THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA

Appeal No. 2016/394

Peart J.
Hogan J.
Baker J.

BETWEEN/

ANTHONY MCDONAGH

PLAINTIFF/

APPELLANT

-AND-

JOHN O'SHEA, MINISTER FOR EDUCATION & SCIENCE, WESTERN HEALTH BOARD, IRELAND AND THE ATTORNEY GENERAL

DEFENDANT/

RESPONDENT

JUDGMENT delivered on the 2nd day of October 2018 by Ms. Justice Baker

1. This is an appeal from an order of Twomey J. of 27 July 2016, where he determined that the action against the first defendant be dismissed on the grounds that the first defendant was unable to obtain a fair trial by reason of the lapse of time between the alleged events the subject matter of the proceedings and arising from the death and consequent unavailability of a critical witness alleged to have sexually abused the plaintiff.

Material facts
2. The facts may be briefly stated. The plaintiff was a day pupil in a primary school run by the religious order of the Brothers of Charity at Renmore, Galway, between the ages of 8 or 9 and 12 years. The plaintiff alleges physical and sexual assault by a member of staff known to him only as "Brother Jim". The plaintiff also alleges that he was physically assaulted and mistreated by another identified member of the school staff who was the principal of the school.

3. The first defendant is a representative defendant nominated for the purposes of representing the Congregation of the Brothers of Charity in the proceedings.

4. The statement of claim pleads that the plaintiff was physically and sexually assaulted on two particular occasions by a member of staff identified as "Brother Jim". From the affidavit evidence it appears reasonably likely that the relevant person was a Brother G., who died on 2 September 2011. The trial judge determined that the Brother Jim to which the pleadings refer was Brother G., the person identified by the affidavit evidence of the first defendant, and that finding was one made following an analysis of the facts and is, in my view, a reasonable inference from those facts. There being no other alternative candidate to fit the description of the alleged sexual abuser, I consider that Twomey J. was correct to deal with the application on the basis that the alleged assailant is the person so identified and that he died in September 2011, approximately ten years after the proceedings commenced.

5. The plaintiff also pleads that having told the principal of the school of the sexual assault or assaults he was beaten and physically assaulted, and that he was then throughout the balance of his school years, repeatedly "picked on" by this member of staff and singled out for severe physical abuse. The plaintiff pleads that "this type of beating" was regular until he left school.

6. The claim is for damages for assault and battery, for physical, sexual, and psychological abuse, and for damages for negligence, breach of duty, *inter alia*, arising from a failure to have any effective supervision investigation of mistreatment within the school and failure to operate a school where the safety and bodily integrity of the plaintiff would be protected. The claim, then, is made on account of alleged direct assaults and on account of the vicarious liability of the defendants as owners, operators, or persons responsible for the management of the school.

7. The claim against the third defendant, the Western Health Board, was discontinued in December 2006. The State defendants are not parties to the motion or this appeal.

Chronology
8. The plaintiff was born in 1965 and is married with five children. Between the ages of approximately 8 and 12 years he attended a school in Renmore, Co. Galway, operated by the Brothers of Charity and left at the end of his primary schooling.

9. The sexual assaults which form part of the subject matter of the proceedings are pleaded to have occurred, therefore, some time before the plaintiff left school in 1980, some 20 years before the plenary summons issued on 18 June 2001. It should be noted for that purpose that the proceedings were instituted shortly after statutory change brought about the insertion of s. 48A to the Statute of Limitations Act 1957 by s. 2 of the Statute of Limitations (Amendment) Act 2000 which extended the limitation period in respect of claims founded on tort in respect of acts of sexual abuse committed against a minor. The present appeal does not concern the question of whether the plaintiff's claim is statute barred but for present purposes I consider it correct that the appeal should be determined on the basis that the plaintiff did move to institute these proceedings within a reasonable time of the commencement of that amending legislation.

10. An appearance was entered by the various defendants without any obvious delay and a statement of claim delivered on 23 July

2001. No complaint can be made regarding the contents of the statement of claim which plead detailed acts of alleged assault, battery, and trespass, of alleged personal injuries, and of alleged negligence and breach of duty against the first defendant.

