An Chúirt Uachtarach
The Supreme Court

Denham CJ
O'Donnell J
McKechnie J
MacMenamin J
Dunne J
Charleton J
O'Malley J

Supreme Court appeal number: 2016 no 000024
[2017] IESC 000
Court of Appeal record number: 2014 no 298
[2015] IECA 287
High Court record number: 2011 no 3819 P
[2014] IEHC 235

Between

Úna Ruffley
Plaintiff/Appellant

- and -

The Board of Management of Saint Anne's School
Defendant/Respondent

Judgment of Mr Justice Peter Charleton, delivered on Friday 26th of May 2017

1. Of itself, bullying is not a tort. That obnoxious perversion of the ordinary human duty of give and take may, nonetheless, give rise to tortious liability. No overall theory of what constitutes a tort has yet emerged from the apparently random declaration of individualised wrongs that mark out the parameters of this area of law. Generally it is because people are expected to behave in a particular way in relation to matters under their control, or are required to organise their affairs so as to avoid harming others, or have a responsibility fixed at law towards those who act on their behalf, which mark out the individual principles upon which a series of disparate civil wrongs are based. As Professor Winfield in *The Province of the Law of Tort* (Cambridge, 1931) put the matter at page 32:

> Tortious liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

2. Crime and tort had a common origin in the taking charge by an increasingly ordered society, through its judicial system, of private retribution for personal wrongs. In the formation of such rules defining liability, people were instructed through individual decisions as to how the rule of law would both replace individual reaction and place into the category of a wrong any attempt at repayment of one wrong by another. Historically, this began by giving civil as well as criminal remedies for wrongs to the person and this was later extended to a person's reputation. The development of tort law has been piecemeal. Prior to the decision in *Rylands v Fletcher* (1868) LR 3 HL 330, issues as to the use or abuse of land were more properly an aspect of the duties and responsibilities of servient and dominant interests. Interference with contractual relations emerged out of the decision in *Bowen v Hall* (1881) 6 QBD 333, perhaps because in some circumstances it would be unjust to answer a claim of wrong with a no privity defence. In reaction possibly to the balance of influence as between the interests of society and the representation of employees, intimidation was recognised as a tort in *Rookes v Barnard* [1964] AC 1129. Whereas up to *Donoghue v Stevenson* [1932] AC 562, negligence was an element of tortious liability, thereafter it became a defined aspect of an overarching wrong subject only, it appears, to public policy limiting its application. So much did the tort of negligence apparently emerge as the answer to every plaintiff's needs, pleaded as it has been as an alternative to every other defined wrong, this Court had to warn in the majority judgments in *Cromane Seafoods v Minister for Agriculture, Fisheries and Food* [2016] IESC 6 that this tort has not dissolved the existing definitions of other wrongs or submerged them.

Inflicting illness by manipulating emotion

3. It was with the decision in *Wilkinson v Downton* [1897] 2 QB 57 that a joke in very bad taste, leading to the unfortunate plaintiff almost losing her reason and suffering obvious physical effects, could give rise to liability. A practical joke is of its nature designed to cause at least momentary amazement, if not shock, but, as in that case, it can go too far: so far that the law must find a remedy. Hence, as Professor Heuston comments at pages 32-33 of the classic 17th edition of *Salmond on the Law of Torts* (London, 1977):

> The law of torts is not a static body of rules, but is capable of alteration to meet the needs of a changing society. One word of warning should be added. It is often rather hastily assumed that any desirable alteration in the law of torts must result in the expansion of the field of liability. But social needs may require contraction as well as expansion. Thus it can hardly be doubted that the courts have been justified in refusing to introduce new heads of tortious liability to enable a witness to be sued for perjury, or conspiracy to defame. Again a tort may be invented or discovered only to have little use made of it. So for a century little has been heard for excluding the plaintiff from a public office to which he is legally entitled.

4. No overall theory has emerged as to why the courts should develop a tort. In our system, it may be because a wrong under the Constitution has been committed, but only where no existing remedy will provide redress; as in *Meskill v CIÉ* [1973] IR 121. Professor Fleming

instances moral wrong as the foundation for liability in tort, morphing into the principle that there should be no liability without fault; C Sappideen and P Vines (editors), *Fleming's the Law of Torts,* (10th edition, Sydney, 2011) at paragraphs 1.40-1.50. Professor Heuston comments that reasonable foresight has not come to be used as the overarching principle which it was once thought to be, while public policy has had a restraining influence in addition to the traditional analysis of the conduct of the defendant and the legitimacy of the interest of the plaintiff; see *Salmond on the Law of Torts*, cited above at page 33.

