THE HIGH COURT

[2022] IEHC 420

Record No. 2018 / 3726P

BETWEEN

SÉAMUS BRADY

PLAINTIFF

AND

PETER MOORE AND PAUL SCANLON

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 5th day of July, 2022.

Introduction

1. This is a claim for damages for personal injuries to the plaintiff, arising out of an accident which occurred on 26 September, 2015, when the plaintiff was removing slates from the roof of a clubhouse at the premises occupied by St. Mary's Donore GAA Club, which are situate at Staleen, Donore, County Meath.

2. The work was being done on a voluntary basis by members of the GAA Club, including the plaintiff and it seems that little or no regard was paid to health and safety. Unfortunately, construction work of any type is inherently dangerous, and health and safety regulations and procedures are all there for a good reason, as the incident giving rise to this

case demonstrates. In this case, the plaintiff was on the roof of the one storey building when he fell through the felt to the ground and suffered very serious injuries.

3. The proceedings are brought against the defendants as representatives of the GAA Club, but the problem for the plaintiff is that, on the date of the accident – and indeed for some time previously and since – he himself was a member of the Club. Indeed, he seems to have been a member of the Committee, but nothing turns on that for the reasons set out below.

4. The proceedings are based on the claim that the plaintiff was a *"visitor"* within the meaning of the Occupiers' Liability Act, 1995, and that the Club consequently owed him a duty of care pursuant to s. 3 of that Act. However, the plaintiff's counsel frankly acknowledged that there might be a legal difficulty for him in seeking to make this claim and I am grateful to him for discharging his duty to the court as counsel by providing me with the relevant authorities, particularly given that the Club has turned out to be unrepresented, as the insurance which it held - and which it believed could cover the events giving rise to these proceedings - did not in fact cover this claim. Although the terms of the insurance policy were not put in evidence, I am told that it was a standard policy, widely used by GAA clubs throughout the country.

Evidence

5. Only the plaintiff gave evidence as to fact. Members of the Club appeared in court and set out the position of the Club, which was, in effect, that they did not want to dispute anything the plaintiff said, were grateful for his contribution to the Club over the years, and that they acknowledged the seriousness of his injuries. There was only one point of dispute

raised but, as the Club gave no evidence and did not seek to cross examine the plaintiff, the only evidence I have is that of the plaintiff. I return to this issue below.

6. Briefly, what occurred was that the Committee of the Club decided to refurbish the clubhouse and they thought that the slates might be suitable for salvage. Presumably to save money, they decided that removing the slates from the roof prior to the contractor starting the refurbishment works was a job they could do themselves, on a voluntary basis. Mr. Scanlon, the second Defendant, who was chairman of the Committee, sent a text to members on 23 September, 2015 asking that recipients would attend on 26 September, 2015 between 9 a.m. and 2 p.m. to help with removing the roof so that construction works could start.

7. The plaintiff and others attended on the day and went up on the roof. The plaintiff's engineer gave evidence that the trusses were approximately 600mm apart on average and, once the slates were removed, only felt remained. The plaintiff stepped on the felt and fell through the roof onto the ground. There was no scaffold, and no health and safety precautions of any sort.

8. No evidence was tendered as to the rules of the Club. The Club itself produced undated minutes which it said tended to show that the plaintiff attended a Committee meeting where it was decided to carry out the works. However, the plaintiff gave evidence that he did not attend any meeting where the works were discussed. The Club members who were in court on the part of the defendant indicated that the plaintiff was present, but they did not give evidence and the plaintiff was not cross examined.

9. The minutes which were handed in on behalf of the defendants appeared to show that the plaintiff was present as a member of the Committee and to have been signed by Mr. Scanlon but I am not sure who wrote them up and they seem to be written in a hand other than that of Mr. Scanlon. The relevant item was in the following terms:

"Roof of Clubhouse to come off – slates + timber need volunteers".

10. However, as counsel for the plaintiff pointed out, this appeared under a heading entitled *"Next Meeting"*, although this heading was scribbled out. There was no evidence as to when this heading was removed and in any event the minutes themselves were not proved in any way. As originally written up, the minutes would only ever have proven that the plaintiff attended a meeting at which it was proposed to discuss the removal by volunteers of the slates and timber at a future meeting. If Mr. Scanlon had given evidence, he may have been able to explain how the heading came to be scribbled out and it may well have been because the discussion and consequent decision were not deferred but were discussed at the meeting itself. However, I have no evidence of any of this and, as the minutes are not dated, I do not even know when the meeting took place, though the dates of various upcoming items suggest that it took place in early September, 2015 as there are various references to *"Sat 12th"*, *"Monday 14th"* and *"wed 16th sept"*, all of which correspond to the dates and days of the week in September, 2015.

