Neutral Citation Number: [2019] EWHC 339 (QB)

Case No: TLQ180145

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2019

Before :

MRS JUSTICE LAMBERT

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Between :

KD	**Claimant**
- and -	
PHILIP GAISFORD	**Defendant**

- -
- -

Justin Levinson (instructed by **Matthew Gold, solicitors**) for the **Claimant**
Philip Gaisford, in person, not in attendance

Hearing dates: 5 & 6 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE LAMBERT

Mrs Justice Lambert :

Introduction

1. This is an action for damages for personal injury and consequential financial loss arising from an alleged sexual assault upon the Claimant by the Defendant during the evening of 21 February 2000.

2. The Claimant is now aged 35. In 1999, when he was 15, he was introduced to the Defendant by his mother who was a friend of the Defendant's wife. The Defendant was at that time a Chief Superintendent with the Metropolitan Police Service. The Claimant had an interest in joining the force when he had finished school and the introduction was made in the hope that the Defendant would give the Claimant advice in connection with a future application to the force. The Defendant facilitated a work experience placement for the Claimant and seems to have taken on something of the role of mentor. He also started giving the Claimant scuba lessons (for a fee) which took place in the swimming pool at the Defendant's home. It was during one of those scuba lessons, on 21 February 2000 (by which time the Claimant had just turned 16 years old), that the Claimant alleges that the Defendant assaulted him sexually. The following day, 22 February 2000, the Claimant reported the matter to the police. He gave an ABE interview. The Defendant was also interviewed, denying any sexual contact with the Claimant and any impropriety. The Police declined to take further action on the basis that there was no corroboration of the Claimant's allegation, and so the matter was left.

3. In August 2012 the police contacted the Claimant, informing him that an investigation into the Defendant's sexual offending had been launched. The Claimant co-operated with that investigation, including by giving a further ABE interview. The culmination of the investigation was a trial at Lewes Crown Court in April/May 2013 and the Defendant's conviction of 28 offences (including of rape, indecent assault, sexual activity with a child, and possession of indecent photographs) in respect of 10 complainants. The victims were men, women and boys aged 15 and 16 years of age. Three counts on the Indictment related to the Claimant. The jury found the Defendant not guilty on one count of indecent assault (which alleged oral masturbation by the Defendant of the Claimant) but guilty on two others (which alleged manual masturbation of the Claimant by the Defendant and of the Defendant by the Claimant whilst the Defendant held the Claimant's hand). It is this allegation of non-consensual manual masturbation that is the subject of this claim for damages. The trial judge sentenced the Defendant to life imprisonment. Following trial, the Defendant appealed both conviction and sentence. The Court of Appeal dismissed the appeal against conviction but substituted a sentence of 20 years imprisonment for the life sentence which had been imposed by the trial judge. The Defendant remains in prison. He is currently imprisoned at HMP Rye Hill near Rugby in Warwickshire.

Preliminary Issue: the absence of the Defendant at trial

4. This claim was commenced in July 2016 and the trial date (listed for the week starting 4 February 2019) was fixed on 23 January 2018. The trial started at 2pm on 5 February 2019. On 4 February 2019 an email was sent by Ms Smout the Custodial Lead at HMP Rye Hill stating that "*Mr Gaisford has refused to attend court and therefore will not be coming tomorrow*." The Defendant did not attend: he was not produced from prison, did not attend via video link and was not represented (having, throughout the litigation,

acted in person). In these circumstances, Mr Levinson who represented the Claimant at trial made an application that I should proceed with the trial in the Defendant's absence under CPR 39.3.