11. The first defendant served his defence almost four years later, on 7 April 2004, two days after serving a notice for particulars on 5 April 2004 which was promptly replied to by the plaintiff, on 20 July 2004.

The judgment of the High Court
12. Twomey J. delivered a considered written judgment on 25 July 2016, *McDonagh v. O'Shea* [2016] IEHC 428, in which he determined that the proceedings be struck out in reliance on the principles set out in the decision of the Supreme Court in *O'Domhnaill v. Merrick* [1984] IR 151 as considered by this Court in *Cassidy v. The Provincialate* [2015] IECA 74.

13. Twomey J. expressly determined to consider the application on the grounds that the plaintiff had been guilty of inordinate and inexcusable delay, and that the first defendant had suffered extreme prejudice as a result and could not now obtain a fair trial.

The reasoning of the judge of the High Court

14. Twomey J. struck out the claim of the plaintiff on the grounds that he considered that to allow the trial to proceed would result in the "grossest imaginable prejudice", quoting Hardiman J. in *Whelan v. Lawn* [2014] IESC 75, the prejudice arising from the fact that Brother G. is deceased. Twomey J. took the view that there was "substantial risk of the first named defendant getting an unfair trial or an unjust result if the trial in relation to the alleged sexual abuse against Brother Jim G. and the alleged physical abuse against Mr Carey, were to proceed", at para. 31 of his judgment.

15. In coming to his conclusion, Twomey J. made the following determinations:

> "• The case before this Court is primarily one of rape and serious sexual abuse against an alleged sex abuser.
>
> • It is a case where the basic facts are disputed between the parties as evidenced by the fact that in their defence filed in 2004, the Brothers of Charity have a full denial of all the alleged acts of abuse.
>
> • The alleged sexual abuser is, it seems, dead.
>
> On these grounds alone, it seems to this Court that it would, to quote Hardiman J. be the 'grossest imaginable prejudice' for this Court to allow a trial to proceed which would consider whether this man abused the plaintiff. In addition, however, it is relevant to note that:
>
> • It is at least 36 years since the alleged sexual abuse by Brother Jim G and the alleged physical abuse by Mr. Carey took place, which is such a long time it must raise the risk of there being an unfair trial or an unjust result.
>
> • The delay in progressing the proceedings, once commenced in 2001, is not the primary responsibility of the first named defendant, and in particular the almost seven year period between December 2006 and September 2013, when nothing was done to progress this trial, is the primary responsibility of the plaintiff.
>
> • The delay of over 2 ½ years in the filing of the defence is the primary responsibility of the first named defendant, but in the context of the 36 years since the events occurred, it is not such a delay as to justify the Court in permitting a trial to proceed where there is a risk of it being unfair or achieving an unjust result.
>
> On this basis this Court concludes that there is a substantial risk of the first named defendant getting an unfair trial or an unjust result if the trial in relation to the alleged sexual abuse against Brother Jim G and the alleged physical abuse against Mr Carey, were to proceed and so dismisses all these proceedings."

16. The death of Brother G. was the primary determining factor in the reasoning of Twomey J. He, correctly in my view, took the view that the period of inactivity, which he said ranged between seven and ten years, was not the "primary responsibility of the Brothers of Charity", notwithstanding that, as he noted, they could have filed a notice of motion to dismiss sooner. I agree with him that the inaction on the part of the Brothers of Charity would not in itself be a reason to refuse the relief. Twomey J. also noted the delay of at least 21 years between the alleged abuse and the commencement of the proceedings in 2001 and expressed the view that the "antiquity of the claim at that stage" impressed an onus on the plaintiff to progress the matter quickly. Twomey J. did not consider that the delay of the Brothers of Charity in serving a defence, calculated by him as two years, but more accurately, two years and nine months, was material in the light of his determination that there was a substantial risk of an unfair trial or an unjust result.

