

## THE HIGH COURT

[2004 No. 5204 P]

BETWEEN

MARY WARD

PLAINTIFF

AND  
 THE MINISTER FOR EDUCATION AND SCIENCE,  
 IRELAND, THE ATTORNEY GENERAL,  
 THE NORTH EASTERN HEALTH BOARD AND  
 BY ORDER NOREEN O'SHEA

DEFENDANTS

**Judgment of Mr. Justice O'Neill delivered on the 16th day of March 2007**

1. This judgment deals with two notices of motion brought by the fourth and fifth named defendants in which both of these parties seek the dismissal of the plaintiff's action on the ground of inordinate delay in the commencement of these proceedings as a consequence of which it is claimed by both of these defendants that their right to a fair trial in due course of law has been breached.

2. In her statement of claim the plaintiff states she was born in 1953 and that she became pregnant at the age of fourteen as a result of rape by a maternal uncle. Following this she claims she was detained in a mother and babies home run by the fifth named defendants at Dunboyne in Co. Meath and that whilst detained there she was subjected to various ill treatments including assaults, batteries and false imprisonment. She further claims that she was physically neglected and was forced to degrading and laborious tasks not fit for a person of her tender years and was required to work to extreme degrees for which she received no payment. She further claims that her child when born was forcibly taken from her and adopted without her consent. She alleges that she made complaints both to the fifth named defendant and a servant or agent of the fourth named defendant of the fact that she had been raped by her maternal uncle and that he was the father of her child, but notwithstanding these complaints she was sent back to live with her maternal grandmother in a home in which her maternal uncle resided and as a consequence of this she was subjected to further rapes by this person as a consequence of which she became pregnant again at or about the age of 16, in or about 1969. For this pregnancy she was sent to and detained in an institution known as Saint Patrick's Home on the Navan Road in Dublin and in this home she suffered similar ill treatment to that alleged concerning the home at Dunboyne in Co. Meath. She claims that because of her tender years both the fourth and fifth named defendants were in *loco parentis* to her and both owed her fiduciary duty to protect her from all of the foregoing alleged ill treatment. She claims that by reason of the foregoing alleged wrongs done to her, her constitutional rights have been breached and as a consequent of all of the foregoing she has suffered severe personal injuries, loss, distress, trauma including ongoing trauma and emotional suffering and psychological and mental harm.

3. In a reply to a notice for particulars from the fifth named defendants the plaintiff states that she cannot recall the names of members of the Good Shepherd Congregation with whom she came into contact in Dunboyne.

4. At para. 30 of the affidavit of Noreen O'Shea sworn on the 14th December, 2005, the following is said:

"30. As far as can be ascertained, the majority of the sisters which the Congregation believes may have been in Dunboyne at the time stipulated by the plaintiff, are now dead. To the best of the Congregation's knowledge there would have been five sisters who would have worked on a permanent basis in Dunboyne at the relevant time. Three of these sisters, including the superior, are now deceased. Of the other two sisters, both of whom are in their seventies (and one of whom was the Nurse/Midwife at the relevant time), neither can recall the plaintiff whatsoever. They have ventured to question if she was ever resident in Dunboyne...."

32. The Ard Mhuire facility in Dunboyne opened in October, 1955 and it closed in 1991. After its closure all records held in the institution at the time were transferred to the fourth named defendant, the North Eastern Health Board. In the circumstances, the Congregation has little in the way of documentary evidence to which it can refer in relation to the claims made by the plaintiff. This fact, together with the fact that most of the sisters involved have now died and that those still alive cannot be of any assistance, puts the Congregation in a wholly unacceptable position of prejudice. It would be grossly unfair, and I am advised and believe a breach of constitutional and natural justice, to admit a claim of the kind brought by the plaintiff to be levelled against the Congregation now, having regard to the inability to defend it in any significant way so long after the fact.

