

THE HIGH COURT

[2022] IEHC 386

[Record No. 2016/3315P]

BETWEEN:

SANDRA DONOGHUE

PLAINTIFF

AND

GERARD CONNOLLY

DEFENDANT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 16th day of June, 2022

1. Introduction

1.1 This Plaintiff alleges that she was sexually abused by the Defendant, her uncle. She claims damages for frequent acts of indecent assault carried out at her grandfather's home when she was between 5 and 15 years of age, in the 1970's and 80's. The Plaintiff claims that she suffered from depression, up to and including suicidal ideation, ongoing anxiety and the aggravation of a debilitating bowel condition as a result of the abuse. Effectively, she says, her childhood was taken from her and she dissociated herself from the little girl she was, in order to protect herself. She still takes anti-anxiety medication to cope with her low mood.

1.2 The Defendant represented himself at the hearing. He claimed that the action was statute-barred as the case did not commence until many years after the last alleged assault. The Defendant denied the allegations and, while his denials were not specifically put to the Plaintiff in evidence, it was clear from the defence filed and the conduct of the case that no assault was admitted. He did not give evidence in the proceedings, nor did he call witnesses.

1.3 In separate criminal proceedings, the Defendant was convicted by a jury of several counts of indecent assault in respect of this Plaintiff. That trial took place in 2015 and the convictions were upheld by the Court of Appeal in 2017. The convictions were in respect of events for one year of the period complained of, when the Plaintiff was 5 years old.

2. Procedural History: The Adjournment Applications and the Right to a Lawyer

2.1 This case was listed for hearing in February, but the defence solicitors came off record on the hearing date. The Defendant asked for time within which to instruct other lawyers. As the case continued before he could do so, it is important to set out the history of events, which explains how this arose.

2.2 The Personal Injury Summons is dated the 15th of April, 2016. Pleadings were exchanged and a full defence filed in 2017. Notices of Intention to Proceed were served on the Defendant in March, 2019 and in September, 2020. The Notice of Trial was dated the 16th of April, 2019 and the case was given a hearing date: the 9th of February, 2022. There were, therefore, clear indications of an impending trial date from early 2019.

2.3 The motion to come off record, filed by the Defendant's legal team, was listed on the 3rd of February, 2022, the week before the hearing date. On the 9th of February, the case and the motion were both assigned to this Court for hearing. The application of the Defendant's solicitors to come off record was heard and granted, leaving the Defendant without legal representation. The Court heard that there had been no reply from the Defendant to messages from his solicitors for a period of well over a year before that date. The Defendant wanted time to obtain legal aid and told the Court that he had applied to the Legal Aid Board. The

Court heard both parties and, although the Plaintiff objected, granted a short adjournment of the hearing to allow his application to be assessed by the Board.

2.4 The parties came before the Court again on the 1st of March, 2022, when the Defendant told the Court about his correspondence with the Legal Aid Board. The Defendant was confident that he would probably get legal aid funding and gave a letter to the Court to support this understanding. The wording of the letter explained why he had had this impression as the letter indicated that his financial situation was such that he would be eligible, but the letter did not confirm that legal aid would, in fact, be granted. The Court adjourned the case again to allow time for the application to be processed but stressed the urgency of the matter. A hearing date was set: 26th of April, 2022. The Court listed the case for mention in the interim, to monitor the progress of the application to the Legal Aid Board.

2.5 On the 22nd of March, 2022 it became clear to the Court that the application was not making progress. The Defendant, as of that date, had not filed sufficient information to allow the Board to make a decision. In other words, his initial application was not yet complete. The Court was reluctant to vacate the hearing date and set a further date for the matter to be mentioned prior to that hearing date, again emphasising how important it was that the Defendant press for an early decision. The Court also took it upon itself to contact the Legal Aid Board in an attempt to ascertain the prospects of a decision being finalised before the hearing date, which remained 26th of April, 2022.

2.6 On the 31st March, 2022, the Court informed the parties that in response to its letter to the Legal Aid Board, the Board confirmed it was not in a position to communicate with any party, aside from the relevant applicant, in relation to the status of an application. The Defendant could provide no further information to the Court in relation to the progress of his

application and could not point to a completed application having been made. The Court ruled on this date that the hearing was to commence on the assigned date. In coming to this decision, the Court took into account the following considerations:

- (a) the seriousness of the case and of the injuries allegedly suffered by the Plaintiff.
- (b) the impact of a further delay on the Plaintiff.
- (c) the length of time since the alleged incidents and the time since the case started.
- (d) the Defendant's inactivity from the time he became aware of the trial date and the date on which his solicitors came off record. Throughout that time, the Defendant ignored messages from his solicitors then came to court on the trial date seeking additional time to get different legal representation.
- (e) the prospect of the Defendant obtaining legal aid considering Section 28 of the Civil Legal Aid Act 1995, which prescribes the legislative basis on which legal aid may be granted, and which includes the prospects of success in the action itself.
- (f) the fact that the Defendant had already been convicted of offences identical to some of the civil wrongs alleged in the case, which fact is admissible in evidence.
- (g) the Defendant's inability to give an indication as to when he would complete his application form, let alone when he might be in a position to proceed with the case.

2.7 Balancing the interests of both parties and on the basis of the above considerations, the Court held that it would not be appropriate to grant a further adjournment. The Defendant had made such little progress in an application that was now extremely urgent, and this had to be seen against a background of inactivity stretching back over the previous year. The prospects of success in his application had to be slim indeed, taking into account his previous

convictions, which was a factor that was likely to weigh against him in the assessment of the Board. As a result of this ruling, the hearing began on the 26th of April, 2022.

3. The Scope of the Claim – Constitutional Breaches and Nominate Torts

3.1 The reliefs claimed, as outlined in the Personal Injuries Summons, include damages, including aggravated damages, for assault, sexual assault and trespass against the person, and various breaches of the Plaintiff's constitutional rights.