Did the High Court apply the correct test?
17. Counsel for the plaintiff/appellant argued that the trial judge fell into error in determining the matter on the basis of the test in *O'Domhnaill v. Merrick* and that the correct approach ought to have been to apply the three-part test established in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 IR 459 and *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561 ("the *Primor/Rainsford* test") by first engaging the question whether the delay of the plaintiff in prosecuting the claim had been inordinate, whether the delay could be excused, and ultimately determining the question of where the interests of justice lay by testing the interests of each of the parties and their material conduct. On such test, the risk that it is not possible to achieve a fair trial is one factor that, as Irvine J. said in *Cassidy v. The Provincialate*, at para. 30, "may go into that scales", but is not determinative:

> "[…] the third leg of the *Primor* test requires the court to carry out a balancing exercise in the course of which it will put the interests of each of the parties and their conduct into different sides of a scales for the purpose of deciding whether the balance of justice favours allowing the case to proceed to trial. In this regard it is to be noted that **one** (emphasis added) of the factors that may go into that scales is whether the delay relied upon gives rise to a real risk that it is not possible to have a fair trial. This question however constitutes the sole consideration of the court when engaged with the alternative line of jurisprudence to which I will now refer."

18. In the course of his oral submissions, counsel for the first defendant/respondent accepted that the test from *O'Domhnaill v. Merrick* involves the court primarily considering pre-commencement delay. Irvine J., in *Cassidy v. The Provincialate*, at para. 32, set out the matter as follows:

> "While the *Primor* jurisdiction is usually exercised in proceedings where there has been post-commencement delay or a combination of pre- and post-commencement delay, the *O'Domhnaill* jurisdiction is most usually employed where, at the

time the application to dismiss is brought, such a significant length of time has elapsed between the events giving rise to the claim and the likely trial date that the defendant can maintain that, regardless of the absence of blame of the part of the plaintiff for that delay, it would be unjust to ask to the defendant to defend the claim. The question most commonly considered by the court when exercising its *O'Domhnaill* jurisdiction is whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result."

19. I consider that the application in the present case ought to have been considered in the light of the *Primor/Rainsford* test primarily because the basis of the defendant's argument is that the loss of the vital evidence as a result of the death of Brother G. now means that there is a real and substantial risk the trial will be unfair. It is events since the initiation of the proceedings that are alleged to give rise to prejudice sufficient to make an unfair trial likely. The first defendant's grounding affidavit, at para. 17, makes it clear that it is the death of the witness, the alleged perpetrator of the sexual assaults, which now makes it:

> "[…] effectively impossible for the first defendant to defend this claim which relates to events alleged to have occurred almost 40 years ago, particularly having regard to the death of the alleged perpetrator".

20. Had the motion to dismiss been brought soon after the proceedings commenced in 2011, the basis of the application would have been the *O'Domhnaill v. Merrick* test and it is likely that the social and personal disadvantages of which the plaintiff suffers could have tipped the balance in favour of the continuation of the action.

21. It seems to me that the test in *O'Domhnaill v. Merrick* was not the appropriate starting point for the treatment of the first defendant's application, and I note too that the first defendant engaged in the litigation up to the service of a defence, that the plaintiff recommenced his own activity on 3 September 2013 by seeking that the defendants would make voluntary discovery, and an order for discovery was made on consent on 27 September 2015 and the first defendant has now made discovery. The engagement between the first defendant and the plaintiff in this time, in my view, make it unfair to strike out the claim merely on account of the delay and because the alleged prejudice is said to have crystallized on the death of the alleged perpetrator in 2011.

22. Counsel for the first defendant/respondent accepted that the application could fairly be dealt with under the *Primor/Rainsford* principles, that the delay of the plaintiff had indeed been both inordinate and inexcusable, and that the death of Brother G. has so utterly changed the landscape that the first defendant is irremediably prejudiced by the delay in bringing the case on for trial. It is pointed out that the post-commencement delay since the proceedings instituted in 2001, the bringing of this motion in late 2015, and the fact that no step of any consequence was taken by the plaintiff in the seven years between 2006 and 2013 has resulted in a loss of critical evidence amounting to sufficient prejudice to justify the decision of the High Court.

