

THE HIGH COURT

[1999 No. 8398P]

BETWEEN

D. F.

PLAINTIFF

AND

**AINÉ MCGARTY, MINISTER FOR EDUCATION & SCIENCE MINISTER FOR HEALTH & CHILDREN, MINISTER FOR JUSTICE,
EQUALITY AND LAW REFORM, MICHAEL NEARY, IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS

Judgment of Gilligan J. delivered on the 12th day of July, 2007.

1. The plaintiff in these proceedings was born on 27th day of April, 1944, and on 4th day of November, 1946, at the age of two years and seven months, by reason of the fact that she was found on 26th day of November, 1946, receiving alms she was ordered by the Dublin Metropolitan District Court pursuant to s. 58 of the Children's Act 1908 to be sent to a certified industrial school namely St. Joseph's in Clifden, Co. Galway, and there to be detained until she attained the age of sixteen years on 26th day of April, 1960.

2. The thrust of the plaintiff's claim against the various defendants can be divided into three parts; firstly the lawfulness of the plaintiff's detention in the certified industrial school; secondly her general ill treatment while detained in the industrial school; thirdly an allegation that she was sexually abused while detained therein.

3. In the statement of claim as delivered in October, 1999 the plaintiff alleges that she was falsely and maliciously prosecuted for the offence of receiving alms at a time when she was two years and seven months old and incapable of committing a crime. It is alleged that she was convicted of the offence and sentenced to detention for sixteen years. It is alleged that the State failed to uphold and vindicate her legal and constitutional rights.

4. It is further alleged that while detained at St. Joseph's Orphanage, Clifden the plaintiff was subjected to physical and emotional abuse and deprivation. She alleges that for sixteen years she had to endure a brutal and brutalising regime with regular beatings and frequent acts of humiliation and that her treatment was in wanton disregard of her constitutional rights.

5. There are allegations of sexual abuse to the effect that the plaintiff was regularly humiliated at night time by having the bed clothes pulled from her and that a named member of the clergy touched the plaintiff in a sexually intimate manner.

6. Particulars were raised and replied to and I take the view that it is fair to come to a conclusion that the sexual aspect of the allegations were not being pressed to the forefront of the plaintiff's claim when it came to the disclosure of expert medical reports in accordance with the provisions of the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 (S.I. No. 391 of 1998). It is evident that the sexual abuse aspect was somewhat clouded because in the medical report of 20th day of February, 2003, the medical doctor specifically refers to the question of having discussed the aspect of sexual abuse with the plaintiff and that it was clear that the plaintiff had no memory of overt sexual assault but there was however a somewhat sexual undertone to some of the plaintiff's alleged experiences including being dragged out of bed at night and such incidences as public bathing.

7. The various defendants have filed defences with extensive denials and in particular have alleged that the plaintiff's claim is statute barred pursuant to the provisions of the Statute of Limitations, 1957 as amended and further, by reason of the fact that there has been inordinate and inexcusable delay, the plaintiff should not be permitted to maintain these proceedings as against the defendants.

8. The various defendants bring before the court notices of motion which claim relief which can be summarised in the following terms;

9. Firstly, an order pursuant to the inherent jurisdiction of this court dismissing the plaintiff's claim for want of prosecution on the grounds of inordinate and inexcusable delay which delay has prejudiced the defendants and that the balance of justice requires that the claim be dismissed.

10. Secondly, an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim in effect due to lapse of time, in the interests of justice and pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms particularly pertaining to the defendants rights to a fair hearing within a reasonable period of time.

11. The pleadings having closed in this action and the various relevant documentation having being interchanged between the parties pursuant to the relevant provisions of the Rules of the Superior Courts (No. 6) 1998 (S.I. No. 391 of 1998), the case came on for hearing before this court (Herbert J.) on 1st day of February, 2006. The trial was adjourned pursuant to an application as made by senior counsel on the plaintiff's behalf on the basis that on the morning of the 1st of February, 2006, a full consultation was held with the plaintiff and her many witnesses and during that consultation and with the help of her witnesses and counsellor the plaintiff particularised certain events relating to sexual abuse.

12. In making the application for adjournment to the Court counsel on the plaintiff's behalf indicated that further incidences of sexual abuse of a fundamental nature during the course of the plaintiff's enforced custody had come to light, that they were more systematic, more serious, more profound and had significant psycho sexual connotations according to the evidence that will have to be adduced in relation thereto.

13. Following the adjournment the solicitors for the fifth named defendant sought and received further and better particulars and then served rejoinders to those particulars. The remaining defendants also raised a notice of further and better particulars and to date no reply to these particulars has been delivered.

14. Senior counsel for the plaintiff when asked by the court on the adjournment application as to when he envisaged that the case would be ready to proceed to a hearing indicated that he was in a difficult position in that regard because matters in effect had not yet fully clarified themselves.

