Neutral Citation [2016] IEHC 635

THE HIGH COURT

[2010 No. 6773 P]

BETWEEN

HENRY KEATING

PLAINTIFF

AND

TOM RIORDAN, CITY OF CORK VOCATIONAL EDUCATION COMMITTEE AND, BY ORDER, JOHN BUCKLEY

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 9th day of November, 2016.

1. The plaintiff issued a personal injury summons on 15th July, 2010, seeking damages arising from alleged sexual assaults, including a particular sexual assault, said to have been visited upon him by the first defendant, a Roman Catholic chaplain in the school in which the plaintiff was a pupil. The first defendant was at all material times a priest in the Roman Catholic diocese of Cork and Ross, and was engaged as spiritual advisor in the school attended by the plaintiff at the relevant time operated by the second defendant. The second defendant is sued as the body responsible for the conduct of persons in authority or who might engage with students attending the school. The third defendant is the Roman Catholic bishop for the diocese of Cork and Ross and is sued as the person responsible for the admission, selection, training, supervision and education of persons admitted as priests of the diocese.

2. This judgment is given in a motion brought by the first defendant that the proceedings be struck out on the grounds that the plaintiff has been guilty of inordinate and inexcusable delay such that the defendant ought not to be subject to trial in respect of the claim.

3. The motion is supported by the second and third defendants, although each of them makes distinct and different arguments.

4. No argument or plea is made by the plaintiff that there has been a fraudulent concealment or any concealment of facts by any of the defendants.

5. The claim is fully defended by all three defendants.

6. The incidents in respect of which the plaintiff brings this claim are alleged to have arisen between September, 1964 and June, 1965, more than 50 years ago. The plaintiff was a first year secondary school student in the School of Commerce run by the second defendant in Cork City. The plaintiff was born on 28th September, 1950. He says he had a happy and normal childhood, but that during the school year in respect of which he brings these proceedings, he was persistently assaulted, and sexually interfered with and sexually assaulted by the first defendant. He sets out a narrative of these claims, and alleges that they occurred primarily in the cloakroom at school or in the school gymnasium. He says they occurred once or twice a week through the school year. He also claims that a most serious incident occurred on a school outing to Redbarn beach near Youghal, Co. Cork towards the end of the school year and says that the first named defendant sexually assaulted and raped him.

7. The plaintiff claims to have suffered serious and profound psychological injury and trauma, which has had a devastating and destructive impact on his personal, family and social life, his education and working career. He says he continues to suffer residual effects of the alleged assaults.

Inordinate and inexcusable delay

8. The defendants argue that the plaintiff has been guilty of inordinate and inexcusable delay to an extent and with an effect that the claim against each of them should be struck out.

9. Briefly, the alleged incidents occurred almost 52 years ago, the plaintiff reached the age of majority 44 years ago, 16 years have passed since the television documentary, "States of Fear" in May, 1999, the publicity from which led to an increase in the number of complaints of sexual abuse made against persons in authority. The claim was commenced 10 years after the commencement of the Statute of Limitations (Amendment) Act 2000, 8 years from the death of his mother, which the plaintiff himself explains as freeing him to engage the matters in issue in these proceedings. The last factor is of some consequence in that it is stated in one of the several medical reports obtained by the plaintiff that some sexual abuse may have occurred in the plaintiff's family home, not by an immediate family member but by a person identified as living in the family home for a period.

10. The proceedings were commenced by personal injury summons on 15th July, 2010 and the defendants claim significant post-commencement delay on the part of the plaintiff, including that it was not until the 15th February, 2011 that the plaintiff issued a motion to join the third defendant; the delay of the plaintiff in furnishing replies to particulars which resulted in a motion to compel particulars of the first defendant issued on 16th June, 2011; the order of the court made on 18th July, 2011 directing the delivery of replies to particulars; the failure of the plaintiff to furnish these particulars until 17th February, 2012, after a motion to strike out for failure; a further motion seeking replies to a notice for further particulars issued on 12th February, 2013; the failure of the plaintiff to make discovery in accordance with an order made on 15th April, 2013 which resulted in a motion issued on 17th July, 2014 by the first defendant. These are mere examples of the post-commencement delay, and mean that six years had passed at the hearing of the motion before me, from the date when the personal injury summons issued.

