THE HIGH COURT

[2023] IEHC 60

[Record No. 1995/6602 P]

BETWEEN

GK (A PERSON OF UNSOUND MIND NOT YET SO FOUND) SUING BY HIS MOTHER AND NEXT FRIEND, EK

PLAINTIFF

AND

ST JOHN OF GOD TRUST (IRELAND)

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 10th day of February, 2023.

Introduction.

1. This is an application by the defendant to have the plaintiff's action struck out on grounds of inordinate and inexcusable delay.

2. The plaintiff was born in Q1 of 1976. He suffers from longstanding Klinefelter's syndrome and has also been diagnosed as having a mild intellectual disability.

3. In the years November 1987 to March 1990, the plaintiff was a five-day border in a school run by the defendant. He spent Monday to Friday residing in the school and spent weekends at home with his parents and two younger sisters.

4. Stated very briefly, the plaintiff's case is that while he was attending the defendant's school, he was seriously sexually assaulted, by a male care worker employed in the school. He alleges that these acts took place in a number of locations: in the care worker's office; on the school grounds; in a nearby park; in the care worker's flat and at another house.

5. After the plaintiff left the school in or about March 1990, he made two detailed statements to An Garda Síochána in April 1990. His mother also made a detailed statement at that time. Having investigated the plaintiff's complaints, a file was sent by the gardaí to the DPP. The DPP directed that there should be no prosecution in the matter.

6. The plaintiff instituted civil proceedings against the defendant by plenary summons issued on 23rd August, 1995, by which time the plaintiff was 19 years of age. A statement of claim was delivered on 5th June, 1997. A notice for particulars was raised on 12th August, 1997, with replies thereto being furnished by the plaintiff on 22nd January, 1998. Copies of the two statements made by the plaintiff to the gardaí in April 1990, were furnished with the

replies. Pleadings closed with delivery of a defence on behalf of the defendant on 3rd March, 1998.

7. On 6th September, 2000, the plaintiff's solicitor served a notice of trial. However, that was not valid, due to the fact that the plaintiff's solicitor had not previously filed a notice of intention to proceed, there having been no step taken in the action for the preceding two years. On 18th January, 2006, the plaintiff's solicitor served a notice of intention to proceed. However, no further steps were taken in the action consequent upon that notice.

8. On 15th March, 2006, the defendant's solicitor sought a copy of the garda investigation file. By letter dated 5th June, 2006, the gardaí confirmed that the DPP had directed that there be no prosecution in the matter, but informed the defendant's solicitor that the investigation file could not be located.

9. In 2015, the defendant's solicitor wrote to the plaintiff's solicitor, indicating that given the delay in the proceedings, the plaintiff should withdraw the action and the defendant offered to bear their own costs if the plaintiff did so. The plaintiff's solicitor replied that he had encountered difficulties obtaining instructions from his client and had concerns about the plaintiff's capacity to furnish instructions to him. Further correspondence in the broadly similar terms was exchanged in 2016, 2017, 2018 and 2019.

10. On 13th February, 2019, the defendant issued the present notice of motion seeking to strike out the plaintiff's action for delay and want of prosecution.

11. On 22nd November, 2022, an order was made by the Deputy Master, on the application of the plaintiff's solicitor, appointing the plaintiff's mother as his next friend for the purposes of the litigation. This was based on a medical report furnished by Dr. Karen Elizabeth Humphries, Consultant Psychiatrist, dated 6th May, 2019.

12. To briefly summarise the arguments: the defendant submits that given the inordinate passage of time that has elapsed, in particular the inactivity on the part of the plaintiff to progress his action between 2000 and 2019, when the defendant issued its notice of motion, and having regard to this inordinate period, the defendant has suffered general prejudice due to the lapse of time since the events giving rise to the allegation and has suffered specific prejudice due to the loss of the garda file; such that the defendant satisfies the tests set out down in *O'Domhnaill v. Merrick* [1984] IR 151 and in *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 IR 459, such that the plaintiff's action against it should be struck out.

13. In response, the plaintiff concedes that there has been inordinate delay in the action, but argues that having regard to the almost unique circumstances of the plaintiff, that the delay in this case was excusable; or in the alternative, it was submitted that if the court looks at the balance of justice, when one weighs up the adverse circumstances of the plaintiff, the balance of justice is in favour of allowing the plaintiff's action to proceed.

14. The adverse circumstances relied upon by the plaintiff, are the following: he is under a cognitive disability as set out in the medical report furnished by Dr. Humphries; he cannot read or write; his formal education effectively ceased at the age of 14 years; the plaintiff's parents separated after the action had commenced; the plaintiff now lives with his father far from where he originally grew up; his father is unable to read or write; and the plaintiff had abused alcohol for a period, which had required the intervention of the local mental health services. It was submitted that taking all of these matters into account, the delay involved was excusable, or in the alternative, the balance of justice lay in favour of allowing the action to proceed.

Chronology of Relevant Dates.

15. The relevant dates can be summarised in the following form: -

1976	Plaintiff is born
November 1987 – March 1990	Plaintiff is enrolled in the defendant's school. The alleged acts of abuse occurred at that time in multiple locations.
2nd April 1990	Solicitors originally retained by the plaintiff's parents write to the school seeking copies of his medical records. No indication of any claim is made in that letter.
11th April 1990	The plaintiff and his mother make statements to the gardaí in relation to the alleged abuse.
27th April 1990	Plaintiff makes a further statement to the gardaí.
6th March 1995	Plaintiff's current solicitor writes to the defendant threatening an action for damages.
23rd August 1995	Plenary summons is issued.

