

THE HIGH COURT

[2012 690 SP]

IN THE MATTER OF THE GARDA SIOCHANA (COMPENSATION) ACTS 1941 AND 1945

BETWEEN

MICHAEL MURPHY

APPLICANT

AND

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 21st day of July 2015.

1. The Applicant was born on the 18th of May 1972. He has 23 years of service including the time when he served in the military prior to joining the police force. On the 15th of November 2012 he was authorised by the Respondent to bring these proceedings in respect of injuries sustained by him in the course of his duty and arising as a result of an incident which occurred on the 9th of August 2008 at Kilkenny Garda Station.

2. The circumstances may be conveniently summarised as follows. The Applicant had arrested a man in Kilkenny Garda station who was suspected of the unlawful taking of a motor vehicle, dangerous driving and public order offences. The prisoner attempted to escape but was restrained by the Applicant. A violent struggle ensued, the end result of which was that the Applicant and his assailant fell heavily to the ground.

3. As a result of the fall the Applicant injured his right hand which became excruciatingly painful and started to swell. Initially, he attended Caredoc, the emergency GP service. On the following day he attended the emergency department of St. Luke's Hospital Kilkenny. Clinical examination disclosed that his right hand was badly bruised. A diagnosis of soft tissue injury and sprain to the second and third carpo-metacarpal joint of the hand was made. X-rays taken at the hospital showed no obvious bony injury. The Applicant's hand was placed in a plaster of Paris cast. There was concern that he may have suffered a fractured scaphoid so three or four days later another x-ray taken, the result of which was negative. The plaster of Paris cast was removed and replaced by a splint. Further x-rays were taken on the 19th August 2008, again with a negative result. He continued to have pain and swelling in his right hand and so a bone scan was carried out; this too was negative. Altogether, the Applicant's hand was in a cast and splint for approximately six weeks.

4. During this period, the Applicant was aware of considerable pain as well as swelling and bruising over the dorsum of his right hand, mainly located in the region of the 2nd and 3rd metacarpals. Pain-killing and analgesic medication was prescribed and taken for a number of weeks. Thereafter, the constant pain which had been experienced initially began to subside but the swelling did not fully resolve. In this regard the Applicant's evidence was that overuse of his hand causes pain arising, by way of example, from the use of tools, such as a strimmer or the gripping and tightening of a screwdriver. For six weeks or so following the incident the Applicant had been unable to make a full fist.

5. The significant swelling which was experienced in the weeks immediately following the assault did subside to some extent, as did the bruising. However, even to this day his hand remains discoloured and in cold weather becomes mottled in appearance. He also experiences pain and discomfort in the dorsum. Gripping movement for anything other than the shortest of periods can cause his hand to cramp or claw. Not surprisingly, the Applicant tries to desist from engaging in any pain-provoking activity. In cold weather he wears gloves. Even at this remove from the incident some permanent swelling over the dorsum of his hand is still visible.

6. The Applicant has been seen and reported upon by Mr. Frank O'Dwyer, accident and emergency consultant; his most recent report is dated the 25th of June 2014. Mr. O'Dwyer has expressed the opinion that the discomfort which the Applicant experiences in cold weather is likely to be a permanent feature, but that this is unlikely to interfere with his ability to work in his chosen career, and that the discomfort experienced when gripping tightly is also likely to be a permanent feature though is unlikely to deteriorate in the future.

7. To be fair to the Applicant, he makes little of his injuries and continues to enjoy his career as a police officer. Although he has been out of work for long periods of time, these absences are in the main due to a quite serious illness unconnected with the injuries with which the Court is concerned.

8. In addition to the medical reports prepared on behalf of the Applicant, the Court has also had the benefit of the medical reports prepared by the Chief Medical Officer dated the 10th of November 2011 and the 5th of March 2015. All of the reports prepared, and which were admitted, have been read and considered.

9. Dr. Walsh's report of the 10th of November 2007 confirms that whilst the significant symptomology experienced after the assault did resolve, the Applicant has been left with residual permanent swelling due to a bony prominence on the back of the right hand associated with intermittent discomfort during activities of prolonged gripping, and that this is accompanied by a temporary mottling of the skin during colder weather. Dr. Walsh confirms that there is no significant functional impairment consequent upon the injury and that no other long-term sequelae are expected.

