

THE HIGH COURT**[2012 No. 4158P]****BETWEEN****JOHN MOLONEY****PLAINTIFF****AND****MICHAEL KELLEHER****(AS NOMINATED DEFENDANT FOR THE REDEMPTORIST ORDER)****DEFENDANT****JUDGMENT of Kearns P. delivered on the 17th day of July, 2014**

By notice of motion dated 25th November 2013 the respondent seeks an order striking out the plaintiff's claim pursuant to the inherent jurisdiction of the Court on grounds of inordinate delay and/or inordinate and inexcusable delay in the commencement or prosecution of these proceedings. Further, or in the alternative, an order is sought striking out the plaintiff's claim pursuant to the inherent jurisdiction of the Court in the interests of justice.

BACKGROUND

Between the years of 1965 and 1970, when the plaintiff was 7 to 11 years old, he served as an alter boy with the Redemptorist Order at Sexton Street, Limerick. The plaintiff alleges that during the course of his service as an alter boy, a member of the Order, Brother Martin Carey (known also as Brother Majella) sexually assaulted and sexually abused him regularly and continuously. Particulars of the alleged assaults are set out in the plaintiff's personal injuries summons. The plaintiff also alleges that he was sexually abused by two teachers at the Christian Brothers School, Limerick between 1965 and 1968 and this complaint is the subject of separate proceedings. The plaintiff submits that as a result of the repeated and continuous sexual abuse which he allegedly endured he had a very troubled childhood and adolescence and a markedly abnormal personal development, the consequences of which are ongoing. The personal injuries summons outlines how the plaintiff lived in constant fear and in dread of the abuse; how his education and learning ability suffered; and that he developed a habit of self harm and became depressed. When the plaintiff was 21 years old he took an overdose of medication and cut his own wrists in an attempted suicide. The plaintiff developed a problem with alcohol abuse for a period of about two years. He developed conflicts about being physically touched and the personal injuries summons outlines the damaging effect these issues had on the plaintiff's marriage, which broke up in 1999, and another subsequent long term relationship. To this day the plaintiff contends that he suffers from extremely low self-esteem and has severe difficulty with relationships.

In 1993/1994 the plaintiff attended a therapist named Ms. Anne O'Neill. Shortly after commencing these therapy sessions the applicant, apparently without any planning or discussion, walked into the Redemptorist Monastery in Limerick in November or December 1993 and told the priest at reception that he wished to make a complaint of sexual abuse against a brother in the Order. His contact details were taken and some days later he was contacted by a Father Tony Flannery and a meeting was arranged. This meeting took place shortly thereafter and was attended by the plaintiff, Fr. Flannery and two other priests. The plaintiff outlined the allegations of abuse in detail and answered all questions which were put to him. A record of this meeting states that the plaintiff alleged that there were four instances of abuse, two of which took place while on an excursion to a nearby beach led by Brother Majella, and another which occurred in the parlour of the monastery. It is noted that the fourth incident is alleged to have taken place in the sacristy but the plaintiff did not go into detail in relation to this incident.

Some weeks later another meeting was arranged, this time in Jury's Hotel, Limerick, and was attended by the plaintiff and the same three priests. This meeting lasted approximately ten minutes. The applicant states that he was informed that Brother Majella had been confronted with the allegations and had firmly denied them. Brother Majella had been sent for assessment at the Our Lady of Victory 'Stroud Institute', a residential treatment centre for priests with certain addictions, and the plaintiff states that the three priests informed him that this assessment found that Brother Majella was innocent of all of the allegations against him. According to the plaintiff the priests offered to provide two therapy sessions but stressed that this was out of a pastoral concern rather than an acceptance of any form of liability.

The plaintiff states that following this meeting and in light of the manner in which his complaint had been handled by the Order, he was left feeling humiliated and rejected. He says that he felt let down and was profoundly shocked and upset that he had been disbelieved. His suicidal thoughts and feelings of depression were exacerbated and he began drinking heavily. His therapy sessions with Ms. O'Neill ceased abruptly as he was no longer able to abide by a 'non-self harm undertaking' he had given her. In the summer of 1994 he attended an Alcoholics Anonymous meeting and continued to do so for a period of two years. While the plaintiff says that this allowed him to get some aspects of normality back into his life, he states that he continues to experience the same feelings of despair and depression and that, owing to a fear of rejection, he was completely incapable of making another complaint until 2010. In 2008 the plaintiff informed his then solicitor of the abuse but did not feel capable of making a formal complaint at that time. According to the replies to particulars, the plaintiff attended a psychotherapist for approximately one year commencing in 2002 and again for one year in 2007. He attended a psychotherapist for three years between 2008 and 2011 and attended Dr. Tessa Neville and Dr. Patricia Noone, both consultant psychiatrists, in September and December 2011 respectively.

