

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2004 16404 P**

**BETWEEN**

**L. M.**

**PLAINTIFF**

**AND**

**THE COMMISSIONER OF AN GARDA SIOCHÁNA, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**Judgment of Mr. Justice Hedigan delivered the 20th day of January 2011.**

1. This action arises from proceedings dated the 1st February, 2010, wherein the President of the High Court ordered that a preliminary issue be tried on the following the questions;

1. Did the defendants owe to the plaintiff a duty of care (howsoever arising including a duty arising pursuant to the provisions of the Constitution and/or a fiduciary duty) as alleged in the statement of claim?
2. If so, is a breach of same actionable at the suit of the plaintiff?
3. Is the plaintiff's case statute barred pursuant to the provisions of the Statute of Limitations 1957 (as amended)?

2. The plaintiff resides in Ireland. The first named defendant is the person who enjoys general direction and control of An Garda Síochána, the force established pursuant to the provisions of the Police forces Amalgamation Act, 1925 and having his principal offices at Garda Headquarters, Phoenix Park, Dublin 7. The second named defendant is a Minister of the Government and a Corporation Sole and has his principal offices at the Department of Justice, Equality and Law Reform, 72-76 St. Stephen's Green, Dublin 2. The third named defendant is the person charged with the direction, control and supervision of prosecutions in the State and his office is located at Chapter House, 26-30 Upper Abbey Street, Dublin. The fourth named defendant is the Irish state. The fifth named defendant is the Law Officer of the state designated by the Constitution of Ireland and is charged with representing the public interest in respect of the Constitution. His office is located at Government Buildings, Upper Merrion Street, Dublin 2.

3. On the 4th May, 1990, the plaintiff made a formal complaint of rape. She was 12 years old at the time. A statement was taken in or about 18th May, 1990, from the plaintiff and a short statement was taken from her mother in or about December 1990. The plaintiff's complaints were validated by St Louise's Unit at Crumlin Hospital in Dublin. St. Louise's is a unit where children are assessed and treated following an allegation of sexual abuse. It appears that no further steps were taken by the defendants to advance the investigation until September 1996 when the English Child Protection Agency contacted An Garda Síochána. The child protection agency had been alerted to the complaint by a social worker in Tallaght following contact from the plaintiff's mother. In or about April 1997, English police interviewed the alleged perpetrator. In February, 1998, eight warrants for his arrest issued and he consented to his extradition back to Ireland. He was returned for trial on or about the 2nd October, 1998. He was convicted of rape, unlawful carnal knowledge, incest and indecent assault and received a nine-year sentence. On the 3rd December, 2001 the Court of Criminal Appeal quashed the conviction and a retrial was directed. Thereafter the accused brought judicial review proceedings to prohibit a retrial by reason of prosecutorial delay and this application was successful before Murphy J. When the case was reopened in 1996 L.M. had made a statement to the gardaí she also gave evidence over a two-day period at the trial. L.M. was seen on 24th September, 1999, for the purpose of the preparation of a victim impact report, she was described as relaxed, pleasant and good humoured. The plaintiff's mental condition notably deteriorated with the collapse of the accused's trial and a diagnosis of post-traumatic stress disorder has been made. Counsel for the plaintiff argues that this deterioration was caused by distress occasioned by the fact that the plaintiff was denied justice due to the failure to properly pursue a prosecution on foot of her complaint. The plaintiff contends that the failure constitutes negligence and breach of duty on the part of the defendants. The plaintiff claims her constitutional right to bodily integrity and privacy have been breached, as have her rights under Articles 2, 3, 6, 8, and 13 of the European Convention of Human Rights. In these proceedings issued on the 21st day of July 2004 the plaintiff seeks damages and various declaratory reliefs. The plaintiff sought discovery from the defendants to establish the full factual circumstances in which the prosecution was not pursued in a more expeditious way. The plaintiff's discovery motion was issued and served in July 2009, in response the defendants made this application for the trial of a preliminary issue.

**4. Submissions of the Defendant's**

4.1 For the purposes of the trial of the preliminary issue, the facts are assumed to be in accordance with the plaintiff's statement of claim. The primary issue therefore is whether the defendants owed the plaintiff a duty of care. The circumstances in which a duty of care arises were addressed by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562.

