

THE HIGH COURT

[2004 No. 5200 P]

BETWEEN

ELIZABETH DONEGAN

PLAINTIFF

AND

THE MINISTER FOR EDUCATION AND SCIENCE IRELAND
AND THE ATTORNEY GENERAL

THE NORTH EASTERN HEALTH BOARD

AND BY ORDER NOREEN O'SHEA AND THE MINISTER FOR HEALTH AND CHILDREN

DEFENDANTS

Judgment of Mr. Justice O'Neill delivered on the 16th day of March, 2007

1. Before the court were two motions brought by the fourth and fifth named defendants. The fourth named defendant in its motion seeks an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim on the grounds that it fails to disclose any cause of action against the fourth named defendant, alternatively an order dismissing the plaintiff's claim against it on the grounds of inordinate inexcusable delay in instituting these proceedings which delay has prejudiced the fourth named defendant and would be an infringement of the fourth named defendant's right to a fair trial. The fourth named defendant also makes the case that the plaintiff's claim is state barred.

2. The fifth named defendant in her motion seeks an order pursuant to the inherent jurisdiction of the court dismissing the plaintiff's claim against the fifth named defendant on the grounds of inordinate and inexcusable delay in the institution of the proceedings and on the grounds that to allow the action to proceed to trial would be a breach of the fifth named defendant's right to a fair trial.

3. The plaintiff in her statement of claim claims damages against all defendants for personal injuries, distress, trauma, loss and damage and expense caused by the negligence and breach of duty (including breach of statutory duty), breach of fiduciary duty and breach of duty owed to her to protect her constitutional rights and to uphold her human rights as protected by the European Convention on Human Rights.

4. The plaintiff claims that after she became pregnant out of wedlock when she was about 20 years of age and had a son, she was detained in an Unmarried Mothers Home which was owned and managed by the fifth named defendants at Dunboyne in the County of Meath. She claimed to have been detained in this institution from 1953 to 1955 and from 1955 until 1974. She alleges she was detained in a similar home owned and operated by the fifth named defendants in Co. Cork. She alleges that continuously during her aforesaid detention and committal in these institutions she was subjected to abuse, intimidation, inhuman and degrading treatment, false imprisonment, trespass to the person, breach of her constitutional rights including her right to bodily integrity; that she was physically neglected and forced to do degrading and laborious tasks not fit for her and required to work to extreme degrees for which she received no payment. In addition she claims that the defendants facilitated the removal of her children from her and the placing of them for adoption with third parties without her consent.

5. In response to a request for particulars from the fifth named defendant, the plaintiff stated she was admitted to the fifth named institution in Cork on the 26th March, 1960 and left it in or about July of 1964. She stated that she was admitted to the fifth named defendant's institution in Dunboyne on or about the 17th June, 1969 and left it on or about the 18th August, 1972.

6. The plaintiff stated in this reply that she could not specifically identify the nuns from the fifth named defendant's congregation against whom allegations were made, but that she could recall two nuns whose names she could not recall who used to make her cook in a hot kitchen for a 100 to 150 people and if they believed that what she doing was not correct she would be pushed out of the kitchen and pushed to the top of the stairs where she would have to stay for the day without anything to eat or drink.

7. A detailed request for particulars from the fourth named defendant has not yet been replied to.

8. At paragraph 30 of an affidavit sworn on the 14th December, 2005 by Sr. Noreen O'Shea on behalf of the fifth named defendants the following is said:

"30. As far as can be ascertained, the vast majority of the sisters which the congregation believes may have been in one or other of the institutions at the time stipulated by the plaintiff and particularly sisters who were in a positions of authority are now dead. To best of the congregation's knowledge, at least 24 sisters have now died. Amongst all of the institutions and timeframe as referred to by the plaintiff, in or about 12 sisters have been identified who may have been there at the time complained of and who are still alive. The majority of the sisters are very elderly at this point, two of the sisters are in their nineties, four of the sisters are in their eighties, four of the sisters are in their seventies and only two of the sisters are in their sixties and one of these sisters will be 70 next May. While two of those sisters have some memory of a person matching the plaintiff's description, there is little or nothing in the way of detailed memory available which could assist in rebutting the plaintiff's claim or any detail of it, (had the plaintiff put in any detail herself)."

9. At paragraph 10 of this affidavit the following is stated:

"10. While the women would have arrived in Ard Mhuire in similar circumstances, it was the practice that personal details or histories were not discussed in the facility, either amongst the staff, or between the staff and the women.

11. As a matter of strict practice, the sister-in-charge in Ard Mhuire and/or the mid-wife/nurse (who was also a Good Shepherd Sister) would have been the only persons who knew of the personal, family or other background of the women. This reality is of particular relevance to the position the congregation finds itself in now in seeking to defend a claim going back five decades."

