

BETWEEN

THERESA MAGEE

PLAINTIFF

AND

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

DEFENDANTS

Judgment of Mr. Justice Gilligan as delivered on the 26th day of October, 2005.

Factual Background

1. The plaintiff is the mother and next of kin of the late Paul Magee (born 19/09/1983) who was taken into garda custody on 26th December, 2002. The late Paul Magee had been arrested by Gardaí for public order offences, at the home of a friend where he was displaying signs suggestive of paranoid delusions.
2. On arrival at Kilmainham Garda Station, he was placed, handcuffed, in a Garda cell where after a short period he was observed to be in an unconscious state. An ambulance was requested and CPR was performed by the Gardaí on duty. Shortly afterwards he was transferred to St James' Hospital where, following attempts to resuscitate him, he was pronounced dead.
3. The plaintiff argues that several issues arise concerning the deceased's death at a time when he was being kept in Garda custody including questions as to his treatment in custody and the extent to which the State or its agents were responsible through gross negligence or otherwise for the death of the deceased. The plaintiff claims that she has not been kept adequately informed of the circumstances surrounding her son's death and she claims the full facts have not yet emerged.
4. A post-mortem was carried out by the Assistant State Pathologist Dr. Marie Cassidy on 27 December, 2002. Toxicological examination showed recent use of cocaine. Dr. Cassidy's ultimate conclusion was that the death was consistent with cocaine related collapse.
5. An inquest was scheduled to commence on 12th February, 2004, but because of the institution of these proceedings that inquest has not yet taken place.
6. The plaintiff sought legal representation in respect of the inquest but was advised that there is no publicly funded provision for legal aid for inquests. For the purposes of adjudication of this case, the defendants accept that the plaintiff does not have the necessary financial means to secure appropriate legal representation at the inquest to represent her interest arising on her son's death.
7. The plaintiff claims against each of the defendants for their failure and/or refusal to take appropriate steps to protect the right to life of the deceased through the provision of an effective independent judicial system to establish the cause of death which said failure and/or refusal constitutes a breach of Article 38 and/or Article 40.1 and/or Article 40.3 of the Constitution and/or Article 2 and/or Article 13 of the European Convention on Human Rights and she seeks a variety of reliefs including:

1. An order directing the provision of legal representation to her in respect of the inquest to be held into the death of her son, Paul;
2. An interlocutory order, if necessary restraining the conduct of an inquest pending a determination of the proceedings herein;
3. Further and/or in the alternative damages pursuant to section 3 of the European Convention on Human Rights Act, 2003 for breach of Convention rights and also damages for breach of constitutional rights;
4. A declaration that the right to life protected by Article 40.1 and /or Article 40.3 of the Constitution and/or Article 2 of European Convention on Human Rights requires the defendants or each of them to take appropriate steps to safeguard the lives of those within the jurisdiction through the provision of an effective independent judicial system to be set up so that the cause of death of individuals who die in state care and/or custody can be determined.

Relevance of the European Convention on Human Rights

8. The European Convention on Human Rights became part of domestic law through the European Convention on Human Rights Act, 2003 on 31 December, 2003. In the Supreme Court decision of *Dublin City Council v. Fennell* (Unreported, Supreme Court, 12 May, 2005), Kearns J. noted that the Act of 2003 does not purport to incorporate the Convention directly into domestic law:

"[R]ather [it] impose[d] an obligation that, when interpreting or applying any statutory provision or rule of law, a court shall, insofar as is possible, and subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions".