11. In view of the fact, therefore, that the only evidence tendered was that of the plaintiff, I find that he did not attend a Committee meeting at which the proposed works were discussed.

12. A significant issue arising in this case as to whether the claim is maintainable at law, but before turning to this, I want to acknowledge the extent of the injuries sustained by the plaintiff. In view of my conclusion on the legal issue, it is not necessary to consider these in extensive detail, but it should be noted that the injuries were serious.

13. The plaintiff suffered fractures to his left wrist, right shoulder, right elbow, nerve damage to his left hand and soft tissue injuries to his back, left shoulder and nose. Both of his arms had to be put in plaster of Paris for six weeks. He had internal fixings in his right elbow, where the fracture was complex, but these were removed in 2016 in the hope that this would assist his range of movement. Unfortunately, it does not seem to have done so.

14. The plaintiff suffered from anxiety and depression after the accident, and is unable to work. He continues to have difficulties with his shoulders and while his left hand has improved somewhat, he has still lost feeling in two fingers and has little or no grip. Given that he is left hand dominant, this is very debilitating and affects his ability to cope with everyday tasks. He expressed unhappiness and frustration about his dependency on others. He is unable to work and has become somewhat socially isolated.

15. Notwithstanding the nature of his injuries, however, the plaintiff must first establish that he has a claim in law against the Club, and I now turn to that issue.

Whether this claim is maintainable at law

16. The personal injury summons pleads that the plaintiff was present at the Club premises as a visitor. In replies to particulars, the plaintiff asserted he was under the direction and control of the defendants such that there was a contract of employment for the specific task in question. However, it was rightly conceded at hearing that the plaintiff was not an employee and the claim was confined to that basis on the plaintiff's alleged status as *"visitor"* within the meaning of the 1995 Act.

17. *"Visitor"* is defined in s. 1 of the 1995 Act as meaning:

> *"(a) an entrant, other than a recreational user, who is present on premises at the invitation, or with the permission, of the occupier or any other entrant specified in paragraph (a), (b) or (c) of the definition of "recreational user",*
>
> *(b) an entrant, other than a recreational user, who is present on premises by virtue of an express or implied term in a contract, and*
>
> *(c) an entrant as of right,*

while he or she is so present, as the case may be, for the purpose for which he or she is invited or permitted to be there, for the purpose of the performance of the contract or for the purpose of the exercise of the right, and includes any such entrant whose presence on premises has become unlawful after entry thereon and who is taking reasonable steps to leave".

18. Section 3 of the 1995 Act defines the duty to *"visitors"* as follows:

"(1) an occupier of premises owes a duty of care ("the common duty of care") towards a visitor thereto except in so far as the occupier extends, restricts, modifies or excludes that duty in accordance with section 5.

(2) In this section "the common duty of care" means a duty to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon."

19. There was no evidence of any extension, restriction, modification or exclusion of the duty in accordance with s. 3 (usually done by notices at the entrances to premises which will be familiar to the general public) and therefore, if the plaintiff was a *"visitor"*, the Club would owe him a common duty of care in accordance with section 3.

20. But, even assuming that it could be said that it could be established in this case that there was a breach of such a duty, which I think it unlikely in circumstances where the plaintiff acted as one of a group of volunteers and where his evidence was to the effect that he took steps to look out for his own safety, the plaintiff first has to establish that he was a *"visitor"*. On this issue, the critical and indeed insuperable problem for the plaintiff is that

the premises were in the occupation of the Club, of which he was a member. No specific evidence was given on the issue (on which the plaintiff bears the burden of proof) but the Club members present in court said it was held by Trustees for the purposes of the Club. There appears to have been no doubt but that the Club itself was in occupation of the lands and clubhouse.

21. The problem for the plaintiff, therefore, is that as a member of the Club, he himself was, along with the other members, the "*occupier"* for the purposes of the Act.

22. This conclusion follows from the long-standing legal principle that a club, as an unincorporated association of persons, cannot be sued by one of its members. The classic statement of this in Irish law is *Murphy v. Roche (No. 2)* [1987] I.R. 656 where Gannon J. pointed out that where an action is taken against an unincorporated association – and that case also concerned a GAA club – by way of action against representative defendants, the plaintiff himself as a member of the association was one of the persons so represented. He stated (at p. 661):

> *"The action is taken properly as a representative action, and consequently the plaintiff is himself one of the persons so represented. In my opinion this club is a voluntary association of persons having a common or mutual interest not for any financial or commercial gain who have expressed to themselves and to all third parties the terms of their association in their rules."*

23. After referring to the circumstances of that case, where a club member had been injured at a dance for which he had, like all present, whether members or non-members, paid a small admission fee, Gannon J. continued:

> *"The duty of care derives from the nature of the circumstances of the place and its use and the extent to which these, namely, place and circumstances, were under the control of the club. The responsibility for breach of that duty and the liability for the*

> *harmful consequences can attach to the club only as a matter of vicarious liability for the wrongful acts or defaults of an agent, whether member or servant. As a member the plaintiff shares equally with the other members the receipts from admission charges and the responsibilities for observing suitable standards of care."*

In effect, as summarised by McMahon and Binchy, *Law of Torts*, 4th ed. (Bloomsbury, 2013) at para. 39.12, Gannon J. found that a person cannot sue a club of which he or she is a member because one cannot sue oneself.

