

**THE HIGH COURT****[2012 No. 8984 P]****BETWEEN****MARIO CAFOLLA****PLAINTIFF****AND****LEO O'REILLY AND SEAN BRADY****DEFENDANTS****JUDGMENT of Kearns P. delivered on 28th day of February, 2014.**

By order dated 21st October, 2013, this Court directed the trial of a preliminary issue, namely, whether the plaintiff's claim against the first named defendant has been the subject of a prior accord and satisfaction. Similar defences have been raised in relation to similar claims brought by Marie Cafolla, a sister of the plaintiff, and Ciara Fusco, a cousin of the plaintiff. All three allege that they were victims of sexual abuse by the late Father Brendan Smyth. Each brought proceedings in Northern Ireland in respect of the alleged abuse, all of which proceedings were settled in 1998, each plaintiff signing an accord and receiving a sum of money in satisfaction.

Each plaintiff subsequently instituted fresh proceedings in this jurisdiction in 2012, being the proceedings herein, in which it is claimed that a separate and further cause of action, and indeed further and different damage, has arisen by virtue of the disclosure that in or around March and April, 1975 two meetings were convened by the first named defendant's predecessor, which were attended by the second named defendant, as a result of which the defendants became aware of sexual abuse by Fr. Brendan Smyth, but failed to take any appropriate steps to prevent further acts of abuse being perpetrated on children, including the plaintiffs herein.

The first named defendant herein is the Bishop of Kilmore and resides at Bishop's House, Cullies, Co. Cavan. He is sued in his capacity as Bishop of Kilmore, and as such responsible in law for the acts and omissions of his predecessors, including the late Bishop Francis McKiernan, with whom the meeting in 1975 took place. As Bishop of Kilmore, the late Bishop McKiernan was responsible for the control and supervision of the late Father Brendan Smyth, a member of the Norbertine Order, the Abbey of which Order was situate in the diocese of Kilmore.

The second named defendant is the Catholic Primate of All Ireland. He resides in Armagh and is sued in a personal capacity arising out of the meetings which occurred in 1975. He is not a party to the present application for the trial of the issue.

**BACKGROUND FACTS**

Between approximately 1968/9 and 1976, the plaintiff was sexually assaulted by Fr. Brendan Smyth on a regular basis.

Proceedings claiming damages, including aggravated damages, were launched on behalf of the plaintiff in Northern Ireland in May, 1996. In those proceedings, the plaintiff sued Cardinal Cathal Daly, Archbishop of Armagh and Primate of All Ireland, on behalf of the Roman Catholic Church in Ireland and the Council of Bishops, various representatives of the Norbertine Order and also Fr. Brendan Smyth.

Amongst the particulars of negligence and breach of duty alleged against the defendants were the following:-

- "(a) Failing to take all care in the circumstances for the safety of the minor plaintiff.
- (b) Failing to exercise any or any adequate supervision of the pastoral duties of the fourth named defendant.
- (c) Failing to exercise proper control over the fourth named defendant
- (d) Causing and allowing the fourth named defendant to engage in assault and sexual abuse of the minor plaintiff.
- (e) Failing to warn the parents of the minor plaintiff of the proclivities of the fourth named defendant.
- (f) With knowledge or means of knowledge, failing to take steps as were appropriate to warn all persons who would be coming into contact with the fourth named defendant of such proclivities.
- (g) Failing to suspend or in any other way prevent the fourth named defendant from carrying out his pastoral duties as a bona-fide priest in the Roman Catholic Church in Ireland under their respective auspices.
- (h) Failing to ensure that the fourth named defendant did not have access to children whilst apparently carrying out his ministry under their auspices.
- (i) Failing to take such steps as were adequate to ensure that appropriate checks were made on all persons carrying out their pastoral duties as a priest under their respective auspices.
- (j) By reason of the aforesaid, causing the parents of the minor plaintiff to place reliance on the integrity and safekeeping of the minor plaintiff whilst in the presence of the fourth named defendant in circumstances when it was wrong and unsafe for them to do so.

