Neutral Citation Number: [2006] IEHC 281

THE HIGH COURT

[2001 No. 4783 P]

BETWEEN

JOHN O'DWYER

PLAINTIFF

AND
ANTHONY MARK MCDONNELL
THE MINISTER FOR EDUCATION AND SCIENCE
THE MINISTER FOR HEALTH AND CHILDREN
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of the Hon. Mr. Justice Quirke delivered the 2nd day of October 2006.

This is an application made on behalf of the second, third, fourth and fifth named defendants (hereafter "the State") for an order, pursuant to the inherent jurisdiction of this court, dismissing the plaintiff's claim against the State on the grounds of inordinate and inexcusable delay on the part of the plaintiff in commencing and prosecuting these proceedings.

It is contended on behalf of the State that the inordinate and inexcusable delay on the part of the plaintiff in prosecuting his claim against the State was so severely prejudicial to the capacity of the State to defend itself against the plaintiff's claim that the interests of justice require that the plaintiff's claim against the State should be dismissed.

Relevant Facts

1. The plaintiff's claim against the State is for damages for personal injuries, loss and damage, allegedly sustained by the plaintiff as a consequence of a series of assaults, batteries, physical and sexual abuse, false imprisonment and psychological trauma allegedly perpetrated upon the plaintiff between 1953 and 1963 whilst the plaintiff attended the Christian Brothers School at Mitchelstown in the County of Cork.

It is claimed on behalf of the plaintiff that the State was vicariously liable for the conduct of two Christian brothers who are alleged to have assaulted, battered, abused and falsely imprisoned the plaintiff while he was a student in the school at Mitchelstown, Co. Cork.

It is also claimed on behalf of the plaintiff that the assaults, batteries, false imprisonment and abuse were caused by reason of negligence, breach of duty and breach of statutory duty on the part of the State which, it is alleged, had a fiduciary relationship with the plaintiff based on trust and that the State occupied a position in *loco parentis* to the plaintiff.

2. On 21st June, 2000, the Statute of limitations (Amendment) Act, 2000, (hereafter "the Act of 2000"), was enacted and came into effect.

Its Preamble provided that it was:

> *"An Act to provide that certain persons shall be under a disability for the purpose of bringing actions relating to acts of sexual abuse committed against them prior to their reaching full age, for that purpose to amend the Statute of Limitations, 1957, and to provide for matters connected therewith."*

Section 2 of the Act of 2000 amended the Statute of Limitations, 1957, by inserting a new section, s. 48A, after s 48 of the Statute.

The effect of provisions of s. 48A of the Act of 2000 was to permit certain categories of person (a), who were suffering from psychological injury, (b) which had been caused, (in whole or in part), by alleged sexual abuse committed when the person had not reached full age and, (c) who would otherwise have been barred by the positions of the Statute of Limitations, 1957, to bring an action founded on tort against the alleged perpetrator of the abuse within one year after the passing of the Act of 2000.

Such an action could be brought provided inter alia that, prior to the 30th March, 2000, the person concerned had either, (i) obtained professional legal advice which has caused him or her to believe that the action was barred by the provisions of the Act of 1957 or, (ii) had made a complaint to the Garda Siochána in respect of the abuse.

On behalf of the State it was contended that the plaintiff is not a person who comes within the provisions of s. 48(A) of the Act of 1957 (as inserted by s. 2 of the Act of 2000).

Section 3 of the Act of 2000 provides as follows:

> *"3. —Nothing in section 48A of the Statute of Limitations, 1957 (inserted by section 2 of this Act), shall be construed as affecting any power of a 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."*

3. These proceedings were commenced by the issue and service of a Plenary Summons on 30th March, 2001. That summons was not served within the twelve month period required by the Rules of the Superior Court and on 5th July, 2002, an Order was made renewing the Plenary Summons which was served on the State on 21st October, 2002.

An invalid Statement of Claim was delivered on behalf of the plaintiff to the State on 30th March, 2004, and, after the issue and service of a Notice of Intention to Proceed, a valid Statement of Claim was delivered to the State on the 6th July, 2004.

As a result of communication failures the plaintiff's solicitors obtained an erroneous order for judgment against the State in January, 2005. That order was subsequently set aside by consent on the application of the plaintiff's solicitors.

This application was commenced by the issue and service of a Notice of Motion dated 2nd June, 2005.

The particulars of negligence, breach of duty and breach of statutory duty pleaded against the State in the Statement of Claim include allegations that the State:

"(a) Caused or permitted the plaintiff to be sent to the …school.

