

THE HIGH COURT**2009 8053 P****BETWEEN****M.K.****PLAINTIFF****AND****COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND ATTORNEY
GENERAL****DEFENDANT****JUDGMENT of Mr. Justice McMahon delivered on the 17th day of December, 2010**

1. On 15th July, 2008, the plaintiff went on a shoplifting spree in Dublin. Having visited several shops she was eventually approached by a security person in Dunnes Stores, South King Street who asked her to accompany her to the office at the rear of the store. The plaintiff was compliant and cooperative. When the gardaí arrived, the plaintiff was arrested on suspicion of committing theft. The gardaí were informed that the plaintiff had been at all times cooperative.

2. The plaintiff was taken to Harcourt Street Garda Station where she alleges that she was assaulted and suffered a serious injury to her left leg. She was processed by the Gaoler in the custody area of the station and a garda custody record was completed. In response to a question she indicated that she was a diabetic. Initially, she was co-operative. She was then told that she would be searched by a female garda and for the first time she became somewhat aggressive. Garda Kate Glennon explained to the plaintiff that it was a matter of procedure that all prisoners detained in the station were searched in order to ensure that they are not in possession of items which could be used to cause injury or harm to themselves or any other persons coming into contact with them. This seemed to calm the plaintiff somewhat and she then agreed to be searched by Garda Glennon. She was taken to the interview room and Detective Garda Patricia Whelehan was sent for to assist in the search. When Detective Whelehan arrived at the interview room, her evidence was that the plaintiff's bag was on the chair and when it was indicated that her bag would also have to be searched the plaintiff's mood changed dramatically and she stated clearly that there was "no way" the gardaí were going to search her bag. She grabbed the bag and held it close to her chest and when the two female gardaí tried to take it from her she became obscenely aggressive. In her evidence she admitted that she was roaring and screaming and that there was some pushing and shoving as the female gardaí tried to take her handbag from her.

3. The disturbance in the interview room was heard outside in the station and both Sergeant Francis Byrne and Sergeant Kevin Joyce went to the interview room when Detective Whelehan called for assistance. Both Sergeant Joyce and Sergeant Byrne gave evidence that they took control of the plaintiff who continued to be aggressive and violent. Sergeant Joyce said he took the plaintiff by her left arm and he held her upper arm with his right hand and her lower hand with his left hand. Sergeant Byrne did the same on the right side of the plaintiff. During this struggle the bag fell on the floor. Sergeant Joyce then decided as the plaintiff continued to resist that it would be prudent to take her to the cell in the station and having communicated this with Sergeant Byrne they proceeded to exit the interview room into a small square area ("about the size of the witness box" according to Sergeant Joyce) before turning left into the corridor which led to the cells.

4. The evidence of Detective Whelehan and Garda Adam Williams who also came to the scene was that when the bag fell on the floor the plaintiff tried to wrap the strap around her legs as she was being pulled out of the interview room and she continued to resist. Detective Whelehan and Garda Williams both gave evidence that they bent down and attempted to untangle the strap from the plaintiff's legs. Both also gave evidence that they saw the plaintiff lash out and kick in the direction of the corridor. She continued to scream and resist.

5. As Sergeant Joyce and Sergeant Byrne were about to turn left towards the cells, Garda Emmett Hayde who had been on duty in the custody area and who had taken the plaintiff's details when she entered the station had also come into the corridor. It was at this stage that the plaintiff said that the assault took place. The plaintiff's version of events is that as she was taken out of the interview area and as she was turning left between the two sergeants she saw another garda (Garda Hayde) running towards her and to protect herself she raised her right leg and kicked Garda Hayde in the midriff area to protect herself. She then alleged that Garda Hayde kicked her back in the left shin causing a serious injury to her leg. Garda Hayde's version of events is that he was standing outside the interview area when the group began to emerge and as the group turned left, the plaintiff began to lash out towards him. He said the plaintiff in particular aimed two kicks in rapid succession at him. He said the first kick struck him on the leg. Although it was a sharp blow, it did not cause him serious injury but it did cause him to raise his foot in anticipation of the second kick and it was then that the plaintiff's leg came in contact with the sole of his shoe.

6. The court must establish from the evidence what exactly happened in this moment of contact between the plaintiff and Garda Hayde, as this is the moment during which the plaintiff alleges that the assault took place.

7. It is for the plaintiff, of course, to prove that her version of this incident is how her injury occurred and she must do so on the balance of probability bearing in mind all the evidence before the court. I will deal with the evidence of the gardaí on this single issue in due course.

8. Shortly after this exchange, Sergeant Joyce and Sergeant Byrne continued with the plaintiff to the cell where the plaintiff complained that her leg was injured. The plaintiff calmed down and Sergeant Joyce examined the plaintiff's leg with her permission. He was surprised to see the nature of the gash on her left shin. In his evidence, he also stated that he had noticed that while he held the witness during the struggle, he could visibly see bruising occur as he gripped the plaintiff by the arm. He enquired of the plaintiff, whether she suffered from any medical condition and she indicated to him that she was a diabetic and that she also suffered from a condition called Cushing's disease which caused her to bruise easily. In the cell, she first accused Sergeant Joyce of kicking her and when he denied ever having kicked her she indicated that it was the garda who took details when she entered, that is, Garda Hayde.

