

## THE HIGH COURT

[2000 12044 P]

BETWEEN

MARGARET MADDEN

PLAINTIFF

AND

MICHAEL DOOHAN, MICHAEL JOSEPH HERRON, THOMAS DERRIG AND PATRICK MCGRATH

DEFENDANTS

**JUDGMENT of Ms. Justice Irvine delivered on the 9th day of October 2012**

1. The within proceedings arise out of the death of the late Terence Madden ("the deceased") a highly respected member of the Sligo community, who was ruthlessly and gratuitously gunned down outside his home in Monasteraden, Co. Sligo, as he stepped into his car at about 7.50am on 28th January, 1999. He was shot twice and died almost immediately as a result of massive blood loss. The fatal shots were fired by the second named defendant.

2. The plaintiff, being the widow of the deceased, brings these proceedings pursuant to Part IV of the Civil Liability Act 1961 on her own behalf and also on behalf of all of the statutory dependents of the deceased. The deceased was survived by three brothers and one sister. He also left surviving him his wife Margaret, his two daughters, Denise and Clare and his son, Alan.

3. The plaintiffs claim for damages pursuant to the Civil Liability Act is pursued on the grounds that the death of her late husband arose directly as a result of his assault and battery by each of the defendants and that as a result of his death, she has lost significant financial support that she would otherwise have enjoyed had he not been killed. She further claims that the aforementioned loss of financial support has arisen as a result of the actionable conspiracy on the part of all of the defendants to cause him the severe personal injuries which ultimately led to his brutal death. Allied to her financial dependency claim is the claim brought on behalf of herself and all of the other statutory dependents relating to the grief and upset experienced by them as a result of the death and which is commonly referred to as the solatium claim. Finally, in addition to the aforementioned statutory claims, the plaintiff claims damages in respect of nervous shock allegedly sustained by her as a result of the events which she witnessed in and around the time of the deceased's death.

4. The first, third and fourth named defendants, with the benefit of legal representation, filed full defences to the plaintiffs claim. However, only the first named defendant appeared in person at the trial of these proceedings. Judgment in default of appearance was obtained against the second named defendant on 16th December, 2002. The third named defendant died on 12th June, 2010 and by order of the court made on 18th October, 2010, his sons, Thomas Derrig Jr. and Jonathon Derrig, were appointed administrators *ad litem* to represent the interests of his estate. The fourth named defendant chose not to appear at the hearing of the action and the court is satisfied, from correspondence received from his former solicitor, that he is aware of the proceedings but has chosen not to attend.

5. Notwithstanding the failure on the part of the defendants to appear and contest the evidence adduced by the plaintiff in support of her claim, having regard to the defences filed by the first, third and fourth named defendants who appeared without the benefit of legal representation, the onus of proof remains upon the plaintiff to establish as a matter of law and by way of evidence, her entitlement to the relief sought.

**The Evidence**

6. In the course of the proceedings, the court heard evidence that the first, second and fourth named defendants were charged and convicted of the murder of the deceased. They were also charged and convicted of intentionally or recklessly causing him serious harm. In addition, the fourth named defendant was charged and convicted of possession of a sawn-off shotgun with the intention of enabling another person endanger life and the third named defendant was charged with a number of offences in relation to the sawn-off shotgun used by the second named defendant in the course of the murder. The trials of the first, second and fourth named defendants took place before the Special Criminal Court in July 2000 and the judgment of that court was delivered by Morris J. on 26th July, 2000. The third named defendant pleaded guilty to a number of firearms offences and in respect of which he received a three year suspended sentence from a differently constituted court on the 10th July 2000.

