

THE HIGH COURT

[2017 No. 3289 P.]

BETWEEN

MARGUERITE HARPUR

PLAINTIFF

AND

MARY BROGAN, MARGARET BRENNAN & EILEEN CALLAGHAN

DEFENDANTS

**JUDGMENT of Mr. Justice Barr delivered on the 14th day of November, 2019**

**Introduction**

1. The defendants are the trustees of a registered charity and religious society known as Saint Joseph's – Daughters of the Heart of Mary (hereinafter "the congregation"). In this action the plaintiff claims damages against the defendants in respect of sexual, physical and emotional abuse which she alleges she suffered while a resident in an orphanage run by the order of nuns in Dún Laoghaire, County Dublin in the years 1965 to 1969. The plaintiff's proceedings against the defendants were commenced by personal injury summons issued on 10th April, 2017.
2. In this application, the defendants seek an Order pursuant to the inherent jurisdiction of the Court, dismissing the plaintiff's claim on grounds of inordinate and inexcusable delay in and about the commencement and pursuit of these proceedings. In the alternative, the defendants seek an Order pursuant to the inherent jurisdiction of the Court dismissing the action due to the alleged impossibility of the defendants obtaining a fair trial by reason of the lapse of time between the events the subject matter of the proceedings and the time at which the proceedings are likely to come to trial.

**Chronology of Relevant Events**

3. It is useful at this juncture to set out a chronology of the events that are relevant to the determination of this application, which is as follows:

1958 – Plaintiff is born.

1965/1969 – Period of alleged abuse while a resident in the defendants' orphanage. The plaintiff was aged between 7 and 11 years during this period.

10/4/2017 – Personal injury summons issued by the plaintiff.

2/5/2017 – Appearance filed on behalf of the defendants.

22/5/2017 – Notice for particulars raised by the defendants.

31/8/2017 – Plaintiff furnishes replies.

5/12/2018 – Defence filed on behalf of the defendants.

5/12/2018 – Notice of motion grounding this application is filed, based on a grounding affidavit sworn by the first defendant on 4th December, 2018.

4/2/2019 – Motion comes on in the non-jury list; a direction is given that the plaintiff may furnish a replying affidavit within a period of six weeks.

21/9/2019 – A notice of intention to proceed is served by the plaintiff.

14/10/2019 – Replying affidavit filed on behalf of the plaintiff.

22/10/2019 – Hearing of this application.

#### **Summary of the Plaintiff's Case Against the Defendants**

4. In the plaintiff's personal injury summons issued on 10th April, 2017, the plaintiff alleges that while a resident in an orphanage run by the predecessors of the defendants, she was subjected to severe abuse of a physical, emotional and sexual nature. She described the abuse as occurring in the following manner: younger girls in the orphanage were put in the care of older residents. These older girls were known as "*charge girls*". The plaintiff alleges that she was sexually abused by various "*charge girls*" at bath time, when they would touch her private parts while giving her a bath. She also alleges that they physically abused her by pushing her head under the water in the bath. She alleges that she was further abused by these girls, who would torment her and push her out of bed causing her to urinate on the floor. When this happened, the plaintiff alleges that she was subjected to degrading and prolonged punishment by two named nuns. She alleged that the form of punishment was that she was made to stand or kneel for prolonged periods in the one place. She would not be allowed to use the toilet during this time. As a result, she frequently soiled her clothes. The nuns would make her continue wearing the clothes and send her to class wearing the soiled garments.
5. The plaintiff further alleged that the "*charge girls*" would place a large quantity of salt in her food, which would make her get sick. When this happened, the nuns would again punish her in the manner outlined above. The plaintiff also alleges that the nuns inflicted emotional abuse on her by telling her that she was "*useless*", "*a horrible child*" and "*evil*". Finally, the plaintiff alleged that on one occasion when she attempted to escape from the orphanage by hiding in her father's car, that upon her discovery by the nuns, she was severely beaten about the body and was forced as a punishment to clean toilets and bathrooms and to make beds.
6. The plaintiff alleges that as a result of all of this abuse, she was caused to suffer severe and prolonged psychiatric difficulties, which have persisted throughout her life.
7. It is part of the plaintiff's case that the actions complained of in respect of the "*charge girls*" were part of a system of supervision that was tolerated or condoned by the nuns, or in the alternative, the nuns failed to exercise any adequate control in respect of the supervision of the younger girls by the older girls. It was alleged that they had effectively outsourced the issue of supervision of the younger children to the care of the older children.
8. In her replies to the defendants' notice for particulars dated 31st August, 2017, the plaintiff stated that she was unable to identify the names of the other residents in the

