Neutral Citation Number: [2012] IEHC 383

THE HIGH COURT

[2007 No. 309 P]

BETWEEN

J. C.

PLAINTIFF

AND

S. D.

DEFENDANT

JUDGMENT of Mr. Justice McDermott delivered on the 17th day of August, 2012

1. Introduction

1.1 This is an application by notice of motion dated the 25th August, 2011, to dismiss the plaintiff's claim by reason of inordinate delay in instituting these proceedings and what is said to be the resultant prejudice to the defendant. The notice of motion is framed on the basis of "inordinate" delay and is not expressed to be on the basis of "inordinate and inexcusable" delay.

1.2 The plaintiff's claim is for damages primarily for personal injuries suffered by reason of alleged assault and sexual assault. The defendant is sued in his capacity as representative of a religious Order of Brothers who were at all material times the owners and operators of a primary school. The plaintiff's claim is that while he was a pupil at the school he was sexually assaulted by a "Brother Brendan". In para. 5 of the statement of claim the plaintiff originally asserted that he was subjected to multiple assaults commencing in the year 1964, and in para. 7 claims that the defendant is vicariously liable "for the actions and activities perpetrated by the said Brother Brendan and by another". The extent of this claim was later limited in Replies to Particulars dated the 31st March, 2010 in which the plaintiff's solicitors stated that the alleged sexual abuse by Brother Brendan occurred on only one occasion in or about 1964 when the plaintiff was approximately eight years old. There was also an allegation of assault against a second unnamed Brother. The two incidents now relied upon were also described in the statement of claim as follows:-

> "When the plaintiff was approximately eight/nine years old, he was confronted by the said Brother Brendan who accused the plaintiff of stealing. The plaintiff was brought to a room and was beaten and lashed with a leather strap and the said individual, (Br. Brendan) had sexual intercourse with the plaintiff. The plaintiff was not touched by the said individual on any subsequent occasion. However, approximately three weeks subsequent to the incident described, the plaintiff was confronted by another Brother who made a similar allegation and who commenced beating the plaintiff. The plaintiff was not sexually assaulted or molested during or at the time of this incident."

1.3 The plaintiff was born on the 29th January, 1956. He was first enrolled in the primary school on the 1st July, 1963, when he was approximately seven years and six months old. The records of his attendance, which are still available, record that he remained in the school until he left at the age of thirteen years and five months approximately. Afterwards the plaintiff had a troubled teenage period and adult life. The affidavits record periods spent in Marlborough House and St. Patrick's Institution in his mid to late teens.

1.4 The replies to particulars also clarified that the alleged assaults occurred "in or about 1964", when the plaintiff "was approximately eight years of age".

1.5 The initiating letter giving notice of this claim to the Order for the first time came from the plaintiff's solicitors on the 7th February, 2006. The allegation made was very general. It stated:-

> "Our client instructs us that on various occasions he was abused including sexually abused by members of your Order as a result of which he sustained personally (*sic*) injuries, loss and damage."

The letter went on to call on the Principal of the school to admit liability, compensate the plaintiff and indicate an appropriate nominee for proceedings.

1.6 By letter dated the 16th February, 2006, the solicitors for the defendant sought some basic information about the claim to enable their clients to investigate the matter, including:-

> "1. Date of birth of your client.
>
> 2. The dates between which your client was a student in the (school).
>
> 3. Details of all allegations being made by your client.
>
> 4. The identity of each individual against whom each such allegation is being made.
>
> 5. Confirmation as to whether your client has reported these allegations to An Garda Síochána."

1.7 The plaintiff's solicitors replied with these further details:-

> "1. Our client was between eight and nine year's age when he first recalled the first incident of assault and a sexual assault.
>
> 2. Our client left the school at fourteen years of age.
>
> 3. Our client alleges that he was assaulted and sexually assaulted. His first recollection is being assaulted and

sexually assaulted by a Brother Brendan who beat him with a leather strap and then had sexual intercourse with him.

4. Brother Brendan was the only name that our client can recall at this point in time.

5. These allegations have not been reported to An Garda Síochána."

1.8 The defendant's solicitors replied that having taken instructions from their client they were aware that two Brothers called Brendan worked in the school at the relevant time. They inquired as to which Brother Brendan was alleged to be the assailant. Failing that, a request was made to provide as much information as possible that might enable the Order to attempt to identify the Brother in question. By letter of the 4th September, 2006, the plaintiff's solicitors indicated that their client had no further information on the matter. They described Brother Brendan as being tall with a long chin and black hair.

1.9 By letter dated the 13th November, 2006, the solicitors for the Order nominated the defendant to act in respect of these proceedings. The defendant's address was provided by letter dated the 20th December, 2006, for the purpose of service.

1.10 Thereafter the case took the following course:-

(a) A plenary summons issued dated the 16th January, 2007.

(b) An appearance was entered on the 26th January, 2007.

(c) A notice of intention to proceed issued on the 23rd April, 2008, on behalf of the plaintiff.

(d) A statement of claim was delivered on the 10th September, 2008.

(e) A notice for particulars issued dated the 17th September, 2008.

(f) A notice of change of solicitor was served dated the 8th October, 2008.

(g) Replies to particulars were furnished dated the 31st March, 2010.

(h) A defence was delivered on the 17th June, 2010.

(i) A reply to the defence issued dated October, 2010.

(j) This notice of motion then issued dated the 25th August, 2011, to dismiss these proceedings for want of prosecution.

Affidavits were exchanged and written submissions on this issue have been furnished on behalf of the parties.

1.11 It is clear that the defendant had no notice of this complaint until 42 years after the event when it received the initiating letter of the 7th February, 2006. The plenary summons then issued on the 16th January, 2007, some 43 years after the alleged event. This motion is now before the court 48 years after the alleged events.

