

THE HIGH COURT

RECORD No. 2000/9533P

BETWEEN

JOHN JAMES O'DONNELL

PLAINTIFF

AND
JIMMY O'DONNELL

DEFENDANT

Judgment of Mr. Justice Kelly delivered the 22nd day of June, 2005

1. The prayer of the plaintiff's statement of claim in this case seeks –

"(a) Damages including aggravated and/or exemplary damages for assault and trespass to the person, intentional infliction of emotional suffering and violation of the plaintiff (sic) right to bodily integrity.

(b) Interest on damages to Statute (sic).

(c) Costs."

2. The claim arises out of incidents of sexual abuse of the plaintiff by the defendant which occurred many years ago.

3. The proceedings were commenced on 17th August, 2000. The statement of claim was delivered on 14th September, 2000.

4. A defence was delivered on 17th October, 2000. It contained a full denial of the allegations and also denied that the plaintiff sustained the injuries alleged.

5. Notice of trial of the action was dated 1st November, 2000, but for reasons unknown to me the action did not come to hearing until 4th May, 2005.

6. On 29th March, 2005, the defendant's solicitors wrote to the plaintiff's solicitors as follows:-

"We refer to the above matter, which is listed for hearing on 4th May, 2005. We confirm that we have received our clients written instructions that judgment can be marked against him on that date and have damages assessed by the court."

7. That apparently was the first intimation given to the plaintiff that the action was not being defended in full. The matter proceeded before me as an assessment of damages.

The Plaintiff's Evidence

8. The plaintiff was born in Scotland on 4th June, 1974. He returned with his parents to live in Donegal in 1976.

9. The defendant was a neighbour of the plaintiff's family. He was a regular visitor to the plaintiff's family home.

10. The defendant is many years older than the plaintiff. When the incidents the subject of these proceedings began the plaintiff was 14 and the defendant was in his late twenties or early thirties. The defendant suffers from a medical condition as a result of which he has never grown higher than about 3ft in stature.

11. In 1988 when the plaintiff was 14 years of age he was on board a vessel with the defendant when the defendant sexually assaulted him. As the plaintiff put it, the defendant "fondled me between the legs". That was all that happened on that occasion. The plaintiff was surprised by this but told no one because he was scared to do so. He believed that if he told anybody they would think that he was telling lies.

12. That incident was the start of a series of assaults which went on over a period of about two years.

13. Many of these assaults took place at a work shop where the defendant was employed or on board a fishing vessel. The plaintiff described the abuse as getting more intense over that time.

14. Over that period of two years the defendant would fellate the plaintiff and request the plaintiff to do the same for him. This happened on average once and on occasions twice per week. The plaintiff always refused to fellate the defendant.

15. In 1989 the defendant attempted to have anal sex with the plaintiff. The plaintiff did not allow this to happen. Never at any stage during the period of abuse did the defendant have anal sex with the plaintiff. Neither did the plaintiff ever fellate the defendant.

16. Over about two years the defendant would regularly masturbate the plaintiff and vice versa.

17. The plaintiff described himself as feeling dirty about all of this conduct but at no stage did he tell anyone what was going on.

18. In 1989 when the plaintiff was 15 the defendant proposed that he would take him on holidays to Benidorm for a period of two weeks. The plaintiff's parents, unsuspecting of anything going on, gave permission for this to happen. The two of them set off for Benidorm.

19. During that two weeks the same form of abuse continued and occurred about nine or ten times.

20. Following the return from Spain the abuse continued in the same format.

21. The plaintiff sat for his Intermediate Certificate examination in 1990 when he was aged 16. He got four passes and described himself as not being too disappointed with that result.

