

THE HIGH COURT

Record Number: 2007 3297 P

Between:

Alan Reynolds

Plaintiff

And

Woodman Inns Limited trading as Ruby's Nightclub and John O'Regan

Defendants

Judgment of Mr Justice Michael Peart delivered on the 18th day of November 2009:

The plaintiff sustained an injury to his head on the 3rd October 2005, at approximately 12.30 a.m. following an assault upon him while on a licensed premises known as Ruby's, owned and operated by the first named defendant.

The second-named defendant is the person who assaulted the plaintiff on that date, thereby causing him these injuries. He has not entered an appearance and no relief is sought against him at present.

On the evening in question the plaintiff had decided to meet up with some friends, and having had a few drinks in a pub called Muldoon's in Waterford city, they proceeded to the nearby nightclub, Ruby's.

According to the plaintiff's evidence they arrived at that premises at about 12.10 or 12.15 a.m. and proceeded to a bar area close to a dance floor. That bar area is a raised area with steps leading down onto the dance floor. The plaintiff has stated in his evidence that having arrived at the bar area in the company of his companions he made his way to the bar itself in order to buy drinks. Having done so he appears to have spent a short while chatting to his friends. They appear to have been standing at this stage rather than sitting at a table. The plaintiff's evidence has been that suddenly a person who turns out to be the second-named defendant, John O'Regan, came over to him and immediately head-butted him.

The plaintiff has stated that by this time he thinks that he and his companions had been in the bar for between five and ten minutes. He felt a severe impact to the side of his head and fell to the ground. The second-named defendant appears to have continued his assault while the plaintiff was on the ground and until Gary O'Gorman, a friend of the plaintiff's, but who was not in his particular group at the time, saw what had happened and came over to render such assistance as he could in order to pull the second-named defendant away from the plaintiff. It appears that the second-named defendant thereupon assaulted Gary O'Gorman also.

In the immediate aftermath of this incident, some security personnel who were in attendance in the area of the bar and a dance floor in question escorted the plaintiff and Mr O'Gorman down the stairs and out of the premises, and other security personnel removed the second-named defendant through a different exit. In due course, apparently being satisfied that neither Mr O'Gorman nor the plaintiff were responsible for the incident which had occurred, both were allowed to re-enter the premises. The second named defendant was not permitted to return, and the evidence has been that in due course he was prosecuted in relation to this assault and for which he received a conviction and sentence.

The injuries which the plaintiff sustained were serious enough for him to require hospitalisation. An x-ray of his head revealed three fractures to his cheekbone and in due course surgery was performed in order to insert a plate, and this has left him with a very significant scar which runs from his left ear across the top of his head, such scar being the result of the surgery undertaken. His recovery from this surgery was uneventful except that he still suffers a tingling sensation or numbness to the left side of his face. This appears to be a permanent condition, and one he is going to have to live with.

Under cross-examination the plaintiff accepted that this had been a completely unprovoked attack by the second-named defendant and he also accepted that it was sudden and unexpected. The plaintiff had not been aware of the second-named defendant's presence on the premises before this assault took place, and did not know him previously. He confirmed that the entire incident was over in a matter of seconds.

One of the plaintiff's friends who accompanied him to these premises on this occasion is Jean Croke who has given evidence. It would appear that she knows the plaintiff because until quite recently before this incident occurred, they had both worked in the Waterford Glass factory. She confirmed that having met the plaintiff and others at a Muldoon's on this evening, they all proceeded to Ruby's and went upstairs to the bar area in order to have a drink. In her evidence she stated that a man suddenly "*came out of nowhere and hit Alan*". She had not been aware of this person prior to this incident, and did not know him, but stated that in the immediate aftermath of the assault, he was struggling and fighting with these security staff who came to the scene, and she described the second defendant as being "crazy".

At another point in her evidence when cross-examined she described the incident as happening "*in the click of a finger*". In other words, it happened very suddenly and was over in seconds.