11. It is convenient first to set out the law governing an application to strike out proceedings on account of inordinate and inexcusable delay. A number of judgments have been delivered by Irvine J., giving the judgment of the Court of Appeal, in regard to the test to be applied by a court in the exercise of its jurisdiction to strike out. *Cassidy v. The Provincialate* [2015] IECA 74 is a convenient starting point, wherein Irvine J. clarified the difference between the two lines of jurisprudence, which fall to be considered on such an application.

12. The broad jurisdiction of the court to strike out a claim if it is satisfied that to do so is in the interest of justice was first considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] 1 I.R. 151, and as Irvine J. explained in *Cassidy v. The Provincialate*, many defendants in historic sexual abuse cases have sought to rely upon the jurisprudence arising from that authority when they would otherwise fail the more narrow test established *in Primor v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561. These cases establish that the court should engage the question of the

interests of justice by testing the interests of each of the parties and their conduct. One of the factors which is relied on, and as Irvine J. said, "may go into that scales" is whether the delay is such to give rise to a real risk that it is not possible to have a fair trial.

13. The three defendants rely on both lines of jurisprudence, and have placed emphasis on the recent jurisprudence of the Court of Appeal.

14. Each of them accepts, as they must, that the test established in *O'Domhnaill v. Merrick* imposes a higher standard of proof than that which must be met by a party seeking to strike out proceedings in reliance on a range of factors that might come to be considered under the *Primor* test.

15. At para. 37 of her judgment in *Cassidy v. The Provincialate*, Irvine J. set out the following:-

> "Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceedings if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?"

16. Irvine J. went on to say that the court should exercise "significant caution" in granting an application that has the effect of revoking the constitutional right of a plaintiff to access to the courts, and the court should be "fully satisfied" that the defendant would be placed at the risk of an unfair trial or an unjust result.

17. The decision of Irvine J. has been followed in a number of cases, by way of examples in the Court of Appeal in *McNamee v. Boyce* [2016] IECA 19, and by Twomey J. in *McDonagh v. O'Shea & Ors.* [2016] IEHC 428, where the plaintiff's claim was for damages for the alleged sexual abuse by the plaintiff while he was a student.

18. In both cases the claims were struck out as the court was satisfied that gross prejudice was likely to be suffered by the defendants. In *McDonagh v. O'Shea & Ors*. the alleged sexual abuser was dead, and the primary claim was one of rape and serious sexual assault against him. In *McNamee v. Boyce* the proceedings were struck out in reliance on the fact the defendant had been exposed to a particular prejudice in that the defendant's wife had died, and was not in a position to give evidence supportive of his defence on a number of key issues as she had done in earlier criminal proceedings.

The application of the principles to the second defendant

19. The evidence of the second defendant is compelling. In particular, it says that it has very few contemporaneous documents or records remaining in relation to the time when the plaintiff was a schoolboy. This defendant is not even in a position to say on its own records that the plaintiff had attended the school as a pupil. In a detailed affidavit on behalf of this defendant Liz Donnelly, the assistant principal officer with Cork VEC, says that there would have been in existence at one time "significant numbers and categories of documents relating to the operation of the school at the material time". She says that these may or may not have corroborated or contradicted specific claims of fact made by the plaintiff, but these are no longer available. The prejudice she asserts is direct and concrete. She exhibited a list of the type of documents that might have been available by way of school records in the 1960s, including enrolment cards, class records, staff details, details of school tours, incident report forms, public liability insurance and general school correspondence and board of management minutes.

20. The specific litigation prejudice this defendant suffers is shown by the lack of documentation. Further, the issues of contribution and indemnity between the second defendant and the other defendants, and how considerations of proportionate liability between them is to be considered, is hampered to a practical and significant degree by the absence of records "properly demonstrating the relationship between and respective roles of the school and the diocese as to the provision of chaplaincy services and appointment and supervision of the first named defendant as a teacher".

21. While there has recently come to light a prospectus for the school, believed to date from 1963-64, and which shows the staff of the school at the time, this defendant is not certain that the prospectus is complete or that it relates to those years.

22. Further, this defendant identifies from this prospectus eight teachers who are known now to be deceased, and says that the persons in authority and with responsibility for managing both the school and the diocese are also dead. This defendant also points to the fact that the plaintiff's witnesses are deceased, and in particular points to a cousin, and the plaintiff's mother, both of whom might have been available at an earlier date for the purposes of a trial, and whose evidence might have been persuasive or determinative with regard to the alleged happenings in the plaintiff's home.