7. The judgment of Morris J. dated 26th July, 2000 fully set forth the courts conclusions in relation to the evidence and submissions of the parties in the course of the trial of the first, second and fourth named defendants. The court expressed itself satisfied on the evidence that the shots that killed the deceased were fired by the second named defendant, Mr. Herron. The judgment records that the evidence against the first named defendant consisted of a number of statements made by him to An Garda Síochána, the content whereof he did not dispute in the course of the trial. In those statements, the first named defendant described how, because of some type of behaviour on the part of the deceased in relation to his own father which he considered improper, he arranged for him to be assaulted by the second named defendant. He admitted to having approached the fourth named defendant, Mr. McGrath, to ask him if he knew anybody that would carry out the horrendous assault that he wished to have perpetrated upon the deceased and that some weeks later he was introduced to the second named defendant whom he agreed to pay £1,500 to carry out the assault. In one of his statements he said that he told the second named defendant that he wanted the deceased hospitalised for a couple of weeks and his arms and legs broken.

8. Based upon the aforementioned statements, the court concluded that the first named defendant intended and expected the second named defendant to inflict appalling injuries on the deceased and went on in its judgment to conclude that the first named defendant had been involved in a joint enterprise to cause the deceased the serious injuries from which he ultimately died. It expressed itself satisfied that there was ample evidence upon which to determine that the first, second and fourth named defendants were the participants in a common design intended to cause serious injury to the deceased and that this constituted sufficient *mens rea* to establish murder.

9. In the present proceedings, the court also heard evidence from Detective Caplice as to statements made by the third named defendant during the investigation into Mr. Madden's murder. In the course of interview the third named defendant, Mr. Derrig, admitted to supplying the fourth named defendant with a shotgun and ammunition and to sawing off the barrel of the gun at his request. He admitted receiving £40 for the gun and also to the fact that he knew it was the gun that had been used to shoot Mr. Madden. He further told Detective Caplice that he had buried the barrel of the shotgun on his lands in the hope that the gardai would not be in a position to trace him to the weapon when the murder investigation began.

10. In terms of the knowledge and motivation of the third named defendant at the time he provided the sawn off shot gun to the fourth named defendant, Detective Caplice told the court that the only reason for sawing the barrel off a shotgun is to facilitate its use in criminal activity. Removing its barrel makes it a much more dangerous weapon when used at close quarters and also makes it easier to conceal.

11. In support of the sufficiency of the evidence adduced on the plaintiffs behalf to establish each of her claims as against the defendants on a joint and several liability basis, counsel for the plaintiff relied upon two particular decisions to which I will briefly refer. The first is that of O'Hanlon J. in *Edward Noel Kelly v. Ireland & Attorney General* [1986] ILRM 318, a decision which I note was followed by Lardner J. in *Breathnach v. Ireland* [1989] I.R. 489 and the second being the decision of Lardner J. in *Sidney Taylor v. Phillip Smyth, Kape Investments Limited, Calla Associates Limited and Northern Bank Limited* [1991] 1 I.R. 142.

12. In circumstances where none of the defendants have contested the legal entitlement or the sufficiency of the plaintiffs evidence to succeed in her claim, I do not intend to review the case law opened by counsel on behalf of the plaintiff save to state that I am satisfied that having regard to the evidence received by the court and the legal submissions advanced by counsel, that the plaintiff is entitled to succeed in her claims against each of the defendants on a joint and several liability basis. However, I do not believe that she entitled to succeed on all of the legal grounds upon which she relies.

13. O'Hanlon J. in *Kelly* concluded that where a clearly identifiable issue has been decided against a party in a criminal trial, by means of a judgment explaining how the decision was reached, that decision gives rise to an issue estoppel in subsequent civil proceedings in which that party is involved. Accordingly, in the absence of special circumstances, any effort by a party to challenge by means of civil proceedings a decision made against them in a court of competent criminal jurisdiction is an abuse of process of the court. Indeed, Lardner J. went a little further in *Breathnach* when he concluded that such estoppel would arise, not only in relation to any specific issue determined in the criminal proceedings but also to findings which were fundamental to the court's decision on the issue. The reasoning in both cases makes perfect legal sense in circumstances where the decision of the criminal court on the same issue is made on the significantly higher level of proof than is required in civil proceedings.

14. The principal legal question that I must answer in this case is whether the issues decided by the Special Criminal Court and which are referred to in its decision of 26th July, 2000, preclude the first, third and fourth named defendants from denying that they are each jointly and severally liable at common law for the assault and battery which caused the death of the deceased and/or are liable to the plaintiff as the parties to the conspiracy to cause the injuries from which he subsequently died.