In January 2010 the plaintiff made a formal complaint to the Gardaí and, following authorisation by the Personal Injuries Assessment Board on 2nd December 2011, the personal injuries summons in these proceedings issued on 26th April 2012

PLAINTIFF'S SUBMISSIONS

The plaintiff accepts that the delay in issuing proceedings is undoubtedly inordinate. The alleged offences occurred more than 40 years ago while a complaint was not made to An Garda Síochána until 2010 and the plenary summons in these proceedings issued in 2012. However, it is submitted that this delay is excusable on the basis that as a result of the abuse the plaintiff was psychologically incapable of bringing proceedings until recently. The plaintiff refers to the medical report of consultant psychiatrist Dr. Tessa Neville

which states that *"In my opinion, Mr. Moloney did suffer psychological difficulties of such significance that his will or ability to make a reasoned decision to institute court proceedings was substantially impaired...He felt that he could never discuss what had happened with any other person because he felt so degraded."*

The decision of Hogan J. in *II v. GG* (Unreported, High Court, 5th July, 2012) is relied upon as authority for the proposition that in cases of alleged sexual abuse, periods of inordinate delay are often found to be excusable having regard to the circumstances -

"The courts have naturally acknowledged that considerable latitude must be given to the victims of sexual abuse to commence proceedings in view of the psychological trauma which victims inevitably suffer. This is especially true given that the climate which prevailed in Ireland up to relatively recent times made it all but impossible for victims to come forward with any confidence that their complaints would be treated with the sensitivity and understanding and, perhaps, most importantly, that otherwise credible accounts of abuse would be believed: see here the comments of Murray C.J. in H. v. Director of Public Prosecutions [2006] IEHC 55, [2006] 3 I.R. 575. All of this means that, as Mr. Murphy S.C., counsel for the plaintiff, put it, the considerations which obtain with regard to the passage of time and the prosecution of civil litigation in a case of this kind are very different than those which obtain in a case such as Donnellan v. Westport Textiles Ltd, [2011] IEHC 11 (a hearing loss case)"

Hogan J. goes on to state at p.8 of his decision -

"In line with the approach taken in many other cases in this difficult area, whether in terms of criminal prosecutions (cf. H v. Director of Public Prosecutions [2006] IEHC 55, [2006] 3 I.R. 575) or civil actions (c/ the judgment of Hanna J. in Hayes v. McDonnell [2011] IEHC 530), it is clear that the overwhelming experience of the victims of such abuse is such that they are psychologically incapable of commencing such proceedings not only within the conventional time limits prescribed by the Statute of Limitations as originally enacted, but also even within a reasonable period of time thereafter."

Counsel for the plaintiff submits that in addition to the 'climate' referred to by Hogan J. which prevailed in Ireland whereby victims of sexual abuse found it all but impossible to come forward with a complaint, there is an even stronger basis for excusing the delay in the present proceedings as the plaintiff did in fact make a complaint in December 1993. It was the manner in which this complaint was handled whereby that the plaintiff felt he was disbelieved and was informed that the alleged perpetrator was innocent of all allegations, which caused the further period of delay. He was unable to make a complaint again until 2010 out of fear of further rejection, humiliation and frustration at being disbelieved. Dr. Neville's report states that following the 1993 complaint the plaintiff *"felt that he would be unable to pursue the matter with any authorities as he had suffered such a setback, that in his mind, nobody would ever believe him"*.

The plaintiff contends that the principle as set out in *Toal v. Duignan (No.1)* [1991] ILRM 135 and confirmed in *Toal v. Duignan (No.2)* that proof of culpable negligence on the part of the plaintiff in issuing proceedings is not a prerequisite to an order to dismiss a case on grounds of delay does not arise in this case. In *Toal v. Duignan (No.1)* Finlay C.J. stated -

"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."

This was confirmed in *Toal v. Duignan (No.2)* where Finlay C.J. held that-

"...the existence of culpable negligence on the part of a plaintiff whose claim has been delayed is of considerable relevance but it is not an essential ingredient for the exercise by the court of its jurisdiction."