orphanage whom it was alleged had mistreated and abused her. She was also unable to identify the older girls who were instructed by the nuns to supervise the plaintiff in the bath. She identified two nuns as being the nuns who had been in charge of her supervision generally while in the bath and who had inflicted the degrading punishments on her and who had called her the insulting names, as being Sister Keating and Sister Holmes. In response to the question as to which nuns had punished the plaintiff by making her stand in the corner, she stated that that had been done by all nuns then working in the orphanage and had been done by Sisters Keating and Holmes in particular.

9. Before leaving this section, it is worth noting that in their defence dated 5th December, 2018, the defendants admitted that the plaintiff had been admitted to Saint Joseph's Orphanage, Tivoli Road, Dún Laoghaire, County Dublin on or about 12th May, 1965. It was alleged by the defendants that she only resided there until 1966. It was admitted that she attended Saint Joseph's National School, which was located within the grounds of the orphanage, until in or about 1971. Other than that, each and every one of the plaintiff's allegations were denied by the defendants.

#### **Evidence in Relation to this Application**

10. In an affidavit sworn on 4th December, 2018, the first defendant, who is the provincial leader of the congregation of the Daughters of the Heart of Mary, stated that as a result of the delay of approximately 48 years between the end of the period of alleged abuse and the commencement of the proceedings herein, the defendants have been caused to suffer severe prejudice in relation to their ability to defend the plaintiff's claim at the trial of the action. In particular, Ms. Brogan stated that Sister Keating died on 17th February, 1971, and Sister Holmes died on 10th August, 2013. She further stated that neither of these nuns worked at the orphanage as pleaded by the plaintiff. Both nuns were in fact principal teachers of Saint Joseph's Primary School. The plaintiff had specifically named one further member of the congregation, Sister Delahunty, and had pleaded that it was her who had prevented her from leaving the orphanage with her father. Ms. Brogan stated that Sister Delahunty died on 25th January, 2009.
11. The first defendant went on to state that the majority of the nuns that worked in the orphanage between 1965 and 1969 were now deceased. She listed four nuns who had died in the period 1969 to 2003. She went on to state that there were two members of the congregation who worked at the orphanage between 1965 and 1969 that are still alive, being Sister O'Carroll, who is 91 years of age and Sister MacHale, who worked for a short period of time in the nursery at Saint Joseph's and is 75 years of age. The first defendant stated that both these nuns had indicated that they had no recollection of the plaintiff and had no recollection of any complaints concerning Sister Holmes or Sister Keating.
12. In addition, the superior of the congregation between 1967 and 1971, Sister Hallissey was still alive and is 89 years old. Sister Hallissey had informed the deponent that she had no recollection of the plaintiff and had no recollection of any complaints concerning Sister Holmes or Sister Keating.