15. The *Taylor* decision is authority for the proposition that where a court concludes that two or more persons combine together with the predominant objective or intention of causing injury to another, such activity amounts to an actionable conspiracy once the plaintiff can establish consequential injury. Counsel for the plaintiff relies upon this decision to support his entitlement to an award of damages as against all four defendants on a joint and several basis, he then submits that the Special Criminal Court decided the issue of conspiracy in the criminal proceedings insofar as the first, second and fourth named defendants are concerned and that by reason of the decision in *Kelly* those defendants are now estopped from denying liability at common law for a conspiracy that resulted in the death of the deceased.

16. Having regard to the reasoned decision of the court of 26th July 2000, which dealt in detail with what it referred to as the common design of the first, second and fourth named defendants to cause serious injury to the deceased such that they were each guilty of his murder, I am satisfied that they are estopped from relying upon the defences filed to these proceedings wherein they raise a defence to the claim of the plaintiff based upon the tort of conspiracy. This very same issue was determined in the course of the criminal proceedings and it would be an abuse of the process of the court to require the plaintiff to prove this conspiracy for a second time where these defendants were found guilty of murder based upon a common intention to inflict grievous injuries upon the deceased.

17. In relation to the claim for conspiracy as against the third named defendant, counsel submits that I should be satisfied from the evidence of Detective Garda Caplice and from the third named defendant's own guilty pleas that his predominant objective when he supplied the gun to the fourth named defendant was that it would be used to injure somebody in the course of criminal activity. Thus he submits, the third named defendant should be considered to be jointly and severally liable with the other defendants for the conspiracy to inflict significant injury upon the deceased and from which injuries he subsequently died.

18. Under the provisions of s. 11(2)(a) of the Civil Liability Act 1961, it is provided that persons may become concurrent wrongdoers as a result of "conspiracy or concerted action to a common end". I have not been in a position to find any cases where damages were claimed by an individual injured as a result of a conspiracy between a number of people to cause them harm. Neither can I find any civil claim brought by the statutory dependents of any such person. However, there seems no reason whatsoever to exclude battery from the class of wrongful actions which may be the subject matter of conspiracy and which may result in loss and damage. Indeed, it would be quite a travesty of justice if a person who conspired to have another person injured or murdered could not be rendered liable in the civil courts to an action in damages brought by the widow of the victim by virtue of the fact that they were able to solicit a third party to carry out a brutal assault which they themselves were not prepared to execute.

19. I have tried to find some clear authority for the proposition that the aforementioned section of the Civil Liability Act can be applied to cases where parties conspire to commit the tort of battery and I have been unsuccessful in this regard. However, there seems to me to be no reason why the tort of conspiracy should not be applied to wrongdoing of this nature. Accordingly, in relation to the plaintiffs claim based upon the civil tort of conspiracy, I am satisfied that the first second and fourth named defendants are, by reason of the legal principles that emerge from the *Kelly* judgment, estopped from raising any defence to the conspiracy claim in these proceedings given that in the criminal proceedings these defendants were found to have conspired together to cause the injuries to the deceased from which he died. In relation to the third named defendant, I am also satisfied from the evidence of Detective Caplice given in these proceedings that at the time he sold the gun to the fourth named defendant that he well knew that gun would be used to inflict serious injuries to a third party. This evidence when taken together with his guilty plea to those charges earlier referred to in this judgment has satisfied me that he too must be found, on the balance of probabilities, to have been guilty of a conspiracy with the other defendants to injure the deceased such that he must be found jointly and severally liable for the injuries which caused his death.