(c) Failed to ensure that the staff at the… school were competent and suitable persons to act in loco parentis,

(d) Failed to carry out inspections of the school to ensure that the plaintiff was not subjected to abuse,

(f) Failed to monitor the plaintiff's progress in the… school adequately or at all.

(h) Failed to provide any or any adequate training for persons engaged in the supervision of children at the school.

(i) Failed to make any or any adequate inquiries as to the suitability of the members of the Christian Brothers … who were working in the said school,

(j) Failed to carry out any or any adequate inspections of the said industrial schools so as to ascertain the suitability of the Christian Brothers …who were in charge or working at the said school.

(l) Failure to provide any or any adequately trained inspectors who would use reasonable care in assessing the school…

(n) Failed to carry out their statutory functions and obligations.

(o) Wrongfully delegated their statutory functions.

(q) Failed to put in place any or any adequate systems to guard against and prevent assault, battery, false imprisonment and sexual abuse against the plaintiff….".

4. The plaintiff, who was born on 28th May, 1949, alleges that he was physically abused and assaulted at the school between the age of nine years and fourteen years. He said that the assault and abuse was initially perpetrated by a Brother Flood and that it occurred over a two year period.

He alleges that between the age of twelve and fourteen years he was abused by a Brother Hogan and that during that time he suffered several various assaults, indignities, humiliations and sexual abuse.

5. In evidence Ms. Elizabeth Regan who is a Higher Executive Officer in the Department of Education and Science averred that the State has been compromised fundamentally in obtaining evidence from relevant witnesses by reason of the death and non-availability of those witnesses. She identified ten relevant senior civil servants whom she averred would have been in a position to provide relevant evidence in relation to the plaintiff's complaints. All ten of those persons are now deceased.

Additionally Ms. Regan identified four school inspectors including a chief inspector and a divisional inspector who were responsible for school inspections at the material time referred to by the plaintiff. All four of those inspectors are now deceased.

Ms. Regan averred that whilst the Department of Education and Science still has some limited documentation relating to this case it is no longer in possession of most of the documents which are relevant to the plaintiff's claim and has no way of locating them.

In particular it has been impossible to locate any records pertaining to the appointment of Brother Flood or Brother Hogan to the school in Mitchelstown.

It has also been impossible to locate school inspection records for the material time and whilst the Department has one file concerning the "*Management*" of the school during the relevant period it has been unable to locate another, more important file entitled "*Management*" which covered the entire of the period between 1930 and 1970. Extensive investigations have failed to locate these documents.

The alleged failure on the part of the State to inspect the school forms a significant part of the plaintiff's claim. Ms. Regan averred that inspections of the school were carried out during the relevant period but the files and records of those inspections cannot now be located. Travel and subsistence records of the inspectors who carried out the inspections had been maintained in respect of those inspections but cannot now be located.

Since that the State does "*..not have many of the relevant witnesses available" who would be in a position to testify as to the events at issue in the proceedings and is deprived of* "*important documents relating to the relevant period…*" Ms. Regan has averred that the State has been "*irrevocably prejudiced*" in its capacity to defend itself and states that a fair trial of the plaintiff's claim against the State is now impossible.

6. The plaintiff, in evidence, averred that as a result of the abuse to which he was subjected he felt very low and developed anxiety and stomach cramps and was unable to cope with his situation.

He said that he became a chronic alcoholic until 1987 when he was admitted to Tralee Hospital and received assistance from Alcoholic Anonymous which enabled him to overcome his alcoholism.

He said that he developed depression and took medication but did not feel able to make a complaint until he was advised by his late brother of the establishment of the Child Abuse Commission in 1999. He then consulted his solicitor who, presumably, advised him of the potential remedies relative to the abuse.

The Law

The inherent jurisdiction of this court to dismiss proceedings where the interests of justice so require is long established and has been confirmed repeatedly in recent years. The most frequently cited dicta summarising the principles of law which apply to this jurisdiction is that of Hamilton C.J. in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pp. 475 - 476 as follows:

"(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to:

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant - because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

Where this jurisdiction is invoked the court, in making its determination, should take the plaintiff's claim at its highest point and should not seek to determine any of the merits of the substantive proceedings.

Accordingly whilst, in the instant case it will be contended on behalf of the State that the Plaintiff is not a person who comes within the provisions of s. 48A of the Act of 1957 (as inserted by s. 2 of the Act of 2000) this court must determine this application on the assumption that the plaintiff will successfully establish what he contends for during the trial of these substantive proceedings.