5. In the context of the application, I made the following findings:

i) it was clear from correspondence to and from the Defendant that the Defendant knew of the trial date, his right to be present for the purposes of cross examination and submissions and his right to be represented at trial.

ii) The Defendant had taken no practical steps to arrange for his attendance at Court (either in person, by video link, with or without representation).

iii) The Defendant knew that it was his responsibility to take steps to arrange for his attendance at trial. On 18 January 2019, the Claimant's solicitor (Ms O'Connell of Matthew Gold & Co) had sent the Defendant a letter giving practical instruction and advice. She informed the Defendant that he would need to take steps to arrange for a video link, to obtain a production order requiring the prison service to produce him for the three- day trial or arrange for a transfer to a local prison. This letter was acknowledged by the Defendant. Although the Defendant raised issues (concerning the late service and contents of trial bundles and witness statements), he made no response concerning his attendance at trial and/or the practicalities of his attending trial.

iv) Ms O'Connell wrote to the Defendant in the period leading to trial trying to find out whether he was intending to attend Court, and if so how. She offered to speak to him personally by telephone and later, as the trial date grew nearer, to speak with one of the Defendant's named "friends and family" telephone contacts to discuss his plans and arrangements. The Defendant did not engage with Ms O'Connell's proposals either directly or via a proxy.

v) The Defendant knew that if he did not attend the Claimant would apply to the Court that the trial should proceed in his absence. He was told this (in emphatic and clear terms) in the 18 January letter.

vi) On 14 November 2018 the Defendant made an application for the trial to be adjourned because of his pending application to the Criminal Cases Review Commission in respect of conviction and sentence. The application was not served on Ms O'Connell, but she became aware of it on 11 January 2019 when Mr David Nicholson of Nicholson Investigations wrote to her on the Defendant's behalf about the application to the CCRC which would, he wrote, "*no doubt delay any further action that your client wishes to take against Mr Gaisford*." The adjournment application was determined by Waksman J on 29 January 2019 who (rightly) refused the application on the basis that the application was wholly speculative and uncertain and that the trial date had, by then, been fixed for over a year. It appears from Waksman J's Order that the Defendant had also objected to a possible transfer to HMP Pentonville for the purposes of the trial on the grounds of security. That objection was also dismissed by Waksman J. The Order was served on the Defendant in prison.

vii) The Defendant did not write to the Court stating that he wished to attend but was, for some reason, unable to do so, nor did he write to the Court or Ms McConnell stating whether he intended to attend and if so how. Had the Defendant wished to attend, but been unable to do so, he would have been able to communicate that message either directly to the Court or via Ms O'Connell. Even if, for some reason, the Defendant had been unable to write to the Court or chose not to contact Ms O'Connell, he would have been able to get a message through via an intermediary such as Mr Nicholson (or one of his other "friends and family" contacts) or possibly via Ms. Smout.

viii) The email from Ms Smout stating that the Defendant was refusing to attend was consistent with the Defendant's failure to take any practical steps to arrange his attendance, his lack of engagement with Ms O'Connell and the Court and with the fact that, having learned that his application for an adjournment had been refused, he had decided not to attend (if he ever had done so).

6. In exercising my discretion that the trial should proceed, I bore in mind the findings above: I concluded that the Defendant had taken no steps to arrange for his attendance at trial; that he had never communicated with the Court concerning his attendance; that his application for the trial to be adjourned had been dismissed and that the only information that the Court had received concerning his attendance was the email from Ms Smout of 4 February. I also took into account that the trial had been listed for over a year, it concerned events relating back to 2000 and that limitation was in issue. If the trial were not to proceed, the trial would be adjourned for a further indeterminate period of, probably, several months at least and the Claimant (having attended Court) would be put through the anxiety of another run up to trial which would, I knew from the papers, be stressful and traumatic. I took into account that the Defendant had been convicted of the alleged assault on the Claimant and so the burden would fall on him to prove on the balance of probabilities that the assault did not take place (see below) and that in his absence the Defendant would be, realistically, unable to discharge this burden. However, when weighing the various factors, I nonetheless determined that it was consistent with the overriding objective that the trial should proceed in the Defendant's absence: the balance fell squarely in favour of proceeding with the trial. I reached that conclusion conscious that, under CPR 39.3(2)(a), in the event of my making a finding against the Defendant, he would have the right to make an application for my judgment to be set aside provided that such an application (a) was made promptly (b) demonstrated a good reason for the failure to attend and (c) demonstrated a reasonable prospect of success at trial.