33. Leaving aside a determination by the court as to whether any particular individual's assault or tort did in fact occur all those years ago (assuming the plaintiff will at some point, point to a particular incident of that kind), the body of the statement of claim makes it clear that the vast majority of allegations made against the Congregation in this case are ones amounting to systems failure. The particulars of negligence cite failure to have correct systems in place, failure to supervise and other matters in a similar vein. The only way in which a court could meaningfully come to a conclusion on those matters would be if it had contemporaneous evidence in relation to how the system actually operated in the various institutions, at the material time, from witnesses who were in situ at the time, particularly sisters in authority. There is no reality to a court being able to make a fair determination in relation to such matters so many years after the fact, particularly when the Superior for the relevant period is deceased...."

5. At para. 15 of a further affidavit sworn by Noreen O'Shea on the 31st March, 2006, she says the following:

"15. Similarly, the Congregation has no documents other than those exhibited. The plaintiff states that the Health Board may have documents which go to prove that she was in a particular institution and that the Congregation can get the said documents. Firstly, it is for the plaintiff's duty to make her case. Secondly, the plaintiff herself is at best unsure about what institution she was in and when. Thirdly, the plaintiff's claim is of alleged acts of abuse of a nature unspecified, by persons unidentified at times unknown. Attendance documents from the Health Board will not assist in defending that case, if the plaintiff is permitted by the court to make it...."

6. In an affidavit sworn by Gerard Lowry on behalf of the fourth named defendant on the 9th March, 2006, he says the following at paragraph 10:

"10. On the 9th February, 2006, the plaintiff swore an affidavit by way of reply to an application made by the fifth named defendant for a dismissal of these proceedings. In paragraph 5 of that affidavit the plaintiff avers to the fact that she

was sent to an institution operated by the fifth named defendant in Dunboyne, Co. Meath and that she was detained there until her first child was approximately eight weeks old when she was then 'removed for adoption' without her consent. As stated herein the fourth named defendant has no records whatever relating to the plaintiff's detention in Ard Mhuire, Dunboyne, Co. Meath, in connection with her first or any pregnancy or in relation to the adoption of her first child.

11. At paragraph six of her affidavit the plaintiff identifies a 'Mrs. Doherty' as the person who had originally brought her to Dunboyne and as the person who had driven her home following her discharge from Ard Mhuire after the birth of her first child. I say and am advised and I believe that a Muriel Doherty was the Children's Officer for Cavan County Council and that, subsequently she acted in that capacity as a servant or agent of the North Eastern Health Board following the transfer of certain statutory functions (but not liabilities) pursuant to the Health Act 1970....

13. At paragraph 8 of the plaintiff's affidavit she avers to her memory of informing a social worker 'or some other such person' for the fourth named defendant of the identity of the father of her second child who appears to have been born in 1973, when the plaintiff was 20 years old. She also claims that she informed a 'Dr. O'Sullivan' of this. The fourth named defendant had made extensive enquiries and carried out searches of its records and has no information, whatsoever, of any social worker to whom such a report was made nor does any record exist which relates to or substantiates the plaintiff's claim in this regard. Furthermore I say and believe that a search of records in the possession of the fourth named defendant reveals no information of any Dr. O'Sullivan or Dr. Sullivan who may have been a servant or agent of the North Eastern Health Board at the material time.

14. At paragraph nine of the plaintiff's affidavit she avers to the fact that following the birth of her second son she recalls Mrs. Doherty taking out the form for his adoption and doing so in front of her grandmother and complaining about the fact that the plaintiff had not signed it. She further recalls being given a 'clattering' in front of Mrs. Doherty by her grandmother and, thereafter, signing the form.

15. I say and believe that investigations are being carried out by or on behalf of the fourth named defendant in order to establish whether a Mrs. Doherty or any other person currently or formerly in Cavan County Council is available as a witness who at the trial of this action could deal with the allegations made by the plaintiff. I have been advised and I believe that the only person who had any involvement with the plaintiff was a children's officer with Cavan County Council the aforesaid Muriel Doherty. At the time of the plaintiff's first pregnancy in 1969, Mrs. Doherty worked as a servant or agent of Cavan County Council.