23. Finally, this defendant is said, by virtue of the delay of the plaintiff in bringing the proceedings, to have lost the opportunity available by virtue of s. 35(1)(i) of the Civil Liability Act, 1961 to seek a reduction or the extinguishment of liability to the plaintiff from the abuser who would be a concurrent or joint tortfeasor.

24. I am satisfied on this evidence that the second defendant would suffer a concrete and irremediable injustice were this trial be permitted to proceed against it. It does not have at its disposal documentation and evidence, which would have been available to it at an earlier date, to defend the proceedings or to seek a contribution or an extinguishment of liability by reason of the Civil Liability Act 1961.

25. I am satisfied therefore that the stringent test *in O'Domhnaill v. Merrick* as clarified by Irvine J. in *Cassidy v. The Provincialate* is met. The litigation and evidential difficulties that this defendant has identified make it now impossible that the trial could be conducted fairly as between the plaintiff and this defendant. The result would be, as was described by Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 526 and adopted with approval by Irvine J. *Cassidy v. the Provincialate* "far removed from the form of forensic enquiry which is envisaged in the notion of a fair trial in accordance with the law of this State."

26. Fairness to this defendant cannot be guaranteed, and in the circumstances I consider that the claim against the second defendant should be dismissed.

The application of the principles to the third defendant

27. The diocesan secretary of the Roman Catholic Diocese of Cork and Ross, Tom Deenihan, swears an affidavit on behalf of the third defendant, the present Bishop of that diocese. He identifies that two previous Bishops who might have had information to assist in the defence of this trial are both deceased. He confirms that he has interviewed all surviving clergy who served alongside the first defendant in his various ministerial appointments, each of whom has "confirmed that he has no knowledge or suspicion of inappropriate behaviour on the part of the first named defendant towards any person, adult or child, at any time". He also identifies that a number of the relevant and identified parish priests and curates are also deceased and that the loss of this evidence of the "integrity with which the first named defendant exercised his ministry" is a further prejudice. This defendant also relies on the argument from the Civil Liability Act 1961 outlined above in respect of the second defendant. He suggests that no documentary or other evidence of the relationship between the first defendant and the third defendant is now available.

28. For the reasons outlined in respect of the second defendant, I also consider that the third defendant would be subjected to litigation and evidential prejudice of an extreme kind were the trial permitted to continue against him and accordingly, that the justice of the matter requires that the case against him be dismissed.

The application of the principles to the first defendant
29. The position of the first defendant is more difficult to characterise.

30. The first defendant swore two affidavits. He says in general and unspecific terms in para. 25 of his first affidavit, sworn on 19th October, 2015, "that any witnesses who may potentially have been called are deceased or otherwise unavailable at this stage". Later at para. 33, he says "most (*if not all*) witnesses other than the plaintiff and the first-named defendant are deceased at this late remove, memories will be substantially impaired by age and time and relevant documents will have lost and/or been destroyed."

31. This affidavit relies on general statements of principal from the case law and does not identify specific concrete prejudice such as would be required to come within the test of *O'Domhnaill v. Merrick* but his second affidavit does set out a number of specific concrete factors which are asserted to bring him within this test.

32. In his second affidavit, the first defendant identified a particular prejudice. A report of 6th September, 1993 from a Dr. Darra Phelan furnished in discovery by the plaintiff, states that the plaintiff was "sexually abused by a person who had lived with the family when he was growing up". This is corroborated by a medical report in 2006 from a Dr. Aidan McKenna, which states that "his godfather was sexually inappropriate to him as a child but no penetration". The plaintiff had averred in his replying affidavit that prior to the sexual assaults allegedly perpetrated by the first defendant, that he had a happy and normal childhood with "no other relevant factors", and that the reference in the medical reports to abuse within his home is an error as no such incident ever occurred, no person ever lived with his family at any time and he was not subjected to any sexual abuse from any other source. Dr. McKenna is no longer available to attend court, and is not in a position now to prove his notes. The first defendant says that this loss of exculpatory evidence which might independently "verify, confirm and add new detail" to the report of Dr. Phelan raises a specific prejudice. It is not said that Dr. Phelan is not available to give evidence.

33. The first defendant in his second affidavit says that the only surviving teacher from the school from the relevant time, Gerry Dunne, has died and that he "could have been available to provide evidence to assist the court and the first named defendant" had the delay not occurred.