29th August 1995	The plenary summons is served on the defendant's former solicitor.
1st September 1995	An appearance is entered by solicitor on behalf of the defendant.
28th May 1997	The plaintiff's solicitor serves the first notice of intention to proceed.
5th June 1997	Plaintiff's solicitor delivers a statement of claim.
12th August 1997	Defendant's solicitor raises a notice seeking further and better particulars.
29th August 1997	Plaintiff's solicitor writes to the gardaí seeking a copy of the garda investigation file.
18th September 1997	Gardaí reply, declining to provide a report on the basis that it is confidential.
22nd January 1998	The plaintiff's solicitor furnishes replies to the notice for particulars and furnishes copies of the statements made by the plaintiff to the gardaí in April 1990.
3rd March 1998	A full defence is delivered on behalf of the defendant, which includes a plea that there has been gross and inordinate delay.
2nd June 1998	The plaintiff's solicitor writes to the defendant's solicitor seeking voluntary discovery.
6th September 2000	The plaintiff's solicitor serves a notice of trial.
23rd November 2000	Defendant's solicitor writes to the plaintiff's solicitor advising that the notice of trial is invalid due to the absence of a notice of intention to proceed.
21st April 2005	A notice of change of solicitor is filed on behalf of the defendant.
18th January 2006	Plaintiff's solicitor serves a second notice of intention to proceed. On the same date, the plaintiff's solicitor writes to a consultant psychiatrist seeking a medical report.

15th March 2006	Defendant's solicitor writes to the gardaí seeking copy of the garda investigation file.
5th June 2006	Gardaí write to the defendant's solicitor confirming that a file had been sent to the DPP and that the DPP had directed that there should be no prosecution. Gardaí state that they could not locate a copy of the relevant file in their garda station.
9th May 2007	Plaintiff's solicitor sends a reminder to the consultant psychiatrist in relation to provision of a medical report.
2nd July 2007	A further reminder is sent to the psychiatrist. A further reminder was sent on 1st August, 2007, which probably crossed with the reply from the consultant psychiatrist.
31st July 2007	Consultant psychiatrist replies to the plaintiff's solicitor, indicating that he is not in a position to provide a medical report.
5th October 2015	Defendant's solicitor writes to the plaintiff's solicitor referring to the delay and indicating that the defendant would bear its own costs if the plaintiff withdrew the action.
11th November 2015	Plaintiff's solicitor replies indicating that he is experiencing difficulties obtaining instructions and that he had a concern regarding the plaintiff's ability to give instructions.
2016 - 2019	Further correspondence is exchanged between the solicitors along the lines indicated above.
13th February 2019	Defendant's solicitor issues the present motion to dismiss the action for want of prosecution.
6th May 2019	Report prepared by consultant psychiatrist on capacity of plaintiff to give instructions.

30th May 2019	Plaintiff's solicitor writes to the Garda Commissioner and the DPP seeking release of the garda file.
22nd November 2022	Order of Deputy Master appointing plaintiff's mother as his next friend.

Statements made to the Gardaí.

16. For reasons that will become apparent later in the judgment, it is necessary to give a brief summary of the content of the statements made by the plaintiff to the gardaí in April 1990.

17. While the first statement is undated, it would appear to have been made by the plaintiff on 11th April, 1990, because in a subsequent statement he refers to the earlier statement having been made on that date. In his first statement, the plaintiff recounted that on a number of occasions he was sexually assaulted by the care worker in his office in the school. He stated that the care worker kissed him on the cheek, while touching the plaintiff's penis. He stated that on a number of occasions the care worker anally raped him while he was standing and was bent over a chair. He stated that that had happened "loads of times". He described in fairly graphic detail what used to happen on these occasions.

18. The plaintiff went on to recount how he was taken by the care worker to a nearby park. He stated that this always happened when it was dark. He stated that the care worker used to insert his fingers into his rectum. He stated that he was brought to the park approximately four times every week. He stated that it was because of this that he had run away from the school.

19. The plaintiff stated that on one occasion, a named resident in the school, was looking through a hole in the door, when he saw the care worker doing "bold things to me". He stated that the boy only saw that happening once. He stated that he told that boy that he would kill him if he told anyone else.

20. On 27th April, 1990, the plaintiff made a second statement to the gardaí. In that statement he recounted how he had been taken by the care worker, along with another named boy, to the care worker's flat on one occasion. He stated that the care worker had met them after school hours outside the school. They had been brought to his flat in his car.

21. In the statement, the plaintiff gave a detailed account of the layout of the flat, the furniture in the flat and its furnishings. He stated that they were only in the flat for a short

while. Then the three of them then returned to the school. He stated that the care worker did not touch him, or the other boy, while in the flat.

22. The plaintiff went on to recount how on a subsequent occasion, he was taken by the care worker to a different house. Again, the plaintiff gave a detailed account of the interior of the house. He stated that he stayed in the house for three days and three nights, without going to school. He stated that while he was in the house, the care worker did "dirty things" to him. He stated that that had happened during the daytime in the care worker's bedroom. He recounted how he had been anally raped by the care worker while in the house. He recounted how the care worker went to work at 09.00 hours and returned to the house at 16.00 hours.

23. The plaintiff stated that a named adult female worker, who was employed at the school, came to the house on one occasion. The care worker told him to hide under the bed. He stated that the lady asked the care worker where the plaintiff was, to which he replied that the plaintiff had "gone out". The plaintiff gave the flat number and the house number in relation to the care worker's flat. He stated that he would try and show the gardaí where the flat was.

