Neutral Citation: [2016] IEHC 290

THE HIGH COURT

[2011 No. 1546 P]

BETWEEN

GERARD NAUGHTON

PLAINTIFF

AND

SEAN JOHN DRUMMOND AND JOHN KEVIN MULLAN AND THE MINISTER FOR EDUCATION AND SKILLS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 1st day of June, 2016.

Introduction

1. This application is brought by the third, fourth and fifth defendants ("the State defendants") for an order setting aside the joinder of those parties as defendants on the grounds that the plaintiff's claim is statute barred as against the State defendants and/or discloses no reasonable cause of action against them.

Background and Chronology.

2. The plaintiff was born on the 23rd July, 1959. As a young boy, he attended the Christian Brothers school at Creagh Lane, Limerick. The first defendant was a Christian Brother and a teacher at the school in the 1960's. In the years circa 1967 and 1968, the plaintiff alleges that he suffered sexual and other forms of abuse in the school perpetrated by the first defendant. The second defendant is the nominee of the Congregation of Christian Brothers.

19th March, 2010 – the plaintiff applied to the Personal Injuries Assessment Board for an authorisation to bring proceedings against the first two defendants and the Minister for Education and Science

11th October, 2010 – PIAB issued an authorisation in relation to those parties.

18th October, 2010 – the plaintiff obtained a second authorisation from PIAB this time naming only the first two defendants.

17th February, 2011 – the plaintiff issued a personal injuries summons against the first and second defendants.

11th November, 2011 – PIAB issued a third authorisation including the Mininster for Education and Science, Ireland and the Attorney General.

28th January, 2014 – the European Court of Human Rights gave judgment in *Louise O'Keeffe v Ireland* (2014) 59 E.H.R.R. 15.

24th October, 2014 – the Master made an order joining the State defendants.

22nd December, 2014 – PIAB issued a fourth authorisation against the Minister for Education and Skills instead of the Minister for Education and Science.

11th February, 2015 – amended personal injuries summons served.

O'Keeffe v. Hickey [2009] 2 I.R. 302.

3. The plaintiff brought a claim for damages for personal injuries arising out of her sexual abuse by the first defendant when she was a child attending a national school of which the first defendant was the principal. The acts complained of occurred in 1973. Although the school was recognised by the State as a national school, it was owned and managed by the local Catholic Diocese without any involvement by the State. The manager of the school was a Father O'Ceallaigh and in 1971, prior to the abuse suffered by the plaintiff, a parent of another child in the same school complained to Father O'Ceallaigh that this child had also been sexually abused by the first defendant. The plaintiff's proceedings were against the Diocese and also the State. The High Court dismissed the claim against the State holding that the State was not vicariously liable for the sexual abuse of the first defendant nor had negligence against the State been established. The plaintiff appealed against this finding to the Supreme Court which dismissed the appeal. In the course of his judgment, Hardiman J. said:

> "[75.] Accordingly it seems to me that the State defendants cannot be liable for the first defendant's tortuous and criminal acts on the ordinary and established principles of vicarious liability. The perpetrator was not the Minister's employee; the latter did not employ him or direct him. He was employed by the patron and directed and controlled by the manager."

O'Keeffe v. Ireland (2014) 59 E.H.R.R. 15.

4. Following the failure of the Supreme Court appeal in *O'Keeffe v. Hickey*, the plaintiff brought proceedings against Ireland before the European Court of Human Rights alleging a breach by the State of various Articles of the European Convention on Human Rights arising from the circumstances which were the subject matter of the earlier domestic litigation. The ECtHR in summarising its conclusions said:

> "[168.] To conclude, this is not a case which directly concerns the responsibility of LH, of a clerical Manager or Patron, of a parent or, indeed any other individual for the sexual abuse of the applicant in 1973. Rather, the application concerns the responsibility of a State. More precisely, it examines whether the respondent State ought to have been aware of the risk of sexual abuse of minors such as the applicant in National Schools at the relevant time and whether it adequately protected children, through its legal system, from such treatment.
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> The court has found that it was an inherent positive obligation of government in the 1970s to protect children from ill-treatment. It was, moreover, an obligation of acute importance in a primary education context. That obligation was not fulfilled when the Irish State, which must be considered to have been aware of the sexual abuse of children by adults through, *inter alia,* its prosecution of such crimes at a significant rate, nevertheless continued to entrust the management of the primary education of the vast majority of the young Irish children to non-State (National) Schools, without putting in place any mechanism of effective State control against the risks of such abuse occurring. On the contrary, potential complainants were directed away from the State authorities and towards the non state denominational managers (para. 163 above). The consequences in the present case were the failure by the non- State Manager to act on prior complaints of sexual abuse by LH, the applicant later abused by LH and, more broadly, the prolonged and serious sexual misconduct by LH against numerous other students in the same National School.
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> [169.] In such circumstances, the State must be considered to have failed to fulfil its positive obligation to protect the present applicant from the sexual abuse to which she was subjected in 1973 whilst a pupil in Dunderrow National School. There has therefore been a violation of her rights under Article 3 of the Convention. Consequently, the Court dismisses the Government's preliminary objection to the effect that this complaint was manifestly ill-founded."

5. The court went on to hold that no effective domestic remedy was available to Ms. O'Keeffe in relation to her complaints concerning a breach of Article 3 of the Convention and this amounted to a violation of Article 13.

