Neutral Citation Number: [2010] IEHC 389

THE HIGH COURT

2003 2141 P

BETWEEN

AHKTAR MANSOOR

PLAINTIFF

And

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Lavan delivered the 4th day of October, 2010

Background

1. The plaintiff is a native of the Punjab district in Pakistan. He has lived in Ireland, in Tullamore County Offaly, since 1970. Since 1978 he has practiced as a medical practitioner in Tullamore and has provided medical services to An Garda Síochána at Tullamore Garda Station in respect of the taking of blood or urine samples from persons suspected of committing offences under section 49 of the Road Traffic Act 1961 (as substituted by s. 10 of the Road Traffic Act 1994). The events giving rise to the claim arose while the plaintiff was performing such duties.

2. On the night of 20th March, 2000, the plaintiff was requested to attend at Tullamore Garda Station for the purpose of obtaining a blood or urine sample from Mr. Declan Foran, who had been charged with driving while under the influence of alcohol. This was a regular occurrence for the plaintiff, indeed on the night in question he attended on six separate occasions at the Garda Station for this purpose. On this particular occasion the plaintiff met Mr. Foran, who the plaintiff contends was visibly drunk, in a room known as the *'the doctor's room'* and Mr. Foran was requested by Garda James Downey to provide a blood or urine sample to the plaintiff. Garda Downey accompanied Mr. Foran to the toilet where he provided a urine sample into a 500 millilitre jug. They returned to the doctor's room, with Mr. Foran holding the jug, to find the plaintiff seated at a table in the room. It is then that the events took an unfortunate turn for the worst.

3. Once in the room, Garda Downey requested Mr. Foran to give the jug to the plaintiff. Mr. Foran responded, entirely without warning, by throwing the contents of the jug over the plaintiff's head and face. Some of the urine entered his mouth and eyes, with the remainder soaking his clothes and running down into his shoes and onto the floor. Garda Downey immediately restrained Mr. Foran, although it is uncertain as to whether or not Mr. Foran provided much resistance. Mr. Foran was subsequently charged with refusing to provide a urine sample and on 27th October, 2000, was convicted before Tullamore District Court and ordered to pay IR£500.00 within 90 days.

4. Following this incident the plaintiff discarded his clothes and bathe himself on a number of occasions. Despite these efforts, he testifies to feeling constantly dirty and to having been unable to remove the taste of urine from his mouth. He attended at his local G.P., and complained of feeling unwell and stressed. He subsequently sought the assistance of Dr. M. Bhamjee, a consultant psychiatrist based in Ennis, County Clare, whom he visited for the first time in April, 2001. Dr. Bhamjee concluded that the plaintiff was suffering from post traumatic stress disorder as a result of the trauma he had suffered when Mr. Foran threw the urine at him. Furthermore, he prescribed a course of sleeping pills and tranquillizers which Dr. Bhamjee felt were necessary to assist the plaintiff in dealing with his condition. Dr. Bhamjee also highlighted the plaintiff's weight loss since the incident and, in particular, drew attention, in his report dated 20th February, 2003, to the fact that as a devout Muslim, the plaintiff felt unable to read the Koran until he was cleansed. This served only to accentuate his anxiety and concern.

5. In addition to seeking psychiatric advice and counselling, the plaintiff also feared that he may have contracted a sexual transmitted disease ("STD") having being soaked in, and having swallowed, urine. To allay these fears he sought expert advice. This culminated in the medical report of Mr. Derek Freedman, a genito-urinary physician dated 14th November, 2006. Mr. Freedman concluded, following a review of the relevant medical literature, that the there were no reported incidences of HIV ever having being transferred by urine. He described the risk of it ever occurring as "implausible". Mr. Freedman went on to observe that given the plaintiff's medical training, it was regretful that he was unable to conduct a more "objective appraisal of [the] infection risk".

6. The plaintiff commenced proceedings against the defendants on 17th February, 2003 and in his Statement of Claim dated 15th October, 2004 claims, *inter alia*, that the defendants are negligent as a result of:-

> '(b) Exposing the Plaintiff to a risk of which the Defendants, their Servants or Agents knew or ought to have known;
>
> (c) Failing to take any or any adequate care for the Plaintiff while he was engaged in his duties as a Doctor;
>
> (g) Failing to provide any or any adequate protection for the Plaintiff.'

