AN ARD-CHÚIRT

THE HIGH COURT

[2024] IEHC 35

[2013 11255 P]

BETWEEN

KATIE KELLY

PLAINTIFF

AND

DECLAN DOWNEY

DEFENDANT

Judgment delivered on 26 day of January 2024 by Mr. Justice Tony O'Connor

Introduction

1. The causes of action with which this Court is concerned in this judgment are of the most serious nature. The plaintiff in prosecuting these proceedings seeks to vindicate her right to bodily integrity by pursuing a civil claim in tort. The defendant denies in the pleadings and in his evidence that he sexually assaulted or raped the plaintiff. This Court having heard evidence over five days applies the principles for the adjudication of the relevant factual issues in dispute.

The relevant principles

2. "Balance of probabilities" is the standard of proof for claims which are pursued in the civil courts. In other words, the plaintiff is obliged to satisfy this Court that she was sexually assaulted by the defendant. It is for the plaintiff to establish that her version is more likely than the denial by the defendant.

3. There is a degree of flexibility in the standard to be applied. This was summarised by McDermott J. in *Re Thirty First Amendment of the Constitution (Children) Bill 2012* [2013] IEHC 458. This related to a challenge by Joanna Jordan to the referendum result leading to the 31st Amendment of the Constitution (Children) Bill 2012. McDermott J. stated at para. 55: -

> "*Thus, the application of the standard of proof in civil proceedings must have regard to the issues in the case and the consequences of a particular finding of fact, with a view to ensuring that an appropriately cogent body of evidence has been established offering clear and convincing proof of the proposition advanced."*

4. McDermott J. followed a line of authority previously summarised by O'Flaherty J. in *O'Laoire v. Medical Council* (Unreported, Supreme Court, O'Flaherty J., 25 July 1997) where O'Flaherty J. stated: -

> "*The common law panorama at this time gives the impression that there is but one standard of proof in civil cases though, of necessity, it is a flexible one. This flexibility*

will ensure that the graver the allegation the higher will be the degree of probability that is required to bring home the case against the person whose conduct is impugned".

5. In short, the Court will apply the balance of probabilities test in these proceedings rigorously having regard to the consequences of its determination.

The account of the plaintiff

6. The plaintiff testified that the defendant started giving her lifts to school in September 2009. Under cross–examination the plaintiff accepted that she was unsure whether the defendant had started giving her lifts in April / May 2009. The plaintiff had her 16th birthday in April 2009. The defendant is the principal in the primary school adjacent to the plaintiff's secondary school and was indeed the principal there in 2009/2010.

7. Following the plaintiff's participation at a ballet and tap dance festival at Birmingham in October 2009, she became scared according to her evidence, after the defendant "put his hand on my leg when he was driving, and he rubbed the inside of my leg" during the journey to school. The plaintiff outlined how the defendant used to comment how she "was clever and pretty" and that he proceeded in subsequent journeys to take her hand to touch and rub his exposed penis.

8. The plaintiff in reply to questions from her counsel stated that the defendant "used to keep driving" and on other occasions would pull the car over. The Court heard the plaintiff's account of how the assaults progressed to oral and full penetrative sex on a regular basis three to four times per week. The plaintiff gave a graphic description of various acts to which she did not consent. She also mentioned how she wrapped up cash notes given to her by the defendant before binning them in school.

9. The plaintiff was very explicit about how the defendant during the mornings when "he raped me" took off his trousers belt and "put it around my neck and around the headrest

and he said that if I moved or cried, that he could make the belt get tighter". She said that there was never a point that she "couldn't breathe, but it was tight to the point that I couldn't move freely". In reply to counsel for the defendant, the plaintiff estimated that this forcible restraint occurred "more than ten times".

10. The plaintiff stated that the assaults and rape ceased when the academic year ended in May or June 2010. It is common case that the defendant had declined to continue giving lifts to the plaintiff during her sixth and last year at secondary school which commenced in September 2010.