10. Further on at paragraph 33 the following is said:

"33. The contemporaneous records in the possession of the congregation are an extract from the admissions register of the facility known as St. Mary's in Cork and a document entitled "admission form"...These appear to confirm that the plaintiff did attend the facilities on different occasions. It also appears to contradict the plaintiff's own assertion that she was detained in St. Mary's in Cork for upwards of 20 years.

34. The extract from the admission register suggest that the plaintiff was in Dunboyne in 1960 and was transferred to St. Mary's, Cork from there in that year. The date of transfer appears to be the 26th March, 1960. The records state that the plaintiff was taken out of Cork by her mother in July, 1964 (which suggests she was there for a period of 4 years). It seems that she returned to Cork in 1969 (having been in Dunboyne since April of 1967) and remained in St. Mary's, Cork until 1972. Following that it appears that the plaintiff went to another facility known as the Clifton Convalescent Home, also run by the congregation for about two years. This was a facility in which it appears that the plaintiff worked and, contrary to her assertions, was paid by the congregation for a couple of years. It is understood that the plaintiff left Clifton Convalescent Home, apparently to go to a wedding, and did not return to work in Clifton Convalescent Home. It is also understood that she may have returned to Clifton Convalescent Home to collect her belongings having previously indicated that she had obtained work in Dublin.

35. I beg to refer to a true copy of an assessment carried out on the plaintiff upon which marked "No's 3" I have signed my name prior to the swearing hereof. This was compiled by Sr. Eilish Kinnane who was then a Masters student in psychology. This record, insofar as it goes, supports the congregation's view as the plaintiff's history in the various facilities. These documents constitute the extent of the congregation's current knowledge of her tenure therein."

11. At paragraph 38 of this affidavit the following is said:

"38. Sr. Carmel Higgins was the sister-in-charge of St. Mary's on both of the occasions when (at least in accordance with the attendance record) the plaintiff was present in St. Mary's, Cork. She was also the Superior in Clifton Convalescent Home when the plaintiff was there. Her death is of particular relevance because of the management structure in place at the time. The sister-in-charge was responsible for all decision making in relation to the residents and only she would have had any personal information on the residents or their backgrounds. It would have been Sr. Carmel both in St. Mary's and in the Clifton Convalescent Home that residents would have gone to had they had any issues in relation to their stay, or if they wished to leave the facilities."

12. The following is said at paragraph 42:

"42. For the sake of completeness there are three persons located by the congregation who have any recollection of the plaintiff.

(a) One has a vague recollection of the plaintiff being in Ard Mhuire in Dunboyne. In that regard she suggests that it would have been later than 1955 as the first group which entered was of its nature more memorable and she does not recollect that that first group included the plaintiff. She also remembers a brief chat with the plaintiff in Clifton Convalescent Home and her recollection is that she was happy.

(b) Another remembers the plaintiff in St. Mary's where she was known as Magdalen. She expressed the view that Sr. Carmel would have been the primary source of information with regard to the plaintiff.

(c) A lay worker who still works for the congregation also has some recollection of the plaintiff while she was in Clifton Convalescent Home. Her recollection is that the plaintiff was not satisfied with Clifton Convalescent Home and also has a recollection that the plaintiff did not like Sr. Carmel.

43. The above represents the extent of the congregation's knowledge and records with regard to the plaintiff."

13. In an affidavit sworn by Gerard Lowry on behalf of the fourth named defendant on the 9th March, 2006 the following is said at paragraph 6:

"6. I say and am advised and I believe that the fourth named defendant did not exist in law as a statutory body or otherwise at the time material to the plaintiff's pregnancies and placement in the aforesaid homes. As such, it did not have and could not have had any responsibility for the placement of the plaintiff in any of these institutions at the time of which she complains.

7. Notwithstanding the foregoing, the plaintiff refers to a servant or agent of the fourth named defendant taking her to Ard Mhuire following her first pregnancy and being involved in the adoption of her second child... In the medical report exhibited in an affidavit she swore on the 1st March, 2005 reference is made to a "Ms. Doherty?Health Board Social Worker" taking the plaintiff to Ard Mhuire and later to Cork.

8. I say and am advised and I believe that a Ms. Muriel Doherty worked as the Children's Officer with Cavan County Council for a time material to these proceedings. However, I am advised that she died some six years ago on or about the 26th June, 2000.

9. If Cavan County Council or any of its servants or agents may have had any involvement with the plaintiff at the time that is material to these proceedings and if any liability arises therefrom, then I say and am advised and I believe that no such liability was transferred to the North Eastern Health Board upon its establishment and that, therefore, no such liability was, in turn, inherited by the Health Services Executive."

