

**THE HIGH COURT**

**[1998 No. 9749P]**

**BETWEEN**

**T. M.**

**PLAINTIFF**

**J. H., J. M.**

**THE MINISTER FOR EDUCATION AND SCIENCE  
IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**Judgment delivered on the 18th day of July, 2006 by Mr. Justice Johnson**

1. The plaintiff was born on 2nd February, 1960 and resides in County Galway.
2. The first defendant is a retired or ex Franciscan Brother who was principal teacher in a national school in the County of Galway.
3. The second named defendant is joined in the proceedings in a representative capacity on the basis that he is a trustee nominee of the Franciscan Order of Ireland and is sued in that capacity.
4. The third named defendant is sued in the capacity and in respect of such supervision as he has over the running of the national school in which the first named defendant taught. The fourth and fifth named defendants are sued together with the third named defendant in that capacity.
5. Between the years 1969 to 1971 the plaintiff was sexually abused and sexually defiled by the first named defendant. The sexual abuse consisted of the first named defendant fondling the plaintiff's penis and testicles and the sexual abuse perpetrated by the first named defendant persisted and continued over a considerable period of time. The plaintiff claims damages as of the first named defendant in respect of this abuse and in respect of the consequences thereof which continues to affect him. The second named defendant it is claimed is liable in negligence and vicariously liable for the conduct of the first named defendant and a similar claim is made against the third fourth and fifth named defendants.
6. The plaintiff on the 25th day of November, 2002 obtained a judgment in default of appearance against the first named defendant.
7. The plaintiff was abused between the years of 1969 and 1972 in the school in County Galway. He took no steps to bring the matter to court or to make any claim against the defendants until after the first named defendant was prosecuted in the Galway Circuit Court for abusing children in or around 26th April, 1998 the plaintiff says and asserts that his knowledge within the meaning of the 1991 Act did not occur until after this date and the plaintiff, even at that stage, felt unable to face the court and his story was relayed to the court by the investigating garda and indeed he was only able to tell his wife of the events which took place shortly before the commencement of this hearing. Proceedings were first instituted against the first and second named defendants on 4th September, 1998 and against the other defendants on 15th May, 2001.
8. Both the second named defendant and the third, fourth and fifth named defendants have filed defences denying liability and pleading (a) the Statute of Limitations and (b) that there was inordinate and unreasonable delay in the prosecution of these proceedings. In dealing with the plea of the statute being quite clear that a long period of time has elapsed between (a) the occurrence of the incidents and (b) the plaintiff having achieved his majority the only way in which the plaintiff can avoid failing by reason of the Statute of Limitations is under the provisions of the Statute of Limitations Amendment Act, 2000 whereby under s. 40 s. 2 an amendment is introduced to s. 48 of the Statute of Limitations, 1957 as follows:

"48(a)(1) A person shall, for the purpose of bringing an action –

  - (a) founded on tort in respect of an act of sexual abuse committed against him or her at a time when he or she had not yet reached full age, or
  - (b) against a person other than the person who committed that act, claiming damages for negligence or breach of duty where the damages claimed consist of or include damages in respect of personal injuries caused by such act, be under a disability while he or she is suffering from any psychological injury that –
    - (i) is caused, in whole or in part, by that act, or by any other act, of the person who committed the first mentioned act, and
    - (ii) is of such significance that his or her will or his or her ability to make a reasoned decision, to bring such action is substantially impaired.

(2) This section applies to actions referred to in sub-section (1) whether the cause of action concerned accrued before or after the passing of the Statute of Limitations Amendment Act, 2000, including actions pending at such passing.

(3) An action referred to in sub-section (1) that but for this sub-section could not by virtue of this Act, may be brought not later than one year after the passing of the Statute of Limitations (Amendment) Act, 2000 provided that after the expiration of the period within which such action could by virtue of this Act have been brought but prior to 30th March, 2000

  - (a) a person bringing the action obtained professional legal advice that caused him or her to believe that the action could not, by virtue of this Act, be brought, or
  - (b) a complaint to the Garda Síochána was made by or on behalf of such person in respect of the Act to which the action relates."

9. Under those circumstances it is quite clear that the plaintiff in this case failed to bring action against either or any of the defendants within the time specified by the Statute of Limitations, 1957 and, indeed, the first proceedings were issued in 1998, that is after Circuit Court criminal proceedings against the first named defendant. However he had dealt with the Gardaí prior to the prosecution of the first named defendant in the Circuit Court.

10. And the proceedings were reissued against the defendants and all of them in March of 2000, liberty having been given to join the third, fourth and fifth named defendants and liberty being given to amend the pleadings.

11. Having heard the evidence of the plaintiff wherein he described the trauma through which he went and in enduring the assaults which he described. The further trauma of having his account rejected by his father and parents.