Sergeant Joyce sent for the ambulance and the plaintiff was taken to St. James Hospital where she had to have a skin graft for the wound in her leg.

The Plaintiff's Medical History

9. The plaintiff was diagnosed with an adrenalin tumour in 1995 and although the tumour was removed, she continued to suffer from depression afterwards which according to the medical reports of Prof. Veronica O'Keane, Consultant Psychiatrist, never resolved completely. According to Prof. O'Keane, this is quite common. The plaintiff had a history of mood disorder dating back to that time and she also had a history of substance abuse including abuse of heroin but had been very stable since 2004. After that date, however the plaintiff continued to abuse by way of overdosing on her prescribed medication of Benzodiazepines. This abuse can cause instant euphoria followed by a period of intense emotionality and distress. Several attempts were apparently made to engage with the plaintiff in counselling in the Psychology Service of the hospital in 2006 and 2007 but the plaintiff failed to attend the appointments. A psychological report in 2007 indicated that the plaintiff had a brief episode of abusing heroin around that time. Prof. O'Keane's conclusion in her report dated 10th April, 2009 is as follows:-

"Overall Ms. K. presented a complex picture. I think her presentation results from a mixture of several factors.

1. She clearly has a biological mood disorder which is secondary initially to her adrenalin tumour and following this the replacement steroids.

2. She also has a significant substance abuse problem. She is an ex-heroin abuser but certainly has had one period in the last five years where she has briefly misused heroin again. Our contact with her indicates that she abuses prescription medications, in particular, Benzodiazepines.

3. She has a vulnerable personality and is socially isolated.

Overall, Ms. K. has a mood disorder which is difficult to treat because of her substance abuse, her lack of cooperation with services and her inability to accept psychological help. Sometimes it is difficult for individuals who feel very vulnerable to engage in psychotherapy, and I suspect this may be the case with this lady."

10. In addition to her cancer history which according to the plaintiff is in long term remission now, the plaintiff was diagnosed with serious diabetes in 2008. Apparently, she is on insulin treatment for this condition. Approximately a year before the present incident, the plaintiff cut the side of her left leg in a domestic accident which was very slow to heal and which eventually required a skin graft. It almost took a year for the wound to heal. This was on the same leg as that which was injured in the incident at Harcourt Street Garda Station in July, 2008. The plaintiff in giving her evidence and in explaining why she did not want to give up her handbag in the garda station when requested to do so said she wanted to get her insulin from the handbag.

11. As if this was not enough, the plaintiff also suffers from Cushing's disease, which according to Dr. Amar Agha is a condition which because of a high level of cortisone in the system causes the skin to bruise more easily. In his evidence, Dr. Agha, who is an expert in the condition, stated that in some cases the bruising of the skin can recover quickly while at other times it can take more time to recover. The doctor also indicated that the removal of the adrenalin tumour in 1995 resulted in low cortisone which required steroid treatment to replace the deficiency. Some of the medication prescribed in this regard if given in too large a dose can cause skin fragility. He indicated that serious bruising could readily occur if the plaintiff was struggling to free herself from the grip of the two sergeants in this case.

The Evidence of the Gardaí

12. As indicated above, the excessive force alleged by the plaintiff concerns the alleged kick which she got from Garda Hayde and I now propose to examine the evidence from the gardaí in relation to that episode. There is very little dispute between the plaintiff and the gardaí in relation to other matters. In particular, the plaintiff admitted in her own evidence the following:-

(i) She went out shoplifting on that day, apparently for the first time, for some unexplained reason.

(ii) Among the items she stole were false finger nails and a stud for her nose which she admitted she had no use for.

(iii) The plaintiff admitted that the gardaí were entitled to search her.

(iv) The plaintiff admitted that the gardaí were entitled to search her handbag.

(v) The plaintiff admitted that she was roaring and strongly resisting all attempts by the gardaí to take and search her bag.

(vi) When the bag was subsequently searched it contained other items of stolen goods taken from other shops apparently on that day.

(vii) The plaintiff gave evidence in court that she had pleaded guilty to the shoplifting when the matters came up in Dun Laoghaire District Court. A member of An Garda Síochána, however, was called subsequently and he gave evidence that the records show that the plaintiff had not pleaded guilty and that the matters had not been disposed of.

(viii) The plaintiff conceded in her evidence that she was acting irrationally at that particular time.

The Evidence of the Gardaí

13. Detective Garda Patricia Whelehan who was called to assist in the search of the plaintiff in the interview room said that she saw the bag fall and the plaintiff trying to wrap the strap around the legs. She alerted the others and she leaned down low to disentangle it. She said someone kicked her. She did not see Garda Hayde arrive as she was kneeling down and she did not see the plaintiff connect with Garda Hayde.

