O'DOWD and Others v. SECRETARY OF STATE[1]

A

Criminal injury to persons—Remoteness—Nervous shock—Applicants' close relatives murdered—Applicants arrived at scene soon afterwards—Whether injury "directly attributable" to criminal offence—Criminal Injuries to Persons (Compensation) Act (Northern Ireland) 1968, (c. 9), s. 11(1).

B

Three close relatives of the applicants were murdered and another wounded in a shooting incident. The applicants arrived on the scene shortly afterwards and suffered nervous shock as a result. They applied for compensation under the Criminal Injuries to Persons (Compensation) Act (Northern Ireland) 1968, but their claims were dismissed both in the County Court and on appeal in the High Court. On a case stated to the Court of Appeal to determine whether an injury can only be considered as directly attributable to a criminal offence within the meaning of section 11(1) of the 1968 Act if the applicants were present at the scene of the crime at the time of the commission of the crime,

C

Held, that if a claimant is to succeed the criminal offence relied on must be the causa causans or the effective cause of the injury suffered. An act can be an effective cause (causa causans) of damage even if it is preceded, accompanied or followed by another act (whether negligent or not) of the injured party or a third party; whether the act complained of it is a causa causans is a question of fact and degree and should not be limited to the act which is the immediate cause of the injury.

D

The following cases are referred to in the judgment:

E

McGregor v. *The Board of Agriculture for Scotland* [1925] S.C. 613.
McGuigan v. *Pollock* [1955] N.I. 74.
McLoughlin v. *O'Brian* [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298.
Martin v. *Ministry of Home Affairs* [1979] N.I. 172.
Niland v. *Secretary of State* [1982] N.I. 181.
R. v. *Criminal Injuries Compensation Board, ex parte Clowes* [1977] 3 All E.R. 854.

F

R. v. *Criminal Injuries Compensation Board, ex parte Ince* [1973] 1 W.L.R. 1334 [1973] 3 All E.R. 808.
R. v. *Criminal Injuries Compensation Board, ex parte Schofield* [1971] 1 W.L.R. 926; [1971] 2 All E.R. 1011.
Stapley v. *Gypsum Mines Ltd.* [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478.

G

The following additional case was cited in argument:

Bourhill v. *Young* [1943] A.C. 92.

APPEAL by way of case stated from a decision of Gibson L.J. The facts appear sufficiently in the judgment of Lord Lowry L.C.J.

H

[1] In the Court of Appeal before Lord Lowry L.C.J., Jones and O'Donnell L.JJ.: June 28, 29, 1982.

T. V. Cahill Q.C. and *J. A. Gallagher* for the appellant.
A *R. D. Carswell Q.C.* and *F. E. P. O'Reilly* for the respondent

Cur. adv. vult.

LORD LOWRY L.C.J. These appeals by way of case stated from a decision of Gibson L.J. arise out of a ghastly act of terrorism perpetrated at the home of Bernard O'Dowd, 47 The Slopes, Ballyduggan, Portadown, as a result of
B which each of the appellants suffered an injury commonly known as nervous shock.

The questions posed for the opinion of the Court are—

(i) Whether under the provisions of the Criminal Injuries to Persons (Compensation) Act (Northern Ireland) 1968 an injury can only be considered as directly attributed to a criminal offence if the applicant
C for compensation was present at the scene of the crime at the time of the commission of the crime and was directly injured physically or was injured mentally or emotionally by personal perception of the crime;

(ii) if the answer to question (i) is No, whether the appellants or any of them, and if so which, are on the facts proved or admitted in evidence entitled to compensation under the Act.

D

The facts, so far as relevant, are as follows:

In the early evening of 4 January 1976 Bernard O'Dowd's family was preparing for an annual family gathering and meal which was habitually held at Bernard's home on the first Sunday of the year and to which Bernard's brother and the brother's family were invited.

E Two masked gunmen invaded the house at 6.30 p.m. and shot all the male adults who were there, namely Bernard, his two sons, Barry and Declan, and a brother of Bernard, known as Uncle Joe. Bernard was seriously injured but has since recovered. All the others were killed instantly.