(k) Misleading the parents of the then minor plaintiff into thinking that the fourth named defendant was a man of integrity and practising the normal perceived standards of a Roman Catholic priest.

(l) Failing to notify the appropriate civil authority of the sexual offences that the fourth named defendant was involved in with the then minor plaintiff."

The proceedings were brought on behalf of the plaintiff with the benefit of advices of Messrs. MacElhatton & Co., solicitors from Belfast and of counsel, Kieran Mallon, B.L. With the benefit of such advices, the plaintiff, who was born on the 15th February, 1960, entered a settlement agreement with the various defendants on the 30th March, 1998, which was executed by him in the presence of his solicitor and signed by him and in which he agreed as follows:-

"I, Mario Cafolla of 10 Gransha Parade in the City of Belfast, hereby acknowledge receipt of the sum of Twenty five thousand pounds (£25,000) together with a sum of money in respect of my legal costs from Reverend Gerard Cusack, Administrator of Holy Trinity Abbey, Kilnacrott, Ballyjamesduff, County Cavan which sum is paid by the said Reverend Gerard Cusack without any admission of liability and accepted by me in full and final settlement and discharge of each and every claim or demand of whatsoever nature or kind and howsoever arising against the defendants herein and each of them and/or against any third party in connection with each and every one of the complaints made by me in relation to Reverend John Gerard Brendan Smith (sic.), deceased. I hereby confirm and agree that each and every one of my complaints in respect of the said Reverend John Gerard Brendan Smith (sic.) and in respect of each and every one of the alleged acts or matters by him concerning me are now fully and finally disposed of and will not be re-opened by me or any one on my behalf at any time in the future either against the within named defendants or by any of them or against any third party."

Notwithstanding the settlement of those proceedings, the further present proceedings were commenced by plenary summons on the 6th September, 2012.

Paragraph seven of the statement of claim delivered on the 13th September, 2012, in these proceedings claims as follows:-

"In or around March and April 1975, two meetings were convened at the behest of the first defendant's predecessor, Bishop Francis McKiernan, arising out of complaints made to the said Bishop that two children had been abused by Fr Brendan Smyth. The second defendant, who was then the part-time secretary to and servant or agent of the said Bishop, attended and participated in the said meetings by asking questions of the children, recording the answers of the children and/or acting as recording secretary. Arising out of the said meetings, Bishop Francis McKiernan and the second defendant, owed a duty of care to members of the public generally, particularly to those children such as the plaintiff to whom Fr Brendan Smyth had access and who had been and continued to be sexually abused by him, to prevent such access and sexual abuse. The said Bishop McKiernan and the second defendant further owed a specific duty of care to the plaintiff in circumstances where one of the children who were interviewed at the meetings identified the plaintiff as being a potential victim of Fr Brendan Smyth and provided details of his then address."

The statement of claim then alleges that "between approximately 1968/9 and 1976 the plaintiff was sexually assaulted by Fr Brendan Smyth on a regular basis".

The particulars of negligence against the first named defendant contend that there was a failure to properly manage, control or regulate Fr. Smyth adequately or at all in circumstances where they knew he had paedophile tendencies and was in fact a paedophile and presented a grave risk to children.

As against both the first and the second named defendants, it is alleged that they were guilty of negligence and breach of duty in that they:-

"(a) Failed to report to An Garda Síochána the fact of formal signed complaints against Fr Brendan Smyth of sexual assault and paedophilia on other children, made to the Church authorities and investigated by them at two meetings in March and April 1975;

(b) Failed, following such meetings, to take any or any adequate steps to ensure that Fr Brendan Smyth did not continue to perpetuate sexual assaults on children including the plaintiff;

(c) Failed, in circumstances where one of the children who were interviewed at the meetings identified the plaintiff as being a potential victim of Fr Brendan Smyth, to contact the plaintiff or his parents for the purposes of establishing whether he had been and continued to be abused by Fr Brendan Smyth;

(d) Failed, in circumstances where one of the children who were interviewed at the meetings identified the plaintiff as being a potential victim of Fr Brendan Smyth, to contact the plaintiff or his parents for the purposes of preventing further abuse of the plaintiff by Fr Brendan Smyth..."

