Neutral Citation: [2015] IEHC 19

THE HIGH COURT

[2009 11050 P]

BETWEEN

LORCAN ROCHE KELLY

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Consolidated by Order dated the 30th day of April 2012

[2010 11021 P]

BETWEEN

LORCAN ROCHE KELLY

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 23rd day of January, 2015

This is an application brought by the defendants pursuant to Order 19 rule 28 of the Rules of the Superior Courts seeking to have the Plaintiff's claim dismissed or struck out on the grounds that the pleadings disclose no reasonable cause of action and that, on the basis of existing law, the Plaintiff's claim is bound to fail.

The plaintiff is a former miner who resides with his two children at Ballintlea, Sixmilebridge, Co. Clare. He is the lawful husband of Sylvia Roche Kelly who was born on the 7th December, 1974 and who was murdered by one Gerry McGrath on the 8th December, 2007. Letters of Administration in the Estate of Sylvia Roche Kelly were granted to the plaintiff on the 23rd April, 2008. The present claim is one for damages brought pursuant to the provisions of Part IV of the Civil Liability Act 1961 by the plaintiff on his own behalf and on behalf of his two children, aged respectively twenty and eleven years, and other family members of the deceased.

In these proceedings, the plaintiff claims that the failure and inaction of the defendants, in the context of a bail application, to inform the relevant court of certain other offences with which McGrath had been charged caused or contributed to the fact that he was at large and on bail when he should not have been and that the plaintiff is in the particular circumstances entitled to maintain an action in negligence against the various defendants herein.

FACTUAL BACKGROUND
The following chronology of events sets out the background circumstances of relevance:-

Date Event

1) 30th April, 2007 Accused assaults a female taxicab driver in Cavan:

Admitted to station bail;

2) 17th May, 2007 Accused appears at Virginia District Court:

Remanded on continuing bail;

3) 9th October, 2007 Accused is arrested at the scene of an abduction and false imprisonment of a young girl in Dundrum, Co. Tipperary. Gardai object to bail.

4) 10th October, 2007 Accused appears at Limerick District Court and is remanded in custody;

5) 23rd October, 2007 Accused appears in Tipperary District Court and is again remanded in custody.

6) 30th October, 2007 Bail hearing Limerick District Court. Gardai object to bail but fail to bring taxi driver assault case to attention of District Judge. Accused is admitted to bail.

7) 12th November, 2007 The Director of Public Prosecutions directs that more serious charges be brought in relation to

the

Cavan incident;

8) 3rd December, 2007 The accused is charged at Virginia District court, inter alia, with assault causing harm. The accused is remanded on continuing bail. No mention of remand by Limerick District Court;

9) 8th December, 2007 Accused murders Sylva Roche Kelly in Limerick.

Thereafter, on the 7th January, 2008 the accused pleaded guilty to the charges arising out of the assault on the 30th April, 2007 in Cavan. The accused received a nine-month sentence in respect of these offences.

On the 12th January, 2009 the accused received the mandatory life sentence for the murder of Ms. Roche Kelly from the Central Criminal Court.

On the 13th February, 2009 the accused attended Clonmel Circuit Court where he received a ten-year prison sentence in relation to the Dundrum offences, which was made concurrent with the life sentence imposed on the 12th January, 2009.

In the present proceedings brought against the defendants arising out of the aforesaid events, multiple allegations of negligence and breach of duty are raised, but the main allegations are of failure by the gardaí to inform Virginia District Court of the offences in Dundrum, Co. Tipperary in relation to which the accused had been arrested at the scene on the 9th October, 2007 and their failure to seek the revocation of the bail of the accused on the 3rd December, 2007. It is further alleged that the gardaí were negligent in failing to inform the District Judge at the bail hearing at Limerick District Court on the 30th October, 2007 that the accused had been charged with an assault on a female taxi driver in Cavan on the 30th April, 2007, thereby bringing about a situation whereby the accused was allowed to remain at liberty. The murder of Sylvia Roche Kelly took place on the 8th December, 2007, five days after the failure to apply to revoke bail at the sitting of Virginia District Court on the 3rd December, 2007.

