THE HIGH COURT

2001 17320 P

BETWEEN

J. O'D.

PLAINTIFF

AND

THE MINISTER FOR EDUCATION AND SCIENCE, IRELAND, THE ATTORNEY GENERAL AND DENIS MINIHANE

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered on the 13th day of May, 2009

The plaintiff herein issued proceedings by way of plenary summons against the defendants on 27th November, 2001. The plenary summons was served on the first, second and third named defendants on 10th April, 2003. It is not entirely clear when the plenary summons was served on the fourth named defendant but an appearance was entered on his behalf on 7th May, 2003, by Messrs. O'Flynn, Exhams & Partners, solicitors. O'Flynn, Exhams & Partners took over the defence of these proceedings on behalf of the first, second and third named defendants ("the State defendants") on 24th July, 2006. A notice of change of solicitors was filed on that day. Thereafter, O'Flynn, Exhams & Partners have represented all of the defendants herein. The fourth named defendant herein is sued as the nominated representative of the Presentation Brothers, having been nominated for the purpose of these proceedings.

Following the entry of appearances by the defendants, a statement of claim was delivered herein on 13th November, 2003. The statement of claim herein alleges, *inter alia*, as follows:

> "At all times material to these proceedings and in particular from the years 1968 to 1970, the plaintiff was a pupil at the above described school, and while therein, was subjected to a number of ongoing assaults of both a physical and sexual nature, which said assaults were carried out by members of the fourth named defendant's school and/or by lay teachers under its direction and control, with the result that the plaintiff has suffered and continues to suffer severe personal injury, loss and other damage."

The school in question is described elsewhere in the statement of claim as G. School, otherwise G. Industrial School/St. J's School.

The liability of the State defendants is said to derive from their responsibility for the welfare of children within the State and, in particular, the welfare of children who were placed in institutions such as that operated by the fourth named defendant herein. Thus, it was alleged that the State defendants were vicariously responsible to the plaintiff for the alleged personal injuries, loss and damage. It was also pleaded against the State defendants that the allegations against them arising out of the same facts gave rise to a constitutional tort for which they were also liable in damages.

Following the delivery of the statement of claim, a defence was delivered on behalf of the fourth named defendant on 5th January, 2004. An exchange in respect of particulars took place between the plaintiff and the fourth named defendant between 5th January, 2004, and 10th May, 2005. A reply to the defence was furnished on 10th May, 2005.

A defence was delivered on 12th January, 2006, on behalf of the State defendants and particulars were also raised by them.

A notice of motion was issued herein on 16th May, 2008, on behalf of all the defendants, grounded on an affidavit of Richard Neville, solicitor. The relief sought in the notice of motion included the following:

> "(a) An order dismissing the plaintiff's claim for failure to commence the proceedings within the time limits provided for by the Statute of Limitations;
>
> (b) an order pursuant to the inherent jurisdiction of the honourable court, dismissing the plaintiff's claim by reason of his inordinate and inexcusable delay in prosecuting the same;
>
> (c) in the alternative, an order pursuant to the inherent jurisdiction of this honourable court, dismissing the proceedings by reason of the fact that the matters at issue between the parties cannot now be fairly tried;
>
> (d) further, or in the alternative, an order pursuant to the inherent jurisdiction of this honourable court, striking out the plaintiff's claim as against the first, second and third named defendants, by reason of the fact that it is unsustainable and/bound to fail."

As can be seen from the notice of motion, three distinct points are made by the defendants against the plaintiff, namely:

(i) the proceedings are statute barred;

(ii) the matters at issue cannot now be fairly tried by reason of the inordinate and inexcusable delay in the prosecution of the action and by reason of the fact that the matters at issue cannot now be fairly

tried;

(iii) the action as against the State defendants is bound to fail.

So far as the last of these points is concerned, it was conceded by counsel on behalf of the plaintiff that the claim against the State defendants would not be pursued following the decision of the Supreme Court in the case of *Louise O'Keeffe v. Leo Hickey*, unreported, 19th December, 2008.

Mr. Gleeson S.C., on behalf of the plaintiff, made one other concession during the course of the hearing. He accepted that insofar as the plaintiff's claim was for damages for physical abuse as opposed to sexual abuse, that element of the claim is statute barred.