Under cross-examination she also stated that she had been to these premises before on a number of occasions, and had always found it to be a well run place and with plenty of security staff on duty.

Gary O'Gorman gave evidence, and, as I have stated, while he has known the plaintiff for many years, both being from Tramore, he had not been among those with whom the plaintiff had arrived at the premises. He happened to be on the premises on this occasion in a different group.

Until this incident happened, he had not in fact been aware that the plaintiff was on the premises at all. He stated that he himself had arrived on the premises between 11:30 p.m. and midnight and had gone straight to the bar area where this incident took place.

He was sitting with his own friends having a drink and chatting. During his evidence he stated that prior to this incident happening he had noticed the second-named defendant who he described as bumping into people, jostling them and looking for trouble.

He then described how he saw the second-named defendant take a lunge at the plaintiff and head-butt him, and give him what he described as *"the few digs"*. He saw the plaintiff fall to the ground, whereupon he ran over to the plaintiff and set about trying to pull the second-named defendant away from the plaintiff who was at that stage on the floor. He described how in the course of doing this, he himself was assaulted by the second-named defendant.

He also described the attack by the second-named defendant as being a completely unprovoked attack. He described also how the security staff immediately came over and took both he and the plaintiff out of the premises. He described the second-named defendant as *"a man possessed"*. Towards the end of his direct evidence, he stated that this assault took place within minutes of his first seeing the second-named defendant in the premises. When he was cross examined, he described the second named defendant as banging into people, being rude, and obnoxious to people in the bar area.

When cross-examined, Mr O'Gorman was referred to a statement which he had made to Garda Brosnan who was investigating the incident. That statement was taken approximately 1 month after this particular incident. In it he states the following:

"On Sunday 3rd October 2005 I was in Ruby's with Alan Reynolds. I'd only met Alan in there. He was with a group of other people. We were talking to each other. I started talking to the other people in the group. I suddenly saw this fella head-butt Alan. Alan fell back with the force. He stumbled into a future years and then hit or fell onto the floor. I tried to break it up. Your man then tried to hit me. I defended myself by putting my arms up. A bouncer then arrived and broke it up. Then two others arrived. They separated myself and Alan. They brought the other fella outside. They brought myself and Alan out the back. After a few minutes we were left back in. We stayed therefore the night. I had received a few bruises to the face. All were minor. I don't want to make a complaint of assault. There were no words spoken between Alan Reynolds and the other fella at all. I've had this statement read to me all is correct."

It was put to Mr O'Gorman by Jeremy Maher SC for the first named defendant, that nowhere in this statement given to Garda Brosnan does he make any reference to the second-named defendant's behaviour in the bar immediately prior to this incident taking place. Mr O'Gorman had to accept that there was no such reference in the statement, but in his evidence, he was in no doubt but that he had observed the second-named defendant's prior behaviour as described already. When re-examined following this cross-examination, reference was made to a statement which Mr O'Gorman had made to a firm of solicitors and then acting on behalf of the plaintiff.

That later statement was given on the 8th August 2006, almost 1 year after the incident. In the note of that statement which has been produced to the Court the plaintiff says, inter alia:

"I don't know if John O. Regan was on his own. I had seen John O. Regan, fronting other people on the premises prior to the assault. I copped him before the incident that he was getting violent. I noted from his actions that he was waving his hands. He was jostling with another group of people. O'Regan is quite a big chap. He was jostling for about 10/15 minutes before the attack on Alan. I felt myself that I should keep out of O'Regan's way and then he comes over to Alan. He felt that O'Regan was a bit like a time bomb. He was starting at a number of different groups of people and arguing a lot. The bouncers would have been present and had come down during that time. There was no way that Alan provoked the attack."

