Neutral Citation Number: [2014] IEHC 424

THE HIGH COURT

[2009 No.11367P]

BETWEEN:

MARGARET BYRNE

PLAINTIFF

AND

ANDREW HEFFERNAN and THOMAS BRENNAN

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 19th day of September, 2014

The plaintiff's claim is for damages for personal injuries arising from the alleged negligence, breach of duty and/or breach of contract on the part of the defendants. The plaintiff alleges that many years ago she was negligently misdiagnosed as schizophrenic by the second named defendant when she was an in-patient in St. John of God's Hospital, represented in these proceedings by the first named defendant, and that as a result she was subjected to assault, battery, physical and emotional abuse, false imprisonment, and further, that her constitutional rights were breached.

By notice of motion the defendants seek an order dismissing the plaintiff's claim on the grounds that it is statute barred by reason of the operation of the Statute of Limitations and in the alternative seek an order pursuant to the inherent jurisdiction of the Court dismissing the claim on grounds of inordinate and inexcusable delay which it is claimed has given rise to prejudice to the defendants and the risk of an unfair trial.

BACKGROUND

The plaintiff was born on the 3rd December, 1967. She has eight siblings, four older and four younger. The plaintiff told the Court that from the age of nine years old she was sexually abused in the family home on a continuous basis by an older brother. When she was approximately fifteen years old she reported the abuse to a neighbour but was disbelieved. As a result of the distress and fear of the abuse, coupled with the frustration at being disbelieved, the plaintiff attempted to take her own life when she was approximately sixteen years old and was admitted to hospital as a result of self poisoning. She informed the staff at Loughlinstown Hospital of the abuse and it was arranged that she meet with the second defendant Dr. Thomas Brennan at the first defendant's hospital, St. John of God. The plaintiff told the Court that after speaking to her brother, Dr. Brennan disbelieved her allegations of abuse and told her that she was very sick and that "her mind was playing tricks on her".

The plaintiff gave evidence of her time in St. John of God Hospital and stated that her circumstances went from bad to worse following her admission. The other patients at the hospital were primarily adults with serious mental illness. She recounted to the Court memories of being pinned to the ground by staff and sedated when she attempted to 'escape' from the hospital. The plaintiff described feeling utterly powerless and alone and says that she eventually gave up trying to 'beat the system' and became withdrawn and refused to speak to anybody. While the plaintiff does not recall specifically being told that she was diagnosed with paranoid schizophrenia, she recalls a family meeting when her parents were told of this diagnosis by a medical registrar. Her family was told that she was a danger to herself and others and weekly meetings were arranged with her parents to discuss how to deal with her illness.

As a result of this diagnosis, a total of 55 courses of ECT treatment were administered to the plaintiff over the course of her time in the hospital. She recalls this as a terrifying ordeal whereby she was strapped to a gurney and sedated. An apparatus was placed in her mouth to prevent her from swallowing her tongue. When she regained consciousness she invariably experienced a pounding headache and drowsiness for a number of hours. She recalls feeling trapped in a cycle of either being sedated and heavily medicated whenever she attempted to resist the treatment, or else being subjected to the ECT treatment whenever she refused to speak to anybody. The plaintiff estimates that in the thirteen years subsequent to her turning fifteen years old she was in hospital for roughly eleven years. During this time she was allowed intermittent visits home. During these visits the plaintiff says that she was bullied by other children in the area and was forced to live in the same house as the brother who had sexually abused her. As a result, she attempted suicide on a number of occasions. While in the hospital she was supervised at all times, including when using the toilet and bathing, and was only allowed out to walk around the grounds. While resident in the hospital the plaintiff was sexually abused by a male trainee psychiatric nurse and religious brother who she had grown to trust. This abuse was the subject of a criminal complaint to An Garda Síochána and, as discussed further herein, was also the subject of separate civil proceedings.

In her early years before she was first admitted to hospital and before she first raised the issue of sexual abuse in the family home, the plaintiff was heavily involved in athletics. She won a gold medal in the county championships and played basketball for a senior team at a very young age. As a result of the sexual abuse she suffered, she left school at approximately 14 years of age and worked in a local hotel having failed to complete the Junior Certificate cycle. The plaintiff described to the Court the severe frustration and trauma she suffered as a result of being forced to change from an outgoing, sociable and athletic person to being 'locked up' for long periods of time and not speaking to anybody.