It is now necessary to look more closely at the details of the plaintiff's claim as set out in the statement of claim and the replies to particulars and to consider the affidavit of Richard Neville grounding this application and the replying affidavits of Eugene Murphy sworn herein on behalf of the plaintiff.

As mentioned previously, the plaintiff's claim is stated to arise out of assaults of a physical and sexual nature whilst he was a pupil at the school run by the Presentation Brothers. The assaults were alleged in the statement of claim to have occurred from 1968 to 1970. In the particulars of personal injuries set out in the statement of claim, some detail is given of the nature of the assaults and the abuse alleged. It is the plaintiff's case that he was a pupil at the school over a two-year period.

The details of the abuse can be summarised as follows:

The plaintiff was subject to a wholly unacceptable and abusive regime.

He was not provided with adequate food and was constantly hungry.

He worked in the fields and was so hungry that he would eat raw potatoes.

He was abused by a Brother C.

He was buggered by Brother C. on a number of occasions and touched inappropriately.

He was abused by two other teachers, a Brother E. and an unnamed Brother.

He alleged that he was beaten on a number of occasions and has outlined one particular beating by Brother C. with a billiard cue.

He complained of a lack of education.

He complained of a number of issues surrounding the death of his mother whilst he was a pupil at the school.

The plaintiff went on to describe difficulties in his later life which he attributed to the sexual and physical abuse alleged to have occurred during the two years he was a pupil at the school.

Particulars were raised in respect of the matters alleged in the statement of claim. The plaintiff was unable to furnish information in respect of the dates, details, times and places in relation to the alleged assaults, save in respect of a limited number of specific incidents. Even then, the amount of information provided was not such as to enable dates for any alleged incident to be ascertained save for one date which is said to have occurred two days after the plaintiff arrived at the school. Some further information was given as to the "unnamed" Brother and it appears that the plaintiff is of the view that this Brother may have been a Brother V.

In a subsequent letter of 19th August, 2004, the plaintiff's solicitors furnished particulars of further physical and sexual abuse, including an incident of buggery, alleged to have been perpetrated by Brother C. and to a lesser extent, particulars of abuse alleged against Brother E. No dates were provided in relation to the alleged incidents. Finally, supplemental particulars of injury dated 10th May, 2005, were delivered. Nothing of significance turns on these.

Richard Neville, in the affidavit grounding this application, pointed out a curious feature of the plaintiff's case. This was the description of the school herein as "an industrial school" and the fact that the plaintiff was of the view that he spent two years at the school. In fact, there was an industrial school at that location, but the industrial school closed in 1959, long before the plaintiff, who was born in 1956, became a pupil at the school. In addition, the records of the school show that the plaintiff was a pupil at the school then known as C.T., a fee-paying boarding school, for a period of six months only in 1969/1970. Apparently, he left the school at the Easter break in 1970, following the death of his mother which had taken place on 1st March, 1970, some three weeks earlier.

Mr. Murphy, the plaintiff's solicitor, sought to clarify the confusion as to the plaintiff's schooling, in his replying affidavit. He confirmed that the plaintiff did not attend an industrial school on the site. He accepts that Mr. Neville may be correct as to the length of time spent by the plaintiff in the school. He stated:

"The plaintiff remembers that he did not wish to go back to school and complained of illness."

It will be seen from the above that there is confusion on the part of the plaintiff in relation to his time at the school and the nature of the school.

I now propose to deal with the specific points raised by the fourth named defendant in the notice of motion before the court. The first of those points relates to the Statute of Limitations 1957, as amended. It is contended on the part of the fourth named defendant, that the plaintiff is statute barred in respect, not just of the alleged physical abuse, but also in respect of sexual abuse. As mentioned earlier, it has been conceded, on behalf of the plaintiff, that the claim, insofar as it

relates to physical abuse, is statute barred.

The relevant statutory provision is s. 48(A)(1) of the Statute of Limitations 1957, as inserted by s. 2 of the Statute of Limitations (Amendment) Act 2000, which provides as follows:

> "S.48 (A)(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 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."

