

THE HIGH COURT**[2011 No. 3675 P.]****BETWEEN****CORMAC WALSH****PLAINTIFF****AND****MICHAEL BYRNE****DEFENDANT****JUDGMENT of Mr. Justice Michael White delivered on the 21st May, 2015**

1. These are proceedings commenced by the plaintiff on 21st April, 2011, seeking the following reliefs:-

- (i) Damages for personal injuries, loss, damage, inconvenience and expense including aggravated damages for sexual assault and battery and trespass to the person.
- (ii) A declaration that the entire relationship created by the defendant with the plaintiff was a continuum of oppression of the plaintiff involving manipulation, psychological domination and acts of assault and battery and this continuum of oppression was tortious.
- (iii) Such further and other declarations and orders.
- (iv) The costs of these proceedings.

2. The action was heard on 27th February, and 3rd and 4th March, 2015, when judgment was reserved. The defendant represented himself. The court heard evidence from the plaintiff, Dr. Damien Mohan, Forensic Psychiatrist and Dr. Rosaleen McElvaney, Clinical Psychologist. . The defendant did not call evidence but made submissions.

3. The plaintiff gave evidence that he was born on 5th March, 1963, and lived in Arklow, Co. Wicklow. He was from a family of eight children, five girls and three boys. He first met the defendant when he was aged 9 in the company of his father. The defendant was a teacher who was the leader of a brass band in Arklow. The plaintiff's father played in the band and the plaintiff also joined. The plaintiff became close to the defendant whom he regarded as a father figure and continued to have regular contact with him during his childhood, teenage years and well into adulthood.

4. The plaintiff stated that a feature of the relationship was the defendant's kindness to the plaintiff. The plaintiff confided in him about personal matters and received numerous gifts from him over many years. As part of his activity in the band, the plaintiff went with the defendant abroad on trips, and also trips in Ireland including camping trips. The defendant began to sexually abuse the plaintiff when he was approximately 11 years of age and this abuse continued to age 16 or 17. The sexual abuse consisted of inspecting the plaintiff's genitals for tics, masturbating the plaintiff on many occasions. The sexual abuse occurred in the context of an exceptionally close relationship between the plaintiff and the defendant over a period of several decades. The defendant was a person of trust in his community and was respected. The defendant told the plaintiff after he had an operation on his testicle in or around 1976/77 it was necessary on doctor's advice to take sperm samples from the plaintiff to check his fertility. This was a particularly insidious form of abuse, which involved misrepresentation of medical advice, allowing the defendant to continue to have the trust of the plaintiff obtained fraudulently.

5. The court has some concern as the defendant has not been legally represented and the evidence of the plaintiff has not been severely tested on cross examination. However the court is satisfied that he is a credible witness and the mental trauma he has suffered is as a direct consequence of the sexual abuse by the defendant over a period of five or six years approximately, and also due to the serious breach of trust by the defendant, for whom the plaintiff had great respect and relied on for advice and guidance.

6. Subsequent to the abuse, the friendship between the plaintiff and the defendant continued. The defendant gave a gift of a building site next to his home to the plaintiff when the plaintiff was getting married. The defendant was the best man at the plaintiff's wedding in 1987. The plaintiff did not disclose the abuse until November 2006, when he told his wife at the age of 43. He made a formal complaint to An Garda Síochána in July 2009 and the defendant is presently serving a sentence of imprisonment after pleading guilty to a number of counts of sexual abuse of the plaintiff.

7. The behaviour of the defendant has seriously impacted on the psychological wellbeing of the plaintiff.

8. In his evidence, the plaintiff described a history of mental health difficulties since 1987. These were also detailed in the psychiatric report of Dr. Damien J. Mohan of 1st February, 2013, which was admitted. The plaintiff recalled two specific periods in 1987 and 1993 when still friendly with the defendant he had mental health difficulties. He also began to abuse alcohol. He had another serious episode of mental breakdown at the end of 2007 and beginning of 2008. He stated he became very depressed and suicidal. His general practitioner prescribed antidepressants and he began to attend a psychologist from that period up to July 2009. The plaintiff was hospitalised under the care of Dr. R.K. Shelley, Consultant Psychiatrist at St. John of Gods Hospital from 5th January, 2011 to 28th January, 2011 and was diagnosed as having an adjustment disorder with mixed anxiety and depression secondary to the consequences of previous sexual abuse in childhood.

9. The tortious acts of assault and battery have been committed by the defendant on the plaintiff.

10. The plaintiff did not initiate the action to 21st April, 2011. The sexual abuse ceased in approximately 1980 on the plaintiff's account. There is a significant delay of approximately 31 years from the date the abuse ceased to the issue of the proceedings.

11. The Statute of Limitations Act 1957 was amended by the Statute of Limitations (Amendment) Act 2000 when a new s. 48A was inserted which states:-

“(1) A person shall, for the purpose of bringing an action –

(a) founded on tort in respect of an act of sexual abuse committed against him or her at a time when he or she had not yet reached full age, or

(b) against a person (other than the person who committed that act), claiming damages for negligence or breach of duty where the damages claimed consist of or include damages in respect of personal injuries caused by such act,

be under a disability while he or she is suffering from any psychological injury that –

(i) is caused, in whole or in part, by that act, or any other act, of the person who committed the first-mentioned act, and

(ii) is of such significance that his or her will, or his or her ability to make a reasoned decision, to bring such action is substantially impaired.