13. Ms. Brogan stated that the congregation had conducted a thorough review of its records for the relevant period. They had only unearthed two entries in two registers, being the orphanage register and a register from the primary school, each of which merely contained an entry indicating that the plaintiff had been in each of those institutions. She exhibited the relevant entries from the two documents.
14. The first defendant submitted that by reason of the efflux of time and the absence of available testimony from relevant persons and the absence of relevant documentary evidence, the defendants were not in a position to provide factual instructions as to the circumstances of the plaintiff's claim to its legal representatives and in consequence thereof, cannot satisfactorily be legally advised as to the merits of the plaintiff's claim insofar as it relates to the congregation. In these circumstances she has stated that it was no longer possible for the congregation to meet and test the plaintiff's claim and it would be deprived of the normal constitutional and legal rights afforded to a defendant in civil proceedings. She stated that it would be unjust in the circumstances to allow the plaintiff proceed with her claim against the congregation in circumstances where the congregation cannot be assured of a fair trial.
15. A replying affidavit was sworn on behalf of the plaintiff on 11th October, 2019. This was well outside the six-week period, which had been directed when the matter had first come into the non-jury list on 4th February, 2019. However, while the defendants' counsel drew the Court's attention to this fact, he did not seek to have the affidavit excluded from evidence, nor did he seek an adjournment due to its late delivery. In these circumstances, it is appropriate for the Court to have regard to it. In the replying affidavit the plaintiff stated that as could be seen from the personal injury summons and the replies furnished by her, the majority of the abuse had been conducted in full view of other students of the school and the persons named in the defendants' grounding affidavit, Sister Holmes and Sister Keating, were stated to have been directly responsible for only a relatively small portion of the abuse, with most of it being conducted by the "*charge girls*". She went on in that affidavit to describe certain other events which had occurred after she had left the orphanage and the primary school, which in combination with the abuse which she alleged she had suffered while in the care of the defendants, caused her to suffer psychiatric illness to such extent, that she would be considered to have been under a disability within the meaning of the Statute of Limitations (Amendment) Act 2000. She further alleged that as a result of suffering this psychiatric illness, her delay in instituting proceedings was not inexcusable.
16. In relation to the point made by the defendants that the death and unavailability of relevant witnesses had caused them prejudice in relation to their defence of the action, she stated that in the course of the litigation she had met and spoken to a number of girls who were in the orphanage at the same time as her and who recalled such treatment being meted out. She had been advised that such testimony would be sufficient to counter any alleged prejudice which might accrue to the defendants, as had been pleaded by them. She stated that in all the circumstances outlined in her affidavit, the balance of justice favoured dismissing the defendants' application herein.

## The Law

17. There are two overlapping but separate tests that can be applied when an application is made to dismiss a plaintiff's proceedings on grounds of delay. The first test was that set down by the Supreme Court in *O'Domhnaill v. Merrick* [1984] IR 151, where Henchy J. delivering the majority judgment stated as follows at page 158:

*"While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons, a trial in 1985 of a claim for damages for personal injuries sustained in a road traffic accident in 1961 would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion, the defendant who has not in any material or substantial way contributed to the delay should be freed from the palpable unfairness of such a trial."*

18. Earlier in the judgment Henchy J. had noted that a balance must be struck between the parties when considering an application to dismiss. In this regard he stated as follows at page 157:

*"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."*

19. It is important to note that when considering this test, the absence of any blame on the part of the plaintiff for the delay that has occurred, is not relevant. The crucial test is whether the defendant has been prejudiced to such an extent by the delay, that there would be a real risk of there being an unfair trial, if the matter were to proceed to a hearing. It is clear that this jurisdiction to dismiss exists even in the absence of culpable delay on the part of the plaintiff, see *Manning v. Benson & Hedges* [2004] 3 IR 556.
20. The second line of authority which governs the exercise of the Court's jurisdiction to strike out proceedings on grounds of delay, is that arising under the decision in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459. The decision in that case established that in order for a defendant to succeed in having the plaintiff's action dismissed, he must establish that there was an inordinate and inexcusable delay on the part of the plaintiff and if he does so, the Court should then go on to consider whether the balance of justice is in favour of dismissing the proceedings, or allowing them to proceed. In this regard, the Court can have regard to a number of different factors, which can be put into the balance when deciding where the balance of justice lies. One of those factors is 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. It is not necessary to consider this line of authority further, because the parties were agreed that where the plaintiff accepted that there had been an inordinate delay, but denied that such delay was inexcusable, that it would be necessary to hear oral evidence in relation to the factors

which it is alleged excused the delay on the part of the plaintiff. In this regard counsel for the plaintiff stated that he would wish to call oral evidence on that aspect. It was agreed between the parties that for the purpose of this application, the Court would not consider the issue of the excusability of the delay in this case, but would rather proceed to determine the matter on the affidavits. Accordingly, this application falls to be decided under the test set down in the *O'Domhnaill* case.