12. The further aspect of the matter being the vilification of his family and himself and the suggestion that they were liars, the glorification of the first named defendant by the local community all served to traumatise him completely so that I am satisfied that he was unable to communicate to anyone the injuries which he had suffered and the trauma through which he went. This view was copper fastened, as far as I am concerned, by the evidence of Dr. Anne Leader, psychiatrist and Mr. Eamonn Murphy, psychologist both make it quite clear that he was psychologically disabled certainly until well after the statutory period had passed. He did complain to the Gardaí the time of the trial.

13. Under those circumstances I find that the plaintiff falls within the provisions of s. 48(1) and (2) of the Statute of Limitations 2000 Amendment Act and the pleas on behalf of the defendants in respect of these matters fails.

#### **Delay**

14. Each of the defendants have also raised the question of inordinate and inexcusable delay in bringing the proceedings.

15. Whereas undoubtedly there has been a very great delay in this case I am satisfied that having regard to the evidence stated by Dr. Leader the psychiatrist and Mr. Murphy the psychologist and by the plaintiff himself that this delay was perfectly explicable and excusable having regard to the psychological condition of the plaintiff over that period of time.

16. When the plaintiff described the relationships within his own family the fact that he was unable to tell his wife of these proceedings until shortly before the case started and the emotional distress which he demonstrated in the witness box demonstrate quite clearly to me that the cause for the delay in this case was the trauma which was suffered by the plaintiff at the hands of the first named defendant and applying the principle in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. at pg. 459:-

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

17. I am totally happy in the case balance is in favour of the case proceeding.

#### **Liability of Second Named Defendant**

18. The plaintiff claims that the second named defendant is liable both in negligence and is also vicariously liable in respect of the actions of the first named defendant. I will first of all deal with the question of negligence. Whereas the second named defendant represents the superiors in the religious order of the first named defendant as it was at the time. There is no evidence whatsoever that the second named defendant had any notice of the activities of which the plaintiff complains or has any previous notice of the first named defendant's proclivities in this area.

19. There was evidence of meetings of the four mothers going to the manager but that was in 1973, after the plaintiff had left the school but there is no evidence whatsoever that the second named defendant knew what was transpiring in the national school.

20. In this regard it is very necessary to set out exactly what the relationship between the first named defendant and the national school is. The first named defendant was a member of the Franciscan Order in Ireland, he was appointed by the manager of the school C O'M to be the principal in the school under the patronage of Archbishop Cunnane the Archbishop of Tuam. He was employed by the manager of the school and his salary was discharged by the third named defendant.

21. Further there is no evidence that the second named defendant was responsible for appointment, care and control of the first named defendant as a teacher. It is quite clear from the evidence of Mr. C that in accordance with the rules of the national school's the manager of the national school is charged with the direct governance of the school and the appointment of the teachers subject to the Minister's approval their removing and conducting of necessary correspondence. Despite the opening of the case there is no evidence before the court as to any letter notice or otherwise given to the Franciscan Order, that the second named defendant represents, regarding any behaviour of the first named defendant. In fact the first and only letter of complaint was the letter of which evidence was given written by the manager C O'M to the Department of Education it was referred to by Mr. C in his evidence and that letter was not written until June of 1973, it was acted on immediately and in any event it related not to the plaintiff but to some girls involved in the class.

#### **Vicarious Liability of the Second Named Defendant**

22. It is quite clear from the evidence that there is no evidence of an employer/employee relationship between the first and second named defendants and secondly there is no evidence whatsoever of control of the first named defendant by the second named defendant.

23. That is to say no control in the course of his functions of a teacher.

24. I am quite satisfied that the assaults which took place did take place in the course of his conduct as a teacher.

25. However having regard to the fact that there is no evidence as I stated of control or employment, I feel I am bound by the decisions of Mr. Justice O'Higgins in the case of *Martin Delahunty v. The South Eastern Health Board and Others* (Unreported) of the case of *Louise O'Keeffe v. Leo Hickey and The Minister for Education and Science, Attorney General* (Unreported) 20th January, 2006, being a judgment of Mr. Justice de Valera and following the principles laid down in both those cases it is clear to me that the second named defendant is not vicariously liable for the actions of the first named defendant.

#### **Negligence of the third, fourth and fifth named defendants**

26. It having been quite clearly established by the evidence of Mr. C the inspector of schools that pursuant to the provisions of the national school regulations that the school, as was the national school in C, was under the patronage of the Archbishop who had C M

as the manager and it was the manager who did the day to day management of the school appointed the principal and carried out the correspondence as stated heretofore. The sole function of the third named defendant was to discharge the salaries ensure that the curriculum was being properly taught and no more.