The Pleaded Claim against the State Defendants.
In the original personal injuries summons issued on 17th February, 2011, the plaintiff pleaded at para. 1:

> "The plaintiff is a person who has been suffering under a severe disability and who is only now capable of bringing these proceedings against the defendants."

The plaintiff alleges that the State defendants are vicariously liable for the acts of the first defendant complained of and are guilty of negligence in failing to put adequate measures in place to protect the plaintiff from abuse. The plaintiff further alleges against the State defendants a breach of Article 3 of the European Convention on Human Rights and section 3 of the European Convention on Human Rights Act 2003 together with breaches of the Constitution. Particulars of these alleged wrongs by the State defendants are given. In the prayer for relief, the plaintiff claims damages for these alleged wrongs, damages pursuant to s. 3 of the 2003 Act and pursuant to s. 5, a declaration that the law of this jurisdiction is incompatible with the State's obligations under the Convention.

The Evidence Before the Court on this Application.
6. The affidavit grounding this motion was sworn by the solicitor for the State defendants, Joseph O'Malley. He avers that the State defendants had no involvement in the day to day management of the school attended by the plaintiff nor was it under their auspices, direction or control. He avers that the school was under the patronage of the Bishop of Limerick and was managed by the Christian Brothers and the State defendants had no contractual relationship with any members of staff nor had they any responsibility for recruitment, supervision or management of staff. None of this is in dispute as the plaintiff has expressly pleaded in the original unamended personal injuries summons that the school was in the control of the Congregation of Christian Brothers who employed and controlled the first defendant.

7. A replying affidavit on behalf of the plaintiff was sworn by his solicitor, Hugh Cunniam, rather than by the plaintiff himself. In this affidavit, Mr. Cunniam explains the basis on which the various PIAB authorisations above referred to were sought and obtained as follows:

"[7.] On the 11th October, 2010 an authorisation issued naming the Minister for Education and Science as a respondent…

However, on the basis of the Supreme Court's decision in O'Keeffe v Hickey [2008] IESC 72 and their holding that the State was not liable, an amended authorisation was sought from the Injuries Board. An amended authorisation was issued on the 18th October, 2010…"

8. Mr. Cunniam goes on to aver that the plaintiff proceeded to issue proceedings on the basis of the latter authorisation. He says that when the plaintiff then became aware that the decision of the Supreme Court was being "appealed" to the ECtHR, he thought it prudent to seek a further authorisation against the State defendants pending the outcome of the latter case which he awaited. He avers (at para. 12-13):

> "There was no good law to suggest that [*the State defendants*] could be liable for the plaintiff's claim. It was a matter of waiting for the European Court of Human Rights' judgment in *O'Keeffe.*
>
> [13.] The European Court of Human Rights handed down its judgment on 28th January, 2014. The plaintiff moved to draft motions and affidavits in the coming months. The plaintiff issued his motion to join [*the State defendants*] on 25th July, 2014…"

He goes on to explain that the final authorisation issued by PIAB on 22nd December, 2014, was sought because the title of the Minister had changed since the previous authorisation was obtained.

9. In a supplemental affidavit sworn on behalf of the State defendants, Mr. O'Malley avers that this case is distinguishable from the ECtHR decision in *O'Keeffe* on the basis that, unlike in the *O'Keeffe* case, there is no record of any complaint having being made in the present case about any abuse perpetrated by the first defendant prior to the abuse alleged by the plaintiff.

10. There is thus no evidence before the court in relation to any alleged disability suffered by the plaintiff at any time and insofar as such claim is pleaded, it is confined to the period prior to 17th February, 2011.

Setting Aside the Joinder of Defendants.
11. Order 15 rule 13 provides that where a party is added as a defendant in any proceedings, those proceedings shall be deemed to

have begun as against the added defendant at the time of the making of the order adding such party. Such applications are normally made without notice to the party sought to be joined. Where a defendant is added as a party, such party is entitled to apply to the court to set aside the joinder. As explained by Clarke J. in *Hynes v. Western Health Board & Anor* [2006] IEHC 55 at para. 3.6:

> "I should finally note that it does not appear to me that there is any material difference between the considerations that apply in a case such as this, where the defendant was joined without notice being given to him, and brings an application to set aside that order, on the one hand, and a case where the defendant is, for whatever reason, heard on the original motion to join. There is no reason in principle why a defendant should be a notice party to an application to join him. A plaintiff is entitled to issue proceedings against a defendant without giving him notice. There seems no reason in principle, therefore, why a plaintiff should not be entitled to bring an application to join an additional defendant without putting that additional defendant on notice. The only parties who have a legitimate interest in such an application are the persons who are already parties to the proceedings and who may have their proceedings interfered with by the addition of a new party. Similarly there is no reason in principle why a person should not be added as a co-defendant on a motion to join such person as third party notwithstanding such party not being on notice. However it seems to me that, as a matter of principle, a defendant who is so joined without notice must be entitled to bring an application to have the order joining him set aside."

12. Where, as here, the added defendant seeks to set aside his joinder on the ground that the claim is statute barred or is bound to fail, the court has an undoubted inherent jurisdiction to set aside such joinder. It should be exercised sparingly and in clear cases only.