It was not suggested in the present proceedings that there had been malfeasance on the part of the gardaí. It was accepted that in general the law, in the absence of *mala fides*, does not impose an actionable duty of care on gardaí in respect of the performance of their duties. Nevertheless, it was submitted that the recent decision of the High Court (Peart J.) in *Smyth & Anor. v. The Commissioner of An Garda Síochána & Ors* [2014] IEHC 453 suggested that this was not a principle conferring a 'blanket immunity' in all circumstances but rather a principle which admitted of exceptions in special circumstances. It was contended that, having regard to the plain obligation on the gardaí to bring forward certain matters for the attention of a judge dealing with a bail application, the failure of the respondents in this instance to do so was a failure of such egregious proportions as to warrant treating this case as exceptional.

In response, counsel on behalf of the respondents argued that the applicant's case was "bound to fail" and should be struck out. Ms. Roche Kelly was an unfortunate woman who was killed by Gerry McGrath but there was no special connection between the killer and his victim such as gave rise to a duty of care on the part of the gardaí. Ms. Roche Kelly was not a complainant and had no prior connection to McGrath. There was no special relationship between the gardaí and the applicant, nor was there any assumption of special responsibility in relation to her, factors which were present in the case considered by Peart J. and the cases could be readily distinguished on that basis. In any event, counsel on behalf of the respondents argued that the murder of Ms. Roche Kelly was not foreseeable, and indeed it had not even been pleaded that the particular event was within the range of foreseeability.

Before considering any of the legal authorities on this topic, it is perhaps appropriate to refer to relevant provisions of the Bail Act 1997, an Act which was introduced with a view to tightening up bail laws in the aftermath of a referendum held for that purpose.

Section 2 of the Act provides:-

> *"2.—(1) Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.*
>
> *(2) In exercising its jurisdiction under subsection (1), a court shall take into account and may, where necessary, receive evidence or submissions concerning—*
>
> > *(a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,*
> >
> > *(b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,*
> >
> > *(c) the nature and strength of the evidence in support of the charge,*
> >
> > *(d) any conviction of the accused person for an offence committed while he or she was on bail,*
> >
> > *(e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,*
> >
> > *(f) any other offence in respect of which the accused person is charged and is awaiting trial, (emphasis added) and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1977."*

Given that a District Judge, absent evidence tendered by An Garda Síochána, can not know of "*any other offence in respect of which the accused person is charged and is awaiting trial*", it was urged upon the Court by counsel for the applicant that this subsection should be purposefully construed so as to permit the Court to take the view that a significant duty of care under the Bail Act fell upon the respondents herein, sufficient to warrant the refusal of the relief sought by the respondents on the present application.

DISCUSSION

The tragic events which followed the communications failures in this case had disastrous consequences for the plaintiff and his family.

There are certainly grounds from the above narrative of facts for thinking that there was negligence of a serious kind on the part of the gardaí and in an application of this sort under O.19 the Court must take the assertions underlying the plaintiff's case as correct. While it is often said that hard cases make bad law, this is a particularly hard case where there is an understandable temptation to think that Ms. Roche Kelly's family should not be left uncompensated. An internal Garda inquiry – even if culminating in significant disciplinary measures against the gardaí concerned – could never fully address the loss suffered by the family of the murdered woman.

Undoubtedly there are serious problems with our system of bail, not least in monitoring those on bail and in monitoring compliance with conditions attaching to bail. The monitoring of persons on bail is simply not possible and evidence to that effect was given by Deputy Chief Inspector Kevin Toland to an Oireachtas committee last week on behalf of the Garda Inspectorate. That committee was also told that about one quarter of recorded headline crime, more than 20,000 offences, including murders and rapes, is committed by people on bail. There is no power of arrest available to a member of An Garda Síochána for breach of a bail term and the member must in every case go back to court to seek a summons or a warrant. The amount of Garda time presently taken up by the failure of persons granted bail to abide terms of bail is considerable. These observations do not bear directly on the instant case but I include them as providing a wider context wherein practical considerations – such as adequacy of resources for any alternative modus operandi for An Garda Síochána - may be borne in mind when considering the kind of issues that arise in this case.

Our existing law is premised on the recognition that the work of the gardaí in the investigation and prosecution of crime would be rendered virtually impossible if an additional duty of care, actionable in damages, were to be superimposed on their already extremely difficult task in investigating and suppressing crime. This view is one which has been expressed firmly and repeatedly over the years by courts in this and our neighbouring jurisdiction. Mere failures of communication or failures to follow up lines of investigation would, if actionable in damages, inevitably drive the force into ever more defensive modes of performing their duties. How satisfactory would it be if cases in which offenders released on bail go on to commit further offences leave the Gardaí at risk of being sued in virtually every such instance by a victim of such crimes?

