

**THE HIGH COURT**

**1998 7983 P, 1998 4484 P, 1998 7984 P,  
1998 3185 P, 1998 7982 P, 1998 3184 P,  
1998 1449 P, 2000 10188 P**

**BETWEEN:**

**J.D., J.F., H.M., M.M., L.N.,  
M.O'B., B.T., and M.O'S.**

**PLAINTIFFS****AND****D.J.L. O'K. and THE BROTHERS OF CHARITY****DEFENDANTS****Judgment of Mr. Justice Hedigan delivered the 6th day of October, 2009**

1. The plaintiffs have brought proceedings against the first named defendant in respect of a series of alleged sexual assaults which are said to have taken place during the course of their medical treatment by him, on a series of dates between 1976 and 1991.
2. The first named defendant, who died in 2004, was at all material times a consultant psychiatrist at Belmont Hospital, County Waterford at which all the plaintiffs received treatment. His estate is party to the present proceedings by means of an authorised representative and is insolvent.
3. The second named defendant is a religious order whom, it is alleged, was the employer of the first named defendant at all material times.
4. The defendants are seeking the following, by way of a preliminary application to this Court:-

- (a) An order pursuant to Order 122, rule 11 of the Rules of the Superior Courts ('the Rules'), dismissing the plaintiffs' claim for want of prosecution;
- (b) An order pursuant to the inherent jurisdiction of this Court, dismissing the plaintiffs' claim on grounds of inordinate and inexcusable delay; and
- (c) An order pursuant to the inherent jurisdiction of this Court, dismissing the plaintiffs' claim on the basis of a violation of the defendants' rights to natural and constitutional justice, as well as prejudice arising therefrom.

**I. Factual and Procedural Background**

5. Each of the plaintiffs received, on various occasions between 1976 and 1991, psychiatric treatment from the first named defendant at Belmont Hospital, County Waterford. Some of the plaintiffs were treated as outpatients, while others were in residential care. Each of them has commenced a separate set of proceedings making allegations of, *inter alia*, sexual assault, trespass to the person and breach of their constitutional right to bodily integrity.

6. The plaintiffs' claims lie not only against the first named defendant as the alleged assailant, but also against the second named defendant in its alleged capacity as the employer of the first named defendant. Specifically, the plaintiffs' claim against the second named defendant alleges that it failed to provide adequate staff, care or supervision for the plaintiffs and that its agents knew, or ought to have known, that the first named defendant was engaged in the alleged conduct.

7. The distinct sets of proceedings brought by each of the plaintiffs have a long and convoluted history, involving various lengthy periods of delay and inaction. Certain incidents have undoubtedly contributed to the length of time which has passed. The fourth and sixth named plaintiffs, for example, chose to change their solicitors around six months after the issue of the plenary summons in each of their cases. Another contributing factor has been the failure by all of the plaintiffs, apart from the seventh named plaintiff, to deliver replies to particulars. In any event, and for ease of reference, the parties have created a detailed chronology of events which I set out below:-

Plaintiff	J.D.	J.F.	H.M.	M.M.
Date of Alleged Incidents	13th October 1980	Before 29th March 1990	July 1986 - January 1991	1985 - 1991

Plenary Summons Issued	10th July 1998	9th April 1998	10th July 1998	11th March 1998
Appearance Entered	4th November 1998	N/A	4th November 1998	N/A
Notice of Change of Solicitor Filed	N/A	N/A	N/A	16th September 1998
Statement of Claim Delivered	3rd February 1999	27th May 1999	3rd February 1999	3rd February 1999
Request for Particulars by First Named Defendant	11th March 1999	24th June 1999	11th March 1999	11th March 1999
First Reminder Letter Sent	31st May 1999	28th February 2000	31st May 1999	31st May 1999
Second Reminder Letter Sent	28th February 2000	N/A	28th February 2000	28th February 2000
Death of First Named Defendant	20th January 2002	20th January 2002	20th January 2002	20th January 2002
Reconstitution of Proceedings	13th May 2004	13th May 2004	13th May 2004	13th May 2004

Plaintiff	L.N.	B.T.	M.O'B.	M.O'S.
Date of Alleged Incidents	1986 – 1991	January 1987 – June 1987	1983 – 1988	1976 - 1990
Plenary Summons Issued	10th July 1998	11th March 1998	3rd February 1998	1st September 2000
Appearance Entered	4th November 1998	N/A	4th November 1998	25th October 2001
Notice of Change of Solicitor Filed	N/A	16th September 1998	N/A	N/A
Statement of Claim Delivered	3rd February 1999	3rd February 1999	3rd February 1999	None Delivered
Request for Particulars by First Named Defendant	11th March 1999	11th March 1999	5th December 2003	N/A
First Reminder Letter Sent	31st May 1999	31st May 1999	31st May 1999	N/A
Second Reminder Letter Sent	28th February 2000	28th February 2000	28th February 2000	N/A
Death of First Named Defendant	20th January 2002	20th January 2002	20th January 2002	20th January 2002
Reconstitution of Proceedings	13th May 2004	13th May 2004	13th May 2004	13th May 2004

