THE HIGH COURT

[2024] IEHC 69

RECORD NO. 2013/858P

BETWEEN:

NIAMH MCDONALD

PLAINTIFF

-AND-

TOMMY CONROY

FIRST NAMED DEFENDANT

AND

GOREY COMMUNITY SCHOOL

SECOND NAMED DEFENDANT

AND

DENIS BRENNAN

THIRD NAMED DEFENDANT

Judgment delivered by Mr. Justice Cian Ferriter on 12th February 2024

Introduction

1. This is the plaintiff's application to amend her plenary summons and statement of claim pursuant to Order 28 rule 1 Rules of the Superior Courts. The application is made in somewhat unusual circumstances: the proceedings have already been the subject of a 34 day trial in the High Court which resulted in a judgment granting substantial damages to the plaintiff. The High Court judgment was overturned by the Court of Appeal who ordered a re-trial. This amendment application is brought in advance of that re-trial. The application is less straightforward than it might otherwise have been given the history of the proceedings and the relative novelty of a number of the issues arising in the case which, at its core, involves an allegation of a sexual relationship between the plaintiff,

when she was 17, and the first defendant teacher and school chaplain, while the plaintiff was still in school.

Background

2. The proceedings involve a claim for damages by the plaintiff, who is now 35 years old, arising from an alleged sexual relationship she had, while still a schoolgirl in the second defendant's school, with the first defendant, a teacher, school chaplain and then-Catholic priest in that school. While certain alleged events relevant to her claims occurred on a school trip abroad in February/March 2005 when she was still 16, she alleges that a sexual relationship between herself and the first defendant commenced when she was 17 (her 17th birthday occurred on 22 April 2005) and continued until after she was 18 (but still in school). In light of the Court of Appeal's judgment, the relevant allegations are now confined to the period before she became 18 (i.e. pre-22 April 2006), the claims relating to events after her 18th birthday being statute-barred.

3. In her statement of claim as originally pleaded, the plaintiff alleged physical and sexual assault, false imprisonment and sex abuse as against the first defendant. She alleged negligence and breach of duty as against all defendants, and claimed that the second and third defendants were vicariously liable for the first defendant's wrongs. The defendants put in full defences and each relied on the Statute of Limitations as a defence to the plaintiff's claims. The third defendant was sued in a representative capacity as an agreed nominee of the Catholic Church. The claims against the third defendant were dismissed by the High Court and that dismissal was not appealed to the Court of Appeal. Accordingly, the remaining claims which will be the subject of the re-trial are only made against the first and second defendants. It is important to record that the first defendant vigorously denies that there was any sexual relationship with the plaintiff at all as alleged by her.

4. The plaintiff now seeks to amend her statement of claim to include a formal plea in answer to the Statute defences to the effect that she had a disability within the meaning of s.48A Statute of Limitations 1957 as amended which prevented her from issuing court proceedings within the limitation period ("the s.48A issue"); to plead that any consent to the alleged sexual relationship was vitiated by her age and the nature of the student-

teacher relationship in question ("the consent issue") and to allege an additional civil wrong, being the tort of grooming ("the grooming issue"). All of these matters arose in some shape or form in the original High Court trial and all of them were the subject of discussion in the Court of Appeal's judgment (which was given by Collins J. on 6 August 2020) ("the Court of Appeal judgment").

5. The plaintiff in her grounding affidavit (and, indeed, at the opening of the application before me) presented her application for amendment of the pleadings as a form of tidy up application necessarily following from the terms of the Court of Appeal judgment and on the basis that all of the matters addressed by the proposed amendments had been the subject of evidence and submissions in the original trial, and the subject of submissions in the Court of Appeal, such that the proposed amendments are necessary for determination of the real issues in controversy between the parties and could not in truth cause the defendants any real prejudice.

6. The defendants oppose the application on the basis that it is brought too late in the day; that the amendments are vague and not properly particularized and that the plaintiff's conduct (particularly as regards the attempt to introduce an entirely new head of claim in relation to the tort of grooming despite not having sought to amend her pleadings when she raised this issue at the original trial) are such as to disentitle her to the amendment relief. The defendants also claim that they will be prejudiced by the amendments at this very lengthy remove given that the events the subject matter of the proceedings occurred in 2005 and up to the plaintiff's 18th birthday in April 2006.

The claims in the proceedings as issued

7. In order to put the issues arising on this amendment application in context, it is necessary to summarise the salient aspects of the original pleadings in the case.

8. The plaintiff issued these proceedings by plenary summons dated 29 January 2013 and delivered a statement of claim on 14 February 2013. In her statement of claim, the plaintiff pleaded that "*between 2004 and 2007, the plaintiff was repeatedly and wrongfully physically and sexually assaulted, falsely imprisoned and sexually abused and subjected to sexualised behaviour by the first named defendant*" (para 5). She further claimed that

she sustained severe emotional suffering "*caused by the intentional and/ or negligent acts and omissions of the defendants, their servants or agents*" (para 6). She alleged that these wrongs were caused by the negligence, breach of duty including breach of statutory duty and fiduciary duty on the part of the second and third defendants (para 7). She pleaded severe personal injuries, loss and damage as a result of these matters. She then provided particulars of "assault, false imprisonment, sexual abuse, sexualized behavior and emotional suffering" and set out over ten paragraphs particulars of matters alleged to support these claims.