27. The evidence is that the first notice the Department got of any matter to deal with the school was by letter from the manager in the middle of June 1973. It is quite clear that having received this letter the third named defendant acted with speed on it and having ascertained the facts attempted to resolve the issues.

28. The manner in which this was done of course must be, continuing to bear in mind that all of this took place in 1973 which is 33 years ago when expectations of society were, very different to what it would be.

29. With regard to vicarious liability of the third, fourth and fifth named defendants it is quite clear that:

1. They exercised no control over the actual day to day behaviour of the first named defendant and;
2. There was not an employer/employee relationship and this court will follow the decision in *Delahunty v. The South Eastern Health Board and Others* and of *L.O'Keefe v. L.H. and the Minister for Education* wherein it is clearly established that the Department of Education is not liable vicariously for the torts of a school teacher and indicating that their responsibilities was solely only extended to paying the teachers salaries ensuring they had the necessary qualifications and overseeing the teachers educational activities on occasional inspection. The Department was not in the position of employer to the first named defendant and consequently no vicariously liability attached to the Minister for Education. Under those circumstances it appears that no vicarious liability attaches to the second or the third fourth and fifth named defendants.

30. The principles laid out by Mr. Justice O'Higgins in the case of *Martin Delahunty v. South Eastern Health Board and Others* apply to the position regarding vicarious liability of both the second, third, fourth and fifth named defendants, namely from pgs. 39 and 40:-

31. 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."

32. Applying those principles to the second named defendant in my view may apply insofar as he was not involved in the management of the school and they apply absolutely to the third, fourth and fifth named defendants. They are precisely in the same situation the Minister was in the *O'Keefe* case.

#### **Assessment of Damages**

33. What is left therefore in the case is to assess damages against the first named defendant. Between the years 1969 to 1972 the plaintiff was continually abused by the first named defendant in the classroom in the presence of other people subsequently in another room, a boiler room in the school.

34. This sexual interference consisted of fondling and squeezing by the first named defendant of the plaintiff's testicles and penis.

35. On one occasion injury was caused to the penis as a result of which he went to the doctor. However in the presence of his father and the doctor he made no complaint as he was unable to do so and the doctor indicated he thought it might be a football injury.

36. This state of affairs persisted until he left the school in 1972.

37. The plaintiff was extremely psychologically traumatised and in addition by the fact that when he made a complaint to his father his father first of also sided with him and then sided against him.

38. The first named defendant when confronted with the allegations of sexual interference with other children mainly girls denied anything and when he was moved from the school he was given a hero's send off by the vast majority of the parish. The result of which was that the parents of the children who had complained were isolated and the plaintiff himself felt totally isolated as his father had now sided against him and felt he had been branded a liar.

39. This situation went on and persisted and the plaintiff was unable to bring himself to complain to anyone or to talk to anyone about this matter and he feels himself that he has lost touch to a great extent with his siblings who were also abused and feels that he has not succeeded in life to the same extent as they have or that he would have had this not occurred. So traumatised was the plaintiff by the occurrences that he was unable to talk to anyone until the late 1990s when he spoke to a Garda and made a complaint to the Garda regarding the behaviour of the first named defendant. Yet even at that time he was so traumatised he was unable to give evidence in court and the Garda gave an account of what he said.

40. His trauma was exacerbated by the fact that the first named defendant appeared to glory in the adulation of the people who then effectively boycotted anyone who stood against him the result is that the plaintiff was and I am sorry to say still is traumatised.

41. The evidence of Mr. Murphy and Dr. Leader are very telling and I think it will be some considerable time before the plaintiff feels that he can recover his self esteem or feel that he is not been held up as a liar.

42. It is very necessary to remember at all times in the course of this case that these events happened 35 to 37 years ago when there was a different atmosphere in the country. And allegations of sexual abuse at all but particularly sexual abuse against the clergy or a member of the clergy were not taken seriously if they were entertained at all and it is only in recent years when the climate has changed that people are now more receptive.

43. In this regard a claim has been made that the defendants were negligent in failing to institute proper enquiries had the enquiries embarked that a discovery might have been made or would have been made of the assaults on the plaintiff.

44. A claim is also made that if at that time counselling had been embarked that the damage which has been caused would have been greatly lessened.

45. There is no evidence before the court regarding

(a) what enquiries were available to the authorities 35 years ago

(b) what the likely result of those enquiries would be having regard to the fact that those enquiries which were made were met by a flat denial by the first named defendant

(c) there is no evidence regarding the counselling facilities which were available at that time namely 1970 without all of those it is impossible to ascertain whether or not and in those circumstances I will not make any finding against the defendants on that basis.

46. On the basis of the injuries which have been inflicted I will assess damages in the sum of €300,000 which is to include the loss of job opportunity and earnings in general damages.