2. The Claim Crystallises

2.1 The plaintiff's solicitor stated on affidavit that he attended the plaintiff's home on the 19th February, 2003, and was provided with instructions in relation to a claim to be brought before the Residential Institutions Redress Board concerning alleged abuse in a number of institutions. On foot of those instructions he made inquiries to obtain records relating to the plaintiff from the period 1964. On the 19th April, 2004, he caused proceedings to be issued against the Christian Brothers entitled *J.C. Plaintiff v. J. K.M. Defendant* [2004/4773 P] in regard to the allegations made by the plaintiff concerning alleged abuse that he suffered when attending primary school. This was done in the mistaken belief that the Christian Brothers was the religious order that operated the school. The plaintiff's solicitor meanwhile obtained the necessary medical evidence in support of an application which was submitted to the Board on the 13th December, 2005. That application was concluded on the 9th January, 2009, in respect of separate abuse allegations.

2.2 The plaintiff's solicitor indicated that throughout this period it was extremely difficult to obtain instructions from the plaintiff arising out of the sensitive nature of his complaints, and also as a result of the plaintiff's ongoing medical difficulties. The abuse which the Plaintiff alleged occurred while in national school was apparently not within the remit of the Board's Scheme. His solicitor then wrote to the Christian Brothers solicitors on the 4th March, 2004. Subsequently, on the 27th August, 2005, the solicitors for the plaintiff submitted a claim to the Personal Injuries Assessment Board and at this stage named the defendant's Order and the Christian Brothers on the application form.

2.3 By letter dated the 25th August, 2005, the plaintiff's solicitors wrote to the solicitors for the Christian Brothers seeking clarification as to whether that Order was responsible for the school attended by the plaintiff. A reply was received on the 21st November, 2005, advising that the Christian Brothers did not have a school at the address furnished and were a different congregation to the defendant's order. As a result, the plaintiff's solicitors state that they wrote the initiating letter of the 7th February, 2006, to the defendant.

2.4 It is clear that the plaintiff had a significant history of psychiatric and psychological difficulty as outlined in the psychiatric reports submitted in the course of this motion. In summary, the plaintiff suffered severe psychiatric problems throughout most of his life with panic attacks, agoraphobic symptoms and symptoms of post traumatic stress disorder. He has difficulty in falling asleep, irritability and hyper vigilance. He suffers from alcohol dependency for which he sought treatment. A psychiatric assessment dated the 16th September, 2010, indicates that the plaintiff's judgment has been greatly impaired as a result. The plaintiff attended a counsellor for the first time in 2003 and only after prolonged sessions referred to the abuse that he allegedly suffered. He referred to the defendant's Order as Christian Brothers in the course of these sessions.

2.5 The plaintiff's solicitors only succeeded in correcting this error after approximately three years when they felt confident enough in relation to their instructions to issue the letter of the 7th February, 2006, to the Principal of the defendant's school. The defendant's solicitors were asked to nominate a person for the purpose of the issuing of proceedings on the 28th March, 2006. This name was provided on the 10th November, 2006. In the meantime there had been correspondence between the parties in which the defendant sought to ascertain the identity of the alleged perpetrators.

2.6 The defendant claims that he carried out such inquiries as were open following the receipt of the letter of the 7th February, 2006. He sought further details in the letter of the 16th February, 2006, quoted above. The plaintiff's reply of the 28th March, 2006, and the letter of the 7th February, 2006, clearly suggest that sexual assaults occurred on many occasions and that they first occurred when he was between eight and nine years of age. The defendant in the affidavits filed on this motion states that from an examination of school records it was accepted that the plaintiff was a pupil of the school from the 1st July, 1963, to June, 1969. The defendants also confirmed that two Brothers called Brendan were members of the congregation at the school. A further inquiry by the Order indicated that one Brother Brendan worked in the school for the first days of the period during which the plaintiff attended the school. It is not contended that the alleged abuse took place during that time in 1963. The records also indicated that this Brother Brendan left the Order in July, 1964 and died on the 17th February, 2010.

2.7 The records also confirmed that a second Brother Brendan worked in the school from September, 1956 to August, 1965. He died in July, 2006. The defendants further determined that the description furnished by the plaintiff in September, 2006 did not match this Brother Brendan.

2.8 In addition, there was no record of any complaint against either of these two Brothers or any disciplinary files in relation to them. Though a request was made by letter dated the 1st March, 2007, seeking dates in respect of the first and last incident of alleged sexual abuse, no reply was received to this letter and the statement of claim was not delivered until approximately eighteen months later on the 10th February, 2008. It offered no further details in relation to the identity of the individuals against whom the allegations were being made.

2.9 From a search of archival records, the defendant discovered that as of July, 2006, of the 48 members of the Order who worked in the school at the relevant time, only six were still alive. As of June, 2010 this number had decreased to four. Inquiries have been made of the remaining four who confirmed that they were not aware of any allegations of physical or sexual abuse in the school when they were working there.

2.10 It was submitted on behalf of the defendants that they had been deprived in this case of the opportunity of investigating the allegations now made and/or of putting the alleged incidents to the main alleged perpetrator(s) and/or of carrying out practical inquiries into the availability of possible witnesses.

3. The Law

3.1 The broad principles applicable to an application to dismiss an action for want of prosecution are reasonably well settled and have been set out in a number of Supreme Court decisions including *Domhnaill v. Merrick* [1984] I.R. 151: *Toal v. Dignan & Ors (No.1)* [1991] ILRM 135 and *Toal v. Dignan & Ors (No.2)* [1991] ILRM 140, *Primor v. Stokes Kennedy Crowley & Oliver Freaney & Company* [1996] 2 I.R. 459, *J.R. v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 748, *Gilroy v. Flynn* [2005] 1 ILRM 290 and *McBrearty v. North Western Health Board & Ors* (Unreported, Supreme Court, 10th May, 2010) [2010] IESC 27.

3.2 The jurisdiction to dismiss an action by reason of delay even though it has been commenced within a time limit fixed by statute, is well established. Finlay C.J. in *Toal (No.2)* affirmed the inherent jurisdiction of the court to dismiss a claim where the length of time which has elapsed between the events out of which it arises and the time when it comes to be heard, is in all the circumstances so great that it would be unjust to call upon a particular defendant to defend himself or herself against the claim made. He stated:-

> "If the courts were to be deprived of the right to secure to a party in litigation before them justice by dismissing against him or her a claim which by reason of the delay in bringing it, whether culpable or not, would probably lead to an unjust trial and an unjust result merely by reason of the fact that the Oireachtas has provided a time limit which in the particular case has not been breached would be to accept legislative intervention in what is one of the most fundamental rights and obligations of a court to do ultimate justice between the parties before it.
>
> That view does not, however, of course mean that this is a jurisdiction which could be frequently or lightly assumed…" (pp. 4-5)

3.3 Finlay C.J. then notes that the issue always remains the one identified by Henchy J. in *Domhnaill v. Merrick* (at p. 557) as follows:-

> "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."

