real damages."

In the same case, Salmon L.J. stated the following, at p. 390:

> "I would unhesitatingly come to that view without any authority at all. I cannot see how logically or on any principle of law, the fact that the plaintiff has behaved rather badly and is a cantankerous old man can even be material when considering what is the proper compensation for the physical injury which he has suffered."

I should note that Lord Denning M.R. returned to the theme and maintained his view in *Murphy v. Culhane* [1977] 1 Q.B. 94.

37. Mr. McGovern S.C. maintained that the words and conduct alleged against the plaintiff, if established, would not amount to contributory negligence. He did, however, concede that the case of *Ward v. Chief Constable of the Royal Ulster Constabulary* [2000] N.I. 543 did open the way for applying contributory negligence to the case. In that particular case, Girvan J. in awarding damages to the plaintiff for excessive and disproportionate force used by the police, reduced by one-third the plaintiff's damages because the plaintiff had made some minor physical contact with the police thereby causing them to push her violently. However, it was urged upon me that the defendant's action in this case was grossly disproportionate to any insult inflicted by the plaintiff. Finally, it was argued that this could not be a case in which contemptuous damages should be awarded. Reference was made to the judgment of the Supreme Court in *Cooper Flynn v. R.T.E.* (Supreme Court, Unreported, 2000), a libel suit. In that case, the Court noted that the jury had found that the plaintiff had no reputation to vindicate. In this case, the plaintiff clearly has suffered a serious injury.

38. For Mr. White, Mr. Mel Christle S.C., in urging me to prefer the version of events as advanced by the defendant and other witnesses on his behalf, submitted that, first, since the plaintiff had compromised the case, as far as the first defendant Mr. Doyle was concerned, the plaintiff then became identified with the first defendant and must bear responsibility for wrong on the part of that defendant. In particular, he relied on s. 35(1)(h) of the Civil Liability Act 1961 which provides as follows:

> "Where the plaintiff's damage was caused by concurrent wrongdoers, and after the occurrence of the damage the liability of one of such wrongdoers is discharged by release or accord made with him by the plaintiff, while the liability of the other wrongdoers remains, the plaintiff shall be deemed to be responsible for the acts of the wrongdoer whose liability is so discharged".

39. Accordingly, the plaintiff must assume responsibility for the wrongs of the first named defendant. These include not only the wrongs alleged against the first named defendant in the personal injury summons, but also permitting the plaintiff to be on the premises in the state and condition he manifested when he was barred.

40. Mr. Christle S.C. urged that there be a substantial finding of contributory negligence against the plaintiff because of his words and conduct. In this regard, he relied upon s. 34(1) of the Civil Liability Act 1961. That section provides as follows:

> "Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees fault of the plaintiff and defendant: provided that-"

41. Referring to the definition of "wrong" in s. 2 of the said Act, Mr. Christle said that, whatever be the position at common law, there is clear provision for contributory negligence in relation to intentional torts which are also crimes such as assault. "Wrong" is defined in the same Act as meaning:

> "[w]rong' means a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible, and whether or not the act is also a crime, and whether or not the wrong is intentional".

42. He also referred to the case of *Hackett v. Calla Associates Ltd. and Ors*. (Unreported, High Court, Peart J., 21 October, 2004). In that case, Peart J. found contributory negligence against the instigator/ringleader of a melee which provoked a disproportionate response from nightclub security staff. The plaintiff was struck with a blunt instrument causing him to lose the sight of one eye. Peart J. held that contributory negligence in that case amounted to 50%.

43. Mr. Christle S.C. then turned to the question of contemptuous damages. I invited submissions on this arising from a reference in a textbook to a number of rather ancient authorities. It seemed to point to a possible line of authority where contemptuous damages, something that is not unfamiliar to the courts in defamation suits, might have some relevance in the proceedings involving this Court in respect of assault. Two of the cases, *Plaistowe v. Daly* [1832] N.S.W.S.C. 22 and *Thorn v. Hunt* [1838] N.S.C.W. 95, concerned the most technical of assaults and resulted in awards of one farthing in damages. Closer to home, the former Court of Appeal decided to give a decision in favour of what was apparently a verdict of self-defence in an assault action by a jury. *Grealy v. Casey* [1901] N.I.J.R. 121 involved a dispute between the plaintiff, a "punter", colloquially, and a bookmaker. The client was engaged in a dispute over the amount of debt and, in the course of a quarrel, called the bookmaker/defendant what were described as "opprobrious names" and stood opposite him in a "frightening manner." The Court of Appeal held that the jury were the sole judges as to the construction of the words "fighting attitude" and were in the circumstances entitled to bring in a verdict upholding the defence of self-defence.

