

THE HIGH COURT**2001 15809 P****BETWEEN****A.G.****PLAINTIFF****V****J .K. AND****THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL****DEFENDANTS****Judgment of Mr. Justice Hedigan delivered the 25th day of February 2011.**

1. The plaintiff claims damages against the first named defendant for assault and trespass and as against the second, third and fourth defendants for negligence, breach of duty, breach of statutory duty and or breach of the plaintiff's constitutional rights. No defence was entered by the first named defendant and judgment has been given against him, with damages to be assessed by the court.

2. The plaintiff resides in County Dublin. The first named defendant was serving a prison sentence at Arbour Hill Prison, Dublin 7 at the time these proceedings were instituted but has since been released. 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 Irish State. The fourth named defendant is sued as legal representative of the second and third named defendants.

3.1 The plaintiff Mrs. A.G. is a separated woman. Her marriage broke up in 1993. At the time of the events complained of in 1999, she lived alone in Blanchardstown. She has suffered from depression since the break up of her marriage and was on medication at all relevant times as a result. She frequently attended unit nine, the psychiatric unit at James Connolly Hospital in Blanchardstown. The plaintiff also had problems with alcohol abuse. These difficulties were exacerbated by events which occurred in 1996 when she was stalked by a neighbour who was subsequently convicted of assaulting the plaintiff. He received a two year sentence.

Whilst attending unit nine, the plaintiff met a woman by the name of B. C. The two women became good friends and visited each other frequently. Both women had similar problems with depression and alcohol dependence. In 1996 B. C. met the first named defendant, J. K. and in November 1998 the couple got married. At the end of January, 1999, B. C. and J. K. moved in with the plaintiff for a period of approximately three weeks following a fire in their home. The plaintiff saw J. K. again in March, 1999, when he called over alone one night at 12 p.m. J. K. had alcohol with him and he made crude suggestions to the plaintiff. The plaintiff went upstairs to bed and J.K. fell asleep in the sitting room. The next morning J. K. attempted to get into bed with the plaintiff who pushed him away and shouted at him to get out. J. K. left the house and did not return alone again. The next time the plaintiff saw J.K. was on the 27th May, 1999.

3.2 At 12.10am on 27th May, 1999, a call was made to Blanchardstown Garda Station to assist Dublin Fire Brigade with an incident at a house in Blanchardstown. As a result of this call Sergeant Brian Crummey, Garda Joseph Quinn and Garda Shane McGee attended the scene. They arrived at the house at 12:20 am and were informed by the ambulance crew that there was a dead body in the house and a man going berserk. The gardai entered the house where they found the body of a woman lying face down in the sitting room. The sitting room was in disarray, furniture was scattered, the television was upside down, and there were vodka bottles and scattered tablets on the floor. Garda Quinn and Sergeant Crummey went upstairs where they found J. K. leaning against a bedroom door sobbing. Garda Quinn spoke to the man who fainted and collapsed to the floor. Garda Quinn and Sergeant Crummey lifted the man onto the bed where he came around again. The Gardai and J. K. then went downstairs. Garda Greally and Garda Ruane arrived at the scene. Garda Ruane spoke to J. K. outside the house for 10-15 minutes. Garda Ruane then brought J. K. to Blanchardstown Garda Station. Sergeant Miley, Detective Garda Hannigan and other members of the Detective Unit arrived. Dr. Lionel Williams then arrived, examined the body and pronounced the woman dead. He pointed out a gash in the mouth of the dead woman to Sergeant Miley. Shortly afterwards Inspector Peter Hughes arrived at the scene. The death appeared suspicious to Inspector Hughes so he had the scene preserved for technical examination.

3.3 Some time later that morning, Inspector Hughes went to Blanchardstown station, J.K. was in the public office. Inspector Hughes asked him if he could identify the body. J.K. indicated he would. At 4.25am, Inspector Hughes, Detective Garda Hannigan, Sergeant Miley and J.K. went to the house and identified the dead woman. Inspector Hughes informed J.K. that he would require alternative accommodation as the house was being preserved as a possible crime scene and asked him whether there was anywhere he could go. J.K. indicated that he wanted to go to the home of the plaintiff whom he knew. He and his wife had stayed there some time before. They arrived at the plaintiff's house at approximately 4:45 am. J.K. was accompanied to the door by Inspector Hughes and Sergeant Miley. There is disagreement between the parties as to the conversation that ensued.