13. In *O'Connell v. BATU* [2012] 2 I.R. 371, the Supreme Court considered this issue in the context of the Statute of Limitations. The judgment of the court was delivered by McMenamin J. who considered the import of the earlier judgment of the Supreme Court in *O'Reilly v. Granville* [1971] 1 I.R. 90 and observed (at p. 385):

> "[38.] I interpret the effect of the judgments in O'Reilly v. Granville as being that:-
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> 1. A co-defendant can be joined in proceedings, notwithstanding there being an issue as to whether the Statute of Limitations 1957 applies to his or her case;
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> 2. the court retains a discretion not to join a defendant, but only where the statute would very clearly apply, or where, in the words of Budd J., the joinder of such a defendant would be futile;
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> 3. in general, time commences to run at the time of the wrongful act giving rise to the action; whether the claim is in fact barred may depend on the circumstances of the case and the conduct of the parties.
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> [39.] The question as to when such a discretion should be exercised arose more directly in Hynes v. The Western Health Board and Cronin, (Unreported, [2006] IEHC 55, High Court, Clarke J., 8th March, 2006). There, the judge observed that the conclusion in *O'Reilly v. Granville* was that, in a clear case, a court should not join a co-defendant, where it is manifest that the case against the defendant is statute barred, and where it is also clear that the defendant concerned intends to rely upon the statute."

14. McMenamin J. continued at para. 55:

> "1. A court of first instance should not generally enter into an inquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant;
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> 2. in general, on such an application, the only question which a court will ask itself is whether, on the facts before it, the claim against the intended defendant is clearly or manifestly statute barred, and if there are no circumstances in which a defendant would be debarred, either in law or in equity, from relying on the Statute of Limitations 1957;
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> 3. if there is doubt upon the question, then the defendant should be joined, and whether or not the claim is in fact statute barred may be dealt with in the ordinary way, if necessary by means of a preliminary issue;
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> 4. prior to acceding to an application to dismiss such a co- defendant out of proceedings because a claim is statute barred, a court will, naturally, ensure that there is evidence before it so that all the circumstances, and any issue as to the conduct of all the parties prior to such joinder, may be considered;
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> 5. however a court of first instance must always retain the discretion to dismiss an application to join co-defendants if the application itself is evidently futile, would serve no purpose, is founded on insufficient evidence or if it is vexatious or an abuse of court process."

15. Accordingly, joinder of a defendant should be refused, or alternatively set aside, where it is manifest that the claim is statute barred and the defendant intends to rely on the statute or where it is bound to fail. While *O'Connell v. BATU* was largely concerned with the Statute of Limitations, earlier authorities make clear that claims which are bound to fail may equally be dismissed pursuant to the court's inherent jurisdiction. Thus, Kelly J. (as he then was) in *Ennis v. Butterly* [1996] 1 I.R. 426 noted (at p. 429):

> "Apart from these two rules [Order 19 rules 27 and 28], the court has an inherent jurisdiction to stay proceedings that are frivolous or vexatious or propound a claim which must fail. It is this inherent jurisdiction which has largely been relied upon by the defendant in this application.
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> The principles upon which the court exercises this jurisdiction have been considered in a number of cases. In *Barry v. Buckley* [1981] I.R. 306, Costello J. (as he then was) said at p. 308:—
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> 'The principles on which the Court exercises this jurisdiction are well established. Basically, its jurisdiction exists to ensure that an abuse of the process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail; per Buckley L.J. in *Goodson v. Grierson* [1908] 1 K.B. 761 at 765.
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> This jurisdiction should be exercised sparingly and only in clear cases; but it is one which enables the Court to avoid injustice, particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence.'

In *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425 at p. 428, McCarthy J., speaking for the Supreme Court, said:—

'Generally, the High Court should be slow to entertain an application of this kind and grant the relief sought. Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture. With that qualification, however, I recognise the enforcement of a jurisdiction of this kind as a healthy development in our jurisprudence and one not to be disowned for its novelty though there may be a certain sense of disquiet at its rigour.'

The jurisdiction was again considered by Costello J. in *D.K. v. King* [1994] 1 I.R. 166 where he repeated the principles enunciated by him in *Barry v. Buckley*. Having expressed the view that the plaintiff's claims were neither frivolous nor vexatious, Costello J. went on to say at p. 171:—

'What I am required to consider therefore is whether any of the claims against all or any of the defendants is so clearly unsustainable that I should strike it out.' "

16. In an application of this nature, as indeed in any other, the court must have regard not only to what is pleaded but to the evidence before it. Thus in Barry, Costello J. noted (at page 308):

"the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case;"

17. Counsel for the plaintiff submitted that it would be inappropriate for the court to decide an application of this nature at a preliminary stage in advance of the trial of the action where the oral evidence may well be different and discovery obtained. He placed reliance on *Doherty v. Quigley* [2015] IESC 54 in support of this proposition. In the course of his judgment in the Supreme Court, Murray J. said at para. 31:

"In any event, since s.48A is concerned with the existence of psychological injury to a plaintiff, and the effects of that psychological injury on his or her capacity to make a decision about bringing proceedings, it must, as I have already indicated, be a matter for the trial judge to determine whether the particular claimant, given their particular circumstances, has been 'substantially impaired' in the manner referred to in s.48A."

