Neutral Citation Number: [2009] IEHC 496

THE HIGH COURT

Record No: 2006 6236 P

Between:

D.O'F. (OTHERWISE KNOWN AS D.F.)

Plaintiff

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

Defendants

Judgment of Mr. Justice Hedigan delivered on the 11th day of November, 2009.

1. The Plaintiff claims damages arising from alleged assault and sexual abuse by prison wardens while he was in detention in periods between 1967 and 1969 in St. Patrick's Institution and Shanganagh Prison.

2. The first named Defendant is the Minister for Justice, Equality and Law Reform, a corporation sole, and is in charge of the operation of prisons in the State.

3. The second named Defendant is the State, represented by the third named Defendant.

4. The third named Defendant is a constitutional officer who is the legal adviser to the Government and the chief law officer of the State.

5. The Defendants have brought this motion to dismiss for want of prosecution and/or for inordinate and inexcusable delay arising from the thirty-seven to thirty-nine year delay in the institution of proceedings. It is alleged that the special facts of the case are such as makes it unfair to the defendant to allow the action to proceed.

Background

6. The Plaintiff claims that he was detained in custody in the year 1967 and in the years 1968 and 1969 in St. Patrick's Institution and Shanganagh Prison. The Plaintiff alleges that he was assaulted and sexually abused in both prisons by a particular warden whom he identifies as "Fitz" and that he was assaulted by numerous other wardens. He initiated proceedings in November 2006 seeking damages in respect of this against the Defendants.

7. The Plaintiff claims that he first informed members of his family of the said abuse in 2001 as up to that time he was unable to talk about it due to the effect it had on him. At that stage, the Plaintiff claims he only partially recognized the effect the abuse had on him. Members of his family advised him to seek appropriate treatment. The Plaintiff had attended St. Anne's mental institution in Cork city throughout the nineteen-seventies and nineteen-eighties but he did not volunteer any information in relation to the alleged abuse. He did disclose the alleged abuse to a Dr. Seneviratne in the UK on 28th July, 2005. He was diagnosed as suffering from post-traumatic stress disorder.

8. On 7th July, 2004, the Plaintiff made a written request to the Department of Justice, Equality and Law Reform seeking a complete custodial record of his time spent in custody in the Irish prison service. He stated that his purpose in obtaining these records was for use in a legal capacity in the United Kingdom. The records were furnished to him by post on 15th November, 2004. It was necessary for the Department to request four institutions to search their archives and forward any documents to the Department.

9. On 31st January, 2005, the Plaintiff made an application to the Residential Institutions Redress Board. This was rejected as the institutions in which the Plaintiff had been incarcerated were not within the Board's remit. The Plaintiff then made an application to the Personal Injuries Assessment Board (PIAB) in June 2006. PIAB authorized the Plaintiff to institute court proceedings and those proceedings were instituted in November 2006. Since then, the prosecution of the Plaintiff's claim has proceeded with due expedition.

10. In his replying affidavit to the within motion, the Plaintiff exhibited a photograph taken in Shanganagh prison during the time of his incarceration there. The Plaintiff appears in the picture. The Plaintiff alleges that the warden "Fitz" also appears in the photograph. Following receipt of the Plaintiff's affidavit and photograph, Mr. Martin Smyth, Assistant Principal in the Irish Prison Service, showed the photograph to four current prison governors, all of whom have been in the prison service for many years. Three of the governors identified the man in the photograph as an officer in Shanganagh and gave his name. That name does not include "Fitz." The three governors also separately informed Mr. Smyth that they had never heard the officer in the photograph referred to as "Fitz" and that in fact he had a completely different nickname. The remaining governor initially identified the individual as being a different officer (but again not one bearing a name including "Fitz" or bearing the nickname "Fitz") to that identified by the other three governors. He then showed the photograph to a retired member of staff who had also previously worked in Shanganagh Castle and who identified the individual in the photograph as being the officer who was also identified by the three other governors. In summary, it appears that the photograph was indeed taken at Shanganagh Castle and that it consists of an officer and a number of inmates but that the officer in the photo was never known as "Fitz."

11. Mr. Martin Smyth also carried out a search of the files and records of Shanganagh prison. Those records are far from complete. A small number of the records date back to the 1970's. They contain no reference to a person whose surname contains the letters "Fitz" on the staff. Nor do they contain any reference to a "Fitz" on the staff. One of the sets of files held in storage referred to a Mr. Fitzpatrick who was stationed in Shanganagh in 1999. (The Plaintiff's allegations relate to the period 1967-1969.)