Neither the statement to Garda Brosnan nor this statement given to the plaintiff's then solicitor constitute evidence as such. Mr O'Gorman has given his evidence to the Court. But Mr Maher refers to the statement to Garda Brosnan in order to cast doubt on the evidence now given by Mr O'Gorman that Mr O'Regan had been acting, prior to this assault, in a generally aggressive manner. The significance of this particular aspect of the case, of course, is because the plaintiff has pleaded in his personal injury summons, inter alia, that the first named defendant "caused or permitted violent and aggressive patrons or persons such as the second named defendant to remain in the premises when they knew or ought to have known that he was in a violent and aggressive mood", and also that the first named defendant "failed to remove or eject the violent and aggressive individuals such as the second named defendant from the premises when they knew or ought to have known that he was in a violent and aggressive mood".

For the defendants, Brendan O'Brien has given evidence. He was not on the premises on the occasion of this incident, but is the general manager of an entity referred to as The Tweedy Group, of which the first named defendant is part, and his duties include the management of Ruby's. He described the premises themselves. It appears to be a large establishment with three bars and a dance area. He has stated that on the night of this incident there would have been about sixteen security staff covering the entire premises, twelve of whom would have been at Ruby's. All these security staff are trained to the required standard. He described where these staff would have been situated in Ruby's, such as at steps or stairs for safety reasons and in the area of the bar itself and its exits.

He stated that he would have seen the worksheets for this evening and this was the source of his knowledge as to how many security staff were on duty. He gave a number of names for the security staff from recollection, but he was not in a position to produce the sheets themselves for that night.

Mr O'Brien also gave a lot of evidence about the CCTV installations in the premises. There are about 20 cameras installed in this bar/dancing area, and at the entrance/exit points, the smoking area. He stated that within a few days of this incident occurring he had viewed the available footage in relation to the incident and what he sees as relevant footage was recorded and retained. That recorded footage has been shown to the Court. However it is of limited value really, since it begins just after the commencement of the incident, and while the second defendant and the plaintiff are struggling together following the initial assault upon the plaintiff. There is no recorded footage available in respect of any time prior to the incident, such as might have shown the second named defendant acting in the manner described by Mr O'Gorman in his evidence. It was put to Mr O'Brien that he had failed to keep the earlier footage and that this has put the plaintiff at a disadvantage. But Mr O'Brien stated first of all that it showed nothing relevant, and that he had been concerned only with the incident itself and had kept as much of that footage as there was. He would not have been aware that it was going to be later alleged in these proceedings that earlier behaviour by Mr O'Gorman was relevant. It appears from his evidence that the moment of the assault itself is not recorded on CCTV. It happened 'off camera' so to speak. It is only after the initial assault that the plaintiff and Mr O'Regan come into shot.

Garda Brosnan gave evidence of having investigated the incident and having taken a statement from Mr O'Gorman. Nothing turns on his evidence, except perhaps that he confirmed that the second named defendant was not a person who had previously come to the attention of the Gardai.

That then is the relevant evidence in the case.

What is clear is that the plaintiff was the victim of an entirely unprovoked attack on this occasion at the hands of the second named defendant. There is also no doubt that he suffered a significant injury. The only question arising now is whether the first named defendant company can be held to have been negligent and should compensate the plaintiff for his injuries.

In order to succeed the plaintiff must discharge the onus of proof on the basis of the balance of probabilities. He must bring forth whatever evidence he can in order to show that in some relevant way the first named defendant breached its duty of care to the plaintiff who was lawfully on the premises. He has attempted to do this essentially by the evidence of Mr O'Gorman who has given evidence of how he saw the second named defendant behaving in a short period leading up to this assault taking place. That is the kernel of the plaintiff's case against the first named defendant.

I am satisfied from Mr O'Brien's evidence first of all that he had in place a sufficient number of properly trained staff for a premises of this kind. There seems to be no conflict in that regard, since the plaintiff himself makes no particular complaint in his evidence, whatever about the pleadings, as to the manner in which this premises was staffed. Indeed, Ms. Croke has stated that it is in her experience a well-run and adequately staffed establishment. While it is pleaded that the first named defendant served alcohol to intoxicated individuals such as the second named defendant and continued to do so when they ought to have known that it was dangerous to do so, there has been no evidence given to support that allegation of negligence and breach of duty.