7. I add as a post script to the above that, at 18.28 on 5 February 2019 (that is, after close of business on the first day of trial) an email was sent by Mr Nicholson (describing himself as the Defendant's legal representative, although not on the record) to the Court. It was not directed to Mr Tipp, although Ms O'Connell had given his contact details to the Defendant, but to the Masters' Listing Clerk. The email was received by me late in the afternoon of 6 February 2019 by which time the trial was over. The email recorded that "*Mr Gaisford asks that the judge be informed that he has not refused to attend court but his non-attendance is due to the fact that he received the court letter last Thursday afternoon, and was therefore unable to arrange transport, or legal representation, in the one and a half working days*." I note the fact of the email to complete the picture only, although I observe that no explanation is offered for the email

being despatched at that late stage, nor why the Defendant had not made arrangements to attend in the event of his adjournment application being refused. The email contents did not persuade me that I should revisit my decision to proceed in the absence of the Defendant. Should the Defendant wish to do so, then he is able to make an application for this judgment to be set aside under CPR 39.3(2)(a).

Limitation

8. There are three issues for my determination: limitation, the alleged assault and quantum. I deal first with limitation.

9. This action was brought substantially out of time (the claim having become time barred under section 11 Limitation Act 1980 in 2005, 3 years after the Claimant had attained his majority). The question for me is therefore whether I should exercise my discretion to set aside the 3 year limitation period under section 33 of that Act on the basis that it would be equitable to allow the action to proceed having regard to the degree to which the time limit prescribed in section 11 prejudices the Claimant or the Defendant. I must take into account all of the circumstances of the case and in particular:

> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11;
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> (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
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> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

10. I draw the following general guidance as to how the court should exercise the section 33 discretion from the two authorities to which my attention has been drawn by Mr Levinson, *A v Hoare* [2008] UKHL 6 and *Cain v Francis* [2008] EWCA Civ 1451:

    a. all of the circumstances set out in section 33 are potentially relevant but, as each case will dependent upon its own particular facts, some will be more relevant than others. In general, however the court is likely to focus mainly upon the reasons for the delay and whether it remains possible for there to be a fair trial.

    b. In considering whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits, the length of the delay will be important not so much in itself but because of any effect which it may have on

the quality of the evidence. The length of delay is not, in itself, likely to be the critical factor unless, as a result of that delay, a fair trial is no longer possible as a result of the deterioration of evidence causing prejudice.

c. A fair trial can be possible long after the event and "*sometimes the law has no choice*". It is possible to have a fair trial of criminal charges of historic sex abuse but much will depend upon the circumstances of the particular case. If a complaint has been made and recorded, and more obviously still if the accused has been convicted of the abuse complained of, it will be easier to see that a fair trial of an action for damages will be possible. In contrast a complaint which comes out of the blue with no apparent support for it (other perhaps than that the alleged abuser has been accused or even convicted of similar abuse in the past) would be "quite another thing" (in the words of Lord Brown in *A*. The critical issue will be whether a fair trial is possible, which must include a fair opportunity for the defendant to investigate the allegations.

d. The financial prejudice which the defendant would suffer as a result of the loss of the accrued limitation defence upon the exercise of the discretion under section 33 is not in itself a relevant consideration in deciding whether that discretion should be exercised.