In or about 1992 the plaintiff was transferred to adult services and came under the care of Dr. Eadbhard O'Callaghan who informed the plaintiff that in his view she did not suffer from any mental illness. Medical records indicate that in Dr. O'Callaghan's opinion the plaintiff had not displayed any symptoms of schizophrenia in the four previous years. Rather, the plaintiff was told she had a 'personality disorder' and this is recorded in a discharge summary dated 6th April 1992. The plaintiff told the Court that Dr. O'Callaghan did not specifically discuss the diagnosis of schizophrenia but outlined his plan to change her treatment and reduce her medication. While the plaintiff initially found it difficult to trust Dr. O'Callaghan, she gradually developed a good relationship with him and was pleased with the course of treatment he followed. She was weaned off the heavy dosage of various medications she had been prescribed and Dr. O'Callaghan arranged counselling with the Rape Crisis Centre in relation to the abuse in the family home and in the hospital.

Between 2003 and 2004 the plaintiff received all of her medical records after she submitted a 'Freedom of Information' request. She told the Court that she had a number of questions surrounding her initial diagnosis and the treatment she received, particularly in light of Dr. O'Callaghan's diagnosis. The plaintiff says she received the files in tranches and each time she got a new bundle of papers she found she had more questions. She noticed ambiguities and became aware of information which was contrary to what she had already been told. The plaintiff told the Court that she was not aware at that time that she had been misdiagnosed but that there were a lot of things she did not understand about her treatment and she was keen to have her questions answered in relation to why things went "*so drastically wrong*".

After making enquiries of Dr. O'Callaghan and a counsellor named Elizabeth Lawlor, a meeting was arranged with Ms. Jane McEvoy, who was the director of services at the defendant hospital. There is some confusion as to when exactly this meeting occurred. The plaintiff indicated that it was before she had consulted a solicitor in November 2002 while a note in the medical documentation records the plaintiff seeking such a meeting in December 2001. It is likely that the meeting occurred around this time. The plaintiff told the Court that the purpose of this meeting was to help her understand what happened to her and to receive an apology for her being 'locked up'. The plaintiff told the Court that despite her willingness to commit to not taking legal proceedings against the hospital, Ms. McEvoy told her that she could not apologise on behalf of the hospital as this would leave them "*legally wide open*".

In the meantime, the plaintiff recommenced her studies in 2002 and completed the Leaving Certificate in 2004. She was awarded a scholarship from Bank of Ireland and completed a one year access course before studying an undergraduate degree in sociology and social policy at Trinity College. She completed this course and was awarded an honours degree. She also lived independently and worked on a part-time basis. During this time, in November 2002, the plaintiff first consulted a solicitor in relation to her time in the hospital and legal proceedings confined to the sexual abuse were commenced on the 15th September, 2005 and were eventually settled. In 2007 the plaintiff attended a number of consultations with Dr. Paul McQuaid who prepared a medical and psychiatric report. Following receipt of this report, a solicitor's letter in relation to the present proceedings was sent to the defendants on the 3rd December, 2008, following which the personal injuries summons issued on the 15th December, 2009.

PRELIMINARY ISSUE ON THE APPLICATION

During the course of the defendants' submissions in relation to dismissal on the grounds of delay, Mr. Fitzgerald S.C., counsel for the plaintiff, argued that the medical records cannot be relied upon by the defendants at this stage in the proceedings as they constitute hearsay evidence only and cannot be relied upon even for the purpose of establishing a timeline for events. It was submitted that such evidence is only admissible in interlocutory matters, while an application to dismiss is not interlocutory, but rather, is determinative and final.

