

THE HIGH COURT

[2010 No. 244 SP]

IN THE MATTER OF THE GARDA SIOCHANA (COMPENSATION) ACTS 1941 AND 1945

BETWEEN

SEAN WALZER

APPLICANT

AND

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Mr. Bernard J. Barton delivered the 23rd day of March 2015.

1. The applicant was born on the 12th of September 1962 and joined the force on the 21st of July 1982. He married on the 21st of April 1988 and has four children.
2. The applicant was authorised to bring these proceedings by the Minister on the 23rd of March 2010 in respect of an incident which occurred on the 5th of September 2005 and as a result of which he was caused to suffer serious psychological injuries which ultimately led to his retirement from the force on the 7th of May 2008 by reason of infirmity of mind.
3. On the 4th/5th of September 2005 the applicant was stationed in Mullinahone garda station County Tipperary. At about 8 pm on the 4th of September he was collected by Garda Horgan in the Piltown patrol car. They patrolled the sub districts of Mullinahone, Fethard, Kilshelan and Clonmel over the next few hours ultimately returning to Mullinahone. At just shortly after 1 am on the 5th of September, whilst driving down Kelly's lane, Garda Horgan and the applicant noticed a car parked beside a wall outside the back entrance gate to Brett's Hardware. Garda Horgan stopped the patrol car within a few feet from the front of that car at which stage the applicant proceeded to get out of the patrol car. He noticed that, whilst the parked car was unlit, its engine was running and that there was somebody in the driver's seat. When that individual saw the patrol car stopping he put on the lights of his car and started to rev the engine. At this point the applicant noticed two other figures beside the car. One of these was wearing a balaclava and when he saw the guards he became very aggressive and verbally abusive, threatening the guards to get out of the way. At this stage the applicant noticed that this individual appeared to be holding a gun which appeared to be pointed at him. A very frightening situation ensued. The guards were in fear of their safety. The applicant rejoined Garda Horgan who reversed the patrol car out into the square following which a black Mondeo car came out of the lane at speed heading for Grange Mocker. The guards followed that car but it was being driven at high speed and ultimately they lost sight of it. After about ten minutes or so attempting to make contact the guards gave up their pursuit and went back to Kelly's lane where they ascertained from the key holder that nothing had in fact been taken from the premises. The applicant and Garda Horgan then resumed patrol until about 6 am.
4. On the 8th of September 2005 the applicant went to Kilenale District Court following which he returned to Mullinahone where he remained until he finished duty. He came back on duty at 8 pm and went on a special unarmed crime patrol with another guard. At about 3.30 on the morning of the 9th of September the applicant returned to the station at Mullinahone where he finished some clerical work before finally going off duty at 4 am. He left the station and closed the door behind him. While standing just outside the doorstep he was overcome by a feeling of extreme fear and experienced a flashback to the Monday morning when he was confronted at gunpoint in Kelly's lane. He described how he became very nervous and frightened. At that time he and his family were living in a house beside the garda station. The applicant went home but found it impossible to sleep. He kept reliving that night in the lane with the gunman. He became afraid at home and ultimately got himself into a state where he simply could no sleep. On Monday the 12th of September 2005, his birthday, the applicant went to see a GP, Dr. Gilman because of the stress and fear which he was experiencing.
5. The applicant was very confused about what was happening to him. He had experienced nothing like this in the past. He was a very fit and healthy man who had participated in Gaelic games to a high level. Dr. Gilman believed that the applicant was developing early signs of post traumatic stress disorder. He prescribed some medication to try and help the applicant sleep and also referred the applicant to a clinical psychologist, Tim Dunne.
6. When reviewed by the GP on the 20th of September 2005 the applicant was still complaining of sleep disturbance, was very anxious and nervous within himself. Dr. Gilman considered that these symptoms were consistent with a post traumatic stress disorder. The applicant was again reviewed by Dr. Gilman on the 17th of October 2005. The medication had not helped to ameliorate the applicant's symptoms of depression, early morning waking, poor appetite, sleep disturbance or insomnia.
7. In the first six months following the incident the applicant essentially found himself unable to face his work not to mention life itself. During this period of time he was prescribed antidepressant medication and tranquillisers. He also continued to attend Dr. Dunne.
8. Throughout the early months of 2006 the applicant complained that his energy levels had decreased, that he was still getting flashbacks and panic attacks, experiencing unnatural and unusual fear, and an inability to sleep.
9. Notwithstanding medication, the applicant's condition did not significantly improve and his symptoms of post traumatic stress disorder deepened though there were times when he felt he was making some progress as a result of the intervention of Dr. Dunne. Nevertheless the overall picture worsened if anything with the applicant finding it progressively difficult to be out of his home or to socialise. He was worried about going back to work and felt that he could not face the duties required of him. He was also ruminating on what might have happened to him on the night of the incident and he was concerned that his standing in the local community as well as his relationship with his wife and family would be adversely affected.