44. Finally, on the issue of liability, Mr Christle S.C. asked me to apply rigorously the provisions of s. 26 of the Civil Liability and Courts Act 2004. He invited me to hold that the plaintiff had given false and misleading evidence and, for this reason, the plaintiff's action should be dismissed. Section 26(1) of the Act of 2004 provides as follows:-

> "If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—
>
> (a) is false or misleading, in any material respect, and
>
> (b) he or she knows to be false or misleading,
>
> the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done."

Findings as to fact

45. It is perhaps instructive to peruse the plaintiff's personal injury summons. I do not have any copy of the verifying affidavit. In the summons, the plaintiff of course alleges assault against the second named defendant. He also alleges negligence and breach of duty against the first named defendant, Mr. Doyle. Among the particulars alleged against him are the following:

> (f) failing to remove the second named defendant from the licensed premises when the first named defendant knew, or reasonably ought to have known, that the second named defendant constituted a danger to the safety of customers in the licensed premises;
>
> (g) failing to warn the plaintiff that the second named defendant constituted a danger to the safety of the plaintiff when the first named defendant knew, or ought reasonably to have known, that the second named defendant constituted such danger; and
>
> (h) continuing to serve the second named defendant with alcoholic beverages when the first named defendant knew, or ought reasonably to have known, that the second named defendant constituted a danger to the safety of customers in the licensed premises.

46. If such was the case to be advanced against the first named defendant it seems highly odd that the plaintiff should willingly join the company of someone whom he knew and who was, apparently, such a lethal threat to customers and the public house that night and he was being served alcoholic drink with the effect of enhancing the danger. It is fair to say that the plaintiff painted a somewhat different picture in giving evidence before this Court. If he is to be believed, we have to accept that for no other reason apparent to the plaintiff, an otherwise civilised conversation degenerated into an impulsive act of violence on the part of the second named defendant. He was not barred, he did not say any of the things alleged by Mr. White; this all happened completely out of the blue. The only possible explanation is that Mr. White might have misheard something or taken it up wrong and, in a flash, an otherwise ordinary everyday conversation exploded into an act of violence.

47. Having observed the witnesses who gave evidence in this case, I have no hesitation in preferring the version of events offered by Mr. and Mrs. White and the material witnesses called by Mr. White's lawyers. I find as a matter of probability the following:-

- The plaintiff was barred from this public house and had been for many years since. He was fully aware of this fact and had, indeed, been prevented from entering in 2004.

- The plaintiff had been drinking earlier, at the very least in Bray, when he made his way to Mr. Doyle's premises on the evening in question. He was in a drunken state at the latest when he went into the bar area, a fact that became apparent to Mr. White after he bought him a drink.

- The pub was crowded that night largely due to the waking of the late Mark Tighe. Due to that fact and because less experienced staff were probably working in the lounge area, the plaintiff's presence was not noted. I am satisfied that had the plaintiff been spotted by more experienced staff he would not have been admitted to the pub and certainly would not have been served alcoholic drink in the lounge area. I regard as entirely bogus the plaintiff's claim that he was looking at that stage for his daughter at that point. Instead, he sat down in the lounge and drank at least two pints.

- I accept fully the evidence of Mr. William Doyle that he, Mr. Doyle, was not present in the lounge when the plaintiff was there. Had he been there, I have no doubt but that he would have asked the plaintiff to leave. The allegation of a conversation having taken place between the plaintiff and Mr. Doyle and his daughter is entirely false in my view.

• The next step on the plaintiff's odyssey might perhaps have been prompted by a desire to find one of his daughters. However, his daughter Laura was there in the lounge. Yet, the plaintiff did not move himself to go to her and speak to her having found himself waylaid by the offer of a drink from Mr. White. This was a wake and within this sombre setting, Mr. White's gesture was appropriately convivial and intended as an act of friendship and kindness to someone who was barred.

