

THE HIGH COURT

2001 5792 P

BETWEEN

M. O'S.

(OTHERWISE KNOWN AS M. G.)

PLAINTIFF

AND

**W. O'S., THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND
AND THE ATTORNEY GENERAL**

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered on the 2nd day of April, 2009

This is an application on behalf of the second, third, fourth and fifth named defendants (hereinafter referred to as the State defendants) seeking orders as follows:-

(a) An order dismissing the plaintiff's action by reason of lapse of time between the events complained of and the date of the trial of the action as a result of which the second, third, fourth and fifth named defendants are no longer in a position to properly defend the action and a fair trial is no longer possible.

(b) An order dismissing the plaintiff's action by reason of want of prosecution on the part of the plaintiff.

Background

The plaintiff herein was born in June, 1955. It is alleged that when the plaintiff was between the ages of 2½ and 15½, she was severely sexually assaulted, including acts of sexual intercourse by the first named defendant, a neighbour of the plaintiff. It appears that when the plaintiff was aged between 5 and 7 approximately, the abuse of the plaintiff included the taking of pornographic photographs of the plaintiff. Sometime around 1961/1962 when the plaintiff would have been approximately 6 to 7 years of age, it appears that the gardaí received an anonymous complaint at Kilkenny garda station. As a result of that complaint, it appears that there was a garda investigation during which the first named defendant's home was searched; photographs and film of a number of children including the plaintiff were found. The first named defendant was apparently then questioned in Kilkenny garda station. The plaintiff was also apparently brought to the garda station, shown the photographs and questioned by the gardaí. In the course of the statement of claim herein, it is pleaded as follows:-

"The plaintiff was extremely frightened as the plaintiff was conscious of being blamed by members of An Garda Síochána, her parents and the local priest for jeopardising the first named defendant's marriage. Thereafter, the plaintiff was ostracised by her neighbours. Approximately, one month after the plaintiff had been questioned in the garda station, a member of An Garda Síochána called to the plaintiff's family home and informed her that they were not charging the first named defendant. The members of An Garda Síochána further told the plaintiff's mother that the first named defendant was a good father and husband and that he regretted his actions."

It is then pleaded in the statement of claim that approximately a month after the visit of the Garda Síochána to the plaintiff's home to inform the plaintiff's mother that they were not charging the first named defendant, the first named defendant continued his pattern of abusing the plaintiff. The plaintiff has set out details of the abuse that took place after the garda investigation apparently ceased and without setting the same out in detail, it is sufficient to say that the particulars of sexual abuse set out in the statement of claim are very serious. The complaint of the plaintiff in respect of the State defendants is that "the collusive behaviour of the gardaí resulted in a complete lack of protection and appropriate care for an extremely needy and deprived child". In essence, the plaintiff's complaint against the State defendants is that as a result of the negligence and breach of duty on the part of the State defendants, the first named defendant was in a position to continue the acts of sexual abuse of the plaintiff, as a result of which she suffered severe personal injuries, including emotional injury, loss, damage, inconvenience and expense. The particulars of negligence alleged against the State defendants include, *inter alia*,

"Failing to prosecute the first named defendant, exonerating the abuse of the plaintiff by the first named defendant and facilitating the continuing and systematic abuse of the plaintiff by the first named defendant."

Subsequently, the plaintiff herein made a complaint at Carlow garda station in July,

1998, in respect of the matters complained of herein. As a result of the complaint made at that time, a prosecution was initiated against the first named defendant. The matter did not proceed to trial as a *nolle prosequi* was entered by the Director of Public Prosecutions.

It also appears that the solicitors for the first named defendant has recently come off record in respect of these proceedings by reason of the first named defendant's inability to give instructions as he now suffers from Alzheimer's.

History of these Proceedings

The plenary summons herein was issued on the 23rd April, 2001. It was served on the State defendants on the 22nd August, 2001. An appearance was entered on their behalf on the 29th August, 2001. A statement of claim was delivered on the 18th November, 2002. A notice for particulars was raised by the State defendants on the 27th March, 2003, and replies were received dated the 11th October, 2004. A notice of intention to proceed was served on behalf of the plaintiff on the 20th April, 2006, and a defence was delivered on the 26th April, 2006. A notice of indemnity and/or contribution was served on behalf of the State defendants on the first named defendant on the 26th May, 2006. A reply to the defence of the State defendants was delivered, but it is not entirely clear when that occurred. Finally, this notice of motion was issued on the 22nd May, 2008, returnable for the 30th June, 2008, and subsequent to that a notice of motion dated the 24th June, 2008, returnable for the 21st October, 2008, was issued on behalf of the plaintiff herein, seeking discovery from the State defendants.