The points made by Mr. Neville, in his affidavit, in relation to this aspect of the case are that the plaintiff would have been under a disability until 1974, three years after he attained his majority. Mr. Neville went on to assert:

> "As for the plaintiff's claim for damages arising from the alleged sexual abuse, he has adduced nothing before this honourable court to indicate that he was suffering from any disability or dominion of such significance that his will, or his ability to make a reasoned decision, to commence this action was substantially impaired so as to entitle him to rely upon section 48 (A)(1) of the Statute of Limitations, as inserted by section 2 of the Statute of Limitations (Amendment) Act 2000, in order to extend the time for bringing these proceedings."

Mr. Murphy, in his first replying affidavit sworn herein on 7th July, 2008, deals with these matters at some length. He set out the fact that the plaintiff attended for counselling with one Theresa Flack. He avers that the plaintiff was unable to deal with the issues arising in these proceedings prior to the counselling, notwithstanding that they had occurred many years earlier and that it was only after counselling that the plaintiff was in a position to attend a solicitor. He stated that the plaintiff first attended Ms. Flack in January 2001, and attended for legal advice for the first time on 3rd September, 2001. He went on to state that the plaintiff was incapacitated for a substantial period of time and could not deal with the issues until shortly prior to the commencement of the proceedings.

In a subsequent affidavit sworn by Mr. Murphy on 25th November, 2008, he expanded on this issue. He stated that the plaintiff would allege that he was under clear disability at all relevant times in that he had been the subject of significant sexual abuse. He also averred to the fact that the plaintiff has now come under the care of Dr. Helen Greally, a clinical psychologist, who provided a report to Mr. Murphy in August 2008. In the course of that report, Dr. Greally stated the following:

> "From a trauma and emotional distress perspective, it is my opinion that Mr. O'D. did not have the capacity to make a complaint until he sought help through the national counselling service in early January 2001. Mr. O'D.'s presentation at his interview identified clearly that this counselling had a profoundly positive effect on his life."

In the course of the oral submissions before me and in the course of the written submissions, counsel on behalf of the fourth named defendant, took issue with the admissibility of the report of Dr. Greally. It was contended that the primary facts upon which the opinion of an expert is based must be proved by admissible evidence. It was contended that there was no admissible evidence before the court such as would enable an expert evidence to give any opinion capable of being received as evidence. Dr. Greally's report was also stated to be hearsay evidence in that she had not sworn an affidavit in the proceedings. Complaint is also made by the fourth named defendant that the plaintiff has not sworn an affidavit himself, setting out any of the matters relied on in this regard. Thus, the fourth named defendant has been deprived of the right to test the claims being made on the plaintiff's behalf by way of cross-examination or otherwise because neither the plaintiff nor the expert witness on his behalf has sworn an affidavit. It was also suggested on behalf of the fourth named defendant, that the allegations of sexual abuse referred to herein were vague. In essence, the point made on behalf of the fourth named defendant is that there is an onus on a plaintiff to show that he has suffered a psychological injury, such that the case comes within the *proviso* contained in s. 48 (A)(1) of the Statute of Limitations. As there was no primary evidence before the court to show that he has suffered such a psychological injury, the expert evidence exhibited on his behalf is not admissible.

In support of the submissions on this point, reliance was placed by counsel on behalf of the fourth named defendant on the decision of the High Court in the case of *R.T. v. V.P.* [1990] 1 I.R. 545, a decision of Lardner J., in which he held as appears from the headnote, *inter alia*:

> "That an expert witness might give his opinion upon facts which are either admitted, or proved by himself, or other witnesses in his hearing at the trial, or were matters of common knowledge; as well as upon a hypothesis based thereon, but evidence in relation to a respondent whom he had never met or examined, was inadmissible as being based on hearsay."

I do not think that that decision is of great assistance in the context of the present case. That was an application for nullity. In the course of the trial of the action, a consultant psychiatrist, who was called to give evidence on behalf of the petitioner, gave evidence concerning the respondent. Counsel for the respondent objected to that evidence as hearsay as the witness had never met or examined the respondent. It was in that context that Lardner J. held that evidence in relation to a respondent whom he had never met or examined was inadmissible as based on hearsay. In the present case, it is clear that Dr. Greally furnished her report having interviewed the plaintiff on five separate occasions between 2nd

February, 2004, and 7th April, 2004. Her opinion is, therefore, based on those interviews as opposed to opinions based on information provided by others. In the course of the judgment in *R.T. v. V.P.*, Lardner J. at p. 551 of the judgement, referred to Phipson on Evidence at p. 561, and went on to quote a statement of the law contained therein as follows:

> " 'An expert may give his opinion upon facts which are either admitted, or proved by himself, or other witnesses in his hearing, at the trial, or are matters of common knowledge; as well as upon a hypothesis based thereon.'