14. Later at paragraphs 14 and 15 of this affidavit the following is said:

"14. Because the fourth named defendant did not exist as a statutory body until 1970 it has no involvement whatsoever in the placement of the plaintiff in any of the aforesaid facilities or the subsequent placement and/or adoption of any of her children. It, therefore, has no documents or records or knowledge of a primary nature in relation to the plaintiff.

15. I say and am advised and I believe that the Health Service Executive has made extensive enquiries in relation to the matters of which the plaintiff complains. Certain documents have been located but these documents were not created by the fourth named defendant or the Health Services Executive. It would appear that upon the closure of Ard Mhuire, Mother and Baby Home, Dunboyne, Co. Meath in or about 1991, the fifth named defendant transferred its adoption records, initially into the care of "Cura" and, subsequently, into the possession of the North Eastern Health since, by that time the North Eastern Health Board had become an Adoption Agency for its functional area."

15. Further on at paragraph 21 the following is said:

"21. I say and believe that investigations have also been carried out by or on behalf of the fourth named defendant in order to establish whether any persons currently or formerly in Cavan County Council are available as witnesses who could deal with the allegations made by the plaintiff. I have been advised and believe that the only person with any involvement with the plaintiff was the Children's Officer with Cavan County Council, the aforesaid Ms. Muriel Doherty. Ms. Doherty remained as a servant or agent of Cavan County Council until the transfer of the aforesaid health functions to the North Eastern Health Board in 1970. However, for most of the time that is material to these proceedings, Ms. Doherty was not a servant or agent of the fourth named defendant. Whilst the plaintiff alleges that she was detained in Cork until 1974, all of the plaintiff's pregnancies and placements and the boarding out or adoption of her children occurred before 1970. If Ms. Doherty had any involvement in any of these matters then she had it as Children's Officer for Cavan County Council."

16. In reply to these contentions the plaintiff in her replying affidavits contends that some facts are undisputed such as the fact that she was in the fifth named defendant's institutions during the period alleged; that the fifth named defendant cannot take advantage of the practise whereby only the superioress and nurse/mid-wife were aware of the personal details of women who were resident in these institutions; that 12 nuns are alive who were in these institutions at the relevant times and therefore are in a position to give evidence as to how these institutions were run; and that there is a quantity of documents which have survived which would assist the fourth and fifth named defendants in defending these proceedings.

17. The fourth named defendant bases their application on two grounds which are additional to that upon which the fifth named defendant relies, namely, that there is no cause of action against the fourth named defendant set out in the statement of claim because liabilities of the kind alleged in these proceedings by the plaintiff were not transferred to the North Eastern Health Board upon the setting up of that Board by the Health Act, 1970, and secondly, the fourth named defendants contend that the plaintiff's claim is statute barred. Both of these defendants contend that the proceedings should be dismissed on the grounds of inordinate delay in the commencement of these proceedings.

18. I propose to deal with the fourth named defendant's submission, that the statement of claim shows no cause of action, first.

19. Prior to the enactment of the Health Act, 1970, Health Services were provided by "Health Authorities" and by County Councils. The Health Authorities Act, 1960 established four bodies known as Health Authorities, based in Dublin, Cork, Limerick and Waterford. In those parts of the State that did not come within the functional areas of these four newly established Health Authorities, local authorities continued to be responsible for the provision of publicly funded health services. Thus the counties of Monaghan and Cavan did not come within the functional area of any of the four newly established Health Authorities in 1960, and publicly funded health services in these counties continued to be provided by Monaghan County Council or Cavan County Council.

20. The Health Act 1970 established the Health Boards including the North Eastern Health Board the fourth named defendant. Section 4(1) of the Act, provides as follows:

"4 - (1). For the administration of the health services in the State, the Minister shall after consultation with the Minister for Local Government by regulation establish such number of boards (to be known and in this Act referred to as health boards) as may appear to him to be appropriate, and by such regulations shall specify the title and define the functional area of each health board so established and, subject to subsection (2), shall specify the membership of each health board..."

21. Section 6 set out the functions of the new Health Boards as follows:

"6 - (1) Subject to s. 17 a health board shall perform the functions conferred on it under this Act and any other functions which, immediately before its establishment, were performed by a local authority (other than as a sanitary authority) in the functional area of the health board in relation to the operation of services provided under, or in connection with the administration of, the enactments specified in subsection (2)..."

22. Section 34 of the Act dissolved the "Health Authorities" set up by the Health Authorities Act, 1960 and it provided as follows:

"34 - (1) The Minister shall by order provide for the dissolution of the Dublin Health Authority, the Cork Health Authority, the Limerick Health Authority and the Waterford Health Authority.