"You must take reasonable care to avoid acts or omissions, which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

In the case of *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84. Keane C.J. stated that in his view not only should the "proximity" and "foreseeability" tests be used but that considerations of public policy together with the test of whether it is just and reasonable to impose a duty of care should be employed. The plaintiff seeks to argue that the Gardaí and Prosecuting Authorities owed her an actionable duty of care in the way they went about their prosecutorial functions. The defendants argue that in circumstances where a body is performing a function that is in the public interest, this may outweigh any duty of care to private individuals. That this is so is clear from the decision in *Beatty v. The Rent Tribunal* [2006] 2 I.R. 191. McCracken J. stated as follows:-

"What can be gleaned from the various decisions is that there are circumstances in which, for reasons of public policy, it would not be just and reasonable to impose a duty of care. What is to be considered as just and reasonable is not merely what would be just and reasonable between the parties, but also what would be just and reasonable in the public interest. Where a public body, such as the Appellant in the present case, performs a function which is in the public interest, then in many cases, and I believe this to be one of them, that body ought not to owe a duty of care to the individuals with whom it is dealing. It is in the public interest that it should perform its functions without the fear of threat of action by individuals. The fact that it is performing a function which is in the public interest may outweigh any duty of care to private individuals."

The defendants maintain that the difficulty faced by the plaintiff, in asserting a duty of care in the circumstances of this case is evident from the ruling in *W (HM) v. Ireland, AG and Government of Ireland* [1997] 2 I.R. 141. In that case the plaintiff instituted proceedings claiming that the Attorney General owed her a duty of care and/or a constitutional obligation to consider and speedily process an extradition request, in order to ensure that one Brendan Smith was quickly brought to justice. The plaintiff was a victim of sexual offences committed in Northern Ireland by Smith. She claimed that in breach of that duty of care and / or constitutional obligation the Attorney General wrongfully and without lawful excuse failed, neglected and refused to endorse the said warrants for execution within the State, that a similar statutory duty was imposed on the Attorney General by the provisions of the Extradition Acts 1965 and 1987 and that, as a result of those breaches of duty, breaches of constitutional obligation and breach of statutory duty and as a foreseeable consequence of the wrongful acts and omissions of the Attorney General, she had suffered shock, distress, loss and damage. The court held that there was no duty of care owed by the Attorney General to the plaintiff. Costello P. explained that even if there was sufficient proximity between the plaintiff and the Attorney General and her injuries were foreseeable, public policy would prevent any duty of care being imposed. Costello P. stated:-

"In considering whether the Attorney General should be protected from actions for negligence, the court is balancing the hardship to individuals which such a rule would produce, against the disadvantage to the public interest if no such rule existed... because of the inhibiting effect on proper exercise by the Attorney General and the Director of Public Prosecutions of their prosecutorial functions, it would be contrary to the public interest that a duty of care at common law be imposed on them. So to conclude is not to submit to a "flood gates" argument of doubtful validity, it is to accept the logical consequences, should the duty of care at common law be imposed in the execution by the Attorney General of his functions under the Act of 1965."

4.2 The defendant argues that English authorities are very much in line with the decision in *W (HM)* and are of persuasive authority. In *Hill v. Chief Constable of West Yorkshire* [1998] 2 All E.R., the House of Lords held that there was no general duty of care owed by the police to individual members of the public to identify and apprehend a criminal. Lord Keith of Kinkaid observed:-

"In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind...A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime."

The approach in *Hill* was followed by the House of Lords in the case of *Brooks v. Metropolitan Police Commissioner and Others* [2005] 2 All E.R. 489. In the *Brooks* case the House of Lords held that converting the ethical value that police officers should treat victims and witnesses properly, into general legal duties of care on the police towards victims and witnesses would be going too far. The court held that the prime function of the police was the preservation of the Queen's peace; they had to concentrate on preventing the commission of crime, protecting life and property, and apprehending criminals and preserving evidence.