24. The judgment of Gannon J. has been followed by this Court (Carney J.) in *Kirwan v. Mackey* [1995] 1 JIC 1801. It has also been distinguished by Morris J. in *Walsh v. Butler* [1997] IEHC 9 as the plaintiff was not in fact a member, but that decision is not relevant here as the plaintiff concedes that he was a member at the relevant time.

25. It was submitted to me that the cases in England and Wales have developed a less restrictive approach and it was suggested that perhaps I might take that view. However, apart from the fact that the principle of comity means that I should, in view of the long-standing and settled nature of the jurisprudence, follow Gannon J., I do not in any event see any basis for departing from his view.

26. The English cases start with *Prole v. Allen* [1950] 1 All E.R. 476, which was clearly considered by Gannon J. as it is mentioned by him in his judgment (at p. 660). In fact, *Prole v. Allen* asserts a general proposition in the same terms as the judgment of Gannon J. Pritchard J. (at p. 477) stated that the plaintiff could not sue the defendant club of which she was a member because it owed her no duty of care. In fact, if anything, the reasoning of Gannon J. for coming to the same conclusion is more explicit in setting out the reason for this legal position. As Gannon J. pointed out, the club members are acting together for a common purpose and actions done by any one or more of the members are done on behalf of all, such that the members are vicariously liable for wrongful acts done to third parties *"to the extent*

that it corresponds with the common interest": see p. 661. That was undoubtedly the case here where the works being carried out were preparatory to the refurbishment of the clubhouse, an action clearly within the common purpose of the members of the Club, which included the plaintiff.

27. *Prole v. Allen* is authority for the proposition that there may be special circumstances where a person who happens also to be a member of the same club takes on an additional duty of care such that he or she can be sued. In that case, one of the members was also the steward who had a duty of care to the members to maintain the club premises in good and safe condition. However, he had closed the other stairwell, turned off the light on the only remaining stairwell, and had done so in circumstances where he was well aware that members would need to leave after a New Year's Eve party and where the remaining stairwell had been altered by recent works so that its layout was no longer familiar to members.

28. That is how *Prole v. Allen* was interpreted in *Huw Glyn Jones v. Northampton B.C.* [1990] EWCA Civ. J0515-12 where the Court of Appeal stated (at p. 26 of the transcript):

> *"[T]here is nothing in the case of* Prole *or in* Robertson v. Ridley *upon which can be founded a form of immunity available in law to one member of a club against a claim by another member of the club, being an immunity based merely upon their joint membership, if the claimant can demonstrate that, according to ordinary principles of law, the defendant member of the club was under a duty of care in respect of the circumstances which caused the claimant's injury and that the defendant was guilty of negligence."*

29. *Robertson v. Ridley* [1989] 1 W.L.R. 872 was a case where a member of a club had an accident on his motorbike, caused by a pothole on the club premises. The Court of Appeal firmly upheld the general position that club members are not owed any duty of care by the

club, that is, by the other members, in respect of the condition of club premises. *Glyn Jones* does not seek to depart from that position but found liability on the very specific circumstances of that case.

30. It is not so much, therefore, that the general position as stated in *Prole v. Allen* has been diluted in England and Wales, but that the fact that a member of a club cannot sue the other members does not confer any general immunity from suit and therefore does not prevent a club member from succeeding in an action against a fellow club member if, on the basis of evidence, facts are proven which support the imposition of a duty of care on another basis which has been recognised in law.

31. In general, however, where the circumstances in which the accident occur relate to club activity, it will not be possible to establish such liability. In particular, the mere fact that the alleged wrongdoer is a Committee member or has a lead role of some kind but was, nevertheless, still acting in accordance with the common interest of club members, that is, in pursuit of the interests of the club, would be insufficient to establish a separate duty of care of this kind. As Pritchard J. stated in *Prole v. Allen*, no additional duty is imposed on a fellow club member by reason of membership of the committee. This was reiterated in *Shore v. Ministry of Works* [1950] 2 All E.R. 228, which was applied in *Robertson v. Ridley*.