(2) An order under this section may included provisions for -

(a) the transfer of any property, rights and liabilities of the Authority (in this section and in the Third Schedule referred to as the dissolved body) to the relevant health board or to a relevant local authority,

(b) the preservation of continuing contracts made by the dissolved body,

(c) the continuance of pending legal proceedings,

(d) the transfer of the holder of any health office under the dissolved body to an office under the relevant health board which, in the opinion of the Minister, is similar to that health office,

(e) the transfer, with the consent of the Minister for Social Welfare, of the holder of any public assistance office under the dissolved body to an office under the relevant health board or any relevant local authority which, in the opinion of the Minister, is similar to the public assistance office.

(3) The Third Schedule shall have effect in relation to a dissolution under this section, and to any transfers of property, rights and liabilities, preservation of contracts, continuance of legal proceedings or transfers of officers provided for by an order under this section, and in that Schedule references to the commencement shall be construed as references to the commencement of the order..."

23. 2 (1) of the Third Schedule to the Act referred to in s. 34 is in the following terms:

"2 - (1) Any debt and other liability (including stock and mortgage debts and unliquidated liabilities arising from torts or breaches of contract) which immediately before the commencement was owing and unpaid or had been incurred and was undischarged by the dissolved body shall, on the commencement, become and be the debt or liability of the body to which it is transferred and shall be paid or discharged by and may be recovered from or enforced against that body accordingly..."

24. Section 36 deals with the transfer of assets of local authorities such as real or personal property including choses-in-action and contracts which before the establishment of the relevant health boards were used by local authorities for the discharge of functions transferred by the Health Act, 1970 from local authorities to the new health boards and is *inter alia* in the following terms:

"36 - (1) On the commencement of section 6 the following property -

(a) All health institutions, and all other property, whether real or personal (including choses-in-action), which, immediately before such commencement was vested in or belonged to or was held in trust for a local authority (other than as a sanitary authority) and was property which was solely for the purposes of services to be transferred on such commencement, and

(b) All other property whether real or personal (including choses-in-action), which, immediately before such commencement, was vested in or belonged to was held in trust for a local authority and had been designated by that authority as property to be transferred to the Health Board,

and all rights, powers and privileges relating to or connected with any such property, shall, without any conveyance or assignment but subject where necessary to transfer in the books of any bank, corporation or company, become and be vested in or the property of or held in trust for, as the case may require) the same Health Board for all the estate, term or interest for which the same immediately before such commencement was vested in or belonged to or was held in trust for the local authority, but subject to all trusts and equities affecting the same and then subsisting incapable of being performed...."

25. Section 37 of the Health Act, 1970 provided for the transfer of officers and continuance of contracts of services and it is as follows:

"37 - (1) On the commencement of section 6 every officer of each local authority appointing members of the health board, who, immediately before such commencement was an officer to be transferred under this subsection shall become an officer of the health board and, for the purposes of any enactment relating to superannuation, his office under the local authority shall be deemed to be abolished..."

(5) Every contract of service, express or implied, which was in force immediately before the commencement of this section between a local authority appointing members of the health board and any person who was not an officer of the local authority but was a person to be transferred under this section, shall continue in force after such commencement, but shall be construed and have effect as if the health board were substituted therein for the local authority, and every such contract shall be enforceable by or against the health board accordingly..."

26. Pursuant to s. 34 of the Health Act, 1970 the Minister for Health on the 30th March, 1971 made an order known as the Health Authorities (Dissolution Order 1971). The relevant part of this order provides as follows:

"The Minister for Health in exercise the powers conferred on him by s. 34 of the Health Act, 1970 (No. 1 of 1970) hereby orders as follows:-

(1) This order may be cited as the Health Authorities (Dissolution) Order 1971.

(2) On the 1st April, 1971 -

(a) the Dublin Health Authority, the Cork Health Authority, the Limerick Health Authority and the Waterford Health Authority shall be dissolved,

(b) all the property, rights and liabilities of each said authority shall be transferred to the relevant health board,

(c) each holder of a health office (other than those specified in the Schedule hereto) under each said Authority shall be transferred to an office which is similar under the relevant health board,

(d) each holder on the date of this Order of each of the offices specified in the first column of the schedule hereto shall be transferred to the office specified in the second column of the said Schedule,

(e) each holder of the public assistance office under each said Authority shall be transferred to an office which is similar under the relevant Health Board,

(f) all contracts of a continuing character and all contracts and agreements in writing made by or with each said Authority and not fully executed and completed shall continue in force and have effect as if they had been made by or with the relevant health board.

(g) all legal proceedings pending at the suit of or against of each said Body shall continue in the name of the relevant health board."

