

THE HIGH COURT

[2001 No. 9393P]

BETWEEN:

ANTHONY MCDONAGH

PLAINTIFF

-AND-

JOHN O'SHEA, MINISTER FOR EDUCATION AND SCIENCE, WESTERN HEALTH BOARD, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 25th day of July, 2016

Introduction

1. This is a case in which the first named defendant is being sued, as a nominee of the Brothers of Charity, for, *inter alia*, damages for the alleged sexual abuse of the plaintiff by one of its members. The Brothers of Charity are seeking to have the plaintiff's proceedings struck out on the grounds that they are unable to get a fair trial by reason of the lapse of time between the date of the alleged events, the subject matter of the proceedings, and the date that these proceedings shall come to trial, and by reason of the death of a critical witness, Brother Jim, the member of the Brothers of Charity alleged to have physically and sexually abused the plaintiff.

2. This Court finds that the proceedings should be struck out on the grounds of the 36 year period since the alleged sexual abuse took place, the death of the perpetrator and the delay of almost seven years on the part of the plaintiff in prosecuting his claim, once it had been instituted, when not even a solicitor's letter was written to progress the claim.

Facts

3. Mr. McDonagh was a pupil, during the years 1974 to 1980, at the Holy Family School at Renmore, Galway when he was between of eight or nine years of age and 12 years of age. Mr. McDonagh alleges that between 36 and 40 years ago, he was physically and sexual abused by a member of staff whom he identifies simply as 'Brother Jim', as this is how he would have known him. The Brothers of Charity have identified the specific individual who they believe is the subject of these allegations. For the purposes of these proceedings, this Court will refer to that person as Brother Jim G, who worked in the Holy Family School from 1977. Brother Jim G died on the 2nd September, 2011. The plaintiff also alleges that he was physically abused by another member of staff, the principal of the school, after reporting his complaint regarding Brother Jim to that person. The principal of the school at that time was a Mr. Carey.

4. It is relevant to note that, while a claim has also been made against Mr. Carey, the essence of the plaintiff's case for damages against the Brothers of Charity is the claim against Brother Jim since it relates to very serious allegations of rape and sexual assault. The complaints against Mr. Carey, who is still alive, relate to the fact that the plaintiff complained about Brother Jim's conduct to Mr. Carey, and the plaintiff alleges that Mr. Carey did not give credence to the complaints and instead subjected the plaintiff to physical abuse on this and other occasions, using his fists and a bamboo stick.

Litigation

5. On the 18th June, 2001, when Mr. McDonagh was 35 years of age, he issued a plenary summons which instituted the proceedings now before this Court. This was some 21 to 25 years after the alleged events. He claimed damages against the first named defendant as nominee of the Brothers of Charity who ran the Holy Family School in Renmore at the relevant time. The plaintiff delivered the statement of claim to the Brothers of Charity on the 23rd July, 2001. A defence was filed on behalf of the Brothers of Charity on the 7th April, 2004, over 2 ½ years from the date of the delivery of the statement of claim. A notice for particulars was delivered by the Brothers of Charity on 5th April, 2004, and replied to by Mr. McDonagh on the 20th April, 2004. Then, on the 12th December, 2007, Mr. McDonagh filed a notice of discontinuance against the third named defendant, the Western Health Board.

6. There followed then an almost seven year gap during which time absolutely nothing happened. The case came to life again on the 3rd September, 2013, when the plaintiff sent a voluntary letter of discovery to the Brothers of Charity. There does not appear to have even been a solicitor's letter issued in the case during this seven year period. Indeed, it could be argued that, *vis-à-vis* the Brothers of Charity, nothing happened in this case for a period of almost 10 years after the proceedings had been issued by the plaintiff, since the only step taken by the plaintiff between April 2004 and September 2013, was the issue of a notice of discontinuance against the third named defendant.