However, the plaintiff in these proceedings contends that this principle does not apply as the defendant is to blame for a substantial period of delay from the period 1993 to 2010. In *Manning v. Benson & Hedges* [2004] 3 I.R. 556 Finlay Geoghegan J. said that a defendant may be entitled to an order to dismiss having regard to a *"lapse of time for which he is not to blame"*. Blameworthiness attaching to a defendant and the conduct of a defendant are factors which the Court may consider when deciding whether or not to dismiss a plaintiff's claim on the ground of delay. In *JR v. Minister for Justice and others* [2007] 2 I.R. 748 proceedings were issued in 1998 in relation to sexual abuse alleged to have occurred in 1967. The plaintiff in that case maintained that she had reported the abuse at the time to the Gardaí who disregarded her complaint and took no action, resulting in 25 years of further abuse. The defendants contended that they were unable to defend the proceedings due to the delay and the unavailability of certain evidence and witnesses. The Supreme Court on appeal made an order refusing the defendants' application to dismiss the proceedings, holding that in the interests of justice the defendant's could not avail of the issue of delay as a reason to dismiss the proceedings. Counsel for the plaintiff submits that the fundamental test is one of fairness and is to be considered on the facts of each case.

It is submitted that the documents obtained on discovery in this case reveal quite clearly that the Redemptorist Order concluded from their own investigation that the plaintiff had been sexually abused by Brother Majella. A letter dated 27th January 1994 from Rev. David Fitzgerald, Program Director at Our Lady of Victory, Stroud Institute, Gloucestershire, where Brother Majella was assessed following the plaintiffs complaint in December 1993, to Rev. Brendan Callanan states as follows -

"After consultation with Paul Lyons SP, the staff has concluded that Father Martin Carey would not be a suitable candidate for treatment at Our Lady of Victory."

However, the seriousness of the issues which have surfaced during his evaluation will warrant further attention. We therefore recommend that Fr. Carey enter into bi-monthly spiritual direction with a priest or religious brother who is well informed regarding psychosexual issues. The period of intense spiritual direction should continue for approximately one year."

We do not advise in-depth psycho-analytical therapy at this time primarily because of Father Carey's limited ego defences and because of the intense anxiety level he experiences under stress..."

The plaintiff places particular reliance on an undated and untitled typed memo stated to be from Fr. John Brendan Callanan which reads as follows -

"Thank him for coming forward"

I took his allegations very seriously

Have made enquiries with professional help

THERE ARE INDICATIONS THAT SOMETHING INAPPROPRIATE HAPPENED:

IT WAS ISOLATED

HAS LONG SINCE CEASED

X HAS RECEIVED PSYCHOLOGICAL/PSYCHIATRIC HELP

X IS FOLLOWING ADVICE GIVEN BY THESE PROFESSIONALS

FROM A PASTORAL CONCERN POINT OF VIEW WOULD BE WILLING TO HELP WITH HIS COUNSELLING EXPENSES: WHAT WOULD HE SUGGEST/EXPECT IN THIS REGARD?"

Beneath the word inappropriate is handwritten the word "*indecent*" while at the foot of this memo is another handwritten sentence which appears to read "*Mentioned to Tony in January*". It is submitted on behalf of the plaintiff that these documents, and in particular the typed memo, unambiguously indicate that a definite finding had been made by the Redemptorist Order that abuse of an indecent nature had occurred and that the defendants wrongfully informed the plaintiff that the finding had been that Brother Majella was innocent of all charges. It is contended that this deliberate misleading of the plaintiff and the consequent trauma he experienced at being disbelieved and rejected is to blame for the subsequent period of delay in making another complaint, and that therefore the delay is excusable and the balance of justice requires that the case proceed.

DEFENDANT'S SUBMISSIONS

Counsel for the defendant submits that the Courts jurisdiction to dismiss on grounds of delay applies to delays occurring both before and after the commencement of proceedings and that this case is overwhelmingly concerned with the pre-commencement period of delay. It is submitted that there are two distinct lines of reasoning in relation to delay whereby in some cases, even where the issue of culpable delay on the part of the complainant does not arise, the court may still dismiss proceedings where the interests of justice require it or where the prejudice to the defendant caused by the delay is so great that he or she could not reasonably be expected to defend the proceedings. It is submitted that both lines of authority were approved by the Supreme Court in *McBrearty v. North Western Health Board & Ors.* [2010] IESC 27 where Geoghegan J. held: –