3.4 The approach to be adopted by the court in dealing with this issue had been outlined by Finlay P. (as he then was) in a somewhat more narrow form in *Rainsford v. Corporation of Limerick* [1984] I.R. 151 at pp. 152 to 154 which with some amendment had been adopted and applied by the courts since. The questions to be determined are whether the delay on the part of the person seeking to proceed has been firstly inordinate and if inordinate, whether it has been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable lies upon the party seeking to dismiss the claim. If the delay has been inordinate and inexcusable, the court must then proceed to exercise judgment on whether in its discretion on the facts the balance of justice is in favour of, or against, the proceeding of the case.

3.5 The Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* summarised the principles of law applicable to such applications as follows:-

> "(a) That 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;
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> (c) Even where the delay had 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 on 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." (pp. 475 – 476)

3.6 The court has been referred to a number of cases in which these principles have been applied to situations of delay in the initiation and prosecution of claims for damages for sexual assault suffered by plaintiffs as children whilst under the care of school authorities or others, but which were not commenced for many years after the alleged events. The Oireachtas has provided for an extension of the statutory period within which a cause of action in respect of alleged sexual abuse could be brought under the provisions of the Statute of Limitations (Amendment) Act 2000 in respect of persons deemed to be under a disability. However, s. 3 of that Act provides that:-

> "Nothing in section 48(A) of the Statute of Limitations, 1957 (inserted by section 2 of that 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."

3.7 The defendant's complaint in this application relates to the period of delay prior to the commencement of the proceedings and subsequent to the date of the accrual of the action. The jurisdiction of the court in respect of this application is stated to be unaffected pursuant to s. 3 of the Act. Although the defendant pleaded the Statute of Limitations in respect of the plaintiff's claim, that matter is not before the court and does not form part of this judgment.

3.8 In *J.R. v. the Minister for Justice, Equality and Law Reform & Ors* [2007] IESC 7, the plaintiff suffered appalling sexual abuse by a member of her family. She claimed damages against the Commissioner of An Garda Síochána and others because of their alleged failure to act upon her complaints relating to this abuse as a result of which she was subjected to further abuse over a period of ten years or more. The plenary summons issued in February, 1998. The alleged abuse, following complaint to the gardaí, had continued between 1967 and 1996. The proceedings were initiated following the conviction of her assailant in 1997. The court at para. 9 said:-

> "9. The test to be applied is whether there has been inordinate and inexcusable delay, and, if so, whether on the facts, the balance of justice is in favour or against the case proceeding. It is therefore essentially a test of fairness, which is to be assessed on all the circumstances of the case, as a matter of discretion, by the court, in the interests of justice.
>
> 9.1 The court has an inherent jurisdiction to control its own procedures and dismiss a claim when the interests of justice are required. Concomitantly, the court has an inherent jurisdiction not to dismiss a claim when the interests of justice so require. The inherent power exists to promote the interest of justice.
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> 9.2 Whether delay should be treated as barring the claim depends on the particular circumstances of a case. The court must assess whether the delay is inordinate and inexcusable, and, even if it has been, whether there are countervailing circumstances."

3.9 Geoghegan J. in *McBrearty v. North Western Health Board & Ors* (Unreported, Supreme Court, 10th May, 2010) [2010] IESC 27, considered the application of these principles in the following way:-

> "How should the principles emerging from the various cases which I have cited be applied to this particular case?...if I am right in my view that there was no inordinate and inexcusable delay then the action must be allowed to proceed unless it would be fundamentally unfair to any particular defendant because of his special circumstances to have to defend the action thereby legitimately invoking the inherent jurisdiction of the court which can be exercised even in the absence of fault on the part of the plaintiff." (p. 30)

3.10 In that case Geoghegan J. was prepared to dismiss the action in the interests of justice irrespective of the fact that there was not a finding of inordinate and inexcusable delay on the part of the plaintiff. He stated that it was fundamentally unfair that two of the defendants should have to face a trial because of the enormity of the worry and upset to which they would be subjected in facing a very substantial action for damages and claims for indemnity many years after the events in question.

3.11 In that case Geoghegan J. also indicated that having found that the delay was neither inordinate or inexcusable, it was not necessary to consider whether on the balance of justice within that narrow test the action should be allowed to proceed. The issue was determined ultimately on the basis of the inherent jurisdiction of the court, the much broader test.

3.12 I propose to consider this application on the basis firstly, of what may be regarded as the more limited test for dismissal of such actions for want of prosecution and secondly, the broader test of whether these proceedings should be dismissed in the interests of justice. The former test might be regarded in some ways as a subset of the latter.

4. Want of Prosecution

4.1 Under this form of relief the court is obliged to inquire as to whether the delay on the part of the person seeking to proceed has been firstly, inordinate and, if inordinate, whether it has been inexcusable. The onus of establishing that the delay has been both inordinate and inexcusable lies on the party seeking to dismiss the proceedings. If the delay has not been inordinate and inexcusable, there are no grounds under this form of relief for dismissing the case. If the defendant succeeds in establishing that the delay is both inordinate and inexcusable, the court must then proceed to exercise a judgment as to whether, in its discretion on the facts, the balance of justice is in favour of or against the proceeding of the case. (See *Rainsford v. Corporation of Limerick*)

4.2 The defendant contends and the plaintiff accepts that the delay in this case was inordinate. The court must then determine whether the delay is inexcusable. It is noteworthy in this case that the relief claimed in the terms of the notice of motion is for the dismissal of the action by reason of the inordinate delay in instituting the proceedings and the resultant prejudice to the defendant. However, the defendant has, notwithstanding the limited nature of the ground specified also relied in submissions upon the fact that the inordinate delay in this case was "inexcusable" adopting the well established narrow formulation of the test.