Disclosure of assaults

11. The plaintiff explained that she had "low mood and anxiety" in the summer of 2010. She described how when she saw the defendant she feared "he might hurt me again".

12. The vice principal of her secondary school had a good relationship with the plaintiff in her leadership role as an elected prefect. That allowed the plaintiff to approach that particular vice principal following her self-harm thoughts over the 2010 Christmas holidays. After a meeting with the vice principal (who was not called to give evidence) the plaintiff on her account told her mother about the assaults (the plaintiff's mother was not called to give evidence). The plaintiff then told her father, whose evidence I will address later.

13. The plaintiff subsequently gave a formal statement to a detective garda in early February 2011 (no member of the Garda investigative team was called to give evidence). Ultimately, in August 2012, the plaintiff was informed by a member of An Garda Siochana that the Director of Public Prosecutions had decided not to prosecute the defendant.

14. The Court is not drawing any inference from the plaintiff's disclosure to others.

Lift home in April 2010

15. There was one occasion in April 2010 when the defendant gave the plaintiff a lift home from school. Due to an emergency situation with the plaintiff's brother, the plaintiff,

then aged 17, was directed by her parents to ask the defendant to give her a lift home. The plaintiff told the Court how she left school early that day to get that lift, during which she states that the defendant pulled the car into an unidentified farmyard entrance. There, according to the plaintiff, he pointed to a condom and showed her how to put it on his penis. The plaintiff was insistent that she did not know what a condom was before then.

16. After this emerged during the second day of cross–examination, the Court was prompted to review the evidence of the plaintiff given earlier in the trial about the frequency and degree of the assaults and rapes after October 2009. The Court understands how memories are affected by trauma and delay and the fact that the lifts occurred over 14 years ago. However, when applying the legal principles for establishing the facts on the balance of probabilities, the plaintiff bears the burden of proof and in this case appears somewhat unreliable concerning certain material issues of fact. The plaintiff is undoubtedly able to recall events from when she was 16 or 17 years of age. Nevertheless, the Court cannot ignore the apparent unreliability about the history of assaults and rapes when it is applying the relevant burden of proof. In itself, the inability to recall specific detail does not establish unreliability. However, that lack of clarity coupled with the absence of records or another witness to support the suggestions that her grades slipped particularly during the 2009/2010 academic year or that she had been late for the start of many school days does not assist the plaintiff in discharging the burden of proof.

17. It is regrettable that the plaintiff failed to answer the question about the reason for her delay in furnishing replies to particulars and advancing these proceedings to trial. Towards the end of the cross–examination the following questions were posed and answered in relation to the reply dated 7 September 2022 to the request for particulars dated 3 September 2014 arising from the personal injuries summons issued on 16 October 2013 (the summons was unspecific about the detail of the alleged sexual assaults and rapes): -

"Q. And it took you eight years to respond to that document, why was that?

A. I was in England for five of those years.

Q. But that wouldn't have impeded you from answering it, given that you could communicate by email or any other way? Eight years elapsed before responses were given, what explanation can you give to the Court about that?

A. [despite a significant pause allowed for a reply, the plaintiff did not reply]

Q. What explanation can you give the judge, Ms. Kelly, as to why it took eight years to reply to particulars and give a detailed narrative as to what you say happened?

A. I don't know."

18. Neither the plaintiff nor any of the expert witnesses offered a good reason for the delay. In a later answer, the plaintiff apologised and stated that "It's not an easy thing to go through."

19. I hesitate to focus on this area in weighing the evidence. The plaintiff did require psychiatric and psychological care for what was diagnosed as post–traumatic stress disorder. The Court has taken account of that care. It is not necessary nor proportionate to set out in this judgment a history of the plaintiff's difficulties because the medical practitioners called to give evidence, as detailed next, did not give information or a view to explain the delay by the plaintiff in prosecuting these proceedings. The medical practitioners called were: -

(1) Dr. Ciarán Corcoran (consultant psychiatrist who first saw the plaintiff on 12 March 2012),

(2) Ms. Emma Tyrell (a chartered forensic psychologist since June 2022 who was one of the two clinicians who signed a report dated 15 June 2022 following assessment in March 2022 of the plaintiff's "psychological functioning and impact of the alleged offences"),

(3) Dr. Denis Duignan (A general practitioner attended by the plaintiff since December 2019) and,

(4) Dr. Grainne Clyne (who examined the plaintiff on 15 April 2013 to complete a report for the Personal Injuries Assessment Board ("**PIAB**") and who produced the records kept by plaintiff's general practitioner for attendances at her practice from 30 November 2007 through 2010 and on through to April 2015).