34. I consider that the first defendant has not met the stringent test in *O'Domhnaill v. Merrick*. There does not seem to be any difficulty with the attendance in court of Dr. Phelan. The first defendant does not say that the last surviving teacher would have provided exculpatory or supportive evidence, but uses the term "could have been available to provide evidence" to assist the court.

35. Of more consequence however, is the fact that the first defendant clearly does not say that he himself has any frailty of memory, or any specific difficulty in remembering his time at the school. He does not say that he has no memory of the plaintiff, or of the incident alleged to have occurred on the school trip to the beach, or that the delay has been such that he himself has lost the clarity of his memory.

36. I propose in those circumstances considering the application of the first defendant by reference to the *Primor/Rainsford* test.

Application of the Primor/Rainsford test
37. There can be no doubt that the delay of 47 years in commencing proceedings is inordinate. A further six years in prosecuting the claim from its commencement is also inordinate and particularly of note in the light of the jurisprudence that a plaintiff who delays in commencing an action is under an obligation to prosecute the claim with expedition.

Does the plaintiff offer a satisfactory excuse?
38. The plaintiff offers an explanation for his failure to bring the proceedings and that it was not until 2008 / 2009 that, in the context of a life-threatening condition, and the publication of the report of the Commission of Enquiry into Child Abuse in May, 2009, that he took steps to engage with the public mental health service and to seek medical assistance and counselling to address his history of sexual abuse. He said that it was not until then that he began to disclose details of the abuse to family members. In late November, 2009 he enquired of the second defendant regarding records of his attendance at school, and after making preliminary contact with an Garda Síochána made formal statements on 15th January, 2010 and 15th May, 2010. He first consulted his solicitor in relation to this claim in March, 2010. The plaintiff says he suffers from a life-long psychiatric and psychological disability which he claims arose in whole or in part from the sexual abuse alleged against the first defendant.

39. The plaintiff explains that after he consulted his solicitor on 20th March, 2010 it took him some time to gather various items of information and documentation in relation to his education, vocational, medical and personal history. Formal initiating letters issued on 16th June, 2010. A PIAB application was made on 20th June, 2010 and the proceedings were served within a short number of weeks after they were issued on 15th July, 2010.

40. He says that his solicitor engaged with various agencies thereafter, including the HSE, An Garda Síochána, and members of the diocese of Cork and Ross and another church representative in late 2010. A further application in respect of the third defendant was made to PIAB and the order joining the third named defendant was not made until 28th June, 2011 which required him to serve an amended personal injury summons.

41. The plaintiff accepts that there were some delays in dealing with replies to particulars, but that this arose because of the "level of queries raised and extensive details sought". Some 143 queries were raised and replied to, and a further 60 or thereabouts were later raised. The plaintiff says that he resides in a rural village in North Cork, he does not drive and there is no public transport available. He is in receipt of an invalidity pension. He is somewhat immobilised by the use of two oxygen cylinders and he needs to be

accompanied when he leaves home.

42. The plaintiff's medical condition is such that he says that he finds it difficult to cope with lengthy meetings. His solicitor has attended at his home on at least two occasions. The third defendant required a medical examination by a psychiatrist prior to delivery of its defence and this took place on 17th August, 2012. Further notices for particulars issued towards the end of 2012.

43. The plaintiff agreed to make discovery on a voluntary basis to the third defendant but the discovery request of the first defendant was disputed and the matter ultimately came to be decided by O'Neill J. in April, 2013. The plaintiff says the discovery was "extensive and lengthy", and that he had to "identify multiple sources of records" spanning up to 50 years. He says that authorities had to be furnished to many of the persons and bodies from whom documentation was sought because of the Freedom of Information Acts. Discovery was furnished to the first defendant on 9th October, 2014 and the third defendant on 29th October, 2014.

44. Thereafter, the plaintiff raised a request for discovery of the second and third defendants in June, 2015 and a motion issued, returnable for 12th October, 2015, which was ultimately dealt with by consent. Discovery from the third defendant was not made until early 2016, the precise date of which is unclear to me.

45. The first defendant issued this motion on 20th October, 2015. The motion was framed in very general terms and sought a trial of a preliminary issue without specifying the issues in respect of which a preliminary trial was asserted to be appropriate. The affidavit grounding the motion refers to a multitude of issues. The motion came before White J. and he directed that the first defendant amend his motion for the trial of a preliminary issue, and that amended motion, dated 20th April, 2016, issued following an order of White J. made on 14th April, 2016.