3.2 In *D.F. v. Garda Commissioner, Minister for Justice, Equality and Defence and others* [2014] IEHC 213, Mr. Justice Hogan held that where constitutional reliefs sought replicate claims in respect of nominate torts, the Court should strike out the claim based on a breach of constitutional rights where the tort '*provides a full and complete protection for the constitutional right.*' In other words, the Plaintiff's case should not include claims for damages for breaches of constitutional rights where the acts complained of also fall within the recognised categories of civil wrongs for which damages are payable. This approach is consistent with that adopted in many cases, as described by Mr. Justice Murray, delivering the Court of Appeal decision in *G.E. v. The Commissioner of An Garda Síochána and Others* [2021] IECA 113. Murray J. traced the history of this approach from *Hanrahan v. Merck Sharpe and Dohme* [1988] ILRM 629, to *M.C. v. Clinical Director of the Central Mental Hospital* [2020] IESC 28, summarising the position by saying that liability for constitutional damages would arise only if there was no (or no adequate) common law or statutory cause of action covering the activity held to comprise a breach of constitutional rights. He noted that it is the function of the Oireachtas to defend and vindicate constitutional rights through its laws by providing remedies in damages, before concluding that the courts would intervene to supply such a remedy only where there was a failure by the legislature to do so, via statute or common law.

3.3 In respect of the facts of this case, the Plaintiff's claim for damages for sexual assault, as a trespass against the person, describes the essence of the case and that claim is sufficient to vindicate her right to compensation in respect of all the conduct alleged. It is not necessary for the Court to consider the same activities under the heading of a breach of constitutional rights, nor should that case be pleaded: an award of damages for the tort of trespass against the person provides the necessary protection for any constitutional rights which have been breached simultaneously and by the same acts.

4. The Plaintiff's Evidence

4.1 The Plaintiff's evidence was to the effect that she did not know anything about sex or sexual matters as a young girl. Her grandfather raised a large family, his wife having died in her 40's. The Defendant was this man's son, the Plaintiff's mother was his daughter. Her family had regular contact with her grandfather, who lived near her home. When she was about 4 years old, she recalled going to a barn at her grandfather's home where the Defendant exposed himself to her and masturbated. As she put it, *'white stuff came out'*, but she did not know what this was at the time. At his instruction, she stood with her skirt up and pants down. The Defendant told her this was their secret and that she was not to tell anybody.

4.2 This conduct progressed to touching her breasts and private parts, which the Defendant did frequently in her grandfather's house. He would make sure nobody else was around, often sending a named brother away. The Plaintiff described him putting his hand into her vagina, recalling the specific feeling of this penetration and saying his nails were rough. She also told the Court that he licked her private parts. The witness described some of this conduct as rape, which is understandable. As a legal concept, rape is confined to very specific acts involving the penis, but, although the offence of rape was not committed, the

penetration of the vagina by the hand or fingers or tongue is a very serious trespass against the person and a violation of bodily integrity, now known as sexual assault, though described in legislation as indecent assault at the relevant time.

4.3 The evidence was that this probably happened hundreds of times, as the family spent a lot of time in that house. Whenever they were there, the Plaintiff said, he abused her, such that it became part of her life; she thought it was normal. She estimated that such an event would happen twice a week. During one such incident, when she was aged 8 or 9 years, the Plaintiff recalled him putting his penis on the left cheek of her backside. She pulled her pants up and ran across a field to escape him.

4.4 The family attended a funfair on one occasion and the Defendant sat beside the Plaintiff in the car taking the opportunity to put his hand down her pants. Since then, every time she sees an advertisement for that same annual event, she recalls this specific assault.

4.5 The Plaintiff described her uncle touching her breasts while she was wearing her confirmation suit. When she attended secondary school, she had a bottle green uniform of which she was proud as she had not had a uniform before. She recalled being at a wall when the Defendant pulled up her skirt and put his mouth to her crotch. He repeated this particular type of sexual assault about 6 times in total, she thought, over the years.

4.6 When she was in 6th class and about 12 years old, she heard boys in school discussing sex and began to understand what was happening. At the age of 14, she asked him to stop. The Defendant told her mother that the Plaintiff had barred him from the house, and her mother asked the Plaintiff why she had told him this. Because she hadn't the strength to

disclose the abuse to her mother, as she described it, '*he had the upper hand again, and I had to have another year*'. The abuse continued, on a regular basis, until she was 15 years old.

4.7 This evidence was given in a clear and straightforward way. While occasionally visibly upset, the Plaintiff did not appear to be exaggerating and occasionally did not recall certain details. In other words, there was no indication that she was giving a well-rehearsed account, but she appeared to recall from memory rather than reciting a story and did not suggest answers if she could not do so, being content to reply as best she could and accept when she could not recall a date or specific event. The Plaintiff did not hesitate when asked certain questions as to place or frequency. In her evidence, details were present which would be difficult to fabricate, including a specific sense of touch she said that she had experienced during the events being described. I found the Plaintiff to be a credible witness, who did not overstate her evidence and did not purport to remember events which she could not recall.

5. Putting the Case in Cross-examination, McKenzie Friends and Rigid Rules

5.1 The Defendant did not put any questions to the Plaintiff, either putting an alternative case to her (for instance that she was confusing him with another abuser) or suggesting that he had not touched her or that she was fabricating this account. This is sometimes referred to as the rule in *Brown v. Dunn* and it has been comprehensively discussed in the case of *DPP and Another v. Burke and Another* [2014] IEHC 483. Instead of putting the case, the Defendant asked about a discrepancy in the Plaintiff's evidence of age and about an incident involving another member of her family. The effect of these questions will be considered below when setting out the Court's assessment of liability.