10. I have had the opportunity of viewing the Applicant's right hand in court. The dorsum was noticeably more swollen in the sense that there is an obvious fullness of the dorsum when compared to that of the left hand. In addition, the colour of the skin of the right hand was noticeably deeper, being much redder than the opposite hand.

Decision

11. I have considered the submissions made by counsel on behalf of both parties and have read the comparators which have been furnished for the assistance of the Court. In the course of submissions, a question arose as to the basis upon which compensation was to be assessed under the Garda Síochána (Compensation) Act 1941 as amended by the Garda Síochána Compensation (Amendment) Act 1945, (the Act of 1941, the Act of 1945, the Acts).

12. Unlike some other statutes, such as the Hepatitis C Compensation Tribunal Act, 1997 as amended, which provides that awards of compensation by the Tribunal to a claimant shall be made on the same basis as an award of the High Court calculated by reference to the principles which govern the measure of damages in the law of tort, the Acts of 1941 and 1945, whilst specifying those matters which may or are to be taken into account by the Court, are silent as to the principles which are to be applied to the assessment of compensation. This begs the question with which the Court is now concerned.

13. In approaching that matter it is considered appropriate to refer briefly to the scheme for the provision of compensation to members of the Garda Síochána or their dependants established by the Acts. Subject to the requirements of s.2 as amended, applications may be made in respect of claims arising as a result of maliciously inflicted fatal injuries causing the death of, or personal injuries (not causing death) to, a member of An Garda Síochána. Every application for compensation is required to be made in the first instance to the Minister and, subject to the provisions of s. 6 (1), (b), (i) and (ii), the Minister is required to authorise the Applicant to apply to the High Court for compensation in accordance with the provisions of the Act.

14. The powers of the Court and general provisions in relation to compensation on an application under the Acts are specified in sections 8, 9 and 10. Whilst s.10 sub-s (1) of that section is concerned with applications in respect of death, sub-s. (2) concerns the provisions applicable to an application for compensation in respect of personal injuries. In that regard sub-s (2) provides:

"In fixing the amount of compensation under this Act in respect of personal injuries not causing death, the Minister or the judge, as the case may be,—

(a) shall have regard to any medical or surgical expenses incurred or likely to be incurred by the applicant in respect of or in consequence of the injuries, and

(b) shall take into consideration the detrimental effect which the injuries might reasonably be expected to have on the future earning power generally of the applicant and, in particular (if the injuries do not preclude the applicant from continuing to be a member of the Garda Síochána), on his future career in that force, and

(c) shall have regard to the pain and suffering occasioned by the injuries to the applicant and also, in a proper case, to any disease or tendency to disease caused by the injuries."

15. The amount of compensation awarded in every case is to be a lump sum in respect of which certain specified payments, expenses and costs are required to be taken into account by the Court. (S.10 sub-s.3). When considering an application for compensation in respect of personal injuries, the Court is required to have regard to the pain and suffering and, where appropriate, to any disease or tendency to disease caused by the injuries. However, and as has already been observed, the Acts contain no express provision as to the principles to be applied when doing so.

16. As it happens, it did not take long subsequent to the passing of the Act of 1941 before that question became an issue in an application by the dependants of Detective Sergeant Denis O'Brien who had been murdered near his home on the 9th September 1942. See *O'Brien and Others v. Minister for Finance* [1944] I.R. 392. In that case the President of the High Court stated a case for determination by the Supreme Court of questions of law involving the principles to be applied and the factors to be taken into account by the Court in the measurement of compensation under the Act.

17. The approach taken by the former Supreme Court to the case stated was expressed by Sullivan C.J., at p 400 as follows:

"Before considering the provisions of that Act it is material to consider how the law stood prior to its passing.

Sect. 106 of the Grand Jury Act, 1836, as adapted by the Local Government (Adaptation of Irish Enactments) Order, 1899, provided that where a peace officer had been murdered in the circumstances mentioned in that section it should be lawful for the County Court of the county within which such murder shall have been committed to make a decree for such sum of money as the Court should think just and reasonable to be paid to the personal representative of such peace officer.

It was decided in several cases, the authority of which has not been questioned, that the compensation to be awarded under that section was not full compensation such as could be recovered in an action against a wrongdoer.