18. This was relied upon by the plaintiff as authority for the proposition that the court could not at this juncture make any determination with regard to the plaintiff's claim that s. 48A applies to him without hearing his evidence. However, it is clear that the onus under s. 48A rests upon the plaintiff as Murray J. makes clear at para. 31:

"The onus is on a plaintiff, relying on s.48A, to establish the necessary factual basis from which a trial court can properly conclude, on the balance of probabilities, that the section applies to him or her."

19. Whilst it cannot be said that the plaintiff at this stage of proceedings has to establish his entitlement to rely on s. 48A on the balance of probabilities, it seems to me that there must be at least some evidence which supports such reliance, even on a *prima facie* basis. That the court must have regard to the evidence that is led by the parties in this application is clear from the views expressed by McMenamin J. in *O'Connell* where he said (at p. 385):

"A court should not impose the burden of joinder on itself or on defendants in circumstances, which would in effect be a form of vexatious litigation (see *Barry v. Buckley*). In each case therefore it is necessary that the court making the decision consider the material which is then available to it or evidence which is undisputed."

20. In my view therefore, the suggestion that the court should in some sense not have particular regard to the evidence before it when the evidence at trial might be different or that the court should exercise some form of discretion to allow the case to proceed on that basis cannot be well founded. As counsel for the State defendants points out, if that were the correct approach no application of this nature could ever succeed.

Is the Plaintiff's Claim Statute Barred?

21. The acts complained of by the plaintiff are alleged to have occurred in 1967 and 1968. The proceedings were commenced against the State defendants on the 24th of October, 2014. By any measure, and irrespective of what cause of action is pleaded, the claim is statute barred unless the limitation period is postponed by either disability or the plaintiff's "date of knowledge" under the Statute of Limitations (Amendment) Act 1991 ("the 1991 Act"). Both are relied upon by the plaintiff to contend that the cause of action accrued less than two years prior to the 24th of October 2014.

22. Section 48A of the Statute of Limitations 1957, as inserted by s.2 of the Statute of Limitations (Amendment) Act, 2000, insofar as relevant to this case, provides as follows:

"48A.—(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 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."

23. It has been argued on behalf of the plaintiff that s. 48A applies to him so as to postpone the commencement of the limitation period to within two years prior to the 24th of October, 2014. As I have noted already, the onus is on the plaintiff to establish reliance on s. 48A ultimately on the balance of probabilities but at this stage, at least on a prima facie basis. In order to come to a

conclusion in this regard, it is necessary to examine the evidence before the court and not merely what is pleaded or asserted on behalf of the plaintiff, as the authorities to which I have referred indicate. As the plaintiff has not sworn an affidavit, the evidence in the case is limited to what is contained in Mr. Cunniam's affidavits. As previously noted, these contain no reference to any alleged disability on the part of the plaintiff. Notably, no expert report is exhibited which might form a basis for such a claim.

24. As matters stand therefore, there is no evidence whatsoever before the court that the plaintiff was suffering from a disability within the meaning of s. 48A at any time. The plaintiff has himself pleaded that he was suffering from a disability but that disability came to an end on the institution of the original proceedings. It is clear that at that time and *a fortiori* at the time he applied to PIAB for the first authorisation, the plaintiff did in fact make a reasoned decision to bring an action arising out of the sexual abuse committed against him. That decision, clearly made on legal advice, was to sue the Christian Brothers and the State. He then shortly thereafter made a further decision not to sue the State because he believed and was advised that he had no case against the State.

25. Plainly therefore, the plaintiff's decision not to sue the State was entirely unrelated to any question of disability, of which there is in any event no evidence. I readily accept the proposition advanced by counsel for the plaintiff that it is perfectly possible for a psychological disability to continue not just prior to the commencement of proceedings but indeed long thereafter as cases such as *Doherty v. Quigley* recognise. However, that simply does not arise here. There is no suggestion, nor could there be on the evidence, that the plaintiff ceased to be under a disability insofar as suing the Christian Brothers was concerned but such disability somehow continued in relation to the State defendants. Indeed, given that the plaintiff's first application to PIAB included a claim against the State, and on further reflection the plaintiff decided not to proceed against the State, such suggestion could not be made.

26. The plaintiff alternatively places reliance on ss. 2 and 3 of the 1991 Act which provide:

> "2.—(1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:
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> (a) that the person alleged to have been injured had been injured,
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> (b) that the injury in question was significant,
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> (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
>
> (d) the identity of the defendant, and
>
> (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
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> and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.
>
> (2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
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> (a) from facts observable or ascertainable by him, or
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> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.
>
> (3) Notwithstanding subsection (2) of this section—
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> (a) a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and
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> (b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury.
>
> 3.—(1) An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

27. The 3 year limitation period referred to in s. 3 above is now 2 years by virtue of s. 7 of the Civil Liability in Courts Act, 2004.

28. In the present case, the plaintiff advances the simple proposition that his "date of knowledge" within the meaning of the 1991 Act, is the 28th of January, 2014, the date upon which the ECtHR delivered its judgment in *O'Keeffe v. Ireland*. If that is so, then the plaintiff's proceedings against the State defendants were issued within the 2 year limitation period.

