

SUPREME COURT OF QUEENSLAND

CITATION: *P v R* [2010] QSC 139

PARTIES: **P**
(plaintiff)
v
R
(defendant)

FILE NO: BS 2593 of 2009

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 6 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 30 April 2010

JUDGE: Daubney J

ORDER: **1. There will be judgment for the plaintiff in the sum of \$439,937.04.**

2. I will hear further submissions as to costs.

CATCHWORDS: DAMAGES –GENERAL PRINCIPLES – GENERAL AND SPECIAL DAMAGES - where plaintiff has claimed damages for personal injuries resulting from sexual assaults committed on her by the defendant when she was a child – where judgment had been entered for the plaintiff with damages to be assessed – assessment of quantum of damages to be awarded – whether the amount claimed is appropriate in all the circumstances

DAMAGES – GENERAL PRINCIPLES – EXEMPLARY, PUNITIVE AND AGGRAVATED DAMAGES - - where plaintiff has claimed damages for personal injuries resulting from sexual assaults committed on her by the defendant when she was a child – whether exemplary and aggravated damages should be awarded

K v G [2010] QSC 13, applied
Paten v Bale [1999] QSC 265, distinguished
Uren v John Fairfax & Sons (1966) 117 CLR 118, cited

COUNSEL: C Heyworth-Smith for the plaintiff
No appearance for the defendant

SOLICITORS: Murphy Schmidt Solicitors for the plaintiff

- [1] The plaintiff has claimed damages for personal injuries resulting from sexual assaults committed on her by the defendant. The proceeding was commenced by claim and statement of claim filed on 11 March 2009. Judgment was entered for the plaintiff on 22 December 2009, with damages to be assessed. The hearing before me, at which the defendant did not appear, was for assessment of those damages.
- [2] The plaintiff was born in March 1989. The assaults occurred in 1997, when she was eight years old. The plaintiff's parents divorced in 1996 and the plaintiff thereafter had access with her father every second weekend and for half of every school holiday. Between April and September 1997 she spent every Tuesday night at her father's house and from September 1997 until December 1997 she spent either Tuesday or Thursday night at his house. The defendant was, during this time, the plaintiff's father's housemate. He had been a family friend for many years.
- [3] The statement of claim particularises six instances of sexual assault by the defendant on the plaintiff between mid-1997 and December 1997. In view of judgment having been entered against the defendant, it is appropriate to take these matters pleaded in the statement of claim as being not in issue.
- [4] The first three of the six pleaded incidents followed the same course, namely the plaintiff was in bed, the defendant entered her room, she pretended to be asleep, the defendant would pull down her pyjamas or boxer shorts and either put his index finger into her vagina or touch her vagina with his index finger, after which he would pull her pyjamas or boxer shorts back up and leave the room.
- [5] The fourth incident involved the defendant pulling the plaintiff's pyjama bottoms or boxer shorts down, putting his head between her legs and licking inside her vagina and the area around her vagina, after which he would pull her pyjamas or boxer shorts up and leave her bedroom.
- [6] The fifth incident occurred when the plaintiff was sleeping in her father's bed. The defendant tried to pull her pyjama or boxer shorts down, but the plaintiff rolled over so that he could not do so. He touched her between her legs on the outside of her pyjamas or boxer shorts. She hit him with a soft toy, and he left the room.
- [7] The sixth incident started in a similar way to the first three incidents, but then escalated. After putting his finger into the plaintiff's vagina and moving it around, the defendant then pulled down his own pants and rubbed his penis back and forth on the plaintiff's vagina saying "Does that feel good?" and "Does that hurt?". He then pulled his pants back up and her pants back up and left the room.
- [8] As I have said, a judgment has already been entered against the defendant in respect of these assaults, and it remains only to assess the plaintiff's damages.