In the year 1919 the law was altered. The Criminal Injuries (Ireland) Act, 1919, s. 1, sub-s. 3, provided that the power of the County Court Judge or Judge of Assize to make a decree for such sum as he thought just and reasonable should include power to make a decree for full compensation, and in O'Connell v. County Council of Tipperary (South Riding) (1) the words "full compensation" were given a very wide interpretation. That Act was repealed in 1923, and, accordingly, at the date of the passing of the Garda Síochána (Compensation) Act, 1941, the compensation recoverable in respect of the murder of a peace officer was such sum as the Court should consider just and reasonable in the circumstances, not full compensation."

18. In *O'Connell v. The County Council of Tipperary (South Riding)* [1921] 2 I.R. 103 (infra) it was held that whilst no definite rule for the assessment of compensation in such a case could be laid down, the Court was required to determine in each case, considering all the circumstances in a just, generous and reasonable spirit, what is the full compensation to be awarded. Sir James Campbell C., with whom O'Connor M.R. concurred, observed of the provision that " ...the compensation may be full, and not merely just and reasonable, which I interpret to mean that , while it should be just , it should also be generous".

19. As has already been observed, the former Supreme Court decided that the effect of the repeal of that Act in 1923 meant that, at the date of the passing of the Act of 1941, the law was as it had been prior to the Act of 1919. In this regard the decision of Chief Baron Pallas in *English v. Kerry County Council* [1900] 34 Ir. L.T.R. 76 is, of the several cases referred to by the Chief Justice in *O'Brien* (supra), the leading authority. That case involved an application for compensation by ex-Sergeant English, R.I.C. in respect of injuries received by him when struck by a stone whilst escorting a prisoner. Under the Act of 1836, compensation could only be awarded in respect of murder or maiming sustained by a witness, magistrate or peace officer "on account of his exertions to bring a disturber of the peace to justice". Having held that the Applicant was maimed within the meaning of the Act, he having been "

rendered less able to defend himself or worry his enemy”, the Chief Barron dealt with the measurement of damages in the following manner:

"I gather from the observations of the learned County Court Judge that he was of opinion that the Grand Jury under the old system were bound to give such sum as they might hold to be full compensation for the injury sustained – in other words, as if an action had been brought against a wrong doer. I am unable to agree with that conclusion, and not only do I consider it wrong, but it has been decided to be wrong by the authority which bound not only the County Court Judge, but which also conclusively binds me – the decision of the Court for Crown cases Reserved." [See In re Nolan's Presentment 24 Ir.L.T.&S.J. 623]

20. As to the rationale behind the Act of 1941 Davitt J. in *Harrington v. The Minister for Finance* [1946] I.R. 320 at page 323 observed:

"Before the passing of the Act under which the application is brought, the matter of the compensation out of public funds of peace officers for malicious personal injuries was regulated by s. 106 of the Grand Jury Act of 1836. Broadly speaking, under that enactment a Guard who was injured maliciously was not entitled to compensation unless his injuries amounted to maiming, and the motive for their infliction was because of some duty he had performed in bringing disturbers of the public peace to justice; and in the case of fatal injuries, his personal representatives were not entitled to compensation unless he was murdered because he had performed some such duty. The maiming or murder of a Guard while he was actually performing the duty of arresting a malefactor gave no right to compensation on that account only.

It is, I think, reasonable to conclude that this rather illogical and unsatisfactory state of affairs was part of the mischief which the Act of 1941 was intended to remedy."

21. One of the questions of law for determination by the former Supreme Court on the case stated in O'Brien was "[w]hether compensation under the Act should be measured by the pecuniary loss suffered by the applicants, or should represent full compensation to the applicants, in the case of a widow for loss of her husband, in the case of the children for loss of their father, and in the case of both for the break up of the home and loss of parental guidance, help and other advantages". The Court was also asked to determine the question as to whether or not a sum could be allowed for general damages.

22. In relation to these questions the Chief Justice stated at p. 402:

"As to questions 2 and 3, it is sufficient to say that, as the law stood at the date when the Garda Siochana (Compensation) Act, 1941, was passed, the compensation awarded in respect of the murder of a peace officer was not full compensation, nor did it include general damages, and, in my opinion, the law in that respect has not been altered by that Act."