These are some of the policy considerations which have persuaded the courts in common law jurisdictions that it is not in the public interest to impose an actionable duty of care upon An Garda Síochána in the discharge and performance of their functions, many of which have been rendered more difficult and onerous through lack of resources. One must of course look at the particular facts of the case in every case, but ultimately one must also have regard to the total detriment to the public interest in all cases if some other approach is to be adopted in a particular case with hard facts such as this one. In the course of his judgment in *Whelan v. Allied Irish Bank plc and others* [2014] IESC 3, O'Donnell J. explained the difficulty and the approach which he felt had to be adopted:-

> *"…The just and reasonable test in Glencar is also essentially a policy consideration and it has been determined long ago that it is just and reasonable that a solicitor, or indeed any other professional advisor, should owe a duty of care in such circumstances. It is also important that the question must be approached at that level of abstraction. As Lord Browne-Wilkinson observed in Barrett v Enfield London Borough Council [2001] 2 A.C. 550 (pp. 559-560):*
>
> *'….The decision as to whether it is fair, just and reasonable to impose liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered…..Questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors are liable to shareholders for negligent auditing, are not liable to those proposing to invest in the company…That decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case.'*
>
> *The test does not mandate or permit a consideration of each individual case and whether the imposition of a duty of care, and therefore liability, meets some undefined concept of fairness in the particular case. If that were so, then the law would be no more than the application of individual discretion in different facts or circumstances which might well be decided differently from court to court. In such circumstances, the law of negligence would be little more than the wilderness of single instances criticised by Tennyson."*

In the case of *Lockwood v. Ireland and Ors.* [2011] 1 IR 374, this Court dismissed a claim made against the gardaí by a rape complainant, when a rape trial collapsed on account of a mistake made in the arrest of the accused (*i.e.* the arrest was deemed unlawful, leading to the inadmissibility of statements). The Court took the view that there was no duty of care in tort such as would create an entitlement to damages arising from the manner in which the gardaí conducted its investigation, and that a claimant would have to establish *male fides* on the part of the gardaí in order to maintain a claim for damages in such circumstances.

In *L.M. v. The Commissioner of An Garda Síochána and Ors.* [2011] IEHC 14, the High Court (Hedigan J.) found against a plaintiff who complained that the gardaí failed to properly investigate and prosecute a rape allegation. The formal rape complaint was made in May 1990 when the plaintiff was a child. No steps were taken between December 1990 and September 1996 until the English Child Protection Agency contacted the gardaí. The UK police interviewed the alleged perpetrator in April 1997 and he was thereafter extradited back to Ireland in October 1998 and convicted. The Court of Criminal Appeal quashed the conviction in 2001 and an order prohibiting a retrial was later granted. The plaintiff's mental health deteriorated thereafter, and she sued An Garda Síochána for their delay in prosecuting the claim. Dealing with the elements required to impose liability, Hedigan J., held as follows:

> *"The necessary elements are proximity, foreseeability, considerations of public policy and also the test of whether it is just and reasonable to impose a duty of care. The key issue in this case is whether it would be contrary to public policy to impose a duty of care on the gardaí. It seems to me that the cases cited above establish that no duty of care exists in Irish law upon the defendants in respect of their investigatory or prosecutorial functions. This is because it would be contrary to the public interest that such a duty be imposed by reason of the inhibiting effect this would have on the proper exercise of those investigatory and prosecutorial functions. It is in the public interest that those bodies should perform their functions without the fear or threat of action against them by individuals. The imposition of liability might lead to the investigative operations of the police being exercised in a defensive frame of mind. A great deal of police time, trouble and expense might have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of suppression of crime." (at page 26)*

In the case of *AG. v. J.K. and Ors.* [2011] IEHC 65, Hedigan J. was again asked to consider the liability of An Garda Síochána. The plaintiff's case was that the gardaí had asked her to provide accommodation to the husband of her murdered friend when he could no longer reside in his house (as it was a murder scene). The husband had a previous rape conviction. The plaintiff thereafter alleged that the husband later raped her. After reviewing the authorities the Court found that no duty of care existed. At page 24 of his

judgment Hedigan J. stated:

> *"The crucial question is as to whether their action in bringing J.K. to A.G.'s house was something done in the course of their investigatory functions that night. I do not think it is possible to hold it was not.... It was inextricably a part of their investigatory functions that night. This I think disposes of the case. On the basis of the now well established law outlined above no duty of care arises from the circumstances herein."*

These various Irish decisions reflect the views expressed by the House of Lords in its seminal decision in *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53.