10. It is clear from the report of Dr. Gilman that the applicant was well known to him and that his presentation following the event was completely divorced from the man he had known prior to it. Dr. Gilman's assessment was that the applicant had suffered a severe post traumatic stress disorder in respect of which he felt that consultant psychiatry and psychology would be required for some considerable time into the future.

11. Dr. James Morrison, consultant psychiatrist prepared a report for the assistance of the court dated the 1st of July 2007. He noticed that the applicant was tense, irritable and intolerant and that this was affecting him in a very severe way. Despite ongoing counselling and psychotherapy the applicant still needed to take medication. He was very upset about the effect which his ongoing condition was having on his family and with those close to him.

12. Despite the intervention of Dr. Morrison, Dr. Gilman and Dr. Dunne the applicant made what is described by Dr. Morrison as only mild improvement in the overall state of his post traumatic stress disorder. He continued to be medically certified unfit to resume work. Dr. Morrison prepared a further report for the assistance of the court on the 23rd of February 2009 at which stage, whilst the applicant's dreams and nightmares were less, flashbacks were still persisting as were panic attacks. He continued on medication. Dr. Morrison thought that the plaintiff would continue to need medication and ongoing psychological support. The applicant remained unfit for work in any capacity and in that regard Dr. Morrison noted that the applicant had become obese and had developed a lack of drive, loss of energy and poor motivation, all matters which, in his opinion, related to his post traumatic stress disorder.

13. Dr. Dunne, who is a chartered clinical psychologist, prepared a report dated the 23rd of February 2009 which comprehensively deals with the applicant's symptoms and the psychological support offered by Dr. Dunne to him. He felt that psychological therapies would be required for the foreseeable future but was hopeful that in due course the applicant would obtain a full remission of his symptoms though he thought a significant remission was unlikely until the legal process had been completed. The Applicant's psychological progress to date, psychiatric opinion and prognoses is contained in an up to date medical report prepared by Dr Tessa Neville, consultant psychiatrist dated the 9th October 2014. It is abundantly clear from this report how badly the applicant has been affected by his illness. Dr Neville also prognosticates that the resolution of these proceedings should be of benefit to the applicant in terms of making what she describes as a slow gradual recovery into the long term. For the foreseeable future the applicant will need to receive ongoing psychotropic medication as well as periodic psychiatric and psychological review.

14. The applicant developed what has been described by Professor Walter McNicholas as sleep apnoea syndrome. At review the applicant was reporting a weight gain of about six stone. Professor McNicholas carried out a number of tests all of which were, in his view, consistent with a severe sleep apnoea syndrome. The applicant was subsequently admitted to hospital in August 2008 for initiation of nasal continuous positive airway pressure. Arrangements were made to provide a device for continuing use at home which resulted in the applicant experiencing an improvement in his sleep and energy levels. On review in October 2009 it was noted that the applicant's weight had fallen to 130 kilos. Professor McNicholas was of the opinion that the weight gain over the years represented a major contributory factor to the sleep apnoea. He observed that the most common acquired factor to the development of sleep apnoea is weight gain and that the incident in question represented a significant contributory factor to the development of his condition. It was his view that if the applicant could succeed in losing weight gained over the previous five years then the need for ongoing C.A.P therapy could be re-evaluated.

15. Reports were also prepared on behalf of the applicant by Patricia Coughlan, vocational rehabilitation consultant, and by Joseph G. Byrne and Sons, consulting actuaries. The court is not on this application required to adjudicate on the applicants claim for past and future medical expenses or past and future loss of earnings as the parties have agreed a figure by way of compensation in relation to this head of claim. Similarly the parties have agreed a sum in respect of special damages.

16. On the 10th of April 2011 the applicant was involved in an incident when he was punched in the nose and as a result of which he was set back to some extent in the limited progress which he had made since retiring from the force.

17. The applicant was a very keen golfer prior to the incident and after which he did try to return, however, he found that very difficult. Nevertheless, and supported by his friends in the golf club, he agreed to accept the position of the Captaincy of the local golf club in 2012. This, unfortunately, was a position which, it transpired, far exceeded the applicant's abilities in terms of his capacity to discharge the functions connected with that office; consequently he had to resign from that position. Ultimately, and as a result of his continuing illness, the applicant developed suicidal ideation in respect of which he was admitted to St. Patrick's Institution. He remained in hospital for about 6 months until December 2012.