11. In exercising my discretion, I note the following features of this case:

a. The Claimant reported his complaint to the police the day after the alleged assault: the Claimant was interviewed and his interview was recorded (audio and video). The recording remains available. The Defendant was interviewed very shortly after the complaint was made and a transcript of that interview also remains available.

b. The Defendant's alleged criminal activities were investigated thoroughly by the police in 2012, including the complaint made by the Claimant. The Defendant was tried by a jury and convicted of the sexual assault upon the Claimant which now forms the subject of the claim. Although the Defendant appealed his conviction, that appeal was not founded upon a submission that the historic nature of the allegations meant that a fair trial was no longer possible.

c. The Claimant did not bring this action for damages before the criminal trial for, he states, two reasons. First, because as a result of the police having decided not to prosecute the Defendant (in 2000) he concluded that the police had not believed him and so others would also think that he was lying. He had, as he put it in his statement on the point, no faith in anyone believing him. But for the police approaching him again in August 2012, he would not have come forward again and would not have sought legal advice. Second because, at least in part because of the assault, his mental health deteriorated. He had felt traumatised by the assault, he was anxious and confused and developed psycho-sexual difficulties.

d. Following the trial, the Claimant's evidence was that he had expected to feel better and to feel relieved. However, if anything, he felt worse. He was particularly distressed when he learned of the appeal. Psychologically his life spiralled out of control he was unable to sleep and he started drinking

excessively. His feelings were made worse by his thinking that, if the police had believed him in 2000 and taken action at that stage, then some of the Defendant's victims might have been spared their ordeal. During 2014 and 2015, he started asking questions of the police concerning the decision not to prosecute in 2000 but made little progress. It was only in mid-2015 that someone mentioned to him that he should consider a civil claim. He then went up a number of blind alleys in trying to seek legal advice before eventually being referred to his current solicitors.

e. The Claimant has been seen and assessed by a Consultant Psychiatrist, Dr Roger Kennedy, who has not found it difficult to form an opinion on the nature and causation of the Claimant's psychiatric ill health by reason of the period of time which has elapsed since the events complained of.

12. I accept the Claimant's evidence. I find that there is a good reason for the Claimant not having brought this action earlier. I accept that, having made his complaint to the police and no action having been brought against the Defendant in 2000, he did his best to try and put the episode behind him thinking that, if he did bring a civil action, no one would believe him. I also accept that after the trial in 2013 (and the associated need for him to dredge up all of the events of 2000) his mental health deteriorated. Critically, I find that, although this claim is brought many years after the alleged assault, a fair trial would remain possible. The initial accounts by both the Claimant and Defendant which were made very shortly after the events of 21 February 2000 remain available. Given that no other persons were present, the fading of memories of witnesses or third parties is not relevant. I bear in mind that there was a criminal trial of the same facts in 2013 and it was not claimed that no fair trial was possible at that time. I therefore conclude that it is fair and just that the claim should proceed and exercise my discretion under section 33 of the 1980 Act to set aside the prescribed time limits and permit the claim to proceed.

The Merits of the Claim

13. Section 11 of the Civil Evidence Act 1968 provides that upon proof of a conviction in civil proceedings, the offender shall be taken to have committed the offence unless the contrary is proved. Undermining a conviction has been described by Lord Diplock as "*an uphill task*". The burden of proof is on the Defendant to establish that he did not commit the offence for which he was convicted. See *Hunter v Chief Constable of West Midlands Police and Others* [1982] AC 529.

14. The only incident upon which the Claimant relies is the mutual masturbation which was the subject of the convictions at trial. I have read the witness statement of the Claimant and he gave evidence before me. He described how, during the evening of 21 February 2000, he was out for a meal with his mother when he received a text message from the Defendant inviting him for a scuba lesson. He had no swimming kit with him but the Defendant had told him that he could borrow some trunks when he arrived. He went to the back of the Defendant's house to the swimming pool from where the Defendant ran his dive school. He was encouraged by the Defendant to swim naked in the pool. After a spell in the sauna they both returned to the pool area and after a further short swim, the Claimant sat on the steps of the pool. He felt unusually tired. The Defendant approached him and started massaging his legs and then masturbated him. He then took hold of the Claimant's hand and moved it to his own penis, saying something along the

lines of "*now it is your turn to do me*". He held the Claimant's hand and moved it up and down over his penis. The Claimant was then led back to the hut and into the sauna. The Claimant fell asleep and on waking and after a shower, the Defendant drove the Claimant home.