24. The plaintiff went on to state that while he was in the accommodation area in the school, he and three other named residents engaged in anal intercourse with each other. He stated that they did it "often".

25. On 11th April, 1990, the plaintiff's mother made a detailed statement running to three and a half typed pages. In that statement, she recounted how she learnt of the alleged abuse, when the plaintiff told her about it when he was residing at home. She stated that she immediately phoned a named care worker from a local health centre. He came to the house and spoke with the plaintiff. In the course of the statement, she recounted how the plaintiff had had difficulty in relation to the transport to school, because he had attempted to jump off the bus on a number of occasions. He had also had issues in the school, when he had attempted to run away from it on a number of occasions. She stated that in June 1990 [which must be an incorrect date] she was informed that the plaintiff had lost his place in the school. This must have occurred at some time prior to 11th April, 1990, being the date of her statement.

26. In the course of her statement, the plaintiff's mother stated that the care worker had called to their house on a number of occasions to discuss the plaintiff's welfare. On one

occasion, he informed her that the plaintiff and other boys in the school "were involved in masturbation and sucking". He told her that he was of opinion that the plaintiff might be homosexual. He told her that he had told the plaintiff not to be engaged in that kind of activity with other boys.

27. The plaintiff's mother also recounted how she had collected a large number of pairs of underpants, together with two pairs belonging to her and three pairs belonging to her daughters, which were all soiled. She found these secreted at various places throughout the house. She stated that she had known that her son, on occasions, wore her underwear. She handed the underwear over to the gardaí for forensic examination.

Loss of the Garda File.

28. By letter dated 29th August, 1997, the plaintiff's solicitor wrote to the superintendent at the relevant garda station outlining that the allegations made by his client had been investigated by two named gardaí. He requested that a copy of the "garda report" be furnished to him. By letter dated 18th September, 1997, the superintendent of the garda station replied, stating that his request had been carefully considered by the garda authorities. However, he stated that it was of paramount importance for the effectiveness of An Garda Síochána that information gathered in the course of a criminal or other investigation must remain confidential. He stated that the garda authorities regretted that they were unable to accede to his request.

29. It appears that by letter dated 15th March, 2006, the defendant's solicitor wrote to the gardaí seeking a copy of the garda investigation file. By letter dated 5th June, 2006, Superintendent McCahey responded, stating that they had made contact with the former detective garda who had been involved with the file. He had retired from the gardaí approximately ten years earlier. The detective garda had stated that he remembered the case referred to and confirmed that a file had been prepared and submitted to the DPP, who directed no prosecution. The letter continued: "Detective Garda Keaty did not retain a copy of the file and unfortunately we have been unable to locate a copy at [named garda station]".

30. By letters dated 30th May, 2019, the plaintiff's solicitor wrote to the Garda Commissioner and the DPP, asking them to review the decision that had been made by the gardaí in respect of his earlier correspondence in 1997, declining to provide a copy of the garda file. Those letters were sent some four days prior to the date on which the plaintiff's

solicitor swore his replying affidavit in this application, on 4th June, 2019. The court is unaware what response, if any, was received by him to his letters sent on 30th May, 2019.

Medical report from Dr. Humphries dated 6th May, 2019.

31. Dr. Karen Elizabeth Humphries is a consultant psychiatrist. For the purpose of conducting her assessment of the capacity of the plaintiff, she had two interviews with him; the first in the presence of his mother on 11th April, 2019 and the second in the presence of his father on 30th April, 2019. She had the benefit of medical records held by the mental health services in the area where the plaintiff currently resides. She also had a telephone conversation with the plaintiff's solicitor on 1st May, 2019.

32. In her report, Dr. Humphries noted that the plaintiff had a diagnosis of Klinefelter's syndrome from a young age. He also had a diagnosis of a mild intellectual disability, which was based on a developmental history of global delay, impaired educational attainment and formal IQ testing. She noted that he had effectively left school at the age of 14 years, when he left the defendant's school. She noted that there was a past history of alcohol misuse by the plaintiff, for which he had received input from the mental health services in his area. She noted that he was unable to read or write. She stated that he appears to be "street wise" and was able to manage to occupy his daytime activity.

33. Having outlined the content of her two interviews with the plaintiff, the doctor gave the opinion that she was not satisfied that the plaintiff understood the claim that he had brought in the proceedings. It was her opinion that the plaintiff was influenced by the input from his parents and would agree with their understanding, if they provided this. He was unable to retain this information and could not communicate it by himself. She was of the opinion that he had no understanding regarding the action, other than his strongly held belief that his "files", held by the HSE, were needed and that when they were obtained, they would explain everything. He was unable to identify the likely outcome from the legal proceedings. He did not appear to understand what the most likely outcome would be.

34. Based on her interviews with the plaintiff, and on the background information and information provided by the plaintiff's solicitor, it was her opinion that the plaintiff did not have the capacity to provide instructions to a solicitor on the conduct of the litigation. That was due to the impact his intellectual disability had on his thinking, his ability to process information and his lack of understanding, regardless of the use of simplified appropriate language. She stated that it was her belief that the plaintiff did not understand the claim, or

the action that he had; due to the impact of his intellectual disability on his ability to process higher level information. As the plaintiff lacked the capacity to instruct a solicitor, she recommended that he should be provided with a litigation friend to act on his behalf, in his best interests. However, she stated that it was important that the plaintiff should remain involved and that his views and preferences should be taken into account, albeit not binding on any decisions made on his behalf in the matter.