The question of State indemnity

23. A matter said to be of some significance in the course of the affidavit evidence was the fact that the Chief State Solicitor came on record for the first defendant on 16 May 2005 and served a notice of change of solicitor on the solicitor for the plaintiff. The circumstances were the subject matter of a contested motion dated 2 April 2015 and heard by Kearns P. that Hayes Solicitors be permitted to come off record on behalf of that defendant.

24. The Chief State Solicitor came on record on behalf of the first defendant following the invocation of the Indemnity Agreement of 5 June 2002 concluded between the Minister for Finance, the Minister for Science, and, *inter alia*, the Congregation of the Brothers of Charity by which the State, for the consideration and on the conditions therein set out, agreed to indemnify each of the contributing congregations therein described in respect, *inter alia*, of an award or settlement under the Residential Institutions Redress Act 2002 ("the 2002 Act") or any determination of any court, award, or settlement arising from the rejection of an award made by the Board or Review Committee, established under the 2002 Act ("the Residential Redress Board").

25. The school which the plaintiff attended was not an institution to which the 2002 Act originally applied but the Scheme set up under that Act was extended to the school under S.I. 518/2005, the Residential Institutions Redress Act 2002 (Additional Institutions) Order 2004.

26. Thus, from 2005 until early 2015, the State defendant had assumed, or had appeared to assume, responsibility for dealing with this action of the plaintiff and the proceedings and all paperwork associated therewith is shown to have been transmitted to the Chief State Solicitor's Office as part of a bundle of 36 cases against the school.

27. In early 2015, Hayes Solicitors, who were instructed by the State defendant, sought to come off record for the first defendant and that motion was resisted by the Brothers of Charity on the grounds that the State was estopped from withdrawing its indemnity to the first defendant which had not had carriage of the proceedings in ten years and when the State had, it was believed, been conducting the defence of the proceedings.

28. Ultimately, an order was made by Kearns P. in the High Court on 8 October 2015 permitting the State to come off record, but he expressly directed that the plaintiff not be prejudiced by the order he made. No record of the reasoning of Kearns P. was available for the hearing of this appeal but it seems correct, in principle, that the plaintiff ought not be prejudiced by the two years, or the almost two years, that it took for the question of indemnity between the defendants and the matter of which solicitor should represent the defendants was determined.

29. I propose to consider this appeal on the basis that the relevant delay by the plaintiff must be seen to be the delay between the last pleading against this defendant in April 2004 and the letter of the plaintiff seeking discovery sent to the Chief State Solicitor on 3 September 2013, and in respect of which a reminder letter was sent one year later, in September 2014. Any delay between the request for discovery and the reminder cannot be blamed on the plaintiff, who continued to believe that the State was acting for all the defendants. In the light of the averments contained in the affidavits grounding the motion to come off record, I consider that the solicitors representing this defendant were not prepared to take any steps in the proceedings until the question of the indemnity and representation was determined.

30. Another element that must be considered in the mix is that the State established a "Residential Redress Scheme" by which compensation was offered to alleged victims of sexual abuse without a need to establish liability, and the plaintiff did engage with the Residential Redress Board in 2005 and 2006, although it subsequently transpired that the Residential Redress Scheme did not extend to him as he was a day pupil in the school and not a "resident" to which the Residential Redress Scheme applied.

31. Twomey J. dealt with the matter on the basis that there was what he described as a "almost seven-year gap during which time absolutely nothing happened." The evidence in the psychiatric report exhibited in the affidavit of the plaintiff's solicitors show that something did indeed happen during that period, albeit it was the plaintiff's engagement with the Residential Redress Scheme.

The application of the *Primor/Rainsford* test
32. Having regard to the view that I have taken that the matter is to be determined on the *Primor/Rainsford* test, I propose considering the test from those authorities. The first consideration is whether the delay has been inordinate. The plaintiff conceded before Twomey J. that the delay was inordinate and that concession was, it seems to me, properly made.

