

G.K. v. D.K.

Between

G.K., (respondent), and

D.K., (appellant)

[1999] O.J. No. 1953

Docket No. C27659

Ontario Court of Appeal

Toronto, Ontario

McMurtry C.J.O., Finlayson and Charron JJ.A.

Heard: May 10, 1999.

Judgment: June 3, 1999.

(11 pp.)

Counsel:

Robert P. Armstrong and Sharon Haward-Laird, for the appellant.
J.G. Hodder, for the respondent.

The judgment of the Court was delivered by

¶ 1 **FINLAYSON J.A.**:— This is an appeal from the judgment of Howden J. issued pursuant to the verdict of a General Division jury in which the respondent was awarded \$35,000 general damages, \$30,000 special damages, \$30,000 aggravated damages and \$55,000 punitive damages for physical assault and intentional infliction of emotional distress. The appellant also appeals from the supplementary judgment of Howden J. in which the respondent was awarded, concurrently with the jury's award, the same amounts for damages under all four headings for breach of fiduciary duty. The appellant also seeks leave to appeal and appeals the award of costs.

Overview

¶ 2 The respondent, G.K. commenced this action against her father, the appellant, alleging that he had sexually and physically assaulted and emotionally abused her beginning in her childhood and ending in 1987 when she was thirty years of age. She also alleged that the appellant had breached his fiduciary duty to her as a parent. She claimed general, special, aggravated and punitive damages.

¶ 3 The issues of sexual assault, physical assault and intentional infliction of emotional distress were tried before the jury. In its answers to questions that made up its verdict, the jury found that the appellant father had physically assaulted his daughter but had not sexually assaulted her. It also found that the appellant had intentionally inflicted emotional distress on her and awarded general, special, aggravated and punitive damages as indicated above.

¶ 4 The claim for breach of fiduciary duty was tried by the trial judge since it was a claim for equitable relief. After receiving written submissions, the trial judge, citing *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 and *J.(L.A.) v. J.(H.)* (1993), 13 O.R. (3d) 306 (Gen. Div.), disposed of this issue in a brief endorsement. He said:

In this case, the jury heard all of the evidence in its consideration of the claims in tort which are relevant to this claim. I see no reason to assess the damages differently from the jury. I award for breach of fiduciary duty general damages of \$35,000, special damages of \$30,000, aggravated damages of \$30,000 and punitive damages of \$55,000. This award is concurrent with the award by the jury, to avoid double recovery.

Issues

¶ 4a

1. Did the trial judge err in failing to dismiss the action for physical assault and intentional infliction of emotional distress as barred by virtue of the Limitations Act, R.S.O. 1990, c. L.15, ss. 45(1)(g) and (j)?
2. Did the trial judge err in his instructions to the jury?
3. Was the jury's verdict perverse and contrary to the evidence in holding that the appellant physically assaulted the respondent but did not sexually assault her?
4. Was the damage award grossly excessive in light of the finding as to liability?
5. Did the trial judge err in his award of damages for breach of fiduciary duty?
6. Did the trial judge err in his award as to costs?

[The Court did not number this paragraph. QUICKLAW has assigned the number 4a.]

Analysis

¶ 5 The overriding complaint of the appellant with respect to the conduct of the trial is that the case for the respondent on the pleadings was based on persistent sexual assaults over an extended period of time. Once the jury rejected this primary complaint, he submits that the balance of the verdict was either perverse or should have been re-examined by the trial judge to determine if the physical assaults were out of time. For her part, the respondent maintains that the appellant's counsel at trial (not counsel on appeal) agreed with or at least acquiesced in the decisions made by the trial judge. Certainly, he did not object to any of the matters that have taken on great significance in this court.

¶ 6 I have considerable sympathy with the complaint of the respondent. However, for the purposes of this appeal, I am prepared to accept the submissions of the appellant that the focus of the case for the respondent daughter, as pleaded and as presented at trial, was on her allegations

of persistent sexual touching and assault by the appellant culminating in an allegation of sexual intercourse after the appellant had drugged her. Accordingly, once the jury had rejected these allegations, the case for the respondent was diminished in severity to a finding in her favour on her allegations of persistent physical assaults of a quasi-disciplinary nature, particularly when she was a young child.