5. As O'Donnell J remarks in the principal judgment, the range of the expansion of tort liability and its extension into relationships at a distance from the conduct found to be at fault is part of the scheme of the law to order society. It is only on a careful analysis of the balance of not only where legitimate activity should be protected, but also where those who suffer in consequence of the wrongs of others should be compensated, that decisions as to redress for civil wrong develop. Hence, usual dangers such as flooding are tolerated in the tort of the escape of dangerous things; but the building of a repository for toxic gas will lead to a different decision on liability. Making a joke is socially acceptable, and bad taste is tolerated, but sending a person into immediate distress to the detriment of their long-term health is not. Commenting negatively on those who enter willingly into the discourse of public life is different to factual but inaccurate statements about those same individuals under the law of defamation. Whereas vulgar abuse is unpleasant, it is only actionable where it assumes the shape of an assertion of fact which takes away another's character.

6. In considering, therefore, any extension of the law on negligent or intentional infliction of harm into the workplace, decisions must be informed by what has so often been said in the context of family disputes: that men and women are to be judged with the appropriate measure of appreciation for human nature and that, hence, conduct is be judged according to the standard of human beings, and not of angels.

7. There are two strands of potential liability for a plaintiff to employ against a bully. Firstly, conduct may be so egregious, deliberate and malicious as to engage the rule in *Wilkinson v Downton,* cited above. In so far as there may be a debate as to whether corporate bullying is a separate tort, this first strand of liability seems to provide the answer. For an employer to persistently and repeatedly engage in unnecessary and nasty conduct over an appreciable time outside the ordinarily tolerated range of correction or discipline necessary in the workplace, in such a way as to undermine the employee's dignity, so that coming to work becomes not merely difficult but dreaded, according to the standards of robust human reaction, is to engage that tort where organic depression or other physical illness is the consequence. The standard has to be set at a level where giving advice, telling people off, temperamental reaction or emotional interaction is not allowed to disrupt the duty of managers to see that work is done, and the entitlement to healthy satisfaction that actually justifying one's wages represents. In this context, joining in an unacceptable standard of conduct may engage an employer in the intentional infliction of harm.

8. That line of liability, however, does not seem to be one which has been analysed to a plaintiff's success in any written decision concerned with bullying to date. Most probably that is so because the tort retains an intentional element which most often may be inferred from the evidence, if it is not otherwise admitted, perhaps in an internal workplace email, but where, as in the original case, the conduct carries obvious connotations. The analysis in the

various judgments of the Supreme Court in Britain in *Rhodes v OPO* [2016] AC 219 also indicates a debate as to the precise elements of this tort. In that and in other English cases, there has been doubt cast on the definition provided in *Salmond and Heuston on Torts* (21st edition, London, 1996) at p 215, which provides that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress, provided that bodily harm results from it". The principle, however, must remain that an individual who, through utterly unacceptable conduct, deliberately distresses another to the point where they suffer a recognised psychiatric condition, is liable in damages.

9. In the United States of America, the application of the tort of intentional infliction of emotional distress in the employment context has confined liability. The elements of this tort are set out in *Womack v Eldridge* 215 Va 338, 210 SE 2d 145 (1974) at para 28:

> [A] cause of action will lie for emotional distress, unaccompanied by physical injury, provided four elements are shown: One, the wrongdoer's conduct was intentional or reckless. This element is satisfied where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result. Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a causal connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.

10. In *Law of Torts* (4th edition, New York, 1971), Prosser comments at p 56 that so far "as it is possible to generalise from the cases", liability will only be established on the basis of "conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." In *Earl v HD Smith Wholesale Drug Co*, 2009 WL 1871929 (CD III June 23, 2009), it was acknowledged at p 4 that courts will "recognise a workplace claim for intentional infliction of emotional distress only in the most extreme circumstances."