4.3 The plaintiff's solicitor has sworn an affidavit outlining the circumstances leading up to the issuing of proceedings on the 16th January, 2007. He first attended the plaintiff's home on the 19th February, 2003, as the plaintiff was unable to attend at his office. Instructions were then provided in relation to a claim to be initiated before the Residential Institutions Redress Board. This required the making of a number of freedom of information requests to the Department of Education, Barnardos, and the Christian Brothers, the Order first nominated by the plaintiff as the Order in charge of the primary school that he had attended. This was required in order to seek and obtain records relating to the plaintiff from the period in or about 1964. This eventually resulted in proceedings issuing against the Christian Brothers. The plaintiff's application before the Board in respect of a separate matter was concluded on the 9th January, 2009.

4.4 The plaintiff's solicitor sets out the extreme difficulty that he had in obtaining instructions from the plaintiff arising out of the sensitive nature of his complaint as well as his medical difficulties. On the 4th March, 2004, the plaintiff's solicitors wrote to the solicitors for the Christian Brothers alleging that, whilst a student in their school he was subjected to assault and battery including sexual assault as a result of which he sustained severe personal injury loss and damage. The solicitors were instructed to issue proceedings in the event that they did not receive an admission of liability. Proceedings issued on the 19th April, 2004. On the 27th August, 2005, the matter was referred to the Personal Assessment Injuries Board and both Orders of Brothers were nominated on the form submitted.

4.5 On the 25th August, 2005, the plaintiff's solicitors sought clarification from the solicitors from the Christian Brothers as to whether they had responsibility for the school attended by the plaintiff. They were informed on the 21st November, 2005, that the Christian Brothers did not have a school at the nominated address and were a different congregation to the defendant Order. This led to the letter of the 7th February, 2006, from the plaintiff's solicitors to the Principal of the school and the correspondence to which reference has already been made.

4.6 The plaintiff's solicitor also set out in his affidavit a history of the psychiatric and psychological difficulties experienced by the plaintiff. These were described in a report by Dr. Declan Murray, Consultant Psychiatrist, dated the 16th May, 2007. The report was based on two interviews with the plaintiff which took place on the 3rd May, 2006 and 4th January, 2007. The doctor is dependent upon the Plaintiff for the narrative set out in the report and the court is, of course, not making any finding on this motion as to whether the events described happened . It outlines the abuse that he allegedly suffered at the defendant's school, but also outlines that he was detained in Marlborough House for two and a half months at the age of fifteen. The report describes how during this period he developed severe symptoms of anxiety and sleep difficulty, feelings of panic, heart palpitations, dry mouth and a fear of the dark. Since the age of 15/16 he has continued to suffer anxiety and cannot sleep without the light on and the door open. He finds it very hard to travel because of panic and anxiety and it is very difficult for him to leave his home. He became addicted to alcohol and suffered depression. He became suicidal while drinking. Though he managed to abstain from alcohol for several years, he now drinks regularly particularly if he has to go out. He suffers from nightmares. Dr. Murray concluded that the plaintiff had suffered severe psychiatric problems throughout most of his life with panic attacks, agoraphobic symptoms and symptoms of Post Traumatic Stress Disorder, in that he was traumatised at school and at Marlborough House. He had recurrent dreams which may be related to the event. He had marked difficulty in falling asleep, irritability and hyper vigilance. He was said to have had significant loss of educational opportunities from his time at the defendant's school. The alleged abuse while attending the school and its consequences contributed to his psychiatric condition, social problems and loss of opportunity. It was also noted that his abusive treatment during his later detention had a significant effect upon him.

4.7 A further report was prepared on the 16th September, 2010, in which Dr. Murray noted that the plaintiff had a history of Post Traumatic Stress Disorder with associated panic attacks and agoraphobic symptoms since he was at school. He also had severe alcohol dependent syndrome. He noted how these conditions affected the plaintiff. He said:-

> "First of all his judgment, that is to say his ability to analyse what had happened, to think through the consequences and to come up with solutions such as contacting a solicitor was greatly impaired. Secondly, his anxiety symptoms would also have been an inhibitory factor even if he had been able to form a clear plan on what to do. He has anxiety about travelling and leaving the area (in which he lives). He had great anxiety about approaching the gardaí to report the assaults. He had fears that if he did report them that he might not be believed. He also had fears that he might be laughed at. The fact that he is also addicted would have impaired his ability to function and to organise his behaviour to get him to think through and make a report.
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> His reporting in the end came as a result of hearing by word of mouth about the Institutional Redress Board and having a specific solicitor recommended to him. The elapse of time and the fact that with publicity and knowing that other people were making such reports facilitated his making a report at this later stage.
>
> Conclusion: While there are many factors involved in the delay, his psychiatric symptoms of Post Traumatic Stress Disorder, agoraphobia and substance dependence all made a significant contribution."

4.8 It would appear then that the plaintiff made contact with the plaintiff's solicitor having heard by word of mouth about the establishment of the Residential Institutions Redress Board. He then had access to legal advice from in or about 2003, which enabled him to consider initiating civil proceedings against those who had abused him in the past.

4.9 There followed a period between 2003 and January, 2007 in which proceedings were not issued against the defendant. I am satisfied that the defendant did not cause or contribute to any delay on the part of the plaintiff in issuing these proceedings. The defendant cannot be accountable for any error in the issuing of proceedings against the wrong Order in 2004, or that it took almost three years to correct that position. This is not a case in which there was a continuing exercise of dominion or control over the

plaintiff such as to inhibit or prevent the initiation of proceedings.

4.10 In summary, the plaintiff left school when he was fourteen years and seven months approximately, and from the age of fifteen spent some time detained in Marlborough House where he was severely abused. He was then incarcerated in St. Patrick's Institution for six months at the age of sixteen. He received a very limited education. He had some training as a joiner and produces a small amount of woodwork from home. It is contended that because of the abuse alleged he developed the psychiatric problems described in the above reports. It was said that this affected him in his judgment and his ability to analyse what had happened to him: his capacity to make decisions such as contacting a solicitor, was greatly impaired. In addition, his anxiety symptoms would have been an inhibitory factor on their own even if he had been able to form a clear plan on what to do. Alcohol addiction contributed to impairing his ability to function and organise his life. These are all offered as excusing circumstances to explain to a large degree the plaintiff's inaction up to 2003. Of course, during a part of that period he was still a minor.