5.2 As to testing a witness's evidence, Ms. Justice Baker summarised the position in *Burke*:

'a) In closing submissions or argument a party may not impeach the credibility of a witness if that witness's evidence has not been tested in cross-examination;

b) Ipso facto a person who does not cross-examine evidence is faced with the prospect that the evidence is heard by the trial judge or jury and is untested.

c) There is no requirement that evidence be cross-examined, but by not cross-examining evidence the evidence goes to the fact finder as untested and uncontradicted evidence.

d) Untested and uncontradicted evidence carries greater weight than tested contradictory evidence.

e) It is not the function of any rule of law to direct the court to accept evidence merely on account of the fact that it has not been tested. The court must hear all of the evidence before it and is entitled to weigh the evidence, including unchallenged evidence, against the evidence as a whole adduced at the trial.

f) A trial judge or jury is not compelled as a matter of law to accept evidence because it is not challenged. Unchallenged evidence is part of the evidence at trial and the fact that it is unchallenged gives it somewhat greater weight, but does not direct a particular result.'

5.3 While it is unusual for a Defendant not to clearly contradict the evidence of the Plaintiff, the Court did not insist that the Defendant directly challenge the evidence, although he was invited to cross-examine her and told that it was his opportunity to ask questions to challenge her version of events. The Defendant did not address the Court in submissions at the close of the case so the issue of being permitted to challenge her account then did not arise.

5.4 The Defendant was not advised that he was required to put his denials to the Plaintiff for three reasons. Firstly, the Defendant was not legally represented, secondly, the Defendant submitted that he had difficulty reading and writing and said that he would have difficulty

formulating questions, and thirdly, the Defendant would otherwise have been required to cross-examine his victim in the context of these allegations, all of which were claims of sexual abuse, in circumstances where it was clear that he denied the substance of the allegations.

5.5 While every person is entitled to represent himself, the law, in order to best protect the citizen and to set out our rights, responsibilities and duties as comprehensively as possible, can be complex and the law of civil litigation alone is a vast area of study. There are many reasons why most litigants are represented by lawyers; at her best, a lawyer brings expert knowledge and skill, experience of the courts and impartiality in case analysis to her client, enabling the client to make the best possible case to the decision-maker, the judge or jury.

5.6 In every court case, as in all trades and professions, a lawyer is entitled to be paid for her work. Even when the citizen does not have the means to pay a lawyer, the importance of access to a lawyer is recognised by the availability of legal aid schemes in both criminal and civil law and the constitutional right of access to a lawyer when one is accused of a criminal offence. Many lawyers act without requesting payment in particular cases - often cases which involve important points of law or in which a litigant does not have the means to initiate a claim that is likely to succeed. Our society's resources do not permit free legal aid in every situation and this judgment has already described attempts made by the Defendant to obtain a lawyer. Due to his lack of progress, coupled with his inaction, this was not an appropriate case in which to allow further attempts to obtain free legal aid. The Court was, therefore, obliged to continue with the case but, in so doing, made certain allowances for the Defendant. Terminology was explained and time given when requested, for instance. At every stage, the Defendant understood what was happening in the courtroom and what would happen next.

5.7 While another defendant would have been required, through his lawyer, to put the case squarely to the plaintiff, this was a case in which it was not necessary to insist upon this. The defence filed made it clear that the allegations were denied, the Defendant confirmed this when asked and the Defendant had no lawyer to conduct cross-examination in a professional manner. The requirement fulfilled little purpose when seen in the light of the facts of the case and would have posed difficulties for both Defendant and Plaintiff for the reasons outlined.

5.8 The Defendant's literacy difficulties added to the weight of the argument against requiring strict adherence to formal requirements. To help counter this difficulty, the Court offered the Defendant the opportunity of having the assistance of a *McKenzie friend*. This concept was described to him and availed of. Throughout the hearing, two friends of the Defendant remained behind him, and he conferred with them on a number of occasions. Their assistance was appreciated by the Defendant, and by the Court, during the hearing.

5.9 To ensure that hearings are effective and because professional lawyers have duties to the courts and can be disciplined in the event of transgressions, it has long been the case that no such friend can address the Court directly. This issue arose in the Supreme Court in *Coffey & Ors v. Birmingham & Ors* [2013] IESC 11 where the right of audience was confined to the professional. This Court heard from a McKenzie friend in *Fogarty v. Governor of Portlaoise Prison* [2020] IEHC 154, where a son represented his father in his bid to be released from prison. The Court of Appeal noted the unfortunate consequences of the decision to allow this exception to the rule in Mr. Fogarty's appeal, [2021] IECA 352, where his son was relieved of his role in presenting the case, confirming the wisdom of the Supreme Court in *Coffey*.

5.10 While there were occasional problems in communicating with this Defendant, these were resolved with patience by the Defendant and his friends, by Counsel for the Plaintiff and

by the Court in turn. Neither the Defendant, nor his friends, had any questions or suggested questions for the Plaintiff save the two already described. Neither question, it should be noted, was very different to the standard fare of cross-examination in such hearings although it has become rare indeed that counsel raise irrelevant assertions about third parties to damage a complainant. Nonetheless, the questions were sufficient to allay my concerns that the Defendant was without ability to challenge the account given.

5.11 While it was ultimately the responsibility of the Defendant to ensure that he was represented if he so wished, the Court was vigilant to vindicate the Defendant's right to a fair hearing. The Court did not consider that this accommodation of the Defendant required a rigorous cross-examination of the Plaintiff in this case, by the man who had been convicted already as her abuser. It is common in such circumstances to use the phrase alleged abuser and that alone may cause a court to hesitate before allowing any but a most careful cross-examination but, in this case, it must be recalled that the Defendant had already been convicted of indecently assaulting this Plaintiff.

5.12 As described, when offered the opportunity to cross-examine the Plaintiff, the Defendant, apart from the two questions referred to later in this judgment, declined to ask further questions. This resolved an issue for the Court as to how far such an exercise might proceed. The criminal law has evolved to the point where a victim of crime has well-defined rights and protections in such a situation. There is no commensurate express protection in civil law and there is an argument that the Plaintiff, having brought the claim, must be robust enough to withstand a defence which is strongly pressed in evidence against her. Given the limits of cross-examination to relevant and admissible matters and the restraints imposed by professional practice requirements, it is doubtful that questioning beyond that which would

be appropriate by a lawyer in a criminal trial would be permitted by a court in a civil matter. As our understanding of psychology evolves, it becomes more and more clear that any form of repetition or bullying, including what is sometimes referred to as 'rigorous' cross-examination, is not as forensically effective as had once been assumed, particularly with vulnerable witnesses. But, as it did not arise in this case, the Court was not required to rule on the limits of such an exercise.