7. Therefore, the Court must determine whether or not the defendants owed a duty of care to the plaintiff and, if such a duty arose, whether or not the assault that the plaintiff was subjected to was reasonably foreseeable, culminating in a breach of that duty of care. Should the Court determine that such a duty was owed and breached, then it also falls on the Court to determine the level of damages (if any) that should be awarded to the plaintiff.

Submissions of the Plaintiffs

8. Counsel for the plaintiff submits that the defendants owed a duty to take reasonable care for the safety of the plaintiff and not to expose him to unnecessary risk. Counsel further submits that the plaintiff was at all material times employed by the defendants as a doctor on duty at the Garda Station. This critical point is disputed by the defendants. Accordingly, counsel for the plaintiff submits that the liability of the defendants falls to be considered under the principles of employers' liability. In this regard, the following extract from McMahon and Binchy 3rd Ed (Tottel, Dublin, 2000)., at p. 480 is relied upon:-

> "the duty of an employer towards its servant is to take reasonable care for the servant's safety in **all the circumstances** of the case". [Emphasis added]

9. This extract, counsel for the plaintiff contends, supports the view that the defendants were under an affirmative duty to take such reasonable steps as were appropriate in the circumstances of the case to protect the plaintiff in the commission of his duties. Further support for this argument can be found in the case law, counsel argue, with the decision of the Supreme Court in *McKevitt v. Ireland and the Attorney General* [1987] I.L.R.M 541 instructive in this regard. In this case the appellant, a drunken prisoner, set fire to himself in his cell. Prior searches of the appellant had failed to discover two boxes of matches that were on his person and when the gardaí refused to furnish him with a cigarette he set fire to the pillow in his room, suffering extensive burns. At page 545 of that decision Finlay C.J. stated:-

> "I am satisfied that as a matter of law if the defendants, having regard to the drunken condition of the plaintiff, had carried out a search of his person for the specific purpose of removing from him something with which he might injure himself and had failed to detect in that search one or more boxes of matches, that that could be an act of negligence contributing to the injuries subsequently suffered by the plaintiff."

10. Counsel for the plaintiff claims by analogous deduction that if there is a duty of care on the member of An Garda Síochána conducting a search of a prisoner in an intoxicated condition to take such steps as may be appropriate to avoid injury to a prisoner, then there must be a similar duty on the gardaí to take all the necessary steps to ensure the safety and security of a medical practitioner who is under their control as his employer.

11. Further case law was opened to the Court that established, according to counsel for the plaintiff, that the defendants had breached the duty of care they owed to the plaintiff. In this regard, *Walsh v. Securicor Ireland Limited* [1993] 2 I.R. 507 is relied upon. In *Walsh* the plaintiff, who was employed by the defendant security company, was injured in an ambush of a security vehicle that he was driving. It was established at trial that although the vehicle was accompanied by a garda escort, it had followed the same route at the same time every Thursday morning for the previous seven years. Egan J., concluding that such blind adherence to the same routine was ill-advised and made the possibility of an ambush much greater and real, summarised the duty of the defendant security company as follows:-

> "Every device of precaution must be taken in a high risk operation such as this and there was expert evidence to the effect that it was unwise to retain clockwork precision in relation to the time factor."

12. Counsel for the plaintiff argue that having regard to the drunken and "unsteady" state of Mr. Foran, and in light of the fact that he had attempted to drive a vehicle in an erratic and dangerous manner, Garda Downey was under a duty to take every reasonable precaution to avoid the incident occurring. Furthermore, counsel urges the Court to conclude that any conclusion to the effect that the defendants did not owe a duty of care to the plaintiff and that the events that unfolded were not reasonably foreseeable "flies in the fact of the evidence".

13. Counsel also draws the Court's attention to an apparent 'inequality of position' that exists between the plaintiff in the circumstances of this case, and a member of the gardaí. Under the Garda Compensation Scheme a garda has a statutory right of recourse to seek compensation where events similar to those which occurred here take place. Unfortunately for the plaintiff no such statutory solution is offered and there is, as counsel suggest, a legislative lacuna. This lacuna, according to the plaintiff, places an additional onus on the Court to consider with even greater rigour any failings on the part of the defendants to properly protect the plaintiff while he was discharging his duties.