¶ 7 The appellant submits that the significance of these two findings is that the jury isolated the tort of assault from the incest inherent in the sexual abuse. The decision of the Supreme Court of Canada in *M. v. M.*, supra, regarding discoverability in incest cases, would therefore be distinguishable if not inapplicable. Accordingly, he submits, the trial judge had a responsibility to re-examine the limitation defence pleaded by the appellant because in his submission the physical assaults took place when the respondent was very young and had terminated at least by the time she was in her late teens. However, this is not factually accurate. The record is replete with evidence of physical, verbal and emotional abuse inflicted by the appellant on the respondent, quite apart from the alleged sexual abuse. The respondent had alleged that her father had physically and sexually assaulted her throughout her childhood without differentiating between the two classes of abuse. The physical assaults often involved slapping and punches to the head which were administered on a continuous basis between the ages of two and a half to three until the respondent was about ten. Thereafter the assaults were less frequent but some were of greater severity. On one occasion, the appellant knocked her down and kicked her in the ribs. On another occasion he took a belt to her. This physical abuse was employed, apparently, as a form of punishment or expression of disapproval. The respondent also alleged a history of sexual abuse. She stated that the appellant placed her head in his lap, rubbed his penis against her thighs, inappropriately touched her vagina, and digitally penetrated her vagina. This was in addition to the allegations, referred to above, wherein she also testified that once, when she was 18 years old, he drugged her and then had sexual intercourse with her.

¶ 8 As a matter of law, physical assaults constituting a tort are subject to a limitation of four years under the provisions of s. 45(1)(j) of the Limitations Act. However, in this case, as in similar child abuse cases, the issue of discoverability was inextricably bound to the sexual abuse. The respondent addressed the discoverability issue by calling as a witness Dr. Elaine Borins, a practising psychiatrist with a distinguished curriculum vitae. Dr. Borins had treated the respondent as a patient and was able to assist her to identify, for the first time, the connection between her feelings of inadequacy, depression, anger and worthlessness on the one hand and the overall abusive conduct of her father on the other. Dr. Borins furnished two reports regarding the respondent and her treatment. Although the focus of the reports was the effect of the alleged sexual abuse, the physical assaults were also mentioned. Dr. Borins did not differentiate between the effects of the sexual and the physical assaults in her analysis of her patient's problems or the effect the childhood abuse had on her.

¶ 9 As I read the judgment of La Forest J. speaking for the majority in *M. v. M.*, supra, the distinction between incestuous conduct and persistent physical abuse directed to a child of the marriage does not appear to be significant for limitation purposes. He says that incest is both a tortious assault and a breach of fiduciary duty. It "does not constitute a distinct tort, separate and apart from the intentional tort of assault and battery ..." (p. 24). However, also at p. 24, he makes

clear:

The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and her injuries. In this case, that discovery took place only when the appellant entered therapy, and the lawsuit was commenced promptly thereafter.

¶ 10 The "tort claim" in *M. v. M.* was incest and, according to La Forest J., a crude legal description of it is assault and battery. He states that the discoverability rule as developed by the Supreme Court should be applied and the limitation period should begin to run only when the injured party has a substantial awareness of the harm and its likely cause. In these circumstances, the nature of the childhood abuse would appear to be irrelevant if there is evidence, as there is in this case, that the victim's awareness of her problems and its cause was only discoverable after therapy.

¶ 11 In any event, whatever merit the appellant's argument might have in the abstract as to a severable limitation period for the physical assaults as opposed to the sexual ones, the appellant's counsel at trial did not appear to recognize the significance of the jury verdict. He had based his defence on the theory that the assaults were primarily sexual and when he raised the limitation issue with the trial judge he appeared to accept that the matter was controlled by *M. v. M.* However, despite the fact that he had agreed that separate questions should be put to the jury on whether the appellant had committed the sexual assaults and the physical assaults, he did not ask the trial judge to ask the jury the further question as to when the respondent was reasonably capable of discovering the wrongful nature of either class of assaults. When the jury returned its verdict, the appellant's counsel failed to ask the trial judge to make a ruling as to whether the limitation period would apply to the physical assaults since the sexual assaults had not been found to have occurred.

¶ 12 In the result, we have no finding of fact by either the jury or the trial judge as to whether there was a point at which it could be said that the respondent was reasonably capable of discovering the wrongful nature of the appellant's acts and the nexus between those acts and her injuries. In these circumstances, the trial judge can not be faulted for not raising these matters on his own initiative.