5.13 It should be noted that the Defendant was advised that the Court could not, of itself, begin to cross-question the Plaintiff. In our adversarial system, a judge must remain impartial insofar as this is possible. The analogy is often made between a judge in court and a referee in a sporting context. For a judge to begin to test a party to a case in that way, particularly when it is effectively being done in place of, and to assist, the opposing party, would be a clear example of a referee entering the field of play. If a judge becomes involved in the process of argument by questioning a witness, the appearance of impartiality is eroded, her authority is lessened accordingly, and the objective of the demonstrably fair trial is more difficult to achieve. Open questions to any witness may be appropriate but a cross-examination in order to assist a litigant in person goes beyond the kind of questions a judge may properly ask; such a judge takes on the character of a representative for one of the parties.

5.14 The Court did not require any form of the following question being asked: these allegations are not true, what do you say to that? Accordingly, this Court did not attach weight to the fact that such direct challenges were not made and proceeded on the basis that the Defendant had, in his defence as filed and in representations to the Court, challenged every aspect of the Plaintiff's evidence and required her to prove each matter asserted in full.

5.15 In considering the issues of cross-examination by a litigant in person of his victim and the role of the McKenzie friend, the Court notes comments in the judgment of Somers J. in the Court of Appeal of New Zealand in *Re G.J. Mannix Limited* [1984] 1 N.Z.L.R 309:

'But I consider the superior courts to have a residual discretion in this matter arising from the inherent power to regulate their own proceedings. Cases will arise where the due administration of justice may require some relaxation of the general rule. The occurrence is likely to be rare, their circumstances exceptional or at least unusual and their content modest. Such cases can confidently be left to the good sense of the judges.'

5.16 This passage was cited with approval by O'Neill J., permitting Sandra Coffey to replace her husband and allowing her a right of audience in the case of *Gabriel Coffey v. Tara Mines Limited* [2008] 1 I.R. 436 and by the Supreme Court, per Finlay Geoghegan J., in paragraph 16 of the judgment in *AIB v. Aqua Fresh Fish Limited* [2018] IESC 49. There, the learned Supreme Court Judge also commented on the long-established rule whereby litigants in person could be assisted by a friend but confirmed that this did not extend, other than in very specific circumstances (such as those pertaining in Gabriel Coffey's case) to offering that friend a right of audience in court. The same comments may be applied to this case in that those attending the Defendant had no entitlement to address the Court and the administration of justice did not require this. Nor did it require a formal putting of the case to the Plaintiff. What was required was that the Defendant had the opportunity to challenge any aspect of her evidence with which he disagreed. His two questions showed that he understood this process and was able to, and did, formulate such questions when necessary.

6. Evidence of Previous Relevant Convictions

6.1 In the case of *Nevin v. Nevin* [2019] IESC 6, the family of a murder victim argued, successfully, that the fact and subject matter of the conviction was admissible evidence in a subsequent civil case in order to ensure that the convicted murderer did not inherit her victim's estate. Delivering the judgment of the Supreme Court on the issue, O'Malley J. described the history of the rule in *Hollington v. F. Hewthorn & Co.* [1943] 1 K.B. 593, a road traffic accident case, which appeared to prevent evidence of criminal convictions being adduced in civil cases other than to prove the fact of a conviction. Rejecting that case in favour of more persuasive authorities which recognised the force and reliability of evidence of a criminal conviction as evidence of the facts on which the conviction was based, the Supreme Court held that the record of a conviction was a public document, admissible as evidence not just of the fact of conviction but capable of constituting *prima facie* evidence of the facts of the case as an exception to the hearsay rule. Due to the process which leads to a conviction, while it can be described as the opinion of a jury, it carries greater weight than that of the opinion of a witness and is sufficiently reliable to constitute evidence of relevant facts in later cases.

6.2 Here, the evidence was offered by the Plaintiff and by the prosecuting guard in the criminal case but there was no formal public record of conviction before the Court. The Defendant did not contest the fact that there was a criminal trial at which he was convicted in respect of several counts, nor did he put the matter in issue in his defence. He did, however, maintain his innocence in respect of the alleged offences. There is a publicly available judgment of the Court of Appeal (*DPP v. G.C.* [2017] IECA 43, Edwards J.) rejecting the Defendant's appeal. The evidence of the prosecuting guard was not contested in this respect. This witness was in a position to describe which counts on the indictment had been the subject

of guilty verdicts and she confirmed that the majority of the 79 allegations had not been left to the jury but had been the subject of directed verdicts to acquit. The jury disagreed on ten counts.

6.3 The convictions relate only to the first five counts on the indictment which were allegations of indecent assault in the first year of the alleged abuse. The Defendant's position is that he never assaulted her on any occasion and it could be argued that the presumption against him in respect of the convictions could also, as a matter of common sense, be used to cast doubt on his denials in respect of the later offences.

6.4 The criminal court directed that the Defendant be acquitted of the other offences alleged by this Plaintiff. Insofar as the reported account of the case reveals the facts, these appear to be similar (if not identical, it is difficult to tell without a transcript) to the allegations made in this case. The Plaintiff confirmed that her evidence in both Courts was similar.

