

**THE HIGH COURT****2000 8880 P****BETWEEN****PATRICK CORNALLY****PLAINTIFF****AND****MARCELLUS WARD, PATRICK A. REILLY, JAMES MUNGOVAN, THE MINISTER FOR EDUCATION AND SCIENCE, JOHN HANNON**  
**DEFENDANTS****THE HIGH COURT****2000 8881 P****PATRICK BRACKEN****PLAINTIFF****AND****MARCELLUS WARD, PATRICK A. REILLY, JAMES MUNGOVAN, THE MINISTER FOR EDUCATION AND SCIENCE, JOHN HANNON**  
**DEFENDANTS****Judgment of Mr. Justice Gilligan delivered on the 16th day of December, 2008**

1. The motions as before the court in both the above entitled actions are brought by the third named defendant, and seek an order pursuant to the inherent jurisdiction of the court striking out the plaintiff's proceedings for inordinate and inexcusable delay since the commencement of proceedings and/or want of prosecution causing prejudice to the third named defendant, and further in the alternative, an order pursuant to the inherent jurisdiction of the court striking out the plaintiff's proceedings due to inordinate delay in commencing proceedings, causing unfairness and prejudice to the third named defendant.
2. Both motions were presented and dealt with together, and in the circumstances, the court proposes to deliver a single judgment.
3. The first named plaintiff was born on the 9th October, 1961, and the second named plaintiff on the 19th February, 1962. At all material times in these proceedings but in particular, in or about 1973 and 1974, both plaintiffs' were pupils at Clara National School, and it is alleged at all material times were in the care of and under the control of the third named defendants, their servants or agents. The plaintiffs' allege that during this particular period of time they were each routinely subjected to sexual and physical abuse by the fifth named defendant, a member of the Regular Third Order of St. Francis of Assisi, having its principal headquarters at Mountbellew, County Galway. The first named defendant at all material times was the principal of the National School and a member of the Regular Third Order of St. Francis of Assisi, and he is separately represented in these proceedings. The second named defendant was the local Parish Priest at the material time and was the School Manager. The third named defendant on whose behalf these two motions are brought, is the nominated defendant for and on behalf of the Regular Third Order of St. Francis of Assisi. The fourth named defendant is the Minister for Education. The fifth named defendant was at all material times a member of the Regular Third Order of St. Francis of Assisi, and was a teacher at the material time at the National School. Judgment in default has been obtained on the 8th May, 2006, by both plaintiffs against the fifth named defendant and the case is set down against him for the sole purpose of an assessment of the damages to which each plaintiff is entitled.
4. It is of some significance that at the time of the institution of these proceedings the fifth named defendant having pleaded guilty to charges of sexual assault against both plaintiffs received a term of imprisonment on the 10th February, 1998. There is some discrepancy as regards precise dates but it is clear that, both plaintiffs were in the same class at the same time, and both were sexually assaulted by the fifth named defendant.
5. Against this background it is, in my view, of significance that the third named defendant on whose behalf these motions are brought, is effectively being sued on the basis that the Regular Third Order of St. Francis of Assisi is vicariously liable for the actions of the fifth named defendant, who at all material times was a member of the Order.
6. The particular plea against the third named defendant is that, the Regular Third Order of St. Francis of Assisi knew, or ought reasonably to have known that, the fifth named defendant had a tendency to abuse and had in the past abused other children with whom he was allowed to come into contact.
7. An originating letter was forwarded on behalf of both plaintiffs in 1998, and a plenary summons was issued on the 28th July, 2000 and was accompanied by a statement of claim also dated the 28th July, 2000. An appearance was entered on the 16th August, 2000. The third named defendant raised notices for particulars dated the 13th September, 2000, and these were not replied to on the plaintiffs' behalf until the 16th January, 2004. The replies to particulars were accompanied by a notice of intention to proceed dated the 16th January, 2004. The third named defendant delivered his defence on the 12th February, 2004, and served a notice claiming indemnity or contribution on the 4th March, 2004. Notice of trial was served as dated the 30th November, 2005, and the plaintiffs then sought voluntary discovery by way of a letter dated the 30th March, 2005, and voluntary discovery was not made by the third named defendant until the 7th June, 2007. The plaintiffs then served a notice of intention to proceed as dated the 14th May, 2007, and a notice of trial on the 20th August, 2007. Various notices to produce were then served, and it then appears that there was some confusion as to the appropriate venue for trial, but it now appears that the matter is listed for trial and will appear in the next jury list to fix dates, it being apparent that the plaintiffs are entitled to trial by judge and jury by reason of the fact that they are claiming damages for assault.
8. Mr. Walsh on behalf of the third named defendant and moving party submits that the plaintiffs are seeking to litigate matters which occurred as far back as 1973/1974, that this is clearly a case where justice delayed is justice diminished. It is submitted that both cases are very similar arising out of incidents at the relevant National School and the various dates as pleaded are identical. The second named defendant died in November, 2005 and no steps have been taken to reconstitute the proceedings as against him. It is contended on behalf of the third named defendant that his loss as a witness represents a serious lacuna. Since the time of the alleged assaults there was a delay in intimating a claim until the initiating letter as sent by the plaintiffs' solicitors on the 7th April, 1998, indicating their intention to issue proceedings against the third named defendant. It is submitted on the third named defendant's behalf that the pre-commencement delay has been inordinate and inexcusable, as has been the post-commencement delay and in particular, the fact that initially there was a notice of trial of the 30th November, 2005, served on the third and fourth named defendants and then subsequently, a further notice of trial of the 20th August, 2007, as against the first, third, fourth and fifth named defendants, both these notices of trial being for trial by judge alone, followed by confusion as to the appropriate venue for trial. It is submitted that there is no reasonable explanation offered for the lengthy delay in these proceedings being brought on for hearing following the issue of the plenary summons on the 28th July, 2000. The relevant parties herein are being asked to revisit matters of antiquity, against a background where there are serious problems with witnesses. It is contended on the third named