33. The next step is to consider whether the plaintiff can excuse the delay. The uncontroverted evidence on affidavit is that the plaintiff suffers from a number of serious and incapacitating conditions, including the fact that he is what Twomey J. described as "mildly mentally handicapped". However, it is the plaintiff's illiteracy and his incarceration that are advanced by the plaintiff himself as the primary excusing factors.

34. Notwithstanding that he finished school at age 12 or thereabouts, the plaintiff is illiterate, and his illiteracy is described by his solicitor as being such that he is "unable to deal with any correspondence without assistance". His solicitor describes him as having the most "severe reading and writing difficulties" and as being "completely illiterate".

35. Twomey J. did not consider that the plaintiff's illiteracy taken alone was in itself an excusing factor. I am of the view that he was correct as the plaintiff has at all material times been legally represented, so that his profound illiteracy would not on its own amount to an excusing factor.

36. However, the plaintiff has been incarcerated since 2008 as a result of having been convicted of a serious assault on a person whom he says assaulted his 14-year-old daughter. He explains his approach to his children's wellbeing as being "protective, hyper vigilant and alert" by reference to the report of his consultant psychiatrist, who describes him as being "over protective". The plaintiff himself, in his affidavit, directly attributes the assault and subsequent conviction to what his psychiatrist describes as an "overreaction". The plaintiff's psychiatrist believes him to have genuine remorse for the assault.

37. It is the lack of support in the various prisons in which the plaintiff has been detained that forms the basis of the plaintiff's assertion that his delay in prosecuting the claim may be excused. He describes being imprisoned in a series of prisons, in none of which he received intervention or support and which he describes as being "unsettling and difficult". He says that he suffered from "intrusive thoughts about the abuse and it is constantly in my mind", and that the thoughts had been "worsened by being alone in my cell and not being in a position to take substances to make it 'go away'".

38. The plaintiff was moved to the Loughan House open prison in late 2012 or early 2013. There he was referred to an addiction counsellor by the authorities in that prison and there he engaged in classes and productive work several days a week. He was prescribed antidepressants and says that he kept busy and this has been beneficial to his wellbeing. The plaintiff is now on temporary release from prison.

39. The facts show that the plaintiff has been since 2013 in a position to attend medical appointments and to attend his solicitor to update particulars of personal injury.

40. The relevant dates coincide with the reactivation of the proceedings by the solicitor for the plaintiff in September 2013, when a request for voluntary discovery was made by letter. At that point in time, the plaintiff had come to have sufficient supports to enable him, as he puts it himself, to "keep my mind off the abuse". The precise date when the plaintiff was admitted to Loughan House is not clear but he describes himself as being in that prison for almost three years in January 2016. The solicitor for the plaintiff, in his affidavit, avers that the ability of the plaintiff to prosecute his claim "was greatly impeded by the plaintiff's psychological injuries, addiction problem and illiteracy, which were caused and/or seriously contributed to by the acts of sexual and physical abuse complained of in the within proceedings." He avers that the post-commencement delay "was further impeded by the plaintiff's incarceration". He says the case is now ready to proceed and, in that regard, I note that the proceedings were set down for trial on 7 November 2015.

41. The plaintiff does not make the argument that his engagement with the Residential Redress Board in 2005 and 2006 is an excusing factor, and indeed the plaintiff's solicitor, in his affidavit, argues that the engagement between the defendants regarding the question of indemnity is not relevant to the matters at issue in the present motion, and I agree. In the course of the appeal before this Court, the plaintiff/appellant's counsel argued that the plaintiff was entitled to treat the case as being one where liability was admitted on account of the fact that the State took over the defence of the proceedings on behalf of the Brothers of Charity as early as 2005 when the action was before that being prosecuted with moderate expedition, and that this must be a factor bearing on the excusability of the delay. Without a positive averment from the plaintiff himself or from his solicitor, I consider myself unable to deal with the matter on that basis, and the precise engagement that the plaintiff had with the Residential Redress Board in 2005 and 2006, or whether that engagement might have led him to an understandable, albeit perhaps incorrect, view that the claim was being dealt with under a no-fault scheme is not explained.

