Neutral Citation Number: [2012] IEHC 327

THE HIGH COURT

[2006 No. 977 P]

BETWEEN

I.I. **PLAINTIFF**

J.J. **DEFENDANT**

JUDGMENT of Mr. Justice Hogan delivered on the 5th day of July, 2012

1. The plaintiff and the defendant are siblings. The net issue which I am now called upon to decide is whether proceedings commenced by the plaintiff against her brother in 2006 alleging that she was raped and sexually abused by him during the period between 1976 to 1980 should be struck out on grounds of undue delay.

2. The emergence since the early 1990s of the phenomenon of delayed child sexual abuse allegations has presented the legal system with enormous problems relating to issues of proof, credibility, fading memories and general fairness to both accuser and accused with which it is still struggling to cope. Given the furtive nature of sexual abuse and the appalling psychological and other problems with which such victims suffer, it is generally quite unrealistic to expect them to commence litigation within orthodox time periods originally prescribed by the Statute of Limitations 1957. In recognition of this problem the Oireachtas has provided for more generous time periods: see Statute of Limitations (Amendment) Act 2000 ("the Act of 2000"). At the same time, very long delay hampers the capacity of the legal system to produce a fair result, especially where as is so often the case - there are no documentary or other records which enable the courts to assess the credibility of witnesses by reference to known or independently provable facts.

3. For the purposes of this particular motion, I will assume that the plaintiff will be able to shown that her action is not statute-barred and that, if necessary, she would be in a position to avail of the provisions of the Act of 2000 to extend time. As Keane J. observed in *Southern Mineral Oil Ltd. v. Cooney* [1997] 3 I.R. 549, 562:

> "It is clear that the jurisdiction to strike out proceedings where there has been delay can be exercised even though the proceedings were instituted within the relevant limitation period. Where the delay has been so extreme that it would be unjust to call upon a particular defendant to defend himself or herself, the guarantee under the Constitution of fair procedures cannot be defeated by the operation of a particular limitation period."

4. It is not enough, however, for the plaintiff to show that the action is not statute barred. As Kelly J. specifically noted in *Kelly v. O'Leary* [2001] 2 I.R. 526, 536, s. 3 of the Act of 2000 expressly acknowledged and preserved the power of the court "to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal." The real question, accordingly, is whether these proceedings should be struck out on grounds of undue delay, *independently* of the Statute of Limitations.

5. The courts have naturally acknowledged that considerable latitude must be given to the victims of sexual abuse to commence proceedings in view of the psychological trauma which such victims inevitably suffer. This is especially true given that the climate which prevailed in Ireland up to relatively recent times made it all but impossible for victims to come forward with any confidence that their complaints would be treated with the sensitivity and understanding and, perhaps, most importantly, that otherwise credible accounts of abuse would be believed: see here the comments of Murray C.J. in *H v. Director of Public Prosecutions* [2006] IEHC 55, [2006] 3 I.R. 575. All of this means that, as Mr. Murphy SC, counsel for plaintiff, put it, the considerations which obtain with regard to the passage of time and the prosecution of civil litigation in a case of this kind are very different than those which obtain in a case such as *Donnellan v. Westport Textiles Ltd*. [2011] IEHC 11 (a hearing loss case).

6. It is, however, one thing to say that both the courts and the Oireachtas have come to realise that orthodox legislative limitation periods are largely unsuited to the special category of claims arising from allegations of child sexual abuse. At the same time it must equally be recognised that this development, however, presents its own difficulties given that it opens up the real likelihood that cases will then be heard decades after the incidents complained of. Indeed, just as the courts have come to acknowledge that victims cannot be expected to sue their abusers within the same sort of timeframe as would be expected if they were pursuing a routine personal injuries action, another important development is independently taking shape in that at the same time the courts have also become more conscious of the importance of the speedy resolution of litigation. The duty to ensure the efficient dispatch of litigation within a reasonable time forms an important part of the judicial constitutional mandate to administer justice under Article 34.1 of the Constitution (*cf* the comments of Finlay Geoghegan J. in *Manning v. Benson & Hedges Ltd* [2004] 3 I.R. 566, 568 and my own judgment to this effect in *Doyle v. Gibney* [2011] IEHC 10). This duty must also be viewed in the context of the State's distinct obligation to safeguard the right to good name in Article 40.3.2.