3.4 The plaintiff's version of the conversation is that Inspector Hughes introduced himself and asked the plaintiff if she knew the man accompanying him (J. K.). The plaintiff responded that she did. The Inspector then asked if they could come in, mentioning that there had been a tragedy. When they came in J. K. sat on the couch and said that B.C. was dead. The plaintiff was shocked and started to cry. J. K. stated that B.C. had been drinking and taking pills. Inspector Hughes asked whether J. K. could stay for a few days. The plaintiff responded that he could stay in her daughter K's old room. Inspector Hughes asked J. K. to come down to the station the next day.

3.5 A different version of the conversation was put forward by Inspector Hughes. He states that when the plaintiff answered the door

J. K said that B.C. is dead. The plaintiff invited them in and asked what had happened. Inspector Hughes told her the circumstances surrounding B. C's death. He stated that J. K. had been in the house with B.C, that he had left the house to get a take away and on his return he found her dead. J. K and A.G. were upset at this point. A.G. hugged J. K. and said she knew B.C. a long time. Inspector Hughes told A.G that J. K. had indicated to him that he wanted the gardaí to bring him over to her house as he indicated that he could stay there. A.G. said that she would look after J. K. for a couple of days. Inspector Hughes stated that he was working nights and that if they wanted information to go to the station after lunch time when the post-mortem would be carried out.

3.6 After the Gardaí left the house A.G. made J.K. tea, she noticed that his clothes were mucky she ran him a bath and gave him some of her brothers clothes. Later that day A.G. and J.K. visited Sister Peggy Mc Loughlin who was a friend of B.C. and A.G. They asked her to inform B.C's daughter of her death. They then went down to unit nine, the psychiatric unit at James Connolly Hospital in Blanchardstown. A.G saw Dr. Lynsey Banford who was also B.C's doctor, she asked her to give J.K something to calm him down. Dr. Banford wrote A.G a prescription for valium which she gave J.K They went to the greyhound pub and had a few drinks. They later went to the police station where A.G and J.K both separately made statements. J.K. was finished making his statement first and A.G. gave him a key to the house.

3.7 After arriving home A.G. cooked egg and chips for the two of them and they had a few cans of beer. A.G. pushed two armchairs together and pulled a duvet over herself. J.K was sitting on the couch, A.G. told him to go up to her daughter K's old room when ever he wanted to. A.G. had taken medication and was awoken at 3 p.m. the next day by J.K. He was crouched down with a knife in his hand which he waved in front of A.G. saying "do you like that A" He then pulled off the duvet and raped A.G.

3.8 Later that afternoon A.G's son T.G. arrived at the house. A.G called T.G into the kitchen and they discussed what had happened to B.C, at this time J.K. was asleep in the sitting room. A.G. gave her son a note written by J.K. This note appeared to be a suicide note and suggested J.K. might have killed B.C. T.G. became concerned at this point and A.G asked him to keep his voice down. She asked T.G to go to the garda station and ask them to remove J.K. T.G. told A.G. to lock herself in the bedroom until the gardai arrived. T.G then went to the garda station. There is disagreement between the parties as to the conversation that ensued.

3.9 The plaintiff's version of the conversation is that on 28th May, 1999, T.G. went to the garda station and gave the gardaí a "piece of his mind" as he was angry that the gardaí would bring a man such as J.K. to the home of a vulnerable woman. T.G. asked the gardaí why they brought J.K. to his mother's house, he claims that he asked whether J.K. was a suspect. He then asked the Gardaí to remove J.K.

3.10 The defendant's version of the conversation is that on 28th May, 1999, T.G. went to the garda station because his mother gave him the note. T.G. did not go to the station until five that evening. Instead of T.G. giving the gardaí a "piece of his mind" and demanding the gardaí remove J.K. he went into the interview room and discussed B.C. with the gardaí. T.G. did not go back up to the house. The gardai did not go up to the house until seven that evening. Had T.G expressed urgent concern they state they would have gone straight up to the house.