15. The defendants in maintaining the motion before this court emphasised the inordinate and inexcusable nature of the delay in prosecuting the plaintiff's claim arising out of events which occurred between 1946 and 1964 and set out extensively the nature not only of the presumed prejudice that arises but of actual prejudice and effectively, in this regard, all relevant witnesses are mostly dead and of the very few persons who remain alive, they are now of very advanced years and incapable of giving any meaningful evidence to the court. In effect there is no one left to give evidence on the defendants behalf in this case against a background

where the various defendants are all being sued in their respective capacities as being vicariously liable for the actions of others during the relevant period of time. The main thrust however of the defendants application is to the effect that by reason of the elapse of time pursuant to the inherent jurisdiction of the court there is now a real and serious risk of an unfair trial, a clear and patent unfairness in asking the defendants to defend the action and the defendants will not have a fair hearing within a reasonable period of time of the wrongful acts complained of.

16. As regard the first aspect of the defendants application herein, being the application to dismiss for inordinate and inexcusable delay and for want of prosecution, while Mr. Giblin, counsel for the plaintiff, conceded inordinate delay there is no doubt that in the overall context of the plaintiff's claim there has been inordinate delay. It is quite clear that these proceedings but for the application for the adjournment would have proceeded ahead on the 1st day of December, 2006, before this court (Herbert J.) and that the defendants were contesting the plaintiff's claim and would have relied on the relevant provisions of the Statute of Limitations, 1957 as amended and that on the grounds of inordinate and inexcusable delay and as a result of the actual prejudice as suffered by the defendants, the plaintiff's claim should be dismissed. In essence the only reason why the plaintiff's claim has not been determined either in her favour or against her is because of the application for the adjournment and in my view in the particular circumstances that presented themselves to counsel on the morning of the hearing counsel, acting in the best interest of the plaintiff, were as a matter of probability left with no alternative but to apply for the adjournment and I am satisfied from the content of the various medical reports that have been opened to me and in particular the reports from the plaintiff's counsellor/therapist, that the plaintiff has significant problems with her own self, has a very significant inferiority complex, and her self esteem is particularly poor, all allegedly brought on as a result of the plaintiff's period of time at St. Joseph's Orphanage. The plaintiff's counsellor describes in her report of the 20th January, 1999, that she has had contact with many persons who have been the subject matter of abuse but no one case has disturbed her as deeply as the plaintiff's case and despite the fact that she has spent many hours working with the plaintiff she still does not believe that she has unearthed all of the plaintiff's awful experiences.

17. The Senior Clinical Psychologist who saw the plaintiff on 7th day of July, 2003, sets out the nature and extent of the psychological sequelae that have affected the plaintiff and that through no fault of her own she has lost out on many opportunities afforded to those who have undergone a normal upbringing.

18. It is clear to me from the content of the various medical reports that this particular plaintiff as a matter of probability has had difficulties with repressed memory and of coming to terms with the nature and extent of the alleged abuse as perpetrated upon her.

19. I come to the conclusion on the information available, that the plaintiff's own conduct in not bringing forth either to her counsellors, treating doctors, or her solicitors the full nature and extent of the alleged abuse as perpetrated upon her is a valid excuse for the delay that has occurred herein which effectively prevented the case from proceeding ahead with all issues being determined on 1st day of February, 2006.

20. This accordingly brings me to a conclusion whereby the plaintiff's delay has been inordinate and is excusable in the circumstances and accordingly I decline to dismiss the plaintiff's claim by reason of inordinate and inexcusable delay for want of prosecution.

21. The second aspect of the defendants application is pursuant to the inherent jurisdiction of the court to dismiss the plaintiff's claim by reason of there being a real and serious risk of an unfair trial or a clear and patent unfairness in asking the defendant to defend the action by reason of the lapse of time. Reliance is also placed on Article 6 of the European Convention on Human rights.

22. There is no dispute in this case as regards the relevant jurisprudence in respect of an application to dismiss the plaintiff's proceedings by reason of the lapse of time involved, without any reference to culpable delay and pursuant to the inherent jurisdiction of the court which jurisdiction emanates from the judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151 through *Toal v. Duignan (No. 1)* [1991] ILRM 135 and *Toal v. Duignan (No. 2)* [1991] ILRM 140 the views as expressed by Hardiman J. in *J O'C v. Director of Public Prosecutions* [2000] 3 I.R. 478 at p. 491 the judgment of Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 526 and the views as expressed by Finlay Geoghegan J. in *Manning v. Benson and Hedges Limited* [2004] 3 I.R. 556 at p. 560.

23. It is clear that there has been inordinate delay in the particular circumstances of this case between the date of the wrongful acts alleged being between December, 1946 and December, 1964 when the plaintiff left St. Joseph's Orphanage in Clifden until August, 1999 when the plaintiff instituted these proceedings and continuing on, on the information available for a further number of years until the plaintiff is ready to proceed some 61 years to date from the alleged commencement of the wrongful acts and some 42 years from the date when the wrongful acts ceased.