7. These constitutional obligations are further underscored by the State's commitment to the right to a hearing within a reasonable time under Article 6 ECHR and the incorporation of the ECHR (admittedly at sub-constitutional level) by the European Convention of Human Rights Act 2003. Moreover, the Supreme Court has made it clear that an earlier culture of tolerance of and indulgence towards otherwise unacceptable delay in the conduct of litigation must come to an end: *cf* here the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 I.L.R.M. 290. These obligations must nevertheless be applied sensitively in the case of persons coming forward with allegations of the child sexual abuse, as otherwise there would be a risk that Article 34 and Article 40 of the Constitution and Article 6(1) ECHR would be deployed with a degree of remorseless rigour such as might frustrate the rights of victims of sexual abuse to seek justice.

The background to the present proceedings

8. These are the considerations which must inform an examination of the defendant's application to dismiss the present proceedings on the ground of inordinate and inexcusable delay. The plaintiff is the sister of the defendant and there are four other siblings. She issued the present proceedings in March, 2006 in which she claimed the defendant had subjected her to rape, sexual abuse and false imprisonment over a four year period between 1976 and 1980. The plaintiff was born in 1968 and thus these allegations, if correct,

relate to abuse which took place when she was aged between eight and twelve and a time when the defendant was aged between 13 and 17. The abuse is said to have principally occurred in the back bedroom of the parties' family home, which was a relatively modest semi-detached dwelling in a suburban town.

9. The plaintiff says that she reported the abuse to her father once during this period when it was occurring only to be beaten by him and to be told that she was dangerous. She did not report the abuse to anyone else during this period. It was not until October, 2004 when, following an altercation at a family gathering, that she blurted this out and reported her allegations to her mother, two sisters and a friend. These allegations came to the attention to the plaintiff shortly after that point.

10. For his part the defendant maintains that he had cut all ties with his sister in 2002 following the discovery of drugs at her property and that he told the plaintiff this at a family birthday party in 2002. He further claims that another sister, L., told him that the plaintiff had in turn told her that she was going to make his life a misery. In December, 2005 the plaintiff asked another sister, S., and another cousin, R., to tell the defendant that she wished to speak with him. He said that he did not wish to do so, but that she could contact An Garda Siochana if she wished to do so.

11. Matters then came to head as the defendant found that the plaintiff was repeating the allegations to other family members. In February, 2006 the defendant caused his solicitor in to write to the plaintiff warning her to desist from making these allegations. The plaintiff then contacted the Gardai and commenced these proceedings on 2nd March, 2006. While the defendant was interviewed by Gardai, nothing further appears to have come of the investigation.

The course of the present proceedings
12. Having commenced the proceedings m March 2006, the plaintiff then delivered a statement of claim on 28th September 2006. Following the exchange of particulars and a further notice for particulars, the defence was filed on 27th March 2007. A request for discovery followed in June 2007 and following two motions, the plaintiff finally made discovery on 10th April 2008. No further steps were taken by the defendant to bring the case on for hearing save for the service of a notion of intention to proceed on 2nd October 2009. Again, no steps were taken after that date, save for the service of a second notice of intention to proceed on 6th March 2012.

13. The service of a notice of intention to proceed is, as it happens, required by Ord. 122, r.11 where there has been no "proceeding" for one year from the last proceeding. By requiring the party so wishing to proceed to give one month's notice to the other side, it implicitly prevents that party from taking any steps in the litigation until the one month period has expired, although doubtless this would not prevent the court exercising an inherent jurisdiction during this one month interval should the justice of the case so require it. The defendant then issued the following motion on 27th April 2012 seeking to have the proceedings dismissed for want of prosecution and also invoking the courts' inherent jurisdiction to dismiss by reason of inordinate and inexcusable delay. The plaintiff subsequently sought and obtained a date for the hearing, although, of course, her legal representatives properly informed the court of the fact that this motion to strike out the proceedings was now pending.

14. As I pointed out in *Donnellan*, there are, in fact, two separate streams of jurisprudence on this topic emanating from the Supreme Court. As I noted in that judgment, the conventional starting point in such cases is the three prong test articulated by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, namely:

i. Whether the delay has been inordinate;

ii. If so, whether such delay is inexcusable;

iii. Even if the delay has been inordinate and inexcusable, the court must nonetheless consider the balance of justice.