Delay and Prejudice

The grounding affidavit of Rachel Joyce sets out certain matters relevant to the issue of delay and prejudice. The claim against the State defendants relates only to the period after the garda investigation took place sometime in 1961/1962. Therefore, some 39/40 years had elapsed before the commencement of these proceedings. It is now 8 years on from the commencement of the proceedings and therefore, any trial is likely to take place between 40 to 50 years approximately after the events complained of. Indeed, the complaints in respect of the first named defendant bring the events complained of back to a period in excess of 50 years. Ms. Joyce deposed to the fact that the lapse of time from the date of the matters complained of to the expected date of trial is so great that the State defendants could not reasonably be expected to defend such an action.

She also deposed to the fact that the garda investigation which took place in 1961/1962 in relation to the wrongdoing by the first named defendant herein was apparently led by Detective Sergeant Nolan. Detective Sergeant Nolan died in January 1990. The fact that such a garda investigation took place in the early 1960s came to light as a result of the complaints made by the plaintiff to the gardaí at Carlow garda station in July 1998. Detective Garda Canny made a statement in the course of the criminal proceedings. Garda Canny referred to the fact that he was a retired member of An Garda Síochána. He was stationed in Kilkenny from 1965 until he retired. He was attached to the Detective Branch during that time. He stated that he remembered an investigation being carried out into allegations of indecency and possession of pornographic photographs by the first named defendant herein and recalled that his house was searched by Detective Sergeant Nolan and that pornographic photographs were located. It was his recollection that these investigations took place during the late 1960s or early 1970s. He added:-

"To the best of my knowledge, Detective Sergeant Nolan prepared an investigation file, but I do not know what the outcome was. I am not aware if he was prosecuted or not. I do not remember any reference to rape during that inquiry and I did not meet or know the injured parties."

It seems that the investigation took place before Garda Canny arrived in Kilkenny. That appears to be the extent of the information available to the State defendants. Ms. Joyce in her affidavit goes on to set out the fact that unfortunately it now appears that no documentation whatsoever exists in relation to the handling of the complaint to Kilkenny garda station by the Detective Sergeant Nolan. Thus, the State relies on the lapse of time since the matters complained of, the death of Detective Sergeant Nolan, the complete absence of any records in relation to the garda inquiry of the early 1960s into the matters complained of, as well as the retirement of Detective Garda Canny, as matters which have served to prejudice the State Defendants' capacity to defend the action. I should say at this point that I cannot see how the retirement of a member of the gardaí could in any way prejudice the State defendants, but aside from that aspect of the matter there is no doubt that the State defendants face significant hurdles in relation to these proceedings.

Complaint is also made as to delays that have occurred in the course of these proceedings. In particular, reference is made to the difficulty in relation to the arrangement of a medical appointment for the plaintiff.

In a supplemental affidavit, sworn on behalf of the State defendants by Frederique Duchene, it is noted that the plaintiff herein through her solicitors, by letter dated the 21st November, 2007, made a request for voluntary discovery. Correspondence ensued between the parties in regard to the issue of discovery and ultimately a motion for discovery was issued on the 24th June, 2008, returnable for the 21st October, 2008. That matter is also before this Court.

The Plaintiff's Response

A replying affidavit was sworn herein on behalf of the plaintiff by Laura Downey, solicitor of Lavelle, Coleman, Solicitors, on behalf of the plaintiff. In that affidavit, Ms. Downey deals with the difficulty in relation to the arrangements for a medical examination of the plaintiff. She also set out matters in relation to the plaintiff's financial circumstances and the fact that she has to a large extent resided in England. She referred to health difficulties suffered by the plaintiff. She also set out certain matters in relation to the position of the first named defendant in these proceedings and clarified a number of errors in the grounding affidavit on the part of the State defendants. Finally, she commented that, whatever difficulties the State defendants face in relation to these proceedings former Detective Garda Canny is still available to give evidence.