I accept this as a correct statement of the law and I find that Dr. Behan's evidence in relation to the respondent whom he has never met or examined and her mental condition is inadmissible as being based on hearsay."

As I have set out above, the position in the present case is quite different.

Reliance was also placed in this context on the decision in the case of *J.F. v. D.P.P.* [2005] 2 I.R. 174. That was a decision which arose in the context of an application for judicial review to restrain the respondent from proceeding with the prosecution of the applicant in relation to sexual offences dating from 1988, on the grounds of delay. In the course of his judgment, Hardiman J. at p. 183 stated as follows:

> "I also consider that a refusal of access to the complainant for the applicant's expert, subverts the right to cross-examination. Oral contradiction in a public forum is the culmination of the work of the cross-examiner but it is by no means the whole of it. All effective cross-examinations, not least of expert witnesses, are the result of intensive preparation. It is of the essence of the right to cross-examine that the cross-examiner, the advocate selected by the person impugned, should have access to the materials for cross-examination. Study and assessment of these materials is a vital part of the process of cross-examination. It is also a vital factor in the formulation of the advice an advocate gives to his client. In a case with a significant issue of expert evidence, this process of preparation will take place in consultation with the party's own expert. If this expert is at a disadvantage vis a vis the other side's expert, counsel will be at a disadvantage in conducting the cross-examination. It is devastating to an opponent for an expert to be able to reply to a proposition put to him in cross-examination, 'I saw this person six times over six months and had every opportunity to form an accurate assessment of him. That proposition is a purely theoretical one formulated by a person who never saw the complainant at all'. It is simply not possible to deny that an expert who can say this is at a huge advantage over his colleague. It would be gross negligence for a solicitor, advised as this solicitor has been, not to endeavour to put in place assessment facilities for his own expert."

That was a case in which the applicant sought to have the complainant in criminal proceedings assessed by an expert nominated by him, and the request was refused. In those circumstances, the applicant brought an application to strike out the relevant paragraphs of the statement of opposition and the supporting affidavits of a psychologist and the relevant parts of the complainant's affidavit. This was refused by the High Court and the applicant appealed to the Supreme Court which allowed the appeal. It was submitted before me that the facts of this case were on all fours with that case.

I cannot agree with the submission that the fourth named defendant in this case is in the same position as the applicant in the case referred to above. First of all, that case was an application for judicial review in the context of a criminal prosecution. The issue before the court was a fair procedure point, and the essence of that point was that in circumstances where the respondent in those proceedings had access to a psychologist's report in relation to the complainant therein, the applicant should have had the same access in order to be able to challenge the evidence of the complainant and of the expert. Obviously, there is a procedural difficulty in the context of the present case, given that the plaintiff herein has not sworn any affidavit and the report of Dr. Greally is put before the court as an exhibit in the affidavit of the plaintiff's solicitor. That being the case, it is not open to the fourth named defendant to cross-examine either the plaintiff or Dr. Greally. It is somewhat surprising that having relied on the decision in the case of *J.F. v. D.P.P.*, there was no reference to the fact that the plaintiff herein has, in fact, been examined by Dr. Harry Kennedy, a consultant psychiatrist, on behalf of the defendants, a point that emerged in the course of the oral submissions. There was nothing to stop the fourth named defendant from exhibiting a report of Dr. Kennedy, had it been seen fit to do so. It has to be borne in mind that part of the decision of the Supreme Court in J.F. v. D.P.P., was to the effect that:

> "There was a positive requirement that an expert, called as a witness on behalf of the respondent and an expert who might be called on behalf of the applicant, had to be treated equally, and the placing of the respondent's witness in a position superior to that of the applicants, was inconsistent with the right to fair procedures".