Conclusion on whether delay was excusable
42. The trial judge took the view that the fact that the plaintiff had received a 12-year sentence means that it "seems clear that he must have been guilty of a most serious assault", and rejected the suggestion that that conviction arose from any matter for which the Brothers of Charity might be responsible. The trial judge did not expressly deal with the evidence of the plaintiff himself which links his assault to his hyper-vigilant and overprotective care of his daughter, but more especially the trial judge did not alert himself to the absence of any meaningful treatment or psychological or medical assistance during the period of incarceration up to late 2012 or early 2013 when the plaintiff was admitted to Loughan House, and thereafter during the period of temporary release.

43. I consider that the plaintiff/appellant has explained his delay in dealing with the proceedings between 2008 and 2013 on account of his illiteracy and his undoubtedly very difficult experience in prison. In this, the plaintiff may be distinguished from the plaintiff in *Cassidy v. The Provincialate*, at para. 44, where Irvine J. considered that there was "no sound evidential basis" for the finding of the trial judge on the excusing factors. I do not consider it necessary to determine whether a reasonable basis has been established to link the matters in respect of which the plaintiff has been convicted with the alleged abuse, as I consider that the plaintiff's illiteracy and inability to deal with correspondence without assistance did, as is asserted, make it impossible or, at least, grossly difficult for him to engage with the litigation while he was in prison and not receiving any assistance or treatment. The matter changed and his engagement is now not to be faulted, and I do not regard it as in any way coincidental that the plaintiff's admission to Loughan House and his engagement with medical, psychological, and counselling services offered by that institution, as well as his present day release, have made it now possible for the plaintiff to proceed to prosecute his claim.

44. Therefore, I am of the view that the trial judge erred in failing to consider the question of whether the plaintiff's delay was excusable, and I consider that the plaintiff has offered a good and excusing reason for his delay between 2008 and 2013. In this regard, I note the observation of Denham C.J. in *McNamee v. Boyce* [2017] IESC 24, [2017] 1 ILRM 168, at para. 61, that the fact

that the defendant had been in prison for part of the time in which delay is alleged to have happened was "a factor" albeit not a "decisive factor".

45. There remains the difficulty, however, that the first defendant claims to have suffered the gross and irremediable loss of a vital witness amounting to a prejudice which meets the test in *O'Domhnaill v. Merrick* to which I now turn.

The test in *O'Domhnaill v. Merrick*: Prejudice
46. In the course of her judgment in *Cassidy v. The Provincialate*, Irvine J. observed that prejudice of a sufficient degree may still tip the balance in favour of dismissal, even where a plaintiff can excuse delay.

47. She stated as follows, in *Cassidy v. The Provincialate*, at para. 37:

> "Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O'Domhnaill* jurisprudence. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the Primor test. Proof of moderate prejudice will not suffice. 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?"

48. I consider this to be the correct approach in the present appeal, having regard to the prejudice suffered to the defence by the death of Brother G.

49. It is established, in the case law, and most particularly in the recent decision of the Supreme Court in *McNamee v. Boyce*, that the loss of a vital witness is a sufficient prejudice to tip the balance of justice in favour of the dismissal of an action. In that case, the defendant had been convicted on one count of sexual assault of the plaintiff which was affirmed on appeal and in respect of which he was given a custodial sentence. The plaintiff's claim was commenced by plenary summons two years later and was renewed and finally served some 18 months after issue. Before a statement of claim was served, the defendant's wife died. It was the death of the defendant's wife who had been an important witness in the criminal proceedings that led the Supreme Court to the view that the proceedings had to be dismissed as the "credibility of the defendant's wife was an important issue in the case" and the prejudice to the defendant could not be dealt with by the admission of her evidence in the criminal trial. Of critical import to the decision of the Supreme Court was that an amended statement of claim was served 11 years after the proceedings issued in which particulars of a much more serious alleged sexual assault were pleaded and which amounted to what the Supreme Court described as "more extensive allegations". The Court considered that the plaintiff's wife, had she been available, "almost certainly would have some evidence to give relevant to those incidents" and that the outcome of the criminal trial and the fact that the defendant had been convicted would unfairly advantage the plaintiff in the test of credibility.