The Applicable Law

The State defendants in this case seek to have the plaintiff's proceedings dismissed by invoking two aspects of the court's jurisdiction, the first, the inherent jurisdiction of the court to dismiss an action where by reason of the lapse of time involved between the events complained of and the date of trial, the defendants are no longer in a position to defend the action properly and fair trial is no longer possible and secondly, the jurisdiction of the court to dismiss an action by reason of want of prosecution. Reliance was placed on the decision in the case of *Toal v. Duignan and Others* (No. 1) [1991] I.L.R.M. 135 and the well known passage from the judgment of Finlay C.J. at p. 139 where he stated:-

"Even though, therefore, the plaintiff may be blameless in regard to the date at which these proceedings have been instituted and with regard to period of twenty five to twenty six 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 the 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] I.R. 151. I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this Court in that case, but they may be summarised in their application to the present appeal as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very lapse of time between the acts complained of 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."

Reference was also made to the Supreme Court decision in the case of *J.R. v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 748. The facts of that decision are not dissimilar to the facts of the present case and not surprisingly, in those circumstances, it was referred to *in extenso* by counsel for the plaintiff and the State defendants. The facts of that case were that the plaintiff alleged that from an early age she was repeatedly assaulted, raped and intimidated by family members. She maintained that in or around 1967, she visited Raheny garda station and complained of the abuse to members of An Garda Síochána, but that the gardaí disregarded her complaint and took no action resulting in twenty five years of further abuse. She issued a plenary summons in February, 1998 claiming, *inter alia*, damages for personal injuries by reason of the negligence of the defendants, in failing, refusing and/or neglecting to act upon the complaints made in 1967.

The defendants claimed that they were unable to defend the proceedings, as a consequence of the lapse of time between the date of the alleged wrong and the anticipated date of trial. They submitted that evidence relevant to liability was no longer available. It was submitted that if the proceedings had been instituted at an earlier stage, witnesses or records might have been available which may have existed in the defence of the action. The plaintiff's case was dismissed in the High Court on the grounds of inexcusable and inordinate delay. The plaintiff appealed against that order to the Supreme Court on the grounds that the trial judge failed to give due significance to the fact that the defendants contributed to the plaintiff's inability to bring the action promptly and that the trial judge had misdirected himself in appearing to attach significance to the absence of records available to the defendant when, if the plaintiff's contentions were correct, no records or entries would have been recorded. The plaintiff was successful in her appeal.

There are a number of facts in that particular case which I think it is worth highlighting. First, the plaintiff in her statement of claim commenced that the assaults upon her commenced around 1960. She was approximately five years of age at that stage. In or around 1967 when she was approximately twelve years of age, she claims that she visited Raheny garda station and complained to members of An Garda Síochána on at least two occasions of the abuse. No action was taken by An Garda Síochána and as a result it was alleged that she continued to be beaten, intimidated, sexually and/or indecently assaulted and raped until 1996 approximately. A significant part of her complaint was that by reason of the inaction of the gardaí, following her complaint in or about 1967, the abuse continued until about 1996. The proceedings in that case were issued on the 6th February, 1998. There was a delay in delivering the statement of claim until the 10th July, 2001.

The Statute of Limitations 1957 was not an issue in that case. Although the Statute is pleaded in these proceedings, counsel for the State defendants made it clear that for the purpose of this application it was not contended that the proceedings are statute barred. In the course of the judgement in that case Denham J. at p. 755 set out the test to be applied in the following terms:-

"The test to be applied is whether there has been inordinate and inexcusable delay, and, if so, whether on the facts, the balance of justice is in favour or against the case proceeding. It is therefore essentially a test of fairness, which is to be assessed on all the circumstances of the case, as a matter of discretion, by the Court, in the interests of justice.

The court has an inherent jurisdiction to control its own procedures and to dismiss a claim when the interests of justice so require. Concomitantly, the court has an inherent jurisdiction not to dismiss a claim when the interests of justice so require. The inherent power exists to promote the interests of justice.

Whether delay should be treated as barring the claim depends on the particular circumstances of a case. The Court must assess whether the delay is inordinate and inexcusable, and, even if it has been, whether there are countervailing circumstances.

In this case the proceedings relate to events approximately forty years ago. By any scale of analysis such a delay in proceedings is inordinate.