22. As of October, 1990, the abuse ceased.

23. The plaintiff did not tell anyone of the abuse until many years later.
24. The plaintiff left school in 1990. He had an ambition to be a chef.
25. He worked in Lisdoonvarna in 1991 as a kitchen porter and trainee chef. In October of that year he returned to Donegal and he went to a training college in Killybegs where he completed a two year course and qualified as a chef.
26. He then returned to Lisdoonvarna and worked there until 1998.
27. Whilst there he formed a relationship with a woman whom he ultimately married. At the time of their marriage they had had one daughter and a second was born subsequent to the marriage.
28. The plaintiff lost his job because of drinking. He got another position in Dunloe but was sacked for not turning up for work because he was intoxicated.
29. The marriage failed. He got a variety of jobs in different hotels in Donegal but didn't manage to hold down any of them. They were lost largely because of excessive drinking.
30. He finally got a job in a hotel in Glenties and he has held that position for the last four years. For something less than a year he has had a relationship with a girlfriend. She appears to have had a steadying influence on him.
31. His relationship with his wife and children has not been satisfactory. He has not visited the children very much and in recent times not at all. He does not have a good relationship with his father, to whom he last spoke in 1999. The reason for this breakdown is the refusal of the plaintiff's father to believe him insofar as his allegations against the defendant are concerned.
32. In 1998 the plaintiff was approached by the police who enquired about any abuse which he might have experienced at the hands of the defendant. This approach was made in the context of an investigation into the behaviour of the defendant concerning another person. The plaintiff declined to make a statement because he didn't want to relive the experiences of many years beforehand. He had, I believe, dealt with them in his own way by that time.
33. He was approached again by the police in 1999 and on this occasion decided that he would make a statement to them. That seems to have triggered a reaction which *inter alia* resulted in the commencement of these proceedings.
34. The police investigation resulted in the defendant being prosecuted and he is now serving a term of imprisonment.
35. The plaintiff's relationship with his wife and children continues to be unsatisfactory. For some time he did not support them and his heavy drinking was obviously a major contributor to the breakdown of the marriage. He told me in evidence that he hopes to visit a bit more frequently than in the past when as he put it he "gets sorted out".
36. He tried to speak to his father once since 1999, but without success. That may change now that the father realises that the plaintiff is telling the truth insofar as the allegations against the defendant are concerned.
37. This summarises the evidence given by the plaintiff. He was not particularly forthcoming in his testimony. I am quite satisfied that had he not been approached by the police it is unlikely that he would have ever gone to them or indeed anyone else concerning the incidents in question. To a great extent he dealt with the effects of the abuse in his own way and was unlikely to make them public.
38. The plaintiff never sought any medical, psychiatric or psychological help in respect of the abuse which he suffered at the hands of the defendant. Neither did he seek any such help in respect of his excessive drinking which has been a feature of his adult life and has largely been responsible for the breakdown of his marriage and his inability, until recently, to remain in employment.

The Psychologists Report

39. During the course of opening the case counsel attempted to introduce a written report from a psychologist. I was informed that it was not intended to call her as a witness in the case. I took the view that even though the defendant was consenting to judgment, that did not create any entitlement to depart from the proper presentation of evidence upon oath. During the course of the hearing a faxed communication was procured from the defendant's solicitor. It consented to the admission of the report and on that basis I received it as evidence in the case.
40. The report is helpful in that the plaintiff appears to have been somewhat more forthcoming in his dealings with the psychologist than he was in giving evidence. That is not to suggest that the plaintiff did anything wrong in giving evidence. Rather he was very ill at ease and if anything understated aspects of his case. Her report gives a more complete picture of the plaintiff's background.
41. He was the second child in a family of five, consisting of three boys and two girls. He had a reasonably happy childhood up to the age of eight years. His parents then separated with his mother moving out of the family home. At that stage the plaintiff and his siblings were put to their election as to the parent with whom they wished to reside. The plaintiff opted to stay with his father but his older brother with whom he was very close chose to live with the mother. She moved to another part of Donegal and as a result the plaintiff saw his mother and older brother only every two or three weeks.
42. The plaintiff regarded his father as a harsh disciplinarian and found life in the family home rather difficult. Going on outings on a fishing boat with the defendant were initially seen as a treat and a way of escaping the difficult situation in the family home. However, once the sexual abuse began, the disadvantages of going on the boat outweighed the advantage of escape from the family home. He apparently felt trapped. He could not refuse to go on the boat with the defendant because this would result in him having to give his father an explanation for his refusal.
43. The experience of the holiday in Spain was described by him to the psychologist as the worst of all the abusive experiences. He was completely trapped with the defendant and had no possibility of getting away from him.
44. The psychologist's report is confirmatory of the part that drink has played in blighting aspects of the plaintiff's life. It played a large part in the destruction of his marriage and his inability to hold a job. His wife facilitated him having access to his daughters despite the breakdown of the marriage. His heavy drinking and irregular lifestyle however resulted in him not turning up for planned meetings and so over time he lost contact with his children. He acknowledges that that is a consequence of his own behaviour.