9. In *Dublin City Council v. Fennell*, a consultative case stated was referred to the Supreme Court by the Circuit Court on the issue of whether the Act of 2003 could have retrospective effect to proceedings that had already been commenced before the Act came into operation. Having examined the recent House of Lords decision in *Re McKerr* [2004] 2 ALL ER 409 and the judgment of Laffoy J in *Lelimo v. The Minister for Justice, Equality and Law Reform* [2004] 2 I.R. 178 Kearns J stated at page 38:

"I am satisfied that the 2003 Act cannot be seen as having retrospective effect or as affecting past events"

10. Thus the plaintiff's claim for the provision of a publicly funded legal representation in respect of the inquest must fail insofar as it is grounded upon the provisions of the European Convention on Human Rights (as implemented by the Act of 2003) as the Act was not in force on the relevant date of the event to which the inquest relates. Thus it appears that the plaintiff's claim must fall back on constitutional grounds.

11. It is accepted by Counsel for both parties in the circumstances that arise that the only relevant issue to be decided by this Court is as to whether or not the Plaintiff is entitled to the Provision by the State of legal representation to her in respect of the inquest to be held into the death of her son Paul.

Role of the Coroner

12. The law in Ireland concerning the function of the Coroner is governed by the Coroners Act, 1962.

13. Under the Act, the primary duty of the Coroner is to hold an inquest where he has been informed that a body of a deceased person is lying within his district and he

“is of [the] opinion that the death may have occurred in a violent or unnatural manner, or suddenly and from unknown causes or in a place or in circumstances which, under provisions in that behalf contained in any other enactment, require that an inquest should be held”. (Section 17)

14. The coroner has a general public duty to act objectively and impartially at all times. It is accepted that the role of the Coroner is judicial in nature. He presides, *inter alia*, over inquests. At the conclusion of the inquest he must address the jury and thereafter record a verdict.

15. The scope of the inquest is described by section 30 of the Coroners Act, 1962.

Section 30 provides:

“Questions of civil or criminal liability shall not be considered or investigated at an inquest and accordingly every inquest shall be confined to ascertaining the identity of the person in relation to whose death the inquest is being held and how, when and where the death occurred.”

16. Thus a Coroner at an inquest is not concerned with civil or criminal liability though the proceedings are inquisitorial in nature.

Right to legal aid

17. The Civil Legal Aid Act 1995 refers to both legal aid and legal advice. Legal aid is defined in section 27 of that Act as representation by a solicitor or a barrister in the categories of civil proceedings which come under the provisions of section 28 of the Act. Inquests are not specifically mentioned in section 28. Legal aid is not generally available at an inquest, although the Legal Aid Board may be authorised by ministerial order to provide legal aid in proceedings before any prescribed court or tribunal.

18. The plaintiff claims that, as there is no statutory provision for legal aid in respect of representation at an inquest, the failure of the State to provide for a publicly funded system of legal aid in respect of enquiries into the death of persons in state custody, in circumstances where the next of kin cannot be reasonably expected to effectively represent themselves, constitutes a breach of the constitutional right to life and a breach of a right to fair procedures and the right of access to an effective remedy.

19. It is well established that a right of access to the courts is an implied personal right under Article 40.3.1° of the Constitution. A constitutional right to legal representation has been considered in a number of contexts. In *Stevenson v. Landy & others* (Unreported, High Court, Lardner J., 10 February, 1993), and *Kirwan v. Minister for Justice* [1994] 2 I.R. 417, Lardner J. held that an impecunious litigant had a constitutional right to civil legal aid where s/he was contesting wardship proceedings taken by the State in respect of his/her child, or seeking release from detention under the Trial of Lunatics Act 1883, respectively.

20. Counsel for the plaintiff also refers to *O'Donoghue v. Legal Aid Board* (Unreported, High Court, Kelly J., 21 December, 2004) where Kelly J. considered the constitutional right to legal aid in Ireland. Kelly J. found that the Civil Legal Aid Act, 1995 gives substance, in many ways to the constitutional entitlement to legal aid for appropriate persons.

21. Thus, the plaintiff submits that the authorities establish a constitutional right to civil legal aid to vindicate the constitutional right of access to the courts. The plaintiff argues that she has a right to ensure that there is an effective and independent judicial enquiry into the death of her son in police custody in vindication of the right to life of the deceased. It is claimed that the right to civil legal aid falls within that right as, without legal aid, the plaintiff will not be in a position to meaningfully contribute to or participate in the enquiry.