Pain, suffering and loss of amenities

- [9] At the outset, I should say that, given the relative temporal proximity of these assaults, this is a case in which I think it would be quite artificial to assess the damages attributable to each of the individual assaults. As in the case of *K v G* [2010] QSC 13, I consider that the present case is quite different from that which was considered by Margaret Wilson J in *Paten v Bale* [1999] QSC 265, in which there were five discrete assaults which occurred over a period of two years.
- [10] The plaintiff's life has clearly been greatly affected by having been sexually abused by the defendant.
- [11] The plaintiff, who is now 21 years of age, gave evidence before me. She said that her relationship with her father had broken down because her father had not believed her when she reported the abuse. He sided with his friend, the defendant. She found it very hard to accept that her father would not believe her.
- [12] The plaintiff was in primary school when she suffered the abuse. She said that, after the periods of abuse, she was not the same as she used to be. She lost concentration and suffered learning difficulties. She found high school very difficult. She had bad memories from the abuse, and was unable to concentrate. She left school at the end of Year 11. During her years at high school she suffered depression, and regularly inflicted harm on herself by cutting herself on her arms, stomach and legs. She said that she felt worthless. She developed an eating disorder and suffered from low self-esteem.
- [13] The plaintiff said that she has attempted suicide three times – when she was 16 years old, when she was 17 years old and again a couple of years ago. She recounted having been admitted to mental health facilities on four occasions since the age of 16. She described her feelings of worthlessness, the need to cause harm to herself, her suicidal ideations, and the desire simply to stop eating, saying that her depression is a “pretty dark place”. Being involved in this litigation has been very difficult for the plaintiff. One of the reasons for that is because, at an earlier stage of the litigation, when the defendant had legal representation, terms of settlement between the parties were reached, but the defendant refused to sign a formal settlement agreement to evidence and give effect to the agreement. The plaintiff said she found this devastating because she just wanted the whole thing over.
- [14] Earlier this year, the plaintiff was admitted to a private psychiatric facility for six weeks. She said that everything had become too hard for her, the case was dragging on too long and was having a bad effect on the relationship between her and her boyfriend/partner. In fact, she and her partner broke up while she was in that clinic. She said that despite being discharged she is still quite depressed, and in fact she did not think she was ready to be discharged. She told me that she was still harming herself and suffering from an eating disorder.

- [15] I have the benefit of several specialist medical reports, to which I will refer, as well as copies of the plaintiff's inpatient medical records in evidence before me.
- [16] The plaintiff was examined by Dr Michael Leong, consultant psychiatrist, on 12 February 2008. Dr Leong has provided an extensive medico-legal report dated 27 February 2008, in which he describes the plaintiff's personal and medical history at some length. At the time Dr Leong saw the plaintiff, she described the problems she had experienced over the previous six months as ongoing depression and mood swings, problems of concentration, anxiety and insecurity, self-doubt, occasional suicidal ideation, body image disturbance, restless sleep, and intrusive recollections of incidents of abuse. When commenting on his mental state examination of the plaintiff, Dr Leong said that she was "moderately to markedly preoccupied with her reported history of sexual abuse as a child impacting on her self-esteem and self-confidence with body image disturbance". He said that her mood was serious, anxious and dysphoric, that her affect was restricted but not labile, and observed that there was recurrent self-harm ideation without specific plans or recent attempts. He also noted that there were no perceptual disturbances. Dr Leong conducted a detailed review of the plaintiff's previous medical records, particularly those relating to psychiatric treatment which the plaintiff had undergone.
- [17] Dr Leong was of the opinion that the plaintiff had suffered and continued to suffer a significant psychiatric illness which was predominantly caused by her experience of sexual abuse at the age of eight years by the defendant. He had a guarded prognosis in both the short and long term view. He commented that the plaintiff's ongoing emotional and psychiatric difficulties appeared to have intensified in 2005/2006 with her emerging sexuality and intimacy issues, and said that she experienced increasing body image disturbance and a sense of extremely poor self-worth resulting in significant depression and suicidal ideation with several suicidal attempts. Dr Leong expressed the opinion that the plaintiff's psychiatric difficulties of chronic dysthymic disorder, low self-esteem and body image disturbance were the consequences of her history of sexual abuse during childhood and that this sexual assault was a major contributing factor to her ongoing psychiatric difficulties and psychiatric disorder.
- [18] On 22 May 2008, the plaintiff was seen by Professor Harvey Whiteford, consultant psychiatrist, who has provided a medico-legal report dated 26 May 2008. After reviewing the plaintiff's personal and psychiatric treatment history, Professor Whiteford expressed the opinion that the plaintiff developed a borderline personality disorder during adolescence and met the DSM IV diagnostic criteria for that condition. He thought the disorder was most severe between 2005 and 2007 but noted (in 2008) that there were still persistent features present. He also referred to her eating disorder, which he thought (at that time) was largely in remission. He said there had also been times when the plaintiff had had clinically significant depression, noting that at times this had been part of her borderline personality disorder but at other times it was sufficient for an additional diagnosis of a mood disorder. At the time of examination, he considered the depressive symptoms were part of the personality disorder and not a separate mood disorder. Professor Whiteford observed that the plaintiff did not appear to him to be exaggerating her symptoms, and her presentation appeared genuine. He also noted that her