6.5 In her analysis of the authorities in *Nevin*, O'Malley J. referred to an argument made by Lord Goddard in *Hollington* that if a conviction was admissible, it "must follow" that an acquittal could be evidence in favour of the defence. The facts of that case did not require any further discussion of his Lordship's conclusion. It seems to me that the two cannot, and should not, be equated. As Ms. Justice O'Malley's analysis makes clear, if there is a guilty verdict, the process of a trial leads to a publicly declared verdict that a jury of her peers with access to all relevant facts that prosecution and defence can adduce, has determined beyond a reasonable doubt that the accused has committed an offence. An acquittal could mean any number of things and it will rarely be easy to determine which of them might be true. Here, the directed acquittals cannot be seen as more than a failure by the prosecution to meet the standard of proof required in such a case i.e. proof beyond reasonable doubt. Given that

acquittals can represent anything from clear innocence to probable guilt, falling short of reasonable certainty, it must be correct to disregard the remaining counts for the purposes of this case as the evidence of directed acquittals adds nothing to either case. The same comment can be made in respect of verdicts where the jury disagrees.

6.6 On this analysis, there is no support for either the Defendant or for the Plaintiff in the fact that allegations were withdrawn from the jury, or that they disagreed, nor can the evidence of the convictions be considered in assessing the evidence as to the later events, which events were not the subject matter of convictions. This Court has no access to the evidence in the earlier trial beyond the general descriptions given by the Plaintiff and the prosecuting guard. A civil case should not require a detailed analysis of a previous criminal trial and, while it is clearly sensible and in accordance with the decision in *Nevin*, which binds this Court, to consider the evidence of relevant guilty verdicts, the same cannot be said of any disagreement or verdict of not guilty (whether directed or not) as such verdicts span too many potential factual scenarios and states of mind and the basis for such verdicts cannot be as clearly ascertained as the basis for a conviction.

6.7 Finally, the convictions being considered as relevant are those relating to 1976. Given the identities of accused and victim, the description of events in the indictment as indecent assaults and the confirmation from the Plaintiff that her evidence in the criminal trial and in the civil trial was very similar, the evidence of convictions in respect of the specific touching when the Plaintiff was 5 years old, the evidence of convictions in respect of that year lends strong support to the evidence of the Plaintiff in respect of acts of indecent touching of her by this Defendant during 1976, but go no further than this year and do not lend support to the other allegations made by the Plaintiff in this case.

7. The Statute of Limitations

7.1 The effect of the Statute of Limitations on cases such as this one has been set out by Collins J. in the case of *McDonald v. Conroy* [2020] IECA 239. This Court's function is to determine the impact of any psychological injury on the Plaintiff insofar as it may have impaired her capacity to bring civil proceedings. This can only be decided having regard to the medical evidence and her own evidence in respect of her capacity over the relevant period of time.

7.2 A claimant has 6 years from the date of an assault within which to bring an action against her assailant, according to section 11(2) of the Statute of Limitations, 1957. She is considered to be a person under a disability while she is still a child, i.e. until she turns 18. A plaintiff is entitled to benefit from the provisions of s.48A of that Act, as inserted by s.2 of the Statute of Limitations (Amendment) Act, 2000, if she is a person whose ability to bring proceedings was substantially impaired by reason of the wrongdoing.

7.3 Here, the Plaintiff submitted that the sexual abuse committed on her by the Defendant substantially impaired her ability to pursue her claim until 2015, when the criminal proceedings concluded. If this substantial impairment cannot be established, the last date on which she could maintain this action was six years after her 18th birthday.

8. Evidence as to Capacity

8.1 The relevant events are alleged to have taken place when the Plaintiff was between the ages of 5 and 15, ranging approximately from 1976 to 1987.

8.2 In May of 1994, when the Plaintiff was in her 20's, she attended her doctor, Dr. McGoldrick, with symptoms of depression. Over the course of the succeeding years, the

Plaintiff presented to Dr. McGoldrick on numerous occasions with abdominal pain and bowel issues. It was not until March 1999, during a detailed consultation with Dr. McGoldrick, when the Plaintiff finally confided in him that she had been sexually abused as a child, by her uncle. Dr. McGoldrick advised the Plaintiff to attend the Rape Crisis Centre but the Plaintiff was not, psychologically, in the right frame of mind at that stage to do so.

8.3 In September 2006, the Plaintiff returned to Dr. McGoldrick feeling very down. She had been seen by a colleague of Dr. McGoldrick's some months before with depression and prescribed medication to alleviate her symptoms. Again, she discussed her experience of sexual abuse with her medical advisor. In evidence, Dr. McGoldrick stated that at this stage, the Plaintiff was *'still not in a frame of mind to go to the Gardaí'*. This is significant: even by 2006, now in her 30's, the Plaintiff was unable to speak to strangers about these events.

8.4 In January of 2011, the Plaintiff reported the incidents to the Gardaí who opened an investigation. Dr. McGoldrick gave evidence that the Plaintiff was prescribed an increased dose of anti-depressants in 2011 as she was feeling very depressed. The criminal proceedings took place in December 2014, with a sentence handed down in March 2015. Dr. McGoldrick confirmed that the Plaintiff was severely exhausted in May 2014 and early 2015 and was referred to two different consultants as a result. The Court heard that the Plaintiff attempted to poison herself in July 2015, after the criminal process concluded. She stated *'I had enough ... I didn't want to die, but I didn't want to live'*. Dr. McGoldrick's view was that the Plaintiff was substantially impaired in her ability to initiate civil proceedings up until that time.

8.5 In preparation for the civil trial, the Plaintiff met with a psychiatrist, Dr. McQuaid, for the purpose of preparing a report. The report is dated 30th of May, 2017. Dr. McQuaid interviewed the Plaintiff on two separate occasions, once in the presence of her husband. Dr.

McQuaid diagnosed the Plaintiff as suffering from chronic adjustment disorder and psychosomatic gastrointestinal disorder, as part of a long-standing Post Abuse Syndrome. Furthermore, he concluded that her personality development was derailed and damaged to a significant degree. When questioned on whether, in his opinion, Ms. Donoghue was substantially impaired to bring proceedings, he stated that at the time of the alleged abuse, in his opinion, Ms. Donoghue was substantially impaired to initiate proceedings, however he stated *'in the intervening years she has been mentally able to manage her own circumstances and take legal proceedings'*. When he met with her in 2017 *'her personality was not derailed, she was not out of touch with reality, she could describe events in a rational way. She was not irrational, despite suffering from an ongoing emotional disorder'*.