20. In reply to questions from the Court, Dr. Corcoran advised that speaking about trauma must be handled "very delicately" and explained the role of "exposure therapy". In reply to counsel for the defendant, Dr. Corcoran clarified that it was "total speculation" on his part to suggest that the plaintiff missed a few appointments with his service due to a fear of increasing her anxiety level which he called "SUDS" (an acronym for "Subjective Units of Distress").

21. The Court is conscious of the need to balance the right to vindicate bodily integrity, reputations and privacy of individuals. The delay of the plaintiff in setting out the significant detail given by the plaintiff at the trial, of the alleged assaults and rapes, caused concern for the Court. That unexplained delay contributes to the Court's consideration of the burden on the plaintiff to establish her claims on the balance of probabilities. If the defendant had not given such clear evidence, this concern would not be particularly relevant.

The defendant's evidence

Journey to school

22. The defendant stated that it was the plaintiff's father who had asked in April/May 2009 for the defendant to bring his daughter (the plaintiff) to school. The defendant understood it was for a couple of weeks due to the ill health of the plaintiff's mother at that time. The defendant testified that the plaintiff used to initially arrive at his house before they would depart at 08:35am. An arrangement was agreed whereby he would leave the car open

so that the plaintiff could get into the car instead of waiting outside. There was no hesitation in his recall of how he dropped the plaintiff at her secondary school before proceeding on to his primary school which is up on a different road that is "100 yards" beyond the secondary school. The defendant explained that there was about five minutes between dropping the plaintiff off and arriving at his primary school.

Petrol voucher and continuation of lifts

23. The defendant recounted how a petrol station voucher for €60 from the plaintiff's family had been dropped into his letterbox during the summer of 2009. The defendant remembered that the plaintiff had a mobile telephone. He believes that it was the plaintiff who had texted him to request a continuation of the transport arrangement for the following academic year, whereas the plaintiff has no memory of her personal involvement in the requests earlier in 2009 or during that summer for lifts. In fact, it was the plaintiff's view that the transport only started in September 2009. The defendant's wife in her brief evidence stated that she was out walking with the defendant when the text arrived from the plaintiff which led to a conversation and a decision about his reply to decline a continuation of the lifts.

24. The plaintiff's father testified that he "can't be 100% sure" on whether the transport started before or after the summer of 2009. The plaintiff's father was unsure about when the petrol voucher had been dropped into the defendant's letterbox and could only recall that it was during a school holiday period.

25. The differing memories of these rather inconsequential events contribute little to the Court's view about the reliability of the accounts.

Routine of the defendant

26. The defendant testified that he normally arrived between 9am and 9:05am at his primary school in advance of classes starting at 9:20am. That period was very busy because

he often had to meet a substitute teacher, engage with members of the 34 members of staff, or with parents who were dropping off their children before classes started. He was categoric that he "was never late" during the 2009/2010 academic year or that his role for meeting substitute teachers, staff or parents had to be undertaken by another person.

Conversation in the car

27. The defendant described himself as not being "a natural speaker or a natural conversationalist". He testified that there were periods of silence during the 14 – mile journey each morning and that each conversation "waxed and waned". The "general chit chat" related to what was on television and it was quite general. He was quite insistent that he never deviated from the route other than for an enforced detour which occurred in or about May 2010. He categorically denied the plaintiff's account of proceeding down a laneway or into a farmyard entrance.