23. Accordingly, it was held that no general damages could be awarded under s. 10 sub-s 1 of the Act of 1941. Moreover, in relation to compensation in the case of the widow for loss of her husband, in the case of the children for loss of their father, and in the case of both for the break up of the home and loss of parental guidance, help and other advantages, such loss could only be taken into consideration by the Court insofar as it could reasonably be anticipated that pecuniary loss would most likely result. Thus the law stood until the passing of the Act of 1945, which was principally concerned with amendments to sections 8 and 10 of the Act of 1941 but which also included provision for the reassessment of compensation previously awarded under that Act.

24. Sub-s (1) (a) of section 10 of the Act of 1941, which concerned general provisions applicable in relation to every award of compensation in respect of death, was amended to provide for those matters which were to be, or which might be, taken into consideration by the Court. In relation to the question of compensation, that is to be "...such sum as the judge thinks reasonable having regard to all the circumstances of the case and, fixing the amount thereof, the judge, in addition to the matters which he is required by subsection (3) of the section to take into consideration shall:

(i)...

(ii)...

(iii)...

(iv) have regard to any loss (other than financial loss) sustained by the applicant,

(v)...

25. These provisions were the subject of a further application for revised compensation by the dependants of Detective O'Brien under the provisions of the Act of 1945. See *O'Brien v. The Minister for Finance (No. 2)* [1946] I.R. 314. Whilst in the view of Maguire J. the legislature had deliberately refrained from enacting that full compensation should be given, thereby excluding consideration of an element such as the shock which Detective O'Brien's widow must have received as a result of the tragic death of her husband, he held that the Court was entitled to take into account the effect upon the health of his widow of that shock. Furthermore, he was of the opinion that:

"...the words of sub-paragraph (iv) of s.2 sub-s. 2, of the Act enable me to award compensation for the loss to the applicants, in the case of the widow for the loss of her husband and in the case of the children for the loss of their father and in the case of both for the break-up of the home and the loss of parental guidance, help and other advantages."

26. Accordingly, in addition to pecuniary losses, the Court went on to compensate the dependants under those headings and in this respect Maguire P. stated:

"In my view in measuring a figure to compensate them I must bear in mind, however, that the main purpose of the Act is to provide compensation for the pecuniary loss, actual and prospective, which they have suffered. I have done it I think on a generous scale. I have weighed all the probabilities as to the length of the life of the deceased and his wife together in her favour and have allowed for the probability, as I hold it to be, that the children would have been dependent on their parents till they reached the age of 19."

27. Section 10 sub-s (2) was not amended by the Act of 1945 since the Act of 1941 had specifically provided that, in fixing the amount of compensation in respect of personal injury not causing death, regard was to be had by the Court "...to the pain and suffering occasioned by the injuries to the applicant and also, in a proper case, to any disease or tendency to disease caused by the injury."

28. The effect of that provision is to vest in the Court a statutory jurisdiction to make an award of compensation to the Applicant for pain and suffering occasioned by the injuries and, in a proper case, in respect of any disease or tendency to disease caused by the injury, and that such assessment is to be made in accordance with the law.

29. The common law is, subject to any statutory alteration or modification, the law of the land having been carried over by the Constitution save insofar as it was inconsistent with its provisions. At common law, compensation for pain and suffering in respect of personal injuries is assessed on the basis of awarding the Applicant such sum of money as will put the Applicant into the same position, insofar as that can be achieved by an award of money, as the Applicant would have been in had the injuries not been sustained. The object of such compensation is reparative and is best summed up by the Latin phrase *restitutio in integrum*. An award of compensation, as with an award of compensatory damages, is made in respect of the Applicant's past and prospective losses including interference with the amenities of life caused by the injuries. Justice requires that the amount of the award must be fair, reasonable and proportionate to the injuries sustained.

30. In the context of the principles to be applied to the assessment of compensation, no material distinction is to be drawn between the use in the Acts of the word "*compensation*" rather than "*damages*". The use of the word "compensation" is appropriate since, as with most other statutory schemes which make provision for the payment of compensation in respect of personal injuries by the State or a State agency, it is generally the State and not the wrongdoer which is required to satisfy the award or otherwise where the payment of compensation is being provided for without the necessity of the claimant or Applicant having to establish wrongdoing on the part of the State or a State agency. The word "*damages*" on the other hand appropriately describes compensation payable by a wrongdoer.