27. It was submitted by Ms. Power S.C. for the fourth named defendant that the Health Act, 1970 set out different transfer arrangements in respect of the dissolved Health Authorities and local authorities which of course continued in existence after the enactment of the Health Act. Whereas s. 34 which deals with the dissolution of Health Authorities set up under the Health Authorities Act 1960, and the Health Authorities (Dissolution) Order of 1971 which gave effect to the direction in s. 34 and brought about the actual dissolution of these Health Authorities deal with the necessary transfers of property, rights and liabilities of dissolved Health Authorities, to the relevant new Health Boards, s. 36 deals with the transfers consequent upon the transfer of functions

pursuant to s. 6, from local authorities to the relevant new health boards.

28. It was submitted that in the case of the former because the body in question was being dissolved it was necessary that everything was transferred and in particular that all liabilities arising from the discharge of its functions as a health authority were transferred to the new Health Board. In the case of local authorities, whereas there was an obvious need to transfer property used by local authorities for the provision of Health Services and this is clearly done in s. 36, because these local authorities were continuing in existence there was no need to transfer liabilities and in s. 36 there is an obvious omission of any transfer of such liabilities.

29. Thus it was submitted that whereas under s. 34 liabilities in tort of the dissolved bodies were clearly transferred to the Health Boards s. 36 made no provision for such a transfer from local authorities to the new Health Board and thus liabilities in tort which a local authority may have incurred in the provision of Health Services remained with that authority following the establishment of the Health Boards.

30. For the plaintiff it was submitted by Mr. Condon S.C. that s. 37(5) of the Health Act, 1970 makes it plain that insofar as the fourth named defendants incurred a liability through the acts or omissions of Ms. Doherty who was the Children's Officer of Cavan County Council and who dealt with the plaintiff, that the vicarious liability of her employer for her actions i.e. Cavan County Council was transferred by s. 37(5) to the North Eastern Health Board who became substituted as her employer.

31. It was further submitted that the provisions in the Health Act, 1970 in regard to transfer of liabilities were similar to those in the Health Authorities Act of 1960 and hence it was probable, that if there was an absence of express transfer of liabilities from a County Council to a new Health Board in the Health Act, of 1970, that such absence was in inadvertent omission on the part of the draftsman and this court should have regard to the overall purpose of the Health Act, 1970 which was to transfer to the new Health Boards all of the health service functions previously discharged by Health Authorities and local authorities together with the property used for those purposes and all contracts in being for that purpose and also all liabilities incurred by Health Authorities or local authorities, in the provision of health services prior to 1970.

32. In reply it was submitted by Ms. Power S.C. that s. 37(5) of the Health Act, 1970 merely transferred contracts of employment from local authorities to the new Health Board so that employees who were being transferred from a local authority to a new Health Board would have no disruption in their contracts of employment and would not be prejudiced by the transfer; this being achieved by the simple substitution of the new Health Board as employer in the place of the local authority. In so doing there is no provision in s. 37(5) for the transfer of any liability in respect of torts or any other wrongs committed by a transferred employee during his or her employment with a local authority and in respect of which the local authority would have been vicariously liable as employer.

33. It was further submitted that the correct approach to the interpretation of the Health Act, 1970 and in particular the transfer provisions set out above is the literal approach, there being no confusion or ambiguity arising out of the language used in these provisions. In the absence of any such doubt or ambiguity, it was not, either necessary or indeed permissible, for the court to adopt the purposive approach and specifically it was not open to the court to add in language to the statute to make provision for something which, it was said, had been omitted. In this regard reliance was placed on the judgment of the Supreme Court in the case of *McGrath v. McDermott* [1988] I.R. 258 and in particular the following passage from the judgment of Finlay C.J. where he says:

"The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislator to be inferred from other provisions of the statute involved or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from expressed statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases maybe implied into statutory provisions solely for the purpose of making then effective to achieve their expressly avowed objective..."

34. Also reliance is placed upon the following passage from the judgment of Denham J. in the case of the *DPP (Ivers) v. Murphy* [1999] 11.R. 98 where the following was said at p. 111:

"No method of interpretation may be such as to encroach on the constitutional role of the Oireachtas as the legislative organ of the State. The rules are applied to interpret the Act passed by the legislator and in so doing afford the respect appropriate from the judicial organ of Government to the legislator.

The rules of construction are part of the tools of the Court. The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislator. If the purpose of the legislator is clear and may be read in the section without re-writing the section then that is the appropriate interpretation for the court to take."

35. It is clear that in s. 34 there is an express transfer of liabilities from dissolved Health Authorities to the new Health Boards. This statutory provision is followed through in the Third Schedule to the Health Act, 1970 and in the Health Authorities (Dissolution) Order 1971.

36. The provisions in s. 36 relevant to transfers from local authorities clearly do not include a transfer of liabilities similar to the transfer effected in respect of the former Health Authorities. Manifestly the problem here is not one of doubt or ambiguity as to the express provisions of s. 36. The issue is whether the omission of any provision for the transfer of liabilities from local authorities to the new Health Boards was an inadvertent omission, or does the omission of such express provision itself properly reflect the intention of the Oireachtas.