Nonetheless s. 3 of the Act of 2000 is relevant to this application because it expressly preserves the right of a defendant to seek and, if appropriate, obtain the relief sought herein, (even when proceedings have been instituted within the limitation period prescribed by law).

The principles identified by the Supreme Court (Murray C.J.) in *H. v. The Director of Public Prosecutions* (Unreported, Supreme Court, 31st July, 2006) are also relevant to this application and I will refer to them later herein.

Decision
I am satisfied that the delay on the part of the plaintiff in instituting proceedings against the State in this case has been inordinate. It would be absurd to suggest otherwise since almost 50 years have passed between the date of the first alleged wrongdoing and the commencement of these proceedings and 36 years have elapsed since the plaintiffs 21st birthday.

The only evidence adduced on behalf of the plaintiff which sought to explain or excuse the inordinate delay on his part in instituting these proceedings against the State has been the averment contained in his affidavit sworn on 11th January, 2006. In that affidavit the plaintiff averred that

"…until 1987 I was a chronic alcoholic and had no control over my life."

He continued:

"I continue to having a feeling of being dirty, having anxiety, a feeling that I could not tell anyone about what happened to me, a feeling that nothing could be done about it, a feeling of hopelessness and I couldn't tell anyone and I developed depression for which I continued to take medication."

Later he averred:

"It was not until my late brother in 1999 mentioned to me about the Child Abuse Commission, was I able to, for the first time, consult my solicitor… to tell doctors and other people about what had been done to me…".

Ms. Irvine S.C. on behalf of the State argued that these bald averments are wholly insufficient to discharge the obligation which, she said, rests upon the plaintiff to provide an adequate explanation for his inordinate delay in instituting proceedings against the State.

She relied upon the principles identified by the High Court (Kelly J.) in Kelly v. O'Leary [2001] 2 I.R. 526 where the court considered an application not dissimilar to this application.

In that case Kelly J. referred to an earlier decision of the High Court (Costello J.) in *Guerin v. Guerin* [1998] 2 I.R. 287 in which the court permitted a claim to proceed after having heard and considered very substantial evidence by way of explanation for inordinate delay in commencing proceedings.

Having dealt in detail with the evidence adduced in Guerin Kelly J. observed at page 542:

"It is suggested that the plaintiff here is in much the same situation as was the plaintiff in Guerin v. Guerin. I cannot accept that to be so. There is no evidence put before the court which would suggest that such is the case. There is nothing like the evidence that was adduced in Guerin v. Guerin which persuaded the High Court (Costello J.) to make the decision which it did. Although a great deal of time was allowed for the filing of affidavit evidence by the plaintiff in this

motion, just a single affidavit was sworn and in my opinion it goes nowhere near establishing facts similar to that in Guerin v. Guerin which might excuse this delay.

Neither is there any suggestion of a type which has now become familiar particularly on applications on the judicial review side to stay criminal prosecutions in respect of sexual offences committed against minors many years ago of any form of dominion over the complainant. Here such dominion as was exercised by the Sisters of Mercy ceased well over 50 years ago. The plaintiff went on to marry and rear a large family to adulthood. No evidence has been adduced seeking to explain much less excuse the delay in proceedings herein.

True it is that there is an assertion in the particulars delivered that the plaintiff suppressed memories because of the treatment alleged to have occurred whilst in the orphanage. But there is not a single averment by way of sworn evidence in support of that contention."

He went on to consider the balance of justice and dismissed the plaintiff's claim on the grounds of inordinate and inexcusable delay.

In this case the plaintiff has not married or raised a family. He has averred that he has "*….never managed to have any relationship with another person*" and is now living alone with his mother where he continues to take medication for depression.

As I have indicated, I believe that the principles identified by the Supreme Court (Murray C.J.) in *H. v. The Director of Public Prosecutions* (Unreported, Supreme Court, 31st July, 2006) are relevant to this application.