14. Finally, counsel addresses a matter of factual significance. There is a dispute as to the evidence of what standard practice is in the procurement of urine or blood samples at a garda station. In oral evidence Garda Downey stated that he believed he was following standard practice and protocol when he instructed Mr. Foran to carry the jug and present it to the plaintiff. The plaintiff, however, disputes this, stating that his recollection was to the effect that it was always a garda who was responsible for taking and presenting the sample to the doctor. Although counsel challenge Garda Downey's evidence, they submits that even if standard practice was that the intoxicated person would be given a jug of urine, the decision of Egan J. in *Walsh v. Securicor* is authority for the proposition that the fact that a matter or mode of carrying out a job had been done to a standard and repeated procedure does not amount to a valid defence.

Submissions of the Defendants

15. Counsel denies that the defendants owed a duty to take reasonable care for the safety of the plaintiff and/or not to expose him to unnecessary risk as alleged or at all. They accept that the plaintiff was at all material times employed by the defendants as a doctor on duty at Tullamore Garda Station on the date in question. This, however, should not be confused as direct employment. The defendant was providing medical services as an independent contractor.

16. Counsel for the defendants also addressed the direct claim made by the plaintiff that allowing Mr. Foran to carry the urine constituted "…a total breach of protocol…" Firstly counsel submits that the plaintiff has failed to produce any evidence as to what the specific protocol was at the time, or indeed is now. In this regard Garda Downey gave evidence that the practice of allowing the arrested suspect carry the urine sample had been the unvarying practice followed by him and other members of the gardaí since he commenced duty in 1982. This practice was followed, according to Garda Downey, in an effort to avoid any risk or claim that the sample may become or was contaminated. Furthermore, Garda Downey stated that he found legislative authority for such a procedure from his interpretation of section 13(1)(b) of the Road Traffic Act 1994. This provides that a member of the gardaí, having arrested a person, may require him to either:-

> "(i) To permit a designated doctor to take from the person a specimen of his blood, or
>
> (ii) At the option of the person to provide for the designated doctor a specimen of his urine…"

Analysis and Conclusions

17. The circumstances of this case are unhappy. No one should be subjected to such an assault and the Court certainly has some sympathy for the plaintiff. Sympathy and compassion, however, while important must not distort a judge's duty to apply the law in a logical and independent manner. I now turn to address the matters raised in this case.

18. Counsel for the plaintiff contend that the defendant was at all material times an employee of the defendants. This is disputed by

the defendants who argue that the plaintiff was an independent contractor engaged under a contract for services. The distinction is of critical importance and can often be quite difficult to discern. Employees enjoy a myriad of statutory and common law protective measures that are not afforded to an independent contractor. Cox, Corbett and Ryan, in *Employment Law in Ireland* (Clarus Press, Dublin, 2009) note, at p. 63 that:-

> "Thus, under the tort of negligence, an employer owes a special duty of care towards his employees that does not necessarily apply to independent contractors."

19. Given the significance of the distinction it is unfortunate that no definitive line of authorities, or indeed legislation, can be identified so as to provide a clear test. There is no, as Edwards J. described it in *Minister for Agriculture and Food v. Barry* [2009] 1 I.R. 215 " 'one size fits all' test". This uncertainty was eluded to by Keane J. in the leading Irish case of *Denny (Henry) & Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 where he observed that 'each case must be considered in the light of its particular facts and of the general principles which the courts have developed'. Having said this, a number of important factors can and have been distilled from the case law which assist in determining whether or a person is an independent contractor or an employee. These include, but are importantly not limited to, (a) whether the person is engaged in business on his or her own account; (b) whether they are referred to as an employee under the contractual arrangement; (c) whether the person is responsible for their own tax affairs; (d) whether the person is free to engage people as substitutes when he or she is not available; (e) the level of control exercised by the employer who engaged him or her; and (f) whether he or she is entitled to payments that normally accrue to employees, such as pension contributions, sick pay, maternity leave, annual leave etc.