psychiatric condition was consistent with someone who had been the victim of childhood sexual abuse. He said that although her condition appeared to have improved in the 12 months preceding examination, she continued to exhibit psychiatric symptoms. She was finding the current litigation stressful, and Professor Whiteford believed that was contributing to the persistence of her symptoms. He thought that her condition would improve with ongoing treatment, the passage of time and the resolution of the litigation, but also said it was likely that she would be left with residual psychiatric symptoms.

[19] Professor Whiteford also referred to the need for the plaintiff to undergo further counselling or psychiatric sessions and the benefit that would accrue from that treatment, noting however that the plaintiff would likely continue to have residual psychiatric symptoms even with optimal treatment. He said she would also continue to be vulnerable to the development of significant anxiety and depressive symptoms at times of stress in her life.

[20] As noted above, the plaintiff has also engaged in self-harm practices. She was examined by Dr Trevor Harris, plastic and reconstructive surgeon, on 12 May 2008. Dr Harris has provided a report dated 14 May 2008. Dr Harris describes in detail the scars resulting from the lacerations which the plaintiff has inflicted on herself over the years, noting that on multiple occasions she has incised the skin of all four limbs and her abdominal wall with a razor blade. He noted that the scarring, which is fairly widespread, inhibits swimming or the wearing of brief shorts. If she does swim in relative privacy, she wears board shorts. Dr Harris then described in close clinical detail the scarring which appears on the plaintiff's right forearm, left shoulder, left forearm, abdominal wall, right hip, right thigh, right leg below the knee, left thigh and left leg below the knee. He concluded by saying:

“The scars as described are extensive, involving a large area of the body surface, and are obvious to onlookers. The scars have reached their mature stage and I would not expect any further spontaneous improvement, nor deterioration, of the scars with time.

The worst areas of scarring can be reasonably covered by clothing.

I do not consider that any of the scars are amenable to improvement by any further treatment, either surgical or otherwise.”

[21] This case does not fall for assessment under the *Civil Liability Act 2003*.

[22] Having heard the plaintiff, and reviewed the material put in evidence, particularly the medical reports describing the plaintiff's psychiatric condition and the permanent physical scarring which has been left as a consequence of her condition, I am quite satisfied that the plaintiff has suffered profoundly and, apart from the legacy of the scarring, has suffered, and continues to suffer, psychiatric damage affecting her self-worth, self-image and self-respect. The plaintiff described in evidence before me the difficulties that she has encountered in respect of her employment, her relationships, and her study. I readily accept that the sexual assaults on her as a child have, on occasion, left her in very dark places in her mind.

- [23] Having regard to the psychiatric and scarring injuries suffered by the plaintiff, her age, and the obvious impact these injuries have had on her capacity to enjoy the amenities of life, I would assess the plaintiff's general damages at \$80,000.
- [24] In view of the ongoing nature of her psychiatric condition (manifested most recently in a six week hospital admission earlier this year) and the permanent scarring, I would allow interest at two per cent on 50 per cent of that award. That yields an allowance for interest of \$10,000.