Identifying the test to be applied by the court where applications are made to prohibit criminal trials of alleged child sexual offenders on grounds of delay by complainants in reporting the court observed (at p. 25):

"A very considerable volume of evidence has been given and case law made explaining circumstances and reasons for delay in making complaints by victims of child sexual abuse. As Murray J. (as he then was) stated in PO'C v. Director of Public Prosecutions [2000] 3 I.R. 87 at p. 105:

> *"Expert evidence in a succession of cases which have come before this Court and the High Court has demonstrated that young or very young victims of sexual abuse are often very reluctant or find it impossible to come forward and disclose the abuse to others or in particular complain to Gardaí until many years later (if at all). In fact this has been so clearly demonstrated in a succession of cases that the Court would probably be entitled to take judicial notice of the fact that this is an inherent element in the nature of such offences."*

The Court's judicial knowledge of these issues has been further expanded in the period since that particular case. Consequently there is judicial knowledge of this aspect of offending. Reasons for such delay are well established, they are no longer "new factors".

Therefore, the Court is satisfied that it is no longer necessary to establish such reasons for the delay. The issue for the Court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial.

The Court would thus restate the test as:

"The test is whether there is a real or serious risk that the applicant by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case."

Thus, the first inquiry as to the reasons for the delay in making a complaint need no longer be made. As a consequence any question of an assumption, which arose solely for the purpose of applications of this nature, of the truth of the complainants' complaints against an applicant no longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or a serious risk of an unfair trial. The fact of prejudice, if any, will depend upon the circumstances of the case.

There is no doubt that difficulties arise in defending a case of many years after an event. However, the courts may not legislate, the courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, as the legislature has not itself established a statute of limitations, that itself may be viewed as a policy of the representatives of the People. Thus each case falls to be considered on its own circumstances."

The principles applicable to the application which is before this court have, in the past, been similar but not identical to the principles which have been applied by the courts when considering applications to prohibit criminal trials for child sexual abuse on grounds of delay.

If, as in this case, the court was satisfied, in the first instance, that the delay had been inordinate the court conducted an investigation in order to discover whether an adequate explanation had been provided by the plaintiff rendering the inordinate delay excusable in the circumstances.

On the facts of this case that investigation is now unnecessary in respect of the period between the time of the alleged wrongdoing and the year 1999. That is so because it has now been established by the Supreme Court in *H. v. Director of Public Prosecutions* (supra) that this court now has judicial knowledge that;

"Young or very young victims of sexual abuse are often very reluctant or find it impossible to come forward and disclose the abuse to others or in particular to complain to Gardaí after many years later (if at all)."

However, it is of significance that in *H v DPP (Supra)* the Supreme Court has now expressly stated that in determining applications by persons charged with criminal offences involving child sexual abuse to prohibit trials on grounds of delay:

"The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case."

The application before this court is not an application to prohibit a criminal trial on the grounds of an infringement of the right of an accused person to a trial with reasonable expedition.

The application before this court is to dismiss civil proceedings on the ground of inordinate and inexcusable delay by the plaintiff in commencing and prosecuting them. It is claimed that the delay by the plaintiff in commencing and prosecuting his claim has prejudiced the defendant, the State, in its capacity to defend itself against the claim.

A distinction must be drawn between the prosecution of a criminal trial and the prosecution of civil proceedings. The former is conducted on behalf of the State by the Director of Public Prosecutions pursuant to a precise statutory authority and regime. The claimant has carriage of civil proceedings and is in a position to influence the pace at which the claim will be prosecuted.

However, the principles which apply to applications to prohibit the criminal trial of persons accused of child sexual abuse overlap to some extent with the principles which apply to applications of the kind which is before this court. That is not just because this court is now deemed to have the judicial knowledge identified by the Supreme Court in *H v DPP (Supra)*.

It is because both sets of principles required the court to investigate, (a) the length of the delay and, (b) the cause of the delay. In applications to prohibit criminal trials the court was then required to determine the overriding question whether there was a real and serious risk that the accused person might not receive a fair trial. In applications to dismiss civil claims on grounds of delay the court, if satisfied that the delay was "*inexcusable*", went on to determine where the "*interests of justice*" lay.

The test identified by the Supreme Court in *H v Director of Public Prosecutions* can be said to reduce emphasis upon apparent culpability for the delay complained of and to focus upon the overriding right of an accused person to a fair trial.

In civil claims for damages arising out of torts such as negligence, breach of contract or assault and false imprisonment, Statutes of Limitations enacted by the legislature regulate the time within which proceedings may be commenced. This court may not seek to legislate or to interfere with the statutory limitation periods prescribed by the legislature. Nonetheless, the court has an inherent discretion to dismiss such claims on grounds of delay.