The plaintiff relied on Order 40 Rule 4 of the Rules of the Superior Courts in this regard:–

> *"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."*

Counsel for the first defendant argued that the application to dismiss is an interlocutory application. In *Minister for Agriculture v. Alte Leipziger* [2000] 4 I.R. 32 Barron J. considered the two approaches on this issue in the English case law, namely the "order approach" and the "application approach", in the following terms:–

> *"The tests to determine whether an order is interlocutory or final as applied for the purpose of English Rules of Court dealing with leave to appeal have been referred to as either the 'order approach' or 'the application approach'. In the former, you look to the order made on the application; while in the latter you look to the orders which might have been made on the application. In the former case, if the order disposes of the proceedings, it is a final order; whereas, in the latter case, if an order might have been made continuing the proceedings, then even though the order disposed of the proceedings, it is an interlocutory order."*

On the nature of an interlocutory application, Barron J. stated:–

> *"In my view, an interlocutory application is one which is purely procedural in nature and an interlocutory order is an order made on foot of an interlocutory application, whereas a final order would normally dispose of the action of proceedings. The order in the instant case does not readily fall into either category.*
>
> *It is an order which disposes finally, subject to appeal, of a substantive right collateral to the main issue in the proceedings. On the other hand a final order determines the rights of the parties in relation to the subject matter of the proceedings, while an interlocutory order determines the rights of the parties in the context of the proceedings as a whole. In the case of a motion to dismiss for failure to plead a cause of action or for want of prosecution, no rights are being finally determined. The order either determines that there is nothing to be litigated or that the right to have a matter litigated has been forfeited.*
>
> *In the present instance, the right which has been affected by the order is the right of the defendant to object to the jurisdiction of the court. It is not an order which deals with the merits of the cause of action, but neither is it an order made in the context of that cause of action. An interlocutory order is an order made on an application which in effect prepares the way for the final hearing which I believe to be the view of the English Court of Appeal in White v. Brunton [1984] Q.B. 570. The present order has no such effect. It is much more of the nature of a final order than of an interlocutory one."*

The first defendant contends that a motion to dismiss on grounds of delay is the same as a motion to dismiss for want of prosecution as referred to by Barron J. and is therefore an interlocutory order. The Court accepts the submissions of the first defendant on this issue and is satisfied that the present application is an interlocutory one rather than a final order. The evidence contained in the medical records is therefore admissible for the purposes of establishing the timeline of events.

EXCERPTS FROM THE MEDICAL RECORDS

A large number of medical records and related documentation was exhibited and opened to the Court to establish the timeline of events and to determine the plaintiff's date of knowledge for the purposes of the Statute of Limitations. At the outset it should be stated that the plaintiff in the course of her evidence unhesitatingly agreed with the accuracy of these records. From those records it is clear that the plaintiff was aware of the misdiagnosis at a very early stage, possibly in 1998 and no later than in 2001 when she was actively seeking an apology from Dr. Brennan and a meeting with the director of services at the hospital. Subsequent to this, the plaintiff consulted a solicitor in November 2002 and the defendants submit that the Statute had undoubtedly began to run at that

stage.

A document entitled 'Confidential Discharge Summary' dated the 4th June, 1992 records Dr. O'Callaghan's final diagnosis of the plaintiff as having a 'personality disorder'. Further medical notes from October 1994 state that the plaintiff had "*no symptoms of schizophrenia – positive or negative for at least 4 years*".

In a document from 1998 entitled 'Thought Record', which Dr. O'Callaghan had asked the plaintiff to prepare on an ongoing basis, the plaintiff writes that her father "*…can't get it into his head that I'm not schizophrenic*". She further states that "*I've tried telling him numerous times that it was a misdiagnosis…*" and that "*I know I'm not schizophrenic*." In her evidence to the Court the plaintiff stated that she never believed even at the earliest stage that she was schizophrenic. However, she says she remained unsure and afraid as to whether or not some other medical professional would diagnose her as such again, resulting in a possible further detention.

Further medical notes dated August 2001 state that "*Overall Maggie is coping well. She wants a resolution and apology from Dr. Brennan.*" The plaintiff accepted in cross examination that she was seeking an apology at this time as she knew Dr. Brennan had done something wrong or that something had gone wrong with her diagnosis and treatment.

On the 3rd November, 1998 Dr. O'Callaghan records the plaintiff as being "*still upset around how we treated her in the early stages of assessment*." Similarly, a note of a consultation with Dr. O'Callaghan dated the 29th August, 2001 states that the plaintiff "*continues to be angry re diagnosis at 15 – says her brother duped Dr. Brennan, wishes it could have been otherwise. Hard to deflect from this.*" Later that year, on the 17th December, Dr. O'Callaghan reports that the plaintiff was "*Still very angry regarding her diagnosis and the fact (as she sees it) that she was not believed re CSA and her family were…Wants to speak Director of Service*."