4.3 The defendants point out that the European Court of Human Rights have accepted that in the substantive domestic law of certain member states there is no duty of care owed by public bodies such as the police and prosecutors. Initially the Court was critical of cases such as *Hill* on the basis that it appeared to endorse a blanket immunity for the police in their role as investigators of crime. See *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245. The decision in *Osman* was revised somewhat in *Z v. United Kingdom* (2002) 34 E.H.R.R. 3, which concerned the liability of local authorities for alleged failures in the performance of their functions regarding the taking into care of children feared to be at risk, the court held that there had not been a breach of Article 6 of the Convention. It was explained that:-

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

4.4 The defendant's further submit that the provisions of the European Convention on Human Rights Act 2003 do not have retrospective effect (*Dublin City Council v. Fennell* [2005] 1 I.R. 604), and in relation to her claim under the constitution, the breaches alleged do not impose a constitutional duty of care on the defendants to the plaintiff.

4.5 The defendants further submit that the plaintiff's case is statute barred pursuant to the Statute of Limitations 1957 as amended. The alleged breaches of duty by the Gardaí long predate the issue of the Plenary Summons on the 21st July, 2004, arising from events in 1990. The plaintiff appears to argue that the claim only accrued with the vindication by the High Court of the Constitutional Rights of the alleged perpetrator on 2nd April, 2004, or perhaps, when the DPP decided not to appeal the decision of Murphy J. to the Supreme Court. They submit that it is very difficult to see how such a decision could have this effect. In reality it would be yet again contrary to public policy if such a consequence were to follow. Short of in some way implicating or involving the High Court decision or the decision not to appeal in the cause of action, any claim in negligence or breach of duty is long since out of time.

4.6 Finally the defendants submit that the plaintiff impermissibly seeks to convert alleged failures to fulfil duties owed to the public at large into actionable private wrongs. It is submitted that it would not be just and reasonable to recognise or impose a duty of care on the defendants to the plaintiff. The Gardaí and the D.P.P.'s role in investigating crime and prosecuting cases is for the benefit of the public at large. It is imperative that the investigating members of the Garda Síochána and the D.P.P. retain their freedom of action at all times. If a duty of care were held to exist as between them and victims of crime their ability to act on issues and deal with investigations would be severely hampered. This would have an inhibiting effect on the proper exercise of their investigatory and prosecutorial functions and this would be contrary to the public interest.

## 5. Submissions of the Plaintiff

5.1 The plaintiff contends that the failure to properly investigate and pursue a prosecution on foot of her complaint constitutes negligence and breach of duty on the part of the defendants. The plaintiff acknowledges that the Irish Courts have applied public interest immunity to acts or omissions of prosecuting authorities. However the plaintiff maintains that the public policy immunity sought to be invoked does not properly have the effect of excluding all liability on the part of the state arising from the negligent investigation and prosecution of crime. The plaintiff argues that there are circumstances in which the negligent investigation and prosecution of crime can give rise to a liability on the part of the State authority. There is a growing body of support from international jurisprudence that there is no longer available a blanket exclusion for all negligent acts or omissions of the prosecuting authorities to victims of crime.

The leading authority in Irish law limiting the duty of care to victims of crime is the case *W (HM) v. Ireland, AG and Government of Ireland* [1997] 2 I.R. 141. In that case the court held that there was no duty of care owed by the Attorney General to the plaintiff. Costello P. explained that even if there was sufficient proximity between the plaintiff and the Attorney General and her injuries were foreseeable, public policy would prevent any duty of care being imposed. It is argued on behalf of the plaintiff that the *W (HM)* case is of limited application. That case dealt with the Extradition Act 1965. Counsel argues that it is possible that under alternative legislation it might be possible to sue the Attorney General. This argument is based on the proposition that if the *W (HM)* case applies generally, as suggested by counsel for the defendant, then this would fly in the face of the Supreme Court decision in *Byrne v. Ireland* [1972] I.R. 241, which held that there is no general state immunity because the people are sovereign and the state is an agent of the people and can be sued. It follows that if the state can be sued, an organ of the state could not have an absolute immunity from suit. In *Byrne* case Walsh J. held: -

"Where the People by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce those must be deemed to be also available...It is not the case that these are justiciable only when some law is being passed which directly infringes those rights or when some law is passed to implement them. They are justiciable when there has been a failure of the state to discharge the obligations"