The lack of fair procedures that existed in *J.F. v. D.P.P.* does not exist in the present case. In this case, the fourth named defendant has had the opportunity of having the plaintiff examined by an appropriate expert. Therefore, the lack of fair procedures present in that case does not exist in this case. The 4th defendant could have, as I have said, exhibited a report from Dr. Kennedy but chose not to do so. I am of the view that it would not be appropriate to disregard the evidence before the court in the form of the plaintiff's solicitor's affidavits, and the exhibits contained therein. It has to be borne in mind that that evidence has not been controverted in any way by the fourth named defendant. In those circumstances, it seems to me that it would be inappropriate to disregard that evidence. In this context, I also bear in mind the provisions of O. 40, r. 4 of the Rules of the Superior Courts which provides as follows:

> "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions on which statements as to his belief, with the grounds thereof, may be admitted. The costs of any affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall not be allowed."

As the application before the court is an interlocutory application, it is therefore possible to proceed by way of affidavit evidence which includes hearsay evidence. Accordingly, I do not believe that there is any procedural defect in the affidavits before the court, such that the matters set out in the plaintiff's affidavits ought to be disregarded.

In those circumstances, I am satisfied that, so far as the issue arises in relation to the Statute of Limitations, there is ample evidence before the court at this point in time to support the contention on behalf of the plaintiff that the plaintiff

was suffering from a disability until 2001, such that it was not possible for the plaintiff to issue proceedings in relation to the matters complained of herein until that time.

Two further issues are raised by the fourth named defendant in respect of this particular case. It seems to me that to some extent the issues overlap. The first is a complaint as to delay in the prosecution of these proceedings since the inception of the proceedings. In the course of his first replying affidavit, Mr. Murphy, on behalf of the plaintiff, sets out a number of steps that have been taken by firm on behalf of the plaintiff in the course of the proceedings. He takes issue with the averment of Mr. Neville that no step was taken in the proceedings as between the date of delivery of the fourth named defendant's defence on 5th January, 2004, and the service of a notice of intention to proceed on 20th December, 2007. Mr. Murphy then went on to outline a number of matters which were dealt with in the period of time concerned. Mr. Neville is quite correct in his averment in that, clearly, the matters described by Mr. Murphy, whilst they may have been steps taken by him in the course of the prosecution of the plaintiff's case, do not amount to proceedings within the meaning of O. 122, r. 11 of the Rules of the Superior Courts, which provides as follows:

> "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the court to dismiss the same for want of prosecution, and on the hearing of such application, the court may order the cause or matter to be dismissed accordingly, or may make such order and on such terms as to the court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded, shall be deemed a proceeding within this rule."

There is no doubt but that there has been no proceeding in the action between 5th January, 2004, and the date of service of the notice of intention to proceed on 20th December, 2007. I accept that steps have been taken in the course of the action such as the furnishing of replies to particulars and that the issue of discovery was being dealt with in the intervening period of time. In addition, so far as the State defendants were concerned, it was necessary for the plaintiff's solicitors to issue a motion in default of defence in October 2005. Nonetheless, so far as the fourth named defendant is concerned, there has been what could only be described as a want of prosecution.

The principles applicable to an application to dismiss for want of prosecution have been considered in a number of cases and those principles have been distilled in the course of the well-known decision in Primor plc. v. Stokes Kennedy Crowley [1996] 2 I.R. 459, at pages 475 - 476, where Hamilton C.J. summarised the principles in a passage which is often quoted and which is so well-known that I think it is unnecessary to repeat it in the course of this judgment. That decision has also been considered more recently in a number of other judgments, most notably, perhaps, the judgment in the case of Stevens v. Paul Flynn Ltd. [2005] IEHC 148, which was subsequently upheld in the Supreme Court. Gilligan J. in the case of Comcast v. Minister for Enterprise [2007] IEHC 297, referred to the judgment of Clarke J. in Stevens v. Paul Flynn Ltd., stating as follows:

> "It is clear from the judgment of Clarke J. in Stevens v. Paul Flynn Ltd. [2005] IEHC 148, which I propose to follow, that there is a shift in emphasis in respect of the manner in which delayed proceedings are to be approached in an application such as is now before this court. As Clarke J. stated at page 7 of his judgment, 'the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay, or the matters which might go to excuse such delay, are issues which need to be significantly reassessed and adjusted in the light of the conditions now prevailing'. Furthermore, 'the balance of justice may be tilted to imposing greater obligations of expedition and against requiring the same level of prejudice as heretofore'."