21. The relationship between the *O'Domhnaill* test and the *Primor* test was recently considered by the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 754 where Irvine J. delivering the judgment of the Court, stated that the question most commonly considered by the Court when exercising its *O'Domhnaill* jurisdiction is whether, by reason of the passage of time, there was a real or substantial risk of an unfair trial or an unjust result. She went on to highlight the difference between the two tests in the following terms at paragraph 37:

*“Clearly a defendant, such as the defendant in the present case, can seek to invoke both the Primor and the O'Domhnaill jurisprudence. If they fail the Primor test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the Primor test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair[...].”*

22. The learned Judge went to state as follows at paragraph 38:

*“Considering its jurisdiction having regard to the test in O'Domhnaill, a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result.”*

23. The decision in *Cassidy* has been followed in a large number of cases in recent years. In *O'Brien v. HSE & Ors.* [2018] IEHC 659, Noonan J., having noted that there were two lines of jurisprudence emerging from the *O'Domhnaill* case and the *Primor* case, summarised the difference between the two tests in the following terms at paragraphs 20 and 21:

*“[...] To summarise these very briefly, the O'Domhnaill line of authority suggests that where the passage of time is such that it is no longer possible for a defendant to have a fair trial, irrespective of any blameworthiness on the part of the plaintiff, the court will dismiss the proceedings. Under the Primor principles, where it is established that the plaintiff has been guilty of both inordinate and inexcusable*

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

24. Turning to the issue of whether the defendant has established that due to the lapse of time and the events that have occurred in the intervening period, they are no longer able to obtain a fair trial, the Courts have considered the issue where relevant witnesses have died in the period between the date of the alleged incidents and the date of the trial. In *Kelly v. O'Leary* [2001] 2 IR 526, Kelly J. (as he then was) had to consider the issue in relation to alleged abuse which had occurred at the Goldenbridge Orphanage in the years 1934 to 1947. The action was commenced over 50 years after the last alleged wrongful act, by summons issued on 26th March, 1998. Of the two sisters against whom allegations had been made, one, Sister Bernardine, had died in October 1990, the second, Sister Xaviera was 82 years of age at the time of the application before the Court. It was alleged that the age of this nun prejudiced the defendant in its defence of the proceedings, as it was pointed out that she would have had hundreds of children under her control during the 21 years in which she was involved in the orphanage. In addition, a priest who had been mentioned in the plaintiff's replies as having visited the orphanage on a regular basis, had died in November 1973. In addition to these matters, medical records which were going to be relevant in the case were no longer available. Kelly J. noted that despite the plaintiff's initial pleadings in her statement of claim and in her replies, in a subsequent affidavit she had described Sister Bernardine as being "*a very kind and gentle person*". The plaintiff had stated that the allegations made against this nun in the statement of claim were due to an error on the part of her solicitor. Having considered the relevant factors set out above, in particular having regard to the death of other nuns who had been involved in the orphanage at the relevant period, such that virtually all of the witnesses who might have been available to the defendant had died in the intervening period, Kelly J. came to the following conclusion at page 544:

*"I am satisfied that there is here a clear and patent unfairness in asking the defendant to defend this action after the lapse of time involved. Actual prejudice has occurred to the defendant by reason of the delay. The defendant has not contributed to this delay. There is here a real and serious risk of an unfair trial. As a matter of probability the trial may amount to an assertion countered by a bare denial. Indeed 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 enquiry*

*which is envisaged in the notion of a fair trial in accordance with the law of this State. Constitutional principles of fairness of procedure required that the action not proceed. To allow the action to go on would put justice to the hazard."*