These and other alleged failures are claimed to have exposed the plaintiff to further assaults and injury, exacerbated by the fact that they could have been prevented had Fr. Brendan Smyth been removed, suspended or otherwise prevented from having access to children, and in particular the plaintiff.

In submissions before this Court, it is alleged on behalf of the plaintiff that the fact these meetings occurred in 1975 was concealed by the first named defendant and his predecessor in title, and by the second named defendant, until mentioned in statements of the second named defendant in or around March, 2010 which were reported in the media.

It is contended on behalf of the plaintiff that it was not until 2012 that, following contact with a journalist, the plaintiff became aware that one of the children who were interviewed in 1975 had identified the plaintiff as being another victim of Fr. Smyth. It is contended that both the concealment and the later revelation in January, 2010 that the plaintiff's name as a possible victim of Fr. Smyth was known to the first defendant's predecessor in title in 1975, meant that further abuse could have been prevented, and these facts constitute a further cause of action and further fresh injury to the plaintiff.

## **THE DEFENDANTS' CASE**

It is contended on behalf of the first named defendant that all allegations of negligence and claims for damages, including aggravated damages, which are made in the present proceedings were also raised in the first set of proceedings in Northern Ireland. The damage was the same and each claim was duly settled by accord and satisfaction in or after 1998. This plaintiff, as in the case of his sister and cousin, had the benefit of professional representation and advice and the settlement agreements included provision for their legal costs. The terms of the accord and satisfaction expressly stated that monies were paid to the plaintiff in full and final settlement and discharge of each and every claim or demand of whatsoever nature or kind and howsoever arising, not merely against the defendants herein and each of them, but also against any third party in connection with each and every one of the complaints made in relation to Fr. Brendan Smyth. It was therefore submitted that the settlement terms could not have been clearer and were "omnibus" in nature, as well as containing a commitment not to re-open the matters dealt with by the settlement at any time in the future, the same being now fully and finally disposed of.

### **THE PLAINTIFF'S CASE**

On behalf of the plaintiff the following arguments were advanced:-

First, there was no privity with the first named defendant, because the Bishop of Kilmore was not a party to the proceedings brought by the plaintiff in Northern Ireland in 1996, nor was he a party to the settlement effected in 1998.

Second, it was argued that the onus was on the first named defendant to show that the plaintiff "intended" to release the diocese of Kilmore by the earlier settlement. The wording of the settlement is general in nature and it was thus contended that it does not go far enough to specifically discharge the diocese or evince any such intention.

Third, it was alleged that neither the plaintiff nor his legal advisors in Northern Ireland in 1998 had any knowledge of the investigation conducted at the behest of the Bishop of Kilmore in 1975, or the fact that two victims had made detailed statements concerning their abuse by Fr. Smyth, or his abuse of other children, or his abuse specifically of the plaintiff. The concealment of the existence and outcome of the 1975 investigation constituted a new and separate cause of action and was new and different damage suffered by the plaintiff in that the plaintiff suffered a separate psychological injury as a result of the revelation in 2012. At that point the plaintiff became aware of the first named defendant's failure to make disclosure at the appropriate time (i.e., in 1975) to An Garda Síochána and the plaintiff's family which would have protected the plaintiff from further abuse and which would have led to earlier treatment. This further claim is said to arise from fresh facts which post-date the settlement of the Northern Ireland proceedings and thus, it was argued, it cannot be said that the first defendant was a concurrent wrongdoer with any of the defendants in the earlier proceedings.