45. He also suffers emotional distress over the fact that he no longer has any relationship with his father.

46. The psychologist conducted a trauma symptom inventory on the plaintiff. This is a 100 item test of Post Traumatic Stress and other psychological sequelae of traumatic events. The inventory consists of three validity scales and ten clinical scales. Scores at or above 65 are considered clinically significant. The plaintiff obtained a clinically significant score on just one of these clinical scales. That was on a scale measuring defensive avoidance symptoms. That scale measures post traumatic avoidance both cognitive and behavioural.

47. The psychologist says that the plaintiff presented as a young man who had been severely traumatised by the sexual abuse perpetrated on him when he was a child. The fact that he was at that stage vulnerable contributed to the severity of the impact. The fact that there was no adult available to him in whom he could confide left him trapped and powerless in the abusive relationship. The fact that even today the adult, namely his father, who was the plaintiff's chief carer continues not to believe him adds to the impact of the trauma.

48. When traumatic material from his past intruded into his present he sought solace in alcohol. This was particularly so as a result of him making his statement to the police.

49. He presented to her as being distressed in relation to his lack of contact with his daughters but regarded himself as powerless to do anything about this.

50. Despite this state of affairs the plaintiff was adamant that he did not feel the need to seek any assistance. That is so because he is coping in his current relationship and he chooses to ignore that his inability to cope emotionally in the past led indirectly to the breakdown of his marriage and his loss of contact with his children. He thinks that going to counselling would involve a re-traumatising of him and that is what he experienced in making the statement to the police.

51. I think it unlikely that he will seek any form of professional help in the future thus maintaining the pattern which he has displayed to date.

Damages

52. There is no doubt but that the plaintiff is entitled to substantial compensatory damages in respect of the defendant's behaviour towards him. There was gross misbehaviour on the part of the defendant involving trespass to the plaintiff's person and an interference with his constitutional entitlement to bodily integrity. This went on over a period of approximately two years.

53. I am satisfied that these experiences contributed to the plaintiff's subsequent problems with alcohol. For all of this the plaintiff is entitled to be compensated.

54. In arriving at a figure I of course have to bear in mind that the abuse was not accompanied by any physical violence. Anal intercourse never occurred and the plaintiff was not forced to nor did he fellate the defendant. This is not to understate the wrongs done to the plaintiff.

55. My attention was drawn to the decision of Finnegan P. in *Noctor v. Ireland & Ors.* [Unreported, 1st March, 2005] in the context of assessing damages. The case is helpful in attempting to arrive at a sum by way of compensation for pain and suffering to date.

56. The abuse suffered by Mr. Noctor was much more severe than that sustained by the plaintiff in the present case. There was dreadful violence and more serious sexual abuse involved. It also had much more serious consequences involving him in many admissions to a psychiatric hospital. There was psychiatric evidence before the court in his case unlike the present. There was an award of €165,000 to Mr. Noctor for pain and suffering to date.

57. In my view the plaintiff in the present case is entitled to an award of €85,000.00 for pain and suffering to date.

58. Insofar as the future is concerned I think there is little scope for damages being awarded. The plaintiff has been holding down his present job for the last four years and is now in a period of stability particularly since his current girlfriend came on the scene. He is not going to have any form of treatment or therapy and has dealt with the matter in his own way. Were it not for the making of the statement to the police I think it unlikely that the plaintiff would ever have sought to do anything about what occurred. He was referred to the psychologist by his solicitor not for treatment but for the purposes of a report in respect of this litigation.

59. I am not satisfied on the evidence that any case for an award of damages for pain and suffering in the future has been made out.

Exemplary Damages

60. Relying on the decision in *Conway & Ors. v. Irish National Teachers Organisation* [1991] 2 I.R. 305 a claim for exemplary damages has been mounted against the defendant.