The facts of *Hill* are well known. The plaintiff was the mother of a woman who was killed by Peter Sutcliffe, otherwise known as "The Yorkshire Ripper". The plaintiff alleged that the police investigation was negligent, and that if a proper investigation had been carried out Sutcliffe would have been apprehended sooner and her daughter would therefore not have died. The plaintiff's mother claimed that the police were under a duty to use their best endeavours and exercise all reasonable care and skill to apprehend the perpetrator – who was unknown at the relevant time – and so protect members of the public who might be his future victims. A number of matters were particularised as to how the police had failed to exercise such reasonable care in the course of their investigation.

The Court held that, although police officers could be liable in tort to persons injured as a direct result of their acts or omissions, there was no general duty of care owed by them to identify or apprehend an unknown criminal, nor do they owe a duty of care to individual members of the public who might suffer injury through the criminal's activities save where their failure to apprehend him had created an exceptional added risk, differing in incidence from the general risk to the public at large from criminal activities, so as to establish sufficient proximity of relationship between the police officers and the victims of the crime. It was held that although it could have been reasonably foreseen that S., if not apprehended, would be likely to harm young female members of the public, the fact that the plaintiff's daughter had been young and female did not of itself place her at special risk and there being no other additional characteristics capable of establishing a duty of care owed towards her by the defendant in relation to the apprehension of S., the judge had been right to strike out the statement of claim as disclosing no cause of action. It was also held, further, that as a matter of public policy the police were immune from actions for negligence in respect of their activities in the investigation and suppression of crime.

The underlying rationale for non imposition of an actionable duty of care was outlined in the speech of Lord Keith of Kinkel where at p. 63 he stated:-

> *"A potential existence of such liability may in some instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would not be uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes."*

Notwithstanding the apparent clarity of the underlying principle which was applied in the three Irish decisions cited above, it is suggested that the case of *Smyth and Anor. v. The Commissioner of An Garda Síochána and Ors.,* [2014] IEHC 453, represents a move away from any kind of automatic exclusion. The High Court (Peart J.) refused to dismiss the plaintiffs' claims, in circumstances where it might have been expected that a dismissal would be ordered on public policy grounds, stating that:

> *"It seems clear from some of the cases to which I have referred that there has been a movement away from the absolute exclusion of a duty of care on the part of the police in the matter of their investigation and prosecution of crime - perhaps less so in the House of Lords, though even there exceptions to the full force of the Hill principle have been identified. The Court of Appeal in a number of cases has been prepared to permit some such claims go to trial rather [than} be struck out on a preliminary application to strike out. The cases decided in this jurisdiction thus far seem to apply the full exclusionary principle of Hill based on public policy without permitting of exceptions." (at para. 69)*

At paragraph 74 of the judgment it is stated as follows:

> *"I do not consider that these policy considerations must be taken as holding good for all time. As I have said, the Hill principles as originally enunciated have been diluted over time. Exceptions have been identified, and it is right that such be the case in my view."*

The basis for an exception being made in the Smyth case was the subject of lengthy analysis in this comprehensive judgment, one feature influencing Peart J. being the presence of a special relationship between the plaintiffs and the defendants (by virtue of the fact that one of the complainants was a garda and the other did work with them). Further, the learned trial judge found that there had been an 'assumption of responsibility' by the gardaí in the particular circumstances of that case. These considerations fulfilled two of the principles outlined in the case of *Glencar Exploration plc v. Mayo County Council (No. 2)* 2002] 1 I.R. 84, and persuaded Peart J. to refuse, at least at the interlocutory stage of the proceedings, to dismiss the proceedings.