18. The applicant and his wife both gave evidence at the hearing. The contrast between the applicant's pre-incident life and that afterwards could not have been starker. Prior to the accident the applicant was a highly sociable individual, well respected and liked by his local community. He was very involved in sporting activities and particularly the local junior GAA football team which he managed for two years. This proved a source of great satisfaction to him especially when the team went on to win a series of trophies including the minor competition. Vocationally the applicant believed that had it not been for the incident he would still be a member of the force.

19. A photograph was produced in the course of the evidence showing the applicant in 1997 at the unveiling of a memorial to Garda Henry Phelan, who was the first member of the force to be murdered by republicans on the 14th of November 1922. That picture was introduced into evidence with a view to conveying to the court the physical appearance of the applicant at that time and for the purposes of contrasting that with his present appearance. I had an opportunity to observe the applicant's demeanour in the course of the hearing. It was clear that he remains overweight and psychologically fragile with an inability due to his condition to regain his pre incident persona. At times he was very emotional and was clearly upset at the effect which his illness has had, not only on himself but specifically and particularly, on his wife and children. He was understandably proud of his pre-incident record and of his sporting and social standing in the community as well as of his record of service.

20. Mrs Walzer impressed me as someone who had suffered greatly and who had experienced immense sorrow at what had become of her husband and the effect that that had had on their own relationship and on the applicant's relationship with his children. Although she herself worked, the family income was wholly insufficient to meet their needs which of itself added to the stress being experienced by them all.

21. The applicant's life was one which, on the evidence, showed that no two days were the same. One day he might feel quite well and be able to go playing golf and on the next he would simply find himself unable to get off the couch in the sitting room. He gave as an example of the kind of things which could happen an occasion when he'd had a particularly good game of golf after which he returned home and where, for no explicable reason that he could recall, he simply "lost it" and verbally abused his wife and children. He also purchased fitness equipment to try and get his weight down and to help him feel better but would then completely fail to utilise it.

22. He was hopeful that at the end of these proceedings that that would be a closed chapter in his life and that some relief from his anxieties would be derived by him from that. He acknowledged that medical opinion was to the effect that at the end of the legal process there was some prospect that his ongoing psychological condition would improve, however, he was fearful that although there would likely be closure at the end of the legal process, the core incident giving rise to his illness would still be present and would continue to affect him.

23. It was also apparent from the evidence of Mrs Walzer that the consequences for their children were significant. In this regard she thought that their daughter Marion and son Kevin were most affected. Marion considered her father to be a slob on a couch and could not understand why her mother could not make him get up and go out. She was affected by her father's negativity. Kevin, whom she described as the brightest of their children, never finished university. She blamed herself for these effects of her husband's illness because she thought that she had loaded her worries on her children. Fortunately, Kevin went on to secure a very responsible position in Abbot Industries and Marion subsequently qualified as a teacher.

24. Mrs Walzer described herself as a person who despite all her trials and tribulations always sees her glass as half full and on one level accepted that she had a very good life. She described herself as running a lovely home. It was clear that she was a devoted wife, mother and homemaker.

25. Her evidence was, I found, of particular assistance to the court in conveying the picture of what life was like for this family as a consequence of the applicant's illness and as providing a view of the applicant from one who knew him best. Overall she said they had been through ten years of misery, with some moments being darker than others, especially when her husband had to be admitted to hospital in 2012.

26. A significant number of reports were prepared for the assistance of the court on behalf of the respondent by Dr. John Walsh, Chief Medical Officer, and Dr. Patrick Devitt, consultant psychiatrist and which the court has had an opportunity to read and to consider.

27. The medical reports on behalf of the applicant and the respondent were admitted as the medical evidence in the case. The respondent also prepared vocational consultant and actuarial reports but they too, like those of the applicant, do not fall to be considered as the matters in respect of which they were sought, have now been agreed between the parties.

28. Suffice is to say that Dr. Devitt accepts that the applicant experienced a post traumatic stress disorder which he categorised as being moderate in degree over a number of years. He was also of the view that, following retirement and on moving into his own home, the applicant had achieved a breakthrough in terms of improvement in his symptoms. That said he accepts that the applicant remained relatively fragile in emotional terms, lacking in confidence and easily upset. He thought that the applicant had become habituated to a sheltered existence and had developed a sense of dependency, in particular, on his wife. With regard to prognosis he was still reasonably optimistic and noted that the applicant himself felt that when his money worries were over as a result of the conclusion of the proceedings the applicant would be under less stress and that his confidence would continue to improve perhaps even enabling him to engage in some form of low stress type employment which would be beneficial for him.

29. However, Dr. John Walsh in his last report of the 27th of November 2014 noted the views of both vocational consultants to the effect that the applicant would experience difficulty in any attempt to return to work and that it was more likely that he would remain unemployed in the long term. He also noted, in a report of September 2014, that the applicant had completed the St. Patrick's Mental Health Services recovery programme, that he interacted well when a patient in St. Patrick's and that whilst there Dr. Nagle had noted that the applicant did not appear mentally unwell on the ward.