A note of a counselling session with Elizabeth Lawlor dated the 24th February, 2003, states that by this time the plaintiff had given her file to a solicitor and was angry about her diagnosis. It also records the plaintiff as being concerned that any legal action she pursues will be troublesome for many people who were involved in her care. On the 1st May, 2003 Ms. Lawlor notes that the plaintiff informed her over the phone that she had instructed her solicitor to begin proceedings against the service. Again, the plaintiff – very honourably – did not disagree with any of these notes or records.

THE STATUTE OF LIMITATIONS

Section 2 of the Statute of Limitations (Amendment) Act, 1991 sets out the relevant criteria for determination of the plaintiff's 'date of knowledge' –

> *2.—(1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:*
>
> *(a) that the person alleged to have been injured had been injured,*
>
> *(b) that the injury in question was significant,*
>
> *(c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,*
>
> *(d) the identity of the defendant, and*
>
> *(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;*
>
> *and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.*
>
> *(2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire—*
>
> *(a) from facts observable or ascertainable by him, or*
>
> *(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.*
>
> *(3) Notwithstanding subsection (2) of this section—*
>
> *(a) a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and*
>
> *(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury.*

Section 3 of the 1991 Act sets out the time limit for actions in respect of personal injuries –

> *3.—(1) An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured.*

The Civil Liability and Courts Act 2004 made the following amendments in respect of time limits –

> *7. - The Statute of Limitations (Amendment) Act 1991 is amended by -*

(a) the substitution in subsection (1) of section 3 of "2 years" for "three years",

(b) the substitution in subsection (1) of section 4 of "2 years" for "three years",

(c) the substitution in subsection (1) of section 5 of "2 years" for "three years",

(d) the insertion of the following section:

"5A.—(1) Where the relevant date in respect of a cause of action falls before the commencement of section 7 of the Civil Liability and Courts Act 2004, an action (being an action to which section 3(1), 4(1), 5(1) or 6(1) of this Act applies) in respect of that cause of action shall not be brought after the expiration of—

2 years from the said commencement, or

(b) 3 years from the relevant date,

whichever occurs first.

(2) In this section 'relevant date' means the date of accrual of the cause of action or the date of knowledge of the person concerned as respects that cause of action whichever occurs later.",

and

(e) the substitution in subsection (1) of section 6 of "2 years" for "three years".

It is submitted on the part of the defendants that the plaintiff's date of knowledge may be as early as 1998 but is certainly no later than 2002 when she consulted her solicitor after meeting with the hospital's Director of Services in relation to her alleged misdiagnosis. Therefore, it is submitted that a three year limitation period applies from that time. Only if the plaintiff's date of knowledge was after the commencement of the 2004 Act, on 31st March 2005, would a two year period apply. Counsel for the second defendant referred the Court to the Supreme Court decision in *Cunningham v. Neary & Ors*. [2004] IESC 43 as authority for the proposition that the statute began to run when the plaintiff engaged the services of a solicitor. Cunningham related to the unnecessary removal of one of the plaintiff's ovaries by the defendant obstetrician in 1991. In 1998 the plaintiff became aware of other incidents involving the defendant and she contacted the Medical Council. She subsequently consulted a solicitor in 2000 and a plenary summons issued in 2002. The Supreme Court held that in 1998 the plaintiff had facts within her knowledge such that it was reasonable to seek medical or other expert advice and that the plaintiff's date of knowledge was in December 1998 when the fact that the removal was unnecessary was ascertainable to her. In relation to her consulting a solicitor, McGuiness J. stated –

"It is perhaps understandable in the circumstances that she may have been hesitant about taking the step of consulting her solicitor. However, once she had done so she not only had the information already available to her but also had the benefit of legal advice. It must be presumed that this legal advice included knowledge of the operation of the statute. In May 2000 proceedings initiated by the plaintiff would have been within the statutory limit.

It was submitted on behalf of the plaintiff in this court that it would be unwise for a solicitor to embark upon a medical negligence action without convincing or at least persuasive, independent medical evidence to establish the claim. Such a practice, it was argued, would have unnecessary and harmful effects on the medical profession. In general terms this is true but, as was pointed out by senior counsel for the defendant, in a case where there is a danger of the statute running against the plaintiff it is perfectly possible and legitimate to issue a plenary summons and to delay serving it on the proposed defendant while investigating the available medical evidence."