There is then the question as to whether the delay is excusable. This requires an analysis of the particular circumstances. It is not an analysis as was made in relation to proposed criminal prosecutions prior to the decision of this Court in *S.H. v. The Director of Public Prosecutions* [2006] I.E.S.C. 55, [2006] 3 I.R. 575 as this appeal does not refer to a criminal prosecution. Thus, neither the old nor the evolved jurisprudence, which has developed in judicial review cases relating to criminal trials for sexual abuse, falls four square into this area of law. In the analysis it is necessary to consider the particular circumstances. The defendants conduct is required to be scrutinised carefully. If it has itself contributed to the delay significantly that factor would prejudice the defendants claim to have the proceedings dismissed. In considering this aspect of the matter there are relevant factors to be taken into account."

In the course of her judgment, Denham J. then went on to look at some of the circumstances of that case. In that case the plaintiff's brother had been prosecuted in relation to the matters complained of and had pleaded guilty to a number of counts of unlawful carnal knowledge and of sexual assault. During the course of sentencing remarks the trial judge in those proceedings commented on the effect of the rejection by a number of members of Raheny garda station of her complaints. He also noted that as a result of the rejection of her credible complaints, she had been incestuously abused for a quarter of a century longer than was necessary.

Having referred at length to the comments of Carney J. in the course of his sentencing remarks, Denham J. then went on

to say:-

"The contribution of a party is a relevant factor."

She then went on to cite the passage from the judgment of Finlay C.J. in *Toal v. Duignan* [1991] I.L.R.M. 135, to which I have referred above. She emphasised one part of that passage namely, "then if that defendant has not himself contributed to the delay". Accordingly Denham J. concluded:-

"Thus, whether a defendant has contributed to a delay may be an important factor."

Denham J. then went on to consider how that applied to the facts of the case before the Supreme Court. Denham J. stated:-

"Applying that analysis to this case, while there has been a very long lapse of time, the plaintiff's case is based on a claim that the defendants contributed to her suffering. The action is essentially about delay and the consequences to the plaintiff. Thus delay is at the core of the plaintiff's case. The proceedings brought by the plaintiff raise the issue of the responsibility for that delay. The plaintiff claims that the defendants are responsible. That issue is the essence of the proceedings. This is a relevant factor in determining the motion, for the issue pleaded in the action is delay and the defendants now seeks to prevent the proceedings on the grounds of delay.

Also at the core of the plaintiff's claim is that a report (and hence record) was not made about her complaint to An Garda Síochána. The defendants have brought this motion on the basis of absence of records. I am satisfied that it would not be proportionate to dismiss the plaintiff's claim because of something which is an essence of the claim, i.e. the absence of a report."

Decision

I now want to look at the circumstances of the State defendants and of the plaintiff in this case. The State defendants make a number of complaints as to the prejudice caused to them by the delay in bringing these proceedings. There is an absence of records in relation to the investigation carried out by the gardaí in 1961/1962. The State defendants are also prejudiced by the unavailability of witnesses, most particularly by reason of the death of Detective Sergeant Nolan who appears to have been the investigating officer. The third factor complained of is that caused by the lapse of time. There is no doubt that a lengthy lapse of time between the events complained of and the trial of an action may have an adverse effect on the ability of a party to defend the action given the ability of witnesses in recollecting the events giving rise to the proceedings. That is a fact which has been recognised in many cases and is a matter of common sense.

The plaintiff on the other hand claims that as a result of the failure to prosecute the first named defendant, she suffered a further period of abuse for approximately ten years. I accept that her ability to make any complaint was significantly impaired as a result of the abuse as set out in the affidavit of Laura Downey referred to above. The plaintiff made a complaint to the gardaí at Carlow garda station in 1998, which led to the prosecution of the first named defendant but unfortunately a *nolle prosequi* was entered into on behalf of the Director of Public Prosecutions on the 13th July, 2005, given the health problems of the first named defendant, namely, that he suffered from Alzheimer's disease.