While the plaintiff accepted that the compensation received from that settlement did constitute partial satisfaction and would be taken into account in reduction of his total claim in the present proceedings, it was contended that the damages recovered in the earlier proceedings fell well short of the level of damages which the plaintiff would have recovered had he and his legal advisors been aware of the full facts of the situation. It had been represented to the plaintiff and his advisors at the time of the original settlement that the Norbertine Order had limited assets with which to satisfy any awards made to the plaintiff and other claimants.

### **DISCUSSION**

Before proceeding to a more general discussion, the first point raised by the plaintiff was dealt with by the Court on an ex tempore basis at the conclusion of the submissions. The Court is quite satisfied that the first named defendant in these proceedings, who is sued as an institutional defendant, was sued in the same institutional capacity as the first named defendant in the Northern Ireland proceedings. In the 1996 proceedings, Cardinal Cathal Daly was sued in his representative capacity as Head of the Roman Catholic Church in Ireland and the Council of Bishops. The first named defendant in the present proceedings is also sued as the successor in title of the Bishop of Kilmore, and the Court sees no meaningful distinction deriving from the somewhat different nomenclature adopted in the legal proceedings in the different jurisdictions. The bishops, as relevant authorities, were enjoined.

Even if I am mistaken in forming this view, the terms of the accord and satisfaction expressly provide that the settlement is not merely with the named institutional defendant but discharges "any third party in connection with each and every one of the complaints made". It also provides that the matters the subject matter of the accord will not be re-opened by the plaintiff at any time in the future "either against the within named defendants ... or against any third party". This fact of itself conclusively disposes of the first issue raised by the plaintiff.

The real question, however, to be addressed in these proceedings is whether, as contended for by the plaintiff, the revelation or discovery of the meeting in 1975 constitutes a fresh cause of action and a new and separate injury which was not addressed by the accord and satisfaction.

### **ACCORD AND SATISFACTION**

Beale et al, *Chitty on Contracts*, Vol 1: General Principles (31st Ed., Thomson Sweet & Maxwell, 2012) at p.1612, state the basic principle of accord and satisfaction as follows:-

"In order to establish a valid compromise, it must be shown that there has been an agreement (accord) which is complete and certain in its terms, and that consideration (satisfaction) has been given or promised in return for the promised or actual forbearance to pursue the claim."

The authors make clear that the question of whether there has been accord and satisfaction is a question of fact. The existence and validity of the accord and satisfaction in this case is not in dispute.

It is clear that under s.17 (1) of the Civil Liability Act 1961 that a satisfaction by one concurrent wrongdoer will operate in favour of all. Of course they must be concurrent wrongdoers in respect of the 'same damage'. It is undeniable that the same physical and psychological personal injuries occasioned by the conduct of Fr. Brendan Smyth constitute the damage pleaded in the plaintiff's personal injuries proceedings in Northern Ireland as well as that pleaded in the present proceedings. The allegations of negligence are essentially the same and both sets of proceedings claim aggravated damages on the basis that the defendants ought to have taken Fr. Smyth 'out of circulation' when his proclivities became known to them. This Court is satisfied that a mere exacerbation of existing damage (arising from the discovery of details of the 1975 meeting) does not alter the substance or nature of the damage. In this

regard Walton et al *Charlesworth & Percy on Negligence* (12th Ed., Sweet & Maxwell, 2010) at p. 333 conclude:-

"Where the claimant in a negligence action reaches, on a proper construction of an agreement, a full and final settlement of all claims arising from his cause of action, he cannot commence another action at some later date arising from the same matter even where some damage has arisen, for instance in an accident claim, some complication of injury, the possibility of which was not foreseen at the time of settlement."

Counsel for the plaintiff is mistaken in my view in suggesting that some new cause of action came into being with the revelations of the 1975 meeting. I instanced *in arguendo* an example which confirms my belief. If a hospital doctor bungles an operation in circumstances where he has health or medical issues, and it later emerges following settlement of the claim by the injured party that the hospital authorities knew in advance of the doctor's problems but nonetheless allowed him to continue operating, that does not amount to a new cause of action but rather is an aggravating factor in respect of the same damage suffered by the same patient.

