

THE HIGH COURT

2000 13487 P

BETWEEN

DONALL MURRAY AND AIR AMBULANCE SERVICES LTD

PLAINTIFFS

AND

SANDRA FITZGERALD, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

CONSOLIDATED PURSUANT TO THE ORDER OF THIS HONOURABLE COURT DATED 30TH JULY, 2007, INCORPORATING THE WITHIN PROCEEDINGS

DONALL MURRAY v. IRELAND AND THE ATTORNEY GENERAL

2005 308 P

DONALL MURRAY v. IRELAND AND THE ATTORNEY GENERAL

2005 3836 P

DONALL MURRAY v. IRELAND AND THE ATTORNEY

2006 4016 P

DONALL MURRAY v. IRELAND

2006 4015 P

DONALL MURRAY v. IRELAND, DECLAN HARTLEY AND THE ATTORNEY GENERAL

2006 4012 P

DONALL MURRAY v. IRELAND, MAURICE GILL AND THE ATTORNEY GENERAL

2006 4013 P

DONALL MURRAY v. IRELAND, ARTHUR O'NEILL AND THE ATTORNEY GENERAL

2006 4014 P

DONALL MURRAY v. IRELAND AND THE ATTORNEY GENERAL

2006 3852 P

DONALL MURRAY AND AIR AMBULANCE SERVICES LTD. v. IRELAND AND THE ATTORNEY GENERAL

2005 309 P

JUDGMENT of Mr. Justice John MacMenamin dated the 27th day of February, 2009.

1. In these proceedings the plaintiffs seek an order pursuant to O. 25 rr. 1 and 2 of the Rules of the Superior Courts for the preliminary determination of a number of points of law. These points of law are identified in the Notice of Motion in the following terms:-

"1.

(a) Does the Road Traffic Act 1994 or any regulations made thereunder enable An Garda Síochána to lawfully seize/confiscate a Mercedes Benz ambulance, registration mark 90D 24748;

(b) Did An Garda Síochána as servants of the first defendant or otherwise commit the Tort of Conversion at Coolevin Road, Ballybrack, on 23rd August, 2000, or elsewhere, when An Garda Síochána seized/confiscated the said ambulance; and

2. As a matter of law on what basis are damages to be assessed for the Tort of Conversion."

2. Order 25 provides:-

"1. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court on the application of either party the same may be set down for hearing and disposed of at any time before the trial.

2. If in the opinion of the court the decision of such point of law substantially disposes of the whole action or of any distinct cause of action, ground of defence, set off, counter claim, or reply therein, the court may thereupon dismiss the action or make such other order therein as may be just.

The plaintiffs rely on both rules in pursuit of the relief claimed.

3. As may readily be inferred from the title to these consolidated proceedings, this matter has a considerable history. In essence the plaintiffs claim damages (including aggravated or exemplary damages) *inter alia* for conspiracy, malicious prosecution, misfeasance in public office, breach of duty and conversion by members of An Garda Síochána. They also seek a mandatory injunction directing the return of a Mercedes Benz ambulance registration no. 90D 24748, seized in circumstances later generally outlined.

4. In the Statement of Claim the first plaintiff is described as being an emergency medical technician and helicopter pilot. Thereafter the reference is made mainly to the first plaintiff. The second plaintiff is Mr. Murray's company. Mr. Murray formerly lived in Dalkey, Co. Dublin. It

is said that through his company he provided emergency and non-emergency medical transportation to persons who were socially and financially disadvantaged. In this context, references to "the plaintiff" in this judgment unless indicated otherwise, may be taken as comprising both the plaintiff and his company.

5. The Statement of Claim is a lengthy one. It makes extensive allegations about the actions of various members of the gardai and State agents against the plaintiff and his company. These include but are not confined to (i) malicious prosecutions for failing to have insurance on a number of vehicles including the ambulance; (ii) alleged disproportionate force by gardai in stop and search procedures; (iii) false accusations of assault on members of the gardai by Mr. Murray; (iv) unlawful failure on the part of the gardai to take action against a named party, one Raymond Kinsella, who is accused of having assaulted, threatened and spread false rumours concerning the first plaintiff in his business which in turn lead to the seizure of another ambulance, and ejection proceedings against the second plaintiff. Allegedly and as a result of this concerted campaign, Mr. Murray claims that his wife's health suffered, their relationship deteriorated and ultimately their marriage broke down. He claims that he was forced to migrate to the midlands to avoid further acts of intimidation.