It cannot be gainsaid that the delay in commencing these proceedings on any view of the facts is inordinate. Counsel on behalf of the State defendants sought to distinguish this case from the facts of the decision in *J.R. v. Minister for Justice*. It was pointed out that in the present case, there had at least been a garda investigation following the anonymous complaint made to the gardaí at Kilkenny garda station in 1961/1962. That is so, but it is also the case that no prosecution took place as a result of that investigation and the first named defendant was able to continue his abuse of the plaintiff for a further period of approximately ten years. It is claimed that that failure to prosecute led to the situation which allowed the first named defendant to continue to abuse the plaintiff herein. In this case, the delay in bringing these proceedings is alleged to have resulted from the continued abuse of the plaintiff for ten years approximately after the anonymous complaint had been made. As set out before, it is part of the plaintiff's claim herein, as set out in her statement of claim that:-

"The plaintiff was extremely frightened, as the plaintiff was conscious of being blamed by members of An Garda Síochána, her parents and the local priest for jeopardising the first named defendant's marriage. Thereafter, the plaintiff was ostracised by her neighbours. Approximately, one month after the plaintiff had been questioned in the garda station, a member of An Garda Síochána called to the plaintiff's home and informed her that they were not charging the first named defendant. The members of An Garda Síochána further told the plaintiff's mother that the first named defendant was a good father and husband and that he regretted his actions."

Given the basis of the plaintiff's claim against the State defendants herein and having regard to the circumstances and facts of this case, it seems to me that the delay in this case in instituting these proceedings and the circumstances of this case are very difficult to distinguish from the facts of *J.R. v. Minister for Justice*. In this case as in *J.R.*, delay is at the heart of the plaintiff's claim against the State defendants. There is no doubt that on the basis of the plaintiff's claim the reason for the delay on the part of the plaintiff in instituting these proceedings, is the fact that the failure to prosecute the first named defendant led to a further ten years of abuse which impaired the ability of the plaintiff to bring proceedings.

In the course of the judgment in *J.R. v. Minister for Justice*, Denham J., as I have noted already, commented that in carrying out the analysis necessary to see where the interests of justice lie, the defendant's conduct is required to be scrutinised carefully. That comment was made in the context of the delay that allowed the plaintiff in those proceedings to be abused for a further period of twenty five years. I think that it is necessary to look at the conduct of the defendants in relation to these proceedings. I accept that the death of Detective Sergeant Nolan in 1990 and the complete absence of any records cause prejudice to the State defendants herein. Those are factors that were apparent to the State defendants following the service of the proceedings. Counsel on behalf of the plaintiff complained of the

delay in bringing the application to dismiss. By way of response, counsel on behalf of the State defendants indicated that they did not rely on any prejudice that accrued between the date of the commencement of the proceedings and the date of the issue of the motion. I have already set out a chronology of the proceedings herein. It is not necessary to do so again at this point. In the replying affidavit sworn herein, by Laura Downey, she set out further details in relation to the conduct of the proceedings including difficulties in travelling to Dublin for the purpose of a medical appointment. Part of her difficulties relate to a lack of money. Other difficulties relating to the conduct of the proceedings against the first named defendant herein are also set out, including the need to deal with the first named defendant's solicitors' application to come off record.

In considering the question of fairness and justice, I find it very difficult to understand how it could be fair or just to allow somebody to embark on difficult, complicated and costly litigation and to continue that litigation for a period of some seven years without regard to the effect on the plaintiff in terms of the stress and strain of running such litigation when an application that could have been made at an early stage to dismiss the proceedings by reason of delay is not in fact made for a period of some seven years. It is quite clear that the plaintiff has been put to considerable expense, time and effort, which might have been avoided had such an application been brought promptly. It is very difficult to see the fairness and justice in dismissing these proceedings on the grounds of delay when there has been such delay on the part of the State defendants in seeking the first of the reliefs sought herein on the motion before this Court. That was an application that could have been brought promptly following the delivery of the Statement of Claim or even, one might say, following the receipt of the Plenary Summons. There was no need to wait for seven years. Accordingly, I am satisfied that the State defendants are not entitled to the relief claimed by reason of the lapse of time between the events complained of and the trial of the action.

The second limb of the State defendant's application relates to dismissal for want of prosecution. Looking at the chronology of events in this case, I accept that there has been delay on the part of the plaintiff in the prosecution of her claim. I have already referred to her personal difficulties which are dealt with at length in Ms. Downey's affidavit. The delay could be described as inordinate but I would hesitate to describe it as inexcusable. Even if I am wrong in reaching that conclusion, I am of the view that the balance of justice favours the plaintiff. This is a case where there has also been delay on the part of the State defendants in relation to some of the procedural steps herein. Overall, given the facts and circumstances of this case, I am satisfied that the prejudice to the plaintiff in these proceedings in the event of a dismissal for want of prosecution outweighs the prejudice to the State defendants in allowing the case to proceed.