25. In *Whelan v. Lawn* [2014] IESC 75, the Supreme Court had to consider an application to dismiss the plaintiff's case on grounds of delay, where the plaintiff had alleged that she had been sexually assaulted while visiting her grandfather in his house. The assaults were alleged to have taken place between 1989 and 1992. Proceedings were commenced on 7th September, 2008. Before the proceedings had been issued, the plaintiff's grandmother, the wife of the defendant, who had resided with the defendant in his house, had died.
26. In the High Court, Charleton J. (then a Judge on the High Court) dismissed the plaintiff's case on grounds of prejudice to the defendant due to the death of his wife, who would have been an essential witness for the defence of the trial of the action. By the time the appeal came on before the Supreme Court, the position of the defendant was further prejudiced due to the fact that he had died and his personal representative had been substituted in his place. In delivering the judgment of the Court, Hardiman J. stated that the grossest imaginable prejudice was the death of the defendant in a case where the basic facts were disputed by one person's word against another's. He stated as follows at paragraph 24:

*"I am therefore of the opinion that the emphasis, in an application such as the present, has to be on whether the underlying dispute has simply 'passed beyond the reach of fair litigation'. If it has, then in my view the ensuing trial, if permitted to continue, would scarcely be a forensic exercise at all. I cannot think of a more radical departure from the requirements of a fair trial, or a more obvious example of a case which has passed beyond the bounds of fair litigation, than a hotly disputed factual issue on which one party will not be able to make any showing whatever."*

27. A similar conclusion was reached by the Court of Appeal in *McNamee v. Boyce* [2016] IECA 19 where the defendant's wife, who had given evidence at his criminal trial in 1999, had died on 7th July, 2005, which was over two years after the plaintiff's plenary summons had been served in December 2002. The civil proceedings had then lain dormant until service of a notice of intention to proceed on 5th July, 2011. Also of significance was the fact that in March 2012, the plaintiff had obtained liberty to deliver an amended statement of claim, wherein she alleged much more serious assaults on the part of the defendant in the form of rape and buggery. In the course of the dismissal application, it had been submitted on behalf of the plaintiff that any prejudice which may have been caused to the defendant due to the non-availability of his wife to give evidence, could be overcome by admitting a transcript of the evidence which she had given in the course of the criminal proceedings. However, Irvine J. noted that the criminal charge on which the defendant had been convicted, which was only one charge



out of six, had not related to the much more serious allegations contained in the amended statement of claim. Furthermore, she highlighted how the admission of a transcript of the wife's evidence would not remotely equate with the power and impact which her evidence may have had if given *viva voce*.

28. In those circumstances the Court was satisfied that the plaintiff's delay had exposed the defendant to a significant risk of prejudice in terms of his ability to defend the very serious allegations made against him. That prejudice stemmed principally from the death of his wife in 2005. The Court held that her unavailability to give evidence was undoubtedly prejudicial to the extent that the trial judge ought to have dismissed the action on the grounds that the balance of justice mandated such step be taken. That action was dismissed using the *Primor* test and having regard to those findings the Court did not find it necessary to consider whether a similar result would have been warranted if the *O'Domhnaill* test had been applied.
29. The Court of Appeal reached a similar decision in *McDonagh v. O'Shea* [2018] IECA 298 where the Court held that due to the lapse of time between the alleged events the subject matter of the proceedings and the death and consequent unavailability of the critical witness, who was alleged to have sexually abused the plaintiff, it was appropriate to strike out the element of the plaintiff's claim which related to the sexual abuse allegation. The Court permitted that part of the claim to continue which related to physical abuse allegedly carried out on the plaintiff by the school principal, who was still alive and in a position to give evidence at the trial of the action.
30. The Court was also referred to a number of recent decisions where the principles outlined above have been applied, see *Bergin v. Smith* (Unreported, High Court, Faherty J., 11th January, 2019), *O'Brien v. Murphy* [2019] IEHC 640 and *Breaden v. Cúnamh* [2019] IEHC 632.