Counsel for the first defendant submits that insofar as the plaintiff claims to have been under a disability which warrants the granting of an extension of time under the Act, the Court must consider whether or not she was capable of managing her own affairs. It is submitted that the plaintiff was clearly a person in charge of her own affairs – she returned to education and completed the Leaving Certificate and a university degree at Trinity College; she recognised the need to upskill and took a computer course; she lived independently and managed her own finances; she made a Freedom of Information request in relation to her medical records in 2002 and pursued it after being denied initially; she sought a meeting with the director of the hospital in relation to her diagnosis and treatment; and she instructed a solicitor in 2002. For those reasons and from those undisputed facts it is submitted that the plaintiff cannot be said to be a person of unsound mind or one who is outside the scope of the Statute.

The plaintiff's solicitor Mr. Pearse Mehigan told the Court that when the plaintiff first consulted him in November 2002 this was primarily in relation to the sexual abuse which occurred while she was an in-patient in the hospital. While proceedings in relation to that complaint were commenced in the normal way, Mr. Mehigan says that the issue of the negligent misdiagnosis was only focused upon in 2007 after receiving Dr. McQuaid's psychiatric report. He was aware that the issue of misdiagnosis had been causing the plaintiff upset and formed part of a 'general grievance' against the hospital, but says that it did not lead to a formal instruction until 2007 and that at that stage the claim was pursued, counsel was instructed, and a preliminary letter was sent in December 2008. Ultimately, the personal injuries summons issued in December 2009.

It is further submitted on behalf of the plaintiff that the statutory limitation periods do not apply in the plaintiff's case as, despite being able to go about her daily life in an apparently normal manner, she was under an 'impairment' which prevented her from commencing proceedings and which places her outside the scope of the statute. Considerable reliance is placed in this regard on the decision of Ryan J. in *Doherty v. Quigley* [2011] IEHC 361. In that case Ryan J. considered the issue of impairment as follows –

"The relevant parts of the section may be extracted as follows:

s.48.—(1) For the purposes of this Act, a person shall be under a disability while—

(b) he is of unsound mind,

It is clear as a matter of logic and also on the basis on which the case was presented that no real issue arises under section 48 of the Statute of Limitations, 1957. In other words, it was not a serious issue in the case that the plaintiff is or was at any material time a person of unsound mind in the sense of being incapable of conducting her ordinary affairs in a general way…The plaintiff was capable of conducting her affairs, achieving a university degree, embarking on a

career, having a relationship that led to marriage, working in this country and in the United States, becoming an Irish dancing teacher and acquiring a professional qualification as a teacher. All of these matters are put forward by the defendant as evidence showing that the plaintiff is not in fact impaired in any practical sense in the conduct of her ordinary life and that includes deciding whether or not to sue the defendant. That question must be considered in light of section 48A of the Statute. It is sufficient to say that there is no evidence in the case to suggest that the plaintiff is anything other than a person who is capable of looking after her own affairs in the ordinary way. The conclusion therefore is irresistible that the plaintiff cannot be considered to be a person of unsound mind."

Nevertheless, Ryan J. went on to consider section 48A of the Statute and concluded as follows –

"I am satisfied that the plaintiff was and is suffering from a serious psychological injury that was inflicted by the defendant. The evidence in that regard is clear and uncontradicted. Having heard Ms. Doherty's evidence and the clinical assessment of Prof. Browne, I accept that Ms. Doherty clearly suffers from a serious psychiatric condition in the form of Post Traumatic Stress Disorder of severe degree as a result of the abuse she suffered. That constitutes a psychological injury within the meaning of section 48A. The injury has caused the plaintiff to be severely affected in her psychological health and it is continuing to do so. Because the condition is of such severity and has persisted for many years the prognosis is uncertain as to future duration and degree of recovery. It is clear, therefore, that the first requirement is satisfied.