3.11 At 7pm Detective Garda Hannigan, and Detective Sergeant Michael Doyle went to the plaintiff's house. The plaintiff admitted them to the house in a distressed state. J .K was present, he appeared to have consumed alcohol and was muttering obscenities. A.G requested Detective Garda Hannigan to remove J.K. from her home. After initial hesitation, J.K. complied with the request. A.G told Detective Garda Hannigan that she had been raped by J.K. that afternoon. The two gardaí brought A.G. to Blanchardstown station and introduced her to Garda's Geraldine Ennis and Olga O'Brien. A.G. made a statement to Garda Geraldine Ennis and explained how she had been raped by J. K. She was asked to provide her clothes to the gardaí and to attend the Rotunda sexual assault treatment unit. According to the gardaí she refused to do so.

3.12 The following day Saturday 29th May, 1999, A.G. visited Sr. Peggy Mc Loughlin at about 8:30 am. She was distraught and crying and told her that J. K. had held a knife to her throat, had threatened to kill her and that he had raped her. Sr. Peggy's reaction was to try and get A.G. to go to hospital. She asked could she talk to May Wilder and A.G. agreed. Both women then visited A.G. and convinced her to go to hospital. She was admitted to unit nine and remained there for three weeks. A.G. told the hospital that she had been attacked; she received counselling and was put on medication. A.G. also made a second statement to gardaí on the 29th May, 1999, in which she stated that J.K. had used a knife when the rape took place.

3.13 In the aftermath of the incident A.G. was treated by Dr. Declan Murray. A.G. avoided going out and became hyper-vigilant. Dr Murray treated A.G. for anxiety and post traumatic stress disorder, the latter condition was aggravated by her underlying psychiatric problems. From 1999 until 2004 A.G. was on very high levels of medication. A.G. moved away from Blanchardstown and made efforts to progress her life. She got a job and tried to tolerate the distress. By 2006 A.G. had made a reasonable recovery however she was still living a restricted lifestyle. Dr Murray and Dr Leader, the medical expert for the defendant both conclude that the rape exacerbated A.G.'s underlying condition.

Plaintiff's Submissions

4.1 At the time Inspector Hughes accompanied the first named defendant to the plaintiff's house, it was known to him that the death of B. C. was suspicious and that the first named defendant was a leading suspect and that he had behaved in a violent manner towards the ambulance men who came to take his wife's body away. None of this information was given to the plaintiff at any stage. In May 1999, the plaintiff was living alone. Sometime earlier she had been subject to an attack by one of her neighbours who had subsequently been given a prison sentence of two years. The plaintiff had a drink problem and had been a patient in the Psychiatric Unit in Blanchardstown hospital. It is clear from the evidence of Garda Paul Kelly that these facts were known to gardai in Blanchardstown. It was the plaintiffs understanding when Inspector Hughes left J.K. at her house that B.C had committed suicide by taking an overdose of medication. Unlike the gardai she had no suspicion that B. C. had been killed. On the 27th May, 1999, the plaintiff and the first named defendant visited a number of friends and acquaintances and the plaintiff informed them of what she believed had been a suicide. Later that day the plaintiff was asked to give a lengthy statement to Detective Sergeant Eugene Brennan. It was still not explained to her that the first named defendant was the chief suspect. By 7pm on the 27th May, 1999, it was known to the gardai that B.C. had been killed by strangulation. No attempt was made to apprise the plaintiff of this fact. No attempt was ever made to ensure the plaintiffs safety, which could have been achieved by a garda call. The plaintiff has given evidence that had she known of the facts she would not have taken J.K. into her house.

4.2 In considering whether or not a duty of care exists towards the plaintiff it is submitted that the court must first consider the circumstances under which the incident came to occur. The plaintiff was until the intervention of Inspector Hughes, safe in her own home. The plaintiff's evidence is that she only admitted J.K. because she was requested to do so by Inspector Hughes and she would

not have admitted him had he attended on his own, having regard to her unhappy previous experience with him. It was never intended there would be any form of supervision by An Garda Síochána in respect of the first named defendant nor was the plaintiff advised to take even the most rudimentary step to protect herself such as to ensure that another member of her family came to the house while the first named defendant was there.