"Most legal practitioners regard, and in one sense, quite reasonably regard the judgment of Finlay P. in Rainsford v. Limerick Corporation [1995] 2 ILRM 561 combined with the judgment in this court by Hamilton C.J. in Primor plc v. Stokes Kennedy Crowley [1996] I.R. 459 as the seminal case law on applications to dismiss for want of prosecution and particularly on the inherent jurisdiction of the court to grant such an order quite apart from breaches of time limits under the Rules of the Superior Courts. Those cases, however, have an older ancestry that is worth considering for the purposes of this appeal. There is also an important and partly overlapping jurisprudence deriving, in the main, from decisions of this court in O'Domhnaill v. Merrick [1984] I.R. 151, Toal v. Duignan (No.1) [1991] ILRM 135 and Toal v. Duignan (No.2) ILRM 140. The importance of this latter jurisprudence is that even in a case where there has been no fault on the part of the plaintiff, the court, in certain circumstances, in the interest of justice may accede to a defendant's application to have the proceedings struck out."

In *O'Domhnaill v. Merrick* [1984] I.R. 151 Henchy J. stated: –

"In all cases the problem of the court would seem to be to strike a balance between a plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend."

Counsel for the defendant submits that the case law makes clear that the Court's inherent jurisdiction to dismiss can be exercised independently of the principles set out in the seminal cases of *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and *Primor plc v. Stokes Kennedy Crowley* [1996] I.R. 459, which relate to post-commencement delay. The principles set out in *O'Domhnaill* were further developed in *Toal v. Duignan (No.1)* where the Court held that even where no blameworthiness is attached to the plaintiff, the evidential prejudice suffered by the defendants through the passage of time was sufficient to warrant the case being dismissed. Finlay C.J. held: –

"Even though, therefore, the plaintiff may be blameless in regard to the date at which these proceedings have been instituted and with regard to the period of 25 to 26 years since the events out of which they arose, as far as these defendants are concerned there would be an absolute and obvious injustice in permitting the case to continue against them. One cannot but be moved with sympathy for the plaintiff who obviously feels deeply the medical condition which he is advised he presently suffers from, but that sympathy could not be permitted to justify what would be unjust proceedings against these defendants. 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] IR 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."

In *Manning v. Benson and Hedges* [2004] 3 IR 556 Finlay Geoghegan J. set out the obligation on the Court in delay cases in the following terms: –

"The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial. This is required by Art.34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss."

Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim then he may also be entitled to an order to dismiss. This

entitlement derives principally from the constitutional guarantee to fair procedures in Art.40.3 of the Constitution."

The two lines of authority in delay cases were also referred to by Peart J. in *J. McH v. J.M.* [2004] 3 IR 385 –

"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 contexts 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..."

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."

Counsel for the defendant submits that the significant periods of delay from 1965/1970 to 1993 when the plaintiff first made a complaint; from 1993 to 2008 when the applicant asserts he informed his solicitor of the abuse; from 2008 to 2010 when a complaint was made to the Gardaí; and from 2010 to the issuing of these proceedings, individually and cumulatively are not excusable. In any event, the defendant submits that even if the Court finds that the delay is excusable, the delay is in no way attributable to the defendant and the balance of justice requires dismissal. In relation to the typed and undated memo which, according to the plaintiff, makes clear that the investigations of the Order found that the abuse had occurred, the defendant strongly denies this. The author of this document, Fr. John Brendan Callanan, Provincial of the Irish Province of the Redemptorist Order from 1993 to 1999, has sworn an affidavit in which he rejects the plaintiff's construction of the document. He states that the Order took the plaintiff's complaints very seriously and that they were alive to the risk that if the allegations were well founded it would be necessary to remove Brother Majella in order to protect other minors. He states that when confronted with the allegations Brother Majella was flabbergasted and strongly and consistently denied them. Brother Majella subsequently cooperated with the assessment by the Stroud Institute, which Fr Callanan says determined that the abuse was unlikely to have occurred. It is submitted that the word 'inappropriate' as used in the memo was used merely in an effort to avoid offending or belittling the plaintiff and does not indicate that the Order was of the view that the abuse had occurred.