11. The second strand of potential liability is that which protects employees from harm in the workplace. An employer is obliged to take reasonable care to protect employees from injury. That duty however is not absolute; it is not that of an insurer. The duty is to remove risks which can be removed, to train employees for the workplace tasks and to organise the workplace in such a way as injury may be avoided. Employees have a duty to take care but, generally in workplace accidents, it is usually not an absence of care or training by an employer which establishes liability, but instead carelessness imputed to the employer through vicarious liability in an action where one employee causes injury to another. Injury can be caused by bullying.

12. In New Zealand and in Australia, the law is based on the general safety of employees and the duty of employers to secure it. Necessarily, the conduct whereby a recognised psychiatric illness will attract damages, if shown to have been caused by conduct at work, has been restricted. In *Attorney-General v Gilbert* [2002] 2 NZLR 342, the Court of Appeal held at para

72 that general legislation providing for safety at work makes "no distinction between physical, psychiatric or psychological illness or injury." At para 83, the court consequently held that the employer must take reasonably practicable steps to ensure that employees do not suffer from psychological harm resulting from workplace stress:

> An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

13. This exercise involves a court reconstructing what an employer ought to have known at the time when repeated actions by fellow employees were undermining the plaintiff's dignity at work. That is a traditional tort exercise. In *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15, the Australian High Court held at paragraph 35 that "the relevant duty of care is engaged if psychiatric injury to the *particular* employee is reasonably foreseeable". As a result, the "central inquiry remains whether, in all the circumstances, the risk of a plaintiff ... sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful." As Hayne J put it in *Vairy v Wyong Shire Council* [2005] HCA 62 at paragraph 126, when a plaintiff makes a claim for damages for personal injury caused by the defendant's negligence, the court becomes engaged in an inquiry into "breach of duty", hence the court "must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered." What this involves is an "attempt, after the event, to judge what the reasonable person *would* have done to avoid what is now known to have occurred." Conduct giving rise to liability in that jurisdiction seems to be of an extreme kind.

14. In *Naidu v Group 4 Securitas Pty Ltd* [2005] NSWSC 618, the plaintiff was a security operative, assigned to a TV news channel, and later became the defendant's assistant, the defendant being the news channel's security and fire manager.. In this role, the defendant subjected the plaintiff to racist and demeaning name-calling, aggressive and threatening communications, indecent sexual acts, sexual harassment, and directed him to work unpaid hours which cut his sleep to unsustainable levels. The plaintiff was threatened on multiple occasions that he would lose his employment if he did not accede to his manager's requests. The manager also said he would kill the plaintiff and repeatedly threatened his life if he told anyone about the indecent sexual acts and other bullying behaviours. The manager also threatened him with physical violence and subjected him to racial abuse, requiring him to work on Saturdays at the his property, work for which the plaintiff was not getting paid. The New South Wales Supreme Court found that the plaintiff's employers owed him a duty of care and that the treatment of the plaintiff amounted to workplace bullying, to such an extent that Adams J found that it was "reasonably foreseeable that such illness might well result from the infliction of that conduct upon the plaintiff". He described the behaviour of the defendant, the manager, at paragraph 17 as "so extreme" that "he well knew, or would have known had he reflected as a reasonable man should have" that the result of what the judge described as prolonged misconduct "could reasonably be expected to expose him to the real risk of such psychological injury."

15. In this jurisdiction, the High Court has correctly emphasised in a series of decisions that what is involved in bullying as a compensatable wrong is a breach of the standard of care owed by an employer to employees; see *Sweeney v Ballinteer Community School* [2011] IEHC 131, *Kelly v Bon Secours Health System* [2012] IEHC 21, *Nyhan v Commissioner of An Garda Síochána & Ors* [2012] IEHC 329 and *Browne v Minister for Justice, Equality and Law Reform* [2012] IEHC 526.. An employer has a general duty of care towards their employees. In McMahon & Binchy's *Law of Torts* (3rd edition, Dublin, 2000) at paragraph 18.80, the authors state that:

> An employer may be personally liable for sexual harassment or bullying of an employee, either on the basis that the employer ought to have been aware of the offending employee's propensity to act in this way or on the basis of an unreasonable failure to provide a safe system of work.

16. In the 4th edition (Dublin, 2013), it is correctly stated at paragraph 18.80 that:

> There is no distinctive tort of bullying or harassment. The question is to be resolved in the context of employers' liability, by asking whether the employers took reasonable care not to expose the plaintiff to the risk of injury from such conduct. The answer will depend in large part on what facts ought to have been known to the employer. Naturally, matters are different where the plaintiff's claim is that he or she is the victim of 'corporate bullying', where the allegation is that the management of the enterprise is implicated in the bullying activity. Such claims have succeeded in some recent cases, and failed in others.