Counsel for the plaintiff states that in light of *Byrne v. Ireland*, the *W (HM)* case cannot be interpreted as authority for a general absence of a duty of care, however even if counsel is wrong on this point it is submitted that in particular circumstances there are 'islands of duty'. In the *W (HM)* case itself Mr. Justice Costello referred to the case of *Nelles v. Ontario* [1989] 2 SCR 170 in which the Canadian Supreme Court had held that immunity from an action for malicious prosecution should not be granted to the Attorney General and Crown Attorneys. Mr. Justice Lamer held that granting an absolute immunity to prosecutors would be "akin to granting a license to subvert individual rights". Counsel for the plaintiff submits that the circumstances of this case are such as to warrant a duty being imposed. The Gardaí interacted with the girl as a 12 year old, a garda was present when the complaint was validated and a statement was made. It is argued that, in circumstances where a 12 year old girl is left in limbo for six years after a complaint of rape, it is foreseeable that this would cause her damage. Furthermore it is argued that even if *W (HM)* does apply, the immunity given to the Attorney General would be different than that given to Gardaí.

The plaintiff in this case is also asserting that her constitutional rights have been infringed. The *Byrne* case established the principle that where there is a wrong there should be a remedy. This principle was echoed in *McFarlane v. Ireland* (No. 31333/06, 10 September 2010). In *McFarlane* the State argued before the European Court of Human Rights that it was "highly probable" that an accused could sue successfully for damages for breach of his right to trial with reasonable expedition. The opinion of the Irish expert was described as having "demonstrated...that the constitution and its remedies were flexible and adaptable, and that the domestic courts had no hesitation in granting, and no difficulty in calculating, damages for a breach of a constitutional right notwithstanding that damages had never been calculated or awarded for a similar breach." The logic of the State's argument in *McFarlane* is to the effect that the plaintiff in this case must have a cause of action and a remedy in damages for breach of her rights arising from failure to pursue the prosecution of the complaint she made in a timely manner. It is argued that the same defendants as in *McFarlane* are arguing for a different proposition in this case in seeking to maintain the plaintiff has no cause of action where she sues for breach of her constitutional right to bodily integrity for a remedy in damages.

5.2 In *W (HM) v. Ireland, AG and Government of Ireland*, Costello J. referred to the leading English authority in this area, namely *Elguzuoli -Daf v. Commissioner of Police of the Metropolis* [1995] All E.R. 883. Costello J. noted that:-

"Of particular relevance to the issues in this case, it has been held in England that on the grounds of public policy, the Crown Prosecuting Service cannot be sued in negligence."

In *Elguzuoli -Daf*, Lord Steyn held that whilst the recognition of individualized justice to private individuals aggrieved by careless decisions of CPS lawyers militated in favour of the recognition of a duty of care, there were compelling considerations rooted in the welfare of the whole community which outweighed the dictates of individualized justice.

Counsel for the plaintiff submits that the facts in this case are very different to those in the *Elguzuoli -Daf* case and that it is difficult to see in what way a liability for failure to proceed expeditiously could be said to have negative effects on the efficiency of the criminal justice system. In any event the *Elguzuoli -Daf* decision can no longer be considered to represent a correct statement of the law in the UK. In *Brooks v. Metropolitan Police Commissioners* [2005] 1 WLR 1495, it was recognized that damages can be a remedy in cases of police negligence. Whilst the House of Lords re-affirmed that as a matter of public policy the police generally owed no duty of care to victims in respect of their activities when investigating suspected crimes, a shift from the position in *Hill* was however apparent. Lord Steyn stated, "with hindsight not every observation in *Hill's* case can now be supported." *Brooks* was followed by the joined cases of *Van Colle v. Chief Constable of Hertfordshire Police and Smith v. Chief Constable of Sussex Police* [2008] 3 All E.R. 977. In *Smith* the police failed to take proper measures in respect of a victim's complaint. The victim was subsequently attacked and sued the police for negligence. The majority in the House of Lords followed the precedents of *Hill* and *Brooks*, Lord Bingham dissented stating as follows:-

"If, as some of the cases suggest, it is necessary to find a special relationship for a duty of care to arise, this relationship was in my view special as a result of Mr. Smith's approach to the police and their response to it... Public policy points strongly towards imposition of a duty of care: Mr. Smith approached a professional force having a special skill in the assessment of criminal risk and the assessment of crime, a professional force whose main public function is to maintain the Queen's peace, prevent crime and apprehend criminals. He was entitled to look to the police for protection and they, in my opinion, owed him a duty to take reasonable steps to assess the threat to him and, if appropriate, take reasonable steps to prevent it"