15. But the *Primor* test is not, however, an all encompassing one, inasmuch as the Supreme Court confirmed in *McBreaty v. North Western Health Board* [2010] IESC 27 that there exists a separate (albeit overlapping) jurisdiction to strike out for undue delay which, as Geoghegan J. put it, can be exercised "even in the absence of fault on the part of the plaintiff." While these two test overlap, they diverge somewhat insofar as the second limb of *Primor* - namely, whether the delay is inexcusable- may be thought to pre-suppose fault on the part of the plaintiff.

16. For the purposes of the present motion I propose to apply the standard *Primor* three prong test and, in the event, I have not found it necessary to address any further Issues.

Whether there has been inordinate delay on the part of the plaintiff
17. Viewed objectively, it seems impossible to gainsay the fact that the delay was inordinate. Some twenty six years had elapsed between the end of the alleged abuse and the commencement of the proceedings in 2006. Putting this matter into further perspective, it means that this Court would now be required to adjudicate in 2012 on events which are said to have commenced thirty-six years ago. This delay speaks for itself and I am therefore coerced to conclude that the first limb of the *Primor* test is accordingly satisfied.

Whether the delay was inexcusable
18. In line with the approach taken in many other cases in this difficult area, whether in terms of criminal prosecutions (*cf. H v. Director of Public Prosecutions* [2006] IEHC 55, [2006] 3 I.R. 575) or civil actions (*cf*. the judgment of Hanna J. in *Hayes v. McDonnell* [2011] IEHC 530), it is clear that the overwhelming experience of the victims of such abuse is such that they are psychologically incapable of commencing such proceedings not only within the conventional time limits prescribed by the Statute of Limitations as originally enacted, but also even within a reasonable period thereafter.

19. The affidavits as originally filed on behalf of the plaintiff did not, however, contain any of the necessary psychological or psychiatric evidence such as would have enabled this Court to conclude that this particular plaintiff was, in fact, effectively precluded by these factors from commencing proceedings. In the end, however, psychiatric reports addressing this issue were belatedly produced before the Court towards the close of the hearing without objection from the defendant. However belatedly filed, I am prepared to accept the evidence contained in the psychiatric reports of Dr. Denis Murphy to the effect that the plaintiff "would not earlier [than October 2004] have been able to persist with her action in the face of her own personal distress." In the light of this evidence, I would accordingly be prepared to excuse the delay on the part of the plaintiff prior to 2004.

20. At this point, however, it must be recalled that the plaintiff had by late 2004 repeated these allegations to members of her family on a number of occasions. It is clear that these allegations had come to the attention of the plaintiff through siblings and other family members. Indeed, we have already observed, the defendant's solicitor wrote to the plaintiff in February 2006 asking her to desist from so doing. As we have noted, the plaintiff then made a complaint to the Gardai and commenced these proceedings. Given, however,

that she waited so long before commencing the proceedings she was under a particular obligation to pursue these proceedings with dispatch: see, e.g., the comments of Henchy J. in *Sheehan v. Amond* [1982] I.R. 235,237. This is so even if her proceedings were technically within the period stipulated by the Statute of Limitations (as amended).

21. That obligation was especially onerous given that she had repeated extremely serious allegations against the defendant to members of her immediate family. If the State's obligation to defend the defendant's constitutional right to a good name in Article 40.3.2 is to be meaningful, it must in turn imply that the procedures contained and operated in our legal system are framed in such a way such that a claim of this gravity is heard and adjudicated within a reasonable period of time.

22. In this regard, the decision of Kearns P. in *MW v. SW* [2011] IEHC 201 is very much on point. This was a case with very similar facts to the present one, where the plaintiff sister sued her brother in respect of alleged sexual assault which was said to have occurred some thirty five or so years earlier. On the issue of reputational damage Kearns P. observed:

> "Significant weight must also be given to the damage to the defendant's reputation which is inevitably produced by such lengthy delay. Due to the delay on the plaintiff's part, he has been prevented, notwithstanding his acquittal on any criminal charge, from defending the action and refuting the very serious allegations therein."