It is submitted on behalf of the plaintiff that there is an even stronger basis for making an exception in the present case, involving the death of Mrs. Sylvia Roche Kelly. The impugned activity of An Garda Síochána did not involve investigative activity, so strictly speaking it is not covered by the case law insofar as it relates to the investigation of crime. Also, it does not (at least arguably) involve 'prosecution' activity, so neither is it covered by the reference to such activity in the case law. Even if it is deemed to amount to prosecution activity, the Smyth case illustrates that this need not lead to automatic exclusion of liability. The activity complained of relates to a discrete area of garda activity covered by Statute, namely, that relating to the granting of bail. It is submitted that this area brings into play unique public policy issues which are as likely to promote the concept of liability as to exclude it.

It was submitted on behalf of the plaintiff that on any analysis of the facts of the *Roche Kelly* case, such public policy reasons as might be in favour of exclusion are outweighed by the public policy in favour of applying ordinary liability principles. This is so because the entire bail system, as a matter of public policy, attempts to avoid bail being granted to a person who may go on to commit a

serious offence.

Some further reliance was placed by the plaintiff on Article 2(1) of the European Convention on Human Rights which imposes upon the State an obligation to protect the life of individuals against the acts of third parties which may be taken as including particular victims identifiable in advance as potential targets of lethal acts and also those not identifiable in advance. Reference was made to the case of *Maiorano v. Italy* (case no. 28634/06) in which the court, in a decision given on the 15th December, 2009, found that the Italian state was responsible in damages in respect of a double murder committed by a dangerous offender who was allowed out on day release. While it had not been possible to identify in advance the two murder victims as potential victims of crime, Article 2 required the general protection of society from potential danger such as that arising from a person who had been convicted of violent crime. In that case the court emphasised that Article 2 enjoined the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. One factual element of note in this case was the failure by the public prosecutor's office to forward information on the perpetrator's criminal activities to the relevant decision-maker.

In considering the application of the provisions of Article 2(1) of the Convention, as introduced into Irish law by s.3 of the European Convention on Human Rights Act 2003, it was submitted that the following facts were of relevance. First, members of An Garda Síochána knew that the accused was a dangerous person, having committed two serious and unusual crimes against females in the same year, in different locations and involving strangers on both occasions. It was at all times within the power of the gardaí to make an application that the bail granted in Cavan should be revoked and yet they failed to do so. Further, at the bail hearing on the 30th October, 2007 in Limerick District Court, the gardaí failed to make the District Court Judge aware of perhaps the most important fact of all, namely, that the accused was already on bail in respect of another offence committed in Cavan.

More generally, it was submitted that there is a heavy onus of proof resting on a defendant in an application of this nature (*i.e*. under Order 19 of the Rules of the Superior Courts) and reference has been made in the plaintiff's submissions to the decision of the High Court (Clarke J.) in *Salthill Properties v. Royal Bank of Scotland* [2009] IEHC 207, where the potential for evidence emerging in the course of a case (e.g. by discovery) is emphasised. It was submitted that the potential in the instant case of some such evidence emerging was a very real one and it would be difficult at the present stage for the Court to form a clear view that the claim must necessarily fail. In cases where somewhat novel questions of law arise against a backdrop of unusual and complex facts, the High Court had recently held in *D.F. v. Garda Commissioner & Ors.* (Hogan J.) [2014] IEHC 213, that the summary strike out jurisdiction should not be applied "to an action involving serious investigation of ancient law and questions of general importance". While the instant case does not involve questions of "ancient law" the general principle expressed by Hogan J. was nonetheless relevant. This case raised novel and difficult issues and was not well adapted to the summary strike out jurisdiction.