Submissions of the Parties.

35. The submissions of the parties have been summarised very succinctly in the introduction section of this judgment. It is only necessary to give a further brief elaboration of the submissions hereunder. Mr. Micheál Ó Scanaill SC on behalf of the defendant, accepted that the plaintiff was a vulnerable person, who was acting under a disability. However, it was submitted that this was not a case where the plaintiff had been unable to act. Quite the contrary; he had given detailed statements to the gardaí almost immediately upon his departure from the school. Notwithstanding his speed in providing those statements to the gardaí, he had waited for a period of five years, before issuing his plenary summons. Counsel submitted that it was noteworthy that the plaintiff was 19 years of age at that time.

36. It was submitted that the plaintiff had further delayed in taking the next step in the proceedings, because the plaintiff's solicitor had to deliver a notice of intention to proceed, prior to delivering the statement of claim, on 5th June, 1997. It was accepted that the plaintiff had responded reasonably quickly to the defendant's notice for particulars, which had been raised on 12th August, 1997; to which replies were furnished on 22nd January, 1998. Counsel stated that the pleadings had been closed by delivery of a full defence on 3rd March, 1998. It was submitted that it was noteworthy that in its defence, the defendant had specifically pleaded delay as a separate ground of defence. Accordingly, it was submitted that the plaintiff was put on notice that the defendant was going to make delay an issue in the case. Therefore, they were on notice that any further delay would further support the defendant's contention in that regard.

37. Counsel submitted that it was significant that the plaintiff's solicitor had purported to serve a notice of trial on 6th September, 2000. This meant that, as far as the plaintiff was concerned at that time, his action was ready for hearing. Notwithstanding that, it was totally inexplicable that the plaintiff and/or his solicitor, had taken no further effective step in the litigation prior to receipt of the defendant's notice of motion to strike out the action in 2019.

38. It was submitted that having regard to the enormous delay that had occurred in the period 2000 to 2019, coupled with the non-availability of the garda investigation file, the plaintiff had satisfied the test set down in *O'Domhnaill v. Merrick*, that there was a real risk that he would be unable to obtain a fair trial at this remove.

39. It was submitted that even if the court was against him on that submission, it was clear that the defendant had satisfied the alternative test set down in the *Primor* case, where it had been held in a number of cases that only moderate prejudice was necessary once it had been established that the delay on the part of the plaintiff had been both inordinate and inexcusable.

40. It was submitted that given the passage of such a long period of time, which even if one took the end point as being the date of issue of the defendant's notice of motion in February 2019, meant that the action concerned events that had occurred between thirty-two and twenty-nine years previously. It was submitted that in such circumstances it was natural that the recollection of relevant witnesses would have faded greatly, such that it was not possible for the defendant to obtain a fair trial. In this regard counsel referred to the decisions in *Rogers v. Mechelin Tyre PLC* [2005] IEHC 294; *William Connolly & Sons Ltd, t/a Connolly's Red Mills v. Torc Grain and Feed Limited* [2015] IECA 280; *McNamee v. Boyce* [2016] IECA 19; *Mannion v. Brennan* [2016] IECA 163 and *Gorman v. Minister for Justice Equality and Law Reform* [2015] IECA 41.

41. It was submitted that insofar as the plaintiff had argued that he was under some particular disability, that was something that had been known at the outset of the proceedings. It was not something that arose during the course of the proceedings, which gave rise to an unexpected delay. While his disability may have excused periods of minor delay in the course of the litigation, it was submitted that it could not be used to excuse the delay of almost twenty years from 2000 to 2019.

42. Insofar as the plaintiff's solicitor had stated that he had had concerns in relation to the plaintiff's capacity to give him instructions, it was submitted that it was noteworthy that the only time that he actually sought a medical report dealing with that issue, was after the date of issue of the defendant's notice of motion herein. The correspondence that he had sent to Dr. Calvert in 2006, was only seeking production of an up-to-date medical report. It was not asking the doctor to carry out any assessment on the capacity of the plaintiff to furnish instructions to his solicitor.

43. It was submitted that under the third test in *Primor*, once the defendant had established inordinate and inexcusable delay on the part of the plaintiff, it was only necessary for the defendant to establish moderate prejudice, in order for the action to be stayed. It was submitted that even where witnesses were still available to give evidence, the quality of such evidence may have deteriorated due to the passage of time. In this regard counsel referred to dicta in the judgment of Mahon J. in *Mannion v. Brennan*. It was submitted that taking the overall passage of time from the date of the events giving rise to the complaint, to the date of issue of the defendant's notice of motion; that lapse of time was so great, that it was reasonable and in the interests of justice that the action should be struck out.

44. On behalf of the plaintiff, Ms. Gillian Reid BL conceded that the delay in this case had been inordinate. However, it was submitted that having regard to the plaintiff's unique adverse circumstances, as outlined earlier in the judgment, the delay in this case had been excusable. It was submitted that a number of cases had established that when considering the issue of delay, there was no universal standard that applied to all plaintiffs. Instead, the court should take account of the unique and personal circumstances that were applicable to each plaintiff: see *AIBP Ltd v. Montgomery* [2002] 3 IR 510; *Vernon v. AIBP Ltd* [2014] IEHC 98 and *Comcast International v. Minister for Public Enterprise & Ors.* [2012] IESC 50.