29. Assuming for the moment that *O'Keeffe v. Ireland* brought about a change in our domestic law such as to confer a right of action on the plaintiff which did not exist before, to which I shall refer further, the central question becomes whether a change in the law brought about by a court decision can, as the plaintiff argues, be regarded as his or her "date of knowledge" for the purposes of postponing the limitation period. The express words of s. 2 (1) of the 1991 Act in the final paragraph make clear that whether or not the plaintiff is aware that the acts or omissions the subject matter of the claim involve negligence, nuisance or breach of duty as a matter of law is irrelevant. This is explained by Geoghegan J. in delivering one of the Supreme Court's majority judgments in *Gough v. Neary* [2003] 3 I.R. 92.

30. In 1992, the first defendant performed a caesarean hysterectomy on the plaintiff which she believed to have been a life saving procedure as a result of what she was told by the first defendant. In 1998 she became aware for the first time that the operation might not have been necessary. She then issued proceedings which the defendant pleaded were statute barred. The plaintiff in reply

pleaded that her "date of knowledge" for the purposes of the 1991 Act only arose in 1998 when time began to run against her. In considering this issue, Geoghegan J. said (at p. 126):

> "It is appropriate to pause at this stage in the review of the English case law and consider those principles in relation to this particular case. While it may not be necessary for the purposes of starting the statute to run to know enough detail to draft a statement of claim, a plaintiff in my opinion must know enough facts as would be capable at least upon further elaboration of establishing a cause of action even if the plaintiff has no idea that those facts of which he has knowledge do in fact constitute a cause of action as that particular knowledge is irrelevant under the Act. But the adequacy of the knowledge must be related to the context and in this case the plaintiff who was a person of limited education was entitled to assume that the hysterectomy was carried out by the first defendant to save her life at the time of childbirth because that is what she was told by him. Mere knowledge that a hysterectomy was carried out therefore is irrelevant."

31. Accordingly one of the essential ingredients necessary to start time running against the plaintiff was missing until 1998 i.e. that she had suffered an injury which was attributable in whole or in part to the act or omission which was alleged to constitute negligence.

32. The situation here is quite different. It is clear that at the latest, from the time he first applied to PIAB for an authorisation and subsequently instituted proceedings against the Christian Brothers, the plaintiff knew all of the facts which are now alleged to constitute a cause of action against the State defendants. However, the only thing he did not know was that such facts allegedly involved negligence, nuisance or breach of duty on the part of the State defendants. Such knowledge is irrelevant for the purposes of the 1991 Act.

33. The issue of whether or not a change in the law brought about as a result of judicial decision can constitute a "date of knowledge" for the purposes of postponing the limitation period has been considered by the courts of England and Wales. In *Robinson v. St. Helens Metropolitan Borough Council* [2002] EWCA Civ. 1099, the plaintiff was severely dyslexic. He attended a secondary school run by the defendants between 1978 and 1983. He attained his majority in 1985. In 1997, the English High Court in *Phelps v. Hillingdon London Borough Council* 96 LGR 1, awarded damages against a local education authority on the basis that it was vicariously liable for the negligence of an educational psychologist who had failed to diagnose dyslexia in a claimant as a result of which she suffered loss. This judgment was upheld by the House of Lords. Following upon the decision in *Phelps*, the plaintiff consulted solicitors who issued proceedings in 2000. The English Limitation Act 1980 provides for a 3 year limitation period for personal injury actions but s. 14, similar in its terms to s. 2 of our 1991 Act, provides that the 3 year limitation period only commences from (a) the date on which the cause of action accrued or (b) the date of knowledge of the person injured. Section 14 defines the date of knowledge as being the date upon which the plaintiff first had knowledge of the following facts:

> "(a) that the injury in question was significant; and
>
> (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and
>
> (c) the identity of the defendant."

The words following sub-paragraph (d) are:

> "and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant."

34. Although not identical therefore, the English Act provides a close analogue of the 1991 Act in this jurisdiction.

35. The plaintiff's claim failed in the High Court, the trial judge considering that his date of knowledge was 1992 when he was first diagnosed by an expert, a Mrs. Ruddock, as having dyslexia. He appealed to the Court of Appeal arguing that his date of knowledge ought to have been regarded as the date of delivery of the Phelps judgment. On the date of knowledge issue, Sir Murray Stuart-Smith said the following:

> "Date of knowledge
>
> [25.] On the basis that this was a personal injury case, was the judge wrong to hold that the date of knowledge was November 1992 after the receipt of Mrs. Ruddock's report? What the judge said about that was this:
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> 'It seems to me that what the claimant is saying in this particular case is yes, the claimant well knew about his condition, he well knew about the name of his disability in 1992 when he got the Ruddick [sic] report. He knew that he had the ability to do something about it because the Ruddick report uses the words 'amenable to structured remediation' and he knew of the fact of his own disappointment and his own achievements with regard to his education.
>
> It is apparent that both the claimant's parents and later on the claimant have had an anxiety about education, about the way the claimant was treated at school, for years and years and years. What the claimant says through his counsel is, yes, he did know the facts and in November, 1997, he knew that he had the makings of a case against the local authority because he went to see solicitors. In fact, sadly, no writ was issued then because that would have been within the 15 year long stop put forward by Section 14(a). But, in fact, he did not know he had a claim because it was only when the House of Lords gave the green light to such cases that a claim was viable and then a claim was brought.
>
> I disagree with the claimant's view of the matter. What Section 14 says at Section 14(1)(d):
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> 'Knowledge that any acts or omissions did or did not as a matter of law involve negligence, nuisance or breach of duty, is irrelevant.'
>
> Now, I recognise that the makers of this statute did not envisage, or did not have as their first matter of importance, a change in the law as radical as *Phelps* but the clear words of the statute are such as to mean that if you know the facts of your case, and you know that the condition that you suffer from could have been ameliorated by the activities of the defendants, then the fact that you did not know that you could have a good claim is by statute irrelevant. I do not accept that the date of knowledge should be 2000. The date of knowledge to my mind should be 1992 or at the latest at some stage before the claimant went to see the solicitors.