23. These sentiments also apply to the present case. While the defendant was never m default of pleading, he was nevertheless obliged to issue two motions to compel the delivery of discovery. Although the plaintiff's affidavit of discovery was furnished in April 2008, nothing happened thereafter for a further four years until a second notice of intention to proceed was issued in March 2012.

24. Here it is necessary to observe that the plaintiff's family circumstances were- or, at least, had become- especially trying and difficult. One of her children had been born with a serious medical condition, but in 2008 that child's condition deteriorated sharply so that he required on-going intensive medical care from that date for the following four years. It is clear from a letter from the plaintiff's general practitioner which was duly exhibited in evidence that the precarious medical condition of her child almost overwhelmed her during this period and certainly demanded her full-time attention.

25. It is impossible not have sympathy and understanding for the plaintiff in this regard. If her underlying contention is correct, then life has sent her a series of blows both in childhood and in her adult life, any one of which would normally be enough to crush the human spirit. Yet an examination of this question requires an objective appraisal of the issue from the perspective of both the plaintiff and the defendant. From the defendant's perspective, however, his good name had been brought into question by the making of allegations of the utmost seriousness. Just as in *MW*, he was entitled to insist that the plaintiff justify her claim when she would not otherwise withdraw it.

26. While the plaintiffs complete preoccupation with the plight of her child during this period was completely understandable, she was not objectively entitled to allow the claim just hang over the defendant. Put another way, one cannot make an allegation of this seriousness against another family member for the first time after an interval of twenty four years and then take eight years to prosecute the proceedings.

27. In these circumstances, I am coerced to conclude that the delay here was inexcusable.

Whether the balance of justice requires the claim to be dismissed

28. So far as the balance of justice is concerned, I propose to apply here the approach adopted by Finlay Geoghegan J. in *Manning* [2004] IEHC 316, [2004] 3 I.R. 556, 576 and ask:-

> "1. Is there, by reason of the lapse of time a real and serious risk of an unfair trial?
>
> 2. Is there by reason of the lapse of time a clear and patent unfairness in asking the defendant to defend the action?"

29. In this regard it should be noted that the claims made allege sexual assault and rape over a four year period between 1976 to 1980. The particulars are scant and merely state that the events complained of generally happened in the back bedroom of their parents' house. It is agreed that there are no documents which might support the claim, such as, for example, contemporaneous medical notes. It would, of course, be somewhat unrealistic to expect contemporary records of this nature in a case of this kind, but it is nevertheless true that the absence of such documentation does not assist the quest for justice after the lapse of such an interval.

30. It is true that the plaintiff does say that she complained to her father of the abuse during this period. While the litigant's father is in advancing years, the defendant has averred - without contradiction -that his father has told him that he will deny at trial that such a complaint was ever made to him by the plaintiff. While I agree that it might possibly have been preferable if the father had sworn a separate affidavit in this regard, the evidence suggests nonetheless that the father will not accept the plaintiff's version of events.

31. This denial, of course, is not dispositive of the matter and, naturally, cross- examination might demonstrate a completely different picture. Yet the picture which emerges is that the plaintiff's case largely rests on bald assertion. If this action were to proceed to trial, one would be faced with the real possibility that the jury would be forced to choose as between two different narratives, so that the party who came across as more appealing, sympathetic and credible was more likely to be believed. However a trial of this kind certainly would certainly put "justice to the hazard" (see *0'Domhnaill v. Merrick* [1984] I.R. 151, 158, *per* Henchy J.), since it puts a premium on the ability of a party to give a skilful performance as a witness.

32. This is especially so when it is recalled that the plaintiff has given almost no detail of how the events complained of are said to have happened. It would be, of course, unrealistic for the plaintiff at this remove to supply exacts details of times and dates. But it should surely be possible for the plaintiff to give at least a general account of *how* and (even if allowing for more latitude in this regard) *when* these events occurred. Specifically, one might have expected a suggested explanation as to how these events happened over a long period of time in a suburban dwelling with a large family without the defendant being detected.

33. Yet without such details, the defendant cannot possibly hope to defend the claim beyond denying it. He would be thus deprived of the opportunity of controverting her testimony by reference to objective facts by showing, for example, that he was absent from the house during some or all of the periods in question or that it was improbable that the events complained of could have occurred without detection.