20. Although important, I do not believe it is necessary for me to consider all of these factors in this case. Before a tribunal is required to consider the above factors an important filtering mechanism must first be traversed; a task that is not completed here. This mechanism has been described recently by Edwards J. as the 'mutuality of obligations test'. Simply put the test requires the employer to provide work for the employee and that the employee is obliged to complete that work. The following passage from his judgment in Minister for Agriculture and Food v. Barry [2009] 1 I.R. 215 is worth quoting in detail:-

> '…the mutuality of obligation test provides an important filter. Where one party to a work relationship contends that that relationship amounts to a contract of service, it is appropriate that the court or tribunal seized of that issue should in the first instance examine the relationship in question to determine if mutuality of obligation is a feature of it. **If there is no mutuality of obligation is not necessary to go further.** Whatever the relationship is, it cannot amount to a contract of service." [Emphasis added]

21. In that case the respondents worked as temporary veterinarian inspectors at a meat processing plant. When the plant closed they sought redundancy payments on the basis that they were employed on a contract of service basis. On appeal to this Court on a point of law it was concluded that there was no mutuality of obligation. Critical factors that influenced the Court included the fact that the respondents had no control over the amount of work they would be given, this was entirely at the discretion of the meat plant. In addition, their contracts provided that they could opt out of at least 16% of the work offered to them and that this would have no effect on their contracts of engagement.

22. In my view the mutuality of obligation test is not satisfied in this case and that it is not required to decide anything further on this matter. It is clear that the defendants were not obliged to give the plaintiff work. Nor could the defendants possibly predict the number of drink driving offences that may occur on any given night. In addition, it was open to the defendants to call a number of general practitioners to assist them and although the plaintiff, along with a number of other G.Ps. may have been on a contact or duty list, were the plaintiff to declare that he were unavailable for work, he could face no sanction or rebuke from the defendants. He simply would not be paid. The plaintiff performed a set task for a fixed sum. Likewise, if the defendants elected to engage a different G.P. on any given occasion, the plaintiff would have had no reasonable grounds for objecting to this. I therefore find that the plaintiff was at all materials times an independent contractor, engaged by the defendants under a contract for services.

23. This finding does not absolve the defendants from the possibility of liability. Although as an employee the plaintiff would enjoy far greater protection, there still exists under the law of tort general principles of negligence which may operate to hold the defendants liable to the plaintiff where they have breached the duty of care they owe to the plaintiff. The plaintiff is clearly owed a duty of care by the defendants not to expose him to the risk of injury resulting from the intentional conduct of another party under their control. This duty, however, only extends to those risks that are reasonably foreseeable and also preventable. A defendant should not be held liable for events that are reasonably beyond his or her control.

24. Although no authorities that directly address similar factual circumstances of this case have been opened to the Court, I refer to these authorities for assistance. In *Hall v. Kennedy* (Unreported, High Court, Morris J., 20th December, 1993) Morris J. refused to hold the proprietors of a public house responsible for an assault perpetrated against the plaintiff. Although the learned judge accepted that the plaintiff was owed a duty of care, the assailant had displayed "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." McMahon and Binchy highlight the following extract from Morris J's. decision that, as they rightly observe at para. 8.27, sets out "with commendable succinctness the relevant principles of law":-

> "The obligation of the [publican] at law is to take reasonable care for the safety of the [customer] while on the premises. This would include in this case ensuring that [another] customer in the premises did not assault him. The necessary steps would include, in an appropriate case, removing such a customer from the premises, refusing to serve him drink [and] staffing the bar with sufficient barmen or security staff so as to ensure the safety of the [customer]".