28. The defendant, in answer to the question about whether he broached the subject of the plaintiff's attire said "absolutely not". Similarly, he said that he "never sexually assaulted" or touched the plaintiff inappropriately. In other words, every single allegation of sexual assault and rape described by the plaintiff was denied unhesitatingly by the defendant.

The car and cigarettes

29. The fact that the plaintiff was able to describe the colour and make of the defendant's car adds little to the facts to be considered by the Court. Similarly, the type of cigarettes smoked by the defendant at the time (Silk Cut as opposed to Benson and Hedges as mentioned by the plaintiff in her evidence) is insignificant in the overall context.

Cessation of lifts

30. The defendant's evidence about receiving a text from the plaintiff that she was not going to school on the last day of the academic year suggested to the Court that the plaintiff was able to express herself to the defendant. The plaintiff had not disagreed with the

suggestion that she finished taking lifts on the second last day of the academic year. There is no dispute that the plaintiff had a mobile phone and used it during the 2009 / 2010 academic year. The inability of the plaintiff or her father to clarify the circumstances surrounding the requests made of the defendant to give lifts is notable because it demonstrated an inability to recall relevant specifics. The Court understands the potential effect of events in the plaintiff's family over 13 years ago on memory. However, it is worthy of comment that the plaintiff in preparing for this trial since the service of the notice of intention to proceed dated 1 September 2020, took another two years to describe the litany of events which she described more briefly in her own evidence. On p. 4 of those replies the following sentence appears: -

> "In August 2010 he [the defendant] texted her [the plaintiff's] father to say that he [the defendant] would not be bringing Katie to school any more and the assaults stopped thereafter".

31. The plaintiff told the Court that she did not know about the requests or the notice of cessation for the lifts. The plaintiff's father could not remember how the cessation was notified whereas the defendant was clear that he declined the plaintiff's request for a continuation of the lifts. The defendant's wife gave evidence of having seen the text and discussing it with the defendant. The Court does not need to determine how the lifts came to an end. However, it was another detail which was left unclear by the plaintiff's father to such an extent that I felt it necessary to question the plaintiff's father in order to understand his apparent equivocation in some of his replies to questions. Lest there be any doubt, I do not find that the plaintiff's father was untruthful. However, his evidence does not assist any attempt to discredit the defendant. It was proper that he was not asked about what the plaintiff told him as that evidence would fall within the self-corroborating category which adds nothing to the weight of the evidence.

Request for meeting at Kinnegad

32. The aspect of the evidence given by the plaintiff's father which related to the events following disclosure by the plaintiff caused the Court some disquiet. He said that the conversation which he had with the plaintiff after arriving subsequent to the plaintiff's meeting with her vice principal in January 2011 was "not too long". In reply to a question he said "it may have been in the course of that conversation, the discussion with the family friend [that we would] make contact with [the defendant] to discuss what we'd been told".

33. The plaintiff's father testified that on the following day, he contacted the defendant to attend a meeting with the plaintiff and a medical person in a hotel at Kinnegad. The plaintiff's father said that he texted the defendant although the content of the message was not described in evidence. The defendant said that the plaintiff's father called to his house on 16 January 2011 to convey the request.

34. Following the request according to the defendant, the defendant contacted his own doctor. This led him to seek advice from a solicitor. The defendant's solicitor then wrote to the plaintiff's father in the following terms: -

> "We do not know the nature and extent of the allegation being made and understand that our client was invited to a meeting with your daughter and a medical person we believe to be a general practitioner or some other medical doctor in a hotel in Kinnegad.
>
> Given that our client is unaware of what allegations are to be made to him, we advised him to attend no such meeting in the presence of a medical person as we are unsure as to the nature and extent of the allegation or the reason for the said meeting.
>
> We think it is highly irregular to have such a meeting about whatever allegation the minor has outlined.
>
> The most appropriate method for dealing with matters such as this is to report the matter to the Gardai, if a criminal offence is to be alleged.

If the matter is one of a civil nature, then we think the appropriate method for you to go to your own lawyers and have them correspond with us."

