This judgment is circulated in redacted form to avoid identification of the parties.

HIGH COURT

[2007] IEHC 252
[2001 No. 9296P]

BETWEEN

R. R.

PLAINTIFF

AND

P. D., THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Johnson P. delivered on the 30th day of July, 2007.

1. This case arises out of allegations made by the plaintiff, whilst serving in the army that he was sexually assaulted by the first named defendant on approximately eight occasions between 1989 and 1994 or 1995. The nature of the assaults were that, whilst attending on the first named defendant in his capacity as sergeant major, the first named defendant fondled his private parts and subsequently exposed himself and exposed the plaintiff.

2. The plaintiff claims that as a result of these assaults he has suffered greatly and in particular has suffered post traumatic stress disorder, has had a breakdown in his family life and has had a complete change in the manner in which he conducts himself due to the trauma which he suffered.

3. The first named defendant did not appear and does not contest the allegations in this Court. I have been informed that a compromise has been achieved between the first named defendant and the plaintiff.

4. The plaintiff claims that the other defendants are (a) vicariously liable for the actions of the first named defendant and/or (b) that they had sufficient notice of the proclivities of the first named defendant to have taken steps to ensure that he did not have any contact with the plaintiff and thereby save the plaintiff from the assaults and the effects thereof.

5. Firstly the defendants plead that the claim is statute barred by reason of the Statute of Limitations. Secondly they plead that the vicarious liability does not apply in this particular case and thirdly that they had no notice of the proclivities of the first named defendant.

6. It should be stated that the plaintiff has admitted that at no time did he make any complaint to his superiors or indeed to anyone else regarding the conduct of the first defendant. He explains this by indicating that there was a culture in the army against making complaints and that he had made a previous complaint regarding the behaviour of a superior for an assault and that it had got nowhere. His view was quite clearly that no one would take the word of a gunner over the word of a sergeant major or indeed a battery sergeant. The first time he actually spoke about the incidents was after he left the army, when he met Battery Sergeant W. with whom he was acquainted, who informed him that two other gunners had made complaints against the first named defendant and that they had been disbelieved. As a result of this, the plaintiff indicated to Battery Sergeant W. that he would have believed them and went on to tell him of his experiences with the first named defendant, but swore him to secrecy and an undertaking not to tell anybody. Despite giving such an undertaking, the battery sergeant went to the superior officers with the statement made by the plaintiff and from there on the case developed.

7. I think it is proper to point out that the plaintiff himself took no steps to do anything to resolve his situation without the assistance or interference of Battery Sergeant W.

8. The first issue to be decided in this case is the question of the Statute of Limitations.

9. Before the case started an application was made to have this issue decided separately. This was not agreed and, in my view, correctly so because the evidence upon which the issue of the Statue of Limitations is decided is precisely the same evidence upon which the question of damages would have to be decided.

10. The assault allegations made by the plaintiff, as I stated above, took place between 1989 and 1995 at the outside. Proceedings in this matter were not issued until the 15th June, 2001, and quite clearly vis a viz the second, third and fourth named defendants, the action would be barred according to the provisions of s. 11, subs. 2 of the Statute of Limitations, 1957.

11. The plaintiff claims that he is entitled to the benefit of the provisions of s. 48A(1) of the Statute of Limitations as inserted by s. 2 of the Statute of Limitations (Amendment) Act, 2000, the provision in question being as follows: –

> "(1) A person shall, for the purpose of bringing an action –
>
> (a) founded on tort in respect of an act of sexual abuse committed against him or her at a time when he or she had not yet reached full age, or
>
> (b) against a person (other than the person who committed that act), claiming damages for negligence or breach of duty where the damages claimed consist of or include damages in respect of personal injuries caused by such act,
>
> be under a disability while he or she is suffering from any psychological injury that—
>
> (i) is caused, in whole or in part, by that act, or any other act, of the person who committed the first-mentioned act, and
>
> (ii) is of such significance that his or her will, or his or her ability to make a reasoned decision, to bring such action is substantially impaired."

12. Therefore the matters for me to decide in this judgment are (1) whether or not the plaintiff was suffering from any psychological injury caused by the assault on the first named defendant and, (2) if so, whether such injury was of such significance that the ability

of the plaintiff to make a reasoned decision by bringing proceedings was substantially impaired.

13. It is quite clear in this instance that the plaintiff says he could not bring himself to face up to it and indeed it was only when he met Battery Sergeant W. that he mentioned the issue of the matter at all. He gives evidence as to how the incidents had affected his life, namely his drinking, drug taking, his marriage breakdown and other issues which affected him.

14. The plaintiff relied, in support of his case, on the evidence of R.Y., a clinical psychologist who treated the plaintiff at the time and indeed who continues to treat him, who gave evidence to the effect that she is quite satisfied that the plaintiff suffered from post traumatic stress disorder and indeed continues to suffer from the effects of it and that this would certainly be sufficient to have impaired his capacity to face up to the fact that (a) he had been abused and (b) to bring the case.