Not least because of the detailed and careful consideration given to the law by Peart J. in the case of *Smyth v. An Garda Commissioner*, I believe it is important to have particular regard to the facts of that case. In that case each of the plaintiffs (*i.e*. Paul Smyth, a Chief Superintendent in An Garda Síochána and Philip Smyth, his brother and a well-known hotelier) pleaded that the defendants were negligent in carrying out an investigation into complaints advanced by them of criminal conduct going back over a number of years. The case advanced by Philip Smyth was to the effect that the defendants failed to cause a full and proper investigation to be carried out into anonymous and false information which gave rise to a search by An Garda Síochána of his hotel premises on the 12th September, 1998 and the falsity of anonymous phone calls to the South East Regional Crime Squad of the Metropolitan Police Force in London between 1992 and 1995 alleging serious crimes of a subversive nature against both Philip Smyth and his brother Paul Smyth, who was then a serving officer in An Garda Síochána of Chief Superintendent rank. The anonymous calls allege complicity in drugs trafficking and a money laundering operation on behalf of the IRA through his companies. In the pleadings it was alleged that because Paul Smyth was a member of An Garda Síochána, he had a special relationship with the gardaí such that a duty of care was owed to him by An Garda Síochána to carry out a full and proper investigation of his complaint. In the case of Philip Smyth there was also alleged to have been a special relationship between him and members of An Garda Síochána by virtue of certain engagements between him and An Garda Síochána in relation to certain other matters unrelated to the facts of the proceedings. Despite knowing the identity of the principal suspects for the making of hoax calls disseminating false information, the investigating gardaí did not follow up the information in their possession, nor were steps taken to put a stop to the calls. It was also alleged that An Garda Síochána failed to request the cooperation of the U.K. authorities in dealing with the matter so that civil proceedings had to be commenced to ascertain the true facts. It was further alleged that Chief Superintendent Smyth suffered from the fact that false allegations were allowed to linger and he alleged that various promotional opportunities were lost to him because a cloud of suspicion and taint was allowed to linger over his good name.

Having recited the factual background in much more detail, Peart J. embarked upon a comprehensive review of legal authorities in this jurisdiction, the United Kingdom and the European Court of Human Rights in Strasbourg before concluding that there may be categories of cases, such as that before him, where it should be left to trial to determine if the plaintiff's claim must fail and that in those cases it would be wrong to hold that a blanket immunity from suit was enjoyed by An Garda Síochána. I gratefully adopt his review of the various twists and turns taken by those courts in their efforts to deal with the complexities of this issue.

At paragraph 65 of his judgment he stated:-

> *"The cases decided here to date have necessarily been decided on their own particular facts. In so far as there may be a suggestion in the present case that the Irish cases to which reference has been made and which have been struck out as showing no reasonable cause of action have been struck out on the basis that no claim in negligence against An Garda Síochána can ever succeed on policy grounds, I would respectfully disagree with such an absolute interpretation of the Hill principle, especially in the light of the English cases to which I have made such extensive reference. … I believe that there may be cases which should be left to trial rather than be struck out on the basis that they are doomed to fail as it has been put."*

At paragraph 70 he stated:-

> *"Each of the Irish cases to which I have referred are cases decided of course on their own facts. I am not to be taken as in any way saying that they were wrongly decided. But I do think that on an application to strike out, as in this case, the plaintiff's case must be looked at very carefully. The assumed facts must be taken at their highest, and as in the present case the existence of a special relationship must be assumed to be established as it is what is pleaded. Consideration of a special relationship does not appear to have been a feature of the cases already decided here to which I have referred. In the present case it is pleaded. The court cannot therefore on this application assess the merits of that argument as it would have to do at trial. The defendants have conceded the facts and pleas of the plaintiffs for the purpose of this issue. It may well be that the basis for the claim of a special relationship may founder at the hearing. But in spite of the decided cases here to date and the resolute adherence to the total exclusionary principle*

in Hill, I would be prepared to hold that such a relationship may in a particular case give rise to a closer proximity between the parties than in the ordinary case such as L. v. Ireland where simply a trial collapsed because a mistake had been made in relation to the arrest of the accused person. I can readily agree that public policy would require that An Garda Síochána should not be exposed to claims arising from such matters, absent mala fides.

71. An exception to the rule has been permitted where there has been an assumption of responsibility by the police. Again, it has been submitted in the present case that there was an assumption of responsibility by An Garda Síochána for fully investigating the plaintiff's complaints and uncovering the author of the hoax calls when assurances were given that this would be done. Again, that may or may not turn out to accord with the evidence at trial, but it is pleaded and must be assumed. Even though in G. v. Minister for Justice, Equality and Law Reform [2004] 3JIC 1903, Hedigan J. on the facts of that case concluded that what happened was part of the investigatory process and that that was sufficient to dispose of the case, there may again be cases where what leads to injury and loss is the result of something which happens outside the investigatory process. This case may be such a one or it may turn out not to be; but I think the plaintiffs ought not to be barred from at least attempting to make the case that they plead, on the basis of what if, though not in name, in practice seems to operate as a blanket immunity."