The applicant Noel Patrick, a son of Bernard aged 22, was at mass. He returned home shortly after the murders and was met at the door by
F his mother who had been in the house but had not been shot. She, in distress, told Noel to go for his Uncle Frank, "as his father and them have all been shot dead."

Uncle Frank, another brother of Bernard, lived about a mile away. Noel went there immediately. In his uncle's house were his uncle and Noel's two younger brothers, the applicants Peter Loughlin, then 17
G years, and Ronan Mary, then 16 years.

All four returned immediately to the scene of the shooting where they saw the bodies of Uncle Joe, Barry and Declan and also saw Bernard, now conscious lying in the hall.

The fourth applicant is Joseph Damien O'Dowd, a son of Uncle Joe. He was at the time of the shooting in his own home about three miles away, but was told of the shooting very soon afterwards after it happened
H and hurried to the house, where he saw that his father and two cousins had been shot dead and his uncle seriously injured.

Each of the applicants as a result of what he saw and heard and as a

consequence of the terrible circumstances in which so many near relations died has suffered considerably. Not only have there been the inevitable grief and sorrow, but each applicant has suffered shock and other emotional results on account of the scene which met his eyes and the memory of it. Each was also for a time incapacitated for work and the special damage sustained by the three who suffered loss had been agreed.

Each applicant claimed compensation under the 1968 Act alleging that he had sustained a criminal injury. Section 11(1) of the Act defines a criminal injury as—

"An injury (including an injury which results in death) directly attributable to—

(a) a criminal offence; or
(b) the lawful arrest or attempted arrest of an offender or suspected offender, or to the prevention or attempted prevention of an offence, or to the giving of help to any constable who is engaged in arresting or attempting to arrest an offender or suspected offender or in preventing or attempting to prevent an offence.

It also provides that "injury" means actual bodily harm and includes pregnancy and mental or nervous shock.

The learned county court judge dismissed the claims, as did Gibson L.J. on appeal, and, with a view to deciding whether the dismissal of the claims was right in law, the question for us is whether the injuries sustained by the appellants, by way of mental or nervous shock, were *directly attributable* to the shootings. It is common case that the answer must be found in the meaning to be given to the words "directly attributable to" in section 11(1).

Mr. Cahill, who with Mr. Gallagher, appeared for the appellants in this Court and in the court below, propounded a clear, short and simple case which was designed to establish the propositions (1) that an injury *directly attributable* to a criminal offence was one of which that offence was a *causa causans* (or effective cause) as distinct from a *causa sine qua non,* and (2) that the shootings in this case were the effective cause, or at least *an* effective cause, of the injuries sustained by the appellants.

For this argument he sought and gained powerful support from four sources:

(1) a learned article in the *Northern Ireland Legal Quarterly* 1981 (Vol. 32, No. 3, page 264) by that very fine lawyer, His Honour, Judge Johnson, Q.C., a distinguished county court judge from 1947 until his retirement in 1978 (which Mr. Cahill adopted as part of his argument and to which I will refer);
(2) a decision of this Court (Lord MacDermott, L.C.J. and Jones J.) on the meaning of the words "directly attributable" in the definition which we are now discussing, given in 1970 and now reported at [1979] N.I. 172 *Martin* v. *Ministry of Home Affairs*.
(3) three decisions of the English Courts on the meaning of "directly attributable" in the context of the Criminal Injuries Compensation Scheme:

R. v. *Criminal Injuries Compensation Board, ex parte Ince* [1973] 1 W.L.R. 1335; 3 All E.R. 808.
R. v. *Criminal Injuries Compensation Board, ex parte Schofield* [1971] 2 All E.R. 1011.
R. v. *Criminal Injuries Compensation Board, ex parte Clowes* [1977] 3 All E.R. 854; and

(4) The recent decision in the House of Lords on liability for damages for "nervous shock" in *McLoughlin* v. *O'Brian* [1982] 2 W.L.R. 982; 2 All E.R. 298.