• I accept entirely the evidence of Mr. and Mrs. White that the plaintiff said the venomous, crude and provocative things described by them. I am satisfied that the plaintiff engaged in a tirade of appalling abuse and lewd sexual references. This was done in the sad setting of a gathering of people, many of whom would have known the late Mark Tighe.

I am satisfied that the plaintiff pressed his face close up against Mr. White and poked him for a number of minutes while speaking to him in the manner which I have described. Although warned by Mr. White and asked to leave by Mrs. White, he persisted heedless of the fact that he was making the defendant very angry. It was this conduct by the plaintiff which sparked the unfortunate, unlawful and highly dangerous reaction which cannot be condoned by this Court. That said, I accept that Mr. White was subjected to the most outlandish provocation.

Conclusion

48. If one were to rely on the cited English authorities and common law, the plaintiff would succeed against the defendant in obtaining an award of damages for tort of assault. It must be stressed here that we are dealing with the civil aspect of this case. The criminal aspect of this case has already taken its course and to that extent the public interest has been served. The plaintiff is *prima facie* entitled to an award of damages in common law. Before proceeding to assess those damages, however, there are two matters which I consider. One is the application of s. 35(1)(h) of the Civil Liability Act 1961. The other is the issue of contributory negligence in view of the provision of s. 34 of the said Act. These are already cited above.

49. I am not satisfied that I should find any level of responsibility on the part of the first named defendant. In the first instance, the case was not argued in front of me that there was any degree of negligence on Mr. Doyle's part or that of his servants or agents. Given the circumstances of the night in question, and the substantial crowd which had assembled in the pub, one should be careful not impose an almost impossible duty of care on a publican. I feel, in all of the circumstances of the case, that Mr. Doherty acted discreetly and appropriately. Having heard the evidence, albeit, without adversarial input from Mr. Doyle, I would not have been disposed to make any finding against him on foot of the particulars set forth in the personal injury summons. I find as a fact that Mr. White was not in the condition suggested in the particulars by the plaintiff; he was not the volcanic risk to the public which the summons tend to suggest. On the evidence before me, there was nothing about Mr. White's behaviour or demeanour which would reasonably have caused the pub staff to apprehend a risk to the public. I accept of course that he had consumed alcohol, or had drink taken in the colloquial expression. As regards the conduct of the plaintiff, given all the circumstances it would have been difficult, if not impossible, to ascertain what the plaintiff was up to. It seems to me that his contemptible behaviour was confined to a very limited circle of people, principally Mr. and Mrs. White, and by the time things proceeded to physical contact I do not think there was anything which reasonably could have been done, for example, by Mr. Doherty. I am satisfied that when the incident occurred there was an appropriate response.

50. I make no finding of contributory negligence against the first named defendant. Thus, s. 35(1)(h) of the Civil Liability Act, 1961 has no material application.

51. The plaintiff, on the other hand, through his wanton conduct, negligence and want of care contributed substantially to the injury which he suffered. The issue of contributory negligence does not appear to have arisen in the English authorities cited above. In this jurisdiction, the Court must have regard to the intervention of the Oireachtas. I see no good reason why intentionally provocative and insulting behaviour carried out over a period of some minutes cannot come within the ambit of contributory negligence. This assault would not have occurred were it not for the persistent misconduct and verbal vitriol of the plaintiff. While again stressing that one must not seek to justify the act of violence which occurred, there is no doubt in my mind that the plaintiff's behaviour should weigh heavily against him. It is not unreasonable, therefore, to apply the yardstick set out by Peart J. in *Hackett v. Calla Associates Ltd. and Ors*. (Unreported, High Court, Peart J., 21 October, 2004), I would reduce the plaintiff's damages by 50%.

52. Two other matters fall to be considered. First, I must assess the damages including consideration as to whether or not this is an appropriate case for contemptuous damages. Finally, I must consider the relevance of s. 26 of the Civil Liability and Courts Act 2004. Addressing first the issue of contemptuous damages. It is apparent that the authorities are both extremely old and not of much assistance. The most recent Irish authority turned on an issue of self-defence which is of no materiality to this case. No authority was found where contemptuous damages were awarded in consequence of the infliction of significant personal injury. I believe it would be hazardous course to award contemptuous damages in such circumstances where the statute has built into law such safeguards as contributory negligence and indeed the Act of 2004. I feel that it would be safer to leave contemptuous damages in the realm of the law of defamation.