### **Conclusions**

31. By agreement between the parties, the issue raised in the defendants' defence that the plaintiff's action was statute barred, was not considered by the Court on this application. Similarly, as previously noted, it was agreed that there would be no evidence called in relation to the issue of whether or not the delay was excusable, having regard to the plaintiff's personal circumstances and her psychiatric health since leaving the orphanage. While there was limited argument that the plaintiff was guilty of post-commencement delay, having regard to the chronology set out earlier and the fact of the Court not embarking on an examination of the excusability of any delay on the part of the plaintiff, I am not satisfied that the plaintiff has been guilty of such post-commencement delay as would warrant the dismissal of the proceedings.
32. In these circumstances, the *Primor* test was not relevant to the Court's consideration of this application. The defendants' application herein falls to be considered solely under the test set out in *O'Domhnaill v. Merrick*.

33. This Court is bound by the decision of the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 754. In that case Irvine J. stated that the question most commonly considered by the Court when exercising its *O'Domhnaill* jurisdiction is whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result. That is the test which I must apply in this case.
34. In order to cross the threshold required by the *O'Domhnaill* test, the defendant must establish that due to the lapse of time and, more particularly, due to the death or unavailability of witnesses, or the destruction or loss of documents, or the natural fading of memory caused by the delay, the defendant cannot get a fair trial at this remove and that there would be a risk of there being an unjust result if the trial were to proceed. In considering this question, the Court does not look at any question of blame on the part of the plaintiff in not bringing the proceedings earlier. The Court simply looks at whether it is likely, as things stand at the present time, that the defendant can get a fair hearing at the trial of the action, if same were to come on for hearing in the near future.
35. In considering that question, the Court has had regard to the fact that in a number of decisions the intervening death of the person who was alleged to have been the primary abuser, has been found to be a matter which usually causes the most severe prejudice to a defendant in defending the action. Indeed, depending on the alleged circumstances of the abuse, the death of such person can almost completely remove any realistic prospect of the defendant mounting a defence to the action. See the decisions in the *Cassidy* and *Whelan* cases discussed above.
36. The death of other relevant witnesses can also severely prejudice a defendant's ability to defend himself, such that the Court may have to dismiss the action against the defendant, see the *McDonagh and Whelan* cases cited above.
37. The absence of such witnesses and in particular the absence of the main alleged perpetrator of the abuse, can often mean that coherent instructions simply cannot be given to enable the remaining defendants to defend the action. In addition, the paucity or absence of relevant documentation can also have a severely prejudicial effect on the defence, or can mean that it is not possible to fill the lacunae caused by the absence of relevant witnesses, who have died in the interim.
38. In the present case, I am satisfied that the defendants have established that due to the delay on the part of the plaintiff, they cannot now get a fair trial if the matter were to come on for hearing in the near future, say early in 2020. The following matters are the factors which have led me to this conclusion: firstly, there was a delay of approximately 47 years between the cessation of the alleged abuse and the institution of these proceedings. If the matter were to come to trial in early 2020, which would be the earliest possible date on which the trial could be heard, this would mean that a period of approximately 51 years had elapsed between the end of the alleged abuse and the trial of the action. That period of time of itself, must make it almost impossible for the defendants to obtain a fair hearing at the trial.