A recent review of the English authorities was conducted in the case of *Desmond v. Chief Constable of Nottinghamshire Police* [2009] EWHC 2362. Mr. Justice Wyn Williams stated as follows:-

"It seems to me that the following principles can be distilled from the authorities cited above. First, the police are immune from an action in negligence at the suit of an individual if the damage complained of was caused by an act or omission in furtherance of the investigation or suppression of crime (the core principle in *Hill*). Second, if the core principle is not engaged a duty of care may be imposed upon the police upon "ordinary principles" if the police are directly involved in causing actionable damage to an individual. Third, the police can be held liable in negligence for damages (including pure economic loss) if they have assumed a responsibility to the individual in question to act with reasonable care"

It appears from the foregoing that even in the UK where there is no constitutional tradition, the principle in *W (HM)* is no longer considered proper law. It is contended on behalf of the plaintiff that in her case a duty of care may be imposed on ordinary principles and that the gardaí should be held liable in negligence for damage having assumed a responsibility to the plaintiff to act with reasonable care in advancing the prosecution of the accused in a timely manner.

5.3 Counsel argues that the plaintiff was entitled to fair procedures which she did not get due to the culpable delay of the state. The proposition that the right to fair procedures is for the benefit of all citizens not just accused persons was established in *Szilvia Gulyas and Brenda Borchardt v. The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General* [2001] 3 I.R. 216. Carroll J. held the decision to refuse the first plaintiff entry into Ireland had been based on a mistake of fact and could not be viewed as a valid decision. That meant that there was also a lack of fair procedures. The first plaintiff was entitled to damages for the disappointment and stress caused by the constitutional tort of lack of fair procedures, the second plaintiff's constitutional rights were breached, in that she was not treated fairly, she was entitled to damages for constitutional tort. Counsel for the plaintiff argues that Gulyas is authority for the proposition that fair procedures are not just for the benefit of an accused. L.M. was entitled to fair procedure, which she did not get due to the culpable delay of the state.

5.4 Council argues that as the complainant of a sexual offence the plaintiff was entitled to be treated as one who is in a particularly vulnerable position. The state recognises that those who complain of serious sexual assault are a particularly vulnerable section of society. This fact is clear from certain legislative provisions that make special provision for complainants of sexual offences, for example s. 26 (3) (b) of the Civil Legal Aid Act 1995 which provides that a complainant in a prosecution for the rape, aggravated sexual assault, unlawful carnal knowledge, or of incest shall qualify for legal advice free of any contribution. Counsel for the plaintiff argues that this provision amounts to an acknowledgement by the state of the particular vulnerability of persons who complain of sexual offences, such as L.M.

5.5 The courts have already recognized the duty of care which gardaí owe to accused persons and to third parties. The duty of care owed to accused persons is evident in the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, persons held in garda custody are entitled to certain rights. Counsel highlighted by way of example the fact that under s. 21 of the 1984 act injured or intoxicated persons in custody may be entitled to medical treatment.

The duty of care to third parties is evident from the case of *Gray v. Minister for Justice* [2007] 2 I.R. 654. This case concerned the negligent disclosure of sensitive and confidential information by gardaí to journalists. It was held that this could give rise to a cause of action for damages for negligence if the disclosure resulted in reasonably foreseeable loss, damage or injury to a person affected by the disclosure. Counsel argues that because the courts have recognized the duty of care which gardaí owe to accused persons and to third parties, there is no reason in principle why victims of crime should not find equal protection under the law.

5.6 The plaintiff submits that her cause of action only accrued when the further prosecution of the accused was prohibited by order of Murphy J. on the 2nd day April of 2004 due to prosecutorial delay. The plenary summons herein issued in July, 2004. The relevant statutory limitation period for breach of constitutional rights is six years and for negligence is three years. Proceedings issued within months of the accrual of the cause of action and are therefore, it is submitted, are not statute barred. She relies on the case of *Hegarty v. O'Loughran* [1990] 1 I.R. 148 where Griffin J. in the Supreme Court stated that:-

"...when the wrong is not actionable without actual damage, as in the case of negligence, the cause of action is not complete and the period of limitation cannot begin to run until damage happens or occurs".

