Neutral Citation Number: [2006] IEHC 13

THE HIGH COURT

[1998/10555 P]

BETWEEN

L. O'K.

PLAINTIFF

AND
L. H.
THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND,
AND
THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice de Valera delivered the 20th day of January 2006.

1. In this action the plaintiff claims damages against the defendants for personal injuries suffered by her, subsequent to sexual assaults inflicted upon her by the first defendant in 1973, when the first defendant was the principal and the plaintiff a pupil at D. School, K., Co. C..

2. Prior to the hearing of this action, judgment (in default) was obtained by the plaintiff against the first named defendant and the plaintiff did not seek to appear, nor was he represented at the subsequent hearing between the plaintiff and the second, third and fourth defendants.

3. At the conclusion of the plaintiff's case an application was made for a direction nonsuiting the plaintiff and this was granted insofar as it was held that the Minister had no case to answer in respect of the allegations of negligence arising out of the State's purported failure to put in place appropriate measures and procedures to detect and prevent sexual abuse by the first defendant.

4. The plaintiff's plenary summons was issued on the 29th September, 1998. In her evidence, which was not contested on this point, the plaintiff stated that the acts of sexual assault, of which she complained occurred between January, 1973, and, at the latest, September, 1973, after which time she was withdrawn from attendance at the school until such time as the first named defendant was removed from his position.

5. The time difference, therefore, between the last act complained of and the initiation of proceedings is, approximately, twenty-five years.

6. In their defence the second, third and fourth defendants (hereinafter "the defendants") at paragraph 9 assert that the plaintiff's claim is barred by virtue of the provisions of the Statute of Limitations Act, 1957 and/or the Statute of Limitations Act, 1991.

7. I am satisfied, on the plaintiff's own evidence, and on the evidence of her general practitioner, Dr. O'Neill, and her psychiatrist, Dr. O'Leary, that it was not until the events of June, 1998, at the trial in the Circuit Criminal Court of the first defendant that the plaintiff realised that the psychiatric and psychological problems of which she complained could be attributed to the actions of the first defendant in the winter, spring and summer of 1973. The plaintiff's state of knowledge, pursuant to the provisions of the Statute of Limitations (Amendment) Act, 1991 is, therefore, June, 1998. In these circumstances the plaintiff's claim is not statute barred.

8. At paragraph 10 of the defence the defendants claim that because of unreasonable and undue delay it was unreasonable to expect the defendants to defend the plaintiff's proceedings.

9. In their submissions the defendants point out that the Statute of Limitations (Amendment) Act, 2000 provides, at s. 3:

> "Nothing in section 48A of the Statute of Limitations, 1957 (inserted by section 2 of this Act), shall be construed as affecting any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal."

10. It is well settled law, and there are a number of Irish authorities including *J.O'C. v. The Director of Public Prosecutions* [2000] 3 I.R. 478, that parties to litigation are entitled to a speedy trial. In the matter of *J.O'C. v. The Director of Public Prosecutions* one of the criteria (the fourth of five) enunciated by Hardiman J. (at pp. 499-500) may be summarised as stating that a court may dismiss a claim because a long lapse of time, whether culpable or not, will necessarily create an injustice, or amount to an absolute and obvious injustice.

11. Again in *Primor Plc. v. Stokes, Kennedy, Crowley* [1996] 2 I.R. 459 the Supreme Court, in applying principles relating to delay, stated at p. 475:

> "Even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case."

12. The delay in this matter is very long and might, in certain circumstances, be considered inordinate but the culpable delay is non existent; from the date of knowledge, June, 1998, to the date of issuing the plenary summons, September, 1998, there is no ascertainable delay and the defendants only allege one matter of positive prejudice in their submissions that is the death of C. S. (who, in any event, died at a time when even reasonable expedition would not have ensured his availability to give evidence if required).

13. Also, and of considerable importance, the facts of this matter are not, to any extent, at issue. The instances of sexual assault have not been contested and are not denied in the defence. The defendants rely on matters of law rather than of fact and this in the matter of undoubted delay is not a paramount factor in this action. I am satisfied, in these circumstances, that the balance of justice is in favour of proceeding with the action and that my discretion should be exercised to this effect.