The evidence does not support other pleas in relation to the inadequate training of staff and so forth.

The only question for determination is whether the plaintiff has established enough about the prior behaviour of the second named defendant to discharge the onus upon him of satisfying this Court that the first named defendant ought reasonably to have formed the view that the second named defendant was acting in such a way as to be a danger or risk to other patrons and ought to have been removed from the premises before this incident occurred.

Both the plaintiff himself and Ms. Croke never noticed the second named defendant at all prior to the assault. On the other hand I am satisfied that they had not been in the premises more than about ten minutes before this occurred, unlike Mr O'Gorman who appears to have been there for about half an hour or perhaps a little longer. Both the plaintiff and Ms. Croke each accept that the incident happened in seconds and very suddenly and without any warning as far as they were concerned.

The fact that Mr O'Gorman never mentioned to Garda Brosnan that the second named defendant was behaving aggressively up to this assault is not conclusive, as that statement was given for a particular purpose and in the context of a criminal investigation by Garda Brosnan. Mr O'Gorman has stated in his evidence that he was asked questions for that statement and he gave answers. That was not a statement in the context of the present civil proceedings, and Garda Brosnan's questions would have been confined to what he saw as relevant to the criminal investigation. The later statement made to solicitors then acting for the plaintiff was given in a civil context, and I believe that it can be used in support of Mr O'Gorman's evidence to this Court as to the prior behaviour of the second named defendant. But it goes only to credibility in relation to his evidence to this Court given viva voce.

I believe Mr O'Gorman's evidence. That is the first thing to say. He strikes me as an honest witness who has simply stated honestly what he recalls happening, even though it is now about four years since all this occurred. It is accepted that he is a friend of the plaintiff and he certainly very bravely came to the rescue of the plaintiff after the incident occurred. But I sense no bias in the way he has recalled the events. I believe him when he says that he saw the second named defendant acting aggressively to patrons and bumping up against them and generally making a nuisance of himself.

But is that enough to get the plaintiff home in relation to a finding of negligence against the first named defendant?

There is evidence of how well staffed this premises was on the date of this incident as far as security personnel is concerned and as to their level of training. It is a well-run establishment. There is no evidence that the second named defendant was intoxicated at all. There is simply no evidence in that regard.

While it is a function of the security staff to intervene appropriately when it appears to them that some person or persons are likely to cause trouble with other patrons, whether as a result of intoxication or otherwise, and while it is of course a duty upon the first named defendant to ensure as far as possible that patrons behave appropriately while on its premises, and to take appropriate measures to eject those who are not, it is not in my view reasonable to impose a burden upon the first named defendant to in every instance observe the actions of each patron on an ongoing basis. That is an impossibly high burden. The law expects that reasonable efforts will be made by a person or legal entity to ensure the safety of its patrons. This premises was adequately staffed for that purpose.

There is no evidence that the second named defendant had been the subject of a complaint to the staff or management prior to this incident. If what Mr O'Gorman has said is true, and I accept his evidence in that regard, the situation is that the second named defendant had been behaving in an unusual manner and somewhat aggressively in a general way, but had not caused any incident such as to give rise to a complaint. We do not know if his actions were in fact observed that night by security staff because no security or other staff member present that night has given evidence. In my view, even if they had observed this unusual and aggressive behaviour, it does not mean that they were immediately obliged to remove him from the premises. It would have been important to keep him under observation had they been aware of his activities, but to say that they ought at that point to have removed him from the premises is to place the duty of care at too high a level in my view. But even Mr O'Gorman states that the assault took place only a very short time after he first saw him acting aggressively.

