

APPROVED

[2022] IEHC 227



THE HIGH COURT

2015 No. 4250 P

BETWEEN

DECLAN HYNES

PLAINTIFF

AND

KILKENNY COUNTY COUNCIL
LEO HOGAN

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 April 2022

INTRODUCTION

1. The principal judgment in these personal injuries proceedings addresses the amount of general damages payable to the Plaintiff: *Hynes v. Kilkenny County Council (No. 1)* [2022] IEHC 226. This supplemental judgment addresses a net issue in respect of special damages. The issue is whether the Plaintiff is entitled to recover, by way of damages against the Defendants, a sum equivalent to that received by the Plaintiff from his employer in respect of sick pay. If recoverable, this sum would be reimbursed to the employer. Put otherwise, does the fact that the Plaintiff had a contractual right to sick pay under his terms and conditions of employment have the consequence of *reducing* the amount of damages which

NO REDACTION REQUIRED

the party causing the personal injuries would otherwise be required to pay by way of damages.

2. It should be emphasised that the compass of the dispute between the parties on this issue is very narrow. The parties accept that—absent an enforceable obligation on behalf of an injured party to reimburse their employer—any amount received by an injured party from their employer by way of sick pay must be deducted from the claim for loss of earnings against a third-party wrongdoer. The controversy between the parties centres on whether the Plaintiff in the present case is under an obligation to reimburse the cost of the provision of sick pay to his employer.

OVERVIEW OF RECOVERABILITY OF COLLATERAL BENEFITS

3. It may be of assistance to the reader in understanding the discussion which follows to pause briefly, and to frame the dispute in its wider context. An injured party, who has been unable to work for a period of time as a result of their injuries, will generally be entitled to recover loss of earnings as part of their personal injuries action. The extent of the loss of earnings will, of course, depend on whether the injured party is entitled to sick pay under their terms and conditions of employment. The actual loss suffered will be the difference, if any, between (i) the amount of earnings which the injured party would have received had they been able to work and (ii) the amount of the sick pay received. Where, as in the present case, generous provision is made for sick pay in the relevant contract of employment, this has the potential to reduce, by a significant sum, the amount of damages which the respondent to the personal injuries action

is required to pay. On the facts, the employer had paid a sum of €40,833.02 (gross) in respect of sick pay.

4. Approaching the matter from first principles, a respectable argument might be made that the employer should not have to subsidise the wrongdoer by bearing the economic cost of the injured party being unable to work as a result of personal injuries caused by the wrongdoer. In particular, it can be argued that the wrongdoer should not be able to rely on the happenstance of the existence of a contractual right to sick pay to avoid having to compensate for one of the direct effects of its wrongdoing, i.e. the inability of the injured party to work for a period of time because of his injuries. (Different considerations will apply in the case of a workplace accident where the employer is the wrongdoer).
5. The principle that a wrongdoer should reimburse the cost of collateral benefits paid to an injured person by an innocent party underlies the approach now taken, following legislative intervention, to the recoverability of social welfare payments. More specifically, sums paid in respect of certain benefits and assistance to an injured person may be recoverable from the person liable in respect of that personal injury. See Part 11B of the Social Welfare Consolidation Act 2005 (as inserted by section 13 of the Social Welfare and Pensions Act 2013). The rationale underlying these statutory provisions appears to be that the economic cost of making social welfare payments to a person who has suffered personal injuries as the result of a civil wrong should be borne by the wrongdoer. This is achieved by allowing the Department of Social Protection to recover an equivalent amount from any award of compensation ultimately paid to the injured person.

6. To date, a more conservative approach has been taken in the case law. The primary purpose of tortious damages is regarded as being compensatory rather than punitive. The purpose is to compensate the injured party for the losses actually suffered by them as a result of the wrongdoing, rather than to punish the wrongdoer. Importantly, the emphasis is on the position of the injured party: a tortfeasor ordinarily is only responsible in damages for the direct injury which he has caused to the person against whom the tort has been committed, and not for indirect injuries to a third person who may suffer loss indirectly as a result of the injury to the first person (*Attorney General v. Ryan's Car Hire Ltd* [1965] I.R. 642 (at 666)). This principle has been applied in the specific context of private sector employment by the Supreme Court in *Hogan v. Steele & Company Ltd* [2000] 4 I.R. 587; [2001] 2 I.L.R.M. 321. Keane C.J., delivering the unanimous judgment, rejected a policy-based argument to the effect that justice required that—in a case involving a wrongdoer, injured party and an innocent employer—the loss should fall on the wrongdoer rather than the blameless parties.
7. It follows, therefore, that in calculating a claim for loss of earnings, it will be appropriate to deduct any sums paid to the injured party pursuant to a contractual right to sick pay. The actual loss suffered by the injured party is the shortfall, if any, between the amount received by way of sick pay and the amount which the injured party would have expected to earn but for his inability to work.
8. Different considerations apply where the injured party is legally obliged to reimburse their employer in respect of sums paid during their absence from work. The case law characterises such refundable payments as being in the nature of a loan or an advance, rather than sick pay in the strict sense. Such

payments are properly recoverable from the wrongdoer as part of a claim for personal injuries.