Counsel for the plaintiff argues that it was not until 2004 that the damage occurred. When the re-trial was prohibited it became clear to L. M. that the trauma she endured in giving evidence at the trial was for nothing.

## 6. Decision of the Court

6.1 The starting point in relation to a claim of negligence is to examine whether each element required to establish a duty of care is present. The necessary elements are proximity, foreseeability, considerations of public policy and also the test of whether it is just and reasonable to impose a duty of care. It is argued on behalf of the plaintiff that a *prima facie* duty of care arises from the relationship between the plaintiff and the gardaí following the making of a complaint by the plaintiff. It seems to me that there is a relationship of proximity in this case. The gardaí interacted with the plaintiff as a 12 year old girl, a garda was present when she made a statement and it was validated. The next hurdle for the plaintiff is to show her injuries were foreseeable. Again it seems to me that due to the relationship of proximity between the plaintiff and the gardaí it would have been in the reasonable contemplation of the gardaí that carelessness on their part would be likely to cause her injury. The plaintiff was just 12 years old when she complained of rape, it was foreseeable that leaving her in limbo for six years would cause her damage.

6.2 The key issue in this case however, is whether it would be contrary to public policy to impose a duty of care on the Gardai. The most relevant Irish decision in this area is that of *W (HM) v. Ireland, AG and Government of Ireland* [1997] 2 I.R. 141. The plaintiff was a victim of sexual offences committed in Northern Ireland by one Brendan Smith. She claimed that in breach of his duty of care the Attorney General wrongfully neglected to endorse the extradition warrants for Brendan Smith and that a statutory duty was

imposed on the Attorney General by the provisions of the Extradition Acts 1965 and 1987 and that, as a result of this neglect the plaintiff had suffered damage. The court held that there was no duty of care owed by the Attorney General to the plaintiff. Costello P. explained that even if there was sufficient proximity between the Plaintiff and the Attorney General and that her injuries were foreseeable public policy would prevent any duty of care being imposed.

"The principles in *Ward v. McMaster* (and indeed in the pre-*Ward* law of torts) recognize that, on grounds of public policy, the law may not recognize the existence of a duty of care. Of course, only in exceptional cases will the court deny a right of action to a person who has suffered loss on the ground that it would not be in the public interest to allow it. In considering whether the Attorney General should be protected from actions for negligence, the court is balancing the hardship to individuals which such a rule would produce, against the disadvantage to the public interest if no such rule existed."

Costello P went on to explain that:-

"There are further compelling reasons why, in the public interest the duty claimed by the plaintiff in this action should not be allowed. If a duty under the Act of 1965 exists it must logically follow (a) that the Attorney General would be under a similar duty in respect of any prosecutorial functions conferred on him by s. 5 of the Prosecution of Offences Act, 1974 and (b) that in exercising his prosecutorial functions under that Act, the Director of Public Prosecutions would owe a like duty to all victims of crimes in the cases in which he is considering the institution of prosecution. Because of the inhibiting effect on proper exercise by the Attorney General and the Director of Public Prosecutions of their prosecutorial functions, it would be contrary to the public interest that a duty of care at common law be imposed on them. So to conclude is not to submit to a "flood gates" argument of doubtful validity, it is to accept the logical consequences, should the duty of care at common law be imposed in the execution by the Attorney General of his functions under the Act of 1965."

6.3 In *Beatty v. Rent Tribunal* [2005] 2 I.R 191, the applicants had claimed that a rent review had been carried out by the respondents in a manner contrary to natural justice, at page 219 McCracken J. held:-

"While it is often expressed that the question should be asked whether it is just and reasonable that there should be liability imposed for certain actions, it seems to me that the more correct approach is to ask whether it is just and reasonable that there should be a duty of care, which, as Fennelly J. points out in the passage just quoted, is one of the basic elements of the tort of negligence. What can be gleaned from the various decisions is that there are circumstances in which, for reasons of public policy, it would not be just and reasonable to impose a duty of care. What is to be considered as just and reasonable is not merely what would be just and reasonable as between the parties, but also what would be just and reasonable in the public interest. Where a public body such as the respondent, performs a function which is in the public interest then in many cases and I believe this to be one of them, that body ought not to owe a duty of care to the individuals with whom it is dealing. It is in the public interest that it should perform its functions without fear or threat of action by individuals. The fact that it is performing a function which is in the public interest may outweigh any duty of care to private individuals. Whether it does or not, of course, is a matter for decision based on consideration of the position of any particular public body."