It seems clear from the foregoing that, far from any attempt to undermine the principles enunciated in the earlier decided cases, Peart J. was focussing on what was described in an earlier part of his judgment as a "narrow aperture" opened up by the particular facts of the case under consideration. He did not purport in any way to depart from the principles accepted by the plaintiffs in that case, consisting of the three tier test adopted in differing forms in this jurisdiction in cases such as *Ward v. McMaster* [1985] I.R. 29, *Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84 and *Beatty v. Rent Tribunal* [2006] 2 I.R. 191.

The three tier test to ascertain whether a duty of care exists towards a particular plaintiff requires that the following pre-conditions be met:-

1) That there is a relationship of such proximity between the parties as to call for the exercise of care by one party towards the other;

2) That it is reasonably foreseeable that breach of the duty of care will occasion loss to the party to whom that duty is owed; and

3) That it is just and reasonable that the duty should be imposed.

The first of these two conditions were found to have been satisfied in the *Smyth* case as already indicated and, that being so, it is understandable that Peart J. would have declined to strike out or dismiss the plaintiff's claim as having no reasonable prospect of success, particularly when the facts of the case before Peart J. were so markedly different from those in the case of *Hill.* (*Hill v. Chief Constable of West Yorkshire* [1989] AC 53)

However, the facts in *Hill* bear very considerable resemblance to the facts of the instant case. The error or negligence arose on the operational side as distinct from the policy side of the respondents' functions. The victim and the perpetrator of the criminal offence were unknown to each other. There was no assumption of special responsibility by the police authorities such as arose in the *Smyth* case. Indeed in the instant case, counsel for the respondents has pointed out that the murder of the plaintiff's wife was not even pleaded as having been foreseeable.

Given that on an interlocutory application of this nature, every fact as pleaded must be assumed to be true, the omission of that particular plea is particularly significant.

CONCLUSION

As already stated, hard cases make bad law. In this case, with the benefit of hindsight, one finds it difficult to avoid strong feelings of frustration and anger over how matters were handled by An Garda Síochána. The failure to advise the judges called upon to address issues of bail in respect of a number of serious incidents was both negligent and disgraceful. It deprived those judges of the opportunity to properly evaluate the facts in relation to McGrath's ongoing liberty, and the Court is satisfied that any reasonably informed judge or lawyer would have taken the view that bail would have been refused or revoked if the full facts had been made known to either court. Of course it is possible – given that it was a matter for judicial determination – that even if informed of the true position, there remained an outside possibility that, subject to strict bail conditions, bail might have been granted, but, for the purposes of this judgment, I am taking the view that it would not.

However, and even assuming this to be one of the worst cases of Garda negligence imaginable, it could not be said, in my view, that there existed in this case the requisite degree of proximity between the unfortunate deceased and her killer or that the death she met at his hands in a hotel bedroom was reasonably foreseeable from any of the information available in this case. The prior incidents of an assault on a female taxi driver at a location at the other end of the country and the abduction of a young girl in Tipperary on the 9th October, 2007 could not in the view of the Court have met a foreseeability test (even had it been pleaded) insofar as the death of Sylvia Roche Kelly is concerned. The victim and her assailant were unknown to each other and to say that requirements of proximity and foreseeability were met merely because of the gender of the deceased is not, in my view, a sustainable proposition.

Still less can it be said that in this case An Garda Síochána assumed some sort of special responsibility towards Sylvia Roche Kelly as distinct from the public in general. The facts of this case are, in my view, clearly distinguishable from those addressed by Peart J. in the *Smyth* case.

To the extent that the European Court of Human Rights may in the past have taken a somewhat different view from those expressed by the House of Lords in the *Hill* case, notably in the decision in *Osman v. United Kingdom* [1998] 29 EHRR 245, the same topic was revisited in their decision in *Z. v. United Kingdom* [2002] 34 EHRR 3 where the court concluded (at para. 100):-

"… The Court considers that its reasoning in the Osman judgment was based on an understanding of the law of negligence which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably by the House of Lords. The Court is satisfied that the law of negligence as developed in the domestic courts since the case of Caparo Industries plc and as recently analysed in the case of Barrett v. Enfield includes the fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case does not disclose the operation of an immunity. In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law."