12. Mr. Martin Smyth also submitted evidence on affidavit stating that Mr. Jack O'Donovan, governor of Shanganagh prison from 1969-1971, is now deceased. His replacement as governor in 1971, Mr. John Frawley, is also deceased. Mr. Pat McFadden was appointed Acting Governor of Shanganagh prison in 1968. He is approximately 90 years of age and has resided in a nursing home for an extended period of time.

Submissions of the Defendants
13. Mr. Conor Dignam BL appeared on behalf of the Defendants who were the moving party in this motion. The delay complained of by the Defendants concerned the Plaintiff's delay in commencing proceedings. The aggregate period of delay could be broken down into two distinct periods – from the time of the alleged abuse between 1967 and 1969 and 2001 when the Plaintiff told his family of the abuse, and the period 2001-2006 until proceedings were actually issued. The law in relation to motions of this kind is well settled. Essentially, the court must engage in three-step process. Firstly, has there been inordinate delay? Secondly, is that delay inexcusable? If so, the court must determine whether the balance of justice requires the court to invoke its inherent jurisdiction to dismiss the claim.

14. Mr. Dignam submitted that the length of the delay of approximately thirty-nine years was of itself inordinate. It was also submitted that the delay was inexcusable as no sufficient excuse had been offered by the Plaintiff for the delay. His assertion that he was unable to talk about the alleged abuse until 2001 was not supported by medical evidence. There was no suggestion that the Plaintiff had been unaware of the alleged abuse and of its consequences for him. Nor was any explanation given by the Plaintiff for the change in circumstances in 2001 leading to him being enabled to speak about the abuse to members of his family. The Defendants had not contributed in any way to the delay. The lapse of time between the Plaintiff's request to the first named Defendant for documents on 7th July, 2004 and those documents being furnished on 15th November, 2004 was explained by reference to the antiquity of the records and the variety of potential sources.

15. The inordinate and inexcusable delay by the Plaintiff complained of was causing serious prejudice to the Defendants in the investigation and defence of the claim. In addition to the general risk of prejudice, there was very specific and real prejudice to the Defendants caused by the vagueness of the Plaintiff's recollection. For example, the Defendants had been unable to locate any person fitting the description of the alleged abuser - "Fitz". The photograph provided by the Plaintiff was no assistance in overcoming the prejudice caused by the delay.

Submissions of the Plaintiff
16. Ms. Eileen McAuley BL appeared on behalf of the Plaintiff. She submitted that the onus of proof lay on the Defendants to show inordinate and inexcusable delay. Here, there had been no delay by the Plaintiff subsequent to the commencement of the proceedings. The only delay complained of was prior to the commencement of proceedings. The law had shown latitude to plaintiffs in sexual abuse cases by extending the applicable limitation periods, illustrating the difficulties faced by victims in complaining of sexual abuse. Ms. McAuley submitted that the issue of pre-commencement delay raised by the Defendants should have been pursued by way of a claim that the proceedings were statute-barred.

17. Ms. McAuley referred to the decision of Clarke J. in *Stephens v. Flynn* [2005] IEHC 148 as authority for the proposition that delay prior to the commencement of the proceedings is only of relevance in assessing whether the delay subsequent to the commencement of proceedings is inordinate and inexcusable. A plaintiff who has delayed in commencing proceedings has a higher onus to move with due expedition once the proceedings have been commenced. Pre-commencement delay could not of itself ground an application for dismissal for want of prosecution and inordinate and inexcusable delay.

18. Ms. McAuley referred to a second medical report of Dr. Seneviratne, dated 19th July, 2006, as support for the Plaintiff's argument that he was unable to speak of the alleged abuse prior to 2001.

19. Ms. McAuley submitted that the Defendants could only succeed in a motion such as this one where they showed actual prejudice. The evidence before the court illustrated that the Defendants had people available to give evidence at the trial of the action. There was also documentary evidence relating to the Plaintiff's incarceration and the persons who were employed in the institutions concerned at that time. The sufficiency of that evidence should properly be a matter for the trial judge.