6.4 In *Hill v. Chief Constable of West Yorkshire* [1998] 2 All E.R., the issue was whether a claim against the police for negligent failure to apprehend a violent criminal was sustainable. The House of Lords held that there was no general duty of care owed by the police to individual members of the public to identify and apprehend a criminal. But the House of Lords further held, as a second and separate ground of decision, that as a matter of public policy the police were immune from actions of negligence in respect of their activities in the investigation and suppression of crime. Lord Keith of Kinkel observed:-

"In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded.... A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and re traversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted."

In *Elguzuoli -Daf v. Commissioner of Police of the Metropolis* [1995] All E.R. 883, it was held that whilst the recognition of individualized justice to private individuals aggrieved by careless decisions of CPS lawyers militated in favour of the recognition of a duty of care, there were compelling considerations rooted in the welfare of the whole community which outweighed the dictates of individualized justice.

Lord Steyn stated as follows:-

"While it is always tempting to yield to an argument based on the protection of civil liberties, I have come to the conclusion that the interests of the community are better served by not imposing a duty of care on the CPS. In my view, such a duty of care would tend to have an inhibiting effect on the discharge by the CPS of its central function of prosecuting crime. It would in some cases lead to a defensive approach by prosecutors to their multifarious duties. It would introduce a risk that prosecutors would act so as to protect themselves from claims of negligence."

In *Brooks v. Metropolitan Police Commissioner and Others* [2005] 2 All E.R. 489, the House of Lords held that the prime function of the police was the preservation of the Queen's peace; they had to concentrate on preventing the commission of crime, protecting life and property, and apprehending criminals and preserving evidence. The cases of *Hill*, *Elguzuoli -Daf*, and *Brooks* illustrate the detrimental effect that the imposition of a duty of care could have on the way the police carry out their duties.

6.5 The decision of the European Court of Human Rights in the *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245 was reviewed and that decision somewhat changed with the decision in *Z v. United Kingdom* (2002) 34 E.H.R.R. 3. The Court at paragraph 100 explained that:-

"The Court considers that its reasoning in the *Osman* judgment was based on an understanding of the law of negligence which has to be reviewed in light of the clarifications subsequently made by the domestic courts and notably the House of Lords. The Court is satisfied the law of negligence as developed in the domestic courts since the case of *Caparo* and as recently analysed in the case of *Baret v. Enfield* include fair, just and reasonable criterion as an intrinsic element of the duty of care and that the ruling of law concerning that element in this case does not disclose the operation of an

immunity. In the present case, the Court is led to the conclusion that the inability of the applicants to sue the local authority flowed not from immunity but from the applicable principles governing the substantive right of action in domestic law."

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

The plaintiff also makes reference to the recent case of *McFarlane v. Ireland* held before the European Court of Human Rights on 10th September 2010. *McFarlane* argued that criminal proceedings brought against him were unreasonably long and that he was denied an effective domestic remedy for a breach of this right. The State argued that it was "highly probable" that an accused could sue successfully for damages for breach of his right to trial with reasonable expedition. They submitted that the domestic courts had no hesitation in granting damages for a breach of a constitutional right notwithstanding that damages had never been calculated or awarded for a similar breach. Based on the state's argument in *McFarlane*, a plaintiff has a remedy in damages for breach of their rights arising from failure to pursue a prosecution in a timely manner. Counsel for the plaintiff argues that in this case the state is seeking to maintain the plaintiff has no cause of action where she sues for breach of her constitutional rights for a remedy in damages. These two positions it is argued, are contradictory and the state is 'trying to ride two horses'. *McFarlane* can however be distinguished from the present case where the complainant is in a different category to an accused person. Gardaí may well have a duty towards an accused in respect of a delay in prosecuting a case against him. However the state did not argue before the Strasbourg Court nor has it ever been established in Ireland that gardaí owe a duty to a victim for failure to carry out their investigatory or prosecutorial functions with reasonable expedition.