31. In substance, however, the principles to be applied and the object to be achieved in the assessment of a compensatory award under the Acts, as with an award of compensatory damages, are the same but are to be distinguished from an award of aggravated or exemplary damages. Although it is a requirement under s.2 of the Act of 1941 that the injuries were inflicted maliciously, the compensation to be assessed for pain and suffering under s.10 sub-s. (2) is in respect of personal injuries and is not compensation, or a claim for damages, in respect of the torts of trespass to the person.

32. The principles to be applied by a court in the assessment of damages for pain and suffering in respect of personal injuries were well known to the legislature when the measures under consideration here were being enacted. If it had been intended that an award of compensation for personal injuries under the Acts was to be assessed in accordance with different principles or on some alternative basis, it would have been relatively simple for the Oireachtas to have provided for that in the legislation. It chose not to do so.

33. It follows, in my view, that there is no statutory basis for approaching the assessment of compensation under the provisions of the Acts for pain and suffering in respect of personal injuries otherwise than on the same basis as an assessment of general damages for pain and suffering in a personal injuries action. To do otherwise, in the absence of express statutory provision, would be to treat the assessment of compensation for personal injuries suffered by a member of An Garda Síochána in a way different to that of other citizens, thereby running the risk of offending the constitutional guarantee that all citizens are equal before the law.

34. I am fortified in the view to which I have come not only by the practice of the Court in the way in which the assessment of compensation under the Acts has been approached, but also by previous judgments of this Court and the Supreme Court. See in particular *O'Looney v. the Minister for Public Service* [1986] I.R. 543 and *Carey and Others v. Minister for Finance* [2010] IEHC 247.

35. Although there is no statutory basis for the practice of referring to previous decisions of the Court by way of comparison as well as to the Book of Quantum, it is of assistance to the Court in discharging its function and undoubtedly contributes to achieving a general consistency in awards which constitute a regularly updated corpus of decisions; a result undoubtedly in the interests of justice.

36. For the sake completeness it is considered appropriate to refer to the provisions of s.22 of the Civil Liability in Courts Act 2004 (the Act of 2004) which imposes on the Court a requirement, when assessing damages in a personal injuries action, to have regard to the Book of Quantum. Although reference to the book is sometimes made by counsel in the course of submissions on the hearing of an application under the Acts, the Court is not bound to have regard to it since, by virtue of s.2 (1) of the Act of 2004, an application for compensation under the Acts and certain actions for damages are expressly excluded from its scope. However, there is no prohibition on the Court from doing so.

Conclusion

37. As a result of the fall in the course of the struggle between the Applicant and his prisoner, who was trying to escape, the Applicant sustained significant soft tissue injuries to his right hand. In the immediate aftermath of the incident and for several weeks afterwards, these injuries resulted in excruciating pain. Although that severe symptomology gradually resolved there are ongoing sequelae. The dorsum of his right hand, which had been badly swollen, still presents fullness in appearance when compared to the uninjured left hand; this is apparent at conversation distance. Dr. Tom Walsh attributes this to what is described as a bony prominence which he considers will be permanent. In relation to this aspect of matters there is no issue between the parties.

38. With regard to the discomfort and mottling experienced in cold weather, and which the Applicant deals with as best he can by wearing gloves, that is likely to be a permanent feature, as is the discomfort and pain experienced when undertaking a turning and twisting movement; such as with a screwdriver or when holding certain tools such as a strimmer. In this regard I accept the evidence of Mr. Frank O'Dwyer, accident and emergency consultant. However, these sequelae are not in any sense vocationally disabling. Understandably, the Applicant tries to avoid using his hand in a manner tending to cause such symptomology. He is conscious of the noticeable appearance of his right hand when compared with the left and, to his credit, is accepting of this and that the other sequelae with which he has been left are likely to be a feature in the future. I accept the evidence of Mr. O'Dwyer that the Applicant is unlikely to develop premature arthritis in his right hand as a result of the injuries.

39. Having regard to the well-settled principles to be applied by the Court in the assessment of compensation for the pain and suffering arising as a result of the injuries already experienced by the Applicant since August 2008 and likely to be experienced by him in the future, the Court will award the sum of €30,000 to date and €15,000 for the future, to which will be added the sum of €916.43, agreed between the parties in respect of pecuniary losses.