14. It is the plaintiff's contention that the second, third and fourth defendants are vicariously liable for the sexual assaults perpetrated by the first defendant. The first defendant was the principal of D. School, of which school C. S. (deceased) was the manager. The selection and appointment of any person as a teacher was a prerogative of the manager as was such a teacher's appointment as principal. It was the function of the Department of Education (and hence the Minister) to pay the salary of such teachers and to ensure that they had the necessary qualifications. The Department also exercised a supervisory role in the

overseeing of teacher's activities in the school. Mr. McG., in his evidence, stated in general terms "the manager was the direct governor of the school" and I accept this as being the situation.

15. I have been referred to the unreported judgment of O'Higgins J. *in Martin Delahunty v. South Eastern Health Board and Others* (High Court, 30/07/03) by both the plaintiff and defendant's counsel. This concerns an action which has similarities to the matter under consideration, one difference being that the plaintiff was a visitor, not a pupil, to the industrial school where he was sexually assaulted by a person described as a "houseparent". Similarities included the fact that the school was managed by a religious order and staff payments were made from State funds. O'Higgins J. found that liability lay with the religious order, also finding that the "person in charge" (who was in the same position as the manager of D. School) was not appointed by or on behalf of the Minister for Education nor was she employed by the Minister's Department. It was not the function of the Department of Education to manage the institution: that function was undertaken by the religious order.

16. O'Higgins J. went on to say at pp. 39-40:

> "The functions of the Minister are not management functions. The evidence was that the ownership and the management of the school was in the hands of the religious order who ran the institution. The fact that the institution was used by the State as a means of fulfilling its constitutional obligations towards at least some of the children in the school does not automatically make the institution an agent of the State, still less an agent of the Minister for Education and Science …"

17. Applying this reasoning to the plaintiff's action herein the ownership of D. School was vested in the Roman Catholic Diocese of C. and R. which stood in a similar position to D. School as did the religious order in the *Delahunty* case to the industrial school. The State funded salaries in a similar manner in both institutions and the requirements imposed on the Department in relation to inspection were more onerous in respect of the industrial school than national schools and D. in particular.

18. I have also been referred to the matter of *Lister v. Hesley Hall Limited* [2002] 1 A.C. 215. In this matter the plaintiffs were pupils of a boarding school owned and managed by the defendants and were sexually abused by the warden of a boarding house in which they dwelt which was attached to the school. The court held (at p. 215) that "there was a sufficient connection between the work that he [the warden] had been employed to do and the acts of abuse that he had committed for those acts to be regarded as having been committed within the scope of his employment" but I accept the defendant's submission that this is an authority for a finding of liability against the school manager, not the Minister who is not in the position of employer vis-à-vis the first defendant.

19. I am satisfied that the principles enunciated by O'Higgins J. in the *Delahunty* case apply similarly to the facts in this matter and that, therefore, no vicarious liability applies to the Minister, the second defendant.

20. I also accept the defendant's submissions in relation to the plaintiff's claim for damages arising from the claim of an interference with the plaintiff's constitutional right to bodily integrity and to privacy contained in paragraph 7 of the statement of claim.

21. The defence submits that the findings of Costello P. in *W (No. 2) v. The Attorney General* [1997] 2 I.R. 141 where the learned President held, *inter alia*, that no action lies for breach of a guaranteed constitutional right where, as in this matter, existing laws protect that right, also apply to the action herein. He stated (at p. 169) that:

> "I am satisfied that the law torts which is applicable in this case was not ineffective to protect the plaintiff's constitutionally guaranteed rights. It does not follow that because a plaintiff does not recover damages under the applicable law (in this case, the law of torts) it must be ineffective in protecting guaranteed rights. It is necessary to consider why the plaintiff's claim has failed. As already explained, the applicable principles of the law of torts established that there was … [no] duty owed to the plaintiff."

22. I accept this proposition and agree with the findings of the learned President.

3. In this matter the plaintiff's claim against the second, third and fourth defendants fails because, pursuant to the applicable principles of the law of torts the second defendant is not vicariously liable for the sexual assaults perpetrated by the first defendant upon the plaintiff.