16. Thereafter and upon the transfer of health functions the North Eastern Health Board in 1970, Mrs. Doherty worked as an employee of the North Eastern Health Board. However I say and I am advised and I believe that the fourth named defendant is greatly prejudiced in answering any allegations concerning Mrs. Doherty's involvement with the plaintiff in connection with her second pregnancy and that Mrs. Doherty is no longer available as a witness to this defendant to give any evidence or instructions in relation to such allegations or to contradict any of the assertions made by the plaintiff. I say and believe and I am advised and I believe that Mrs. Doherty died approximately six years ago on the 26th June, 2000....

23. The plaintiff's claim dates back to a period in excess of 30 years prior to the institution of these proceedings. I say that the lapse of time between the events complained of and the making of any complaint in relation to such event is by any measure inordinate. It is over 30 years since the plaintiff on her own account was last detained in an institution in connection with her second pregnancy. Since that time she would appear to have made little or no reference to or complaint about any abuse allegedly suffered while so detained. Such delay is by any reckoning inordinate. As a result of such passage of time files are incomplete and a crucial witness has died. The delay has therefore prejudiced the fourth named defendant in attempting to defend this action. The prejudice arises, in particular, from:

- (i) The absence of any primary knowledge on the part of the current servant or agents of the fourth named defendant concerning the matters of which the plaintiff complains;
- (ii) The absence of any primary documents created by current servants or agents of the fourth named defendant in connection with the plaintiff's first pregnancy and capable of being proven by the defendant;
- (iii) The absence of any appropriate witnesses whom the fourth named defendant may call in the defence of this action in relation to the matters of which the plaintiff complains;
- (iv) The absence of any person from whom the fourth named defendant could take meaningful instructions in relation to the allegations made by the plaintiff, and, therefore;
- (v) The inability of this defendant to cross-examine the plaintiff on any of the allegations she makes about servants or agents of the fourth named defendant."

7. In the case of *Elizabeth Donegan v.* the same defendants in these proceedings in which I have delivered judgment of even date, I have set out the legal principles relevant to the issues that arise on these two applications in this case. Precisely the same principles apply in this case, and hence there is no need to repeat them here.

8. I am satisfied that neither of these defendants, caused or contributed to the delay in the commencement of these proceedings.

9. I am also satisfied that the delay in commencing these proceedings has been inordinate.

10. In my view both the fourth and fifth named defendants are hopelessly incapacitated in defending these proceedings. All potential witnesses who would have been in a position to give evidence relevant to the allegations made by the plaintiff are now dead. Those members of the fifth named defendant's Congregation who survive and who were in Dunboyne at the relevant time, not only have no recollection relevant to the allegations made but have no recollection of the plaintiff being there at all. The only person whom the fourth named defendant could look to in the first instance for instructions and then evidence i.e. Mrs. Doherty is likewise dead.

11. Thus neither of these defendants has anybody available to them to whom they can even look for instructions in relation to the allegations made by the plaintiff, let alone rely upon for evidence.

12. As in the case of Elizabeth Donegan, I directed that discovery of documents be made for the purposes of this application. I have been given the documents discovered and I have carefully considered them. These documents are purely of an administrative nature and could not assist any witness in addressing the allegations made by the plaintiff. Indeed there is no documentary evidence to support the allegation that the plaintiff was in Dunboyne at all.

13. The prejudice of both defendants but in particular the fifth named defendant is compounded by the vagueness of the allegations made. Notwithstanding the plethora of allegations made the plaintiff is unable to specify by whom, where or when or in what circumstances these alleged wrongs were committed.

14. This is not a case where a trial would reduce to a contest between mere assertion against bare denial. Neither of these defendants can even get that far, not being in a position to know, that they can mount a denial to the plaintiff's allegations.

15. I am satisfied that because of the passage of time and the total loss of evidence available to the defendants, that the normal forensic enquiry which is of the essence of a trial in due course of law is in this case now impossible, and if the trial were permitted to go ahead it would be a parody of justice.

16. In the circumstances I must grant the relief which is sought in both notices of motion and dismiss the plaintiff's action.