It is submitted that it would be unrealistic for the Court not to take into account the fact that An Garda Síochána at that time regarded the first named defendant as the most likely suspect in the death of his wife, a suspicion which was to increase as time went on. It is also clear that the plaintiff in agreeing to provide accommodation for the first named defendant was doing so only on the basis that she understood that B.C. had committed suicide. The plaintiff, on the basis of the information given to her, was receiving the first named defendant not as somebody suspected of having killed his wife, with a history of violence and rape, but rather as a grieving spouse whose wife had just committed suicide. In asking the plaintiff to make a decision as to whether or not she would provide accommodation for the first named defendant, Inspector Hughes was asking the plaintiff to make the decision without her being possessed of all relevant information. The plaintiff argues that An Garda Síochána, when possessed of the appropriate information which they had or ought to have had, should not have requested the plaintiff as a female, who was an extremely vulnerable member of the public, and who was living on her own to provide accommodation for the first named defendant without being aware that there was at the very least a degree of risk to the plaintiff.

No inquiry was made to ascertain whether the plaintiff lived alone. The absence of concern for the plaintiff has to be seen in the context of Detective Hannigan's evidence that to him at all times J. K's conduct was "bizarre, unreasonable and not in keeping with that of a grieving husband". Inspector Hughes accepted under cross examination that if he had been aware of J. K's background he would not have brought him to the plaintiff's house. However, this statement has to be read in light of the fact that prior to leaving J. K. at the plaintiff's house, absolutely no investigation whatsoever was made of J. K. background. It is hard to believe that assiduous 'profiling' would not have ascertained J. K. background. What is beyond argument however, is that no consideration was given to whether or not a person with a significant history of violence should be staying with the plaintiff, as was the case; a violent man, a rapist in a volatile state who had also clearly indulged in heavy drinking.

4.3 Insofar as the existence of a duty of care is concerned, it has long been accepted that while individual members of a police authority may be liable for individual negligent acts, such as a garda driver in the driving of a garda vehicle. It is without doubt that in ordinary circumstances a member of An Garda Síochána does not have a specific duty in the conduct of his official duty towards members of the public generally. In that context therefore while an individual member of An Garda Síochána investigating a crime who fails to follow up an obvious lead may be guilty of negligence in the ordinary sense of the word, this does not give rise to any actionable liability on the part of a member of the public. In *Hill v Chief Constable of West Yorkshire* [1988] 2 All E.R. 238, Lord Keith of Kinkel observed as follows at 240:-

"There is no question that a Police Officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. Though he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence...By common law Police Officers owe to the general public a duty to enforce the criminal law...That duty may be enforced by mandamus, at the instance of one having title to sue. But as the case shows, a Chief Officer of Police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, where the particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decisions upon such matters are such as no reasonable Chief Officer of Police would arrive that someone with an interest to do so may be in a position to have recourse to Judicial Review."

4.4 In the case of *Swinney and Another v Chief Constable of West Cumbria Police* [1996] 3 All E.R. 449 it was held that if a special relationship existed between a the police and a member of the public, in that particular case an informant, then a duty of care could arise in respect of which a breach would give rise to liability in negligence and the possibility of damages. Gibson L.J. observed at 466.

"It seems to me arguable that an informant giving in confidence sensitive information to the Police, is in a special relationship to the Police, that relationship being based on an assumption of responsibility towards the informant by the Police, is such that when through the negligence of the Police that information is disclosed to criminals, it can result in a valid claim by the informant in respect of consequent damage to the informant."

In the case of *Cowan v. Chief Constable of Avon and Somerset Constabulary* [2001] All E.R. (D) 204. Keane L.J. accepted the decision in the case of *Swinney* and also the fact that a special relationship could exist between an individual and the police so as to impose a duty of care. In analysing the final decision he said as follows at 212:-

"Once again, as in *Swinney*, the existence of a duty of care owed by the Police Force to the individual is founded upon the assumption of responsibility by a Police Officer and the consequent close or special relationship between the Police Officer and the Plaintiff. That approach accords with the other authorities already cited."