> It seems to me that to imply that the date of knowledge depends on the state of the law is to run contrary to the words put in the statute and I note the words of Brooke L.J. in *North Essex Health Authority v. Spargo* [1997] 8 MLR 125 when he says:
>
> 'The knowledge required to satisfy Section 14(1)(b) attribution, is a broad knowledge of the essence of the causally relevant act or omission to which the injury is attributable.'…
>
> [29.] If I have correctly understood Mr. Bowen's submission, it is that, unlike conventional claims for medical negligence, it was not recognised in 1992 that failure to diagnose or treat dyslexics could give rise to liability; the claimant therefore did not know that the injury was attributable to the act or omission of his teachers, and further if he had then consulted a solicitor, the solicitor would not have considered that the injury was significant, because he would not have considered it sufficiently serious to justify proceedings, until the result of the Phelps case at first instance was known. This is an entirely circular argument. As the judge held the claimant knew as soon as he got Mrs. Ruddock's report that he was dyslexic and that he had been badly treated at school in as much as they had failed to do anything to help him. That is sufficient to satisfy section 14(1)(b). As soon as he consulted solicitors, they considered the injuries sufficiently significant to justify commencing proceedings. They would presumably have taken the same view in 1993 if they had been consulted then and appreciated that the acts or omissions complained of, as a matter of law, could have constituted negligence. In my judgment the judge was right to conclude that the date of knowledge was on or shortly after receipt of Mrs. Ruddock's report."

36. Interestingly, one of the principle authorities relied upon by Sir Murray Stuart-Smith in his judgment was *North Essex Health Authority v. Spargo* [1997] 8 MLR 125, a decision expressly approved by Geoghegan J. in his judgment in Gough.

37. A similar issue again came before the Court of Appeal of England and Wales the following year in *Rowe v. Kingston upon Hull City Council & Anor* [2003] EWCA Civ. 1281. Again the plaintiff was suffering from dyslexia which was diagnosed in 1991. He attained his majority in 1992. While at school, he had received no help for his condition and in 1998, he issued proceedings against the authority responsible for the school. In this regard, Keene LJ. said at para. 6 of his judgment:

> "[6.] It seems clear that the claimant and his parents were prompted to go to see a solicitor in September 1997 by the High Court decision in the case of Phelps. The judge there had held the education authority vicariously liable for the negligence of an educational psychologist employed by it in failing to identify that the plaintiff was severely dyslexic and failing to mitigate the adverse consequences. That High Court decision was reversed by the Court of Appeal but then restored subsequently by the House of Lords. That is reported at [2001] 2 AC 619. In particular, the House of Lords held that the psychologist had owed a duty of care to the plaintiff and had been in breach of that duty of care."

38. As in the Robinson case, the plaintiff in *Rowe* claimed that he did not know until the *Phelps* decision that he had suffered an injury and consequently the limitation period was postponed until then. Keene LJ. dealt with this argument as follows:

> "[24.] The mere fact that a person may not realise that he has a good claim in law until a particular decision of the courts clarifies the situation provides no justification for interpreting the 1980 Act in other than the normal way. A claimant can always bring a claim to establish for the first time that he has a good cause of action. He is not prevented from obtaining access to the courts. Moreover, to do what the claimant advocates, namely to interpret section 14(1) of the Act so that the three-year period runs from the date when the law first recognised such a claim by means of a judicial decision, would bring into existence a host of stale claims, some of which could be 20, 30 or more years old, and so give rise to great unfairness to defendants. I therefore would reject the claimant's argument based on Article 6 (1) of the European Convention on Human Rights. It follows that, on this first issue of when the claimant had the requisite knowledge under section 14, I would reverse the conclusion of the judge below. In my judgment the three year period in this case must have commenced when the claimant reached his majority, because he already had the requisite knowledge before that date."

39. I respectfully agree with and adopt those views. It seems to me that as a matter of principle, the proposition that a cause of action, apparently long since statute barred, can be somehow revived or indeed conferred *ab initio* as a result of an expansive development of the law by judicial decision, cannot be well founded. As the English Court of Appeal points out, the potential for the bringing of stale claims would be virtually limitless. It would militate against the very purpose for which statutes of limitation exist, namely to protect parties being unfairly pursued by claimants who fail to act in a timely manner and to bring certainty and finality to the pursuit of litigation. In my view therefore, the effect of the clear concluding words of s. 2 (1) of the 1991 Act is that a party's date of knowledge for the purposes of that Act cannot be reckoned by reference to subsequent judge made law.