20. Having concluded that each of the defendants are jointly and severally liable to the plaintiff for all of the legally recoverable losses arising from her husband's death on the grounds of conspiracy, it is not necessary for me to decide whether the defendants, other than the second named defendant, are liable to the plaintiff for the same loss on the grounds of assault and/or battery. They personally did not assault the deceased. Neither did they directly impose any unwarranted physical contact on him as is required to establish an act of battery. While I am confident that it is probably the case as a matter of law that one party can be held liable for an assault or act of battery committed on their behalf by another party either on the basis that they acted as their agent or on the grounds that they can be considered vicariously liable for their actions, I have not found clear legal authority for this proposition. This being so, I am not happy to decide whether the Special Criminal Court in its decision setting out the reasons underlying the convictions of the first, second and fourth named defendants can be stated to have determined the same issues as would fall to be decided in this case against these defendants if asked to consider their liability for the plaintiff's losses based upon the torts of assault and battery. In these circumstances, I have decided that I will not consider this legal issue as my conclusions on the matter are redundant having regard to the overall outcome on the conspiracy issue.

### **Damages**

21. Having concluded that the plaintiff has established liability against each of the defendants for the brutal killing and premature death of her husband, I must now consider the compensation to which she and the deceased's family are entitled. The heads of loss which I must consider are as follows:-

- (i) solatium;
- (ii) financial loss;
- (iii) special damages; and
- (iv) nervous shock.

### **Solatium**

22. At the time of his death, the deceased was survived by the plaintiff, his three children and four siblings. The maximum sum which the court may award in respect of the grief sustained by the deceased's statutory dependents has been capped by the legislature in the sum of €25,400. No waivers have been executed by the deceased's four siblings so I must consider whether or not I should award them any part of the solatium monies. Having heard the evidence of the deceased's two daughters, I am satisfied that each of the deceased's siblings would undoubtedly have suffered significant grief and upset as a result of their brother's violent and gruesome death. However, the overall sum available in respect of solatium is small and accordingly, I feel that I must limit them to a modest award. I will accordingly award John Madden, Albert Madden, Ciaran Madden and Winifred Foley each a sum of €1,250. In relation to the balance of the solatium monies, I believe these should be divided equally between the deceased's widow and his three children. I will accordingly award them each a sum of €5,100.

### **Dependency Claim**

23. At the time of the deceased's death, he was employed as a FAS supervisor in Sligo. He also ran his own auctioneering and insurance business and did some part time farming. The Actuary, Mr. Peter Byrne, advised the court that the financial dependents of the deceased as of the date of his death were his widow, Margaret and his daughter Clare who was at that time still in full-time education. Using evidence obtained from the Revenue Commissioners which showed that the deceased had a net weekly income of approximately €499 at the time of his death and based upon a retirement age of 65, he capitalised the financial loss to the plaintiff as of today's date in the sum of €611,000 and the loss to his daughter Clare in the sum of €17,000. It is also the case that in the year prior to the deceased's death, the bed and breakfast business operated by himself and his wife since approximately 1994 had yielded a turnover of something in excess of €6,000. Any profits arising from that business were not taken into account by Mr. Byrne when he made his calculation in respect of the dependency claim.

24. The estate which passed to the plaintiff on her husband's premature death did not give rise to what is commonly referred to as an accelerated benefit and hence there is no deduction in this respect to be made from her dependency claim. However, the court must consider the plaintiff's dependency claim taking into account the possibility that the deceased might not have worked until he was 65 by reason of a range of factors unrelated to the present proceedings such as unemployment or possible ill-health. Taking these matters into account but also factoring in the probability that had the deceased lived, the bed and breakfast business would have yielded some additional income. I am satisfied that the reduction I should make in respect of *Ready v. Bates* factors should not be substantial. I will accordingly award the plaintiff a sum of €550,000 in respect of her dependency claim and I will allow his daughter's Clare's dependency claim in the sum of €17,000 in full.

### **Special Damages**

25. I am entirely satisfied that the plaintiff has proved the loss of €17,224.24 in respect of those items of special damage as set out in the schedule of special damages which appears at p. 350 of the book of pleadings produced to the court. I will allow that sum in full.

### **Nervous Shock**

26. I am satisfied from the evidence of the plaintiff and that of her daughters, Dr. Costello, her general practitioner and Dr. John Canavan, Clinical Psychologist, that the plaintiff suffered what is commonly described as nervous shock as a result of the events surrounding her husband's death. It is hard to imagine the trauma that the plaintiff must have felt when, having heard her husband leave the house to go to Dublin for an early morning meeting, she ran down the stairs in response to a loud noise only to find him lying face down on the ground outside his car covered in blood.