61. Exemplary damages are awarded to mark the courts disapproval of a defendants conduct. As was said by Griffin J. in *Conway's* case:-

"Such damages may be awarded where there has been, on the part of a defendant, wilful and conscious wrongdoing in contumelious disregard of another's rights. The object of awarding exemplary damages is to punish the wrongdoer for his outrageous conduct, to deter him and others from any such conduct in the future, and to mark the courts (or the jury's in a case of a trial by jury) detestation and disapproval of that conduct. Such damages are to be awarded even though the plaintiff who recovers them obtains the benefit of what has been described in the case law as a fortunate windfall."

62. It is contended that as the wrongdoing of the defendant here was carried out on a minor who was to a considerable extent placed in the defendant's charge and as his conduct was quite disgraceful exemplary damages should be awarded. His conduct was disgraceful but that alone is not determinative of the question.

63. In *Conway's* case Finlay C.J. pointed out that as a general principle exemplary damages should not be awarded if in the opinion of the court the amount necessarily payable by the wrongdoer in the form of compensatory damages constitutes a sufficient public disapproval of and punishment for the particular form of his wrongdoing.

64. Like Finnegan P. in *Noctor's* case I am satisfied that the substantial award of compensatory damages made to the plaintiff here

constitutes a sufficient disapproval of and punishment for the form of wrongdoing engaged upon by the defendant. I will not award exemplary damages.

Aggravated Damages

65. Aggravated damages are compensatory in nature and can be awarded in cases in which the injury to the plaintiff has been aggravated by malice or insolence or arrogance accompanying it.

66. The plaintiff complains that the defendant maintained a denial of liability in these proceedings and that he should be awarded damages in that regard. I am at one with the view of Finnegan P. in *Noctor's* case that the maintenance of a denial of liability is not an abuse of the process of the court. A defendant is entitled to require a plaintiff to prove his case. The denial of liability was not maintained up to trial as I have already recorded. That was a concession which the defendant was not obliged to make.

67. In *Noctor's* case Finlay P. approved a statement from the decision of Nourse L.J. in *Sutcliffe v. Pressdram Limited* [1990] 1 All E.R. 269, where he identified the factors which might lead to an award of aggravated damages. They are:-

"Conduct calculated to deter the plaintiff from proceeding; persistence, by way of a prolonged or hostile cross-examination of the plaintiff or in turgid speeches to the jury; a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself in a manner calculated to attract further wide publicity; and persecution of the plaintiff by other means".

68. The President also pointed out that in *Cooper v. O'Connell* [Supreme Court, 5th June, 1997] it was held that the fact that the defendant had put liability in issue was insufficient to justify an award of aggravated damages.

69. Such being the case there is no scope for an award of aggravated damages by reference to the denial of liability and its being persisted in until March of this year.

70. There is however another basis upon which the claim is made.

71. On 28th August, 2000, in a response to the initial letter from the plaintiff claiming damages for sexual assault the defendant's then solicitors wrote as follows:-

"We refer you to our above named client who instructed us in relation to a letter forwarded to him on 11th August, 2000, claiming sexual assault by our client upon your client. We hereby confirm that our client denies such allegations and we request that the said allegations contained in your letter of 11th August be withdrawn. Our client is also seeking a letter of apology along with a reasonable offer of compensation in relation to the defamatory comments contained therein.

We confirm that the contents of the said letter have caused our client severe distress, annoyance and defamation upon his character. Please note that if the said comments are not withdrawn and the writer is not contacted with a reasonable proposal as regards compensation that we have our clients instructions to issue appropriate proceedings without any further notice to your client.

We would be obliged if you could confirm by return if you have authority to accept proceedings on behalf of your client."

72. In hindsight of course this letter can be seen as so much bluster. Events have shown that the plaintiff's complaint was well justified and the defendant's threat of proceedings against the plaintiff was nonsense.

73. The writing of the letter threatening proceedings and asking the plaintiff's solicitors if they had authority to accept such proceedings was clearly conduct calculated to deter the plaintiff from bringing this suit. It was not successful but the making of this threat could have had no other intent.

74. In my view there is a distinction to be drawn between a denial of liability with the putting of a plaintiff on proof of his case and threatening in a very formal way to bring cross proceedings which to the knowledge of the defendant could have had no substance in fact.

75. In my view the plaintiff is entitled to a sum by way of aggravated damages in respect of that activity.

76. I award an additional €3,000.00 under this heading.

Conclusion

77. There will therefore be an award of €88,000.00 in favour of the plaintiff together with the costs of these proceedings.