4.5 There are circumstances in which a duty of care will be owed by the Police to a member of the public. For such a duty to arise, a special relationship of proximity is required as between the plaintiff and the police. In *Swinney* the duty arose because the plaintiff was somebody who had furnished information to the police. It is submitted that in the present case a duty of care arises having regard to the special relationship and proximity as between the plaintiff and the police; a relationship and proximity created by the police. The plaintiff is somebody who assisted An Garda Síochána in response to their highly unusual request when she had no obligation to do so. Significantly the very situation which gave rise to the injury to the plaintiff was created by An Garda Síochána's decision to ask the plaintiff to accommodate the first named defendant. It is submitted that this fact alone created a sufficient measure of proximity so as to create a situation where the duty of care arose.

4.6 It has long been accepted that not only must there be a duty of care but the loss or damage must be foreseeable and the Court should consider it appropriate to impose the duty. If one applies that criteria to the present case, the relationship of proximity was created by the request made by Inspector Hughes that the plaintiff would accommodate the first named defendant. This gave rise to the necessary duty of care. As to foreseeability, it would seem eminently foreseeable that somebody like the first named defendant, who had a history of violence and rape, and who was at the very least suspected of having murdered his wife, would commit a crime of violence against the plaintiff, a vulnerable a psychologically frail woman living alone, while being alone with her in her house. It is equally the case that it is appropriate, just and equitable for the court to give relief to the plaintiff, especially having regard to the circumstances of the plaintiff's background and vulnerability, and the glowing testimony given as to her character by Detective Hannigan. There can be no suggestion that the imposition of liability here is in any way contrary to public policy or would "open the floodgates" to similar claims, based as it is on the particular and distressing circumstances of this perhaps unique case.

4.7 The second, third and fourth named defendants plead that there exists immunity at law against acts by members of the Garda Síochána in undertaking bona fide discharge of their duties. The basis of the immunity is clearly the protection of the public interest.

It is submitted that immunity would only arise in a situation where the relevant member of the police authority was acting in the course of his duty. It is not part of the investigative process, nor is it part of the discharge of the ordinary duty of a member of An Garda Síochána, that he should in fact take somebody who has been questioned by the gardaí to the house of a third party upon that individual being released from questioning and *a fortiori* where the gardaí involved know absolutely nothing about the person they are taking there. All the more so where they did not endeavour to find out anything about the plaintiff or to inform her of the situation regarding B. C's death. The plaintiff submits that it is difficult in that context to see how it could be argued that Inspector Hughes in so doing was in fact acting in the discharge of his duty.

Submissions of the second, third and fourth named defendant

5.1 It is submitted that the gardaí had no reason to believe that the first named defendant posed a threat to the plaintiff. The plaintiff voluntarily took the first named defendant in after the incident in which B.C. died. It is submitted that the Garda investigation was at an embryonic stage when the first named defendant was taken to the plaintiff's house and the overriding concern for the gardaí would have been the preservation of the crime scene. It was at the first named defendant's behest that he was taken to the plaintiff's house and the plaintiff welcomed him at that time. It is submitted that the gardaí were not nor could not have been aware of the first named defendant's violent propensity.

5.2 It is submitted that the plaintiff was more favourably placed than the gardaí to make a decision as to whether or not to have the first named defendant stay with her. When Detective Inspector Hughes asked the plaintiff could J. K. stay with her she said "Yeah. I felt sorry for him." The plaintiff spent the next day in J. K's company. She accepted in cross-examination that she was not hostile to him and was not afraid of him at this time because she believed B.C had overdosed. She accepted she consumed alcohol and pills on the 27th of May, 1999, in the company of J. K. On that date the plaintiff and J. K. attended Blanchardstown Garda Station and both made statements, the plaintiff remained on in the station and gave J. K. the keys to her house, she did not complain to the gardaí about J. K. staying with her. Inspector Hughes gave evidence that if the plaintiff was hostile towards J. K. he would have taken him away.