15. The Claimant told me that the masturbation was not consensual: he was not gay and, although he accepted that it was a teenage relationship, he had had a girlfriend Lucy with whom he was still friends. The Claimant accepted that he was unable to remember every detail of the events of the evening and that some elements of the evening remained confused and blurred in his recollection. He accepted that there may be differences in his various accounts given over the course of the years (owing to memory and his distress). He was however certain that the Defendant masturbated him and then held his hand whilst he moved it up and down his penis. As he described it in his ABE interview the following day "*he started touching my privates, … I tried to move away from… and then he started again… I didn't want him to do it and I asked him not to do it, but I really couldn't do anything about it because of the way I was feeling, I really couldn't move… and then he took my hand and put it on him which I tried to pull away from, but he was holding me, he started moving my hand.. I didn't understand.. I didn't think it would happen to me."* He said he felt unable to take any steps to stop the masturbation, being in part rather cowed by the Defendant's status as an older man and a person of authority and in part because he felt unusually tired and emotionally numb. The next day he told his girlfriend and she persuaded him to inform the police. They therefore went to the police station together where he gave a short account to the desk officer, returning on 23 February to give a full police interview. It was some time later that he was told by letter that no further action would be taken. He was left feeling embarrassed and humiliated.

16. The burden is on the Defendant to prove on the balance of probabilities that the sexual assault did not take place. The Defendant is not in Court to confirm his witness statement; I have no difficulty in finding that the Defendant has not discharged the burden on him. I also note however that when the Defendant was interviewed by the police on 1 March 2000 he described the allegations as horrendous; he denied any sexual contact with the Claimant and denied that they swam naked in the pool together. When the allegation of masturbation was put to him, he said that "*the kid's living in cloud cuckoo land*." In his witness statement for these proceedings (and I believe at the criminal trial) he gave a very different account in which he accepted that mutual masturbation had taken place but that the Claimant had been a very willing participant, the masturbation was consensual and the Claimant very evidently enjoyed it. His only explanation for this radical change in his account was that he wished to protect his family. The alleged consensual nature of the touching was emphatically rejected by the Claimant.

17. In all of the circumstances, I find that non-consensual mutual masturbation took place at the Defendant's home on 21 February 2000 and that therefore the Claimant's claim for assault is proven.

Quantum

18. The Claimant has had a stormy life. Before the assault he was suffering from depression linked to his anxiety concerning his mother's ill health and problems with his girlfriend. His GP had prescribed anti-depressant medication. After the assault, however, his

mental state deteriorated considerably. He had been on track to do very well in his GCSEs, had intended sitting his A levels and was expected to go on to university. Following the assault, he lost motivation, ruminating upon what had happened and struggling to contain his depression he had difficulties in sleeping and occasional flashbacks to the assault. He started smoking and drinking alcohol to excess. Although he passed 10 GCSEs he did not get the grades which had been predicted. Thereafter, he withdrew from school, never completed the sixth form course and did not go to university. He obtained sales work but was made redundant; he worked for Tesco in security and then began working in the call centre for the local ambulance service. In around May 2007, he was arrested as part of historical investigation for pornography offences and in January 2009 he was convicted of making indecent images and distributing indecent photographs. Upon release in January 2010, the Claimant had a number of relationships with women: one of those women was 17 years old and when this became known he was recalled to prison. He had a relationship with another female who he married but she was herself suffering from mental health difficulties and made a false allegation against him. In September 2011 he took an overdose of tablets and was sectioned. Since then he has struggled with depression and alcohol abuse and obtained and lost several jobs. Fortunately, I understand that he is currently managing his depression and his alcohol intake and has a long-term partner with whom he lives and to whom he is committed.