50. The Supreme Court took the view that the principal reason that the defendant could not present his case in a satisfactory way was the delay of the plaintiff in progressing the proceedings. It is important in the context of that case to note the fact that the plaintiff, in the course of her evidence at trial, recounted a statement which she attributed to the deceased wife of the defendant with which Mrs. Boyce had never been afforded the opportunity to address.

51. The first defendant/respondent relies on the conclusion of the Supreme Court in *McNamee v. Boyce* as a strong and authoritative decision which, it is argued, must favour the dismissal of the plaintiff's claim in the present proceedings as the first defendant too has lost the ability to call in evidence the alleged perpetrator of the sexual assault on the plaintiff.

52. The plaintiff/respondent argues for the contrary view, namely that the alleged prejudice is more illusory than real having regard to the nature of the pleas in the defence of this defendant, which it is argued do not put the sexual assault seriously in issue but in which the focus is the extent to which the Congregation of the Brothers of Charity might have any liability for any action of Brother G.

53. Having reviewed the defence of this defendant, I consider that the plaintiff's argument in regard to the nature of the defence must fail as there is a clear denial that the plaintiff was sexually assaulted in the manner alleged or at all and all the particulars are denied in full. The balance of the defence, it is true, raises issues of law regarding vicarious liability, the existence of any duty of care in the circumstances, and the plea that if the plaintiff was subject to the alleged acts, which are denied, these were the deliberate and concealed acts of an individual who was "acting outside the authority vested in him by reason of his membership and/or association with" the Congregation of the Brothers of Charity "who at all material times had no knowledge whatsoever that the plaintiff was being subjected to such alleged acts".

54. The defence does therefore, albeit as only one element, deny that the alleged assaults took place.

55. Plainly, the first defendant will be prejudiced if the alleged perpetrator of the sexual assault is now deceased, both on account of the difficulty in defending the assault claimed, but also by reason of the fact that the question of vicarious liability or negligence will depend to a large extent on the evidence that he might have given if he were still alive.

56. The trial judge dealt with this aspect of the claim *inter alia* by reference to the facts of *Cassidy v. The Provincialate*, where the vicarious liability of an employer of an alleged abuser and/or negligence was also in issue. I do not consider that approach to be incorrect, and I am of the view that the prejudice suffered by the death of such a central witness is of such a degree to justify dismissal of that aspect of the claim.

The balance of the claim: Physical abuse and assault
57. However, the trial judge also took the view that the sexual assault was the "essence of the plaintiff's case against the Brothers of Charity" and the serious sexual abuse was in relative terms a more serious claim than the alleged physical abuse. He considered the physical abuse claim to be subsidiary and dismissed that aspect of the claim too.

58. It is established in the authorities that a court hearing an application to dismiss for want of prosecution may strike out part of a

claim. *Burke v. Beatty* [2016] IEHC 353, per Noonan J. and my judgment in *McGrath v. Reddy Charlton McKnight* [2017] IEHC 210. I consider that Twomey J. wrongfully exercised his discretion in regard to the claim for damages arising from physical abuse or assault for the reasons I now set out.

59. The trial judge took the view that the sexual assault was the primary cause of action, and that:

> "Thus, the more serious the alleged offence in the context of a civil trial, the more likely the Court is to forgive inordinate delay in bringing the matter to justice. The corollary would also apply, so that the less serious the alleged offence, the less likely the Court is to forgive inordinate delay. In this regard, Mr. Carey is alleged to have committed physical abuse and is not accused of the very serious sexual abuse alleged against Brother Jim", at para. 26.

60. The trial judge then went on to note that he regarded it as relevant that corporal punishment was not banned until February 1982 by Circular 9/82 in respect of primary schools. With respect to the trial judge, the "corporal punishment" to which Circular 9/82 refers was corporal punishment as a corrective or disciplinary measure, not physical assaults of the type of which the plaintiff complains, described by him as "beating" and "severe", as well as the fact that he alleges he was "singled out" for that punishment in the circumstances.