Past economic loss

- [25] The plaintiff had a part time job in a bakery when she was at high school in 2004 and 2005. After leaving high school, she worked in a supermarket in 2007 and 2008. In October 2008 she commenced employment in the Public Service. She is still employed in the Public Service as an administrative officer.
- [26] During her employment the plaintiff has had a number of periods when she has been on sick leave without pay. These periods have involved days off due to her depression and, more significantly, periods as an inpatient at private psychiatric clinics. A schedule detailing those periods of time off without pay, and the amounts of net pay lost by her, is in evidence before me, and was verified by her. I will allow the sum claimed for past economic loss of \$17,074.80. I will allow interest on that amount at six per cent for six years (being the period of time over which she has effectively been employable), yielding \$6,000.
- [27] The plaintiff shall also be compensated for the past lost superannuation, which is calculated as \$1,536.73. Interest thereon for six years is \$500.

Future economic loss

- [28] In evidence before me the plaintiff said that, as a teenager, she had been interested in joining the police. Due to her injuries, however, she has been unable to pursue that ambition. For the last couple of years, however, she has been pursuing a course in justice administration. She said that her studies have been hampered by her illness, and progress is slow. It is to be hoped that resolution of this litigation will give her a boost in terms of pursuing and completing those studies. Successful completion of this course would open the door for the plaintiff to seek to be enrolled in formal tertiary studies at a university. In evidence before me she expressed some hesitant desire to undertake university study, but expressed some doubt as to her capacity to do so.
- [29] It will be apparent from the foregoing that the psychiatric injuries from which this plaintiff suffers are likely to have a long term deleterious impact on her capacity to earn income. At the very least, there are likely to be periods when she will either simply not be able to work or will require time off work without pay. Both of the psychiatrists whose reports are in evidence before me have referred to the likelihood

of her continuing to suffer from some degree of psychiatric impairment into the future.

- [30] In all the circumstances, it seems to me that it is appropriate in the present case simply to make a global assessment of the loss suffered by the plaintiff by reason of the impairment of her earning capacity. Having regard to her age and the fact that she has been, and continues to be in employment, but balancing against that the ongoing effect of her psychiatric illnesses, I would allow her a global sum of \$150,000 for future economic loss.
- [31] The plaintiff should also receive an award calculated as nine per cent of that future economic loss representing lost future superannuation. That will be the sum of \$13,500.

Special damages

- [32] The plaintiff has tendered and verified schedules of her out of pocket expenses for medical and hospital expenses, travelling expenses and pharmaceutical expenses. Those total \$27,682.24, which I will allow. Interest is also recoverable on \$2,566.70 of those special damages (being the actual out of pocket expenses incurred by the plaintiff). I will allow \$2,000 interest.

Future expenses

- [33] The plaintiff makes claim for future expenses under a number of heads.
- [34] First, she makes claim for future psychiatric treatment and attendances on her general practitioner. Professor Whiteford has recommended a further 20 sessions of counselling with a clinical psychologist or psychiatrist at \$310 per session, less \$164.90 schedule fee, being \$144.10 per visit. Allowing that sum over, say, two years, and applying the appropriate multiplier, yields an allowance for counselling of \$2,743.44.
- [35] I also accept that the plaintiff will need to see her general practitioner on average once per month to obtain repeat prescriptions and otherwise be treated in respect of her conditions. This is obviously likely to be a long term need. I will allow a global sum of \$5,000 for that.
- [36] The plaintiff will also incur travelling expenses in order to attend on counselling and her general practitioner. Those have been quantified and verified in a schedule tendered in evidence. I will allow the sum claimed of \$5,906.47.
- [37] The plaintiff confirmed in evidence before me that she had been taking, and was continuing to require to take, medication in treatment of the conditions from which she suffers. A schedule calculating her future medication requirements and the cost

of those requirements has been tendered. I will allow the sum claimed of \$17,993.36.

Aggravated damages

[38] The plaintiff has claimed aggravated damages. Professor Luntz¹ has noted the following conditions for the award of aggravated damages (omitting references to authorities):²

“As with exemplary damages, aggravated damages may be awarded where the defendant has acted, either in committing a tort or thereafter, with contumelious disregard of the plaintiff’s rights, in an insulting or highhanded way or with malice. The additional factor, which is required is that such conduct must have increased the plaintiff’s suffering.”