defendants behalf that the prospect of being in a position to defend the case as brought against the Order of St. Francis is not feasible and that, it would be a travesty of justice to allow these proceedings to be brought to a hearing. The fifth named defendant herein has not opposed judgment and judgment has already been obtained against him, and in these circumstances damages can be assessed for the plaintiffs. It is alleged that the third named defendant had no involvement with the National School in question.

9. It is further contented that there has been no compliance with disclosure.

10. As regards the plaintiffs request for voluntary discovery, it is submitted that while it may have been the case that the plaintiffs solicitors wrote five letters calling on the third named defendant to make voluntary discovery, no motion was brought for a formal order for discovery and further emphasis is placed on the fact that it took the plaintiffs solicitors, on the plaintiffs behalf, three years and four months to reply to the third named defendants notice for particulars as dated the 13th September, 2000, which were not replied to until the 16th January, 2004.

11. Mr. Keane on the plaintiffs behalf refers to the very delicate age of the plaintiffs at the time of the sexual assault as perpetrated upon them, the medical reports as furnished to the court which give a reasonable explanation as to the cause of the delay involved, the fact that the fifth named defendant was a member of the Regular Order of St. Francis of Assisi and pleaded guilty to sexually assaulting both plaintiffs and that accordingly, the real issue involving the third named defendant is as to whether or not the Order of Francis of Assisi is vicariously liable for the actions of the fifth named defendant against a background where the particular plea is that, the Order knew or ought reasonably to have known, that the fifth named defendant had a tendency to abuse and had in the past abused other children with whom he came into contact.

12. Mr. Keane refers to the fact that in this particular case, there is an extensive paper trail which has been discovered by the third named defendants, and that in all the circumstances while there may have been inordinate delay between the date of the alleged assaults and the institution of these proceedings, that delay is excusable, the post-commencement delay is not inordinate and there was in any event delay on both sides in delivering replies to particulars and in the furnishing of voluntary discovery. The real issue is one of law pertaining to vicarious liability, and in the circumstances there cannot be any real prejudice on the part of the third named defendant.

13. There can be little doubt but that the delay in these proceedings, between the dates of the assaults upon the plaintiffs by the fifth named defendant and the institution of proceedings is inordinate, but in my view excusable having regard to the medical evidence and in particular, the views as expressed by Dr. Alice Swan in her medical report of the 18th November, 2004, wherein having reviewed the situation of both plaintiffs she is satisfied that both were powerless in the situation in which they found themselves, and both were traumatised and could not have brought the proceedings any sooner. Both required an approach by a third party as happened in this case.

14. It is clear from the content of the medical reports of Dr. Alice Swan as furnished to the court that Patrick Cornally has had difficulties with the legal proceedings. He portrays a very strong sense of betrayal, has had periods of depression, blames himself for the incidents that occurred and while matters settled for a period of time, they returned with the criminal trial in 1998 and whenever he is dealing with legal proceedings including consultation with Dr. Swan, he feels very anxious to the point of being nauseous and has difficulty in eating, and has needed sedation from time to time. Dr. Swan also noted that at times of stress he has loss of memory.

15. Patrick Bracken has suffered low self esteem, persistent feelings of shame, feelings of guilt, recurring nightmares, flashbacks and low frustration tolerance. Once interviewed by An Garda Síochána he had a sense that he would not be able to deal with the matter and Dr. Swan sets out that he was correct in this regard, as he has found particular difficulty since the legal proceedings commenced in 1998.