9. In practice, therefore, an employer can protect its position by including a form of wording in the contract of employment to the effect that the employee is legally obliged to reimburse the amount paid from any compensation received from a third party in a personal injuries claim.

SUBMISSIONS IN SUPPORT OF RECOVERABILITY

10. It has been left to the injured party, Mr. Hynes, to make submissions in support of the proposition that the cost of providing the contractual sick pay is recoverable as damages in these personal injuries proceedings. The injured party thus finds himself in the anomalous position of advocating for a cause notwithstanding that he himself has no pecuniary interest in the outcome of same. In the event that the cost of providing the contractual sick pay is recoverable, then the benefit accrues to the injured party's employer alone. The amount recovered will have to be reimbursed to the employer, with the injured party merely acting as a conduit.
11. In some of the earlier case law, the relevant employer, as the party most directly affected, had participated in the hearing as a notice party. It appears from the correspondence in the present case that the solicitors representing the injured party put his employer, VHI Healthcare, on notice that the question of the recoverability of the sick pay would be addressed at a hearing on 8 April 2022. The employer did not seek to participate in that hearing. However, counsel on behalf of the injured party took up the cudgels and ensured that all reasonable arguments in favour of recoverability of the cost of the provision of the sick pay

were made to the court. I am satisfied that all that could have been said in support of recoverability has been said.

12. The crux of the dispute between the parties centres on whether the injured party, Mr. Hynes, is legally obliged to reimburse his employer. The parties concur that no such obligation arises under the contract of employment itself. The contractual entitlement to receive sick pay is not contingent on the injured party seeking to recover the amount received in the context of any personal injuries action.
13. It is submitted on behalf of the injured party, however, that a right to recover the value of the sick pay arises by virtue of the injured party having supposedly given an undertaking, through his solicitor, to refund the sum of €40,833.02. The undertaking is said to be contained in a letter dated 26 September 2013. I will return to consider the content of this letter at paragraphs 29 to 34 below.
14. It is further submitted on behalf of the injured party that the determinative factor is that an undertaking has been given. It is said that it does not matter whether the injured party had been under a contractual obligation to reimburse the sick pay, nor whether the undertaking had to be given as a precondition to receipt of the sick pay. Counsel cites the judgment of the High Court (Charleton J.) in *Allen v. Trabolgan Holiday Centre Ltd* [2010] IEHC 12 in support of these submissions.
15. The other side's characterisation of the undertaking as having been given *retrospectively* is refuted. It is submitted that the question of an undertaking will only ever fall into place *after* an accident has occurred and the payment of sick pay arises. Attention is also drawn to the fact that the undertaking found to be

effective in *Hogan v. Steele & Company Ltd* [2000] 1 I.L.R.M. 330 had been given some weeks after the accident.

DISCUSSION

16. The High Court judgment in *Hogan v. Steele & Company Ltd* [2000] 1 I.L.R.M. 330 is the leading authority in this jurisdiction on the question of the recoverability of payments made to an employee who is unable to work because of injuries caused by a wrongdoer other than the employer. The facts of that case were the obverse of the present case: there was no entitlement under the contract of employment in that case to the unconditional payment of monies equal to the wages otherwise payable. Rather, monies had been advanced by the employer, and accepted by the injured employee, on the basis that they would have to be repaid. Having regard to these factual circumstances, the High Court (Macken J.) held that the wrongdoer was obliged to pay the sums so lost to the injured party and that the injured party was, in turn, obliged to repay the same to his employer. It was further held that the monies advanced were no more than the sum which, absent the employer exercising a discretion to pay, would or could have been borrowed by the injured party.
17. (It should be explained that this judgment had been appealed to the Supreme Court on the narrow issue of whether sums paid by the employer in respect of income tax, social insurance and pension contributions were recoverable: *Hogan v. Steele & Company Ltd* [2000] 4 I.R. 587; [2001] 2 I.L.R.M. 321. The Supreme Court held that, unlike the net wages, these sums had been deducted for specific purposes and were not in any sense a “loan” from the employer to the employee which the latter was obliged to repay to the employer).