22. In response, the defendants submit that, insofar as a number of Irish cases have upheld a right to civil legal aid, they are in entirely different circumstances to this case. Firstly, the cases all concern civil litigation before the courts or alternatively inquiries on foot of which the person seeking legal representation/legal aid is or has been in serious jeopardy in respect of his or her fundamental legal rights.

23. The defendants argue that in the *O'Donoghue* case, Kelly J. was concerned with constitutional rights in the context of a statutory scheme and not as a matter of general principle. Insofar as Kelly J. referred to the Convention and to the European Convention on Human Rights Act 2003, this position has since been clarified by the Supreme Court decision in *Dublin City Council v. Fennell*.

24. The defendants argue that although *State (McKeown) v. Scully* [1986] 1 I.R. 524 is authority for the proposition that the next of kin are entitled to an opportunity to be heard at an inquest, there is no Irish authority for the proposition that such persons are entitled to publicly funded legal representation at such an inquest.

25. Attempts to establish that a State has a positive constitutional duty to assist a civil litigant who is denied effective access to the courts because of factors such as poverty, for which the State is not directly and immediately responsible, have almost invariably failed.

26. In *O'Shaughnessy v. AG* (Unreported, High Court, O'Keefe P., 16 February, 1971) O'Keefe P. dismissed a challenge to the constitutionality of the Criminal Justice (Legal Aid) Act, 1962 because it failed to make any provision for legal aid in civil cases on the ground that it was for the legislature to determine how the personal rights of the citizen were to be vindicated.

27. In *MC v. Legal Aid Board* [1991] 2 I.R. 43, Gannon J said “the fact that the existence of fundamental personal rights is expressly recognised by the constitution does not impose on the state any duty to intervene in aid of a party involved in any private civil dispute in relation to any such personal rights.”

28. *Stevenson v. Landy & others* (Unreported, High Court, Lardner J., 10 February, 1993) concerned wardship proceedings taken by

the Eastern Health Board. The Legal Aid Board had refused to grant legal aid to the mother of the child involved to contest the proceedings because she had failed to show that she was reasonably likely to be successful in the proceedings. This was a requirement provided for in the scheme of legal aid and advice. Lardner J. quoted from the decision of O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325 where he said at page 350:-

"The requirements of fairness and justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. Facing as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does."

29. Having quoted that passage, Lardner J. continued:-

"That Statement was made in relation to a criminal prosecution. The present case is of a different nature. Having considered the circumstances of the Applicant and in which the application for legal aid to be represented in the wardship proceedings is made, I have come to the conclusion that the dicta which I have quoted are applicable, *mutatis mutandis*, to the wardship proceedings."

30. Lardner J. construed the scheme of civil legal aid and advice in a manner which he found to be more in accordance with the requirements of the Constitution and having regard to the administration of justice.

31. In *Kirwan v. Minister for Justice* [1994] 2 I.R. 417, Lardner J. ruled that an applicant who was being detained in the Central Mental Hospital was entitled to free legal aid in respect of his appearance before a committee established by the Minister for Justice whose task it was to advise on whether persons such as the applicant were fit to be released from detention. Lardner J. held that the constitutional requirement of fair procedures applied to applications for review of detention in this type of case and that this obliged the executive to provide legal aid to any applicant who was "without the requisite means to procure the collection of the relevant information and to formulate and present the appropriate submissions."

32. In *McBrearty v. Morris* (Unreported, High Court, Peart J., 13 May, 2003), Peart J. stated that *Stevenson* and *Kirwan* had to be read in light of their particular facts and that it was not possible to extrapolate from them any principle of general application. He went on to hold that the plaintiff's constitutional right to fair procedures did not include the right to have legal representation at a public enquiry into allegations about some members of the Gardaí in Donegal funded or provided for by the State in advance of the Tribunal reaching its findings.