19. The Claimant has been seen and assessed for the purpose of this litigation by Dr Roger Kennedy, Consultant Child and Adolescent Psychiatrist. Dr Kennedy has provided a report (in 2017) and gave evidence before me. His opinion is balanced. He does not seek to attribute to the assault the entirety of the Claimant's mental health difficulties throughout his adult life, noting the presence of a reactive depression linked to anxiety concerning the Claimant's mother's diagnosis of multiple sclerosis before he assault. His opinion is that it is likely that the Claimant would always and inevitably have been vulnerable to depression throughout his life but that the effect of the assault was to exacerbate both the frequency, severity and duration of the episodes of anxiety and depression. He attributes 80% of the Claimant's condition to the assault. He diagnoses the Claimant as suffering from moderately severe intermittent depression mixed with anxiety (ICD-10 F33). His opinion is that the Claimant is currently in a "better frame of mind" but still vulnerable.

20. General Damages: the Schedule of Loss seeks a sum within the bracket of £21,720 and £37,550 by way of general damages (to include an element of aggravated damages). There are, as Mr Levinson accepted, no authorities which are sufficiently similar to provide me with a useful guide as to the appropriate level of the award. I award £25,000 for general damages to include a modest element as compensation for the Claimant's mental distress due to the manner in which the Defendant has committed the tort and his motives in so doing. In reaching this figure I make no allowance for the Claimant's cigarette consumption, nor his alcohol consumption, conscious that both of these mechanisms for relief of tension may have been adopted by the Claimant either as a result of his pre-existing depressive illness or as a result of the trauma of his own criminal conviction. Also, although the prognosis remains guarded (and will always be guarded) the Claimant is now apparently (and has been for some time) relatively stable. I take into account that, although the lion's share of the Claimant's intermittent depression is due to the assault, he would always have had a predisposition to depression and 20% (per Dr Kennedy) of his illness is independent of the assault. In

awarding £25,000, I am placing the award towards the top of the lower third of the Judicial College bracket for moderately severe psychiatric damage.

21. Therapy costs: these are proven by Dr Kennedy both as to need and quantum. I therefore allow those costs at £8,320.

22. Loss of Earnings: I accept as a fact that, at the time of the assault, the Claimant was on course to perform well in his GCSEs, to go on to sit A levels and to university; further that as a consequence of the assault, he failed to do as well as had been predicted and that his academic career unravelled. His job history over the course of the past 20 years or thereabouts has been sporadic and confined mainly to low paying, low status roles. Equally I recognise that there has been no submission (nor could there be) that in considering the claim for loss of earnings I should take into account and compensate the Claimant for the effect on his earnings potential of the Claimant's own criminal convictions and that the Claimant would have been vulnerable to depression in any event but that the prognosis is, in Dr Kennedy's opinion in the short, medium and long term reasonably good.

23. Although there are potential concurrent causes for the Claimant's poor work history, I nonetheless conclude that there has been some loss of earnings: at very least, the loss of a chance of doing better and achieving more over the course of his working life and the loss associated with more prolonged periods when the Claimant had no work and that associated with obtaining higher paid work more consistent with his 16 year old promise. As Mr Levinson submits, it is impossible to quantify the loss of earnings on a conventional multiplier/multiplicand approach given that the Claimant, as a young person at the time of the assault, had no paid history of employment or earlier reliable assessment of academic potential. Any form of scientific assessment of loss is impossible. However, this is not a bar to recovery of a sum to reflect a diminution of earnings, see *Cornell v Green* [1988] EWCA Civ 510. The claim as formulated by Mr Levinson is £25,000. I consider the figure to be rather too high, given the many imponderables. The figure which I award is £15,000 to reflect the loss.

24. There will therefore be judgment for the Claimant in the sum of £48,320.