18. Notwithstanding the factual differences, the decision of the High Court in *Hogan v. Steele & Company Ltd* is nevertheless of direct relevance in that Macken J. expressly addressed the scenario of an unqualified contractual right to sick pay. This arose as follows. In the course of her review of the case law, Macken J. considered the judgment in *McGuinness v. O'Reilly*, unreported, High Court, Morris J., 30 November 1992. That judgment had been decided on the basis that the injured party had been entitled under the terms of her employment to receive payment while she was out of work. It was held, therefore, that the injured party had been under no obligation to refund her employer and accordingly was not entitled to claim the sick pay as special damages. The judgment in *McGuinness v. O'Reilly* went on then to consider the legal effect, if any, of an undertaking given by the injured party to refund the advance payments made to her out of any monies which she recovered by way of damages. It was held that the injured party was not bound by this supposed undertaking.
19. Macken J., in her judgment in *Hogan*, expressly approved of this approach as follows (at page 342 of the reported judgment):

“On their face, it seems to me that the learned judge’s comments were both logical and correct. He accepted such evidence as was led before him [...] that the plaintiff was entitled under the terms of her contract of employment to receive the payments which she did, and he was careful to ensure that she thereafter could not be placed under an obligation by the subsequent, although unsustainable at law, letter of undertaking. In other words, he took the view that the letter of undertaking could add not a whit to the picture, since she was, on the evidence presented to the court, entitled under her contract of employment to have the money anyway.”
20. Macken J. also disapproved of a decision from England and Wales which suggested that sick pay is recoverable where the injured party is merely under a moral obligation, as opposed to a contractual obligation, to refund the sum paid

to his employer (*Dennis v. London Passenger Transport Board* [1948] 1 All E.R. 779).

21. Macken J. went on to express reservations as to whether the logically anterior finding in *McGuinness v. O'Reilly*, to the effect that the injured party had been entitled under the terms of her employment to receive payment while she was out of work, may have been reached without the benefit of full argument. The same collective agreement which had been at issue in *McGuinness v. O'Reilly* was before Macken J. in *Hogan v. Steele & Company Ltd.* Macken J. held that, on its proper interpretation, the collective agreement did not provide for an unconditional right to sick pay. Put otherwise, Macken J. only disagreed with the factual premise underlying the subsequent analysis in *McGuinness v. O'Reilly*, not with the analysis itself.
22. For present purposes, the point is that the judgments in both *McGuinness v. O'Reilly* and *Hogan v. Steele & Company Ltd* support the proposition that an injured party who has a contractual right to receive sick pay, which right is not conditional on an obligation to reimburse the monies paid in the event that the personal injuries are caused by an actionable wrong by a third party, is not entitled to claim the sick pay as damages.
23. The same result flows from a first principles analysis. An injured party, who has an unconditional right to receive sick pay, only suffers an actual loss to the extent that there is a shortfall between the amount received by way of sick pay and the amount which they would have expected to earn but for the personal injuries. There is no logical basis on which they can claim a loss in respect of the monies paid by way of sick pay.

24. An injured party cannot convert what is an otherwise unrecoverable item into a recoverable one by waiving their contractual rights post-accident. It might seem anomalous that the *timing* of the agreement between an employer and employee is determinative of the question of the recoverability of sick pay. Had the contract of employment included a term obliging the employee to reimburse the monies paid in the event that the personal injuries are caused by an actionable wrong by a third party, then the sick pay would have been recoverable. The common law thus recognises that the liability of a wrongdoer will be affected by the terms of an agreement to which it is not party, namely the contract of employment between the injured party and their employer. Given that the wrongdoer is at the mercy of the contractual arrangements between the employer and the injured party, it might be asked rhetorically why the timing of those arrangements is significant. The answer is that an injured party who advances a claim for damages is under a duty to mitigate their losses. It would be entirely inconsistent with this duty for an injured party to waive an unconditional contractual right to sick pay and to seek, instead, to visit this voluntarily assumed loss on the wrongdoer.
25. Different considerations apply where an employer continues to make payments to an employee in the immediate aftermath of an accident, notwithstanding that there is no contractual obligation to provide sick pay. It may take some time for the precise details of such an *ad hoc* arrangement to be ironed out. Once the parties have had an opportunity to discuss the matter, they may settle upon an arrangement whereby payments in the form of a loan or advance are made, with the employee undertaking to reimburse the employer. Neither the judgment in *Hogan v. Steele & Company Ltd* nor that in *Allen v. Trabolgan Holiday Centre*

Ltd support the proposition that a post-accident undertaking is effective in the case of an unconditional contractual entitlement to sick pay. *Hogan v. Steele & Company* is undoubtedly a non-contractual case, and counsel very properly conceded that it is not apparent from the written judgment in *Allen v. Trabolgan Holiday Centre Ltd* that there had been an unconditional contractual entitlement to sick pay.

26. In summary, monies paid to an injured party during their absence from work due to the personal injuries suffered as a result of the wrongdoing of a third party will only be recoverable against the wrongdoer where the injured party is under a legal obligation to reimburse those monies to their employer. An injured party, who enjoys an unconditional contractual right to sick pay, cannot convert what is an otherwise unrecoverable item into a recoverable one by waiving their contractual rights post-accident.