6. The defence in the consolidated proceedings runs to some 128 paragraphs. In it, the defendants deny any wrongdoing whatsoever, contend that the gardai were acting in the course of their duty in their relationship with the plaintiffs and deny the existence of any campaign or conspiracy.

#### **The issues which arise from the pleadings**

7. A number of defence pleas are particularly relevant to this application. The first is the contention that the plaintiffs failed to mitigate their loss if in fact there was any actionable loss or damage. The court was informed by counsel for the plaintiffs that the claim being advanced by the plaintiffs' ranges between a minimum value of €10 million and a maximum value of €15 million. I make no comment on this claim in this ruling, save insofar as it is hotly disputed by the defendants.

8. The second relevant defence issue is whether there exists in law a statutory defence to a claim in conversion. Third there arise issues of credit. The questions of who is to be believed and reasonableness will it is said loom large in any consideration of the case.

9. It is now necessary to focus on the particular reliefs sought in the motion. The first plaintiff claims that on 23rd August, 2000, he was driving an ambulance and conveying a patient to her home. He says he was stopped by one of a number of gardai. Mr. Murray claims that without any introductory enquiry or explanation that one garda stated that he was seizing the vehicle under s. 41 of the Road Traffic Act. A question arises as to whether ownership transfer documents were completed at the time. Apparently the vehicle had formerly been owned and operated by Dublin Fire Brigade.

10. Mr. Murray says he was opening the rear ambulance doors to remove a patient from it. He contends that the gardai were not interested in the patient. He alleges that the gardai unjustifiably called for back up as a crowd of 20 or 30 onlookers had gathered round. He says another garda said that he had a false insurance disc. Mr. Murray states that he provided the name and address of the insurer of the ambulance and invited a member of the garda to contact the insurer. He says the garda stated that he was not obliged to do so. Mr. Murray says that he produced a letter from Dublin Fire Brigade to the effect that notification of change of ownership of the ambulance from Dublin Corporation to himself had not been effected.

11. The plaintiff pleads that further documents were proffered to the gardai, but they refused to release the ambulance. By letter dated 28th August, 2000, the plaintiff demanded the return of the ambulance.

12. By way of defence, it is said the gardai found this documentation relating to ownership and payment of charges for detention of the vehicle unsatisfactory. In the Statement of Claim in the consolidated proceedings dated 9th January, 2008, it is said that the ambulance even now continues to be detained at Dun Laoghaire Garda station compound, parked in a position where it can be viewed by the general public. It will be noted that this is now some eight years after the events complained of.

13. The defence deals with the germane issues to this motion in some 31 paragraphs. It states:

- (i) that the garda member who stopped the plaintiff did so on foot of information that the vehicle had no insurance;
- (ii) that the garda called on the Mr. Murray to produce his driver's licence and evidence of insurance;
- (iii) that the garda examined the policy number and insurance details displayed on the vehicle and from this he identified the insurer;
- (iv) the garda made enquiries from the insurance company and was informed that the policy had been cancelled prior to 23rd August, 2000;
- (v) as a result the gardai were lawfully entitled to seize the vehicle pursuant to s. 41 of the Road Traffic Act 1994 and s. 41 of The Road Traffic Regulations 1995.
- (vi) the seizing garda was expressly authorised so to do before seizing the vehicle;
- (vii) that the gardai failed to inform the first plaintiff of the reason for seizure.

14. A District Court prosecution for a number of road traffic offences followed. The first plaintiff was apparently convicted and sentenced to a period of imprisonment. (It is not clear what actually occurred in the District Court or whether the plaintiff was represented. The nature of the defence is not identified. This sentence was appealed successfully to the Circuit Court).

15. In fairness to the plaintiffs it appears uncontested that when the appeal came on for hearing on 19th April, 2002, in the Dublin Circuit Court, a witness from the insurance company gave evidence that while the original policy of insurance on the car had indeed been cancelled, that the insurance company would have been compelled to provide cover in respect of the vehicle in the event of any accident, as the first named plaintiff's mother's policy of insurance in respect of her motor vehicle had been transferred for a period of a few hours on 23rd August, 2000, (the date in question) to cover the ambulance. Thus the appeal of the first named plaintiff in respect of the offence under s. 56(3) of the Road Traffic Act 1961, (no insurance) was allowed, but all other convictions were upheld and taken into account.