35. Indeed, following that letter, the plaintiff made her complaint to the Gardai and the defendant met with HSE social workers. The defendant then notified his school's board of management about the suggestions of criminal conduct made by the plaintiff. Following notification in August 2012 of the decision not to proceed with a prosecution, the plaintiff's solicitors obtained reports from Dr. Clyne and Dr. Corcoran before issuing the personal injuries summons on 16 October 2013.

36. The aforementioned detail is given so to show the Court's understanding of the turmoil which occurred following the unorthodox request for the meeting in Kinnegad. However, I clarify that those facts do not assist or damage the plaintiff's attempt to discharge the burden of proof which she bears according to the law. The Court's focus is always on determining whether the plaintiff has satisfied the Court that the assaults and rapes occurred. No inference adverse to the plaintiff is drawn from the unusual request for a meeting in Kinnegad.

Cross – examination of the defendant

37. The robust cross–examination of the defendant about notifying his own school's board of management, his questioning by the Gardaí, the position of fixtures in his car, the sale of his car subsequent to the plaintiff's identification of same and the reason for not seeking an earlier determination of these proceedings did not undermine the defendant's credibility. The defendant explained that he did not want "his name out there". He replied to one question as follows: -

"…we are here today. My name is out in the public domain today. My staff are all aware of the serious horrible accusations that have been made against me. My

children are aware of them. I wanted my name cleared. I felt my name was cleared because the DPP did not give instructions to prosecute."

38. A later reply summarises his position: -

"I knew I'd have to meet the case if it was brought to court."

39. Further questioning about the incidents detailed by the plaintiff did not elicit one iota of support for the version given by the plaintiff. The plaintiff's account of the defendant's intimidatory type advice relating to her brother's mental health difficulties was also denied. The defendant's explanation for steering the plaintiff away from discussing the issue appeared reasonable.

40. During the cross – examination, I ruled against the question which invited the defendant to speculate on why the plaintiff would make her allegations following her assessment and treatment by the various medical personnel. The Court, similarly, will not embark on speculation about motives. I repeat that my focus is on the relevant burden of proof. The professional cross–examination conducted by counsel for the plaintiff did not undermine or detract from the credibility and reliability of the defendant's evidence.

Evidence from staff in the defendant's school

41. The defendant's assertion that he was always on time for the opening of his school which had some 650 pupils in 2009/2010 was corroborated by Ms. Emma Tyrrell (full time school secretary in that academic year) and Ms. Caroline Stone (then a teacher in the school). These witnesses were only asked to attend the Court one day or two days before giving their testimony. Their integrity is not in doubt for this Court; their answers in cross examination did not dent the import of their memory of that school year.

42. In summary, the Court has not been satisfied by the plaintiff about her account of being regularly late for the commencement of her school days in the relevant period. The

plaintiff's assertion in this regard underpins her allegations of what can only be described as violent rapes, some committed away from the regular route taken by the parties to school.

Conclusion

43. It is impossible to reconcile the allegations of the plaintiff with the evidence of the defendant. The refrain about the burden of proof in such a serious claim will forever remain in the minds of the parties. The plaintiff has failed to establish her claims in a civil court which has a lower standard of proof with a different regime for resolution than exists in the criminal process.

Condition and prognosis

44. The evidence of the medical practitioners, already identified, really concerned the condition and prognosis for the plaintiff. There is no necessity to detail those findings because they are only relevant to an assessment of damages which need not occur. It appears that the plaintiff has had to grapple with and will have to deal with serious issues. The Court seeks to respect the right to privacy of the parties in so far as it can protect same.

Order to be made

45. In the circumstances, the plaintiff's claim against the defendant is dismissed.

Counsel for the plaintiff: Niall Beirne SC, John Shortt SC and Alexis Mina BL.

Counsel for the defendant: Conall Mac Carthy BL.

Solicitors for the plaintiff: John J Quinn & Company.

Solicitors for the defendant: Gearoid Geraghty & Company.