The Relevant Law
20. In addition to its powers under the Rules of the Superior Courts to dismiss a claim for want of prosecution (Order 27, Rule 1; Order 36, Rule 12(b); and Order 122, Rule 11) this Court has an inherent jurisdiction to control its own procedure and to dismiss a claim when the interests of justice require it to do so (*Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, at 475, *per* Hamilton CJ). The decision of the Supreme Court in *Collins v. Dublin Bus* (Unreported, Supreme Court, 22nd October, 1999) makes it clear that there are two separate bases of jurisdiction to dismiss, one flowing from the provisions of the Rules and the other flowing from the Court's inherent jurisdiction.

21. The decision of Finlay Geoghegan J. in *Manning v. Benson and Hedges* [2004] 3 I.R. 556 is further authority for the proposition that the two bases of jurisdiction to dismiss a claim for want of prosecution and on grounds of inordinate and inexcusable delay are distinct. Counsel for the defendant submitted that the court had a separate jurisdiction to dismiss a claim in the interests of justice where, by reason of a lapse of time between the alleged wrongful acts and the probable date of trial, either a fair trial cannot be conducted by the court or it would be in breach of the defendant's rights to fair procedures to require him to defend the claim. This inherent jurisdiction derived from Articles 34 and 40 of the Constitution. Finlay Geoghegan J. accepted this argument, stating that:

> *"I accept that the courts have recognized the existence of a jurisdiction to dismiss a claim by reason of a lapse of time without there being any delay in the sense of culpable delay by a plaintiff and where the requirements of what are variously described as "the interests of justice" or the prevention of "patent unfairness" or the requirements of "constitutional principles of fairness of procedure" or the risk of putting "justice to the hazard" so require.*
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> *Toal v. Duignan (No. 1) [1991] ILRM 135 was a case where the Supreme Court exercised such a jurisdiction. The plaintiff's claim (in part) was for damages for an injury allegedly suffered at birth. Approximately 25 years had passed since that time. The plaintiff was considered to be blameless for the period which had elapsed. Finlay CJ (with Henchy and Hederman JJ.), delivering the unanimous judgment of the court on several defendants' applications to dismiss, stated at p. 139:-*

> 'In the High Court it was held by Keane J. that the case was governed by the decision of this Court in O'Domhnaill v. Merrick [1984] I.R. 151. I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this Court in that case, but they may be summarized 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.'"

22. Counsel for the Plaintiff relied on the decision of Clarke J. in *Stephens v. Flynn* [2005] IEHC 148 as authority for the proposition that delay prior to the commencement of proceedings is insufficient to ground an application to dismiss where the plaintiff has moved with due expedition since the commencement of the proceedings. This decision was upheld by the Supreme Court in a judgment reported at [2008] 4 I.R. 31. Counsel for the Plaintiff referred the Court to the following passage of Clarke J.'s judgment:

> *"In Hogan v. Jones [1994] 1 ILRM 512 Murphy J. having referred to Rainsfort further approved and applied a principle stated by Lord Diplock in Birkett v. James (1977) 2 All E.R. 801 at p. 808 to the following effect:-*
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> > 'It follows a fortiori from what I have already said in relation to the effects of statutes of limitation on the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied on must relate to the time which the Plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent on the Plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued'.
>
> *Having regard to the above it is clear that inordinate and inexcusable delay in the commencement of proceedings is not, in itself, a factor though it may colour what happens later."*

23. This remark of Clarke J., and the quote from Lord Diplock in *Birkett v. James*, must be interpreted in light of their context. Both judges were dealing with applications to dismiss for want of prosecution and not pursuant to the court's inherent jurisdiction on grounds of inordinate and inexcusable delay. It appears to be the law that delay in the commencement of proceedings is only of relevance to a claim for dismissal for want of prosecution in so far as it colours the delay subsequent to the issuance of the writ. However, that statement of law is of no relevance to the court's inherent jurisdiction to dismiss a claim for inordinate and inexcusable delay on the part of the plaintiff causing prejudice to the defendant. In that respect, the court is entitled to consider all delay by the plaintiff since the events out of which the claim arises. It may be the case that the cause of action did not accrue until later, for example due to the plaintiff's lack of knowledge, and the court must have due regard to that in assessing whether the delay complained of is inordinate and inexcusable. Of course, the fact that the Plaintiff has moved expeditiously since the institution of the proceedings will be a factor in his favour, but it is only one of several factors and is by no means determinative.