6.6 The courts have also recognized the duty of care that gardaí owe third parties. The case of *Gray v. Minister for Justice* [2007] 2 I.R. 654, concerned the negligent disclosure of sensitive and confidential information by gardaí to journalists. It was held that this could give rise to a cause of action for damages for negligence if the disclosure resulted in reasonably foreseeable loss, damage or injury to a person affected by the disclosure. Counsel for the plaintiff argues that because the courts have recognized the duty of care which gardaí owe to accused persons and to third parties, there is no reason in principle why victims of crime should not find equal protection under the law. However there is no precedent which the plaintiff can rely on which indicates that gardaí or prosecuting authorities owe a duty of care to a victim in the investigation or prosecution of a case. There are compelling reasons why this is so. Public policy concerns outweigh the needs of individualized justice. The imposition of a duty of care in these circumstances could inhibit the prosecution of crime by introducing a risk that police and prosecutors would act so as to protect themselves from claims of negligence.

6.7 Subsequent to the hearing of the present case, Kearns P. delivered a judgment on the 10th day of December, 2010, in the case of *B L v. Ireland, the Attorney General and the Commissioner of An Garda Síochána*, which provides a very helpful summation of the law in this area. The plaintiff was the complainant in a prosecution for rape. It transpired that the accused had been arrested pursuant to a power of arrest which had been abolished. The evidence obtained during the course of his detention was held to be inadmissible and as a result the prosecution case collapsed. The plaintiff claimed damages arising from the alleged negligence and breach of duty of the defendants. Kearns P. held:-

"I am satisfied to conclude that no duty of care arises in respect of *bona fide* actions and decisions carried out by An Garda Síochána in the course of a criminal investigation and/or prosecution. Any other view would have quite alarming consequences. One might begin by enquiring where the duty of care would begin or end. Would the victim of a crime, such as that perpetrated on the plaintiff in the present case, be the only person with an entitlement to sue, or would any such entitlement extend to immediate members of her family or perhaps to some person who might have been a witness in the trial or a witness to the event itself? By the same token, the inhibiting nature of any such duty would effectively cripple the capacity of An Garda Síochána, or any other police force for that matter, to carry out its duties effectively and with expedition. It would be unacceptable that those charged with responsibility for the investigation and prosecution of crime should have to take legal advice at every hand's turn in respect of every step in the criminal process. Any such approach would simply render the present system, struggling as it is with the multiple obligations imposed on the Garda Síochána in respect of those suspected of crime, to constraints of unimaginable proportions."

I gratefully adopt this as a statement of the law in Ireland regarding the non existence of a duty of care on the gardaí and prosecuting authorities in carrying out their functions in the investigation and prosecution of crime.

## Conclusion

6.8 The starting point in relation to a claim of negligence is to examine whether each element that is required to establish a duty of care is present. The necessary elements are proximity, foreseeability, considerations of public policy and also the test of whether it is just and reasonable to impose a duty of care. The key issue in this case is whether it would be contrary to public policy to impose a duty of care on the Gardaí. It seems to me that the cases cited above establish that no duty of care exists in Irish law upon the defendants in respect of their investigatory or prosecutorial functions. This is because it would be contrary to the public interest that such a duty be imposed by reason of the inhibiting effect this would have on the proper exercise of those investigatory and prosecutorial functions. It is in the public interest that those bodies should perform their functions without the fear or threat of action against them by individuals. The imposition of liability might lead to the investigative operations of the police being exercised in a defensive frame of mind. A great deal of police time, trouble and expense might have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. While the recognition of individualized justice may militate in favour of the recognition of a duty of care, there are compelling considerations rooted in the welfare of the whole community, which outweigh the dictates of individualized justice. This view of the law is entirely consistent with the jurisprudence of the European Court of Human Rights as set out in *Z v. United Kingdom* (2002) 34 E.H.R.R. 3.

The fact that the defendants are carrying out functions which are in the public interest outweighs any duty of care to private individuals. This is not to say that such bodies are immune from actions for damages arising from ordinary principles of negligence. The absence of duty relates only to their actions arising from their prosecutorial or investigatory functions. For all the above mentioned reasons the Court finds that the defendants did not owe a duty of care to the plaintiff. That being so the question of whether the case is statute barred is moot.