32. Nothing which would come close to establishing liability on an alternative legal basis has been proven here. It was suggested, but not proven, that Mr. Scanlon took a leadership role in relation to the voluntary works to be carried out on the roof. He sent out the text and may initially have suggested that these works would be done, but the evidence, so far as it goes, was that that was agreed to by the membership and participation by individual members was on an entirely voluntary basis. The fact that the message seeking volunteers may have been sent to non-members does not alter the clear legal position that the plaintiff, who was a member, is not owed a duty of care by the other members in connection with club activities.

Furthermore, it does not alter the fact that he was, along with other members, *"occupier"* of the premises in the same way that the plaintiff in *Murphy v. Roche (No. 2)* was one of the invitors, and not an invitee.

33. There was no suggestion, let alone evidence, that Mr. Scanlon had any special knowledge of risk (as the Court of Appeal accepted was the case in *Glyn Jones v. Northampton B.C.*). Indeed, even if he had, it would have to be shown that there were some circumstances which would make it reasonable in law for them to defer to his judgment rather than exercise their own. It must have been plain to everyone, for example, who participated in the roof works on the day that there was no scaffold or other protective measures.

34. On the contrary, the plaintiff gave evidence in this case that he had taken steps of his own initiative to assure his safety, such as by insisting that Mr. Scanlon check the slates for asbestos (which on examination was found not to be present). The evidence therefore is that, while Mr. Scanlon might have taken some kind of administrative lead in picking the time and date at which the works were to occur, and he might even have initially suggested that the project would take place, it was agreed to by the membership, who made a group decision to proceed. The plaintiff volunteered to join in the carrying out of the works and there is no evidence that he was in any way pressured into doing so. Indeed, he took such steps as he thought appropriate to assure his own safety and this indicates that he was exercising his own free will and judgment in participating.

35. In those circumstances, it does not seem that there is any basis for imposing liability on the defendants. The usual situation applies which is that the plaintiff, as a member of the Club, participated freely in a joint activity by the club membership which was done in pursuit of the common interest of the Club. Indeed, the plaintiff was, in his capacity as member, the "*occupier*" of the premises for the purpose of the 1995 Act, and he cannot sue himself.

36. This is also the legal position in Northern Ireland, as appears from the only case I have found on this issue which post-dates *Glyn Jones v. Northampton B.C.*, is *McKinley v. Montgomery* [1993] N.I. 93, where the Northern Ireland Court of Appeal found that the plaintiff, as a member of the defendant club, was entitled to enter onto club premises by virtue of her membership and was therefore not a *"visitor"* within the meaning of the Occupiers' Liability Act (Northern Ireland) 1957.

37. It should be noted that, in *McKinley v. Montgomery*, while approving the various statements in *Prole v. Allen* and *Glyn Jones v. Northampton B.C.* to the effect that the general position in law is that members of a club, including committee members, owed no duty of care to other members, but that liability could be established on an independent basis on *Donoghue v. Stevenson* principles, the Northern Ireland Court of Appeal found nothing in the evidence that would justify the imposition of any such liability.

38. Similarly, in this case, I find that the plaintiff, as a member of the GAA Club, was in occupation of the premises and was therefore an *"occupier"* of the Club premises rather than a "*visitor*" within the meaning of the 1995 Act. Furthermore, there was no basis established in evidence or indeed even suggested which would justify the imposition of an additional liability on any particular individual involved in the Club. Indeed, it is not clear how such an additional liability could be imposed insofar as defective premises are concerned given the provisions of s. 2 of the 1995 Act which makes it clear that the Act now provides the sole basis for establishing liability on occupiers of premises as such.

39. While the English and Northern Irish caselaw therefore leaves open the possibility that there may be cases in which, based on special circumstances falling outside the usual activities of a members' club and the usual activities of Committee members, liability can be established on general *Donoghue v. Stevenson* grounds, in imposing any such liability the courts would, I think, be bound in considering whether a duty of care existed or was breached

to have regard for the enormous social benefits of members' clubs across a wide variety of activities, enhancing the lives of people of all ages from young children to the very elderly. If liability were too readily imposed, people who otherwise volunteer their time might be dissuaded from doing so and this would be damaging to the social life and leisure pursuits of a very large proportion of the population.

40. I note that in *Wall v. National Parks and Wildlife Service* [2017] IEHC 85, this Court (White J.) expressly approved a variety of Irish, English and Scottish judgments which stressed that, in imposing a duty to take reasonable care, that duty would not be set too high if activity of social utility were thereby to be put at risk. In the cases cited, the acts of social utility ranged from having fire extinguishers readily accessible, and the maintenance of routes for outdoor activities, to community social occasions such as fetes, maypole dancing and other activities which are traditional in England.

41. Imposition of a duty of care in these circumstances would result in a chilling effect on a wide range of social and leisure pursuits, enjoyed by a very large proportion of the population. Unfortunately, there are examples, of which this is one, where the incident is regarded in law as an accident for which no one is responsible.

42. I must therefore dismiss the claim.