4.11 The account by the solicitor of his dealing with his client between 2003 and 2007 highlights his difficulties in taking instructions. Clearly, the plaintiff had difficulty in recollecting important facts about his case including the Order of Brothers whose school he had attended. Ultimately, that matter was resolved and the truth was ascertained – he had in fact attended the defendant's school. Though there was a delay of some three years in determining the appropriate defendant after 2003, this was not entirely the plaintiff's fault: nor was it the defendant's.

4.12 I am satisfied that having regard to the range of difficulties suffered by the plaintiff in the period between his teenage years and the initiation of these proceedings, the defendant has not established that the inordinate delay was inexcusable.

4.13 It follows, therefore, that within the more limited want of prosecution test it is not necessary to consider whether the balance of justice lies in favour of or against proceeding with the case. However, that is not the end of the matter. It is necessary to consider the broader test applicable in this type of case that developed out of the *Domhnaill v. Merrick* and *Toal (No.1)* and *Toal (No.2)* lines of authority, already discussed. However, had I determined that the delay was inexcusable, I would have been entirely satisfied that the balance of justice lay against allowing this case to proceed. Though the plaintiff has a right to maintain a cause of action against the defendant, this must be weighed against the defendant's right to have the benefit of a fair trial of that action. I am satisfied that a fair trial is not possible having regard to the passage of time and that the balance of justice in this case would have required the dismissal of this action for want of prosecution. In making that determination as to where the balance lies, I am satisfied that substantial prejudice has been caused to the defendant's case by reason of the plaintiff's delay. The nature and extent of this prejudice is set out in the next section of this judgment.

5. Dismissal in the Interests of Justice

5.1 It is now well settled that there is an inherent jurisdiction in the court to dismiss an action by reason of lapse of time even though there has been no culpable delay by the plaintiff. This applies to situations in which delay may have been inordinate but not inexcusable. The court has been referred to a number of authorities in this area in which the test has been applied.

5.2 In *Manning v. Benson & Hedges Limited* [2004] 3 I.R. 556, Finlay Geoghegan J. identified the questions to be considered in respect of the facts of each case of this kind as:-

> "1. Is there, by reason of the lapse of time a real and serious risk of an unfair trial;
>
> 2. Is there by reason of the lapse of time a clear and patent unfairness in asking the defendant to defend the action."

The court noted that the relevant lapses of time were the periods between the wrongful acts alleged upon which a court will be asked to make a determination and the probable date of trial. In considering these questions Finlay Geoghegan J. noted the following:-

> "The constitutional requirements that the courts administer justice require that the courts be capable of conducting a fair trial. This, as was submitted, is required by Article 34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial, then he may be entitled to an order to dismiss.
>
> Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim, then he may also be entitled to an order to dismiss. This entitlement derives principally from the constitutional guarantee to fair procedures in Article 40.3 of the Constitution. Whilst in some of the cases the judgments have referred to matters under both of these headings, they appear to be potentially separate grounds upon which the inherent jurisdiction to dismiss may be exercised. The factors to be considered by the court in relation to each question may overlap. It appears to me that they may include:-
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> 1. has the defendant contributed to the lapse of time;
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> 2. the nature of the claims;
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> 3. the probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;
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> 4. the nature of the principal evidence; in particular whether there will be oral evidence;
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> 5. the availability of relevant witnesses;
>
> 6. the length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date.
>
> Further, on the second question it will be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time (paras. 32 – 35)."

5.3 In *P.K. v. Deignan & Ors* [2009] 4 I.R. 39, the plaintiff sought damages for personal injuries sustained in the 1950s as a result of alleged acts of abuse perpetrated upon him when a pupil of a national school. The proceedings issued some 50 years after the last

alleged incident of abuse and a statement of claim was delivered some two years later. The defendant applied for an order dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay in instituting and prosecuting the proceedings: the claim was dismissed on those grounds. It was held by Dunne J. that by reason of the time that had elapsed between the alleged wrongful acts and the date the case was likely to be heard there was a real and serious risk of an unfair trial and that being so, there would be a clear and patent unfairness in asking the defendant to continue to defend the action. It was also held that in considering whether to exercise its inherent jurisdiction to dismiss a claim in respect of pre-commencement delay, the court should consider whether the delay was inordinate and if it was, should then go on to consider where the balance of justice lay. The existence of culpable delay on the part of the plaintiff was not an essential ingredient for the exercise of the courts inherent jurisdiction to dismiss in this regard.

5.4 In doing so, Dunne J. cited the various factors set out by Finlay Geoghegan J. in *Manning v. Benson & Hedges Limited*, that may be considered in reaching a conclusion on that issue. The case was one which would proceed on the basis of oral testimony. The court would have to consider factual and legal issues. A number of relevant witnesses would not be available to the defendant because they were dead. Further, over 50 years had elapsed since the matters complained of and the time when the case was likely to be given a trial date. It was, therefore, concluded that to allow the matter to proceed would give rise to a real and serious risk of an unfair trial. There would also be a clear and patent unfairness in asking the defendant to continue to defend the action. Dunne J. concluded that the prejudice to the defendant outweighed the undeniable prejudice to the plaintiff if he were denied the opportunity to proceed with his case.

5.5 In *Kelly v. O'Leary* [2001] 2 I.R. 526, the plaintiff sought damages for negligence in respect of physical and mental injuries arising from events that occurred during her placement in an orphanage between 1934 and 1937. A plenary summons issued in March, 1998. Kelly J. in dismissing the plaintiff's claim held, *inter alia*, that constitutional principles of fairness of procedure required dismissal of an action in circumstances where there was clear and patent unfairness in asking the defendant to defend the action after the lapse of time involved. In the instant case, actual prejudice had occurred and the defendant had not contributed to the delay. Kelly J. noted that the effect of the delay was such that the defendant would be required to defend proceedings in respect of incidents that took place between 55 and 68 years ago. The witness was 83 years old and cared for approximately 1,000 children over the years that she was at the orphanage. She could not remember specific incidents.