In the aftermath of the decision of the Supreme Court in *H v DPP (Supra),* it can reasonably be asked whether, in applications to dismiss civil claims on grounds of delay, the court should now reduce emphasis on apparent culpability for the delay complained of and focus upon the issues of potential prejudice arising from the delay, i.e, the interests of justice and the right to a fair trial in civil proceedings.

Culpable or "*inexcusable*" delay can still be a factor in the consideration by the court of the "*circumstances*" of each application made.

Where, as in this case, there has been a very substantial lapse of time between the date of the alleged wrongdoing and the date when these proceedings were first commenced there is a clear obligation upon the plaintiff to prosecute his or her claim with expedition. This is so because of the obvious difficulties which the parties will encounter in defending (or prosecuting), the claim after the passage of a very lengthy period of time.

A defendant faced with a claim arising out of wrongdoings alleged to have occurred 40 or 50 years earlier suffers a presumptive prejudice in his or her capacity to defend his or herself by virtue of the passage of such a long period of time. That prejudice is rendered more acute where a plaintiff alleges vicarious liability of the type which is alleged in these proceedings.

In determining whether proceedings such as those which are before this court should be dismissed on grounds of delay it is no longer invariably necessary for this court to be satisfied that the inordinate delay complained of has also been inexcusable. Failure by the plaintiff to provide an adequate explanation for the delay complained of can be a factor in the determination of the court. In particular, where a plaintiff, with carriage and control of civil proceedings, prosecutes (or fails to prosecute), the proceedings in a cynical or patently improper or unfair manner then the inexcusable nature of the delay will be relevant and may be determinative.

However, in cases such as the instant application the overriding consideration will be the level and extent of prejudice sustained by the defendant as a result of the delay and whether, as a consequence there will be a real and serious risk of an unfair trial of the issues to be determined.

In making its determination in a case such as the case before this court it will now be more appropriate for the court to consider whether the delay has been so inordinate and the prejudice to the defendant so grave that it is no longer possible for the court to fairly determine the issues before it.

If the court is so satisfied then the interests and the balance of justice may require that a claim should not be allowed to proceed and should be dismissed.

In this case I am satisfied on the evidence that the delay on the part of the plaintiff in commencing these proceedings has been inordinate. However, the court has judicial knowledge of the cause and justification for that delay.

No adequate explanation has been provided by the plaintiff for the delay by the plaintiff in commencing and prosecuting the proceedings between 1999 and 2nd May, 2005, (when this application was commenced).

Although the plaintiff consulted his solicitors in 1999 a Plenary Summons was not served upon the State in this case until the 21st October, 2002. No explanation was provided on behalf of the plaintiff for that period of more than three years.

A valid Statement of Claim was not delivered to the State until 6th July, 2004. By then more than five years had passed since the date when the plaintiff first instructed his solicitor in relation to the matters which are the subject of these proceedings.

However, no evidence was adduced indicating that the additional delay between 1999 and 2004 resulted in any additional specific prejudice to the State's capacity to defend the proceedings

The principle issue for determination in this case is whether, on the facts, the balance of justice in this case requires that the plaintiff's claim should proceed or should be dismissed.

Although in determining where the balance lies the factors identified by the Supreme Court (Hamilton C.J.) in *Primor v. Stoakes Kennedy Crowley and Oliver Feeney and Co*. [1996] 2 I.R. 459 at p 476 paragraph (*d*) have less relevance in this case I note that there was no delay on the part of the State in dealing with the plaintiff's claim and no delay or conduct on the part of the State could be said to amount to acquiescence.

On the evidence of Ms. Regan at least 13 relevant witnesses are now deceased and are not available to testify on behalf of the State. Most of the documentation which has the greatest relevance to the plaintiff's claim and to the State's capacity to defend itself against that claim is no longer accessible.

The death of the many relevant witnesses and the absence of the documentation is of particular importance in this case because what is alleged on behalf of the plaintiff against the State is a vicarious liability in respect of events which are alleged to have occurred within 40 and 50 years ago.

I am satisfied that the capacity of the State to defend itself against the plaintiff's claim has been seriously and irrevocably prejudiced by reason of that fact. I cannot, therefore, see that the interests of justice will be served by permitting this claim to proceed to trial.

I am, therefore, satisfied that the delay and the consequent prejudice to the State in the special circumstances of this case make it unfair to the State to allow the action to proceed and make it just to strike out the plaintiff's action.

There is a real and substantial risk that it will not now be possible have a fair trial of the issues which must be determined in these proceedings.

It follows that the plaintiff's claim against the State must be dismissed.