

CASE COMMENT: *LM v COMMISSIONER OF AN GARDA SÍOCHÁNA*

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Introduction

In November 2015 the Irish Supreme Court allowed an appeal for two cases in *LM v Commissioner of An Garda Síochána*.¹ *LM*² and *Belinda Lockwood v Ireland*³, both tried on a preliminary issue, were claims in negligence against public authorities. *LM*, at the age of twelve, made a complaint of rape which was not investigated for another six years and this delay is the basis for the negligence claim. In contrast, *BL* issued a complaint of rape which saw the accused go to trial. However, the grounds for negligence lay in the error by the Gardaí of unlawful arrest which, it was argued, led to no conviction. The issue the High Court dealt with in both cases was whether public authorities such as the Commissioner of An Garda Síochána and the Attorney General owed a duty of care to members of the public.⁴ The High Court in both instances deemed there to be no such duty of care for public policy reasons and claimed simply to be following previous precedent.

The interaction between the law of negligence, particularly the duty of care and human rights law - where this is intended to mean the European Convention on Human Rights (“the Convention”) - will be the focus of this article. It has been of recent academic debate as to whether these two areas of law should converge.⁵ Without examining the convergence debate itself, this article will examine where the Supreme Court stands on the issue by examining the judgment of O’Donnell J in the aforementioned case. Section

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¹ [2015] IESC 81.

² [2012] 1 ILRM 132.

³ [2011] 1 IR 374.

⁴ Other bodies include the Director of Public Prosecutions and the Minister for Justice, Equality and Law Reform, Ireland.

⁵ Donal Nolan, “Negligence and Human Rights Law: The Case for Separate Development” (2013) 76(2) *MLR* 286.

One examines the current position of the law of negligence, as described by O'Donnell J. Section Two examines the impact the Convention has had on negligence, again through O'Donnell J's analysis. Both of these sections are aimed at bringing context to the two areas of law and how they have interacted with each other. Section Three analyses the stance of the Supreme Court with regards to the debate. It shall be concluded that the Supreme Court understands the two areas of law as being legally similar and heavily dependent on one another, which is significant as it may suggest a shift towards the convergence of human rights law and negligence law in Ireland.

I. The Current Status of the Duty of Care

Both cases under appeal examined the issue of whether a duty of care was owed by public authorities to members of the public in a trial on a preliminary issue. As O'Donnell J pointed out, although both cases are different in nature, the High Court dismissed the claims in negligence for public policy reasons.

According to the High Court's decision, the current status of the duty of care with regards to public authorities is outlined in *W v Ireland*⁶ and *Hill v The Chief Constable for West Yorkshire*.⁷ Both cases were tried on a preliminary issue, and in both instances it was decided that the defendants "did not owe a private law duty of care to individuals".⁸ The current position of the duty of care is illustrated by the reaffirmation of these cases, whereby there has been consistent protection of public authorities against negligence claims. The basis for this argument stems from the desire to prevent public authorities from practicing defensively as well as keeping the floodgates closed to a stream of negligence claims. O'Donnell J summarised the history of negligence law and the progression of imposing a duty of care since the landmark case of *Donoghue v Stevenson*.⁹ Though the case law regarding this issue gives the impression of public authorities being immune to negligence claims, O'Donnell J attempts to clarify the problems with this view and illustrate the issue as more complex.

⁶ [1997] 2 IR 141.

⁷ [1989] AC 53.

⁸ [2015] IESC 81, at [5].

⁹ [1932] AC 562.

II. The Impact of Human Rights Law on Negligence

O'Donnell J observed that the developments of negligence law “have occurred in parallel with, and have been influenced by, cases exploring the impact of the European Convention on Human Rights (“the Convention”) on domestic law”.¹⁰ The Convention was transposed into Irish law through the European Convention on Human Rights Act 2003. In *Osman v United Kingdom*¹¹ the European Court of Human Rights (ECtHR) determined the public policy reason in excusing a duty of care to be a complete protection for public authorities, and they interpreted this to be a breach of Article 6.1 of the Convention. This decision has been extensively criticised. However, the Court later backtracked on this approach in *Z v United Kingdom*.¹² In that case, the ECtHR established that the public policy argument was in accordance with the Convention. In reviewing these cases, O'Donnell J noted the interaction between the two areas of law as a check upon the other, where “domestic tort jurisprudence in common law countries is capable of being tested against the Convention.”¹³ Furthermore, human rights law has been tested with Irish negligence law in the controversial judgment of *O'Keeffe v Ireland*.¹⁴ The court ruled that Irish law “did not provide an effective remedy in respect of the plaintiff's complaints of sexual abuse at the hands of a teacher.”¹⁵

It has been established that, with regards to actions that lie under the Irish legislation, damages lie for a breach of the Convention right to protect life where, “it is alleged that police failures have led to the death of an individual”.¹⁶ This awarding of damages is an example where Convention claims can lead to success where negligence claims would not, as public authorities are typically shielded by the public policy argument.