37. Section 15(1) of the Health Authorities Act, 1960 dissolved certain boards which had been responsible for the provision of a variety of health services. The Third Schedule to that Act provides in similar terms for the transfer of liabilities from a dissolved board to the new Health Authority.

38. There was not however any general transfer of liabilities in regard to the provision of health services by local authorities prior to 1960 to the new Health Authorities. The only express provision for transfer of liability was in respect of the liabilities of boards which were dissolved by s. 15.

39. In the Health Act, 1970 we see a repeat of the same approach to liabilities, namely the liabilities of the Health Authorities dissolved by the Health Act, 1970 are expressly transferred to the new Health Boards, but there is no provision at all for the transfer of liabilities of local authorities, which of course continue to exist.

40. In my view it was clearly the intention of the Oireachtas both in the case of the Health Authorities Act, 1960 and the Health Act, 1970 not to transfer liabilities from bodies which continued to exist and which could be sued in respect of those liabilities namely local authorities. Clearly there was an unavoidable need to provide for liabilities of bodies to be dissolved that is to say various boards dissolved by s. 15 of the Health Authorities Act, 1960, and the Health Authorities dissolved by s. 34 of the Health Act, 1970.

41. It is evident that there was a sound reason for not making express provision for the transfer of liabilities from local authorities to the new Health Boards in the Health Act, 1970, namely that the local authorities were continuing in existence and could and would remain answerable in respect of liabilities incurred by them up to the transfer functions pursuant to s. 6 of the Health Act, 1970.

42. I am satisfied therefore that the omission of any express transfer of liabilities from local authorities to the new Health Boards was not an inadvertent omission and I am equally satisfied that having regard to a similar approach being taken in the Health Authorities Act, 1960, that this omission of any provision for the transfer of liabilities from local authorities, itself, reflects the true intention of the Oireachtas in this regard.

43. I have come to the conclusion that s. 37(5) does not have the range of effect contended for by Mr. Condon. In my view the sole purpose and function of s. 37(5) was simply to transfer contracts of employment so as to ensure continuity of these contracts, and no more. To read into this provision a transfer of liability in respect of tortious acts or other liabilities on the part of a former employee of a local authority would in my view, be legalisation by the court, in circumstances where the intention of the Oireachtas is, as already said, expressed by the omission of express provision for the transfer of these liabilities. Manifestly this court cannot engage in such an exercise.

44. Accordingly I have come to the conclusion that any liability to the plaintiff in respect of any tortious acts or omissions on the part of persons who were servants or agents of Cavan County Council, arising out of the matters pleaded in this case was not transferred to the North Eastern Health Board on the coming into force of the Health Act, 1970 and hence did not transfer to the fourth named defendant in these proceedings. Hence, the plaintiff's statement of claim does not disclose a cause of action against the fourth named defendant.

45. I propose to deal next with the issue which is common to both fourth and fifth named defendants namely whether these proceedings should be dismissed on the grounds of inordinate delay in the commencement of the proceedings.

46. The first issue which necessarily arises here it is the appropriate test to be applied to assess whether or not these defendants are entitled to a dismissal of the action on the grounds of an inordinate delay.

47. Two streams of authority potentially have application. The first of these and the one relied upon by both of these defendants is that stemming from the judgments of the Supreme Court in the cases of *O'Domhnaill v. Merrick* [1984] I.R. 151 and *Toal v. Duignan* (No. 2) [1991] I.L.R.M. 135. The second line of authority stems from the judgments of the Supreme Court in the case of *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. The critical difference between these two lines of authority is whether, where delay is inordinate, must it be excused.

48. I am in agreement with the views expressed by Peart J. in the case of *Mc H v. M* [2004] 3 I.R. 385 where he says the following:

"32. I am of the view that there are two separate and distinct tests, one the test set out in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in respect of post-commencement delay and the other the *Toal v. Duignan* (No. 2) [1991] I.L.R.M. 140 test, if I can so describe it in respect of pre-commencement delay. First of all the distinction reflects the different and respective context in which the delay took place in each case. But besides that, I am of the view that there are sound and logical reasons why the test in each instance ought to be different.