What the law requires is that the owner of a premises takes reasonable steps to ensure the safety of its patrons. This was an unprovoked attack. It came out of the blue. Apart from behaving somewhat unusually and aggressively, there was no warning that the second named defendant would erupt as he did and attack a patron. There is no evidence that the staff was alerted to the activities of the second named defendant.

The first named defendant was under a duty of care to the plaintiff. Under Glencar principles the scope of that duty of care must be a fair and reasonable one.

This was a very busy bar and dance area, from what I saw on the CCTV footage. There were a large number of patrons present in the area shown. It appeared to be quite crowded. It would in my view be an impossibly high burden upon the first named defendant if security staff were to be expected to observe absolutely everything that was happening, and anticipate everything which may occur. In this case they could not have been expected to anticipate that this assault might take place. It happened out of the blue.

Not every instance of injury on a person's premises gives rise to civil liability in negligence. This case has a significant similarity to a

case which was the subject of a judgment of Morris J. (as he then was) in *Hall v. Kennedy* and another, unreported, High Court, 20th December 1993. In that case the second named defendant was the owner of a licensed premises in which the plaintiff had been the victim of an assault by another patron and against whom succeeded. The question then arose as to whether the owner of the premises had also been negligent. Finding that a case had not been made out against the owner, Morris J. (as he then was) stated:

"The obligation of the second named defendant at law is to take all reasonable care for the safety of the plaintiff while on the premises. This would include in this case ensuring that a customer in the premises did not assault him. The necessary steps would include, in an appropriate case, removing a customer from the premises, refusing to serve him drink, staffing the bar with sufficient barmen or security staff so as to ensure the safety of the plaintiff. I am of the view that Mr Kennedy [the assailant] showed none of the signs or manifestations of drink such as should have alerted a reasonable publican or his staff to the prospect that he might assault another customer. I am satisfied that Mr Kennedy's reaction was a hot-headed, spontaneous reaction to what he saw as an insult which the second named defendant could not have foreseen... .. It is my view that nothing that had transpired prior to the assault would have given a reasonable barman an indication that he could expect trouble... .. I believe that there were sufficient staff to ensure that the premises was conducted properly. In so far as the allegation is made that Mr Kennedy should not have been allowed to remain on the premises or served with further drink, I am of the view that he did not demonstrate up to the time of this incident any of the characteristic indications which would make this step necessary."

Obviously in the present case there is the evidence of prior unusual or aggressive behaviour by Mr O'Regan, and that is a distinction to the facts in *Hall v. Kennedy*, but I am not satisfied that it is sufficient to have required ejection from the premises, even if I accept or assume that the security staff observed it or ought to have done so. There is no evidence to show how long Mr O'Regan had been on the premises before this assault. All we know is that during a short period before the assault, Mr O'Gorman saw unusual and aggressive behaviour towards other patrons.

I am not satisfied that by not having ejected the second named defendant from the premises, or, if it be the case, by failing to see what Mr O'Gorman saw, the first named defendant has breached its duty of care to the plaintiff.

I should of course say that I have the utmost sympathy for the plaintiff who has been wholly innocent in relation to the incident. He has suffered a very nasty injury. But not every incident of injury sustained on a licensed premises will lead to a successful claim for damages against the owner of the premises.

There is an onus of proof upon the plaintiff to show that the owner was in some way negligent in the legal sense before he becomes entitled to be compensated. That onus in some instances is difficult to discharge, particularly in the case of a spontaneous and sudden assault. Such things can happen unexpectedly no matter how well staffed the premises is, and no matter how highly trained the security and other staff are. Even such trained staff cannot be expected at all times to have eyes in the back of their head and be all-seeing, and so long as reasonable steps are taken by the owner for the safety of patrons, that is all that the law requires of them. What will or will not be reasonable in any case will of course depend on the facts of each case. But in the present case I am not satisfied that the first named defendant, its servants and agents failed to do what was required of them at law.

In my view his claim must be dismissed as he has not satisfied the Court that the first named defendant was negligent.