17. With regard to forming the elements of a tort of wrongful conduct that embraces workplace bullying, the common law in Ireland has not developed through judicial decision according to necessity and justice but instead has been subject to an intervention in the shape of section 5 of the Industrial Relations Act 1990 (Code of Practice Detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002 (SI No 17 of 2002). This defines workplace bullying as "repeated inappropriate behaviour", which may be "direct or indirect, whether verbal, physical or otherwise" engaged in by an individual or a group against the plaintiff at their workplace and which "could reasonably be regarded as undermining the individual's right to dignity at work." Whereas under the strand of tort liability derived from *Wilkinson v Downton*, an isolated but sufficiently grave incident from which intention to cause severe distress may suffice if psychiatric injury results, bullying is by its nature a repeated activity. A consideration of workplace codes of practice from other jurisdictions tends to reveal the same elements – behaviour completely beyond the tolerable, that undermines dignity at work, and which is repeated so that it forms a pattern which genuinely undermines a person's ability to come to work and serve in his or her position.

18. Whether the courts were obliged, pursuant to the statutory mechanism under which this code of practice was established, to accept this definition has not been argued in this case. In the light of the relevant case law, this seems beside the point. The definition was accepted by the High Court in *Quigley v Complex Tooling and Moulding Limited* [2009] 1 IR 349, where the plaintiff claimed that he had been a victim of workplace bullying by his manager, which allegedly resulted in mental distress and psychiatric injury. The plaintiff was awarded damages. In the Supreme Court, the award of damages was overturned on the basis that

causation of the plaintiff's depression had not been proven to have resulted from the bullying, but was rather ascribable to him having lost his job when the factory went out of business. At paragraph 15, Fennelly J, however, accepted the code of practice definition and described what the plaintiff had been subjected to as "a unique amalgam of excessive and selective supervision and scrutiny … unfair criticism, inconsistency, lack of response to complaint and insidious silence."

19. The test requires all of the elements to be fulfilled. It should be considered sequentially. It is objective. Not subjective. It cannot be right to formulate liability on the basis of how people see the conduct of their colleagues in the workplace, but instead only on the basis of how that conduct would be objectively viewed; see *Glynn v Minister for Justice, Equality and Law Reform & Ors* [2014] IEHC 133 at paragraph 54. An employer is entitled to expect ordinary robustness from its employees; *Croft v Broadstairs and St Peter's Town Council* [2003] EWCA Civ 676. Correction and instruction are necessary in the functioning of any workplace and these are required to avoid accidents and to ensure that productive work is engaged in. It may be necessary to point to faults. It may be necessary to bring home a point by requesting engagement in an unusual task or longer or unsocial hours. It is a kindness to attempt to instil a work ethic or to save a job or a career by an early intervention. Bullying is not about being tough on employees. Appropriate interventions may not be pleasant and must simply be taken in the right spirit. Sometimes a disciplinary intervention may be necessary. In *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, the Court of Appeal in England and Wales considered a disciplinary procedure which was alleged to have resulted in the plaintiff suffering from depression. Underhill LJ noted at paragraph104:-

> It is a normal characteristic of the employment relationship that employees may be criticised by the employer and sometimes face disciplinary action or other such procedures. And in an imperfect world it is not uncommon for such criticism or disciplinary process to be flawed to some extent: there will be a spectrum from minor procedural flaws to gross unfairness. The message of *Croft* is that it is not usually foreseeable that even disciplinary action which is quite seriously unfair will lead the employee to develop a psychiatric illness unless there are signs of pre-existing vulnerability.