46. While this chronology of some of the procedural events shows a considerable degree of delay on the part of the plaintiff, it also shows the extent to which this defendant caused significant delay in failing to bring this motion, and did induce the plaintiff to continue to incur litigation expenses, including obtaining medical reports and documentary records, all of which are costly and time consuming. The application of the *Primor/Rainsford* test in the circumstances leads me to the conclusion that the plaintiff's delay was inordinate, some but not sufficient excuse is apparent from the psychological and emotional frailty of which the plaintiff complains, but the excuses do not fully explain the delay.

47. In *Cassidy v. The Provincialate* it was considered that the plaintiff might have excused a delay if she could have shown that she had never escaped the dominion of her alleged abuser, or that she suffered from "a myriad of miseries" which appeared to be connected to the abuse. In the absence of psychological or psychiatric evidence to support her assertion that she suffered from difficulties which explained the delay in commencing the proceedings, the court held that the delay was not excusable. That plaintiff had been noted as having married, reared a family and held a number of positions of employment during the relevant years, and that was a factor that influenced the court in its decision.

48. The plaintiff in the present case avers to having been threatened by the first defendant with retribution if he ever told anyone about what occurred. He says he was in great fear of this defendant. He says he was unable to return to school after the end of the first year and this lead him to having serious alcohol addiction problems, and suicidal ideation, and he made at least one attempt to take his own life. He says that "until recent years" he was "unable to comprehend or rationalise the incidents of abuse" and was "unable to communicate same in any meaningful way to anyone". He says he lost his marriage, his career and all aspects of his life have been negatively affected.

49. In particular, the plaintiff says on affidavit that he was reluctant to bring the proceedings during the life of his mother because of the upset that they would be likely to cause to her. His mother died in 2002. The plaintiff went to the gardaí and other authorities only after the "States of Fear" programme, and he did not do this until January, 2010.

50. The plaintiff received formal psychiatric intervention in 1985 during his employment as a naval officer. He was given medication and spent a year in direct psychiatric care. He continued with this intervention until July, 1998 when he made an attempt on his own life. Following this, he was admitted as an inpatient to a psychiatric unit. He managed thereafter to abstain from alcohol, but did replace it with some drug use for a time. He says that he continues to suffer depression and an anxiety disorder for which he is prescribed medication.

51. The plaintiff has been under the care of a number of doctors and in the recent past he has been treated by Dr. David Walshe, consultant psychiatrist. Dr Walshe has furnished a number of reports from which it appears the plaintiff remains on medication for stress, anxiety symptoms and sleep difficulties. He suffers from an obsessive compulsive disorder. The last report of Dr. Walshe, dated April, 2016, recites that the plaintiff "continues to show psychiatric and psychological disorders, congruent with the history of physical, sexual and emotional abuse either with direct causation (PTSD) or a strong inducing and perpetuating factors (OCD, bipolar disorder, alcohol dependence)".

52. Dr. Walshe's view is that the plaintiff did not have the mental capacity to bring a legal action in his youth or adult life from a combination of his psychiatric conditions and a strong belief that it had to remain "a secret".

53. In a supplemental replying affidavit sworn on 12th July, 2016 the plaintiff confirms "with absolute certainty" that he had experienced no other instance of sexual abuse during his lifetime, save that alleged against the first defendant. He says that Mr. Gerry Dunne, the last surviving teacher identified by the first defendant, had no "particular involvement" with him while he was a student at school. He does not believe that Mr. Dunne had any particular supervisory role or was involved in any policies or procedures in the school at the time. This fact is not rebutted by the first defendant who has not identified that Mr. Dunne could have offered evidence of any specific importance.

54. I consider in the circumstances that the plaintiff's frailty of health offers additional explanation for delay, but not enough to justify the delay.

55. Accordingly my focus will be on the third limb of the *Primor/Rainsford* test, and turn now to consider the various factors identified by the Supreme Court by which a court will balance the interests of the parties.

56. It is convenient to address the elements of this test by reference to the elements explained by Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* and the various factors that must be taken into account. I will do these in sequence.

The first element: fairness

57. The first element to which a court must have regard is the implied constitutional principles of basic fairness of procedures.