24. It was accepted by counsel for both parties that the principles applicable to an application to dismiss an action pursuant to a court's inherent jurisdiction on grounds of inordinate and inexcusable delay are well settled. Essentially they are the same principles which apply to a dismissal for want of prosecution (Delaney and McGrath, *Civil Procedure in the Superior Courts,* 2001, at 382). In the present proceedings, the Defendants complain of delay by the Plaintiff prior to the commencement of the proceedings in November 2006. Thereafter, it is accepted that the Plaintiff has acted with due expedition and there is no issue of post-commencement delay. It is well-established that issues of pre-commencement delay must be afforded different treatment by the court than post-commencement delay. In the decision of *McH v. JM* [2004] 3 I.R. 385, Peart J. stated, at 395:-

> *"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] ILRM 135 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 case ought to be different."*

25. In the decision of the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151, Henchy J. laid down the following principle in respect of pre-commencement delay:-

> *"Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case. However, where, as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent. 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."*

26. This statement of the law was applied and endorsed by Finlay CJ in *Toal v. Duignan (No. 1)* [1991] ILRM 135. In relation to the test to be applied, the Chief Justice stated, at 139:-

> *"In the High Court it was held by Keane J. that the case was governed by the decision of this Court in O'Domhnaill v. Merrick [1984] I.R. 151. I am in agreement with that view of the law…[T]he principles laid down by this Court in that case…may be summarized…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."*

27. The Chief Justice then set out examples of situations where it might be unfair to require a defendant to defend an

action. He stated, at 142:-

> *"[I]t has been consistently held:-*
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> (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";
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> (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";
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> (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 on 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";
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> (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 can recall of events which happened in the past…" as opposed presumably 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."

28. In *JD and Others v. DJL, O'K and the Brothers of Charity* [2009] IEHC 422, this Court found that:

> *"the key distinction between the test for pre-commencement delay and that of post-commencement delay is that the former focuses heavily on the position of the defendant, in particular any prejudice arising as against him, while the latter places greater emphasis on the conduct of the plaintiff and whether he can provide adequate justification for any period of culpable inaction on his part.*
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> *In respect of pre-commencement delay, it is clear from the decision of Henchy J. in O'Domhnaill that a balance must be struck between the right of the plaintiffs to have recourse to the courts and the unfairness of allowing a claim of such vintage to proceed as against the defendants. In the present case and as noted above, the pre-commencement delay ranges from 6 years and 3 months to 17 years and 9 months from the last alleged incident of abuse. The case is undoubtedly one in which a heavy reliance will be placed on oral testimony, as envisaged by Finlay CJ in Toal. The inevitable fading and diminution of memory which will have arisen throughout the period of pre-commencement delay is something which weighs in favour of the defendant's application. As against this, the plaintiffs contend that they were incapable of taking action owing to the severe effect which the alleged acts of the first named defendant had upon them. While this argument is essentially one of incapacity, relating more to the issue of whether the plaintiffs' claim is statute-barred, I am satisfied that it is nonetheless a factor to be taken into account in considering the appropriate exercise of the court's inherent jurisdiction to dismiss proceedings."*

29. A relevant factor in assessing where the balance of justice lies in such cases is the international obligation of the State under Article 6 of the European Convention on Human Rights to ensure the provision of justice within a reasonable time (*Price v. United Kingdom,* judgment of the European Court of Human Rights of 29th July 2003, at para. 23). In the recent case of *Mannion v. Bergin and Others* [2009] IEHC 165, this Court stated:-

> *"This obligation must be borne in mind by the Courts when considering as in this case where the balance of justice lies as to whether to dismiss for a want of prosecution. The obligation is not merely to advance a case where necessary but may also be to prevent its continuance where, as here, it has lain dormant for a substantial period of time."*

30. I am satisfied that the requirements of Article 6 of the Convention should also be borne in mind in assessing a claim for dismissal on the basis of the Court's inherent jurisdiction where there is inordinate and inexcusable delay by the plaintiff causing prejudice to the defendant. Article 6 does of course require the vindication of the right of access to the courts, but the obligation to ensure that proceedings are determined within a reasonable period of time is also a factor to weigh into the balance.