The decision in Stevens v. Paul Flynn Ltd. was a case dealing, strictly speaking, with dismissal for want of prosecution. This case is one in which there is not just a complaint in relation to want of prosecution following the commencement of proceedings, but is also a case in which the fourth named defendant relies on the inherent jurisdiction to dismiss a case by reason of pre-commencement delay when the circumstances are such that because of the delay it is no longer possible to obtain a fair trial.

As I have mentioned previously, there is a certain amount of overlap between an application to dismiss for want of prosecution, and to dismiss pursuant to the inherent jurisdiction of the court on the basis that the matters at issue cannot now be fairly tried. If one applied the Primor principles to the facts of this case, the first question to be considered is whether there has been inordinate and inexcusable delay in prosecuting the case by and on behalf of the plaintiff. Assuming one reached the conclusion that there had been inordinate and inexcusable delay, one would then proceed to consider whether the balance of justice lay in favour of dismissing the proceedings, or not, as the case may be. In other words, the court would have to consider the issue as to where the balance of justice lies. There is a passage in the judgment in a case called Birkett v. James [1978] A.C. 297, which is often quoted. Lord Diplock, in that case, said at p. 322 of his judgment that:-

> "A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued."

That passage has often been quoted with approval in this jurisdiction and is particularly apposite in relation to the facts of this case. This case commenced in 2001. It has proceeded at what could only be described as a leisurely pace. It concerns matters that go back to 1969, some forty years ago. Thus, this is one of those cases in which it could be said that it is the more incumbent on the plaintiff to proceed with all due speed. The issue of proceedings in 2001 in relation to matters which were then going back over thirty years, meant that the case should have been prosecuted with speed and dispatch. Instead, the proceedings were not served on the defendants until 2003. The statement of claim was not delivered until November of 2003. It became necessary for the solicitors for the plaintiff to serve a notice of intention to proceed in 2007. I have already outlined various other steps taken within the course of the proceedings and I do not think it is necessary to reiterate those issues at this point. I accept that, as stated by Mr. Murphy in his first replying affidavit, the case is complex and difficult but having said that it is important to have regard to the difficulties of defendants in

defending claims brought so many years after the matters giving rise to the claim. In the circumstances of this case, I have no hesitation in reaching the conclusion that the delay in prosecuting the claim on behalf of the plaintiff is both inordinate and inexcusable.

Having reached the conclusion that the delay in prosecuting this case is inordinate and inexcusable, it is necessary for the court to consider the question of the balance of justice. In that context, it seems to me, that the issues that arise in this respect are to a large extent similar to those to be considered in the context of the application on behalf of the fourth defendant to dismiss the plaintiff's claim by reason of the fact that the matters at issue between the parties cannot now be fairly tried. In that context, counsel on behalf of the fourth named defendant referred to the decisions in the cases of O'Domhnaill v. Merrick [1984] I.R. 151 and Toal v. Duignan (No. 2) [1991] I.L.R.M. 135. I will refer very briefly to a passage from the judgment of Henchy J. delivering the majority judgment of the Supreme Court in the case of O'Domhnaill v. Merrick at page 157 to 158 of the judgment where he stated as follows:-

> "The question to be answered in this appeal, therefore, is whether the defendant should be required in the circumstances to seek to rebut an allegation of negligence on her part in an accident that happened virtually a quarter of a century before the trial, and to meet a claim for heavy damages for personal injuries suffered by the plaintiff in that accident when she first learned of such a claim sixteen years after the accident …. Whether delay should be treating as barring the prosecution of a claim must inevitably depend on the particular circumstances of the case. However, where, as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent. In all cases, the problem of the court would seem to be to strike a balance between the plaintiff's need to carry on his or her delayed claim against the defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend …. I consider that it would be contrary to natural justice and an abuse of the process of the courts if the defendant had to face a trial in which she would have to try to defeat an allegation of negligence on her part in an accident that would have taken place twenty-four years before the trial, and a claim for damages of which she first learned sixteen years after the accident…. While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons, a trial in 1985, of a claim for damages for personal injuries sustained in a road accident in 1961, would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion, the defendant, who has not to any material or substantial way contributed to the delay, should be freed from the palpable unfairness of such a trial."