15. The defendants were represented by Professor Patricia Casey who said that, far from having post traumatic stress disorder, the plaintiff suffered and suffers from a personality defect which pre-existed the assaults and she indicated that she had a certain doubt as to whether the assaults took place at all. That was certainly the impression that she managed to create in my mind. She saw the plaintiff on two occasions and for less than two or three hours each time. As already stated, R.Y. not only treated him then but continues to treat him to this present day.

16. It is quite impossible to reconcile the evidence of R.Y. and Professor Casey. One of the matters which Professor Casey dealt with was the failure of the plaintiff to demonstrate any emotional distress at the situation in which he found himself and at the assaults which he suffered. In this Court the plaintiff had demonstrated a great deal of distress. In fact, on the first day of the case while he was giving evidence, I think I had to rise at least on three occasions to enable him to compose himself.

17. Under the circumstances, and having regard to the complete conflict of evidence, it is necessary to take a decision regarding which I accept:

> (a) that the assaults took place;
>
> (b) that the plaintiff is suffering and has suffered from post traumatic stress disorder;
>
> (c) that that is a psychological injury; and
>
> (d) that it is of such significance that his will to make a reasoned decision to bring the action in this matter was substantially impaired.

18. In those circumstances, I am satisfied that the plea of the Statute of Limitations fails and the plaintiff is entitled to proceed on that ground.

19. Professor Casey, in the course of her evidence, laid great emphasis on the fact that it might have been difficult for him to do so but a lot of people in that situation do make a complaint.

20. Having had the opportunity of observing the plaintiff in the witness box over a period of time and having heard the evidence of R.Y., who has been treating the plaintiff for a considerable length of time and who is still treating him to the present day, that Professor Casey's evidence was coloured by the fact that she had doubts as to whether he was assaulted at all and, that being so, it must have affected the views which she held and expressed. However, as stated, I am satisfied:-

> (a) that the plaintiff was telling the truth;
>
> (b) that he suffered from post traumatic stress disorder; and
>
> (c) that it affected him in the way in which it did, as stated above.

21. The question now to be decided is whether or not the second, third and fourth named defendants were vicariously liable for those assaults.

Vicarious liability

22. The question of vicarious liability is now to be considered.

23. There are a number of authorities on this particular heading starting with the decision of Mr. Justice Costello in *Health Board v. B.C.* [1994] ELR 27 in which Mr. Justice Costello stated:-

> "In the absence of expressed statutory provision the law in this country in relation to liability of an employer for torturous acts including statutory torts of his employee is perfectly clear an employer is vicariously liable where the act is committed by his employee in the scope of his employment."

24. He went on to say at p. 34:-

> "An employer may or course be vicariously liable when his employee is acting negligently or even criminally but I cannot envisage any employment in which they were engaged in respect of which a sexual assault could be regarded as so connected with it as to amount to an act within its scope."

25. The application of the doctrine is as originally laid down in Salmon & Huston's Law of Torts 1996 Ed. at p. 443:-

> "That the employer is liable if it is either (1) a wrongful act authorised by the master (2) a wrongful an unauthorised mode of doing some act authorised by the master it is clear that the master is responsible for acts actually authorised by him for liability would exist in this case even if the relation between the master was one of agency and not one of service at all. The master as opposed to employer of an independent contractor is liable even for acts which he has not authorised provided they are so connected with acts which he has authorised that they might be rightly regarded as modes although improper modes of doing them."

26. This difficulty is referred to by Mr. Justice McCarthy in *McIntyre v. Lewis* [1991] 1 I.R. 121 at p. 137:-

> "In the course of the argument, counsel for the State was asked as to where the scope of employment or duty ends - at what particular time and in what circumstances. No satisfactory answer was obtained to this question because there is no satisfactory answer. The matter is summarised in the second edition of McMahon & Binchy, Irish Law of Torts, at p. 756 where it is suggested that the test is by looking to see if the acts complained of are so closely connected with the employment of the primary wrongdoer as to make the employer vicariously liable."

27. The case of *Trotman v. North Yorkshire Co. Council* [1999] LGR 584 and in the judgment of Lord Justice Butler-Sloss at p. 591 it quotes *inter alia*:-

> "But in the field of serious sexual misconduct, I find it difficult to visualise circumstances in which an act of the teacher can be an unauthorised mode of carrying out an authorised act, although I would not wish to close the door on the possibility."

28. Two further cases have been cited by the parties. These are Canadian cases namely, *Bazley v. Curry* [1999] 174 DLR 4th 45 and *Jacobi v. Griffiths* [1999] 174 DLR 4th 71. Both of these cases set out principles for establishing whether or not the acts complained of were within the course of and within the scope of the employment. In these cases infant children of vulnerable age were involved and in both cases sexual assaults were involved.

