Dismissal for want of prosecution – whether delay inordinate and inexcusable – prejudice to a fair trial – death of a defendant – effect of dismissal on other defendant.

Neutral Citation no. [2003] NIQB 22 | *Ref:* **GIRF3890**

Judgment: approved by the Court for handing down | *Delivered:* **12/03/2003**

(subject to editorial corrections)

1991 No. 4375

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ESTHER POLLOCK

Plaintiff;

-and-

NORTHERN HEALTH AND SOCIAL SERVICES BOARD
AND
MARGARET McAULEY
AND
JOHN McAULEY

Defendants.

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GIRVAN J

[1] This is an appeal brought by the second and third defendants ("the McAuleys") against the decision of Master Wilson given on 14 January 2002 refusing their application to dismiss the plaintiff's claim for want of prosecution.

[2] The plaintiff issued her writ on 10 May 1991 claiming damages for personal injuries, loss and damage sustained by reason of the negligence, assault, battery and trespass to the person by the defendants and each of them in or about the care, supervision and control of the placement of the plaintiff in the care of the McAuleys by the first defendant ("the Board") and, in the alternative, by reason of the negligence of the Board its servants and agents in its failure to warn, advise, counsel or assist the plaintiff. In her statement of claim delivered on 8 October 1996 the plaintiff (who was born on 12 May 1970 and accordingly attained the age of majority on 12 May 1988) alleges that she was placed by the Board in the foster care of the McAuleys from 28 August 1971 until 1 April 1983. During the course of her placement in foster care the plaintiff alleges that she was subjected to physical and sexual abuse and thereby sustained severe personal and psychological injuries. She alleges negligence by the Board in relation to the decision to place her with the McAuleys and then failing to ensure her proper care and treatment during the placement. Against them she also relies upon breach of duty under the Children and Young Persons Act (Northern Ireland) 1968 and the Children and Young Persons (Boarding Out) Regulations (Northern Ireland) 1976. She alleges that the McAuleys breached the duties owed to her by them as foster parents and they subjected her to physical and sexual abuse, in particular scalding her with hot liquids and thereby causing severe scarring. The statement of claim sets out a list of matters evidencing alleged abuse such as being locked up and beaten with a wooden stick and spoon. In the particulars of personal injury she alleges she suffered from scarring, disfigurement, emotional and mental disturbances.

[3] The court has been referred to medical reports furnished by Mr Michael Brennan a plastic and hand surgeon, Dr Harbinson a consultant psychiatrist and Dr P S Curran another psychiatrist. According to the first report furnished by Mr Brennan the plaintiff has extensive scarring and a scar to the left side of the lip. The plaintiff told him that she sustained injuries when she was a child aged about five years but she had no recollection of the injury but said that she had been told that she had been scalded by hot water and she did not know what treatment she had had at the time. In the interviews with Dr Harbinson she described her life with the McAuleys describing episodes of being hit, locked up at night and abused. Dr Harbinson described her as badly physically and mentally scarred. Dr Curran in his report recorded that the plaintiff declared she must have been scalded by hot water as a child. She spoke bitterly of Mrs McAuley if kindly of Mr McAuley. In relation to Mr McAuley she said "Things happened to me when he was out at work. I am sure to this day he must wonder what it was all about because he was innocent. Things went on that he never knew about." In her interview with Dr Harbinson she made an unparticularised allegation of sexual abuse by an adopted child living in the McAuley household.

[4] In her affidavit sworn on 14 January 2003 Karen Houston solicitor in the firm of Nixon and Co the solicitors on record for the plaintiff sets out the steps taken in the conduct of the litigation. Following the issue of the writ on 10 May 1991 very close to the expiry of the limitation period the plaintiff took no further steps apart from a notice of intention to proceed dated 6 December 1993 until the summons for discovery was issued on 4 March 1994, that is to say nearly three years after the issue of the writ. An order for discovery having been made against the Board. The Board furnished discovery on 6 July 1994 but the statement of claim was not served until 26 September 1996 some 27 months later. Defences were delivered promptly and the defendants served notice for particulars in November 1996. Replies were furnished on 21 March 1997 some three months later. The particulars as furnished were of a generalised nature and it is difficult to see why it took that length of time to furnish the particulars. In relation to the allegation of sexual abuse it was not alleged that the McAuleys themselves had sexually abused the plaintiff but rather a child living in the household. The plaintiff was "not yet able to communicate to her legal advisers the manner and true nature of the sexual abuse alleged."

[5] On 1 December 1997 the Board brought proceedings to strike out the plaintiff's claim. This application was not dealt with until 17 December 1999 as a House of Lords ruling on a matter of the law was awaited. The House of Lords gave its ruling in Barnett v Enfield London Borough Council [1999] 3 All ER 193 on 17 June 1999 6. Mrs McAuley died on 27 July 2000 and the plaintiff's solicitors assert that it was necessary to bring an application to have somebody appointed to represent the interests of the estate of Mrs McAuley. The summons and affidavit for the appointment of a representative on behalf of the second defendant's estate was not issued until May 2002 some 20 months after the death of Mrs McAuley.

[6] The guiding principles in relation to applications to strike out proceedings for want of prosecution are to be found in cases such as Birkett v James [1978] AC 297 and Slade v Adco Limited [1996] PIQR 148 and in this jurisdiction in Braithwaite and Sons Limited v Anley Maritime Agency Limited [1990] NI 63 and in Neill v Corbett [1992] NI 251 (decisions of Carswell J as he then was).