Hedigan J., himself a distinguished former member of the European Court of Human Rights, felt able to state at para 6.5 of his judgment in the *L.M.* case:-

> *"In the Z case the European Court of Human Rights reviewed the jurisprudence of the House of Lords on actions for police negligence. The court held that in light of developments in the domestic courts it was clear that what was involved in such cases was not a blanket immunity from suit which the police enjoyed, but rather that under substantive domestic law there existed no duty of care owed by the police in their investigatory and prosecutorial functions. This it was held was in accordance with the convention."*

The Court was referred to a summary note of a judgment delivered post *Osman* by a divisional chamber of the European Court of Human Rights in the case of *Maiorano & Ors. v. Italy* (Application No. 28634/06) where the state was held responsible in respect of a double murder committed by a dangerous offender, Angelo Izzo, while on day release.

The case in question concerned the obligation of the Italian judicial system to afford general protection to society against potential danger from a person who had been convicted for a violent crime. The court did not find fault in general with the arrangements in Italy for the resettlement of prisoners. The system had a legitimate aim and provided for sufficient safeguards. However, the manner in which that system had been applied in Mr. Izzo's case was questionable. The court noted that the positive factors which had led the Palermo sentence execution court to grant day release, in particular the favourable reports by probation officers and psychiatrists, had been counterbalanced by many indications to the contrary. Throughout his imprisonment, Angelo Izzo had in fact regularly committed criminal offences and his behaviour had shown that he had a tendency to disrespect the law and authority. In view of the dangerousness of a repeat offender who had been convicted of exceptionally brutal crimes, those circumstances should have led the sentence execution court to be more prudent. Secondly, the court noted that the public prosecutor of Campobasso had been promptly made aware of the fact that Angelo Izzo, once granted day release, had re-established contacts with the criminal underworld and was actively planning criminal acts. Despite the fact that it had taken this danger seriously, and had even ordered police surveillance, the public prosecutor's office had not informed the sentence execution judge with a view to the possible withdrawal of the day release scheme.

The court took the view that the granting by the Palermo sentence execution court of day release to Angelo Izzo, despite his criminal record and behaviour in prison, together with the failure by the public prosecutor's office of Campobasso to forward information on his criminal activities to the sentence execution judge, had constituted a breach of the duty of care required by Article 2 of the Convention. Accordingly, the court held unanimously that there had been a violation of Article 2 under its substantive head. The court awarded €10,000 to the father of the man whose wife and daughter had been murdered by Izzo, the father being a prisoner whom Izzo had known in Palermo prison. Other relatives were awarded €5,000 each.

This finding was made against a background where the applicants had filed a criminal complaint against the police prosecutors who, they allege, should have forwarded to the sentence execution courts information in their possession from two fellow prisoners of Izzo about his "suspicious behaviour" and in particular "his intention to commit a murder". Those complaints had not been acted upon and no disciplinary action had been taken against those prosecutors. It was in these circumstances that it was held that the state had not entirely fulfilled its positive obligation to ascertain whether any responsibility could be imputed to its agents in respect of the double murder.

It seems to this Court that this case can not be taken as speaking directly to the facts of the case before this Court. The Italian case is one which arose under a different criminal and judicial structure and was one where the offender had been convicted of similar offences in the past, was serving a prison sentence, and was released under a day release system against a backdrop where relevant authorities had failed to act on specific warnings of his declared intention to commit further crimes. It is not a case, nor does it purport to be a case, which could be taken as rolling back the considered view of the full Court expressed in the "Z Case" as to the adequacy of domestic law in a common law jurisdiction. The summary provided to this Court does not in any way address the issue of an unconvicted person being at large due to communications failures, negligent or otherwise, which might have conveyed to the relevant judge under a different legal system information which was relevant to its decision whether or not to grant bail.

While the threshold for success in an application under order 19 is a high one, the underlying facts of this case are not in dispute, nor has it been shown that discovery could lead to the establishment of any facts which might satisfy the requirements of the first two limbs of the test in *Glencar Explorations plc v. Mayo County Council* [2002] 1 I.R. 84.

The Court is therefore compelled, notwithstanding the many disturbing aspects of this case which hopefully will result in an appropriate investigation elsewhere, to dismiss the plaintiff's claim, not on the basis of some supposed 'blanket immunity' but because long established common law principles whereby a duty of care is deemed to arise are not present on the facts of this most unfortunate case.