

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 8177 P.]

BETWEEN

BRIDGET O'BRIEN

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE, NOEL CORCORAN AND BY ORDER CHARLOTTE EGAN

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 21st day of November, 2018

1. This application concerns a claim for sexual abuse brought by the plaintiff in which the first and second defendants seek an order dismissing the claim on the grounds of delay.

Background

2. The plaintiff was born on the 2nd August, 1951. She is a separated mother of four children and resides in County Kilkenny. The second defendant is the regional leader of the Congregation of the Brothers of Charity ("the Congregation"). The third defendant is the guardian ad litem appointed by the court to represent the estate of the late Dr. Denis Lane O'Kelly, consultant psychiatrist, who died in 2002. In the 1980's and for many decades before that, the Congregation owned and operated a small psychiatric hospital in Waterford known as Belmont Park Hospital. Dr. Lane O'Kelly was employed as a consultant psychiatrist at the hospital between 1956 and 1991 when he retired. The hospital closed down in 1992.

3. The first defendant is, like the second defendant, alleged by the plaintiff to have been responsible for the control, management and operation of Belmont Hospital. This is conceded by the second defendant but denied by the first defendant which claims to have had no such involvement save for the provision of funding for the hospital.

4. In the 1980's, the plaintiff suffered from alcohol dependence which resulted in her admission to Belmont Hospital under the care of Dr. Lane O'Kelly on at least two occasions in or around 1988. Following her discharge from these admissions, the plaintiff attended at the outpatients' clinic for follow up by Dr. Lane O'Kelly. During the course of two consultations with Dr. Lane O'Kelly at the outpatients' clinic, the plaintiff alleges that he sexually assaulted her. In the within proceedings, the plaintiff claims damages arising from these alleged events.

Chronology of Relevant Events

5. 1988 – the plaintiff claims to have been assaulted in or around 1988 when she was 37 years of age. It is not alleged that she was unaware of the occurrence of these assaults. Although she made no formal complaint at the time, the plaintiff indicates in replies to particulars that she disclosed the abuse to a fellow patient in the hospital. It would also appear from a medical report put in evidence on behalf of the plaintiff from Dr. Elizabeth Cryan, consultant psychiatrist, that the plaintiff raised the issue with one of the nurses in Belmont Hospital as to whether it was unusual for a psychiatrist to perform an internal examination.

6. 1991 – Dr. Lane O'Kelly retired.

7. 1992 – The hospital closed down.

8. 1997 – The Congregation became aware for the first time of complaints about Dr. Lane O'Kelly.

9. 2002 – Dr. Lane O'Kelly died.

10. 2005 – The plaintiff reported the abuse to a friend who advised her to contact the Rape Crisis Centre and she telephoned the Centre and spoke to a counsellor about the matter.

11. 2011 – RTE screened a documentary entitled "Behind the Walls" which was an exposé of the activities of Dr. Lane O'Kelly. The plaintiff in oral evidence said she saw this programme which acted as a catalyst to her to take action.

12. 2013 – 2014 – the only evidence available to the court as to when the plaintiff first consulted solicitors came from the plaintiff's own direct oral evidence. She was asked how she came to be assessed by Dr. Cryan on the 18th April, 2015 and in reply said that her solicitors referred her to Dr. Cryan one or two years after she consulted them.

13. 18th April, 2015 Dr. Cryan assessed the plaintiff and provided a report to her solicitors a few days later on the 22nd April, 2015 in which she expressed the following view:

"Clearly, Ms. O'Brien's PTSD had arisen as a direct consequence of her alleged experiences of sexual assault. Due to a sense of deep shame, self-blame and fear that she would not be believed, Ms. O'Brien's capacity to take a legal case had been impaired, up to shortly before her assessment..."

14. 13th September, 2016 – The plenary summons was issued.

15. 19th September, 2017 – The statement of claim was served.

Prejudice to the Defendants

16. In the affidavit grounding this application, the second defendant deposes to a number of matters which he claims are prejudicial to the Congregation arising from delay. Some of these I have alluded to already, for example the closure of the hospital in 1992 and the death of Dr. Lane O'Kelly in 2002. It should be noted that the plaintiff's case is that she was alone with Dr. Lane O'Kelly when the alleged sexual abuse occurred so because of his death, she is now the only person who can give any relevant evidence of the

occurrence of the events complained of.

17. Brother Corcoran avers that the medical director of the hospital was Dr. Lane O'Kelly himself and there were fourteen members of staff employed at the hospital, four of whom are now deceased. The administrative director of the hospital was Mr. Jim O'Donnell between 1968 and the closure of the hospital in 1992. Mr. O'Donnell died in 2017. Brother Canice Walsh was the brother superior of the Congregation who had overall responsibility for the management of the hospital between 1975 and 1990. He died on the 7th June, 2004. Prior to that, Brother Raymond Quigley was the brother superior between 1969 and 1975 and he died on the 24th October, 2005. The matron of the hospital was Brother Francis Casey who is now 80 years of age and has no recollection of any complaints concerning Dr. Lane O'Kelly. Three nurses and one domestic who worked at the hospital during the relevant period are deceased.

18. The same prejudice is claimed to affect the first defendant save that in an affidavit sworn by Janet Dwyer, head of Service and Social Care of South East Community Healthcare within the first defendant, she avers that additionally, the first defendant was at no time responsible for the control, management, or operation of the hospital or for the provision and/or retention of medical practitioners, doctors, nurses, psychiatrists, and/or ancillary staff and services required at and for the purpose of the hospital. That averment by Ms. Dwyer is not contradicted.