33. I take the view that the case of *McBrearty v. Morris* can be distinguished from the present case on the basis of the facts decided therein because if the plaintiff in the particular circumstances of that case cooperated fully with the relevant Tribunal, the probabilities are that his reasonable legal costs would have been provided for by the Tribunal and paid by the State. In effect, the plaintiff in those proceedings was seeking the payment of his legal costs in advance of any conclusion being reached by the Tribunal.

34. In the recent case of *O'Donoghue v. Legal Aid Board* (Unreported, High Court, Kelly J., 21 December, 2004), the plaintiff successfully sued the State arising out of a delay of 25 months in providing her with legal aid. The case came before the courts as a claim for damages arising from the delay in the delivery of legal aid and advice services which was claimed to be unreasonable and in breach of the plaintiff's rights, including unremunerated rights under Articles 40.1 and 40.3 of the Constitution on the basis that the Constitution protected a right of access to the courts and a right to timely legal representation to vindicate that right of access.

35. In his judgment, Kelly J. accepted the arguments made by the Board. He agreed that the statutory obligation imposed on the Board by the Act was not an absolute one and that it was required to carry out its functions within its resources. He held that the delay in providing legal aid to plaintiff was caused exclusively by the lack of resources made available to the Board and that it was, therefore, not in breach of its statutory duty.

36. Kelly J did not accept the State's arguments to the effect that there was no right to legal aid, finding that the plaintiff had rights which had not been vindicated. He reviewed the case law and stated at p. 44 of his judgment:

"Applying the approach of Lardner J. it seems to me that the unfortunate circumstances of the plaintiff in the present case are such that access to the courts and fair procedures under the Constitution would require that she be provided with legal aid. That view is reinforced by the fact that she fell squarely within the entitlements to such under the Act and the regulations but was denied it for a period of 25 months because of the manifest failure of the State. The delay in granting the certificate for legal aid, in my view, amounted to a breach of the constitutional entitlements of the plaintiff and if she can demonstrate loss as a result she is entitled to recover damages in respect thereof."

37. Kelly J. at p. 45 of his judgment deals succinctly with the argument that the court is powerless to intervene regardless of the nature of the rights being asserted by the plaintiff whether it be statutory constitutional or a right under the European Convention on Human Rights. He states:-

"The reason for such an assertion is that it is said that the court would be trespassing into an area outside its competence under the Constitution. (See *Sinnott v. Minister for Education & Ors.* [2001] 2 I.R. 545 and *T.D. v. Minister for Education & Ors.* [2001] 4 I.R. 259).

38. I do not accept such to be the case. This case is not concerned with a claim for any form of mandatory relief against the State. The court is doing no more than what the courts have been doing since at least *Ryan v. Attorney General* namely, ensuring that a right under the Constitution is protected and given effect. As was stated by Keane C.J. in *Sinnott v. Minister for Education* at page 631:-

"That is not to say that where a plaintiff successfully claims that his constitutional rights have been violated by the State in the past and will continue to so violated in the future (which is not the case here) unless the court intervenes, the courts are impotent when it comes to the protection of those rights."

39. Later in the judgment he said that while in principle there is nothing to preclude the granting of mandatory relief against a Minister

to meet a constitutional obligation, the courts should “presume that where this court grants a declaration that he or she had failed to meet his or her constitutional obligations the Minister will take the appropriate steps to comply with the law as laid down by the courts.”

Role of Legal Representatives at Inquests

40. The role of legal representatives at inquests was referred to by O’Hanlon J. in *State (McKeown) v. Scully* [1986] I.R. 524. O’Hanlon J held that there was a departure from the rules of natural and constitutional justice in failing to give the widow and the next of kin of the deceased any opportunity to be heard before the very grave and damaging finding was made against the deceased husband of the prosecutrix.