24. There is presumed prejudice arising in respect of any witnesses that would be available to give evidence on the defendants behalf and details of actual prejudice are set out in the affidavits as filed on the defendants behalf and it is quite clear that the reality of the situation is that there is now no witness available to give evidence on the defendants behalf because all the witnesses are mostly dead or else so aged and infirm as not to be in a position to give meaningful evidence.

25. In considering the threefold dimension to the plaintiff's claim, the alleged wrongful imprisonment is presented on the basis of the unlawful conviction of a crime by a minor aged two and a half years but, as counsel for the State defendants submits, it appears that the situation which actually pertained takes on a different complexion because at the relevant time s. 58 of the Children Act, 1908 was a lawful operative piece of legislation that in fact has never been declared unconstitutional, and does not appear on its face to have given rise to any conviction of a criminal offence but merely allowed the court detain a child in a certified industrial school until the child attained the age of sixteen years, where the child fulfilled a given criteria one of which was that the child was receiving alms. It thus appears that any attack on the relevant legislation in place at the time of the plaintiff's order for detention in a certified industrial school will necessarily require an attack on the manner in which the law was carried out and this will necessarily involve oral testimony relative to the particular facts of this case. The plaintiff makes a secondary claim that at the age of sixteen she was unlawfully detained for a further four years and this aspect will also require oral testimony.

26. The second aspect of the plaintiff's claim relating to her alleged treatment at the hands of an alleged brutal regime that existed for her entire period of detention at St. Joseph's Orphanage, will also necessarily require oral testimony and quite clearly the nature of the claim that is made out is of a regime that was carried out in an open manner.

27. The third aspect relating to allegations of alleged sexual abuse will also clearly require oral testimony and while initially the plaintiff's complaints related to a degree of sexual abuse apparently carried out in private, the plaintiff's latter complaints appear to relate to abuse carried out openly and relates to events which clearly would necessarily be the subject matter of oral testimony.

28. Accordingly it could not be said that the alleged circumstances of this case make it a documents case only and in my view quite the reverse is the situation and this is a case which will be presented primarily on the basis of oral testimony and defended

necessarily on the basis of oral testimony if such were available.

29. Finlay Geoghegan J. in *Manning* [2004] 3 I.R. 556 dealt extensively with this very issue at pp. 568 and 569 of her judgment wherein she stated;

"The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial. This, as was submitted, is required by Article 34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss. Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim then he may also be entitled to an order to dismiss. This entitlement derives principally from the constitutional guarantee to fair procedures in Article 40.3 of the Constitution. Whilst in some of the cases the judgments have referred to the matters under both these headings, they appear to be potentially separate grounds upon which the inherent jurisdiction to dismiss may be exercised. The factor to be considered by the court in relation to each question may overlap. It appears to me that these may include:-

1. Has the defendant contributed to the lapse of time
2. The nature of the claims;
3. The probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;
4. The nature of the principal evidence; in particular whether there will be oral evidence;
5. The availability of relevant witnesses;
6. The length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date".

30. In my view none of the defendants in the particular circumstances can be considered to have contributed in any significant way to the relevant lapse of time. The claims being made are wide ranging both in the nature of the wrongful acts alleged and the time over which they are alleged to have occurred. There will be significant factual issues to be determined by the court if the claim went to trial. I am satisfied on the basis of the affidavits as sworn on the defendants' behalf that there are now no relevant witnesses available to give evidence on the defendants' behalf.

31. It is clear from the statement of claim that the allegations being made by the plaintiff go back as far as December, 1946 and continue through to December, 1964. It is further clear that the plaintiff is not yet in a position to proceed with the alleged sexual abuse element of her claim and it is somewhat unclear as to when such a claim will actually be ready to proceed.

32. In my view this is a case which will have to be decided to a large extent on oral testimony rather than on documentation.

33. Not only have I decided that there is presumed prejudice arising but also actual prejudice and in the context of deciding the issues involved in this case the actual prejudice that is suffered on the defendants behalf can be described as substantial.

34. The European Convention on Human Rights was incorporated into Irish law by virtue of the enactment of the European Convention on Human Rights Act, 2003 the Act coming into effect on 31st December, 2003. The Act of 2003 operates prospectively only from that date. Article 6 of the European Convention of Human Rights states;

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

35. Article 6 of the European Convention is an extra factor to be added into consideration by the court but subject to the application of existing Irish law and jurisprudence.

36. For a court to be asked at some time in the future to determine issues of fact that arise between 1946 and 1964 in the absence of any of the persons involved on the defendants behalf would in my view result in a basic unfairness of procedures and give rise to a real and serious risk of an unfair trial, create a clear and patent unfairness in asking the defendants to defend the action, fail to provide the defendants with a fair hearing within a reasonable time of the wrongful acts complained of and would in the words of Henchy J. in *O'Domhnaill* put "justice to the hazard". In these circumstances I dismiss the plaintiff's claim for want of prosecution by reason of lapse of time pursuant to the inherent jurisdiction of the court.