19. She further avers that although the hospital was funded by the Department of Health, it was not managed by the first defendant's predecessor, the South Eastern Health Board which has no details of specific admissions to the hospital or any records relating to Dr. Lane O'Kelly.

Legal Principles

20. The principles to be applied to applications of this type are by now so well-rehearsed in so many cases that I do not believe it is either necessary or useful to embark on any very detailed analysis of those principles. Suffice it to say that two distinct lines of relevant authority emerge from the jurisprudence. The first has its root in *O'Domhnaill v. Merrick* [1984] I.R. 151 and the second in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. To summarise these very briefly, the *O'Domhnaill* line of authority suggests that where the passage of time is such that it is no longer possible for a defendant to have a fair trial, irrespective of any blameworthiness on the part of the plaintiff, the court will dismiss the proceedings.

21. Under the *Primor* principles, where it is established that the plaintiff has been guilty of both inordinate and inexcusable delay, the court may then go on to consider where the balance of justice lies in order to determine whether the case should be permitted to proceed. A defendant is entitled to rely on one or other or both lines of authority in pursuing an application such as this. The onus of proof on a defendant who places reliance on *O'Domhnaill* is higher. Such a defendant must establish prejudice likely to lead to a real risk of an unfair trial. The bar is set somewhat lower in *Primor* where once a defendant establishes that the plaintiff has been guilty of both inordinate and inexcusable delay, proof of moderate prejudice may suffice, even in the absence of establishing a real risk of an unfair trial. Thus under the *Primor* principles, the plaintiff's culpability in relation to delay is a central feature which is absent in *O'Domhnaill*.

22. Although the first and second defendants rely on both strands, certainly the emphasis was on the *O'Domhnaill* strand, the defendants accepting, as they must, that the court has to take the plaintiff's case at its high watermark in assessing the issue.

23. The decision of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74 has clear resonances with the instant case. The plaintiff in *Cassidy* claimed to have suffered sexual and other abuse at the hands of one P.D., an employee of the Religious Sisters of Charity, the effective defendants. The abuse was alleged to have been suffered between 1977 and 1980 and the proceedings were commenced in 2012, 32 years after the last alleged abuse. P.D. was by then believed to have been deceased. The court's judgment was delivered by Irvine J. who applied the earlier decision of the Supreme Court in *Whelan v. Lawn* [2014] IESC 75, again a case in which the plaintiff alleged sexual abuse against a man who was now deceased. The fact of the alleged abuser's death was described by Hardiman J. in his judgment (at para. 12) thus: "The grossest imaginable prejudice is the death of the defendant himself in a case where the basic facts are disputed by one person's word against another's."

24. Echoing that sentiment, Irvine J. observed (at para. 52):

"In this regard I am satisfied that it would be hard for a defendant to demonstrate greater prejudice than that which arises for the defendant in this case, by reason of the fact that PD is believed to be dead."

25. She went on to expand on that observation at para. 57 in the following terms:

"Had PD been alive he might well have denied the allegations made against him, and the defendant would have had the benefit of his evidence in that regard. Even on a straight swearing battle as between the plaintiff and PD, PD's evidence may have been preferred to that of the plaintiff for any number of reasons. He may have been in a position, from facts only known to him, to challenge and undermine her evidence. He may have been able to call other witnesses such as work colleagues, friends or family capable of supporting his testimony or undermining that of the plaintiff. Accordingly, the defendant has not only lost the benefit of PD's own evidence but also the evidence of witnesses who might otherwise have been in a position to defend the allegations made by the plaintiff."

Discussion

26. Those remarks by the Court of Appeal appear to me to be entirely apposite in the present case. These proceedings were instituted some twenty eight years after the events complained of and fourteen after the death of the only person who could dispute the plaintiff's version of events, namely Dr. Lane O'Kelly. It is not clear to me on what conceivable basis the first and second defendants could defend this claim without his evidence. The fact that there may have been complaints about Dr. Lane O'Kelly after the event or television documentaries about him is *nilhil ad rem*. The prejudice suffered by the defendant in this case is of precisely the same kind as identified in the authorities to which I have referred as being the grossest imaginable prejudice. It is impossible to envisage at this remove in time how the defendants could get a fair trial. Whether the plaintiff has contributed to the delay herself is in this context at least, immaterial.

27. It therefore seems to me that there would be a manifest and patent unfairness in requiring the first and second defendants to now defend this claim. The interests of justice therefore require that the claim should be dismissed.

28. As I have reached that conclusion, it is unnecessary for me to consider the issue of delay in the context of the *Primor* strand. I would however merely observe that I do not think it could be gainsaid that the delay here was other than inordinate. Even taking the plaintiff's case at its height however, there remain some troubling aspects on the issue of excusability. As I have noted in the above

chronology, the plaintiff appears to have consulted her solicitors one to two years prior to April 2015 as a result of being moved to do so by a television programme in 2011. That only emerged from the plaintiff's oral evidence and is not to be found anywhere in her affidavit, a somewhat surprising deficit.

29. Even after Dr. Cryan promptly provided her report as to the plaintiff's capacity to sue, it took a further year and a half for a summons to issue and a further year again for a statement of claim to be delivered. It need hardly be emphasised that where delays of the magnitude that have taken place in this case occur, there is a particular onus on a plaintiff to proceed with alacrity. Such a sense of urgency is self evidently absent from this case.

Conclusion

30. For these reasons therefore, I propose to dismiss the plaintiff's claim against the first and second defendants.