16. In so far as the second named defendant is now deceased, Mr. Walsh submits his loss as a witness represents a serious lacuna. I am not advised as to what evidence, if any, the late Patrick A. Reilly could have given which would have assisted the third named defendants defence of the proceedings and which may not now be available. It is clear that the de facto position as regards his death has persisted since November, 2005. Furthermore, he was never a member of the Regular Third Order of St. Francis of Assisi and the plaintiffs claim as pleaded in so far as it relates to the third named defendant, is solely in respect of vicarious liability on the basis that the order knew, or ought reasonably to have known that, the fifth named defendant, a member of the Order, had a tendency to abuse and had in the past abused other children at his former position.

17. The court accordingly is satisfied that in this case where there has been a long delay prior to the institution of the proceedings, the delay is inordinate but in the circumstances excusable. The court accordingly has to consider whether the consequences of the delay have put at risk the possibility of a fair trial of the matter complained of, and in particular, the court in the exercise of its wider discretion has to have regard to the general principles of fairness, even allowing for the fact that the delay is excusable.

18. The sole issue to be considered in the particular circumstances of this case concerning the third named defendant is as to whether or not it is vicariously liable for the known and admitted actions of its member, the fifth named defendant herein, who has pleaded guilty to sexually assaulting both plaintiffs and has been sentenced to a term of imprisonment. This central issue effectively involves a decision of the court on the aspect as to whether or not the third named defendant knew or ought reasonably to have known that the fifth named defendant had a tendency to abuse, and had in the past abused other children with whom he came into contact. In the particular circumstances of this case in the exercise of my discretion based on general fairness, I am of the view that it would be inappropriate to dismiss the plaintiffs claim for want of prosecution on the grounds of pre-commencement inordinate but excusable delay.

19. The relevant principles applicable to post commencement delay are set out in the judgment of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.

20. In following those principles this Court has an inherent jurisdiction to control its own procedure and to dismiss a claim where the interests of justice require such a course of action.

21. In the *Primor* test to dismiss for want of prosecution the moving party must demonstrate that the delay is inordinate and inexcusable, and that the balance of justice favours dismissal. Accordingly where a plaintiff charged with want of prosecution excuses his or her delay during the currency of proceedings, the court is unlikely to dismiss the claim for want of prosecution.

22. As regards post commencement delay, litigation is a two party operation and there is no doubt but that there was delay on the plaintiffs behalf in replying to a notice for particulars as dated the 13th September, 2000, and it was not until the 16th January, 2004, that replies were actually delivered. However, there was also delay by the third named defendant in furnishing voluntary discovery to

the plaintiffs' solicitors, their request being by way of a letter dated the 30th March, 2005, and the actual discovery being furnished by way of an affidavit of the third named defendant as dated the 7th June, 2007. The motions herein to strike out the proceedings were brought on the third named defendant's behalf on the 10th October, 2007. The third named defendant had previously furnished discovery on the 7th June, 2007, and the second notice of trial against all but the second named defendant had been served on the 20th August, 2007.

23. I am satisfied that the delay in bringing these proceedings to a conclusion since the issuing of the plenary summonses is inordinate.

24. I am further satisfied that the conduct of both parties contributed to the delay, although I accept that the initial delay on the plaintiffs behalf in failing to reply to the notice for particulars until the 16th January, 2004, was the more serious delay, but nevertheless, the third named defendant does not appear to have objected in any way to the request for voluntary discovery on the ground of any delay and proceeded to comply with the request in June, 2007. By reason of the fact that both parties contributed to the delay I find the delay to be excusable.

25. Even if I am incorrect in this view, were it necessary for me to exercise my discretion against the background of the particular facts of this case, where the issue involving the third named defendant is solely as to whether or not the Third Order of St. Francis of Assisi is vicariously liable for the known and admitted actions of its member, the fifth named defendant herein, where in circumstances the fifth named defendant has pleaded guilty to charges of sexually assaulting both plaintiffs and has received a term of imprisonment, where there is extensive documentation available, where the claim as against the third named defendant has been clearly set out since the 28th July, 2000, and where the action having been set down is now due to appear in the next jury list to fix dates, I am of the view the balance of justice would be in favour of the proceedings going to a full hearing.

26. The third named defendant raises the issue of non compliance with disclosure, but in this regard it appears that neither the plaintiff or the third named defendant have made any reference to disclosure, and I am satisfied that this is an aspect of matters that can readily be dealt with, without either party being caused any undue prejudice.

27. Accordingly in all the circumstances I decline the reliefs as sought by the third named defendant herein.