25. This decision can be contrasted with my decision in Walsh v. Ryan (Unreported, High Court, Lavan J., 12th February, 1993) where liability was imposed. In that case the assailant was known to the publican as someone with a propensity for violence. Guidance can also be found in the so-called "prison assault" cases. In a number of cases it has been established that although the prison authorities owe a duty of care to other inmates to ensure that they are not unreasonably assaulted or attacked by their fellow prisoners this duty is not an overly onerous one. For example, in *Bates v. Minister for Justice* (Unreported, Supreme Court, 4th March, 1998) where the plaintiff suffered horrific injuries following an attack by a fellow prisoner who through a jug of boiling water that also contained salt over him and then proceeded to attack him with a knife, the Court rejected the plaintiff's contention that the self-service system whereby prisoners helped themselves to tea and coffee for breakfast was flawed. Any other system that would be imposed would also contain risks given that the end result with all of these possible alternatives was that the prisoners would be in possession of a cup of hot tea or coffee, thereby having the potential to cause serious harm. Murphy J. noted that there exists a 'constant battle' to ensure that the human dignity of the prisoners and the security of the prison are assured. Other cases also invoke a similar line of reasoning; see *Kavanagh v. Governor of Arbour Hill Prison* (Unreported, High Court, Morris P., 2nd April, 1993) and *Boyd v. Ireland* (Unreported, High Court, Budd J., 13th May, 1993)

26. All the above authorities reveal that extreme neglect or failure to respond to an obvious and realistic danger must be present before liability will be imposed. It is an approach that I endorse. Applying these principles to the case at hand it is clear that the defendants have not breached the duty that they owe to the plaintiff. Mr. Foran, although drunk, did not pose an obvious or foreseeable risk to the plaintiff. The gardaí had no prior knowledge so as to indicate that Mr. Foran was volatile and at risk of reacting in the violent manner that he did. Furthermore, as in the 'prison assault' cases, and indeed the 'licensed premises' cases, to impose a duty on the defendants in circumstances such as these would be to impose too onerous a duty and risk paralysing the gardaí in the performance of their duties. Although the plaintiff must be protected against all foreseeable risk and harm the events as unfolded here were not reasonably foreseeable.

Additional Observations

27. Although I am not now called to consider the extent of the damage suffered by the plaintiff, I feel it is important to comment on the plaintiff's fear that he had contracted an STD as a result of the unsavoury incident that occurred. I would concur with the views expressed by Mr. Derek Freedman, a genito-urinary physician, in evidence, who was of the opinion that the plaintiff, as a practicing general practitioner should have been more aware of the incredibly remote chance that he was at risk of having contracted an STD. There is a pervading view in the general public about the risk of contracting such diseases that seems to be somewhat ill-informed and irrational. This was recently addressed in detail by Irvine J. in *Carey v. Minister for Finance* (Unreported, High Court, Irvine J., 15th June, 2010). That case concerned applications for compensation by members of An Garda Siochána for injuries inflicted on them during the course of their employment. All of the plaintiffs feared that they had been infected or contaminated by an STD during the course of their duties. Following an extensive and thorough review of the medical literature and expert evidence tendered to the Court Irvine J., to all intents and purposes, rejected the plaintiffs' claims. It is clear from the judgment that the level of knowledge and understanding amongst the general population about the real risks of contracting such diseases is drastically ill-informed. Indeed, it is apparent from that case that the real risk of the plaintiff having acquired an infection from the exposure to urine is incredibly small. In *Carey* the evidence indicated that where someone was subjected to a needle stick injury from a uninfected member of the public, then the risk of infection was in the region of 1:10,000,000 and 1:50,000,000. The risk where urine is involved would appear to be even more remote. I would echo the sentiments of Irvine J. at para. 6.23 of her judgment where she expressed her hope that the judgment would bring an end to unwarranted and unnecessary claims from those who fear infection and are seeking compensation from the State:-

> "I would hope that this judgment… may herald not only an early end to what appears to me to be a significant amount of unwarranted and avoidable anxiety for those unfortunate enough to be assaulted in the course of their duties but also an end to the monetary consequences of such claims on the finances of the State."

28. The plaintiff's reaction in this case could be described in a similar manner. It is important for people, where necessary, to seek the appropriate medical advice but that once that advice has been tendered it is vital that members of the public move on and embrace the reality that they are infection free. They must continue to lead an active life, and this includes (where appropriate) an active social, sporting and sexual life.

Conclusion

29. For the reasons stated above the Court finds that the defendant's duty to protect the plaintiff from foreseeable harm and risk was not breached here. The actions of Mr. Foran were wholly unforeseeable and unpredictable in the extreme. The relief sought is therefore refused.