5.3 The plaintiff accepts that she did not mention that a knife was used in the alleged rape until the 29th of May, 1999. She said this was because of the "booze and pills" that she had consumed. It should be noted however, that the plaintiff's statement of the 28th May, 1999, is highly detailed and precise in its description of the facts of the alleged rape. A file was sent to the DPP and no prosecution was directed in relation to the claim of rape. The plaintiff blames the gardaí for the alleged rape on her by J. K. because they knew or ought to have known the background and or previous convictions of J. K. The gardaí did not know anything adverse about J. K. at the time they left J. K. at A.G.'s house. While J. K was a suspect in the suspicious death of his wife, there was no evidence before gardaí to suggest in any way that J. K. was a potential risk to anyone else or indeed A. G. There was nothing to suggest that he had a violent propensity. In that regard in her statement to gardaí on the 27th May, 1999, the plaintiff stated that she never saw J. K hit B.C but she did see B.C hit J.K. and he did not retaliate. B.C however told her that J. K hit her on two occasions.

5.4 It is submitted that the plaintiff must establish the rape and she must establish facts or circumstances which would have put the gardaí on notice that she was at risk by taking the first named defendant into her home. It is submitted that there are four elements in the tort of negligence.

- i) A duty of care
- ii) Failure to conform to the required standard
- iii) Actual loss or damage
- iv) A sufficiently close causal connection between the conduct complained of and the resulting injury to the plaintiff.

In the circumstances of this case it is submitted that gardaí could not be held liable under any duty of care that would require them to allege to a third party such as the plaintiff that a person in the position of the first named defendant on the 27th May, 1999, may have murdered his wife, or to prevent him having contact with other persons until the circumstances of his wife's death became apparent.

In the case of *Hill v. Chief Constable of West Yorkshire* [1988] 2 All E.R. 238, it was held as a matter of public policy that the police were immune from actions for negligence in respect of their activities in the investigation and suppression of crime. In the more recent joined cases of *Chief Constable of Hertfordshire v. Van Colle* and *Smith v. Chief Constable of Sussex Police* [2009] 1 A.C. at 225, Lord Carswell concluded at 280:-

"The factor of paramount importance is to give the police sufficient freedom to exercise their judgment in pursuit of the objects of their work in the public interest, without being trammelled by the need to devote excessive time and attention to complaints or being constantly under the shadow of threatened litigation."

It is submitted that the decision of the House of Lords in these cases affords a forceful basis for asserting that the police in the instant case should not be held under a duty of care of the nature alleged by the plaintiff. Further it is submitted that the plaintiff cannot contend that simply because the first named defendant may have been suspected of having been involved in the murder of his wife, he was for that reason alone a person from whom the police ought to have protected the plaintiff in any specific way.

5.5 In *Osman and another v Ferguson and another* [1993] 4 All E.R. 344, it was held that the existence of a general duty on the police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so. It would be against public policy to impose such a duty as it would not promote the observance of a higher standard of care by the police and would result in the significant diversion of police resources from the investigation and suppression of crime.

Arising from this case, a complaint was made to the European Court of Human Rights and in *Osman v United Kingdom* [2000] 29 EHRR 45, the UK was found to be in breach of Article 13 of the Convention, as a result of a perceived immunity for the police arising from the UK judgment. This decision was however, reconsidered in the case of *Z and Others v United Kingdom* [2001] 29 FLR 612.

In the *Z* case the House of Lords held that no action lay against the local authority in negligence for breach of statutory duty concerning the discharge of their duties relating to the welfare of children under the Children's Act 1989 in respect of childcare. It was held at paragraph 100 of the judgment that the law of negligence as developed:-

"includes 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 an immunity but from the applicable principles governing the substantive right of action in domestic law."

5.6 It is submitted that damages are not an appropriate remedy in a case such as this. In *Hill v. Chief Constable of West Yorkshire* [1988] All E.R. 238 at 244-245 Lord Templeman said:-

"The question for determination in this appeal is whether an action for damages is an appropriate vehicle for investigating the efficiency of a police force... The threat of litigation against the police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties. This action is in my opinion misconceived and will do more harm than good."