These facts

20. In every respect, and by ordinary human standards, the school authorities were at fault in their treatment of Úna Ruffley. She was a valued special needs assistant. By no standard could it have been expected that she would have subjected any of the children in the school to any form of ill-treatment. As there is no full transcript before the Court, it has not been possible to work out whether the door which was locked on the 14th of September 2009 incorporated a glass panel. Most school doors do but this, apparently, was a storage room called into action due to pressure for space. She was worried about the child running from the room, and the evidence was that he had that propensity, and chose a remedy which was contrary to the not very well publicised school policy; that a child and a teacher should not be behind a locked door. Had the child bolted out the door and perhaps escaped into the street, it is possible that there could have been either disquiet or injury. Then there would really be need for an inquiry. Other people, completely responsible people, had locked the door in these circumstances. Once the informal survey conducted on her behalf disclosed

that her offence was not unique, and that is what the survey did, any attempt at disciplinary action against her should have come to a complete stop. It was then the responsibility of those in charge to acknowledge, and this does not require any formal process, that there was a fairly widespread practice of teachers and special needs assistants locking themselves into a room with children: and that because this could expose them to false claims or could frighten the children, this practice should immediately stop. Thereafter, but only thereafter, a breach of that policy might become serious.

21. In the age of judicial review, disciplinary procedures are necessarily subject to procedural infirmity and may fail due to the principles which are so ingrained in lawyers, being alien to those who are engaged in administration or education. It is also well to take into account the degree to which emotion on both sides may have influenced what has gone wrong here. O'Donnell J is correct to call paragraph 48 of the judgment of ÓNéill J into question. While in most circumstances, this could be regarded as coming within the principle set out in *Hay v O'Grady* [1992] 1 IR 210 at page 217, being that inferences of fact drawn from witnesses should be treated by appellate courts with especial respect; in reality other explanations were reasonably forthcoming for what had occurred. These include emotional reaction, worry about possible claims and genuine concern for the children. People in such circumstances do not need to have their emotions whipped up but perhaps an equal explanation is that the school board just became overwrought.

22. In all of this, instead of sensibly stepping back, the school authorities allowed the juggernaut of disciplinary action to continue in an unfair fashion and this included an incident where no closure was brought to matters and where one particular meeting was fraught with emotion of an unpleasant kind directed against Úna Ruffley.

23. What is involved here was a disciplinary process where the school authorities, for reasons best known to themselves, entrenched themselves in a dugout of justification whereby they could admit no fault. This is not bullying. The conduct was not at that extreme and repetitive level. It is, instead, a disciplinary process that has gone wrong. It must clearly be acknowledged, however, that the reason that it went wrong had nothing to do with Úna Ruffley but was entirely down to a lamentable failure to rethink by the school.

24. The consequence of this has been obvious emotional distress caused to someone who should otherwise have been valued. Her contribution to the education of those with learning difficulties should be acknowledged by the Court. The school should acknowledge that it was in the wrong and Úna Ruffley should be encouraged to return to her duties. There has been enough litigation about this matter and this part of it is not at all to the credit of the school in any way.

Costs and discretion

25. Not every wrong, even one which results from unfair or unfortunate circumstances, gives rise to a cause of action. Given that the test for bullying is of necessity to be set very high, these are not circumstances which can attract damages. There are, however, circumstances under which the discretion of the court in relation to costs under Order 99 of the Rules of the Superior Courts can enable an acknowledgement that extreme circumstances have occurred. This can result in, and could reasonably be argued to mean

here that, the costs of the litigation in the High Court and in the Supreme Court being awarded to the losing party. The circumstances that might justify this, in this one exceptional instance, also include that the relevant law has been clarified by the litigation in a manner which would be of benefit to existing and future cases and to insurers, none of whom can claim, in consequence, this exceptional circumstance. It is also rare for a court to come across an instance where one side is completely at fault, but fails to acknowledge any such failing even in the context where ÓNéill J was required to make particularly trenchant findings of fact.

26. The issue as to costs requires separate consideration, but by no sensible reckoning was this litigation complex. This was an ordinary tort case involving the resolution of straightforward facts: was a door locked, why was it locked, was it a breach of procedures to lock the door, was the plaintiff the only person to lock the door while inside with a child, how would school authorities ordinarily react to such a minor breach of procedures, was it necessary to invoke a formal investigation and reprimand, was a disciplinary note justified, should that have been backed away from once the facts became clear that it was not just Úna Ruffley who had made that understandable mistake, what happened at the meeting of the school board, and what happened on the various occasions when the plaintiff and the school authorities met? In terms of discovery, it is hard to see more being involved than the gathering of internal human resources management and disciplinary files together with a trawl of relevant emails. In the light of whatever submissions are made as to the principal judgment of O'Donnell J and this judgment, the costs issue and the final form of the order should then be decided.