5.6 Complaints had also been made by the plaintiff against another nun, but these had been withdrawn though the plaintiff had persisted with them for a considerable period. That nun was now dead and unavailable as a witness for the defendant. Other witnesses were also dead and this, of course, was a matter that had to be taken into account. He noted that as a matter of probability the trial would amount to an assertion countered by a bare denial. Indeed, he noted:-

> "Even the ability of this defendant to make a denial is doubtful in respect of a number of allegations. Such an exercise would be far removed from the form of forensic inquiry which is envisaged in the notion of a fair trial in accordance with the law of this State. The constitutional principles of fairness of procedure require that the action not proceed. To allow the action to go on would put justice to the hazard (pp. 543 – 544)."

5.7 In *J. McH. v. J.M. & Ors* [2004] 3 I.R. 386, the plaintiff sought damages for personal injuries as a result of alleged acts of sexual abuse suffered in the 1940s whilst the plaintiff was a pupil at a national school. Proceedings issued in June, 2001, 57 years after the last alleged incident of abuse. One of the defendants sued in his capacity as a trustee of the school applied for an order dismissing the plaintiff's claim on the grounds of inordinate and inexcusable delay. It was submitted on behalf of the plaintiff that the plaintiff's delay in issuing proceedings was excusable having regard to her medical history as set out in affidavits sworn on her behalf by her medical advisers. It was argued that the defendant could not succeed as the delay was not therefore inordinate and inexcusable. It was further submitted without prejudice to that contention, that the defendant had suffered no prejudice as a result of the plaintiff's delay as his main defence was based on a legal argument that vicarious liability did not attach to the actions of the defendant. The application to dismiss the main part of the plaintiff's claim was refused. It was held in relation to the pre-commencement delay that the court had an inherent jurisdiction to dismiss a claim in the interests of justice. The existence of culpable delay on the part of the plaintiff was of considerable relevance to this determination, but it was not an essential ingredient for the exercise of the courts inherent jurisdiction to dismiss. It was found that the plaintiff's delay was inordinate but not inexcusable having regard to the medical evidence adduced on behalf of the plaintiff. It was further determined that the prejudice to the defendant did not outweigh the prejudice to the plaintiff in the event of her claim being dismissed on the grounds of delay.

5.8 In contrast to the Kelly case, Peart J. held that the replying affidavit in *J. McH* contained evidence which excused the delay. There was no issue as to whether the first defendant was in fact a teacher at the school at the relevant time. In addition the court found that the defence offered was based mainly upon a legal submission that the defendant was not vicariously liable. Notwithstanding the death of a number of key personnel which the defendant claimed prejudiced his defence in respect of a claim of system failure at the school, the defendant's application was dismissed. In this case, however, the defendant does not allege any system failure, only two occasions of assault.

5.9 The behaviour of the defendant who seeks the dismissal of the action is also to be considered in cases of this kind. For example, in the *J.R.* case cited above, Denham C.J. noted that there had been a very long lapse of time, but the plaintiff's claim was based on the proposition that the State's delay contributed to her suffering. The responsibility for that delay and the failure of the State to adequately investigate and prosecute the perpetrator of the abuse, thus allowing him to continue that abuse for a period of ten years, was at the core of the proceedings. This was an important factor in determining the motion. The state sought to dismiss the action by reason of delay on the part of the plaintiff who had suffered continuous abuse over that period by reason of the State's delay. As a matter of justice, the Supreme Court determined that the State could not avail of delay as a reason to dismiss the proceedings. *O'S v. O'S, the Commissioner of An Garda Síochána & Ors* (Unreported, High Court, Dunne J., 2nd April, 2009) [2009] IEHC 161, is a decision to the same effect. In this case, I am satisfied that the defendant did not cause or contribute to the delay in issuing the proceedings in any respect.

5.10 In *T.M. v. J.H. & Ors* (Unreported, High Court, Johnson J., 18th July, 2006) [2006] IEHC 261, the plaintiff claimed that he was sexually abused between 1969 and 1971 by the first named defendant, a retired Brother. Proceedings were first instituted in September, 1998. Evidence was adduced on the part of the plaintiff of the extreme difficulties that the plaintiff had in communicating to anyone about the injuries that he had suffered and the trauma to which he was subjected. Johnson J. (as he then was) determined that the delay in initiating proceedings was perfectly explicable and excusable having regard to the psychological condition of the plaintiff over that period. The court determined that the balance of justice was in favour of allowing the case to proceed. It is noteworthy that the defendant in that case was a retired teacher and there is no reference to the death of any witnesses being a factor to the fair conduct of the trial.

5.11 In *M.W. v. S.W.* (Unreported, High Court, Kearns P., 6th May, 2011) [2011] IEHC 201, the plaintiff claimed that she had been sexually abused by the defendant between January, 1969 and December, 1972. Proceedings were commenced in November, 2006 and

application was made for a declaration that the plaintiff's action was statute barred or, in the alternative an order dismissing the plaintiff's claim for want of prosecution.

5.12 The defendant was charged with indecent assault and tried in 2008: the jury failed to reach a verdict. A retrial took place in February, 2009 following which the jury acquitted the defendant. A statement of claim was delivered in November, 2008 and a defence on the 9th April, 2009. Between January, 2010 and January, 2011 applications were made by the plaintiff to adjourn the case due to the plaintiff's continuing ill health. The defendant claimed that he had been very much prejudiced by the delay but no specific prejudice was relied upon. The allegations at the time of the hearing of the motion related to events alleged to have occurred 39 to 41 years prior to the motion. Kearns P. stated:-

> "It must be accepted that the passage of such a period of time has a very real impact on memory and the reliability of evidence. There are immediately obvious effects, such as the ability to mount an effective cross examination, with all the ensuing consequences for the basis fairness of procedures of trial…Significant weight must also be given to the damage to the defendant's reputation which is inevitably produced by such lengthy delay. Due to the delay on the plaintiff's part, he has been prevented, notwithstanding his acquittal on any criminal charge, from defending the action and refuting the very serious allegations therein."

5.13 It was noted that the plaintiff had been put on a strict timetable by the High Court to prosecute the claim after years of delay and the court determined that the plaintiff should have adhered to it. It was held that to allow the plaintiff to proceed in the matter "would be unfair to the highest degree".