34. Even if, however, particulars of this kind had been supplied by the plaintiff, the risk of injustice by reason of delay would still have

been high. Apart from anything else, as Henchy J. put it in *Sheehan* ([1982] I.R. 235, 238), "memories...inevitably become dulled or distorted with the passing years..." Judicial concerns regarding the lapse of time are especially heightened where (as here) the claim rests on the oral testimony of the recollection of particular witnesses, as distinct, for example, to claims which rest principally on legal argument or physical evidence: see, e.g., the comments of Hardiman J. to like effect in *JOC v. Director of Public Prosecutions* [2000] 3 I.R. 478. While it is true that this was a dissenting judgment in respect of an application for prohibition of a criminal trial, nevertheless as Finlay Geoghegan J. observed in Manning, the judgment assists "in identifying principles which should apply when exercising the inherent jurisdiction for which the defendants contend."

35. All of this is perhaps another way of saying that a claim of this kind which rests completely (or, at best from the plaintiff's perspective, almost completely) on one person's word against another in respect of events which occurred between thirty two to thirty six years ago is so fraught with uncertainties that the risk of an unfair trial is in turn so great that the action should not be allowed to proceed. As Finlay Geoghegan J. observed in *Manning*, [2004] 3 I.R. 556, 568:-

> "The constitutional requirement [in Article 34.1] that the courts administer justice requires that the courts be capable of conducting a fair trial...Accordingly, if a defendant can on the facts establish that having regard to a laps of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss."

36. In my view, the delay here is inherently prejudicial. For good measure I would also add , were it necessary to do so, that the defendant can also point to specific prejudice in that two witnesses (his sister L. and cousin R.) have both died in the last fourteen months or so. It will be recalled that the defendant contends his deceased sister would have said that the plaintiff told her that she intended to make his life a misery and that these allegations of abuse post-dated that particular conversation. If that account were true, it would lend some support to the defendant's contention that these allegations are spiteful and malicious.

The Supreme Court decision in *JR v. Minister for Justice*
37. For completeness I should record that Mr. Murphy SC laid particular emphasis on the Supreme Court's decision in *JR v. Minister for Justice* [2007] IESC 7, [2007] 2 IR 748. In that case the applicant maintained that the she had been subjected to sexual abuse, incest and beatings at the hands of her parents and her brother. She maintained that in 1967 when she was aged 12 years of age she went to Raheny Garda Station to complain, only to find that her complaints were dismissed and ignored. The abuse came to light in 1993/1994 as a result of the actions of a social worker who relayed these concerns afresh to the Gardai. This resulted in the conviction of the plaintiffs brother of rape, unlawful carnal knowledge and sexual assault in the Central Criminal Court in 1997. Indeed, the remarks of the sentencing judge, Carney J., appeared to accept the plaintiffs account of what had happened with regard to her 1967 complaint.

38. While the plaintiffs proceedings (which had commenced in 1998) were struck out by this Court, the Supreme Court allowed the appeal. Denham J. stressed that the essence of the case was whether the State had contributed to the plaintiffs delay in coming forward and she concluded in the exercise of her discretion that it would be unfair to do so.

39. *JR* is, however, to my mind, a significantly different case, despite some superficial similarities. First, it did not concern an allegation of sexual abuse as such. Second, the defendants were all legal (and not natural) persons. Third, the fact of sexual abuse was by then uncontested and the only issue was in the proceedings was whether the Gardai had properly discharged their duties. Fourth, the case turned on the question of whether the defendants had contributed to the plaintiffs delay in coming forward her claims. The issues of proof and credibility in a case of that kind are very different and nor did it involve a highly disputed allegation of sexual abuse against a named individual. It is, after all, one thing for the State to have a claim that its police force failed properly to investigate (an admittedly very serious) complaint hanging over it. It is quite another to make allegations of rape and sexual abuse against a family member. The objective obligation to prosecute such claims, once made, with speed and dispatch is manifest.

Conclusions
40. For the reasons stated, therefore, I propose to dismiss the within proceedings on the grounds of inordinate and inexcusable delay. Given the inherent risks of unfairness associated with this delay, I have also concluded that the balance of justice plainly required that the within proceedings be struck out.