16. The defendants say that Mr. Murray was advised that the vehicle would be released to him on the production of satisfactory evidence of ownership, road tax and insurance and the payment of charges in respect of removal and storage. They plead that Mr. Murray at no time has

produced such material and that instead he sought the release of the vehicle without complying with these lawful requirements.

17. Counsel for the plaintiffs has made lengthy and detailed submissions as to the law in relation to conversion. He contends it is a tort of strict liability to which there can be no defence on the facts. It is said that a trial with a judge and jury of several weeks could be substantially reduced or avoided by acceding to the relief sought and that it is in the public interest that these issues should be tried in a preliminary way.

18. The plaintiff is aware of the provisions of the Road Traffic Act and the regulations. In one of a number of his written submissions, there is reference to the provisions of s. 41(5) of the Act of 1994. While it is not of course determinative of any issue it will be noted that s. 41(5) of the Act of 1994 provides specifically:

“(5) *No action shall lie in respect of anything done in good faith and without negligence in the course of the detention, removal, storage, release or disposal of a vehicle under this section.*”(emphasis added).

19. The court has also been referred to the Road Traffic Act, 1994 (Section 41) Regulations 1995 wherein it is provided at regulation 4:

“(4) Where a member of An Garda Síochána is of opinion that in events to which s. 41(1) of the Act refers is being or has been committed in respect of the driving or use of mechanically propelled vehicle, such member may take such steps, including the making of an arrangement with any other person as the member thinks fit, for the detention, removal and storage of the said vehicle. The regulations also make provision for the payment of charges by the owner of a vehicle for its detention and removal.”

20. For the purposes of this ruling I will do no more than to draw attention to these statutory provisions which may be engaged in this, just one of the issues involved.

21. The defendants say that an essential part of any statutory defence to a claim made in tort (howsoever formulated) would be good faith that is, provided members of An Garda Síochána acted *bona fide* in the seizure, they are immune from suit. Thus an essential feature of the case must be whether or not members of An Garda Síochána did in fact act in this way or not.

22. As a matter of logic it follows that there are issues in dispute. These relate to mitigation of loss, credit, and whether there is a factual basis for the statutory defence relied on by the defendants. While counsel for the plaintiffs has assured the court that there can be no dispute on the facts or the law I am not so persuaded. Disputed issues clearly arise in this aspect of the case. Indeed counsel for the defendant submitted forcibly that there were hardly any of the factual matters which were alleged in the Statement of Claim which were not contested. One cannot legitimately argue there is no issue on facts or law when plainly such issues arise in these aspects of the case. Mere assertion of a proposition by one party cannot bind both.

23. I am driven to the conclusion that there are here substantial contested facts which are relevant to the issues of law. I cannot accept that there is agreement in the facts. No material facts have been conceded for the purpose of the preliminary issue. All these findings are of importance in light of the legal principles involved.

### **The Legal Principles**

24. The question of whether there should be a trial of a preliminary issue has recently been considered; (*R.N. v. Refugee Appeals Tribunal & Anor.*[2008] 1 I.L.R.M. 289). There the Supreme Court comprehensively reviewed previous authorities on the matter including *Kilte v. Hayden*[1969] 1 I.R. 261, *Tara Mines v. Minister for Industry & Commerce* [1975] I.R. 242 and *BTF v. D.P.P.*[2005] 2 I.L.R.M. The United Kingdom authority of *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.* [1961] CH 375 was approved. In the course of her *R.N.* judgment Denham J. observed:

“9. At the heart of this case is the circumstance that there are facts in dispute. There is no agreement on the facts – even for the determining of the preliminary issues.”

She relied on the authority of *Kilte v. Hayden* [1969] I.R. 261 at 265-6 where O'Dalaigh C.J. having considered well established authorities observed:

‘I am satisfied that the procedure laid down under O. 25, r.1 corresponds to the old hearing on demurrer and *may not be availed of where the facts giving rise to the point of law are in dispute between the parties.*”

The judge also referred to the judgment of O'Higgins C.J. in *Tara Mines v. The Minister for Industry & Commerce* [1975] I.R. 242 where O'Higgins C.J. at p. 257 specifically held that where the trial of an issue under O. 35 r. 2 would necessitate the hearing of evidence on factual matters relating to the question of law, relief would be denied. (This order and rule allowed for the determination of a question of law in a special case.) O'Higgins C.J. stated:

“Once this is so r. 2 of O. 34 cannot apply, for such are matters of fact. In my view therefore the defendant's application cannot succeed and this appeal should be dismissed.”

Thus a further dispute, or matters requiring evidence on matters of fact will bar relief.