61. By referring to the abolition of corporal punishment as arising after the incidents complained of in the current action, the trial judge appears to have taken the view that some of the alleged behaviour by the named teacher was culturally or socially acceptable at the time, and while that may be a factor that would lead a court to take a view regarding whether permitting such action was negligent, Circular 9/82 does not in its terms exonerate a teacher from the consequences of a physical action amounting to assault or physical abuse before its commencement.

62. Accordingly, I consider that the trial judge fell into error in coming to the view that the primary action or the essential nature of the plaintiff's case was the allegation of sexual abuse.

63. The claim is pleaded in assault and sexual assault and there can be no complaint that the plaintiff did not fairly plead the physical assault or identify the person he claims was responsible. The plaintiff describes his treatment after making a complaint as continuing for the balance of his time in school.

64. Whilst noting that there may well be a difficulty in trial in decoupling the alleged sexual abuse by Brother G. from the alleged physical assault on the plaintiff, as the first such physical assault or beating is alleged to have occurred after the plaintiff complained of the sexual assault and where he was told "not to be saying things like that", it seems to me that the claim for physical assault is one that may be separately maintained and in respect of which, in my view, the defendant has not established prejudice.

65. In that regard, I note that the grounding affidavit of Noel Corcoran, the sole evidence adduced on behalf of the first defendant, asserts that the prejudice relied on for the purpose of the application derives from the fact that the "alleged perpetrator is now deceased". The alleged perpetrator of the physical assault is still alive. I consider it relevant that the identified person accused of physically abusing the plaintiff has not sworn an affidavit and no evidence is adduced that might support an allegation that, apart from the obvious loss of clarity of memory by the passage of time, unfairness would result from allowing the action to proceed in respect of the alleged assaults by this person.

66. It is also said by the first defendant that there is an absence of any written records relating to the claim. The question regarding records may be dealt with primarily on the basis that the affidavit of discovery sworn on behalf of the first defendant makes it clear that there was no system in place for the keeping of records and that there are no documents, notes, memoranda or records in respect of, or dealing with, the system of reporting in place at the school in relation to allegations of abuse at the time the plaintiff was a student there. The absence of a system, of itself, could explain why there are no records, and while the absence of records might make it more difficult to remember an incident, the claim of the defendant is not that the records have been destroyed, the basis on which the claim against one of the defendants was struck out by me in *Keating v. Riordan* [2016] IEHC 635, but rather that no records exist now or ever existed. The plaintiff cannot be blamed for such potential difficulty nor does this factor arise from any delay in the prosecution of the claim.

67. The first defendant also argues that it has lost the evidence of certain other possible witnesses to the claim of the plaintiff. The plaintiff, in response, identifies a number of other possible witnesses, but primarily relies on the fact that the identified principal of the school is alive and has not sworn an affidavit asserting any positive or actual prejudice or frailty of memory.

68. I consider that the two strands of the claim may fairly be separated and that the action in respect of physical assault and the "singling out" of the plaintiff may proceed as I am not persuaded that any prejudice sufficient to meet the test in *O'Domhnaill v. Merrick* has been shown.

Conclusions

69. For these reasons, I consider that the application to dismiss should be dealt with on the basis that the claim should be dismissed only insofar as it relates to the alleged sexual abuse by Brother G., but that the balance of the case is to proceed.

70. I consider that, on the application of the *O'Domhnaill v. Merrick* test, the first defendant has established a sufficient degree of prejudice regarding this defendant's ability to fairly defend the claimed sexual abuse, but that a different consideration exists regarding the balance of the claim.

Decision

71. To the extent set out in this judgment, I therefore propose allowing the appeal.

72. I would stress, however, that there must be no further delay in the prosecution of these proceedings by the plaintiff. If there is, then the defendants might reasonably issue a fresh motion to strike out the balance of the present proceedings.

73. With a view to ensuring that there is no further delay, I would propose that these proceedings be listed before the judge having *seisin* of the non-jury list for directions on Thursday 25 October 2018.