7. The plaintiff has accepted that the delay is inordinate in this case. The plaintiff is mildly mentally handicapped and has been in prison since 2008 and is due for release in 2017. He has argued that his delay is excusable, as he says that it was caused by his illiteracy, his incarceration, his psychological injuries and addiction problems which he says were caused, or seriously contributed to, by the acts of sexual and physical abuse, which acts are the responsibility of the Brothers of Charity. The plaintiff thus attributes his delay in progressing these proceedings in part to his imprisonment, which he says is excusable as it was caused, or contributed to, by the alleged abuse he received as a school boy.

8. For the plaintiff to have received a 12 year sentence, it seems clear that the he must have been guilty of a most serious assault, which assault resulted in his being charged with endangering the life of another person. This Court rejects the suggestion that his alleged abuse by the Brothers of Charity was in some way partly responsible for this assault of an individual unconnected to the alleged abuse. Accordingly, this Court rejects the suggestion that the plaintiff's resulting imprisonment excuses his delay in progressing these proceedings.

9. However, as is noted hereunder, whether the delay by the plaintiff is excusable or not does not have to be considered by this Court in determining whether to dismiss the proceedings on the grounds of delay.

Test to be applied: should delay result in dismissal of proceedings?

10. This Court can decide the case on the principles set down in the case of *O'Domhnaill v. Merrick* [1984] IR 151, which sets out the

test to be applied in cases where there is an application for the proceedings to be dismissed on the grounds of delay. The *O'Domhnaill* principles, as they apply to a case such as this one, were recently considered by the Court of Appeal in *Cassidy v The Provincialate* [2015] IECA 74.

Cassidy v The Provincialate [2015] IECA 74.

11. The *Cassidy* case was a case in which the Court of Appeal held that the claim for damages against a religious order should be dismissed on the grounds of the inordinate delay and because of the death of the alleged perpetrator of abuse. It is particularly relevant to the case before this Court because of the similarity in the facts between this case and the facts in that case. It too involved claims of rape and sexual abuse which were made against a man, referred to as PD, between 1977 and 1980, which is almost the exact same time period as the alleged abuse took place in the present case. Accordingly, the *Cassidy* case involved a similar period of delay in bringing the case to hearing. The application to dismiss the proceedings in the *Cassidy* case was heard in the High Court in January 2014. Accordingly, the delay in this case is over two years longer than the delay in the *Cassidy* case. On the other hand, in the *Cassidy* case the only person who was alleged to have committed the sexual abuse had died, while in this case the only person who is alleged to have committed the sexual abuse appears to be dead, but it is the case that a person who is alleged to have committed physical abuse is still alive. There was also absolute certainty in the *Cassidy* case about the identity of PD as the alleged abuser, whereas in this case, the plaintiff has not accepted that it is beyond dispute that Brother Jim is Brother Jim G.

12. It is also relevant that in *Cassidy*, there was a claim against the Religious Sisters of Charity on the grounds of their vicarious liability as an employer of PD and their direct liability for allowing PD have unsupervised contact with the plaintiff, who was between 12 and 16 at the time. That is similar to the plaintiff's case, where there is alleged to be vicarious liability on the part of the Brothers of Charity as an employer of Brother Jim and Mr. Carey and also direct liability as a result of the failure of the Brothers of Charity to ensure proper supervision and control.

The test in O'Domhnaill v. Merrick [1984] IR 151

13. In the Court of Appeal judgment in the *Cassidy* case, Irvine J. gave a succinct analysis of the *O'Domhnaill* test for deciding whether a trial should be stopped on the grounds of delay. At para. 32, Irvine J. states:-

"[...] the *O'Domhnaill* jurisdiction is most usually employed where, at the time the application to dismiss is brought, such a significant length of time has elapsed between the events giving rise to the claim and the likely trial date that the defendants can maintain that, regardless of the absence of blame of the part of the plaintiff for that delay, it would be unjust to ask to the defendant to defend the claim. The question most commonly considered by the court when exercising its *O'Domhnaill* jurisdiction is whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result."

In reliance on this judgment of the Court of Appeal, this Court will determine the application by the Brothers of Charity to have this case dismissed by applying the *O'Domhnaill* test to the current circumstances. Accordingly, this Court is not required to consider whether the inordinate delay on the part of the plaintiff is blameworthy or not. Instead, this Court must consider whether by reason of the passage of time in this case, there is a real or substantial risk of an unfair trial or an unjust result.