45. It was submitted that in this case the combination of circumstances was almost unique. The plaintiff suffered from a significant intellectual disability; during the currency of the proceedings his parents had separated; and as a result he had come to live with his father, who was also illiterate and resided a significant distance from his solicitor's office. In addition, the plaintiff had had no formal schooling since the age of 14 years and there was evidence that he had misused alcohol for a period in the interim. Lastly, it had been established by the medical report furnished by Dr Humphries, that he in fact had lacked the capacity to give full instructions to his solicitor in relation to the carriage of the litigation. Counsel submitted that when these factors were taken into account, the delay in this case had been excusable.

46. It was submitted that even if the court was against the plaintiff on that aspect, when the court came to consider the third question in the *Primor* test, being the balance of justice, there was no real prejudice to the defendant in facing the serious allegations at this remove. The defendant would have been aware of the allegations at the time that the garda investigation was carried out in the weeks and months after April 1990. The defendant was

given full details of the allegations when it was furnished with the plaintiff's statements to the gardaí, with the replies in January 1998. It was submitted that the defendant therefore was in a good position to organise its defence within a short period after the date of the events complained of.

47. Counsel further submitted that it was noteworthy that the defendant had been unable to point to any specific prejudice in the form of loss of documents, or unavailability of relevant witnesses. It was submitted that this differentiated the case from the decision in *McNamee v. Boyce*, which also involved allegations of sexual assault, but where a critical witness, being the defendant's wife, had died in the interim. Counsel submitted that it was noteworthy that there was no assertion that any critical witness required by the defendant had died, or was otherwise unavailable.

48. Insofar as the garda file appeared to be missing, it was submitted that that was something which would affect both parties, as neither party would be able to rely on material contained in it. Therefore, its loss could not be said to be a particular prejudice to the defendant.

49. Finally, counsel submitted that in cases of historical sexual abuse, it was common for both civil and criminal trials to be permitted to proceed at a considerable remove from the date of events giving rise to the action. In the absence of any specific prejudice arising to the defendant, it was preferable that such serious allegations should be heard and determined by a court. Accordingly, it was submitted that the defendant's application ought to be refused.

The Law.

50. 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*, 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."

51. 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."

52. 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.

53. 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*. 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 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.

54. 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 74 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 […]"*

55. 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."*

56. 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:

> *"20. […] To summarise these very briefly, the O'Domhnaill line of authority suggests that where the passage of time is such that it is no longer possible for a defendant to have a fair trial, irrespective of any blameworthiness on the part of the plaintiff, the court will dismiss the proceedings.*
>
> *21. Under the Primor principles, where it is established that the plaintiff has been guilty of both inordinate and inexcusable delay, the court may then go on to consider where the balance of justice lies in order to determine whether the case should be permitted to proceed. A defendant is entitled to rely on one or other or both lines of authority in pursuing an application such as this. The onus of proof on a defendant who places reliance on O'Domhnaill is higher. Such a defendant must establish*

prejudice likely to lead to a real risk of an unfair trial. The bar is set somewhat lower in Primor where once a defendant establishes that the plaintiff has been guilty of both inordinate and inexcusable delay, proof of moderate prejudice may suffice, even in the absence of establishing a real risk of an unfair trial. Thus under the Primor principles, the plaintiff's culpability in relation to delay is a central feature which is absent in O'Domhnaill."

57. One of the essential differences between the *O'Domhnaill* test and the *Primor* test is that in the latter scenario it is only necessary for a defendant to establish moderate prejudice, once he has established that there was both inordinate and inexcusable delay on the part of a plaintiff. This was established in *Stevens v. Paul Flynn Ltd* [2008] 4 IR 31. More recently, it was stated by Irvine J. (as she then was) in *McNamee v. Boyce* where she stated as follows at para. 35: -

"Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the Primor test."

58. Another issue which is of importance in the present case, is the extent to which the issue of prejudice, which is considered as part of the balance of justice, is affected by the non-availability of critical witnesses. In *Mannion v. Brennan*, Mahon J. held that even where witnesses were still available, the quality of their evidence may have deteriorated because of the passage of time. He stated as follows at para. 35 of his judgment;

"One of the questions which a court is obliged to consider when dealing with the issue of the balance of justice is whether or not a defendant has been prejudiced as a consequence of the delay. Various reasons may give rise to prejudice for a defendant, including the non availability of important witnesses because of death or emigration, destruction of documentation, lack of or reduced recollection because of the passage of time or a belief that the proceedings have been long since abandoned. Even where witnesses are still available to give evidence, the quality of such evidence may have deteriorated because of the passage of time. In Manning v. Benson and Hedges [2005] 1 ILRM 180, 208, Finlay Geoghegan J. remarked that:-

> *"Delays of four to five years as a matter of probability will reduce the potential of such witnesses to give meaningful assistance or to act as a witness.""*

59. Another factor that must be considered is that there is a duty on the court to ensure that litigation is conducted in a timely manner. This arises not only as part of the State's obligation to ensure that parties are given a decision within a reasonable time pursuant to Art. 6 of the European Convention on Human Rights, but is also an obligation that arises under the Constitution. This was clearly stated by Irvine J. when giving the judgment of the Court of Appeal in *William Connolly & Sons Ltd T/A Red Mills v. Torc Grain and Feed Limited*, where she stated as follows at paras. 25 and 26;