Prof. Browne's overall clinical diagnosis was that Ms. Doherty suffered from PTSD at the severe end of the spectrum. Ms. Doherty can go about her daily business and do normal things for a large amount of time but her condition is there all the time and can be activated at any moment, at which point she will show all the disorganisation and emotion of the traumatic experience. He described it like there were two dimensions to the one person, both of which are there at any given time, although not always apparent. The core of her disassociation and her PTSD are still active and have not been resolved. In the rational, ordinary part of Ms. Doherty's personality, she was capable of making those decisions but at any time she could move into the other part of her personality and be completely incapacitated…

…The evidence of Prof Browne is that the plaintiff's capacity to decide to sue or to make a reasoned decision to do so was seriously interfered with when her ever-present condition was activated, which means that for such time those capacities were substantially impaired. And accepting, as I do, that those active periods were and continued to be of such duration and frequency that they interfered significantly with the relevant capacities, then it follows that the conditions of the section are fulfilled and that the plaintiff was under a disability.

It seems to me that, contrary to what Counsel for the defendant have suggested, carrying on one's life with a semblance of normality does not preclude the possibility that there may be a myriad of complex and debilitating psychological problems lurking beneath the surface. I am satisfied that this was – and remains – the case with Ms. Doherty."

Counsel for the plaintiff submits that the facts in Doherty are very similar to the present case and that while the plaintiff managed to complete her Leaving Certificate, study at Trinity and receive an honours degree, live independently and manage her own finances, submit a freedom of information request, and consult with a solicitor, this does not mean that she was not impaired for the purposes of the Act. Following her discharge from the defendant's care and supervision, the plaintiff describes herself as having had no confidence and a low self-image. She was terrified of the dark and afraid to eat in the company of others. She describes herself as being 'scared' of her work colleagues for no apparent reason. She says that while she did her best to live a normal life, she was "*debilitated by anxiety*" and suffered from regular panic attacks. She was terrified of authority figures and suffered from chronic low self-esteem and persistent self doubt. It is submitted that all of the plaintiff's interactions with her solicitor must be viewed in the context of her ongoing impairment and consequent inability to give instructions in relation to the misdiagnosis until after Dr. McQuaid's report in 2007 which concluded that she "*has been significantly damaged by virtue of what would appear to be a failure of psychiatric evaluation and diagnostic determination*." It is further submitted that her solicitor could not have taken any action in respect of these proceedings without such instructions and that to do so would have amounted to a breach of duty.

Counsel for the first defendant submits that the decision of Ryan J. in *Doherty* is distinguishable from the present proceedings as section 48A deals only with "*Disability of certain persons for purpose of bringing certain actions arising out of acts of sexual abuse*." It is submitted that the concept of impairment as an additional disability relates specifically to cases in respect of sexual abuse and not to allegations of medical negligence or negligent misdiagnosis. While the plaintiff may have been able to rely on the concept of 'impairment' in the separate proceedings in relation to sexual abuse at the hospital, she may not do so here. The relevant test in these proceedings is whether the plaintiff has or had a disability or is a person of unsound mind as applied by Barron J. *in Rohan v. Bord na Móna* [1990] 2I.R. 425 and Murphy J. in *Presho v. Doohan* [2009] IEHC 631. Counsel for the second defendant further submits that section 48A makes no attempt to amend or supplement in any way the existing provisions of section 49 in relation to disability. It is submitted that the evidence clearly shows that the plaintiff was not under a disability which places her outside the Statute.

I have carefully considered all of the evidence and am satisfied that the plaintiff's date of knowledge was before the commencement of the 2004 Act and that a 3 year limitation period therefore applies. It is clear from the various records that the plaintiff had serious concerns in relation to her diagnosis at a very early stage. Certainly by August 2001 the plaintiff was seeking an apology from Dr. Brennan and sought a meeting with the director of services in an attempt to gain answers to the many questions she had in relation to her treatment. She was also contemplating consulting a solicitor around this time and subsequently did so in November 2002.