(2) This section applies to actions referred to in subsection (1) whether the cause of action concerned accrued before or after the passing of the Statute of Limitations (Amendment) Act, 2000, including actions pending at such passing.

(3) An action referred to in subsection (1), that but for this subsection could not, by virtue of this Act, be brought, may be brought not later than one year after the passing of the Statute of Limitations (Amendment) Act, 2000, provided that, after the expiration of the period within which such action could by virtue of this Act have been brought, but prior to 30 March, 2000 –

(a) the person bringing the action obtained professional legal advice that caused him or her to believe that the action could not, by virtue of this Act, be brought, or

(b) a complaint to the Garda Síochána was made by or on behalf of such person in respect of the act to which the action relates.

(4) Subsection (3) shall not apply to an action referred to in subsection (1) where final judgement has been given in respect of the action.

(5) This section is in addition to and not in substitution for section 48 of this Act.

(6) For the purposes of this section, a judgment shall be deemed to be a final judgment where –

(a) the time within which an appeal against the judgment may be brought has expired and no such appeal has been brought,

(b) there is no provision for an appeal from such judgment, or

(c) an appeal against the judgment has been withdrawn.

(7) In this section –

‘an act of sexual abuse’ includes –

(a) any act of causing, inducing or coercing a person to participate in any sexual activity,

(b) any act of causing, inducing or coercing the person to observe any other person engaging in any sexual activity, or

(c) any act committed against, or in the presence of, a person that any reasonable person would, in all the circumstances, regard as misconduct of a sexual nature:

Provided that the doing or commission of the act concerned is recognised by law as giving rise to a cause of action;

‘full age’ means –

(a) in relation to a person against whom an act of sexual abuse was committed before the commencement of the Age of Majority Act, 1985, 21 years, and

(b) in relation to a person against whom an act of sexual abuse was committed after such commencement, full age within the meaning of that Act;

‘professional legal advice’ means advice given by a practising barrister or solicitor in circumstances where the person to

whom the advice was given sought such advice for the purpose of bringing or prosecuting an action to which subsection (1) applies, whether such an action was brought or not.. ”

12. Dr Damien J. Mohan in his evidence to the court and in his written report summary stated:-

“Having considered Mr. Walsh’s clinical presentation, I am satisfied that he suffered from a recognised psychiatric disorder and was under a disability caused by a psychological injury caused in part by the abuse and contributed to by the continuum of oppression, that was significant enough to impair his will and an ability to bring an action at an earlier date.”

13. I am satisfied that the plaintiff is not prevented by the statute of limitations from bringing a claim for damages for injury as a result of the actions of the defendant.

14. The plaintiff seeks a declaration that the entire relationship created by the defendant with the plaintiff was a continuum of oppression.

15. In legal submissions to the court, counsel for the plaintiff argued that the court should develop the law by recognising the practice of grooming for the purposes of sexual abuse as either a new tort or the development of existing tort law.

16. The plaintiff relies on the passage of the judgment of Keane J. in *McDonnell v. Ireland & Ors* [1998] 1 I.R. 134 at 156 when he stated:-

“Is there any reason why such an action, whatever its legal parameters, should not be regarded as an action founded on tort within the meaning of s. 11 (2) of the Act of 1957? A tort is defined in Salmond & Heuston on the Law of Torts (20th ed.) at p.15 as:-

‘some act done by the defendant whereby he has without just cause or excuse caused some form of harm to the plaintiff.’

The learned authors add:-

‘The law of torts exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs.’

Manifestly, as this and other leading textbooks demonstrate, the law, as it has evolved, has staked out the territory within which the law of torts holds sway with more precision. For a variety of reasons, damage which at first sight may seem to have been wrongfully inflicted may not be properly remediable in tort. Even where remediable, the proceedings may still require to be brought within the constraints of a different form of action, most conspicuously in the case of actions for breach of contract, with significant consequences in areas such as the assessment of damages. But subject to these limitations, which do not require exploration in the context of the present case, it may well be said that the English law of tort has, as a matter of history, demonstrated over the centuries a flexibility and a capacity to adapt to changing social conditions, even without legislative assistance, which made it the obvious instrument for the righting of civil wrongs when the Constitution was enacted in 1937.

The dynamic nature of the tort action was well understood when the Act of 1957 was enacted. It had been graphically illustrated by the manner in which the action for negligence outgrew the medieval constraints of the action for ‘trespass on the case’. The law had seen new species of tortious principles, such as the rule in *Rylands v. Fletcher* (1868) 2 H.L. 330, impose novel forms of liability on defendants. I see no reason to suppose that the Oireachtas legislated in 1957 on the basis that the law of tort was at that stage petrified for all time. It may be, however, - and surmise on the topic would be both unjustifiable and unprofitable - that the draughtsman did not envisage the extent to which the developing constitutional jurisprudence of the High Court and the Supreme Court in later decades would powerfully reinforce the progressive development of the law of civil wrongs.