It is a matter of the utmost importance that the integrity of settlements, once arrived at with the benefit of proper legal advice, be upheld. It goes without saying that no claim could ever be regarded as finalised and concluded if it could be set aside in circumstances where a newly discovered complication were to come to light in the aftermath of a settlement. Settlements must, in the interests of the proper administration of justice, achieve finality of disputes.

I am in any event satisfied that the "new" or "additional" facts relied upon by the plaintiff were already in the public domain when the proceedings were settled. In the course of the hearing before this Court, counsel on behalf of the first named defendant handed in a number of newspaper reports which made clear that the information relating to the meetings in 1975 had been in the public domain for some time before the settlement had been arrived at in 1998. Reports from the *Cork Examiner* (Oct 1995), *The Irish Times* (Oct 1995), *Sunday Mirror* (August 1997) make this abundantly clear. It follows that the plaintiff and, more particularly his legal advisors were aware, or ought to have been aware, of all material facts prior to entering into the accord. It cannot plausibly be maintained that any alleged insufficiency in the sums received was therefore attributable to any ignorance of the potential liability of the defendants herein.

The Court is also of the view that the further detail that the plaintiff herein was identified by an interviewee at the meeting in 1975 to the defendants as a victim of Fr. Smyth is not an issue on which anything turns when considering whether settlement was properly reached.

The Court is therefore satisfied that the plaintiff has failed to demonstrate either that a different cause of action or different damage has arisen in this case. The furthest the contention for different damage can be put is that the plaintiff's existing damage was exacerbated by the events of 1975.

In terms of the adequacy of the compensation obtained, it is not for the Court to second guess a quantification of damages made in a different jurisdiction some considerable time ago, particularly when that settlement was arrived at with the benefit of full legal advice. Lawyers local to that jurisdiction were the very experts best placed to assess the exigencies of that litigation and it would be presumptuous of this Court, which is not privy to all facts and information available to those legal experts, to undermine and set aside a settlement arrived at by conventional legal process.

The case of *J.B. v. Southern Health Board* [2007] IEHC 291 (Unreported, High Court, de Valera J., 20th July, 2007) provides ample authority for the proposition that, once settlement is properly reached, the amount a claimant accepts in full and final settlement of each and every claim is determinative of what amounts to full satisfaction in that case. In his judgment Mr. Justice de Valera stated:-

"The plaintiff has submitted that the settlement of his original claim was not in full satisfaction of the plaintiff's claim and was limited to those (first) proceedings and in support of this contention suggests that the sum of £28,000 could not fully compensate the plaintiff for the damage he suffered. I do not accept this submission. The phraseology of the discharge form is clear and unambiguous. It reads, at the relevant part:

'I J.B. accept the sum of £28,000 in full and final settlement of all claims...'

He continued:-

"These claims, with the exception of the claim for damages for breach of constitutional rights (in relation to which Costello J. in *W. (No. 2) v. The Attorney General* [1997] 2 I.R. 141 held that no action lies for breach of a guaranteed constitutional right where, as in this matter, existing laws protect that right), are identical to the other headings of claim maintained in the year 2000 (second) proceedings and the words 'in full and final settlement' are clear and unambiguous in their meaning."

Critically the settlement reached in Northern Ireland was not reached in ignorance of any fact material to the sum offered, given that the matters now relied upon as "revelations" were in fact in the public domain at that time. The whole settlement having been properly reached, I conclude that the plaintiff's claim has been the subject of an accord and satisfaction.

Notwithstanding slight differences in the terminology of the terms of settlement in the case of Marie Cafolla, I am satisfied that the considerations and conclusions arrived at in the present case apply also in the related cases of Marie Cafolla and Ciara Fusco against the same defendants – both settled in respect of the same damage – and I do not consider it necessary to deliver separate judgments in those cases.