DECISION

27. I turn now to apply these principles to the circumstances of the present case. The injured party has been employed, at all material times, by VHI Healthcare. (To avoid possible confusion, the reader should bear in mind that VHI Healthcare's involvement here is in its capacity as employer, and not in its capacity as the provider of health insurance).
28. The contract of employment makes generous provision for sick pay. In brief, Mr. Hynes had been entitled to receive 100% of his basic salary for up to six months in any twelve month period. A sum of €40,833.02 (gross) was duly paid to Mr. Hynes. This is equivalent to net earnings of €35,887.22, once deductions in respect of payroll taxes, i.e. PAYE, PRSI and USC, are applied.

29. Notwithstanding that the injured party had been entitled to receive sick pay as part of his contractual terms and conditions, his employer wrote to him as follows on 10 January 2012:

“I was sorry to hear of your recent road traffic accident in December 2011 and I hope you will be better soon.

Declan, if a Vhi Healthcare employee is absent from work due to a road traffic accident there are some administrative details, which we need to bring to your attention. In the event of you pursuing a third party claim for damages, you should include the salary related costs incurred by VHI in your absence in any such claim – we will be pleased to let you know the appropriate amount involved. On successful settlement of your claim you would be expected to reimburse the Board.

I would appreciate if you could confirm to me, within a month, whether or not you will be pursuing a third-party claim. If you require any further clarification please contact me on [...]”.

30. Further correspondence ensued between the employer and the injured party’s solicitors. Relevantly, by letter dated 14 March 2013, the employer confirmed that the amount sought to be recovered was in the sum of €40,833.02 (gross). The injured party’s solicitor ultimately responded to this letter on 26 September 2013 as follows:

“We hereby confirm that the costs as outlined in your letter of the 14th March, 2013 will be refunded out of our Client’s claim to VHI Healthcare if and when the claim is successful.”

31. The chain of correspondence does not give rise to a legal obligation on behalf of the injured party to reimburse the cost incurred in the provision of the sick pay. If and insofar as the letter from VHI Healthcare of 14 March 2013 purports to say otherwise, and suggests that the injured party was obligated, as a matter of “*administrative detail*”, to include the salary related costs of the employer as part of his claim for personal injuries, it is incorrect in law. The injured party had an

unconditional contractual right to sick pay, and, accordingly, the cost to the employer is not recoverable.

32. The solicitor's letter of 26 September 2013 cannot reasonably be construed as entailing a voluntary undertaking on behalf of the injured party to refund the cost of the sick pay. Rather, the letter goes no further than to confirm that—in the event that the claim to recover, as against the wrongdoer, the cost to the employer in meeting its contractual obligation to provide sick pay, proved to be successful—then such monies would be refunded. Put otherwise, any obligation to refund was always contingent on the claim to recover the cost to the employer of providing the sick pay being allowed by the court. For the reasons outlined earlier, the claim is inadmissible, and, in consequence there is no standalone obligation on behalf of the injured party to refund the employer.
33. Even if this were not the ordinary and natural meaning of the correspondence, any undertaking supposedly arising would not be enforceable. Any undertaking would have been given in circumstances where the parties were operating under a common mistake as to law, i.e. a mistaken belief that the cost of providing the sick pay was recoverable against the wrongdoer; and the undertaking is, therefore, unenforceable.
34. Support for this approach is to be found in the judgment of *McGuinness v. O'Reilly*. As summarised by Macken J. in *Hogan v. Steele & Company Ltd*, the High Court in the earlier case had found that an employee with a contractual entitlement to sick pay could not be placed under an enforceable obligation to refund the monies by a subsequent letter of undertaking. (See discussion at paragraphs 18 to 22 above).

CONCLUSION

35. Monies paid to an injured party by their employer during their absence from work due to personal injuries suffered as a result of the wrongdoing of a third party will only be recoverable against the wrongdoer where the injured party is under a legal obligation to reimburse those monies to their employer. For the reasons explained herein, an injured party, who enjoys an unconditional contractual right to sick pay, cannot convert what is an otherwise unrecoverable item into a recoverable one by waiving their contractual rights post-accident.
36. It follows that the cost of €40,833.02 (gross) incurred by VHI Healthcare, as employer, in the provision of sick pay to the Plaintiff pursuant to his contract of employment is not recoverable as against the Defendants in these proceedings. Nor is the Plaintiff personally under any obligation to reimburse this cost: for the reasons explained earlier, the chain of correspondence does not give rise to an enforceable undertaking.

Appearances

Patrick Treacy, SC, John Shortt, SC and Colette Egan for the Plaintiff instructed by Byrne Carolan Cunningham LLP
Stephen Lanigan-O'Keefe, SC and Paul McKeon for the Defendants instructed by Harrison O'Dowd

Approved
Gemma S.MNS