5.14 In the case of *F.W. v. J.W.* (Unreported High Court, Charleton J.,18th December, 2009), the defendant was a 91 year old grandfather at the time of the hearing of a motion to dismiss the case for want of prosecution. The plaintiff claimed damages for injury caused by alleged sexual abuse between the ages of four and seven. This was denied. The motion was heard some 17 to 20 years after the events of which complaint was made. Dismissal of the action was sought on the grounds of inordinate and inexcusable delay or on the grounds that there could not now be a fair trial by reason of the lapse of time.

5.15 The plaintiff was born in July, 1985 and the alleged assaults took place between 1989 and 1992. A formal complaint was made in 2003 to the gardaí. The file was not properly dealt with. In February, 2008 the plaintiff attended with a firm of solicitors concerning the matter. A complaint was made to the Garda Ombudsman Commission. An initiating letter issued in April, 2008. In June, 2008 the plaintiff's grandmother, a vital witness in the case, died. A plenary summons issued in September, 2008. In December, 2008 the defendant suffered a small stroke but no medical report was exhibited in the affidavits on his behalf. Particulars were exchanged and a defence was delivered in July, 2009. The motion to dismiss the matter was heard in December, 2009. Charleton J. concluded that there was inordinate delay in the commencement of the proceedings. From the time of her statement of complaint at the age of seventeen and a half approximately, to the initiating letter of April, 2008, a period of five years passed. The court did not regard this period of five years as being excusable. In addition, the court had regard to the crucial role of oral evidence at the trial of the action. In particular, evidence of the deceased grandmother would have been vital in respect of events alleged to have taken place in a domestic environment. Charleton J. concluded that while most of the delay in the case could be excused by reason of the plaintiff's minority, that did not apply to at least the last two to three years prior to the commencement of proceedings. He concluded that by reason of the death of the grandmother the trial would take place in the absence of any realistic ability on the part of the defendant to meet the claim of sexual abuse which was denied by him. The court, therefore, dismissed the proceedings.

5.16 In *Hayes v. McDonnell & Ors* [2011] IEHC 530, the plaintiff claimed damages against two religious orders and various agencies of the state in relation to alleged assault and sexual assault that occurred while he was a child detained by the state between 1949 and 1962, between the ages of eight and sixteen. An initiating letter issued in August, 1999 and a plenary summons followed in September, 1999. A statement of claim was delivered in April, 2009 following a notice of intention to proceed delivered in September, 2008. In the meantime an application to the Residential Institutions Redress Board had been initiated in 2005 and withdrawn in October, 2008 because of the plaintiff's dissatisfaction with the nature and extent of the hearing afforded by the Board in respect of the type of complaint which he was making. The defendants complained that they were prejudiced by reason of the death and incapacity of a number of witnesses who worked in the two institutions where the plaintiff was held or who were employed by the state in their supervision. The three brothers against whom the plaintiff had made allegations were dead. Another person against whom an allegation was made was suffering from Alzheimer's disease. For his part the plaintiff submitted evidence to the court from a consultant psychiatrist that he was suffering from post traumatic stress disorder and the court concluded that the delay was excused by the fact that he was impaired in bringing his proceedings by the consequences of the actions of which he complained. Medical evidence together with the evidence of the plaintiff's disillusionment with the Board and subsequent withdrawal of his application were found to explain and excuse the delay which it was agreed was inordinate in the circumstances. Notwithstanding the prejudice alleged by the defendants the court concluded that the balance of justice lay in favour of allowing the matter to proceed. Hanna J. concluded that the prejudice alleged "can be dealt with again by the trial judge if and as appropriate".

5.17 It is not surprising that the application of the same principles regarding delay in civil cases concerning alleged sexual abuse or other abuse of children in schools or institutions many years ago may result in different conclusions. Each case depends on its own facts. In some instances the defendant alleged to have perpetrated the abuse may be alive: the witnesses to some of the surrounding circumstances relevant to the claim may be alive. Relevant facts may still be capable of objective verification by records or otherwise. In some cases the acts of the perpetrator may have caused huge damage to the plaintiff effectively disabling them from dealing with the issues or taking proceedings until many years later. Other claimants may have been minors during and for some time after the alleged abuse and/or been under the control or dominance of the alleged abuser. On the other hand, witnesses including the alleged perpetrator may be dead at the time of the initiation of proceedings or at the time the case comes on for trial. Vital evidence may no longer be available. Records may have been lost. All of these factors must be carefully considered. In that regard, I accept that the death of a witness even if a party to a case, is not of itself enough to establish the basis for the dismissal of an action. The death or unavailability of a witness is one of life's events which the administration of justice is often required to accommodate (see *Killeen –v- Thornton Waste Disposal Limited* [2010] 3 I.R. 457).

5.18 The court in determining whether a delayed case should be dismissed in the interests of justice, must carefully consider the fact that the plaintiff has a constitutional right of access to the courts and fair procedures. The plaintiff will suffer significant prejudice if denied the opportunity to litigate his claim and so, a case ought only to be dismissed if the defendant demonstrates that his co-existing right to a fair trial and fair procedures cannot be vindicated by reason of demonstrably clear and patent unfairness in asking him to defend the proceedings and a real and serious risk of an unfair trial.

5.19 The parties in this case are agreed that the delay in initiating the proceedings was inordinate. I have already indicated that I consider that the delay on the part of the plaintiff in initiating proceedings was excusable because of the difficulties highlighted in the psychiatric reports. I am satisfied on the basis of the medical evidence that his ability to deal with his situation and take the

necessary steps to seek redress by contacting a solicitor and initiating proceedings was greatly impaired. I accept the evidence that his psychiatric symptoms of post traumatic stress disorder, agoraphobia and substance dependence all made a significant contribution to the delay in this case. He also contends that he suffered abuse in another institution, not the subject of these proceedings, which contributed in a significant way to his difficulties.