53. Turning to the assessment of damages, the plaintiff was referred to St. Columcille's Hospital, Loughlinstown. He was there complaining of swelling and bruising around the left eye and tenderness of the bones of the left eye. Radiographs revealed a possible fracture of the left infra-orbital bone as well as a nasal fracture. He was seen in St. James's Hospital on 30 December, 2005. He had some bruising and swelling around the left eye. There was a depression of the left zygoma. He underwent surgery and a general anaesthetic on the same day. A low-profile plate was placed along the frontal zygomatic suture. The plaintiff did very well postoperatively and was discharged home the next day. In summary, the plaintiff incurred a significant fracture of his left zygoma warranting open reduction and internal fixation and the placement of a plate on his left frontal zygomatic suture.

54. I accept that the plaintiff experienced considerable pain and discomfort in the immediate aftermath of his injury. This gradually resolved into numbness of the left cheek, left lip and left upper teeth. There is very mild evidence of flatness of the left cheek. The place was palpable and some tenderness was noted over it, but at last review in November, 2006, things seemed to be getting better and matters were resolving. He is likely to suffer mild continuing symptoms with some numbness and pins and needles in his left cheek. He will have similar symptoms in his left lip and left teeth. Cold will cause him to experience pain from time to time.

55. I would assess general damages in this case in the sum of €15,000 to date and €25,000 into the future. That would be reduced in an award by 50% together with any special damage.

56. I now turn to s. 26 of the Civil Liability and Courts Act 2004. Again, this is set out above. The question I must ask myself is did the plaintiff give false or misleading evidence to this Court knowing same to be false and misleading and was it material? I have already made it clear that I expressly prefer the evidence offered on behalf of Mr. White. I simply do not accept that the incident occurred in the manner alleged by the plaintiff. The plaintiff has at all times maintained that he remembered what happened on that evening and that he sought to contradict the accounts of others which on the balance of probabilities I hold to be true accounts. No infirmity of memory is alleged against the plaintiff or contended for by him.

57. I am satisfied that the plaintiff's account of what occurred was both fanciful and self-serving and deliberately so. He knew what was going to be alleged against him from the pleadings. In my view, he maintained his evidence both as to his status as a customer and his conduct on the evening in question with a view to deflecting any blame for what occurred and the deleterious effects such might have on the damages he might receive by way of same being reduced. On his behalf, Mr. McGovern S.C. argued that to dismiss the case under s. 26 would amount to an injustice. I would not disagree with him were it to be the case that a plaintiff who had received a significant injury and yet told untruths to a material extent should watch an undoubted tortfeasor walk away. However, in this case it will not occur.

58. The law has taken its course and the second named defendant has suffered the imposition of a significant, albeit suspended, sentence. As to the undoubted nature of the plaintiff's injury, it is notable that s. 26 is silent as to the existence or nature or extent of any injury. It is "injury neutral" and, therefore, must contemplate a situation where a genuinely injured plaintiff who grossly exaggerates a claim to the extent of giving materially false or misleading evidence can fall foul of its provisions. The purpose of this section is well describe by Peart J. in the case of *Carmello v. Casey* [2008] 3 I.R. 524 at pp. 539 to 540. Peart J. says, and I quote:-

> "Section 26 was introduced by the Oireachtas for the very clear purpose of avoiding injustice to, *inter alios,* defendants against whom false or exaggerated claims are mounted in the hope of recovering damages to which such plaintiffs are not entitled. Such actions are also an abuse of the process of the court. It has always been a very serious criminal offence to knowingly give false evidence under oath. The proof of such an offence is required to be beyond reasonable doubt. The court is not so constrained, and makes its finding on the balance of probability. This section is certainly of a draconian nature, but it is deliberately so in the public interest, and is mandatory in its terms, once the court is so satisfied on the balance of probability, unless to dismiss the action would result in injustice being done."

In the circumstances, in my view, the plaintiff comes within the intended scope of s. 26 of the Civil Liability and Courts Act 2004. Since the law has imposed the appropriate penalty on the defendant, Mr. White, for his action, and since I am satisfied the plaintiff has given false or misleading evidence knowing same to be the case with a view to affecting materially the outcome of the case, I dismiss the action.