14. It is this Court's view that there is a substantial risk of an unfair trial or an unjust result if it is allowed to proceed. It reaches this conclusion on the basis that:-

- a delay of at least 36 years since the events complained of is of such a length of time that its very length raises a risk of an unfair trial or an unjust result; and
- the person who has been identified by the first named defendant as the alleged and primary abuser, is dead.

Uncertainty over the identity of the alleged abuser

15. In his submissions, counsel for the plaintiff left open the possibility that the Brother Jim the plaintiff was alleging was the main abuser might not be the Brother Jim G identified by the Brothers of Charity as the person the plaintiff had in mind, and on this basis, it appears to have been suggested that the perpetrator of the sexual abuse might not in fact be dead.

16. No evidence was produced to the Court to suggest that there was another Brother Jim in the School at that time. Nor indeed was any evidence produced that the person identified by the Brothers of Charity, namely Brother Jim G, was not the Brother Jim referred to in the plaintiff's statement of claim. In addition, the Brothers of Charity are the party who are best positioned to know if there could be another person who could have been the Brother Jim identified by the plaintiff. They identified Brother Jim G as that person and it seems highly unlikely that if the Brothers of Charity felt that it could be some other member of the order, that they would, in the face of such doubt, proceed to isolate one member of their congregation, with all the resultant damage to that person's reputation. This is particularly so in this case, since outside of these proceedings, Brother Jim G has not been associated with abuse of any sort and no records exist in the Brothers of Charity records recording any allegations or rumours of abuse. As such, he had a reputation which will suffer, even after death, as a result of being so identified and which will no doubt be felt by any members of his family that are still alive.

17. While this Court must consider the plaintiff's case at its height in proceedings for strike out, in the foregoing circumstances this Court believes that it is reasonable to infer, for the purposes of these proceedings, that Brother Jim G is in fact the person that the plaintiff refers to as Brother Jim.

18. This uncertainty, from the plaintiff's perspective, regarding the identity of someone who is alleged to have committed such serious sexual abuse, is understandable with the passage of such a long period of time. Nevertheless, it highlights to this Court the fact that there is a substantial risk of an unjust trial if this case were to proceed at least 36 years after the events alleged, since such a delay will inevitably lead to confusion about important details, including the crucial issue of the identity of the alleged abuser.

"the grossest imaginable prejudice"

19. The Court is influenced in reaching its decision to dismiss these proceedings by the fact that the Irish Courts have attached considerable significance to the death of an alleged sexual abuser in dismissal claims on the grounds of delay. In the *Cassidy* case, at para. 53 Irvine J. quoted with approval the words of Hardiman J from the decision in *Whelan v. Bridget Lawn and others* [2014] IESC

"In *Whelan v. Bridget Lawn and others* [2014] IESC 75, Hardiman J., in the context of an application to dismiss the plaintiff's claim on the grounds of delay in a sexual assault action, stated that the "grossest imaginable prejudice" in a case where the basic facts are disputed by one person against another is the death of the defendant."

In *Cassidy*, Irvine J. found that whether she applied the *O'Domhnaill* test for stopping a trial on the grounds of delay or the test set out in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, the trial before her should be stopped. The *Primor* test involves the consideration of whether the delay was inexcusable, as well as inordinate, and if so (as it was found to be in the *Cassidy* case), the Court has to consider whether the balance of justice rests in favour or against the dismissal of the proceedings. On that question, Irvine J., stated at para. 60:-

"I am quite satisfied that the death of PD alone was of such prejudicial magnitude that it warrants the court determining the balance of justice issue against the plaintiff."

20. In reaching its decision, this Court is influenced by these cases and in particular the powerful statement by the Supreme Court and its recent adoption by the Court of Appeal that it is the "grossest imaginable prejudice" where the basic facts are disputed for a case of sexual assault to proceed where there has been the death of the alleged perpetrator. In this instance, it is the case that the basic facts are disputed, since the allegations of sexual abuse against Brother Jim are disputed by the Brothers of Charity. On this basis, it would *prima facie* be the grossest imaginable prejudice to allow this case to proceed, but this Court must next consider whether the facts of the present case are such that a different decision might be reached than was reached in the *Cassidy* case.