The Court's Decision

31. I now turn to the application of these principles to the circumstances of the present case. It is clear that the events giving rise to the action allegedly occurred at unspecified dates between 1967 and 1969. Proceedings were not instituted until November 2006, though the Plaintiff did make an application to the Residential Institutions Redress Board in January 2005. Even taking January 2005 as the endpoint of the pre-commencement delay, it is a delay of at least thirty-six years. This is of itself a very lengthy period and I am satisfied that, by any scale of analysis, it constitutes an inordinate period of delay (*JR v. Minister for Justice* [2007] 2 I.R. 748, at 755).

32. There is then the question of whether this delay is excusable in the particular circumstances of the case. The reason offered by the plaintiff is that he was unable to speak of the alleged abuse until 2001, when he told members of his family who advised him to seek appropriate treatment. No explanation is offered as to the change of circumstances in 2001 which enabled him to speak of the alleged incidents of abuse. Thereafter, he took no action until July 2004 when he sought documents from the first named Defendant relating to his incarceration in Irish prisons between 1967 and 1969. He first disclosed the alleged abuse to a medical professional in 2005. His application of January 2005 to the Residential Institutions Redress Board was rejected in December 2005. The Plaintiff then made an application to the Personal Injuries Assessment Board (PIAB) in June 2006. PIAB authorized the Plaintiff to institute court proceedings and those proceedings were instituted in November 2006.

33. Counsel for the Plaintiff referred the Court to a medical report of a consultant psychiatrist of 19th July 2006 in support

of the Plaintiff's assertion that he was unable to speak of the alleged abuse until 2001. This report states that the Plaintiff had lived in denial regarding abuse for many years and had a stigma in relation to the sexual abuse. He has been unable to disclose information because it causes psychological distress and worsens his symptoms of post-traumatic stress disorder. He remains reluctant to discuss his difficulties openly. Having examined this report, I am not fully satisfied that it provides clear and unconditional support of the Plaintiff's assertion that he was unable to speak of these alleged events until 2001. It is known that the Plaintiff had attended the services of St. Anne's mental institution in Cork in the nineteen-seventies and nineteen-eighties. One might have thought that this would have provided an appropriate forum for him to address these difficulties in a confidential and supportive professional setting. Even if I were to allow the Plaintiff the benefit of the doubt in this regard, it remains the case that there was a further substantial period of delay between 2001 and November 2006, when proceedings were finally instituted. I am of course conscious of the fact that the Plaintiff did make an application to the Residential Institutions Redress Board in January 2005. This delay since 2001 is particularly objectionable when seen in the light of the fact that the events complained of were already historic in nature, dating back to 1967-1969. No excuse has been forthcoming from the Plaintiff in respect of this latter period of delay.

34. I am also mindful of the fact that the Defendants did not contribute to this delay. I am satisfied that the four month delay of the first named Respondent in fulfilling the Plaintiff's request for custodial records is adequately explained by the antiquity of the records sought and the variety of potential sources. I therefore find that the delay by the Plaintiff between the events complained of and the institution of proceedings is inordinate and inexcusable.

35. It is clear that the long lapse of time between the alleged abuse and these proceedings would of itself raise a real risk of an unfair trial for the Defendants. The case herein is evidently one in which oral testimony would be of paramount importance, having regard to the lack of documentary evidence and the nature of the case. The Defendants have pointed to specific prejudice arising from the delay, due to the fact that many of the potential key witnesses are either dead or unlikely to be able to give evidence. The Defendants have undertaken extensive inquiries and have been unable to locate any person fitting the description of the alleged abuser. The photograph provided by the Plaintiff has been of no assistance in identifying his alleged abuser. If anything, the difficulties encountered in identifying the warden in the photograph show that the recollections of any potential witnesses are likely to be severely diminished. This is prejudice of the kind which establishes a clear and patent unfairness in expecting the Defendants to defend the claim after such a substantial lapse of time. The Plaintiff's own recollection of events as apparent from the replies to particulars is somewhat hazy and vague as one would expect after such a long period of time since those alleged events. In my view to allow a trial to proceed in such circumstances would be in clear violation of the constitutional requirements of fairness of procedures and the State's international obligations under Article 6 of the European Convention on Human Rights for a trial within a reasonable time.

36. In all of the circumstances of the case, I am satisfied that this is a case where the Court should exercise its inherent jurisdiction to dismiss the proceedings on grounds of inordinate and inexcusable delay on the part of the Plaintiff causing prejudice to the Defendants.