30. Not surprisingly Dr. Walsh, who is a specialist occupational physician, defers to the views of Dr. Devitt in circumstances where the applicant's illness is essentially one for psychiatric speciality.

31. Quite appropriately it was not suggested on behalf of the respondent that the applicant had not in fact been significantly affected as a result of the incident, indeed, in his initial report Dr. Devitt had expressed the opinion that the applicant developed serious symptoms of anxiety, intrusive recollections, irritability, loss of consciousness and social withdrawal all of which warranted a diagnosis of post traumatic stress disorder albeit, in his view, to a moderate degree. The differences between the parties, insofar as they exist, are, in essence, one of degree. Counsel on behalf of the respondent quite correctly and properly put the views of the chief medical officer and Dr. Devitt to the applicant and did so in a way, which the court notes, was appropriately sensitive to the circumstances of the case.

Conclusion.

32. Submissions were made by counsel on behalf of the applicant and the respondent and the court is obliged for the assistance rendered by these and the comparators produced.

33. Although it was submitted on behalf of the respondent that the applicant's weight gain was a significant feature in the development of his sleep apnoea syndrome and that there had to be some question mark over the applicants efforts to reduce his weight which had been encouraged by Professor McNicholas, I am satisfied, having heard the evidence, and having read the reports, that there is a causal connection to the incident in respect of that syndrome and that the applicants illness is of a type which bears significantly on motivation. In fact the applicant gave evidence that he had lost some weight and was conscious of the necessity of doing so in his own best interests. It remained an objective which he hoped better able to achieve once the understandable anxieties and concerns associated with the litigation could be put behind him at its conclusion.

34. Insofar as there is a difference between the physicians reporting on behalf of the applicant and those on behalf of the respondent in relation to the degree of the applicant's post traumatic stress disorder, I am satisfied, on the basis of the reports, and having heard the evidence of the applicant and his wife and further considering the evident ongoing affects, ten years after the event, that his illness has had and continues to have on him, that the court is warranted in coming to a conclusion that his post traumatic stress disorder is more properly categorised as being severe.

35. The consequences of this illness have been devastating for the applicant not only in relation to his chosen career in the force but also in relation to his person; so completely altering him from the man he was before the incident and in his enjoyment of all aspects of life and the amenities that go with it.

36. Whatever about the past, the future, insofar as that can ever be prognosticated in relation to his illness, is far from certain. What can be said is that the applicant is hopeful that with time his symptoms will abate sufficiently to enable him to enjoy the remainder of his life, albeit having regard to the fact that the incident will, as he had put it himself, always be with him and which by now has

already cast a long and intrusive shadow. The picture of the future is not, however, dependant solely on the hopes of the applicant and his wife but rather is also supported by the applicant's medical advisors who, in their professional opinion, view the future after the conclusion of the litigation with some positivity.

37. The court is concerned in this case only with the assessment of general damages. Given that the applicant is a relatively young man, at 52 he still has, on the balance of averages, a long life ahead of him.

38. I am satisfied, on the evidence, that the applicant is entitled to an award of general damages both in respect of the past and the future. These damages are to be assessed in accordance with tortious principles.

39. In assessing general damages in an application such as this for non pecuniary losses the court is concerned with and required by law to make a just award, namely one which is fair and reasonable, founded on the evidence, and faithful to the principle of restitution best described in the Latin phrase *restitutio in integrum*. Such damages are compensatory in nature and are to be distinguished from aggravated or exemplary damages, which are essentially punitive. The purpose or object of compensatory damages is reparative, that is to say, they are intended to restore the plaintiff, insofar as that is possible by an award of money, to the status quo ante in respect of past and prospective losses caused by the wrong.

40. The assessment of damages is not confined to actual pain and suffering experienced in the past or as a matter of probability may be experienced in the future but also encompasses the loss of or injury to the enjoyment and the amenities of life which go with the living of it; an uninjured plaintiff or, in this case applicant, being entitled to enjoy all of the attributes both physical and intellectual of which he was possessed and which were enjoyed at the time of the commission of the wrong giving rise to the injuries and loss.

41. Accordingly, applying these principals, and having regard to the evidence, the submissions of counsel, the comparators offered, and the findings made, the court will award the sum of €125,000 in respect of pain and suffering to date and the sum of €50,000 in respect of pain and suffering for the future added to which will be the following amounts agreed between the parties namely, €46,143.36 in respect of vouched special damages and €170,000 in respect of past and future medical expenses and past and future loss of earnings making a total award of €391,143.36 and the court will so order.