Is there any responsibility on the part of the Brothers of Charity for the delay?

21. It has been suggested by the plaintiff that the Brothers of Charity should have issued a notice for trial, or a motion to dismiss, in the 11 years between the filing of their defence in 2004 and the issue of their motion to dismiss on the 8th October, 2015. This Court is not persuaded that this is a sufficiently good reason for it to conclude that it should allow the trial to proceed. While it was possible for the Brothers of Charity to issue a notice for trial or a motion to dismiss the proceedings earlier, the primary obligation to progress a trial is on the plaintiff. There was a period, after the defence was filed, of almost seven years when not even a solicitor's letter appears to have been written on behalf of the plaintiff. Indeed, as noted earlier, it is arguable that the period of inactivity is approximately ten years. Any such delay is not the primary responsibility of the Brothers of Charity. While it is true that the Brothers of Charity could have filed a notice of trial or a motion to dismiss sooner, this is not sufficient reason for this Court to conclude that a trial at least 36 years after the alleged events, and after the apparent death of the alleged and primary abuser, should be allowed to proceed.

22. In addition of course, there is the period of at least 21 years between the alleged abuse and the commencement of proceedings in 2001. Of course, this 21 year period of delay *per se*, would not be remarkable in the context of the age of the plaintiff at the time of the alleged abuse, and bearing in mind that it is common to have sexual abuse claims regarding what happened in schools many years after the event. However, once the plaintiff had commenced his proceedings in 2001, because of the antiquity of the claim at that stage, there was an onus upon him to progress the matter quickly. In those circumstances an almost 10 year period between April 2004 and September 2013 when little or nothing is done by the plaintiff cannot, in this Court's view, be visited on the first named defendant.

23. Finally, there was also the delay of over 2 ½ years between the delivery of the Statement of Claim by the plaintiff and the filing of the defence by the Brothers of Charity. This delay must be attributed solely to the Brothers of Charity. However, this Court does not believe that this delay by the Brothers of Charity, in the context of a delay of at least 15 years between the commencement of the proceedings in 2001 and the possible hearing of the claim in 2016 at the earliest (during which time the alleged sexual abuser died), is sufficient to persuade this Court that the trial should be allowed to proceed where it has concluded that there is a substantial risk of an unfair trial or an unjust result if the trial was to proceed.

Relevance of the fact that the alleged physical abuser is still alive

24. The plaintiff's counsel has argued that Mr. Carey is still alive and so the issues regarding the death of Brother Jim are not relevant to the claims against him. The claims against Mr. Carey are two-fold. First, he is accused of not dealing with the complaints made to him by the plaintiff of alleged sexual abuse by Brother Jim of the plaintiff. The issue of whether the Brothers of Charity are liable for Mr. Carey's alleged acts or omissions in this regard are intrinsically bound up with the claims against Brother Jim. Accordingly, this Court cannot see how it could allow these claims against Mr. Carey to proceed, if it finds, as it does, that the claims against Brother Jim cannot proceed.

25. Secondly, in relation to the allegations of physical abuse by Mr. Carey, it is clear to this Court that these do not constitute the essence of the plaintiff's case against the Brothers of Charity, which is the serious sexual abuse against Brother Jim. While not wishing to underestimate the alleged physical abuse suffered by the plaintiff, it is clear that rape and serious sexual abuse is of a different character than the allegation that Mr. Carey used his fists and a bamboo stick against the plaintiff.

Gravity of the alleged offence as a factor in dismissal of trials for delay

26. In determining whether to strike out a claim on the grounds of delay, the relative seriousness of the alleged offences is, in this Court's view, a factor in the Court's determination. Some support for this view is provided by the statement of Kearns J, in the Supreme Court case of *McFarlane v. DPP* [2008] IESC 7 at para. 141, that:-

"Any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence charged when exercising this jurisdiction."