8.6 Dr. McQuaid assessed the Plaintiff over two distinct interviews in 2017 and extracted from those meetings that the Plaintiff was in a position to bring legal proceedings, however at this time in 2017 she had already commenced proceedings and had attended counselling for some years. Dr. McGoldrick was the witness who gave evidence as to the Plaintiff's capacity over a longer period of time and, significantly, as to how she coped in the intervening years. It was very clear from his evidence that he did not consider that the Plaintiff had capacity to bring these proceedings until 2015 when the criminal trial process concluded.

8.7 The Defendant was afforded the opportunity to cross-examine both medical experts. On both occasions he informed the Court that he did not have any medical knowledge and was not in a position to put any questions to the experts. The history of his attempts to obtain representation are set out elsewhere in the judgment. The Court was advised that the defence had not asked the Plaintiff to attend with any medical expert in order to prepare a report when the Defendant had been represented by solicitor and counsel.

8.8 The Plaintiff herself did not consider that she was able to initiate proceedings until after the criminal process was complete. She found that process very difficult. As Mr. Justice Ryan made clear in *Doherty v. Quigley* [2011] IEHC 361, one cannot simply conclude that, as the Plaintiff was able to make a criminal complaint, she ought to have been able to start civil proceedings. To paraphrase his conclusion, criminal proceedings are different in many respects; such is the nature of criminal investigations and prosecutions that events take on a life of their own. The complainant is not required to take the lead in pursuing the Defendant. It is not necessary for the Plaintiff to show that she was completely incapacitated. The Statute requires evidence of substantial impairment relating to her capacity to instigate and maintain legal proceedings against her assailant.

8.9 The evidence of Dr. McGoldrick was compelling as to the debilitating depression and adjustment disorder which prevented the Plaintiff from acting sooner in this case. While in a position to disclose the abuse to trusted people at first, the response of her family members served to ensure that she was unable to take formal steps to initiate proceedings until she had obtained counselling, medical assistance in the form of anti-depressants and until sufficient time had passed in order for her to manage her response to disclosing these events. It is significant that, having made a report to the guards who, thereafter, prosecuted her claim, those proceedings had the serious effect on her already outlined. While the Plaintiff continued to successfully negotiate other milestones in her life, it is notable that when it came to managing the disclosure of these assaults, the Plaintiff suffered serious setbacks in her mental health at every stage of disclosure, all of which was well documented by a diligent and attentive General Practitioner, Dr. McGoldrick.

8.10 This Court finds that the Plaintiff's capacity to initiate proceedings was substantially impaired until after the criminal process concluded, in 2015, such that she could not initiate and maintain civil proceedings in this regard. Given that these proceedings issued in 2016, the action was brought well within the 6 years permitted by the Statute.

9. Delay

9.1 The court also has jurisdiction to dismiss a case on the grounds of delay generally. There was no submission addressing this argument, though it was pleaded. While the Defendant was not represented, he understood the importance of delay and confirmed that he considered it unfair that the trial would proceed after this length of time. There was no suggestion on his part of a failure of memory or of the death of any witness such that it would be unfair to permit the case to proceed. When considering delay, the length of any delay is relevant. It may be unjust and disproportionate to prohibit a litigant from pursuing proceedings due to delay, unless the delay was egregious. Given that the reason for this delay is specifically the subject matter of a section of the Statute of Limitations, in the absence of actual prejudice, it is not an appropriate case in which to dismiss the case on the grounds of delay generally, despite the long period between the wrongdoing and the plenary summons.

10. Conclusion on Liability

10.1 The Court's decision on liability in this case was decided taking three distinct matters into account. First and foremost, the Plaintiff was a clear, compelling and credible witness. Her account of events was persuasive and, without hearing more, I would have been entitled to accept it. I do accept it and this alone was sufficient basis to find for the Plaintiff.

10.2 Secondly, the very limited cross-examination did not affect the weight of the Plaintiff's evidence and there was no defence evidence called to counter her version of events. Her account, therefore, was not only unchallenged it was uncontradicted by other evidence.

10.3 The Defendant, as described, asked two questions of the Plaintiff. In the first question, the Defendant drew attention to the fact that the Plaintiff had said in one version of events that the abuse began when she was 4 years old and, in another, when she was 5. This highlighted the fact that the Plaintiff did not seem sure about when the abuse began. This is an issue that arises in many cases of child sexual abuse, particularly when a witness tries to describe a continuum of abuse. For many years, the courts did not understand the complex psychology of the victim who did not immediately report a sexual assault. Modern courts are more familiar with the psychology of victims and of children. It is well documented that children do not remember dates, or even specific matters of fact that one might expect them to recall. Even as adults, different victims respond differently to trauma. Just because a child (or an adult recalling abuse that occurred when she was a child) cannot recall what age she was when an event occurred makes little difference to her credibility or reliability as to whether or not the event she describes occurred at all. This one feature of her evidence does not lead me to reject her account.

10.4 One of the effects of trauma is to produce a kind of tunnel vision in a victim as they dissociate from an event. They may recall only a strong smell or, as in this case, a physical feeling. Here this was described as the roughness of the Defendant's fingers in her vagina. Few children can describe the timing of events and are more likely to recall a social, family or personal milestone. Again, this was seen here with the Plaintiff vividly recalling an assault around the time of her confirmation as she was wearing clothes purchased for that event. The

question as to the age she was when this began, while specific and highlighting that she was indeed not sure as to her age, did not lead me to doubt the fact that she was abused.