Bearing in mind those comments, and the requirement to consider the balance of justice, it is necessary to look at the facts of this case. There are a number of facts that have to be borne in mind so far as the fourth defendant is concerned. The most serious allegations in this case are made against Brother C. Brother C died in 1992, long before any allegation was ever made against him by the plaintiff. Accordingly, the possibility of obtaining instructions from him in relation to the allegations was long gone even before the commencement of these proceedings. The plaintiff has also made allegations against a Brother E. There is no record of a Brother E or a Brother of a similar sounding name having worked at the school during the relevant time. There are also allegations made against a Brother V. It is not entirely clear whether the allegations against Brother V are of sexual or physical abuse. Given the circumstances, I think it is clear that the fourth defendant will have great difficulty in defending the plaintiff's claim.

It goes without saying that the passage of time has an impact on the ability of a witness to recall accurately events that occurred in the past. The greater the passage of time, the more likely it is that a witness's recollection of events will have dimmed. In the present case, a significant element of the prejudice to the defendant is caused by the fact that there are simply no witnesses available to refute the plaintiff's allegations. It could be said that this is not the plaintiff's fault – after all – if the plaintiff was under a disability by reason of the alleged abuse such that the proceedings were not commenced sooner, why should that delay avail the fourth named defendant? That may be an argument to be made by a plaintiff in respect of an application to dismiss by reason of the fact that the matters at issue between the parties cannot now be fairly tried because of the length of time which has elapsed since the events giving rise to the proceedings. It seems to me that the issue of the balance of justice in the present case cannot be decided on that basis alone. In this case, there is the added consideration of the inordinate and inexcusable delay in prosecuting the case once proceedings were commenced.

This case illustrates very clearly, in my view, the risks and dangers of an unfair trial inherent in an action commenced long after the events complained of. Assuming that the case proceeds to trial, it is unlikely that the case would be heard before the end of 2009. Accordingly, a trial would take place some forty years after the events complained of. It is clear that not only does the fourth named defendant have an impossible task in trying to defend the allegations made herein given the fact that there are now no longer any witnesses available to him to refute the plaintiff's claims, but it is also clear that the plaintiff himself has difficulties with recollection in relation to the matters complained of in these proceedings. In the first instance, the plaintiff appeared to have believed that he had been in attendance at an industrial school. Clearly, that was not the case. Instead, he attended for a period of time at a fee paying boarding school. Secondly, the plaintiff appears to have been of the view that he spent two years at the school when, in fact, it appears that he spent less than a full academic year at the school. It appears that he spent just two terms at the school. Thirdly, the plaintiff has described instances of abuse committed by a Brother C. Although I think it is unfair to characterise the description of those events as vague, as has been suggested by the fourth named defendant, there is undoubtedly a lack of detail as to the times and specific places where these events are alleged to have occurred. Given the nature of sexual abuse, in particular, abuse which is not likely to take place otherwise than in private, a lack of detail is inevitably something that causes difficulty for a defendant. To use the phrase often quoted from a judgment of Hardiman J., there are no "islands of fact" that are easily or readily identifiable in respect of the allegations made herein. Fourthly, the plaintiff has made allegations against a named Brother, namely Brother E, in respect of whom there is no record of anyone of that or a similar name having worked in the school at the relevant time. Finally, the plaintiff has had difficulty in identifying a third Brother he believes was involved in abusing him. It is against that background that one has to consider the balance of justice. The dismissal of these proceedings at this stage would have an undoubted prejudicial effect on the plaintiff. His proceedings would be at an end and he would have no possibility of ever having a trial in respect of the issues raised in these proceedings. As against that, the fourth named defendant would have to face a trial in respect of which there is no witness available to refute the allegations made by the plaintiff. The allegations made against the fourth named defendant are vague to the extent that it has not been possible to ascertain the identity of two of those against

whom the allegations are made. There are few details of locations or times or dates on which the abuse is alleged to have taken place. It is very difficult to see how a defendant could properly and fairly defend such allegations. This is particularly the case in circumstances where the plaintiff's own recollection of the matters complained of is clearly so impaired on crucial issues by the passage of time as in this case. To paraphrase Henchy J.'s words in O'Domhnaill v Merrick, justice delayed puts justice to the hazard. It seems to me that there is a real and serious risk of an unfair trial in this case by reason of the delay in prosecuting these proceedings. I cannot see how the 4th defendant could reasonably be expected to defend these proceedings. I am therefore satisfied that the prejudice to the 4th defendant outweighs the undoubted prejudice to the plaintiff. For that reason, I propose to grant the relief claimed herein.