Mr. Carswell, who with Mr. O'Reilly appeared for the respondent, presented an equally clear and concise submission which, however, was not based on the authorities and was, perforce, less direct in its approach. His principal theme was that the Court, having regard to the dictates of public policy, should find a way of interpreting the words "directly attributable" so as to set limits to the ambit of both claimants and situations which could in law attract an award of compensation; otherwise, he argued, the area of compensatability would be indefinitely and unacceptably extended. And, when asked where, on this basis, the limits to compensation must be set, counsel submitted, not unreasonably, that the bounds defined in the court below were consistent with authorities in the similar field of damages for nervous shock allegedly caused by negligence and that those bounds represented the most logical stop-line.

But, bravely though Mr. Carswell has resisted the inexorable advance of the appellant's case, I entertain no doubt that Mr. Cahill's contention must prevail, buttressed as it is by authority on every side. Accordingly, I approach the question at issue by way of his supporting arguments.

First of all, just as Mr. Cahill adopted Judge Johnson's article as part of his argument, I am equally content to adopt it as part of my reasoning for the purpose of this judgement. The article is available to be read in its entirety and to paraphrase it would be an idle exercise. Of necessity, I am bound to repeat some of the salient points, as I steer my way through well-charted territory.

Martin v. *Ministry of Home Affairs supra* is a binding authority of the meaning of the vital words "directly attributable". In that case the court held without equivocation that, if the claimant is to succeed, the event relied on (which was there the arrest of an offender and is here the shooting) must be the *causa causans* of the injury. Both members of the Court relied on that phrase, in contrast to *cause sine qua non* as the true reciprocal expression of "directly attributable". Both also relied on *MacGregor* v. *The Board of Agriculture for Scotland* [1925] S.C. 613 where Lord Alness Lord Justice Clerk, spoke (page 620) of the "effective or immediate cause" and also of the *causa causans* in contrast to the *causa sine qua non*. Elsewhere (page 623) Lord Anderson speaks of "the immediate cause of the loss—the *causa causans*". It is therefore clear from the language used, as well as from the facts of the case, that the learned Judges of the Second Division were, consistently with the language appropriate to the law of tort, speaking of the effective cause and not, in principle, confining their outlook to the "immediate" cause, as meaning the proximate cause with no act intervening between the *causa causans* and the damage.

The three English decisions on compensation speak for themselves without the need of further analysis, and, even if the matter were more doubtful than I consider it to be, there would be merit in following the statutory interpretation adopted by the English Courts in the same field: per Black L.J. in *McGuigan* v. *Pollock* [1955] N.I. 74, 107.

Ex parte Ince supra is, indeed, dealt with at some length in the very helpful and interesting judgment of Hutton J. in *Niland* v. *Secretary of State* [1982] N.I.J.B. No. 3, and I respectfully agree with the learned judge that there is no conflict in principle between *Ince's* case and *Martin's* case. I also endorse and adopt his remarks on the *causa causans*, the "immediate cause" and the chain of causation and his further observations on the attempts which judges have made from time to time in the realm of tort to reconcile the logic of causation with a policy of "drawing the line".

This brings me naturally to *McLoughlin* v. *O'Brian* supra, in which the House of Lords has reversed the Court of Appeal since the delivery of all the judgments noticed above and since the publication of Judge Johnson's learned article. I resist the temptation to comment at length on the interesting and thought-provoking speeches of their Lordships: the main point for present purposes is that, even at common law (where the need to prove foreseeability and the possible resort to public policy considerations confront a plaintiff in a way in which they cannot obstruct a criminal injury claimant) the need for the claimant's initial presence at the scene of the disaster in nervous shock cases has been consigned to the lumber room of rejected legal fallacies. Mr. Carswell, while relying on parts of *McLoughlin's* case for public policy support, very fairly agreed that it would be unreasonable (supposing he could persuade the court to throw a protective mantle of policy round the present respondent) to put the present appellants in a more difficult position than the plaintiff in *McLoughlin*.