¶ 13 The same criticism can be made of the complaint that the trial judge, in asserting his own jurisdiction over the equitable issue of breach of fiduciary duty, failed to make a separate finding on the limitation issue. As I read the written submissions of the appellant's counsel at trial, he did not challenge the characterization by the respondent's counsel that the same acts of the appellant that were found by the jury to be assaults, also constituted breaches of fiduciary duty. Indeed, the language used is open to the construction that he agreed with the submissions of the respondent's counsel and simply suggested to the trial judge that he follow the judgment of D. Rutherford J. in *J. (L.A.) v. J. (H.)*, supra, a case the trial judge referred to in his reasons.

¶ 14 Accordingly, I am not prepared to give effect to the appellant's complaint with respect to issue no.1.

¶ 15 With respect to issue no. 2 relating to objections in this court to the charge to the jury, no objection was made at trial. The complaints now made with respect to the use the jury could make of character evidence, the evidence of certain witnesses other than the appellant, instructions as to the requirements of intentional infliction of mental distress and guidance with respect to the requirements of a finding of punitive and aggravated damages are all matters of non-direction. It is accepted that in civil cases, failure to object in these circumstances is usually fatal: see *Tsalamatas v. Wawanesa Mutual Insurance Co. et al.* (1982), 31 C.P.C. 257 (Ont. C.A.).

¶ 16 I think that it would be useful to repeat an instruction on the issue of failing to object to a charge to the jury, whether it be non-direction or misdirection, given by this court in *Arland and Arland v. Taylor*, [1955] O.R. 131 (C.A.). There, Laidlaw J.A. for the court stated at p. 137:

While the failure of counsel at trial to make an objection to a charge to the jury does not in every case preclude counsel on appeal from raising the objection, it should be made plain once again that the omission of counsel at trial to make an objection to the charge must not be regarded lightly, but, on the contrary, in such a case when counsel seeks to raise the objection as a ground of appeal, a new trial cannot be granted as a matter of right, but only as a matter of discretion. A new trial should not be granted unless the Court is fully satisfied that it is necessary in the interests of justice.

¶ 17 And again at p. 140:

I extract from the cases to which I have referred these general propositions:

- (1) A new trial is contrary to the interest of the public and should not be ordered unless the interests of justice plainly require that to be done.
- (2) An appellant cannot ask for a new trial as a matter of right on a ground of misdirection or other error in the course of the trial when no objection was made in respect of the matter at trial.
- (3) A new trial cannot be granted because of misdirection or other error in the course of the trial "unless some substantial wrong or miscarriage has been thereby occasioned".
- (4) A party should not be granted a new trial on the ground of non-direction in the judge's charge to the jury where, having opportunity to do so, he did not ask the judge to give the direction the omission of which he complains of.

¶ 18 More recently, these four propositions were quoted with approval by the British Columbia Court of Appeal in *Christie v. Westcom Radio Group Ltd.* (1990), 75 D.L.R. (4th) 546, leave to appeal to the Supreme Court of Canada refused (1991), 79 D.L.R. (4th) vi.

¶ 19 I agree with the appellant that the trial judge should not have instructed the jury, where adequate notice had not been given as to the calling of a particular witness, that this was a matter the jury could consider in deciding what weight to give to the witness' evidence. If counsel fails to abide by an undertaking as to the calling of witnesses or fails to observe the rules of court in

this respect, the trial judge can do various things. He can refuse to permit the witness to be called, he can grant an adjournment to permit opposing counsel to prepare to cross-examine the witness or he can award cost sanctions. The burden of counsel's misconduct, if that is what it is, should not be charged to the witness. However, in this case the instruction did not result in a "substantial wrong or miscarriage of justice" sufficient to warrant a new trial: see Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(6).

¶ 20 As to issue 3, the verdict was not perverse. Two separate questions were put to the jury and it is most strange to suggest that the jury was obliged to give the same answer to both questions.

¶ 21 Issues 4, 5 and 6 can be disposed of shortly. I am not persuaded that the damages awarded were so excessive as to warrant interference by this court. The award of costs was in the discretion of the trial judge and we do not propose to interfere with it.

¶ 22 Accordingly, I would dismiss the appeal with costs.

FINLAYSON J.A.

McMURTRY C.J.O. — I agree.

CHARRON J.A. -- I agree.