10.5 The second question required the Plaintiff to agree with a description of an incident involving another family member. This line of questioning was irrelevant to these allegations and the Plaintiff was advised that she need not answer. The reference in the question appeared designed to cast a favourable light on the Defendant and his family and, by contrast, to put the Plaintiff's immediate family in a bad light. While the conclusion may be that (if the Defendant's question was based on accurate facts) the Plaintiff's family had behaved in an unkind or even wrongful way in a separate dilemma, it was not relevant to the issue of whether or not the Defendant touched the Plaintiff in the manner alleged. It is no part of a trial of fact to allow one party to put general allegations of wrongdoing to another with a view to blackening her name or, by association, that of her family generally. A civil trial involves a focused testing of the claims of one party and should be confined to that which tends to prove or disprove that claim or the specific defences raised. Here, the defence being that the acts had not occurred, there was little evidential value in an account of an unrelated act of the Plaintiff's, still less in an unrelated act (no matter how immoral) of a member of her family.

10.6 As noted, the failure to put the defence case clearly was not a factor in this assessment of the evidence but the fact that the defendant declined the opportunity to give evidence meant that there was no alternative account of events to consider and nothing to reduce the weight one must attach to the account of a credible witness. These were the factors considered in weighing the Plaintiff's evidence and there was almost nothing, beyond his bare denial, to be put on the defence side of the scales. This denial was not supported by sworn evidence and must carry very little weight indeed as a result.

10.7 Thirdly, the effect of the *Nevin* case is that the Court may take the criminal convictions of the Defendant into account, albeit only to the effect that the abuse against the Plaintiff during 1976 was proven to a higher standard of proof than all other allegations. Those events happened, and this has been proven beyond a reasonable doubt as to the Plaintiff's accuracy or reliability. This presumption lends much weight to the early allegations.

10.8 Logic may appear to require that the presumption apply equally or in some measure to the later offences; was not the misconduct in question committed by the same man against the same young girl? The usual arguments, that the child may be mistaken or may have a grudge, appear to have been overcome in the earlier criminal proceedings. This reasoning is flawed, however. There is no unfairness in considering the convictions as being directly relevant to the question of whether or not he committed the earlier offences. If this was to be extended to later offences on which no convictions were recorded, what would be the effect and weight of that evidence? If a recorded conviction is only *prima facie* evidence of guilt in respect of those offences, what does it say about related but unproven offences? Little or nothing, it appears to me. Certainly nothing that can confirm the facts of later events here.

10.9 Considering all of these factors, this Court is satisfied that all of the events outlined by the Plaintiff probably occurred. A different standard of proof is applicable here to that in the criminal trial and, abiding by that lower standard, the Plaintiff's credible and convincing account and the lack of countering evidence persuade me to accept the Plaintiff's evidence in full. The earliest allegations, concerning 1976, have been the subject of criminal convictions and there is very strong evidence indeed that these events occurred.

11. The Effects of the Abuse: Physical and Psychological Injuries

11.1 The effects of this abuse on the Plaintiff have been very serious. When the Plaintiff was 19 years old, she told the man who would become her husband what had happened to her. When their daughter was born in 1997, the Defendant attended the child's Christening. When the Plaintiff eventually told her family, they put pressure on her in various ways. One sister told her to go to counselling saying that the family would pay. A brother asked how she would feel if he, the Defendant, had a heart attack over what she said. These responses added to the Plaintiff's feelings of trauma and stress. In her words, *'I had to carry that too'*.

11.2 The Plaintiff's evidence was that she is disconnected from herself as a child. She described herself as two people. In her view, she has lost her childhood as she only remembers abuse, it is difficult to retrieve any good memories. She described herself as being a sad child, holding her head down and feeling that she had done something wrong, but not knowing why. As already described, she understood these events as normal; it was normality for her.

11.3 From her early years she described suffering from stress and anxiety and she continues to take prescribed medication on most days. She feels anger and struggles to manage it so that it is expressed appropriately. After the Defendant was sentenced in July of 2015, the Plaintiff took an overdose of paracetamol and spent 3 nights in hospital. She described how she kept going over the details of the abuse and said of this period: *'I didn't want to die but didn't want to live'*. It is likely that the conclusion of the criminal proceedings did not bring closure to the Plaintiff and that it was very difficult for her to move on, despite the fact that the Defendant had been found guilty and sentenced.

11.4 The Plaintiff felt that she did not have a childhood. In her words, the Defendant tarnished her memory of her grandfather's home, in particular. Even now, she is not free of the abuse and says she never will be. I have described the visit to a funfair that continues to remind her of the assaults committed against her while she was a child.

11.5 The Plaintiff suffered from depression and, in particular, from May 2011 increased her anti-depression medication. She has remained on anti-depressants, apart from a small window of 6 months. She has not been able to cope without medication to enhance her mood. It was described as uncommon for a patient to remain for a prolonged period on anti-depressants, and she was having long term significant psychological problems as a result. The medical evidence was that it was highly likely that she would continue to need such medication into the future.

11.6 She was diagnosed with Crohn's disease in 1999. In 2009, the Plaintiff had a bowel abscess and had sections of the bowel removed in 2013 and 2015. She remains on anti-inflammatory medication to suppress the effects of this condition. The medical evidence was that the cause of the condition was unknown, but that the circumstances of the Plaintiff's abuse were likely to have been a stressor, contributing to repeated recurrences of the symptoms and to its severity.

12. Assessment: Proportionate Awards and Aggravated Damages

12.1 The Court must assess the amount of damages which the Defendant should pay to the Plaintiff. A proven indecent assault is actionable *per se*, in other words, it is not necessary to prove that there has been an injury caused by the battery, to give the tort its formal name, as it is acknowledged that such a trespass against the person is a significant wrong and the victim

must be compensated for the fact of the unwanted direct contact. It is hard to express this more clearly than was done in *Dullaghan v Hillen* [1957] Ir Jur Rep 10: *Security for the person is one of the first conditions of civilized life. The law, therefore, protects us, not only against actual hurt and violence, but against every kind of bodily interference and restraint not justified or excused by allowed cause, and against the present (immediate) apprehension of these things.*

12.2 In this case, the facts revealed repeated sexual assaults over a period of years. While they stopped short of rape, they included penetration of the vagina by the Defendant's fingers or hand and by his tongue, both of which are very serious forms of indecent or sexual assault.