33. In the case of post- commencement delay it is usually the case that the proceedings have been commenced within the period permitted by the Statute of Limitations although that fact of itself does not preclude a court from regarding the delay as inordinate.... The delay giving rise to a motion to dismiss arises only out of delay in the actual prosecution of the case to trial. In the case of inordinate delay there can be some reasons which are regarded as excusable and others which are not. Even in the case of reasons which do not excuse or justify the delay, there will in many cases be no real or significant prejudice to the defendant. For example in the claim for damages for personal injuries arising out of a traffic accident, there could easily be and probably often is, a delay of six months since the entry of an appearance by the defendant in the delivery of the plaintiff's statement of claim. The reason for that delay might be simply that the plaintiff's solicitor never got around to doing it. That is an inordinate and inexcusable delay, but the court would go on and consider the balance of justice issue and might well decide that to dismiss the plaintiff's claim would be an unnecessarily draconian consequence of that type of delay. If, on the other hand, there was a justifiable excuse for not delivering the statement of claim, it would make no sense if the court could nevertheless consider the balance of justice and perhaps dismiss the claim, in circumstances where (1) the delay was inordinate in the sense of abnormal or out of the ordinary and (2) and was excusable.

34. Different considerations, I suggest arise in relation to pre-commencement delay which is inordinate and yet excusable. There can easily be circumstances in which in such a case the balance of justice would be in favour of dismissing the claim. For example even if Kelly J. had in *Kelly v. O'Leary* [2001] 2 I.R. 526 found that the delay of 50 years was excusable, he could well have reached the conclusion based on the facts and circumstances of that case, that the defendant was so prejudiced as to her ability to defend the proceedings after such a passage of time that the claim ought not to be allowed to proceed. That inordinate and excusable delay is of such a completely different category to the type of delay outlined in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, that it is perfectly understandable that a different rule should apply as to how the courts should assess the significance of the delay. In my view it must follow that the principles announced in *Primor Plc v. Stokes Kennedy Crowley* must be confined to post-commencement delay and that the wider discretion based on general fairness regardless of whether the delay is excusable or not should be confined to pre-commencement delay."

49. In my view the opinion expressed by Peart J. in the above passage is entirely consistent with the general statement of principle set out in the judgment of Henchy J. in *O'Domhnaill v. Merrick* at p. 158 where he says the following:

"I consider that it would be contrary to natural and constitutional justice and abuse of process of the courts if the defendant was to face a trial in which he would have to try to defeat an allegation of negligence on her part in an accident that would have taken place 24 years before the trial, and a claim for damages of which she first learned 16 years after the accident..."

While justice delayed may not always be justice denied, it usually means justice diminished. In such a case as this it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons, a trial in 1985 of a claim for damages for personal injuries sustained in a road accident in 1961 would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion the defendant who has not in any material or substantial way contributed to the delay should be freed from the palpable unfairness of such a trial."

50. In *Toal v. Duignan* Finlay C.J. said the following at p. 139:

"In the High Court it was held by Keane J. that the case was governed by the decision of this Court in *O'Domhnaill v. Merrick* [1984] I.R. 151. I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this court in that case, but they may be summarised in their application to the present appeal as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."

51. In this passage from the judgment of Finlay C.J. it was made clear in my view that the conduct of a plaintiff in causing or contributing to the delay is not a decisive or determinative factor in the appropriate test for pre-commencement delay.

52. In my view the decisive issue is whether or not the delay has substantially deprived a defendant of the capacity to defend the action, regardless of whether or not that delay is the result of culpable behaviour on the part of the plaintiff.

53. I am therefore of the view that in a case such as this where the only issue is pre-commencement delay, the court does not have to consider whether or not the delay on the part of the plaintiff in commencing these proceedings has been excused, the primary focus of the enquiry being whether or not the capacity of these defendants to defend the action has been substantially degraded.

54. As indicated in the above quoted passages from the judgments of Henchy J. and Finlay C.J. and indeed as was made crystal clear in the judgment of Denham J. in the Supreme Court in *JR v. the Minister for Justice, Equality and Law Reform and Others* (Judgment delivered on the 1st February, 2007), a critical factor is whether or not the defendant has caused or contributed to the delay. In that circumstance a defendant may not be permitted to take advantage of delay caused or contributed to by him, to have the proceedings stopped.

55. In this case the only allegation of a contribution to delay, was on the part of the fifth named defendant, on the grounds of what was described as a strict practice, whereby the identity of and the personal circumstances of a woman in the institutions run by the Good Shepherd Nuns were known only to the Superioress of the institution and the nurse/mid-wife who was always a nun.

56. It was submitted for the plaintiff that the defendants could not take advantage of this "questionable" practice to assert prejudice on the grounds of delay.

57. I cannot accept that this practice and the fact that it limited a great deal of relevant knowledge to a very small number of people could rightly be regarded as contributing to delay.

58. Whilst this practice might seem unusual in the context of contemporary Ireland, in the context of the time in respect of which a plaintiff makes her allegations, namely 1953 until 1974, it was an entirely understandable precaution derived from the stigma attaching to unmarried mothers and the consequent need to ensure a very high level of protection of the privacy of unmarried mothers, so that they could return to normal life with the least risk of disclosure of their experience.