39. However, my conclusion does not rest on the mere passage of time alone. Significant events have occurred in the intervening years which have rendered it impossible for the defendants to get a fair trial. In particular, the two nuns against whom the plaintiff has made her primary complaints are both dead. The third nun named by the plaintiff, Sister Delahunty, died on 25th January, 2009. Four other nuns who worked in the orphanage between 1965 and 1969 have also died in the intervening years.
40. The evidence is that two remaining members of the congregation who worked at the orphanage in the relevant years, Sister O'Carroll and Sister MacHale, are both of advanced years. Neither of them has any recollection of the plaintiff, nor do they have any recollection of any complaints concerning the two Sisters against whom the allegations are made. Thus it would not appear that they will be in a position to give any relevant evidence at all at the trial of the action.
41. Thirdly, the plaintiff has been unable to identify any of the "*charge girls*", whom it is alleged were the primary abusers during the relevant years.
42. Fourthly, insofar as there is any documentary evidence, it merely consists of two entries in the orphanage and school registers respectively and is of no evidential value *per se*.
43. Fifthly, the Court has taken into account that fact that the defendants were not in any way culpable for the delay that there was between the dates of the alleged abuse in 1965 to 1969 and the institution of proceedings in 2017.
44. Taking all of these matters into account, the Court is satisfied that it is not possible for the defendants to obtain a fair trial if this matter were to proceed at this stage over 51 years after the last alleged act of abuse.
45. It was submitted by senior counsel on behalf of the plaintiff that this was a case about a system of supervision, or the lack of it and/or a system of degrading punishment applied in the orphanage, rather than about specific abuse of the plaintiff. In these circumstances, it was submitted that the defendants could rely on the evidence of a range of other possible witnesses, who may be in a position to give relevant evidence concerning the existence of such systems, such as: other employees in the orphanage; teachers in the school; the local GP; the local priest and any inspectors who may have carried out inspections on behalf of relevant Government Departments. It was submitted that these witnesses may well be in a position to counter the plaintiff's allegations in relation to the systemic issues of abuse and punishment which she alleges occurred in the orphanage during the relevant years.
46. I do not think that that submission is well founded on the pleadings. The plaintiff's case as pleaded is that she was subjected to abuse both physical and sexual at the hands of unidentified "*charge girls*" and that when she soiled herself, or urinated on the floor, due to the actions of the "*charge girls*", she was subjected to severe and degrading punishments for such a length of time as to amount to an assault upon her by the named nuns. She further alleges that the actions of the "*charge girls*" was allowed to happen by

lack of supervision on the part of the named nuns and that the punishments were meted out by those nuns. She further alleges that the nuns subjected her to emotional and verbal abuse in the manner set out in her pleadings. Thus, the central part of the plaintiff's case is that the matters complained of by her, were done to her. She alleges that as a result of these things done to her, she was caused to suffer psychiatric injury, in respect of which she claims damages. In these circumstances, this is not a case about a system which was operated in the orphanage, it is about specific things that were allegedly done to the plaintiff while in the orphanage.

47. While it is noted that in the plaintiff's affidavit sworn on 11th October, 2019, she stated that she had met and spoken to a number of girls who were in the orphanage at the same time as her and who recalled such treatment being meted out and she believed that such testimony would be sufficient to counter any alleged prejudice which might accrue to the defendants as they have pleaded in this application, I do not think that such a bare assertion is sufficient to counter the undoubted prejudice which would be suffered by the defendants in having to meet the claim at this remove. The plaintiff does not identify any of the people to whom she has spoken. All she states is that they were in the orphanage at the same time as her and they recalled "*such treatment being meted out*". This does not imply that they saw any such treatment being meted out to her. It would appear that the most they could possibly say was that treatment as that described by the plaintiff in her pleadings, whereby younger girls were subjected to abuse at the hands of "*charge girls*" and then punished severely by the nuns; such evidence is only of very marginal relevance to the central issue in this case, which is whether the plaintiff was actually abused in the specific manner described by her. Furthermore the evidence which these unidentified people may be able to give, does not overcome the enormous prejudice to the defendants caused by the delay in initiating the proceedings herein. Given the plaintiff's inability to identify any of the "*charge girls*" and the fact that the nuns whom she has identified have died, and having regard to the lack of any other relevant witnesses, I am satisfied that the defendants cannot get a fair trial at this time.
48. In summary therefore, in circumstances where the primary perpetrators are either unidentified, or have died in the intervening years, I am satisfied that the defendants cannot get a fair trial at this remove. The action comes within the test set down in *O'Domhnaill* and the circumstances are of sufficient similarity to the decisions in the *Cassidy, Kelly, Walsh* and *McNamee* cases that the Court is satisfied that it is appropriate to dismiss the action on grounds of delay, due to the fact that as a result of such delay the defendants cannot now get a fair trial. Accordingly, I dismiss the plaintiff's action against the defendants.