Fairness must be apparent in regard to both plaintiff and defendant, and it has been established in the case law that a plaintiff's right to access to the court is not an absolute right and must be tempered with the demands of justice: see Irvine J. giving the judgment of the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206, in which she stressed the "constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures" (para. 40). In *Gorman v. Minister for Justice, Equality and Law Reform & Ors.* [2015] IECA 41 Irvine J., again giving the judgment of the Court of Appeal, stressed that the right of a plaintiff to exercise his constitutional right of access to the courts was not an unqualified right but must be balanced against the right of a defendant to protect their good name: "These specific constitutional obligations pre-suppose that litigation will be conducted in a timely fashion."

The second element: unfairness to the defendant

58. The second consideration identified in *Primor* is whether the prejudice in the special facts of the case is such as to make it unfair to the defendant. A particular prejudice identified by the defendant in this case is of a much lesser force than that identified in *Cassidy v. The Provincialate,* where the relevant alleged abuser was deceased, or in the judgment of Twomey J. in *McDonagh v. O'Shea & Ors*., where that fact persuaded him that the trial should not continue.

59. The first defendant does not complain of any frailty of memory or of health, and specifically does not aver on affidavit to the fact that he does not recall the plaintiff, that he does not recall the incident at the beach in respect of which the complaint is made, or that he does not recall attending the school tour.

60. In that regard, I consider that the judgment of Hogan J. in *I.I. v. J.J.* [2012] IEHC 327 may be distinguished. Hogan J. struck out the claim on the grounds that it rested on what he described as "bald assertions" of fact, and because he considered that there was sufficient risk of an unfair trial, where the skill in giving evidence, or an agreeable personality of a witness might be the factor that would weigh the balance. In that case, the particulars given of the incident were described as "scant", and Hogan J. noted that the plaintiff had given no particulars of where or how the abuse was alleged to have occurred in a relatively modest family home. Hogan J. was not convinced that the defendant could be afforded the necessary opportunity to disprove the plaintiff's allegation as there were no objective facts on which he could rely in defence.

61. The circumstances of the present case are different. Old medical reports from the South Lee Medical Health Services show a reference to an incident with a priest which led the plaintiff to leave school. They also show a reference to the plaintiff having been abused by a family member. That family member is deceased as is a doctor who relies on that note in his report, Dr. McKenna. However Dr. Phelan, who is the source of the note on which Dr. McKenna relied, is still alive and there is no evidence before me that would suggest he is not in a position to give evidence. The correctness of the plaintiff's explanation of the nature of the note in which this entry is contained is capable of being tested in cross-examination, whether with the benefit of the evidence from Dr. Phelan or otherwise.

62. The plaintiff has particularised the incidents in respect of which he brings this claim, and they are not vague assertions of events which are neither concrete nor specific. The plaintiff explains the geography of the school, refers to an incident which occurred in the store room and the gymnasium, and explained why the plaintiff would have used that cloakroom for the placing and removing of his coat and other items. The plaintiff is specific in the details of the alleged physical assaults, and threats, and with regard to the incident at Redbarn beach, describing an allegation that the first defendant pursued him into the water initially and then away from the beach and forced him to the ground in an isolated area off the beach. The details of the assault in that case are concrete and specific. He is specific also as to the time of year when this occurred.

The conduct of the defendant

63. The conduct of the defendant is a factor identified by the Supreme Court in *Primor*. The Court of Appeal found in *Cassidy v. The Provincialate* that the defendant had not been guilty of delay and had not induced the plaintiff to incur unnecessary expenditure in the preparation for trial. I am also mindful of the fact that Irvine J. in *Gorman v. Minister for Justice, Equality and Law Reform & Ors*. held that the fact that the defendants moved to dismiss the claim only when the plaintiff sought consent to the reinstatement of trial did not "in itself afford any ground for valid complaints". It is however a factor to be weighed.

64. I consider that the circumstances in the present case are materially different from those in *Cassidy v. The Provincialate*, and that the need for a second motion can fairly be said to be the responsibility of the first defendant. I also consider that the first defendant delayed inordinately in bringing the motion to dismiss, and the summons had issued on 15th July, 2010, more than 5 years before the motion seeking to dismiss. In the meantime this defendant had brought a motion to compel the plaintiff to reply to particulars, a motion seeking an order to strike out the claim for failure to reply to particulars. A defence was served on 1st May, 2012, more than 3 years before the motion to strike out was brought. A further notice for particulars and a motion compelling replies to these was issued by this defendant, a motion for discovery, and a motion to strike out for failure to make discovery were later brought.