8. In relation to the above chronology, submitted by the first named defendant, it must be noted that in the case of the seventh named plaintiff, replies were furnished to the second defendants in December, 2003. Further particulars were sought in February, 2004 but replies have not to date been delivered. In relation to all bar the eighth named plaintiff, who has never served a statement of claim on the second defendant, the notices for particulars were served by the second defendant on the 15th September, 1999. In light of the delays apparent, the defendants brought motions on the 28th day of April 2008, seeking to dismiss each of the plaintiffs' claims for want of prosecution and on grounds of inordinate and inexcusable delay.

## II. The Submissions of the Parties

9. The defendants argue that each of the plaintiffs have been guilty of culpable delay both in the institution of

proceedings ('pre-commencement delay') and in the prosecution of those proceedings, once instituted ('post-commencement delay'). In respect of the pre-commencement delay, the defendants argue that in all cases the period of delay has been inordinate and inexcusable. They emphasise that the expanses of time which were allowed to pass, between the date of the final alleged incident and the institution of proceedings, range from 6 years and 3 months in the case of the fifth named plaintiff to 17 years and 9 months in the case of the first named plaintiff. These extraordinary periods warrant, in the defendants' submission, the exercise of the court's inherent jurisdiction to dismiss the proceedings.

10. As regards the post-commencement delay, the defendants submit that the passage of time has given rise to serious prejudice as against them in the making of their defence. They point to specific factors such as the death of the first named plaintiff in 2002 and also to more general considerations such as the fading of memory in proceedings which are likely to be heavily reliant on oral testimony.

11. The plaintiffs accept that periods of pre-commencement delay and post-commencement delay have arisen but reject the suggestion that either period is sufficient jointly or individually to merit the dismissal of their claims. In this regard, the plaintiffs appeal to the court's responsibility to uphold justice and vindicate the rights of all citizens. They emphasise the profound and damaging effect which the alleged heinous acts of the first named defendant have had against them.

12. In terms of pre-commencement delay, the plaintiffs assert that issues relating to the Statute of Limitations are matters for defence at trial. In any event, they make clear their intention to adduce medical evidence to the effect that they lacked capacity to bring their claims within time owing to the psychological trauma which was occasioned by the alleged acts of the first named defendant.

13. With respect to post-commencement delay, the plaintiffs accept that the period which has elapsed in each of their cases has been inordinate. However, they contend that this delay has been excusable owing to the extreme difficulty which they feel in confronting the events of the past and thereby providing appropriate instructions to their legal advisers. Some of the plaintiffs have also suffered from diagnosed mental and physical illness during the relevant period which they submit has served to further exacerbate the situation.

14. As to the balance of justice in the case, the plaintiffs point to a number of factors which, they submit, weigh in their favour. They emphasise that at no time have the defendants attempted to deny the allegations made. They also stress the fact that since the commencement of proceedings, it appears that the second named defendant did not fully investigate the allegations, review the medical records of the plaintiffs or interview potential witnesses. The plaintiffs contend that these points, in addition to the seriousness of the claims being made and the harm alleged, should stand in favour of a full resolution of the issues at plenary hearing.

### III. The Decision of the Court

15. It is well-established that where issues arise as to both pre-commencement delay and post-commencement delay, each of these must be afforded separate treatment by the court. In the decision of *McH. v. J.M.* [2004] 3 I.R. 385, Peart J. considered the position and stated the following at page 395:-

"I am of the view that there are two separate and distinct tests, one the test set out in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in respect of post-commencement delay, and the other, the *Toal v. Duignan* (No. 2) [1991] I.L.R.M. 135 test, if I can so describe it, in respect of pre-commencement delay. First of all, the distinction reflects the different and respective contexts in which the delay took place in each case. But besides that, I am of the view that there are sound and logical reasons why the test in each case ought to be different."

16. In respect of pre-commencement delay, the classic exposition of the principle to be applied was laid down in the Supreme Court decision of *O'Domhnaill v. Merrick* [1984] I.R. 151. In that case, Henchy J. made the following remarks at page 157:-

"Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a 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 a plaintiff's need to carry on his or her delayed claim against a 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."

17. This statement of law was applied and endorsed by Finlay C.J. in the decision of *Toal v. Duignan* (No. 1) [1991] I.L.R.M. 135. The learned Chief Justice then went on to say the following, at p. 139, in relation to the test to be applied:-

"In the High Court it was held by Keane J. that the case was governed by the decision of this Court in *O'Domhnaill v. Merrick* [1984] I.R. 151. I am in agreement with that view of the law. [...] [T]he principles laid down by this Court in that case [...] may be summarised [...] as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."