In the *Hill* case the culprit had at the relevant time not yet been identified, which is the case here. The Gardai at the time of the alleged assault herein were only in the process of investigating the death of B.C. It is submitted that the concept of the "investigation of crime" should be narrowly interpreted in circumstances where the criminal law is predicated on the presumption of innocence. On the 27th May, 1999, when the gardai brought the first named defendant to the plaintiff's house in the aftermath of his wife's death, the gardai were not aware of the first named defendant's previous convictions and could not prevent the first named defendant having contact with other persons. Further it is submitted that an accused person has rights just as any potential victim has and both sets of rights must be protected by gardai. It is denied that there was a close degree of proximity amounting to a special relationship between the plaintiff and the gardai. In the absence of this special relationship, it is submitted that there was no duty of care of the kind alleged by the plaintiff in existence.

The Decision of the Court

6.1 The plaintiff's claim is for damages for personal injury suffered due to the negligence, breach of duty, including statutory duty on the part of the second, third and fourth defendants. The plaintiff claims that the defendants knew or ought to have known that J. K. posed a threat to the plaintiff and they failed to take any steps to ensure her safety while in his company and failed to advise her of the fact that the first named defendant had been questioned in relation to the suspicious death of B.C. She claims they negligently delivered J.K. to her house where the following day he raped her.

6.2 The starting point in relation to a claim of negligence is to establish 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. In this case the Gardai are being sued for negligence. The first consideration therefore is whether there exists a duty of care on the Gardai in the circumstances herein. It is now clearly established in Irish Law that the Gardai owe no duty of care in respect of actions taken in the course of their duty to investigate and prosecute crime. The absence of this duty situation arises from considerations of public policy. In *W (HM) v. Ireland, AG and the Government of Ireland* [1997] 2 I.R. 141. Costello P. explained at 158:-

"The principles in *Ward v Mc Master* (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 at 160:-

"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 the 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 More recently this matter was considered by the President of the High Court in *L v. Ireland & Ors*, [2010] IEHC 430. The learned President confirmed the non existence of a duty of care on the gardai and prosecuting authorities in carrying out their functions in the investigation and prosecution of crime:-

"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."

6.4 Even more recently this court has also considered this issue in *L.M. v Commissioner of An Garda Síochána and Others* [2011] IEHC 14, where it was held at para 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."

There are some differences in the accounts given of this event but I think little hangs thereon. The Gardaí arrived at J.K.'s house at 12:20 am on the 27th May 1999. There they found the body of B.C. lying face down in the sitting room. Vodka bottles and tablets were scattered on the floor. They were told of the presence upstairs of J.K. who was in a state of great distress. He was shortly after brought to Blanchardstown Garda Station. It was decided because of the suspicious nature of the death to preserve the scene. Later on J.K. was brought back to the house for the purpose of identifying the body. He was then advised by Inspector Hughes that he could not stay there as the house was to be preserved for investigation. He was asked if he had anywhere he could stay. He stated that he wished to go to the house of A.G. He said he knew her and had stayed with her before. The Gardaí then drove J.K. to A.G.'s house. When she answered the door A.G. said she did indeed know J.K. She was very sympathetic to his plight and agreed that she would look after him. The Gardaí departed and continued their investigation of the death of B.C. The crucial question is as to whether their action in bringing J.K. to A.G.'s house was something done in the course of their investigatory functions that night. I do not think it is possible to hold it was not. It was an action that was humanitarian but also very practical. He had to go somewhere. The Gardaí would have been heavily criticised had they left him to walk the streets. There were no grounds at that time to arrest and detain him. From their point of view, the Gardaí needed to preserve the scene and that involved removing J.K. therefrom. It was inextricably a part of their investigatory functions that night. This I think disposes of the case. On the basis of the now well established law as outlined above no duty of care arises from the circumstances herein.

6.5 Having heard the case over a number of days I think I should express a view on the evidence. I find the following;

At the time they delivered J.K. to A.G.'s house, the Gardaí did not know and could not have known that J.K. had a conviction for rape and assault in the United Kingdom. He did have a minor conviction in Ireland as a youth. It apparently dated to 1971. Not even that was known to the Gardaí that night. A.G. readily opened her house to J.K. and it was reasonable for the Gardaí to accept, as was the case, that she knew him and his deceased wife and would look after him. The Gardaí could not possibly have foreseen that this man would so violently abuse the hospitality he received that night. To all intents and purposes J.K. appeared to have been safely deposited in a welcoming home. Until they were told by A.G. that she wanted him out, the Gardaí had no reason to fear for A.G. When she did ask for his removal, the Gardaí promptly ejected him.