12.3 The personal injuries guidelines set out guidelines for the courts in cases of personal injury. There is no guideline for injuries caused as a result of sexual assault, it being recognised that the fact of the assault carries the injury into a different and more serious category.

12.4 In the case of *M.N. v. S.M.* [2005] 4 IR 461, there was a continuum of sexual abuse over a period of 5 years, whilst the Plaintiff was a teenager, which culminated in rape. A jury awarded €600,000 and the Supreme Court reduced this to €350,000. The Court outlined a number of relevant factors when considering assessments of the level of general damages. The nature of the injury, whether it was a continuum of abuse over years or a single incident, was significant, as the consequence to the plaintiff was greater than the sum of the individual assaults. As in *M.N.*, the timing of the assaults in the stage of life of the plaintiff was significant: she was a very young child. Her development was altered and subverted by this abuse and her whole life affected by it, including her emotional development. The Court concluded that:

'An award of damages must be proportionate. An award of damages must be fair to the plaintiff and must also be fair to the defendant. An award should be proportionate to social conditions,

bearing in mind the common good. It should also be proportionate within the legal scheme of awards made for other personal injuries.'

12.5 Bearing this last comment in mind, I have considered a number of cases in this regard. In *Hickey v. McGowan* [2017] IESC 6 the general damages awarded by a trial judge was reduced by the Supreme Court from €350,000 to €150,000. In order to better correlate with cases of catastrophic injury. In that case, the Plaintiff had suffered psychological injury as a result of a continuum of sexual assaults, including the penetration of his anus and fondling of his genitalia, perpetrated by a member of a religious order acting as the Plaintiff's teacher.

12.6 Perhaps the most useful comparator is that of *G.F.B. v. T.B.* [2016] IEHC 97, where Barr J. awarded €105,000 in general damages. There, the Court had regard to the fact the abuse was carried out over a number of years and at a time when the plaintiff was particularly vulnerable – being a young boy aged 7 to 10 years. In that case also, the defendant was in a position of trust in relation to the plaintiff as he was living in the family home, as the partner of the boy's mother. As here, the abuse did not include acts of rape although here there is a more serious allegation of penetration by the fingers and tongue, and there is a history of serious psychological sequelae.

12.7 In *G.F.B.*, it was not alleged that the abuse caused any definable physical or psychiatric injury to the plaintiff, nevertheless he did require counselling over a prolonged period of time, which was continuing at the time of the hearing. This case can be distinguished on that basis, as there is a link between the ongoing depression and stress of this Plaintiff with the abuse she suffered as a child, and there is a further causal link between the abuse and the aggravation of her irritable bowel condition and Crohn's disease due to high levels of stress.

12.8 Barr J. awarded aggravated damages to the value of €25,000 in circumstances where the defendant alleged that the plaintiff had been coached by his father to make false allegations against him. The defendant thereby went beyond merely putting the plaintiff on proof of his claim; he went further and alleged the plaintiff had deliberately told lies over a number of years, culminating in these proceedings, in an effort to wrongly extract money from him. There was no comparable conduct here.

12.9 Finally, as the defendant had already been dealt with in the criminal courts, as is the case here, Barr J. held that it was not necessary to award punitive damages. As here, there were no items of special damages. Unlike in the case of *G.F.B.*, I cannot conclude that this Defendant made any allegations against another alleged perpetrator. He confined himself to the two sole questions referred to above. The fact of the assaults being egregious torts does not, of itself, require that there be an award of aggravated damages. As submitted by Counsel, this is reserved for cases in which the Court wishes to mark its disapproval of specific conduct in how a case was presented. There is no reason for such damages in this case.

12.10 In *O'Donnell v. O'Donnell* [2005] IEHC 216, Kelly J. (as he then was) described aggravated damages, in the context of a comparable civil sexual abuse claim, as follows:

'Aggravated damages are compensatory in nature and can be awarded in cases in which the injury to the plaintiff has been aggravated by malice or insolence or arrogance accompanying it. The plaintiff complains that the defendant maintained a denial of liability in these proceedings and that he should be awarded damages in that regard. I am at one with the view of Finnegan P. in Noctor's case that the maintenance of a denial of liability is not an abuse of the process of the court. A defendant is entitled to require a plaintiff to prove his case.

12.11 Kelly J. concluded by quoting from Nourse L.J. in *Sutcliffe v. Pressdram Limited* [1990] 1 All E.R. 269, who identified the factors which might lead to an award of aggravated damages as:

"Conduct calculated to deter the Plaintiff from proceeding; persistence, by way of a prolonged or hostile cross examination of the Plaintiff or in turgid speeches to the jury; a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself in a manner calculated to attract further wide publicity, and persecution of the plaintiff by other means."

None of these factors are present in this case and, accordingly, I do not consider this an appropriate case for an award of aggravated damages.

12.12 Taking into account the principles handed down by Denham J. in *M.N. v S.M.* and the awards of Barr J. and of the Supreme Court in recent, comparable cases, it seems to me that an award of €145,000 is a fair and proportionate one for general damages to date. This is made up of two parts. €125,000 relates to the assaults themselves and the psychological sequelae. The sum reflects serious trespasses against the person of a child, with life-long effects causing depression and with lasting anxiety. The sum is chosen also to acknowledge that the indecent assaults stopped short of penetration of any body part of the child by the penis, by its nature a more serious wrong. The sum of €145,000 also includes a portion of damages, in the amount of €20,000 to reflect the physical consequences of the Plaintiff's stress which manifested in a worsening of her bowel condition. I will also award €25,000 for damages into the future, making a total award of €170,000.

13. Conclusion

13.1 As I made clear on the final day of the hearing, I took the view that the Plaintiff's case had to succeed due to her credible and uncontradicted evidence, the presumption against the Defendant, and the medical evidence establishing that the Plaintiff's capacity to bring the action was substantially impaired. The detailed reasons for these conclusions have been set out above.

Costs follow the event.