[39] An award of aggravated damages is, fundamentally, compensatory in nature.³ As Margaret Wilson J said in *Paten v Bale* (supra), at [16], aggravated damages are usually given to compensate for the harm done to a plaintiff by a wrongful act that was aggravated by the manner in which it was done.

[40] Unlike *Paten v Bale*, however, this is not a case in which it can be said, in conscience, that the defendant has acted with propriety in defence of this claim. Nor is it like *K v G* (supra), in which a significant factor militating against an award of aggravated damages was the fact that the plaintiff had received an award of compensation under the *Criminal Offence Victims Act 1995*.

[41] In the present case, the findings of liability on which the judgment against the defendant is founded are that he sexually assaulted an eight year old child in the circumstances articulated in the statement of claim. Moreover, as is clear on the evidence before me, the defendant’s denials that he committed those assaults convinced the plaintiff’s father that the assaults had not occurred, leading to an irreparable split in the relationship between the plaintiff and her father. The doctors have referred to this factor contributing to her psychological injury. It is also clear that this ongoing litigation has exacerbated the plaintiff’s injuries. I have already referred to the fact that a settlement was reached, but not formalised because of the defendant’s refusal to sign terms of settlement. That settlement was reached in April 2009, at a time when the defendant was legally represented. His refusal to sign the terms of settlement obviously had a significant deleterious impact on the plaintiff.

[42] In all the circumstances, I consider this to be a case in which it is appropriate to make an award of aggravated damages, compensatory in nature, and would assess the quantum of those aggravated damages at \$50,000.

Exemplary damages

¹ H Luntz “*Assessment of Damages for Personal Injury and Death*” (4 ed).

² At para 1.7.10.

³ *Uren v John Fairfax & Sons* (1966) 117 CLR 118 per Windeyer J at 151.

- [43] It is trite to observe that, in contrast to the compensatory nature of aggravated damages, exemplary damages are punitive in nature. As Professor Luntz observes (omitting references):⁴
- “Exemplary damages ... are damages over and above those necessary to compensate the plaintiff, that are awarded to punish the defendant and provide retribution, to act as a deterrent to the defendant and others minded to behave in a similar way, and to demonstrate the Court’s disapproval of such conduct.”
- [44] In the present case, the defendant has suffered no penal sanction for this offending conduct. On the evidence before me, he was charged and an indictment was presented in respect of the subject sexual assaults, but the Crown elected not to proceed in respect of those charges.
- [45] The reason why the Crown chose not to proceed is not in evidence before me. Ultimately, however, that explanation is unnecessary, because the fact is that judgment has been entered in the civil proceedings and, for present purposes, I act on the basis of the sexual assaults particularised in the statement of claim as having occurred.
- [46] To my mind, it is unquestionable that, the defendant not otherwise having been punished or penalized for having committed this conduct, sexual abuse of this nature of a vulnerable child is conduct which calls for an award of punitive damages. It is necessary, in fixing the amount to be awarded under this head, to convey the Court’s disapproval of this conduct. I have decided to allow \$50,000 for exemplary damages.

Conclusion

- [47] In summary, I have assessed the damages to be awarded to the plaintiff as follows:

General damages	\$80,000.00
Interest on general damages	10,000.00
Past economic loss	17,074.80
Interest	6,000.00
Past superannuation	1,536.73
Interest	500.00
Future economic loss	150,000.00
Future superannuation	13,500.00
Special damages	27,682.24
Interest	2,000.00
Future counselling	2,743.44
Future GP	5,000.00
Future travelling expenses	5,906.47
Future medication	17,993.36
Aggravated damages	50,000.00
Exemplary damages	<u>50,000.00</u>
Total	<u>\$439,937.04</u>

⁴ At para 1.7.1.

[48] There will be judgment for the plaintiff in the sum of \$439,937.04. I will hear further submissions on costs.