[7] In Slade v Adco Limited the Court of Appeal held that in an application by defendant to strike out a personal injury claim for want of prosecution whilst it was necessary to the defendant to do more than merely assert that he had suffered significant prejudice as a result of the plaintiff's delay it was no necessary for him to call evidence of particular circumstances in which the likelihood of serious prejudice the defendant could be inferred. The prejudicial effect of delay on a defendant and the effect of delay and the possibility of a fair trial depended on the nature of the issues in the case. In some cases much of the evidence will be in documentary form and there will

be in existence statements made soon after the relevant events which will enable witnesses to refresh their memories. In other cases including many cases involving road accidents or industrial accidents where claims for damages for personal injuries were made the crucial evidence may be largely oral and in the statements made shortly after the event may be imprecise or incomplete. It followed therefore that each case is likely to depend on its own facts. The onus of proving prejudice and the impossibility of a fair trial rests on the person who asserts it. In some cases the defendant on whom the burden almost invariably lies will be able to show that in the period since the issue of the writ a witness has died, has become too infirm to give evidence or can no longer be traced. The court stated the guiding principles to be that the court should only exercise the power to strike out an action for delay where it is satisfied

(1) that there has been inordinate and inexcusable delay since the issue of the writ;

(2) that the overall delay in pursuing the claim has caused or is likely to cause serious prejudice to the defendant; and

(3) that the post writ culpable delay has caused or is likely to cause additional prejudice which is more than minimal.

[7] In this case the alleged events giving rise to the claim occurred between August 1971 when the plaintiff was one and 1 April 1983 when she was thirteen. These events occurred more than thirteen years before the issue of the writ. The writ was technically issued within the time permitted under the Limitation (Northern Ireland) Order 1989, but close to the end of the limitation period. If the present proceedings were to be struck out it is inconceivable that the plaintiff could bring fresh proceedings so that the factor which weighed against dismissal in Birkett v James (namely that the plaintiff could still issue fresh proceedings in time) is not present in the present case. The claim as presently pursued by the plaintiff is based to a degree on speculation, certainly in relation to the case that Mrs McAuley caused the scarring and in relation to the charge of sexual abuse which is entirely unparticularised in relation to its nature. It would go without saying that if the plaintiff saw fit to furnish particulars of the alleged sexual abuse at this stage Mrs McAuley being dead would not be in a position to deal with the charge. Mrs McAuley against whom the plaintiff appears to direct the main allegations died in 2000. The death of Mrs McAuley as the defendant and as the central witness to the defence case as far as the second or third defendants are concerned provides clear evidence of actual prejudice to the McAuleys in the defence as of the claim (cf Glidewill LJ in Hornaguld v Fairclough Building Limited [1993] PIQR 400 at 414.

[8] I am satisfied that the plaintiff has been guilty of inordinate and inexcusable delay. The writ was issued many years after the alleged abuse, albeit within the limitation period. In Braithwaite and Sons Ltd v Anley Maritime Limited [1990] NI 63 Carswell J, as he then was, stated that time elapsed within the limitation period could not itself constitute inordinate delay (although he was not in that case speaking of a minor's claim where the limitation period can be very protracted) but delay before the expiry of the limitation period was not to be altogether disregarded. A plaintiff who started late must proceed with greater dispatch and delay in proceedings could more readily be regarded as inordinate if it followed earlier delay in commencing proceedings. There was considerable delay in the delivery of the statement of claim. While it was no doubt understandable that the plaintiff wanted to obtain disclosure of documents to assist in the formulation of the statement of claim she did not make application for discovery until nearly three years after the writ was issued and there was further delay in furnishing the statement of claim following the obtaining of discovery. In the result the statement of claim was not delivered until some five years after the writ. Those delays were inordinate and no excuse has been proffered to justify them. Following the decision of the House of Lords on the legal point there was further and justified delay in progressing the action and the plaintiff did not take steps to apply for the appointment of a party to represent the estate of Mrs McAuley until May 2002. Looking at the progress of proceedings as a whole in the context of the nature of the case and the nature of the allegations and bearing in mind that Mrs McAuley has since died I consider that

(a) there has been inordinate and inexcusable delay since the issue of the writ;
(b) the overall delay in pursuing a claim has caused serious prejudice to the second and third defendants; and

(c) the post writ culpable delay has caused or is likely to cause additional prejudice which is more than minimal.

[9] One point which concerned me in relation to the application upon which I received argument related to the fact that the present application was brought by the McAuleys but not by the Board which may or may not bring a later application to dismiss for want of prosecution. If the proceedings against the Board continue the Board may seek to join the second and third defendants as third parties in the present action relying on rights conferred by the Civil Liabilities (Contribution) Act 1979. If it can do so the second and third defendants would be back in the proceedings. The question arises as to whether that should effect the court in the exercise of its discretion in relation to the application to strike out. It is clear from the authorities discussed by Hutton J (as he then was) in DHSS v Derry Construction Limited [1980] NI 187 at 203 and by Gibson LJ in McMullan v Wallace [1977] NI that the court

may strike out proceedings against some only of a number of defendants. If a defendant has justifiable grounds for making such an application then the court should exercise its power to strike out those proceedings leaving intact the proceedings affecting the remaining defendants. The court cannot at this stage predict the outcome of any application by the Board to strike out the proceedings effecting it nor can it accurately predict whether the Board as remaining defendant could rejoin the second and third defendants as third parties. Whether it can and what consequences would flow from the joinder are matters that will have to be considered if the question should arise. On the material presently before the court the court is satisfied that the proceedings against the second and third defendants should be dismissed for want of prosecution. Accordingly the appeal will be allowed and I will hear counsel on the question of costs.