18. The court went on to expand upon this general principle, providing examples of the kind of situations in which it might be unfair to require a defendant to defend an action. Finlay C.J. stated at p. 142:-

"[I]t has consistently been held:-

(a) that a lengthy lapse of time between an event giving rise to litigation, and a trial creates a risk of injustice: "the chances of the courts being able to find out what really happened are progressively reduced as time goes on";

(b) that the lapse of time may be so great as to deprive the party against whom an allegation is made of his "capacity... to be effectively heard";

(c) that such lapse of time may be so great as it would be "contrary to natural justice and an abuse of the process of the court if the defendant had to face a trial which (he or) she would have to try to defeat an allegation of negligence on her part in an accident that would taken place 24 years before the trial ...";

(d) that, having regard to the above matters the court may dismiss a claim against a defendant by reason of the delay in bringing it "whether culpable or not", because a long lapse of time will "necessarily" create "inequity or injustice", amount to "an absolute and obvious injustice" or even "a parody of justice";

(e) that the foregoing principles apply with particular force in a case where "disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past ...", as opposed presumably cases where there are legal issues only, or at least a high level of documentation or physical evidence, qualifying the need to rely on oral testimony."

19. The jurisdiction of the court to dismiss a claim on the basis of post-commencement delay is predicated, by contrast, not only in the court's inherent jurisdiction but also in O.122, r.11 of the Rules. That provision states, *inter alia*, as follows:-

"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 in 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. [...]"

20. The issue of post-commencement delay was afforded considerable treatment by the Supreme Court in the decision of *Primor plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. In that case, Hamilton J. set out the following applicable principles at p. 475:-

"(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."

21. It seems to me, therefore, that the key distinction between the test for pre-commencement delay and that of post-commencement delay is that the former focuses heavily on the position of the defendant, in particular any prejudice arising as against him, while the latter places greater emphasis on the conduct of the plaintiff and whether he can provide adequate justification for any period of culpable inaction on his part. I now turn to the application of each of these tests to the circumstances of the present case.

22. In respect of pre-commencement delay, it is clear from the decision of Henchy J. in *Ó Domhnaill* that a balance must be struck between the right of the plaintiffs to have recourse to the courts and the unfairness of allowing a claim of such vintage to proceed as against the defendants. In the present case and as noted above, the pre-commencement delay ranges from 6 years and 3 months to 17 years and 9 months from the last alleged incident of abuse. The case is undoubtedly one in which a heavy reliance will be placed on oral testimony, as envisaged by Finlay C.J. in *Toal*. The

inevitable fading and diminution of memory which will have arisen throughout the period of pre-commencement delay is something which weighs in favour of the defendants' application. As against this, the plaintiffs contend that they were incapable of taking action owing to the severe effect which the alleged acts of the first named defendant had upon them. While this argument is essentially one of incapacity, relating more to the issue of whether the plaintiffs' claim is statute-barred, I am satisfied that it is nonetheless a factor to be taken into account in considering the appropriate exercise of the court's inherent jurisdiction to dismiss proceedings.

23. It seems to me that pre-commencement delay must be assessed in the light of the circumstances which pertained on the date of initiation of proceedings. I am satisfied that in 1998, in respect of the first to seventh named plaintiffs, and 2000, in respect of the eighth named plaintiff, it would not have been unfair to require the defendant to defend the claims. At that time, the first named defendant was still alive and capable of meeting the claims against him, as the majority of the incidents alleged had taken place within the previous decade. The defendants' capacity to fully defend the claim would undoubtedly have been impaired to some general extent but I am of the view that this unfairness would have been superceded by the plaintiffs' right to seek redress in respect of the alleged heinous conduct a consequence of which may be taken as at least in part being a cause of the delay in issuing proceedings.

24. As to the post-commencement delay which exists within the case, it is apparent that in the years since the issue of proceedings, little or no progress has been made in respect of each of the claims. In the majority of cases, no positive step has been taken for over 11 years. There is evidence before the court to suggest that this effective standstill has occurred despite sporadic attempts on the part of the plaintiffs' solicitor to move things along. The affidavits sworn herein by the solicitor for the plaintiffs makes clear that she was having the greatest difficulty obtaining any response from her clients. I accept that she was dealing with very vulnerable people. It is clear her clients had the greatest of difficulty in revisiting memories of the abuse they alleged. It is difficult for the court to avoid the suspicion that the plaintiffs themselves have little enthusiasm for bringing the present proceedings to a head. I can readily understand their reluctance. It is only human nature that victims of sexual abuse such as that alleged in the present case would be reluctant to revisit their memories of such an egregious breach of their trust and confidence.