> *"25. Of perhaps even greater significance than the State's commitment to meet the rights of parties to have a hearing within a reasonable time under Article 6 ECHR, is the growing recognition that the court itself, by virtue of its constitutional mandate to administer justice under Article 34.1, has a duty to ensure that litigation is dispatched with efficiency and within a time frame that will ensure that justice will not be put to the hazard, as may happen if cases are left to be decided at a substantial remove from the events in dispute. If the courts were to renege on their constitutional obligations in this regard, given that the rules of court leave it largely to the parities themselves to progress litigation, their ability to administer justice would be truly cast in doubt. As was so aptly observed almost fifty years ago by Diplock L.J. in Allen .v. Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229 at page 255: –*
>
> *"The chances of the courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard"*
>
> *26. Accordingly, it is clear that entirely independent of the views of the parties to litigation, the court itself must, because of its constitutional mandate, by its own conduct ensure that litigation is completed in a timely fashion. Its obligation in this regard is inconsistent with affording any undue tolerance to unnecessary delay in the course of litigation. Further, as can be seen from many recent judgments, recognition of this obligation on the part of the courts has had a significant beneficial impact in bringing to an end the culture of delay that previously bedevilled litigation in this jurisdiction."*

60. It has been noted in many cases that the mere passage of time is likely to have an adverse effect on the ability of witnesses to remember events that took place a long time ago. As stated by Irvine J. in *McNamee v. Boyce*: *"As is so often quoted in judgments concerning delay 'memories fade' and this 'puts justice to the hazard'"*. In *O'Gorman v. Minister for Justice Equality and Law Reform* [2015] IECA 41, Irvine J. returned to this theme and having cited the dictum of Finlay Geoghegan J. in *Manning v. Benson* and Hedges Limited, where she had stated that delays of four to five years as a matter of probability would reduce the potential of such witnesses to give meaningful assistance, or to act as a witness, Irvine J. stated as follows: -

> *"Regardless of the integrity of witnesses, it is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the more fragile and unreliable the evidence becomes. This is of particular concern in cases where there is no documentary or other objective evidence to support a claim where there is conflicting oral testimony. As has been stated so often on applications such as the present one, memories fade and justice is put to the hazard."*

61. The court accepts the submission made by Ms. Reid BL that the authorities establish that when considering delay on the part of a plaintiff, the court is obliged to take into consideration all of the facts and circumstances that are relevant to that particular plaintiff and to that particular case. In *AIBP Ltd v. Montgomory*, Fennelly J. stated as follows at p.518: -

> "*There may, of course, be cases where the unpredictable hazards of life afflict the course of litigation. Individuals may be handicapped by poverty, illness, ignorance or absence from the jurisdiction. Documents may be mislaid, lost or destroyed. Poor or inadequate legal advice or service may, through no fault of the litigant, impede the progress of a claim."*

62. In *Vernon v. AIBP Ltd*, Barrett J., having referred to the dicta of Costello J. in *Guerin v. Guerin* [1992] 2 IR 287 and to the dicta of McKechnie J. in *Comcast International Holdings v. Minister for Public Enterprise*, held that it was incumbent on the court to have particular regard to the circumstances of a plaintiff whose socioeconomic background and personal circumstances and family misfortunes, meant that she was not able to proceed with the litigation as speedily as one might expect.

63. In *Comcast International Holdings v. Minister for Public Enterprise & Ors*., McKechnie J., in a concurring judgment, having referred to the dicta in *Guerin v. Guerin* and the dicta of Fennelly J. in the AIBP case cited above, stated as follows at para. 33: -

> *"In expressing this opinion may I immediately disown any interpretation which suggests that the old days of "endless indulgence" have returned. I hold no such views. It is not what I convey or intend to convey. My point is utterly simple. In the situation under discussion justice is best achieved by letting it react to given facts. The same period of delay, in different cases, may demand different treatment. Justice is not always referenced to the highest bar. If that were the case the wealthy, powerful, and the influential would set it. That should not be allowed. Justice sets its own bar. A failure of the average man and his average lawyer to match the gold standard of their opposite in society and in practice must not be necessarily condemned."*

64. It is against the background of these general principles that the court must determine the issues that arise for consideration on this application.

Conclusions.

65. The court has summarised in some detail the content of the plaintiff's statements to the gardaí. The allegations made therein were of the gravest kind. It is unquestionably the case that a full garda investigation would have been carried out into those allegations. It must be inferred that the gardaí would have interviewed all relevant witnesses, including in particular, the boys identified by the plaintiff in his statements as having been present when some of the sexual assaults were allegedly perpetrated on him.

66. The court also finds that it is likely that the gardaí would have carried out detailed searches of the various locations where the plaintiff alleged that the assaults had taken place. It is likely that they would have searched the school premises, the park and in particular, the care worker's flat, and the other property identified in the statements. The evidence of the gardaí of what they found on these searches would have been highly relevant to the issues that fall to be determined at the trial of the action.

67. In particular, the fact that the plaintiff gave a detailed description of the layout, the furniture and the furnishings in the care worker's flat, would be highly probative, either in favour of the plaintiff, if his description of the flat was accurate; or, if the search had revealed that his description of the flat was completely inaccurate, that would be evidence highly

favourable to the defendant. However, the evidence of the gardaí of what they may have found as a result of any searches carried out by them, is no longer available. In addition, the gardaí may have carried out forensic tests on materials seized during the searches. The results of those tests are not available.

68. The statements which the gardaí took from the other boys at the time, would also be highly probative. If they had contradicted the plaintiff's version, or if they had suggested that the plaintiff had said that he would make false allegations against the care worker for some reason; they would be strongly probative evidence in favour of the defendant.

69. If the other boys had made statements at the time, which were not supportive of the plaintiff's case and if they should be called at the trial of the civil action to support the plaintiff's case, the existence of their earlier statements would be highly relevant for the purposes of cross-examination, as prior inconsistent statements. That possible line of cross examination has been lost to the defendant by the loss of the garda file.