In relation to the letter dated 27th January, 1994 from the Stroud Institute, Fr. Callanan states that to the best of his recollection the reference therein to the "seriousness of the issues which have surfaced" during the assessment related not to a finding that any abuse had occurred, but rather Brother Majella's profound immaturity and personal development issues and that these would have included psycho-sexual issues. He states that David Fitzgerald of the Stroud Institute advised him at the time that "there were not substantial reasons to believe that the alleged incidents were likely, but rather they were unlikely". In relation to the disputed memo, Fr. Callanan states that the use of the word "inappropriate" would have included issues such as 'horseplay' by a member of the congregation and it was considered that anything more than this was unlikely to have occurred.

The defendant submits that under the line of authority originating with *O'Domhnaill*, the balance of justice is the determinative factor for the Court to consider in this case. It is submitted that the factors to be taken into account in determining where the balance of justice lies include the following as laid down by Hamilton C.J. in *Primor*: –

"(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

J'OC v. Director of Public Prosecutions [2000] 3 I.R. 478 (S.C.) concerned the right to a fair trial in criminal proceedings. Hardiman J. summarised the principles applicable to delay in civil litigation in the following terms which counsel for the defendant submits are highly indicative of the factors likely to be extremely prejudicial to a defendant in a case where there has been long delay: –

"Examples of the application of these principles in civil cases can be multiplied. Enough, however, has been said to indicate that it has consistently been held:-

(a) that a lengthy lapse of time between an event giving rise to litigation, and a trial creates a risk of injustice: "the chances of the courts being able to find out what really happened are progressively reduced as time goes on";

(b) that the lapse of time may be so great as to deprive the party against whom an allegation is made of his "capacity ... to be effectively heard";

(c) that such lapse of time may be so great as it would be "contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial which (he or) she 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 ...";

(d) that, having regard to the above matters the court may dismiss a claim against a defendant by reason of the delay in bringing it "whether culpable or not", because a long lapse of time will "necessarily" create "inequity or injustice", amount to "an absolute and obvious injustice" or even "a parody of justice";

(e) that the foregoing principles apply with particular force in a case where "disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past ...", as opposed to cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony."

In *Manning v. Benson & Hedges* [2004] 3 I.R. 556 Finlay Geoghegan J. set out the following non-exhaustive factors to be considered by the court in determining whether it would be unjust for a defendant to have to meet a claim –

"1. has the defendant contributed to the lapse of time;

2. the nature of the claims;

3. the probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;

4. the nature of the principal evidence; in particular whether there will be oral evidence;

5. the availability of relevant witnesses;

6. the length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date."

In *PK v. Deignan* [2009] 4 I.R. 39 Dunne J. held that the defendant was prejudiced by the fact that almost all of the alleged perpetrators of abuse were dead. Counsel for the defendant submits that the death of Brother Majella, the only direct witness to the plaintiff's allegations, seriously undermines the defendant's ability to adequately defend these proceedings.

Counsel for the defendant submits that the prejudice suffered by defendant in this case is so severe that even if the Court finds that the plaintiff is not culpable for the delay, the balance of justice favours dismissal. It is contended that the death of Brother Majella means that the testimony of the plaintiff would go entirely unchallenged. The discovery process has shown that no records relating to abuse of others or which might support the plaintiff's claims exist. The monastery building has undergone substantial refurbishment and key locations do not exist or have been fundamentally altered. Records of persons who travelled on excursions such as the beach trips where two of these incidents allegedly occurred are no longer traceable or have been destroyed. Indirect witnesses cannot now be effectively identified and even if they were their memories are likely to be grossly impaired by the enormous passage of time. In addition to this, the plaintiff has initiated separate proceedings against two other alleged abusers and there is a risk of conflation with these complaints and difficulties arise in relation to causation.

DISCUSSION

The period of delay from when the incidents of abuse suffered by the plaintiff allegedly occurred, between 1965 and 1970, until a formal complaint was made to An Garda Síochána in January 2010 and subsequent civil proceedings were commenced in December 2011 is undoubtedly inordinate. Both parties are in agreement on this point. The first issue for this Court to consider therefore is whether or not this lengthy period of delay is excusable in the circumstances of this particular case. In considering this facet of the case the Court is mindful of the extreme psychological trauma often experienced by survivors of sexual abuse and the frequent difficulties and fears they face in considering whether or not to make a complaint. The Court has given careful consideration to the plaintiff's affidavit and to the impact the alleged abuse has had on him as set out in the personal injuries summons. I have also had regard to the report of Dr. Neville, a consultant psychiatrist, who details the profound effect the plaintiff's troubled childhood and consequent difficulties in his adult life had on his ability to initiate a formal complaint or to discuss the incidents with anybody. The Court follows the authorities as summarised by Hogan J. in *II v. GG* which make clear that in cases of this nature, which involve allegations of sexual abuse dating back many years, the Courts should in certain circumstances allow considerable latitude to complainants who fail to initiate a complaint until many years after the alleged incidents occurred. For those reasons I am satisfied that the period of delay from the time the incidents allegedly occurred until 1993, when the plaintiff first made a complaint, is excusable.