In examining the interaction with Convention rights, it is apparent that in certain situations, claims can be made for negligence and a breach of a Convention right within the same case. However, because Irish citizens must first exhaust all domestic remedies, negligence law is typically the first source of action in cases where claims lie for both. Despite this, as previously mentioned, certain scenarios allow for the success of one claim

¹⁰ [2015] IESC 81, at [16].

¹¹ [2000] 29 EHRR 245

¹² [2002] 34 EHRR 3.

¹³ [2015] IESC 81 at 17.

¹⁴ [2014] 59 EHRR 15.

¹⁵ [2015] IESC 81 at 18.

¹⁶ [2015] IESC 81 at 19.

over another. The question arises as to the compatibility of the two areas of law and, in areas of overlap, whether they can be converged.

III. Where the Supreme Court Stands

In the context of UK negligence law there has been considerable debate as to whether the areas of negligence and human rights should be converged.¹⁷ Donal Nolan summarises the debate well by examining the contrasting views of the judiciary, where some judges have deemed it unnecessary to change the common law for a human rights violation remedy whilst others believe convergence to be a desirable aim.¹⁸

In Ireland, the Supreme Court's stance is made clear in O'Donnell J's judgment. In discussing the merits and demerits of a case of a trial on a preliminary issue, O'Donnell J observed how determining the duty of care is "considerably complicated by the possibility of the Convention claims".¹⁹ He used the complication of possible breaches under the Convention as a reason against the determination of a preliminary issue regarding the duty of care. This is because, he reasoned, if a Convention claim is possible and proceeds, the reason to initiate a trial on a preliminary issue (under the assumption of saving time and money) is made void as the Convention litigation would proceed at the same rate and time. O'Donnell J further recited Gillen J's observation in the High Court of Northern Ireland that "the common law position may be influenced to by developments at the level of the Convention."²⁰ The assertion that the judgment of the negligence case, made on a trial on a preliminary issue, is negated by an action under a Convention claim, assumes the outcome of one area of law is dependent on the other. Furthermore, in stating the possibility for influence of the two areas of law, there is a suggestion of dependence, whereby the negligence judgment relies upon the developments of human rights law. The dependence suggested by O'Donnell J suggests that similar issues arise in both areas of law.

O'Donnell J went on further to discuss the role of Convention claims in the case of *LM*. There seemed to be confusion as to whether the Convention claims were 'live' within the negligence case. O'Donnell J illustrated the issue with two scenarios. He noted that if Convention issues

¹⁷ Donal Nolan, "Negligence and Human Rights Law: The Case for Separate Development" (2013) 76(2) *MLR* 286.

¹⁸ *Ibid.*

¹⁹ [2015] IESC 81 at 38.

²⁰ *C v Chief Constable of the PSNI* [2014] NIQB 63.

are live, which suggests a convergence of both areas of law, then “the case will not be disposed of.”²¹ He contrasted this scenario with the possibility that Convention rights are separate. In this scenario, he hypothesised that the impact of the negligence case would have little value as the Convention issues “would have to be addressed at some stage.”²² The assertion that the negligence judgment loses its value if the Convention claim is carried out suggests that, once again, the negligence claim relies on the outcome of the human rights claim. In this depiction, it seems that human rights law is heavily influential on domestic tort law, as well as the fact that both deal with similar issues of law. However, he also noted that where a case converges the two issues of law, the issues will not be wholly resolved, which suggests perhaps an incompatibility Convention claims have in negligence cases.

Lastly, the outcome of O’Donnell J’s judgment is to allow for an appeal for both cases, having considered the trial on a preliminary issue as being an inadequate means to justice. Though O’Donnell J lists the reasons why the trials were shrouded with uncertainty, the mere fact that he did not reaffirm the *Hill* principle suggests possible change or developments of an exception to the rule. One can only assume a reconsideration of all the issues raised is made in light of the influence of the Convention, where the affirmation that no immunity exists on public authorities is sought to be justified by a full examination of the case here in the negligence context.

Conclusion

The significance of certain conclusions made from O’Donnell J’s judgment show the Supreme Court’s understanding of a very dependent relationship between the law of negligence and human rights law. It is clear that O’Donnell J’s judgment is made with the assumption that both areas of law are similar in legal issues. As a result, he depicts a rather heavily dependent relationship between the two areas of law, where a judgment in human rights law directly impacts negligence cases. With such assumptions of the two areas of law, it could be hypothesised that they may possibly take a more formal form of convergence in the future.

²¹ [2015] IESC 81, at [38].

²² [2015] IESC 81, at [38].