29. The principles set out in the *Bazley* case, which need to be established to attribute vicarious liability, are five in number and are as follows:-

> 1. The opportunities the enterprise afforded to the employee to abuse his power;
>
> 2. The extent to which the wrongful act may have furthered the employer's aims and hence be more likely to be committed by the employee;
>
> 3. The extent to which the wrongful act was related to friction or confrontation or intimacy inherent in the employer's enterprise;
>
> 4. The extent of power conferred on the employee in relation to the victim;
>
> 5. The vulnerability of potential victims through wrongful exercise of the employee's power.

30. In the *Jacobi* case two further principles were issued to assist in determining this particular knotty issue.

> 1. A court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls.
>
> 2. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.

31. In these cases *Bazley* held that there was vicarious liability and *Jacobi* held there was not vicarious liability.

32. Finally the case of *Lister v. Hesley Hall Limited* [2001] UKHL 22 [2002] 1 A.C. 215 has become the leading United Kingdom authority on the issue. All of the above cited cases were mentioned in it. Once again the situation was such that the plaintiffs were residents in a school owned and managed by the defendants and they were sexually abused by the warden.

33. Lord Steyn said at para. 28 of the judgment at p. 230:-

> "Employing the traditional methodology of English law, I am satisfied that in the case of the appeals under consideration the evidence showed that the employers entrusted the care of the children in Axeholme House to the warden. The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present case clearly falls on the side of vicarious liability."

34. In the same case Lord Clyde at para. 50 p. 237 stated:

> "In addition to the opportunity which access gave him, his position as warden and the close contact with the boys which that work involved created a sufficient connection between the acts of abuse which he committed and the work which he had been employed to do. It appears that the respondents gave the warden a quite general authority in the supervision and running of the house as well as some particular responsibilities."

35. In the Irish case of *Delahunty v. South Eastern Health Board* [2003] 4 I.R. 361 the above principles were adopted with approval by Mr. Justice O'Higgins. In that case it was decided on the facts that the young man assaulted had not been in the care of the defendants but had merely been a visitor to their establishment.

36. However, the remainder of the principles were adopted and it is quite clear that law is now as stated in the case of *L.O'K. v. Minister for Education and Science* [2006] IEHC 13, judgement delivered by Mr. Justice deValera on the 20th January, 2006. It would appear that the principles as stated by Mr. Justice Costello in *Health Board v. B.C.* have now been moved such that, if the tort and/or indecent assault was conducted in the course of and within the scope of the employment, then there can be vicarious liability and therefore, utilising the principles established in the above recited cases, it is necessary to ascertain whether or not they apply to this particular situation.

37. All of the above cases were cases which related to young and vulnerable children, which is not the situation in this case. The plaintiff was a married soldier at the time of the first incident and I do not think that the same principles that were applied in the cases of wardens of boarding school and/or orphanages can be applied to the army. I have come to this conclusion after a good deal of consideration and some doubt. The doubt was created particularly by the fact of the control which the first named defendant had over the plaintiff, but overall I feel that the balance in this particular case lies against vicarious liability.

38. On the question of notice, the evidence of the plaintiff and many of his witnesses is that there was general chat on a continual

basis about the defendant's activities, that it was well known and that it was the chat of the barrack room and the camp.

39. This has been completely denied by all of the defendant's witnesses. Whereas I grant there is a distinction in rank between the plaintiff's witnesses and the defendant's witnesses, I came to the conclusion that all of them appear to be attempting to tell the truth.

40. Therefore, I am satisfied that there was banter, possibly name calling and certainly general slagging, I think would be the correct way of putting it, and, though that may have been prevalent in the mess room at times, none of it was taken sufficiently seriously by any of the men, the NCO's and any other officers who may have heard it to be considered anything other than of a humorous nature.

41. It is necessary to look at the incidents and at the evidence in light of the times as they then were. These events took place in the 1980's and early 1990's, at a time when the antenna of the ordinary reasonable person was far less acute to the potentials for sexual abuse or sexual assault than they are today. We must remember that, for the last ten years, the country has been subject to continual reports of sexual exploitation, sexual abuse and sexual assaults, all of which have tended to make the population a great deal more sensitive to matters which twenty years ago would not have drawn any attention whatsoever.

42. I am quite satisfied that had any of the NCO's or others, any real apprehension regarding the behaviour of the defendant, they would have given notice of such apprehension one way or another through the preferred route as laid down in the Army code or otherwise. I am reinforced in this view by the speedy action of Battery Sergeant W., when informed by the plaintiff of the events which occurred, he immediately repeated to the Superior Officers and laid the plaintiff's claim before them, despite the fact that he had been bound by the plaintiff to secrecy. It is for this reason, I have come to the conclusion that, on the balance of probabilities, the plaintiff failed to discharge the onus of proof on him that, at the time of the incidents when the subject matter of these proceedings occurred, the level or content of the activities which were described in the mess room, in the bar and in the canteen were such as would have alerted a reasonable person and cause them to take steps to either enquire into or prevent the activities of the defendant.

43. Having regard to the foregoing, I hereby dismiss this case.