14. Garda Adam Williams also responded to the call for assistance and he indicated that when he went to the interview room, the plaintiff was refusing to let go of her handbag and became violent when Detective Garda Whelehan attempted to take it from her.

While Sergeant Byrne and Sergeant Joyce were holding the plaintiff and taking her out of the interview room, Garda Williams bent down to retrieve the bag and he saw the plaintiff kicking out with her leg toward where Garda Hayde was standing. "I thought she was going to kick me" he said. He said he managed to unwrap the bag and having retrieved it handed it to Detective Garda Whelehan. He said he never saw Garda Hayde kicking anyone. He said he was looking down at the bag in a very confined area. He confirmed that Garda Hayde had indicated that he was kicked but he did not indicate that he was injured.

15. Sergeant Kevin Joyce said when he exited the interview room, Garda Hayde was approximately, "one yard away". He said at that stage as they turned left to go to the cell and away from Garda Hayde, the plaintiff suddenly and without warning, pivoted, leaned back against him and kicked out at Garda Hayde striking him twice in quick succession. The plaintiff was taken to the cell within seconds.

16. Sergeant Francis Byrne said as they exited into the corridor with the prisoner between himself and Sergeant Joyce, the plaintiff continued to struggle to free her arms and was kicking out. He was conscious of her head movements and was cautious not to take a bang in the head. At this stage, the plaintiff had turned around and she was kicking out in his direction, but she missed him and he recalled glancing over his shoulder and he saw Garda Hayde behind him but he was not directly involved as far as he could see. He confirmed that Garda Hayde did not kick the plaintiff.

17. Garda Emmett Hayde was garda who first interviewed the plaintiff and compiled the custody record. He confirmed that when the plaintiff was taken down to the interview room after a few minutes he heard a lot of screaming and the plaintiff being very aggressive. There was also some banging. He realised that Detective Whelehan and Garda Glennon needed some assistance. As he had to go the long way around from behind the serving hatch in the custody area, he arrived at the interview room after Sergeant Joyce and Sergeant Byrne. He saw that as Sergeant Byrne and Sergeant Joyce struggled with the plaintiff, the bag fell on the ground and the plaintiff tried to wrap the strap of the bag around her leg. He went down also with Garda Whelehan to untangle the plaintiff's leg. When the strap became free and Garda Whelehan took the bag, the plaintiff was not well pleased and she swung her leg at him and began to kick out in his direction. He said he lifted his right leg as a natural and instinctive response. Her first kick caught him in the shin, it was a sharp enough blow but nothing too serious. When the plaintiff attempted to do it again, he again lifted up his leg and this time her foot struck the underside of his boot somewhere in the sole area. The plaintiff was then taken to the cell. In cross examination, he said the plaintiff was kicking out at various times but that she connected with him twice. Garda Hayde had no idea how the plaintiff got the wound.

18. Counsel for the plaintiff in his cross examination of these witnesses tried to exploit minor differences in the written statements and in the version of events made by each of the gardaí witnesses. I accept that such minor differences occur in both the statements given by the witnesses and in their evidence before the court. In my view, however, these are minor differences and do not speak of conspiracy. It must be remembered that this incident occurred very quickly in a highly charged atmosphere when the plaintiff was screaming and resisting in a very confined space. The witnesses had different perspectives from where they saw this incident. It would indeed be surprising given the brevity of the moment and the different perspectives if there were no differences in their accounts. I accept their evidence was given honestly.

19. In the circumstances the plaintiff must show that the force used by the Gardaí was disproportionate and unreasonable in the circumstances. The plaintiff was hospitalized and again had a skin graft. It took her five months to fully recover. The case is made that the extent of the bruising and the seriousness of the wound almost speak for themselves. This is an argument which would have more force, perhaps, were the plaintiff not afflicted by medical conditions which meant that she bruised easily and had fragile skin which when broken was slow to heal and recover. There is no doubt that she was resisting strongly and showing a lot of aggression when she says she received the blow to her leg. Given how easily she suffered her earlier wound – she was visiting a friend's house and she hit the lower shin against some stacked skirting boards – which took twelve months to recover, I conclude that the injuries she suffered here would not require the application of great force.

20. As I have already said, the onus is on the plaintiff to prove that Garda Hayde kicked her in the positive way she alleges and taking the evidence in the round, I am not satisfied that she has met that threshold in this case. Bearing in mind, her irrational conduct on that day, her admitted violent resistance to having the bag removed and her insistence that Garda Hayde came running down the corridor (which I do not accept), and (her statement) that she kicked him in the abdominal area first with her right leg (something the garda witnesses would surely have confirmed, had it occurred), her evidence on this is difficult to accept. Moreover, her evidence that she had pleaded guilty in the District Court to the charges is clearly wrong. Taken with her medical conditions, her recent injury to the same leg which took twelve months to heal and her propensity to bruise easily, the explanation of Garda Hayde is plausible in her case whereas it might not be such a reasonable explanation, for a plaintiff unaffected by the symptoms of Cushing's disease and diabetes.

21. I dismiss the plaintiff's action.