The defendant asserts that the period of delay from 1993 until 2008 when the plaintiff maintains he informed his solicitor of the abuse and to 2010 when a complaint was made to the Gardaí is inexcusable in itself and also cumulatively with the preceding period of delay. I have carefully considered the evidence in relation to the plaintiff's complaint in 1993 and the manner in which it was subsequently handled by the defendant. While the Court will consider the status of the relevant documents relating to the defendant's investigation of the alleged abuse in greater detail herein, I am satisfied that following his second meeting with members of the Order at Jury's Hotel, the plaintiff held a genuine belief that he had been disbelieved. It does not necessarily follow that this was due to any fault of the defendant or that the actions of the defendant were designed to prevent the plaintiff from pursuing a complaint. It is clear that this had a devastating impact on the plaintiff and the Court accepts his reasons for failing to make another complaint until 2010, namely that his psychological difficulties and fear of rejection and humiliation at being disbelieved were so great as to dissuade him to initiate a further complaint. Making a complaint to the Gardaí or other relevant authority in order to initiate proceedings is a difficult step for many victims of sexual abuse to take. It requires a considerable degree of courage and is often only achieved after a lengthy period of time has elapsed and with the support of counsellors and other professionals. I am satisfied therefore, given the plaintiff's fear of rejection and humiliation and his psychological state as detailed in the medical reports and his own evidence, that this 'second' period of delay is also excusable.

The Court has considered the extensive legal submissions of both parties and reiterates the position in relation to the jurisprudence in delay cases as eloquently expressed by the Supreme Court in *McBrearty* and by Peart J. in *McH* as outlined above. In addition to the well established principles as set out in the seminal cases of *Rainsford* and *Primor*, there is an overlapping line of authority which derives primarily from the decisions in the *O'Domhnaill* and *Toal No.1* and *No.2* cases. These latter cases make clear that even where there is no culpability on the part of a plaintiff, as in the present case, the Court may still dismiss proceedings in the interests of justice. The issue for the Court to consider in this regard is whether or not the prejudice suffered by the defendant as a result of the

passage of time requires the proceedings to be dismissed having regard to the balance of justice.

The most important witness in these proceedings, as far as the defendant is concerned, passed away in 1997. Brother Majella's death means that there is no witness who can directly challenge the plaintiff's version of events. Nor can the plaintiff confront this witness directly with his account of what is alleged to have occurred. There is a lack of relevant documentary evidence and potentially important records have been destroyed. The lapse of time means that even if any indirect witnesses could be identified, which is highly unlikely, their recollection of events would likely be unreliable.

It is clear therefore that there is substantial prejudice to the defendant as a result of the delay. However, in deciding where the balance of justice lies, the Court must also consider whether the defendant is to blame in whole or in part for any period of this delay. Crucial to this consideration is the status of the various documents in relation to the defendant's investigation of the alleged abuse. It is the plaintiff's position that the untyped and undated memo of Fr. Callanan, as corroborated by the letter of January 1994 from David Fitzgerald of the Stroud Institute, unequivocally indicates that the defendant had made a finding that the abuse did occur but nevertheless misled the plaintiff and informed him that Brother Majella was innocent of all of the allegations. The defendant denies that such a finding was ever made and the affidavit of Fr. Callanan as discussed in detail above rejects the construction placed on these documents by the plaintiff. The Court is of the view that at this remove, and having regard to the position set out by the author of this memo; the open-textured nature of the document; and the substantial prejudice suffered by the defendant, these documents are not sufficient to tip the balance of justice in favour of the plaintiff. The existence of this document only serves to compound the defendant's difficulty in being able to defend these proceedings after such a lapse in time.

DECISION

For the reasons outlined above, the Court finds that if this case was allowed to proceed there would be a patent unfairness in asking the defendant to defend these proceedings and the interests of justice therefore require that the case be dismissed pursuant to the inherent jurisdiction of the Court.