25. Nonetheless, as the cases cited above indicate, the court has a clear duty to vindicate the rights of all citizens. This not only requires that individuals such as the plaintiffs should receive their right of access to the courts, but also that the defendants should have civil proceedings brought against them determined within a reasonable period. The court must further take account of Ireland's international obligations with regard to the provision of justice within a reasonable time. This court in the recent case of *Mannion v. Bergin and Others* [2009] IEHC 165, stated the following:-

"In my view, to the factors set out [in *Primor*] for determining where the balance of justice lies must be added the requirement that the courts secure to the party claiming delay his right provided for in Article 6 of the European Convention on Human Rights to a trial within a reasonable time. It provides as follows:-

'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

As has been noted by the European Court of Human Rights, this duty applies in legal systems where the procedural initiative lies with the parties. In such systems, of which the Irish legal system is one, the courts must maintain a supervisory jurisdiction to ensure that justice is done as expeditiously as possible. In *Price v. United Kingdom* and *Lowe v. United Kingdom* (Case Number 43186/98, 29th July, 2003), the Court stated as follows:-

'23. The Court has held on a number of occasions that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of the proceedings, does not dispense the State from complying with the requirement to deal with cases in a reasonable time (see *Buchholz v. Germany*, judgment of 6th May, 1981, Series No. 42, page 16, para. 50; *Guincho v. Portugal*, judgment of 10th July, 1984, Series A, No. 81, page 14, para. 32; *Capuano v. Italy*, judgment of 25th June, 1987, Series A, No. 119, page 11, para. 25; *Mitchell and Holloway v. The United Kingdom*, No. 44808/98, judgment of 17th December, 2002). The manner in which a state provides for mechanisms to comply with this requirement – whether by way of increasing the number of judges, or by automatic time limits and directions, or by some other method – is for the state to decide. If a state let the proceedings continue beyond the "reasonable time" prescribed by Article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay.'

This obligation must be borne in mind by the Courts when considering as in this case where the balance of justice lies as to whether to dismiss for want of prosecution. The obligation is not merely to advance a case where necessary but may also be to prevent its continuance where, as here, it has lain dormant for a substantial period of time."

#### IV. Conclusion

26. Very little is offered by the plaintiffs by way of explanation for their extraordinary failure to progress the case since proceedings issued. I do not believe that the court can accept the assertion that the first defendant was capable of exercising any power or dominion over the plaintiffs after his death in 2004. Nor can I accept the argument that the defendants ought to have brought this motion sooner or brought motions to compel replies to particulars. In this regard the plaintiffs are arguing that the defendants were not sufficiently solicitous in taking them to task for their own delay. It seems a very unreal approach to take. The real argument advanced by the plaintiffs to explain their post-commencement delay is that they were simply unable to bring themselves to address questions that obliged them to relive the experience of which they complain. No evidence is produced to suggest there will be any change in this understandable attitude. The inevitable conclusion, therefore, must be that it is at least probable that were the court to refuse the relief sought herein the case would remain pending indefinitely.

27. The defendants have now waited eleven years since proceedings commenced in respect of events that occurred up to 33 years ago. Save in the seventh named plaintiff's case, no particulars have been furnished despite the defendants' demands. Even in that case, a request for further particulars has lain unanswered for over five years, the defendants having waited four years before that to receive what they considered to be inadequate details of the claim. The failure to provide these particulars of the claim must have prejudiced the defendants' ability to seek out evidence to assist in defending themselves. The particulars sought were not of an especially onerous kind. I accept that they rose to little more than details of the claim that one would have expected to have been taken when instructions were first given. Even to date, no attempt has been made to furnish these particulars now outstanding in six cases for ten years, in one case

for over five years and in the remaining case not even a statement of claim has been issued. Whatever the reason for this extraordinary delay, the defendants have undoubtedly been prejudiced thereby. The primary facts of the case are now almost certainly beyond their reach. The first named defendant is dead which must be greatly to the prejudice of the second named defendant, which is alleged to be responsible for his conduct. Those witnesses at the time who have not passed away are likely to have very impaired recollection. None of the delay can be attributable to the defendants.

28. No court wishes to strike out proceedings of any kind without good cause, much less proceedings where such cruel and egregious breach of trust is alleged as herein. Nevertheless, as the cases cited above show clearly, the courts have an obligation under both national and international law to ensure that parties who are sued have a trial of the issue within a reasonable time. Any trial that would now take place in this matter could not be said to have been within a reasonable time. Moreover, a trial conducted at such a distance in time from the events alleged could not in my view amount to a fair trial in the circumstances that I have found to prevail herein. For these reasons, I must grant the relief sought in this motion and dismiss the proceedings herein in accordance with paragraph 4(a), (b) and (c) of the notice of motion. I am informed by counsel that no order for costs is sought.