40. During the course of the hearing, counsel for the plaintiff canvassed the issue of a potential estoppel arising against the State defendants by virtue of certain correspondence from the State Claims Agency. A supplemental affidavit was sworn by Mr. Cunniam during the hearing exhibiting this correspondence. It comprises three letters written by the Agency. The first is dated the 18th October, 2011, and asks how the plaintiff's claim can be distinguished from the judgment of the Supreme Court in *O'Keeffe* and if it cannot, that it should be discontinued against the State. The second letter is dated 10th May, 2012, and points out that the State had no involvement in the recruitment, employment or payment of the first defendant and asks that the claim be discontinued against the State. The third letter is dated 22nd May, 2012, and is concerned with whether the school in question operated under two names or whether the names refer to different schools. The letter concludes by again asking for the proceedings to be discontinued.

41. It is notable that all this correspondence post dates the commencement of the proceedings by the plaintiff. It also post dates the first two PIAB authorisations obtained by the plaintiff as a result of initially deciding to sue the State and on further consideration deciding not to do so. Clearly therefore the plaintiff's decision not to pursue the State cannot have been influenced by these letters and as Mr. Cunniams's first affidavit makes clear, that decision was based on the apparently then correct legal advice that the plaintiff had no valid claim against the State. It seems to me that this correspondence at its height does no more than point out what the plaintiff already knew and had acted upon, namely that there was no case against the State.

42. For an estoppel to arise, there would have to be a representation made by the State to act in a certain manner upon which the plaintiff relied to his detriment. That does not arise here. These letters essentially highlight the obvious shortcomings in the plaintiff's claim by reference to the previous decision of the Supreme Court in *O'Keeffe,* shortcomings of which the plaintiff had already been advised and was well aware. They are fairly standard denials of liability of the kind that any defendant might be expected to advance in cases where liability is in dispute. I am therefore satisfied that this correspondence could not conceivably create any estoppel against the State defendants.

43. It accordingly follow that the Plaintiff's claim against the State defendants is manifestly and clearly statute barred.

Is the Claim Bound to Fail?
44. Order 19 rule 28 of the Rules of the Superior Courts provides as follows:

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

This rule permits the court to strike out a pleading in its entirety but not by reference to parts only of such pleading – see *Aer Rianta v. Ryanair* [2004] 1 I.R. 506. The court has in addition to O. 19 r. 28 an inherent jurisdiction to strike out claims that are bound to fail and I have already alluded to the authorities in that regard. The plaintiff's application to join the State defendants is premised solely on the ECtHR judgment in O'Keeffe which found Ireland to be in breach of certain articles of the European Convention on Human Rights.

42. The status of the European Convention on Human Rights under national law was considered by the Supreme Court in J. *McD v. P.L.* [2009] EHSC 81. In the course of his judgment, Murray C.J. said (at p. 245):

" *Status of the European Convention on Human Rights.*

[15.] The relationship between international treaties to which Ireland is a party and national law is imbued with the notion of dualism, the effect of which finds expression in Article 29.6 of the Constitution. According to the concept of dualism, at national level national law always takes precedence over international law. At international level, as regards a state's obligations, international law takes precedence over its national or internal law, which is why a state cannot generally rely on their own constitutional provisions as an excuse for not fulfilling international obligations which they have undertaken. Coming back to the national level the dualist approach means that international treaties to which a state is a party can only be given effect to in a national law to the extent that national law, rather than the international instrument itself, specifies…

[17.] Article 29.6 of the Constitution provides in very clear terms 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.'

[18.] This is consistent with the sovereign legislative powers vested in the Oireachtas by Articles 6 and 15 of the Constitution. The Oireachtas, in turn, when determining whether, and to what extent, an international agreement shall be part of the domestic law of the State is governed by the provisions of the Constitution.

[19.] In delivering the judgment of the then Supreme Court in *In Re Ó Laighléis* [1960] I.R. 93 at 124 and 125 Maguire C.J. stated:-

'When the domestic law makes its own provisions it cannot be controlled by any inconsistent provisions in international law. …The insuperable obstacle to importing the provisions of the Convention for the Protection of Human Rights and Freedoms into the domestic law of Ireland – if they be at variance with that law is, however, the terms of the Constitution of Ireland. By Article 15.2.1, of the Constitution it is provided that 'the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State'. Moreover, Article 29, the Article dealing with international relations, provides at s. 6 that 'no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas'.

The Oireachtas has not determined that the Convention on Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law.

No argument can prevail against the express command of s. 6 of Article 29 of the Constitution before Judges whose declared duty is to uphold the Constitution and the laws.' "

43. The Chief Justice continued at p. 248:

> "[30.] It is important to underline that the obligations of contracting parties under the Convention are engaged at international level as was pointed out in *In Re Ó Laighléis* [1960] I.R. 93. The Convention does not of itself provide a remedy at national level for victims whose rights have been breached by reference to the provisions of the Convention. The contracting states are answerable at international level before the ECtHR, an international court, and then only where available national remedies for any alleged wrong have been exhausted. This follows one of the general principles of international law that international courts should not have jurisdiction unless an individual claimant against a state has first exhausted available domestic remedies.
>
> [31.] The ECtHR in exercising its jurisdiction to find that a contracting state has breached its obligations under the Convention may, and does, award damages to victims who may also benefit from declarations as to their rights. Even then orders or declarations of the Court are not enforceable at national level unless national law makes them so. This is so even though a contracting state may be in breach of its obligations under Article 13 if it fails to ensure that everyone whose rights and freedoms as set out in the Convention have any effective remedy for their breach by the State."