I take by way of example the unenumerated constitutional right of privacy upheld in *Kennedy v. Ireland* [1987] I.R. 587. It is true that the courts in England have been hesitant in recognising that such a tort exists; see *R. v. Khan* [1996] 3 W.L.R. 162. But even in the absence of a written constitution, such a novel growth might, for all one knows, have flourished sturdily in this jurisdiction. The fact that it did so in the form of an action for infringement of a constitutional right does not prevent it, in my view, from being classified as a civil wrong. Indeed, I do not know of any other category to which it could be assigned. Specifically, it can be classified as a civil wrong which is not a breach of contract but which is remediable by an action for unliquidated damages and/or an injunction. The same considerations would apply to the cause of action alleged to be vested in the plaintiff in the present case for breach of his constitutional rights. On this view, the present action would seem to be appropriately described as an action in tort and, bearing in mind that, major legislative interventions such as the Civil Liability Act, 1961 apart, the law of torts - including the categorisation by name of specific forms of wrongdoing as torts - has been evolved by the courts, there is no obstacle to an action for damages for breach of a constitutional right being identified as such.

In *Meskeil v. Coras Iompair Éireann* [1973] I.R. 121 Walsh J. said at p. 132:-

‘It has been said on a number of occasions in this Court, and most notably in the decision in *Byrne v. Ireland* [[1972] I.R. 241] that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it.’

I think that passage is perfectly consistent with the constitutional right being protected by a new form of action in tort, provided, of course, the form of action thus fashioned sufficiently protects the constitutional right in question.”

17. In *M.N. v. S.M.* [2005] 4 I.R. 461 at 472, Denham J. in considering the appropriate level of damages ordered in civil proceedings for a continuum of sexual abuse over five years which culminated in the rape of a teenager stated:-

"The nature of the injury to the plaintiff is complex and may be permanent. There are a number of important factors to be considered in analysing this injury. First, in this case the injury did not occur on a single occasion. It was not one sexual assault or one rape. Rather it was a continuum of abuse over years. This had an effect more than the individual assaults – it created a continuum. The consequence to the plaintiff was greater than the sum of the individual assaults."

18. While Denham J. did not declare the continuum of the sexual abuse as a separate tort or a new species of the already existing tort, the feature of sexual abuse over a period of time being a continuum of abuse was recognised.

19. The plaintiff wishes to have acknowledged the behaviour of the defendant in befriending him, gaining his confidence and trust, and using his position of trust to abuse the plaintiff over a period of a number of years. Within that continuum there were many acts of kindness of the defendant towards the plaintiff, which continued subsequent to the abuse for a substantial period of time.

20. Dr Rosaleen McElvaney in her evidence to the court and also in a report which was admitted, on the grooming of a child at para. 6.2, stated:-

"Although various definitions of grooming appear in the literature, two are of particular relevance to this case. Craven *et al* reviewed the relevant literature and cite Gillespie (2002) definition by describing grooming as the process by which a child is befriended by a would be abuser in an attempt to gain the child's confidence and trust, enabling them to get the child to acquiesce to abusive activity. It is frequently a prerequisite for an abuser to gain access to a child (Gillespie at p. 411 cited in Craven *et al*)."

21. At para. 7.1 she stated:-

"Craven *et al* (2006) extended the definition of grooming to account for the grooming that takes place of the child's environment. They define grooming as:-

'A process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining the child's compliance and maintaining the child's secrecy to avoid disclosure. This process serves to strengthen the offender's abuse pattern, as it may be used as a means of justifying or denying their actions (297)'"

The relevant academic articles quoted by Dr McElvaney are Gillespie A. (2002). Child protection and the internet – challenges for Criminal Law. Child and Family Law Quarterly, 14, pp 411 -425.

Craven, Brown, and Gilchrist.

Sexual grooming of children: Review of literature and theoretical considerations.

Journal of Sexual Agression (November 2006) Vol 12, No 3, pp 287 -299.

22. In this case, the mental trauma suffered by the plaintiff, is not just confined to the acts of assault and battery, but arises also as a result of the consequences of the breach of trust of the defendant who had played such an important role in the plaintiff's life. The courts objective consideration of the purpose of the defendant's kindness, concern and considerable investment of time, to the period when the abuse stopped was for the insidious purpose of satisfying his own sexual desire. For those reasons, it is appropriate to extend the law of tort, to cover what is now a well recognised and established pattern of wrongdoing, where a child is befriended, where trust is established and where that friendship and trust is used to perpetrate sexual abuse.

23. The court would define this as a combination of behaviour by which a child is befriended, to gain his or her confidence and trust and which includes a process by which a person prepares a child, significant adults and the environment for the abuse.

24. The behaviour can involve many acts of individual kindness, but with the aim of gaining access to the child and maintaining the child's compliance with the abuse and secrecy to avoid disclosure.

25. The plaintiff is entitled to succeed and is also entitled to aggravated damages

26. The court assesses damages in the sum of €200,000.