27. The plaintiff described her feelings of shock, panic and despair as she tried to summon help. As she did so, she experienced a searing pain in her chest which required her emergency transfer to Sligo General Hospital where she was later diagnosed as having suffered an anterior myocardial infarct or in common parlance a heart attack. She was detained for approximately seven days with cardiac symptoms and was in a terrible state of shock when temporarily discharged from hospital for the purposes of attending her husband's funeral.

28. Dr. Canavan told the court that the plaintiff had all of the hallmark symptoms of Post Traumatic Stress Disorder. Her sleep was severely disturbed for several years. She had flashbacks and nightmares and frequent dreams of hearing gunshots. She withdrew from all social situations and sought to avoid locations or events that might remind her of the traumatic events surrounding her husband's death. Her recovery was made much more difficult by the fact that she had to deal with living at the scene of the murder thus

experiencing memories and intrusive thoughts which caused her anxiety on a daily basis. Likewise, the fact that the plaintiff had to witness a restaging of her husband's murder and deal with a significant garda investigation over an extended period made it difficult for her to control her feelings of stress and anxiety particularly when those in charge of that investigation appeared to be at a complete loss as to why her husband had been shot or as to who within the community could possibly have wanted him killed. In July 2000, some eighteen months after the murder, the plaintiff had to endure the enormous stress of coming to Dublin and participating in the trial of the first, second and fourth named defendants which lasted for a period of three weeks. During that time she had to listen to the evidence of all of the witnesses, stand outside court beside the men who were ultimately convicted of his murder and give evidence herself as to the circumstances in which her husband died. All of these factors significantly impacted upon her ability to recover from the physical and psychological effects of the murder.

29. Dr. Canavan told the court that the plaintiff has made good progress over the last number of years. However, as a result of psychological injuries she is still isolated within her community, fearful of living alone and unable to get satisfactory sleep.

30. In the context of these proceedings, the court can only compensate the plaintiff for injury which can be categorised under the heading of nervous shock. In this respect, she cannot be compensated for any of the medical conditions disclosed to the court which do not fall within that category and these include her diabetes, retinopathy and cardiac heart disease. However, Dr. Costello told the court that the plaintiff had experienced no cardiac problems prior to her husband's shooting and that the trauma which she experienced not only caused her initial heart attack but also caused her to develop high blood pressure which has proved difficult to control. She has gone on to develop cardiac disease which required her to undergo angioplasty and subsequently triple bypass surgery. On the evidence before me, I cannot ascribe her coronary heart disease to the shock sustained by her at the time of her husband's death. However, Dr. Costello was clear that cardiac disease is multi-factorial and was satisfied that the plaintiff's high blood pressure would have had the effect of significantly progressing her heart condition to the point where she required surgical intervention.

31. Taking all of the evidence that I have heard in respect of the nervous shock claim, I believe the appropriate sum in respect of general damages to cover this head of claim is a sum of €150,000.

### **32. Summary of the Awards**

John Madden €1,250 Solatium

Albert Madden €1,250 Solatium

Ciaran Madden €1,250 Solatium

Winifred Foley €1,250 Solatium

Clare Madden €5,100 Solatium

Alan Madden €5,100 Solatium

Denise Madden €5,100 Solatium

Margaret Madden €5,100 Solatium

Margaret Madden €550,000 Dependency Claim

Clare Madden €17,000 Dependency Claim

Margaret Madden €17,224.24 Special Damages

Margaret Madden €150,000 Nervous Shock

33. Notwithstanding the conclusion of these proceedings I recognise that it would be hopelessly unrealistic to believe that the plaintiff will ever fully psychologically recover the health which she might have expected to have enjoyed at this stage of her life had her husband not been taken from her so prematurely by the senseless and ruthless actions of the four defendants in these proceedings. Nonetheless, I hope that the plaintiff, who appears to be very fortunate in terms of the support she receives from her loving family, will make further progress to the point that she will be able to enjoy some improved quality of life in the years to come.