In the result, even were a duty to exist, I would have been constrained to find on the evidence that what happened was not reasonably foreseeable.

6.6 The above disposes of the case in relation to the second, third and fourth named defendants. Judgment has already been obtained against the first named defendant and I am required now to assess damages on the basis of the evidence which I have heard and the medical evidence which is contained in the written reports submitted to me by the solicitors for the plaintiff. These are four medical reports from Dr. Declan Murray dated 21st March, 2001, 25th March, 2002, the 26th February, 2003, and the 12th March, 2009.

6.7 The plaintiff is a woman with a date of birth of the 8th May, 1955. The facts of the case are already well set out above. Following the assault and rape she was admitted to the psychiatric unit at James Connolly Memorial Hospital and remained there for approximately three weeks. She was treated with antidepressants and night sedation. She improved whilst in hospital. During admission she attended a funeral home to see the remains of her friend B.C. The plaintiff has a long sad history of psychiatric disorder. This involved alcohol dependence and depression. She also had a previous history of post-traumatic stress disorder following a serious assault by a neighbour in 1996. It is clear that at the time of the assault and rape involved in this case, the plaintiff was a very vulnerable individual. The events involved in this rape case greatly exacerbated her existing psychiatric symptoms and added a new episode of post-traumatic stress disorder. It also made a major contribution to prolonging her psychiatric symptoms at an increased degree of severity. On review in March, 2001, she still had persistent symptoms following that assault. It was expected that she would need continuing psychiatric treatment for years to come.

6.8 On further review on the 25th March, 2002, the plaintiff was found to have a fluctuating course of difficulty. At times she had symptomatic improvement, at other times anxiety with feelings of panic and feeling sick. She was anxious going out to hospital appointments and appointments with her solicitor. She was hypervigilant and excessively fearful of danger. She was afraid to open her door and became startled when somebody knocked on it. She only let her immediate family into her house due to this anxiety. She was still depressed and prone occasionally to excessive alcohol consumption. She was at this stage on medication which she would require in the long term. On later review in February, 2003, she was found to have made some improvements but continued to have intermittent depression and anxiety symptoms. In the final report dated 12th March, 2009, which was prepared for the purposes of these proceedings it was noted she had been discharged from the psychiatric clinic in May, 2006. Since that time she had been keeping reasonably well and had been working in the Community Employment Scheme. On review she looked well and gave a clear account of her history. Her speech was normal and she did not report any current psychiatric symptoms. Her mood was good, her sleep was good also and energy levels, appetites and concentration were normal. She did not appear to have any major symptoms of anxiety. It was noted that she had experienced in May of 2008 a period of anxiety, hypervigilance and nervousness for a few weeks

when she learned that the first named defendant, her assailant herein, had been released from prison having served nine years. This anxiety abated gradually. She remains on long term treatment to help prevent symptoms of post traumatic stress disorder and depression recurring. Overall her psychiatric condition was considered to have been resolved. She will need to continue her medication indefinitely and is likely to have symptoms at times of stress in the future.

6.9 The plaintiff presented in this case in the evidence that she gave to the Court as a very honest and frank witness. I accept in full all the evidence she gave in relation to the assault upon her. It is quite clear that she suffered a violent and most distressing attack. It is particularly noteworthy that this attack was a gross violation of the hospitality and comfort which she offered to her assailant on the evening in question when she thought he had just lost his wife in tragic circumstances. This dreadful violation of her trust and hospitality must go towards exacerbating the grave psychological problems that she encountered on top of the assault and rape itself. It goes without saying that mere money cannot reflect the suffering inflicted upon her in this assault. However it is the only currency which is available to the Court. It seems to me that the plaintiff has fortunately, through her own strength of character and the devoted attention of her medical advisers, succeeded in overcoming much of the psychiatric problems that were caused by this assault. Nonetheless there is some continuing difficulty which is likely to remain on a permanent basis. I therefore measure general damages for pain and suffering to date in the amount of €150,000 and for pain and suffering into the future in the amount of €50,000. I will hear counsel in respect of any updated particulars of special damage.