65. The fact that the defendant induced the plaintiff to incur further expenses in pursuing the action is not a factor which would of itself amount to an acquiescence or raise an estoppel, but the fact is that six years have now passed since the proceedings issued, and blame cannot be laid fully at the feet of the plaintiff. The behaviour of the first defendant is a factor to be weighed in the balance in the present case.

66. If one takes some account of the failure of the defendant to prosecute this motion with expedition, and to raise a number of procedural steps in the course of the litigation between 2010 and 2015, the plaintiff's delay in bringing this case if tested against the date of the transmission of the "States of Fear" documentary is relatively modest. That is not to say that a plaintiff must not move with due expedition when litigation is commenced long after an alleged incident of abuse, as in the present case, but insofar as the broadcasting of the "States of Fear" documentary is described by the plaintiff as an event which gave him courage to pursue the claim and make complaints to the gardaí, the delay thereafter is only partially attributable to blame on his part.

The other factor: prejudice generally

67. This litigation is not, as argued by the first defendant, a "documentary case", and will be decided on the oral evidence, and the evidence of the medical witnesses. The defendant cannot show the loss of the evidence of a crucial witness. The circumstances giving rise to the dismissal of a claim in *McNamee v. Boyce* are different in that the wife of the defendant who might have offered evidence in his defence was deceased.

68. I am not satisfied, weighing all of the factors, that the interests of justice require that I dismiss this case. The first defendant can show some prejudice by the continuation of the case, but the balancing of justice between the parties, bearing in mind the plaintiff's own physical and mental frailty, and the fact that the defendant does not offer any averment that he does not recall any incident with this plaintiff, is such that I consider the matter should proceed to trial.

69. Therefore I refuse to make the order striking out the claim against the first defendant.

The Statute of Limitations
70. The first defendant also seeks that the claim be struck out on the grounds that it is statute barred. The first defendant accepts that the relevant statutory provisions are s. 2 of the Statute of Limitations (Amendment) Act 2000, and the plaintiff failed to bring proceedings within the period provided by that Act. The plaintiff claims he was under a disability "until shortly before" proceedings issued on 15th July, 2010 He claims that he suffered and he continued to suffer from a psychological injury that was of significance and sufficient to impair his will and his ability to make a reasoned decision, and in those circumstances to have been under a disability as identified in s. 48A of the Act of 2000. He relies on *R.R. v. P.D. & Ors*. [2007] IEHC 252. That judgment is of relatively little assistance to me however, in that Johnson P. had heard oral evidence from the plaintiff and medical witnesses on the trial of a preliminary point.

71. It is clear that the onus is on a plaintiff relying on s. 48A of the Act of 2000 to establish the necessary factual basis on which the plaintiff will rely to defeat a defence that a claim is statute barred. This is clear from a number of cases and in particular the Supreme Court decision of *Doherty v. Quigley* [2015] IESC 54 where the Court held that it had to make decisions of fact and law "to be decided by the trial judge in the ordinary way on the balance of probabilities".

72. The plaintiff has furnished a significant volume of psychiatric, psychological and medical evidence in support of an argument that he has long suffered and still suffers from a disability. Some details are narrated earlier in this judgement. The first defendant has not exhibited any medical evidence. The first defendant relies in argument on the fact that the plaintiff has pleaded and said on affidavit that it was not until his mother died in 2002 that he felt that it was sufficiently appropriate within his family to make a claim of abuse. The eight years between 2002 and 2010 are argued by the first defendant to be unexplained years during which the plaintiff's litigation disability no longer existed. The evidence of the plaintiff contains a different emphasis. The plaintiff has pleaded that he was extremely ashamed of his experience and tried to repress it for many years. The mere fact that this first defendant can point to the death of the plaintiff's mother as a matter which released him from some of his shame and repression is not in my view sufficient to enable me to deal with the Statute of Limitations without hearing oral evidence. The plaintiff has adduced medical evidence of the effect of that shame, and also relies on the date of the broadcasting of the "Sates of Fear" programme as a date from which he began to be relieved of his shame and fear.

73. I consider that it would be wrong as a matter of principle for me to hold that the claim is statute barred in the absence of hearing the plaintiff and any relevant medical witnesses.

74. For that reason, I refuse on this interlocutory motion, and in the absence of oral evidence, to dismiss the claim on the grounds that it is statute barred on the evidence.