41. He stated at p. 526 of his judgment:

“Had such opportunity been given, they could reasonably have sought to be represented at the inquest; to have the witnesses cross-examined on their depositions; to address the jury; and to offer to make available to the coroner further evidence which might be of assistance at the inquest.”

Conclusion

42. It is appropriate to consider the particular facts in the instant case. The deceased, aged 19, was arrested on the 26th September 2002 by members of An Garda Síochána for public order offences at a time while it appears he was displaying signs suggestive of paranoid delusions. On arrival at Kilmainham Garda Station he was placed handcuffed in a Garda cell and on the basis of the information available it appears that within a very short period of time he was observed to be in an unconscious state. He was immediately transferred to St. James’ Hospital where following attempts to resuscitate him he was pronounced dead later on the same day. The Assistant State Pathologist carried out a post mortem on 27th December, 2002, and her deposition records her conclusions as follows:

“This man was apparently arrested on 26 December 2002 at 4.45 a.m. He was taken to Kilmainham Garda Station and he was found collapsed in his cell a short time later. He was taken to hospital. Eventually he was taken to theatre, their concern being that he possibly had an intra-abdominal bleed. No abnormality was discovered at the operation. He did not recover in the hospital and died that day.

1. Postmortem examination showed widely scattered surface bruising and minor injuries, without any significant internal trauma. He appears to have developed a coagulopathy, a bleeding or blood clotting disorder, and this would account for the extensive bruising identified, much of which would have complicated medical treatment. This was evident by the time he reached hospital but there appeared to be no obvious cause for such a disorder. Despite surgical and medical intervention his condition did not improve and he died within 24 hours of collapsing.

2. The postmortem examination showed features suggestive of death in cardio-respiratory without evidence of primary cardiac or respiratory disease.

3. In view of the circumstances samples were retained for toxicological examination which showed that he had recently used cocaine. This could account for his behaviour and subsequent collapse. Cocaine is a mood altering drug but in excess can cause seizures, cardiac arrhythmias, collapse and death. Blood clotting abnormalities have also been described, although the reason for these is unclear. In the absence of other specific findings it would appear that cocaine could be responsible for this man’s death.

4. The other injuries he sustained could have occurred in a minor scuffle but these would not normally be expected to cause or contribute to his death, especially as there was no evidence of any internal trauma of any significance.

5. In summary the postmortem appearances were consistent with cocaine intoxication causing collapse and death.

Cause of Death

I a. Consistent with Cocaine related collapse”

43. It is accepted by the State authorities that the plaintiff in these proceedings does not have the necessary financial means to secure appropriate legal representation to represent her interest at the proposed inquest arising on her son’s death.

44. I note the defendant’s submission that if the coroner was, within the limits of section 30 of the Act of 1962, to make any determination as to fact that gives rise to a new apprehension or concern, the plaintiff, as next of kin of the deceased, may have a civil remedy. I take the view that as a result of the death of a citizen while in the custody of An Garda Síochána, it is evident that the next of kin needs the benefit of legal representation in order to deal with any possible apprehension or concern and also to give the next of kin an effective right of audience before a coroner sitting with a jury.

45. Having regard to the fact that the coroner presides over the relevant inquest and his role is judicial in nature, that the inquest of itself is inquisitorial and that a jury will record a verdict, it appears reasonable to come to the conclusion, applying the rationale of Kelly J. in *O’Donoghue v. The Legal Aid Board* and Lardner J. in *Stevenson v. Landy and Others and Kirwan v. Minister for Justice*, that, due to the unfortunate circumstances of the plaintiff in the present case and the fact that her son’s death occurred within a very short period of time of him becoming unconscious while in the custody of An Garda Síochána, fair procedures under the Constitution require that she be provided with legal aid for the purpose of being adequately represented at the forthcoming inquest into her son’s death.

46. I will hear the submissions of counsel as to the form of the order to be made.