70. From the statement made by the plaintiff's mother, it appears that in April 1990 she gave an amount of unwashed underwear to the gardaí for forensic examination. The results of that examination would have been part of the garda file. That is no longer available to the defendant.

71. When one has regard to the fact that the DPP, even when provided with three very detailed statements made by the plaintiff and his mother, did not direct that there should be a prosecution in the matter; the court can only infer from that, that there was considerable contradictory material unearth by the gardaí in the course of their investigation, which led the DPP to come to the conclusion that the plaintiff's account was not credible. Whatever that material was, it is no longer available to the defendant. Thus, the loss of the garda file is a significant prejudice to the defendant in the conduct of its defence.

72. The plaintiff's solicitor made the point in his replying affidavit sworn on 4th June, 2019, that the defendant's solicitor had only asked the local gardaí for a copy of the investigation file in 2006. He stated that the defendant's solicitor had not made any further inquiries of either the Garda Commissioner, or the DPP, as he had done by letters dated 30th May, 2019. It is noteworthy that the plaintiff's solicitor has not sworn any supplemental affidavit, disclosing what reply he received to his letters. The court can only infer from his silence in that regard, that the garda file remains unavailable.

73. The court is satisfied that the lapse of time, coupled with the loss of the garda file, gives rise to a situation where the defendant cannot get a fair trial at this remove. The court holds that this satisfies the test set down in *O'Domhnaill v. Merrick*, because the court is satisfied that in these circumstances, there is a real risk that a trial held at this remove, and in the absence of the garda investigation file, runs a real risk of arriving at an unjust result.

74. Even if I am wrong in that, I hold that the defendant is also entitled to an order striking out the proceedings under the *Primor* test. It has been conceded that the delay in this case was clearly inordinate. Notwithstanding the very able argument put forward by Ms. Reid BL on behalf of the plaintiff, I cannot hold that the delay that has occurred in this case is excusable due to the plaintiff's mental disability and due to the other circumstances outlined in her argument. One has to remember that the plaintiff was 19 years of age when he first issued his proceedings. He was 24 years of age when his solicitor purported to serve a notice of trial in 2000.

75. If one pauses at that point to consider the effect of the service of a notice of trial; it indicates that the solicitor has obtained an advice of proofs from counsel and has complied with proofs directed therein. This means that he has obtained statements from all relevant witnesses and has obtained reports from expert witnesses. By serving a notice of trial, the plaintiff's solicitor is stating that the plaintiff is ready to proceed to a hearing of his action. The court accepts that when a matter is set down for hearing in Dublin, there is a further step that must be undertaken; namely, that the matter must be actually set down for a hearing date. That is usually done by application to the office, or the registrar dealing with the personal injury list. Nevertheless, the essential point remains, that service of a notice of trial means that the party serving the notice is ready for trial.

76. What happened after that, was that the action remained dormant for nineteen years. The plaintiff's solicitor has said that he had difficulties contacting his client and had concerns about his capacity to furnish instructions. However, the earlier correspondence he exhibited to his affidavit, does not bear this out. The correspondence that he sent to Dr. Calvert in 2006, indicated that while the plaintiff's father had, at some prior point, indicated that he wished to have the file transferred to another solicitor; he had subsequently changed his mind and had furnished instructions to the plaintiff's solicitor to continue with the action. To that end, he was asking the doctor for an up-to-date medical report on his client. That

correspondence did not require the doctor to give any opinion on the capacity of the plaintiff to furnish continuing instructions to his solicitor.

77. Even when the defence solicitor made an offer in 2015 to walk away from the action without costs, if the plaintiff were to withdraw the action; while the plaintiff's solicitor stated in correspondence that he had concerns about the plaintiff's ability to provide instructions, he did nothing in that regard, until after the defendant issued the present notice of motion in 2019; at which time, he obtained a medical report from Dr. Humphries in May 2019.

78. For two reasons, I find that the delay between 2000 to 2019 was not excusable: first, there was nothing more that the plaintiff's solicitor needed from the plaintiff to bring the action on for hearing. The plaintiff had made detailed statements to the gardaí, which would have been used by his counsel as the basis for his examination in chief. The remainder of the proofs, being statements from the plaintiff's parents and from other witnesses as to fact and experts' reports, in the form of an up-to-date medical report from a psychiatrist and perhaps a report from a vocational accessor, if the plaintiff was going to make the case that his earning potential had been adversely affected by the assaults and their psychological affects on him; none of that involved great input for the plaintiff, save for attendance at appointments with his experts.

79. There is no evidence that the plaintiff's solicitor encountered any difficulties in compiling the necessary proofs, save for the inability of Dr. Calvert to supply a medical report in 2006. It often happens that a doctor, for one reason or another, is not in a position to give a report. In those circumstances, a plaintiff's solicitor simply sends him to another doctor, who is qualified in the same area.

80. If the plaintiff's solicitor had concerns about the ability of his client to furnish instructions at any time after the institution of proceedings in 1995, he ought to have arranged for the necessary medical examination and based on that, he ought to have made the necessary application to have someone appointed to look after the plaintiff's interests in the litigation.

81. The plaintiff's solicitor did nothing in that regard between 2000 and receipt of the defendant's notice of motion in 2019. It was only at that time, that he obtained a medical report from Dr. Humphries and made the necessary application to the Deputy Master of the High Court on 22nd November, 2022. In these circumstances, I find that the delay in this case, and in particular, the delay between 2000 and 2019, to be inexcusable.