25. A further authority relied on by Denham J. in *R.N.* was *BTF v. D.P.P.* [2005] 2 I.L.R.M. 367 where Hardiman J. observed:

“It is often a difficult and delicate decision as to whether to try a particular issue as a preliminary matter. In a case where a point is raised which in and of itself and without regard to anything else may terminate the whole proceedings clearly a strong case can be made for its trial as a preliminary issue. The classic example is where the statute of limitations is pleaded. *In other cases, however, the position may be much less clear.*” (emphasis added).

This case is by no means one where a clear issue of law arises.

26. In *BTF* the Supreme Court endorsed the principles laid down not only in *Tara Mines* but in *Windsor Refrigerator Co. Ltd.* (referred to

earlier) where Evershed M.R. stated at p. 396:

"I repeat what I said at the beginning, that the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom – save in very exceptional cases – of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted turns out to be the longest way round."

27. In the instant case I find that there are facts in dispute, and further that there is no agreement on facts. Furthermore I consider the determination of the issues would be reliant upon establishing *in evidence* of a number of events. Just one of the contentious issues is the state of mind of members of the garda on the basis of information which they say was available to them. The existence of a statutory defence, mitigation and credibility are others.

28. If these observations apply in relation to the first issue in the motion paper, *a fortiori* they apply to the second, where what is sought is a determination as to the basis upon which damages might be assessed for the tort of Conversion. Even assuming, hypothetically, for one moment that the plaintiffs establish unlawful seizure these would not by any means eliminate the need to address disputed issues of fact and law on the question of damages.

29. My conclusions are fortified by the fact that in his affidavit Mr. Murray in effect, accepts that it would be necessary to establish facts in order to determine the issues in question. (para 11. of the applicant's affidavit).

30. In circumstances where those facts are not agreed I find that it would be entirely inappropriate to make an order pursuant to O. 25 for the trial of a preliminary issue. Such an order would necessarily involve the hearing and the issue of oral evidence from the first plaintiff, and any other witnesses which he might choose to call, then the evidence of the gardaí involved, and the representative of the insurance company who gave evidence to the District and Circuit Court. A court would be called on to decide which evidence to accept. There would be witnesses as to damages.

31. A number of further points arise which reinforce this finding. The defendants submit that given the nature of the first named plaintiff's claim, which is that there has been an established and long standing conspiracy by various members of An Garda Síochána to persecute himself and his family, it would be essential that his credibility be assessed in the context of the entirety of his claim as advanced against the various members of An Garda Síochána. Thus the defendants would be prejudiced were part of the evidence to be considered in isolation. I accept this as being a further factor in the balance, though of course I make no finding on any issue of substance in the case. That remains for other days.

32. Further, it is submitted that hearing oral evidence at the trial of a preliminary issue would involve traversing the same ground at the hearing of the action on the balance of the claims made by the plaintiff thereby giving rise to the risk of duplication and the risk of injustice. I accept this point. In the light of the very detailed written submissions from the plaintiffs' side, I would add I have not been persuaded that acceding to the relief claimed by the plaintiffs would in any way have the effect of substantially disposing of the action as a whole or any distinct cause of action. On the contrary, I think that acceding to the application might actually prolong the overall hearing. Even were a court persuaded to accede to the plaintiff's motion this would necessitate a trial of issues on oral evidence in circumstances where, as a matter of fact, only a small part of the overall claim would be disposed of. I do not think this would be an appropriate use of court time and resources.

33. Finally, the court must bear in mind that on 30th July, 2007, McKechnie J. made an order *consolidating* the ten separate actions commenced by way of plenary summons by the plaintiffs against the defendants. The points which the plaintiffs now seek to have tried as a preliminary issue are points which arise in the case bearing record no. 2000/13487P. But, to grant the plaintiffs the relief they seek would have the effect of setting aside the order of McKechnie J. insofar as it relates to this action. As a matter of principle, if the plaintiffs had been dissatisfied with the order they ought to have appealed it to the Supreme Court. It would be inappropriate to seek to avoid the effect of the order in this manner. I am therefore not prepared to accede to the plaintiffs' claim in the notice of motion.

34. The plaintiffs brought a second notice of motion dated 29th October, 2008, alleging abuse of process by reason of the fact that the defendants replying affidavit was delivered on 21st November, 2008. No submissions were made to me on this point. In any case, even had there been, I cannot see how there could be any evidence of abuse of court process. I will refuse the reliefs sought.