5.20 A somewhat unusual delay occurred between the 19th February, 2003, the date upon which the plaintiff first instructed his solicitor in respect of allegations of abuse, and the issuing of the plenary summons on the 16th January, 2007. Within that time a line of inquiry was pursued in respect of the Christian Brothers on the basis of the plaintiff's instructions, which were clearly incorrect. This led to the initiation of proceedings against that Order in 2004, though in August, 2005 the solicitors for the plaintiff had submitted a claim to the Personal Injuries Assessment Board naming both the Christian Brothers and the defendant Order on the application form. By the time an initiating letter issued to the defendants on the 16th February, 2006, time was very short for the defendants to take any meaningful step to investigate the alleged abuse which at that time included allegations of multiple assaults in respect of the Brother Brendan who was working in the school at the time. Brother Brendan died on the 9th July, 2006 aged 80, after an illness of three months.

5.21 Apart from that element of delay and the death of Brother Brendan, the extent of the plaintiff's claim did not crystallise until particulars of the claim were furnished on the 31st March, 2010. In the initial correspondence, already referred to, following the receipt of the initiating letter of the 7th February, 2006, the defendants sought details of the numerous allegations of assault, sexual and otherwise, of which the plaintiff complained. The statement of claim delivered on the 10th February, 2008, offered no further details in relation to the identity of the individuals against whom the allegations were being made beyond what is contained in the correspondence. The plaintiff at the time still maintained multiple allegations of sexual assault and assault. It was only in the replies to particulars that the plaintiff's claim was reduced to a claim in respect of two assaults only. Both were alleged to have occurred in or about 1964 at the defendant's school when the plaintiff was approximately eight years of age. The sexual abuse allegedly perpetrated by a Brother Brendan was said to have occurred on one occasion. The plaintiff did not recall the name of the Brother involved in the second incident which was said to have occurred three weeks after the first.

5.22 In July, 2006 only six remaining members of the Order who worked at the school at the time of the alleged assaults were still alive. By June, 2010 this number was reduced to four. Inquiries were made of the remaining four members who confirmed that they were not aware of any allegations of physical or sexual abuse in the school when they were working there.

5.23 The defendant Order was not in any way responsible for the delays that occurred in this case and, in particular, was not responsible for the mistakes and delays that occurred in identifying the wrong defendant between 2003 and 2007: nor was it responsible for the subsequent delay in delivering the statement of claim and the delay in clarifying the extent of the plaintiff's claim. The defendant was prejudiced in that its inquiries were hampered by the lack of specificity in the plaintiff's allegations, by his failure to identify the alleged perpetrators and by further delaying until March, 2010 before limiting the number of allegations to two.

5.24 The changing nature of the plaintiff's claim over time is also cause for considerable concern. There is an enormous difference between a case in which a plaintiff makes general allegations of multiple occasions of sexual and physical assault and an allegation that the plaintiff was assaulted on one or two occasions only. No explanation has been offered to the court as to why or how the plaintiff's claim was transformed in this way on the pleadings. The uncertainties within the plaintiff's claim are also apparent from the fact that an error was made in joining the wrong Order of Brothers and that he could not identify the actual perpetrator of the sexual abuse apart from saying that it was a Brother Brendan. In further correspondence the plaintiff could not name the second alleged assailant. It is difficult to understand how any defendant could be expected to meet a case in which the sands have shifted so considerably since the date of the initiating letter.

5.25 This is a case that would be decided on oral evidence if it were to proceed to trial. It is difficult to see how a defendant is to take statements or from whom they are to be taken at this remove from the alleged events. I am satisfied that the defendant for its part, has made every reasonable effort to investigate the allegations made ,whether the rather vague and generalised allegations of multiple assaults (including sexual assaults) first made or the two occasions now the subject matter of the proceedings. I have already outlined the fruits of those inquiries which, as one might expect, are few. Apart from confirming that the plaintiff was a pupil at the school run by the Order, and that there was a Brother Brendan working at the school in or about 1964, the defendants are unable to reconstruct anything of the events surrounding the plaintiff's attendance at the school. For example, it is simply not possible to determine whether in 1964 there was any allegation of theft made against any pupil of the school, an allegation that was said to have provided the backdrop for both of the alleged assaults upon the plaintiff.

5.26 Most of those who might have been interviewed about the events in 1964 are dead. The Brother Brendan, who is now suggested to be the perpetrator of the sexual assault and assault, is also dead.

5.27 I am satisfied that the defendants are wholly prejudiced by the delay that has occurred in this case. They are said to be vicariously liable for alleged assaults carried out by two members of their Order some 48 years ago. The trials of more recently occurring cases of assault or sexual assault often give rise to difficulties or differences of recollection. It is not unusual in such cases for the accounts provided by witnesses to vary sometimes in a significant way, notwithstanding honest attempts to tell the truth. As time passes that problem may become more acute. In this case the details of the events are minimal and inexplicably the events have been reduced in number to two. There are no surrounding details related to the core events that may be subjected to realistic forensic inquiry and cross examination. The difficulty on the part of the plaintiff in producing a coherent and accurate account of these alleged events is exemplified by the mistake he made as to the Order which actually ran the school at which he was a pupil between the ages of eight and fourteen in his own locality. There is no question of the defendant Order having available to it any witness who saw part of what is alleged to have occurred or knows anything of the background of any alleged theft or who can testify to the degree, if any, to which there was any interaction between Brother Brendan and the plaintiff, whether as teacher and pupil or otherwise. There is no evidence to suggest that the plaintiff was ever taught by a Brother Brendan.

5.28 I am not satisfied that the prejudice to the defendant in preparing and maintaining a defence in this case can in any way be met by any orders that may be made by a trial judge in the course of the hearing of the case.

6. Conclusions

6.1 The delay in this case was inordinate but for reasons which I have stated, excusable. Therefore, in the application of the narrow test in relation to the defendant's application to dismiss the action for want of prosecution, it is not necessary to consider the balance of justice and within the confines of that test, the case could have proceeded. However, notwithstanding the fact that the delay was excusable, I must then consider whether this case should be dismissed in the interests of justice. I am satisfied that the defendant has established that there is a real and serious risk of an unfair trial by reason of the lapse of time and further, that there is a clear and patent unfairness in asking the defendant to defend this action. The defendant is not to blame for any of this delay but

has been placed in an impossible position by reason of the passage of time in attempting to prepare for and defend this action. For the reasons set out above, I am satisfied that the plaintiff's claim for damages should be dismissed in the interests of justice.