82. Turning to the third question under the *Primor* test, I am satisfied that the balance of justice favours the action being struck out at this stage. While it is true that the defendant would have been aware of the gist of the allegations against its care worker as a result of the garda investigation that took place in the months following April 1990; and was certainly aware of the detail of the allegations upon receipt of the plaintiff's statements to the gardaí, which were furnished to the defendant with the plaintiff's replies in January 1998; I am satisfied that given the lapse of between 29-32 years between the events complained of, and the service of the notice of motion in 2019, that the defendant will suffer general prejudice in the conduct of its defence.

83. It is well settled that lapse of time, of itself, can cause prejudice due to the adverse effect that that has on the memory of witnesses: see *dicta* in the cases cited above. That a defendant can assert general prejudice, without specific prejudice, sufficient to constitute the moderate prejudice necessary for the purpose of satisfying the third test in the *Primor* case, was clearly stated in the decision of Mahon J. in *Mannion v. Brennan*, quoted above.

84. In considering the issue of prejudice, the court is not restricted to a consideration of the period up to the date of issue of the notice of motion by the defendant, but can look at the lapse of time between the time of the events complained of and the likely trial date. In the present case, the events are alleged to have occurred in the period November 1987 to March 1990. Even if the matter were to be set down immediately, it would not get on for hearing until Q2 of 2023, at the earliest. That would give rise to a lapse of approximately 33 years between the last of the matters complained of and the trial of the action. That period undoubtedly gives rise to general prejudice on the part of a defendant having to defend itself in relation to such historic allegations.

85. The court recognises that some delay in hearing the defendant's motion was due to the onset of the Covid-19 pandemic and the restrictions on court hearings that ensued as a result of that. However, even if one were to calculate the relevant time period to the date of issue of the defendant's notice of motion in February 2019, the court is satisfied that that lapse of time would still give rise to general prejudice.

86. In this case there is also the issue of specific prejudice caused by the loss of the garda file. The impact of that has been outlined earlier in the judgment.

87. One of the matters which must be looked at by the court when considering where the balance of justice lies, is whether the defendant caused or contributed to any post –

commencement delay in the litigation. Having regard to the matters set out earlier in this judgment in the chronology section, the court is satisfied that the defendant has not caused, or contributed to any delay in the conduct of the action to date.

88. Taking all relevant matters into consideration the court holds that the balance of justice is in favour of dismissing the plaintiff's action.

89. In reaching its conclusions herein, the court has had regard to the personal circumstances of the plaintiff. Counsel for the plaintiff laid great emphasis on the fact that he is a vulnerable man and has suffered from that vulnerability since the time of the events giving rise to his action against the defendant, when he was between the age of 11 and 14 years. The court has also taken into account that since the commencement of the litigation, the plaintiff's parents have separated and the plaintiff has gone to reside in another part of the country with his father, who is illiterate.

90. Many plaintiffs, who bring personal injury actions, are vulnerable in one way or another. Every day, solicitors bring actions on behalf of plaintiffs who have been profoundly injured as a result of various types of accidents and other misfortunes. For example, medical negligence actions are brought on behalf of profoundly disabled children, injured as a result of alleged want of care at the time of their birth. Actions are also brought in respect of both minors and adults, who were profoundly injured as a result of road traffic accidents and other types of accidents. The fact that the plaintiff in question may be very seriously injured, does not, of itself, render the litigation more difficult.

91. In the present case, the plaintiff undoubtedly has a cognitive disability; he also had the misfortune that his parents separated at some time after the commencement of the action; and it appears that he misused alcohol for a period, requiring treatment from his local mental health services; however, there is no compelling evidence that any of these misfortunes impeded his solicitor in getting the plaintiff's action ready for hearing. Indeed, the purported service of a notice of trial in the year 2000, indicates that the plaintiff's solicitor was of the opinion that the plaintiff's action was ready for hearing at that time.

92. While the plaintiff has a mild learning disability, and while his father is illiterate, there is no evidence that the plaintiff's mother is similarly disabled. From the content of her statement to the gardai in April 1990, it is clear that she is a rational and intelligent woman, who was able to give a very clear account of matters relevant to her son's claim. It is also noteworthy that when Dr. Humphries was carrying out her assessment of the plaintiff's

capacity to give instructions to his solicitor, which was carried out by means of interview in April 2019, both of the plaintiff's parents attended with the plaintiff for separate interviews. This indicates that they both continued to take an active part in his welfare and took an interest in the conduct of the litigation. It is also noteworthy that the plaintiff's mother consented to act as his next friend in 2019, although the order was made by the Deputy Master in 2022. Thus, while the court accepts that the plaintiff is under a disability, requiring the assistance of a next friend in the conduct of the litigation, the court is not satisfied that his personal circumstances were such as would justify complete inaction in relation to the carriage of the litigation for a period of 19 years between 2000 and 2019.

93. While the court has considerable sympathy for a very vulnerable plaintiff, who has made allegations of the most serious kind; the court is compelled in the interests of justice to accede to the application made on behalf of the defendant. Accordingly, the court holds that the plaintiff’s actions against the defendant must be struck out on grounds of delay and want of prosecution. The court will grant the reliefs sought by the defendant in its notice of motion dated 13th February, 2019.

94. As this judgment is being delivered electronically, the parties will have two weeks within which to file brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

95. The matter will be listed for mention at 10.30 hours on 9th March, 2023 for the making of final orders.