When discussing causation it is natural and also, I believe, sound to seek guidance from the branch of our jurisprudence in which it has been exhaustively considered both by judges and by academic writers. I come back to the classic observation of Lord Reid in *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C., 663, 681:

> "If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it. 'A jury would not have profited by a direction couched in the language of logicians and expounding theories of causation, with or without the aid of Latin maxims'. *Grant* v. *Sun Shipping Co. Ltd.* [1948] A.C. 549 per Lord du Parcq. The question must be determined by applying common sense to the facts of each particular case."

I note with interest the pluperfect tense used by Lord du Parcq in speaking of the jury, since for us the proper choice of words to instruct them, preferably without the aid of Latin maxims, remains a live problem. The need to undertake this task, however, serves to remind a judge of the difference between a proposition of law and a question of fact, such as the difference between a *causa causans* and a *causa sine qua non*.

Without further burdening this judgment with examples of reported cases, it is safe to say that an act can be an effective cause (*causa causans*) of

damage, even if it is preceded, accompanied or followed by another act (whether negligent or not) of the injured party or a third party: whether the act complained of *is* a *causa causans* is a question of fact and degree. There will, admittedly, be a few occasions on which there is only one reasonable answer to that question, one way or the other.

I come back now to Mr. Carswell's invitation to limit the ambit of compensatability. This seems to me to involve treating a *causa causans* as if it were not one, contrary both to logic and to the binding authority of *Martin* v. *Ministry of Home Affairs* supra. And, even if we could do this, I can discover from the langauge of the legislation no criterion by which to decide what is the limit to be imposed on the meaning of the words "directly attributable". If a limit is to be prescribed, it must therefore be devised by Parliament and not guessed at by the court. The test imposed by *Martin*, and readily accepted by me, may create difficulties on occasion, but it is one which is known to and practised by our law.

Already I have by implication dealt with most of the matters arising on the careful judgment appealed from, but it is my duty to take express notice of one point which appears to be central to the decision. Speaking of *Martin's* case and *MacGregor's* case, the learned Lord Justice said:

> "It seems clear that an injury is only to be regarded as directly attributable to a crime if it is the immediate consequence of that crime. Where it not so, one might have been tempted to be sympathetic to the view that provided the chain of causation in any case is unbroken and in that sense the result is directly attributable to the cause though it is not the immediate cause it might be regarded as being within the meaning of the statute. I think it must be taken as implicit from the judgments in *Martin's* case that the Court rejected this and the more generous interpretation given in England to the phrase 'directly attributable to', as for example in [*Ex parte Ince*]."

I respectfully consider that this view owes much to earlier nervous shock decisions in both fields and that there is no warrant for giving the expression *causa causans* in *Martin's* case the narrow interpretation which this part of the judgment seeks to do, nor can I see what artificially narrow meaning could plausibly be chosen by a court for this ordinary and well-known legal term.

I would therefore answer question (i) "No".

I have experienced more difficulty with the answer (or "answers", to be precise) to the second question. Having regard (1) to the general tone of Gibson L.J.'s judgment, (2) to the fact that one is looking to causation and not to foreseeability and (3) to the new fact that the House of Lords has decided *McLoughlin* v. *O'Brian* in favour of the plaintiff, I concede that Mr. Cahill has a strong case for saying that there is only one reasonable answer to the question of causation: once you have disposed of the fallacy that the claimant has to be present when the crime is committed and the injury is then and there sustained by personal perception, then, it may be submitted, the claimants here *must* win. All the same, I would prefer to follow the procedure in *Ex parte Ince* and, having established the true legal basis, remit the case for the learned Lord Justice to decide, as a fact, whether the shootings have been shown to be the effective cause of the injuries in each case and, if

so, to assess the compensation. This course seems, on general principles, best calculated to preserve the distinction between the legal principle, on the one hand, and the ultimate factual decision, on the other.

JONES L.J.

I entirely agree and have nothing to add.

O'DONNELL L.J.

I also agree.

Order accordingly.

Solicitors for the appellant: *J. F. McEvoy & Co.*
Solicitor for the respondent: *Crown Solicitor.*

P.S.G.