Although this statement of principle was made in the context of a criminal trial, this Court views the rationale for that principle to be that the more serious the offence, the greater the court's vigilance to ensure that the alleged perpetrator is brought to justice. This rationale is just as applicable to a civil trial as it is to a criminal trial. Thus, the more serious the alleged offence in the context of a civil trial, the more likely the Court is to forgive inordinate delay in bringing the matter to justice. The corollary would also apply, so that the less serious the alleged offence, the less likely the Court is to forgive inordinate delay. In this regard, Mr. Carey is alleged to have committed physical abuse and is not accused of the very serious sexual abuse alleged against Brother Jim.

27. While not a determinative factor, it is also relevant to note that at the time of the alleged offences (between 1974 to 1980), corporal punishment was not banned in schools, since this was only done with effect from 1st February, 1982, by the Minister of Education (see Department of Education, Circular 9/82 in respect of primary schools and Circular M5/82 in respect of secondary schools).

28. This Court concludes that there is a substantial risk of an unfair trial or an unjust result, if the trial was to proceed after a delay of between 36 and 40 years between the alleged offences and the likely hearing of the claims. Notwithstanding that the alleged perpetrator of the physical abuse is still alive, this Court would dismiss the plaintiff's claims for physical abuse against Mr. Carey, as well as the sexual abuse claims against Brother Jim, in view of the length of this delay, taking account of the less serious nature of this physical abuse.

Reliance by the plaintiff on the case of *JR v. Minister for Justice*

29. Counsel for the plaintiff relied on the decision of *JR v. Minister for Justice Equality and Law Reform* [2007] IESC 7 to support his claim that the proceedings should not be struck out. In that case, the plaintiff claimed that in or around 1967, at the age of 12, she visited Raheny Garda Station in Dublin to complain about sexual abuse, to which she had been subjected, in her family home since the age of five. The Gardai were dismissive of the complaints and did nothing about them. An application was made by the Minister for Justice to dismiss the proceedings on the ground of the inordinate delay between the alleged offences and the trial. This was rejected by the Supreme Court. However, in that case, unlike in the present case, not only was the alleged sexual abuser still alive, but he had been convicted of the sexual abuse, whereas in the present case the alleged sexual abuser is dead and it is denied by the Brothers of Charity that Brother Jim was guilty of sexual abuse.

30. By way of contrast, the similarities between the present case and the *Cassidy* case, in which the proceedings were dismissed, are striking and support this Court's conclusion that the proceedings should be dismissed.

Conclusion

31. This Court concludes that:-

- The case before this Court is primarily one of rape and serious sexual abuse against an alleged sex abuser.
- It is a case where the basic facts are disputed between the parties as evidenced by the fact that in their defence filed in 2004, the Brothers of Charity have a full denial of all the alleged acts of abuse.
- The alleged sexual abuser is, it seems, dead.

On these grounds alone, it seems to this Court that it would, to quote Hardiman J. be the '*grossest imaginable prejudice*' for this Court to allow a trial to proceed which would consider whether this man abused the plaintiff. In addition however, it is relevant to note that:-

- It is at least 36 years since the alleged sexual abuse by Brother Jim G and the alleged physical abuse by Mr. Carey took place, which is such a long time it must raise the risk of there being an unfair trial or an unjust result.
- The delay in progressing the proceedings, once commenced in 2001, is not the primary responsibility of the first named defendant, and in particular the almost seven year period between December 2006 and September 2013, when nothing was done to progress this trial, is the primary responsibility of the plaintiff.
- The delay of over 2 ½ years in the filing of the defence is the primary responsibility of the first named defendant, but in the context of the 36 years since the events occurred, it is not such a delay as to justify the Court in permitting a trial to proceed where there is a risk of it being unfair or achieving an unjust result.

On this basis this Court concludes that there is a substantial risk of the first named defendant getting an unfair trial or an unjust result if the trial in relation to the alleged sexual abuse against Brother Jim G and the alleged physical abuse against Mr Carey, were to proceed and so dismisses all these proceedings.