59. I have come to the conclusion that the fifth defendant for this reason or indeed for any other reason has not contributed at all to the delay in the commencement of these proceedings. I am also satisfied that the fourth named defendant has not at all contributed to that delay.

60. This brings me to a consideration of the effect of the delay on the capacity of both of these defendants to defend these proceedings.

61. Firstly there can be no doubt but that the delay is inordinate. The allegations made by the plaintiff cover a period from 1953 or perhaps 1955 to 1974 namely 54 years now, from the earliest date and 33 years from the latest date.

62. Insofar as the fourth named defendant is concerned, its only contact with the allegations made by the plaintiff is through a Ms. Muriel Doherty who was the Children's Officer for Cavan County Council up until her functions were taken over by the North Eastern Health Board after which she became a servant or agent of the North Eastern Health Board. Her dealings with the plaintiff concerned the care and or placement for adoption of children of the plaintiff. Thus she is clearly affected by the serious allegations made by the plaintiff to the effect that a child or children of hers were forcibly taken from her and placed for adoption without her consent. Ms. Doherty died in the year 2000 and without her evidence in my view the fourth named defendants have no capacity to counter these allegations.

63. It has been submitted by the plaintiff that there are documents in existence which could be used to refresh memories.

64. For the purposes of this application I directed that discovery of documents be done at this stage. This was done promptly by the fourth named defendants. The fifth named defendant's institution in Dunboyne, Co. Meath closed in 1991 and its documentation was surrendered to the North Eastern Health Board. Thus at this stage apart from a few documents exhibited in the affidavit of Sr. Noreen O'Shea the only documents surviving relevant to the issues arising in these proceedings were those in the possession of the fourth named defendant.

65. I have been furnished with all of these documents and I have carefully considered them. These documents are of an administrative nature and do not bear at all or shed any light on the allegations that are made by the plaintiff in these proceedings.

66. Thus in my view these documents in themselves would be of no assistance in resolving the issues in the case even if they could be proved or were admitted. Because they do not bear on or shed light on the allegations made by the plaintiff they would not in my view be of any assistance in refreshing memories relative to the allegations made by the plaintiff.

67. Insofar as the fifth named defendant is concerned, apart from the loss of evidence which I will deal with in a moment, the fifth named defendant is peculiarly hampered by the vagueness or lack of detail in the allegations made by the plaintiff. Notwithstanding a request for particulars which was replied to and notwithstanding the opportunity to make a number of replying affidavits, the plaintiff is unable to supply any detail of the alleged ill treatment of her whilst in the institutions of the fifth named defendant. In particular she is unable to identify any person who allegedly perpetrated such ill treatment and is unable to give any kind of detailed description of alleged assaults or other forms of ill treatment. Although a critical and important part of her case is that she was "detained" in these institutions for the best part of 20 years she gives no details whatsoever of who caused that detention or how it was brought about. She makes very serious allegations of her children being forcibly taken from her and adopted without her consent but she does not name what person was instrumental in doing this or in any way detailing the circumstances in which she alleges this was done.

68. Her case is largely a serious of bald allegations without any of the normal detail which would necessarily be required to enable a defendant to face up to such allegations.

69. The affidavit of Sr. Noreen O'Shea avers as set out above that the great majority of nuns who were in these institutions at the relevant time and particularly those in authority and are now dead and of the survivors no one has any memory relevant to the allegations made by the plaintiff. It was submitted by the plaintiff that these survivors could give evidence of the "systems" followed in the running of the fifth named defendants' institutions. Even if that were so, it would not enable these persons to address the allegations of ill treatment made by the plaintiff in these proceedings.

70. I am of the view that the fifth named defendants would be hopelessly incapacitated if called upon to defend these proceedings. As said earlier the documents which have survived are of an administrative nature and would not at all assist the fifth named defendant in addressing the allegations made by the plaintiff.

71. In this case the contest would not amount even to what has been described in other cases as assertion countered by bear denial, for the simple reason that the fifth named defendants are so hampered by the vagueness of the allegations of the plaintiff and so incapacitated by the lapse of time that they are not even in a position of being able to assert a bear denial.

72. In my view it would be patently unfair to ask either the fourth or fifth defendants to defend this action after such a lapse of time. A forensic enquiry, as is envisaged as being of the essence of a trial in due course of law, is in my view, in this case simply impossible, and were it attempted the result would in all probability be a parody of justice.

73. In these circumstances I have no doubt but that this court should invoke its inherent jurisdiction to dismiss these proceedings on this ground.

74. In the light of the above conclusion it is unnecessary for me to consider whether or not, as was urged, by the fourth named defendant, the plaintiff's claim is statute barred.