44. And finally at p. 250:

> "[36.] It is in the context of the foregoing perspective of the Convention that an international instrument binding on states as a matter of international law at international level rather than national level that this Court has held, at least prior to the coming into force of the European Convention on Human Rights Act 2003, could not be invoked by an individual as having a normative value or a direct legal effect in Irish law.
>
> [37.] Consequently no claim could be made before a court in Ireland for a breach as such of any provision of the Convention. To admit such a claim would have been to treat the Convention as directly applicable in Irish law.
>
> [38.] This is still the position subject to the special exceptions of a claim against an 'organ of the state' as defined in s. 3 of the Act of 2003, or a claim for a declaration of incompatibility pursuant to s. 5 of that Act."

45. The only relevance of the Convention to domestic law arises from the European Convention on Human Rights Act 2003 which came into effect on the 1st of January, 2004. This Act, *inter alia*, requires the Irish Courts to interpret Irish law insofar as possible in a manner compatible with the State's obligations under the provisions of the Convention as interpreted by the ECtHR. The 2003 Act has no retrospective effect and can therefore only apply to matters arising post the 1st of January, 2004. This issue was considered by the Supreme Court in Dublin City Council v. Fennell [2005] 1 I.R. 604 where the Supreme Court held that the Act had no retrospective application. As noted by Kearns J. (as he then was) delivering the unanimous judgment of the Supreme Court (at p. 637):

> "I am satisfied, however, for all the reasons outlined above, that the Act of 2003 cannot be seen as having retrospective effect or as affecting past events."

The issues of justiciability and retrospectivity were considered by this court in *Byrne v. An Taoiseach* [2011] 1 I.R. 190 where Laffoy J. identified the issues arising as including (at p. 199):

> "(a) whether the provisions of articles 2, 6 and 13 of the Convention are directly justiciable as a matter of domestic law in these proceedings in respect of the commission in respect of deaths occurring 29 years prior to the coming into effect of the European Convention on Human Rights Act 2003;"

46. Laffoy J. dealt with this issue as follows (at p. 218):

> "The Act of 2003 introduced a starting point at which the liability of an organ of the State for failure to perform its functions in a manner compatible with the provisions of the Convention arises under national law which is fixed in time, irrespective of the evolution of the jurisprudence of the European Court of Human Rights which may give rise to additional obligations on the part of the State at the level of international law. Accordingly, I find that the plaintiff's complaint covered by issue (a) in relation to the manner in which the commission performed its functions and the State's obligation arising therefrom are not justiciable under the Act of 2003."

47. It is thus clear that a breach by the State at international level of any provision of the Convention, such as found by the ECtHR in *O'Keeffe,* cannot give rise to justiciable rights under domestic law at the suit of the plaintiff. Insofar therefore as the plaintiff's personal injuries summons purports to rely directly on articles of the Convention, such claim is bound to fail. The plaintiff's claim under the 2003 Act is also bound to fail as the matters complained of long predate the coming into effect of that statute.

48. What remains therefore are the plaintiff's claims in negligence and vicarious liability against the State defendants. Insofar as vicarious liability is concerned, the plaintiff accepts that under the law as enunciated by the Supreme Court in *O'Keeffe v. Hickey*, such claim cannot succeed. The plaintiff however, seeks to argue that having regard to the ECtHR decision in *O'Keeffe v. Ireland*, the Supreme Court may be prepared to revisit its earlier decision. That may or may not be so but I am bound to apply the law as it stands and even if this case were on all fours with *O'Keeffe v. Hickey,* it would clearly have to fail on the issue of vicarious liability. It is of course in any event separately distinguishable by virtue of the fact that in the present case, there was no prior complaint of abuse by the second defendant.

49. Finally on the issue of what might be termed primary negligence, the plaintiff has sought to argue that the Supreme Court did not expressly rule on this issue and it is therefore still open. That however appears to be incorrect. The plaintiff in *O'Keeffe v. Hickey* did in fact rely on primary negligence as well as vicarious liability, was unsuccessful on both fronts in the High Court but only pursued her appeal before the Supreme Court on the issue of vicarious liability. Even had this ground been pursued, it is evident from the judgment of Hardiman J. that it would have failed. He said (at p. 344):

> "[129.] I would comment as follows on the other two headings under which the plaintiff's claim was put, though neither was proceeded with. The first was negligence in failing to put in place appropriate measures and procedures 'to protect and cease [sic] the systematic abuse which the first defendant on the evidence embarked upon…'. In my view this is a claim which could more appropriately be made against the manager. It was he who had the power to put in place appropriate measures and procedures governing the running of the school. The Minister can hardly be responsible for a failure to 'cease' a course of action of whose existence he was quite unaware."

50. In the light of the foregoing, I am of the opinion that quite apart from any limitation issue, the plaintiff's claim herein against the State defendants is bound to fail.

Conclusion.

51. For the reasons explained therefore, I am satisfied that the plaintiff's claim against the State defendants is clearly and manifestly statute barred and separately, that it is in any event bound to fail. I will accordingly set aside the order of the Master of the 24th of October, 2014, joining the State defendants and strike out the plaintiff's claim as against those defendants.