The plaintiff was a very impressive witness who gave a clear and honest account of her evidence to the Court. Based on the plaintiff's own evidence and the vast amount of records available, the Court cannot accept that the instruction to her solicitor in 2002 related solely to the sexual abuse claim while the misdiagnosis was simply a grievance at the 'back of her mind'. On the contrary, her evidence was that she informed her solicitor of her contention that she was misdiagnosed and it is clear from the records that the possibility of a negligent misdiagnosis was very much at the forefront of her concerns at that time and was integral to her decision to consult with a solicitor in an attempt to obtain the answers she was entitled to. While the sexual abuse aspect of her complaint duly proceeded in the ordinary way, no steps were taken in relation to the misdiagnosis until December 2008. This issue, to put it simply, was 'parked'. It is incumbent upon legal professionals to alert clients to various procedural requirements and matters such as the Statute of Limitations. The Court does not accept that the option of pursuing a claim in negligence for misdiagnosis emerged only after analysing Dr. McQuaid's report in 2007. The plaintiff's own evidence and various records indicate that this was not the case. The plaintiff made very clear in her evidence that she had made her solicitor fully aware of her belief that she had been misdiagnosed and that something had gone wrong in relation to her treatment. She described feeling frustrated that the 'system and her family' continued to disbelieve her and says she informed her solicitor in order to find out what legal options were available to her. It is clear that, at the very latest, the Statute began to run when the plaintiff consulted her solicitor in November 2002.

To her great credit, the plaintiff has shown herself to be a remarkably resilient individual who gave entirely credible and honest evidence to the Court. In spite of her traumatic background she has achieved a great deal by way of resuming her education and attempting to lead as normal a life as possible. However, the purpose of these proceedings is not to consider the merits of the plaintiff's claim. The Court must decide if and when the Statute began to run in the plaintiff's case. The plaintiff instructed a solicitor in 2002 and for the reasons outlined above, I am satisfied that the statute began to run at this time. In addition to what she already knew as evidenced in the records, the plaintiff now had the benefit of legal advice which must be presumed to include knowledge of the Statute and the need to take appropriate legal steps to protect her interests.

In light of the foregoing, the Court must find that the plaintiff's claim is statute barred.

DELAY

Having found that the claim is statute barred the question of delay does not fall to be considered in any great detail. However, for the sake of completeness, applying the well settled principles as set out in the long line of authority in relation to delay (including *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561; *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459; *Manning v. Benson and Hedges* [2004] 3 IR 556; *ÓDomhnaill v. Merrick* [1984] I.R. 151; *Toal v. Duignan* (Nos. 1 and 2) [1991] ILRM 135 and 140; *Comcast International v. Minister for Public Enterprise & ors* [2012] IESC 50), a defendant can successfully apply to have a case dismissed pursuant to the inherent jurisdiction of the Court on grounds of injustice or the risk of an unfair trial in asking them to defend proceedings even where there has been no blameworthy delay on the part of the plaintiff. However, as stated by Clarke J. in *Comcast "the threshold which must be surmounted to justify the dismissal of proceedings where there is no culpable delay on the part of the plaintiff must necessarily be more onerous than that which applies in the case of culpable delay".*

As already stated, the Court does not find any culpable delay on the part of the plaintiff in these proceedings. She took appropriate steps at an early stage in an attempt to ascertain what had occurred in relation to her diagnosis and treatment and consulted a solicitor within the statutory time limits for commencing proceedings. However, it is now twenty-one years since the plaintiff was diagnosed as not suffering from schizophrenia and twenty-seven years since the diagnosis was first made. Dr. Brennan is now elderly and it is claimed that he has no serviceable recollection of having treated the plaintiff. Dr. O'Callaghan, whose evidence as the psychiatrist who changed the diagnosis is integral to these proceedings, has regrettably passed away. Dr. Louis O'Carroll, a registrar who was involved in the plaintiff's treatment around the time of her initial diagnosis and two staff members of another medical facility attended by the plaintiff have also passed away. In addition, over fifty doctors and consultants have been identified in the records as having been involved in the plaintiff's care whose memories of events are all likely to have been impaired owing to the lapse in time. It is submitted therefore that the defendants' ability to call relevant oral evidence or to rebut or test the evidence of the plaintiff is therefore substantially impaired.

While the plaintiff's claim is now precluded by operation of the Statute of Limitations, had the Court been required to determine the issue of delay, for the reasons detailed above the proceedings would have been dismissed due to the lapse in time and the consequent substantial risk of an unfair trial.

DECISION

For the reasons outlined above, the plaintiff's claim is dismissed on the grounds that the proceedings were commenced out of time and the claim is therefore Statute barred.