9. Those particulars (provided from paragraphs 10 to 20 of the statement of claim) commenced with a plea, at paragraph 10, that the first defendant "*was highly regarded and popular with students, he was central to many school activities and he was perceived by the students to have influence and executive power in relation to school trips and mentors. He was popular in the school and he also provided counselling to pupils and teachers*". There followed nine further paragraphs in the statement of claim which detailed alleged events relating to interaction between the plaintiff and the first defendant commencing with an allegation that the first defendant invited the plaintiff and another student to sleep in his bed with him during a transition year school trip to The Gambia (it appears that this trip took place over 10 days from end February to early March 2005, when the plaintiff was still 16). Further matters pleaded included allegations that after that trip the first defendant started to send the plaintiff private text messages which became increasingly personal and sexual in nature. It is alleged that the plaintiff was told by the first defendant that he wanted to develop the relationship and bought a mobile phone for this purpose; that he organised a social night at his home following the Gambia trip and that she found herself alone with him at one point in the evening and felt uncomfortable by the attention he gave her; and that he advised her that they would wait until she was 17 before taking the relationship further.

10. The plaintiff reached her 17th birthday on 22 April 2005. The plaintiff in the subsequent paragraphs of this section of her statement of claim alleges that the relationship after her 17th birthday developed into a sexual one which she was unable to discuss with anyone and which led to her feeling increasingly distressed. She alleges that she felt pressurised by the first defendant to have sexual intercourse with him and felt unable to extricate herself from her situation with him. She alleged that by the time she was in 6th year she

was having sexual contact with the first defendant approximately once a week and that the relationship was ended by the first defendant in February of her 6th year at school i.e. February 2007 when she was 18 and not long before her 19th birthday.

11. The plaintiff pleaded particulars of injuries caused by the alleged wrongs including recurrent depression and anxiety and delayed post-traumatic stress disorder. She pleaded that, at the time of the statement of claim (being February 2013) she continued to suffer from depressive disorder and ongoing post traumatic stress disorder.

12. A case in vicarious liability was made against the second and third defendants. Particulars of negligence and breach of duty and intentional infliction of emotional suffering were separately pleaded as against the second defendant ("the school") with separate particulars of such claims also set out as against the third defendant.

The original defences

13. Each of the three defendants put in full defences and each of them pleaded that the plaintiff's claim was statute barred having regard to the provisions of the Statute of Limitations (the proceedings being issued almost 7 years after the plaintiff became 18).

14. The first defendant in his defence pointed out that, in her replies to particulars, the plaintiff alleged that the wrongs against the first defendant began in 2005 and not 2004 as pleaded in her statement of claim. The first defendant counterclaimed for damages for infliction of emotional harm and for misuse of the court process and malicious falsehood on the basis that the plaintiff's allegations were false and maliciously made.

15. The second defendant pleaded a series of preliminary objections including the Statute, and that the matters alleged in the statement of claim did not give rise to any cause of action stateable in law against the second defendant. The second defendant also denied vicarious liability for the alleged actions of the first defendant. The second defendant pleaded inordinate and inexcusable delay in prosecuting the proceedings. The second defendant adopted the position that it was a stranger to the allegations of alleged unlawful conduct as between the plaintiff and the first defendant.

16. Despite the inclusion of positive pleas in the defendants' defences, in particular the pleas relating to the Statute, the plaintiff did not file any reply to the defences.

The High Court trial and judgment

17. A trial of the proceedings took place in the High Court over some 34 days between the end November 2016 and February 2017 which culminated in the trial judge finding in the plaintiff's favour in a judgment of 9 October 2017. The trial judge held that on the balance of probability the first defendant wrongfully physically and sexually assaulted, falsely imprisoned and sexually abused the plaintiff. He also found that the tort of grooming had been established in line with the judgment of White J in *Walsh v Byrne* [2015] IEHC 414 ("*Walsh v Byrne*"). He held that the school was negligent in failing to prevent the injuries to the plaintiff and as such was vicariously liable for the tortious acts committed by the first defendant. He held that the third defendant was not vicariously liable for the acts committed by the first defendant against the plaintiff. He awarded the plaintiff €200,000 damages along with €10,000 aggravated damages as against the first and second defendants.

18. It is clear from the terms of the High Court judgment and Court of Appeal judgment that the plaintiff and first defendant each gave evidence at the trial and were extensively cross examined. The school principal of the second defendant also gave evidence, as did another teacher in the school. A Dr Cryan, psychiatrist, gave evidence on behalf of the plaintiff. It does not appear that the plaintiff called any of her treating clinicians to give evidence at the trial. Another expert psychiatrist, Dr O'Connell, was called on behalf of the defendants.

19. A number of features of the trial are relevant to note at this juncture in the context of the amendment application now before me.

20. Firstly, it appears that the plaintiff through her counsel at the opening of the case introduced for the first time into the proceedings an allegation of "grooming" of the plaintiff by the first defendant. It appears that this was the subject of protest on behalf of the defendants. It further appears that a suggestion that the plaintiff might apply to amend her pleadings was rejected by counsel for the plaintiff who made clear that they were

standing over the pleadings as drafted. The reference to grooming it appears may have resulted from the decision of White J in *Walsh v Byrne* which was given in 2015 after these proceedings commenced but before the trial. In that case, White J held that there was an independent tort of grooming and sought to set out the parameters of that new tort. Counsel for the plaintiff on this amendment application confirmed that grooming was not advanced as an independent tort or cause of action at the trial. Notwithstanding this, the allegation of grooming was the subject of closing submissions and addressed by the trial judge in his judgment where, as already noted, he held that the first defendant had committed grooming. The Court of Appeal overturned this finding. I will come later to how the issue of grooming was addressed in the Court of Appeal judgment.

21. Secondly, the plaintiff sought to rely on the provisions of s.48A Statute of Limitations 1957 (as inserted by the Statute of Limitations (Amendment Act) 2000) ("s.48A") to argue that the defendants' Statute defences were defeated by the fact that she was under a disability within the meaning of that provision such as to prevent her from bringing her claims before she did. The plaintiff had not pleaded s.48A by way of reply to the defendants' defences. The third defendant had in fact brought a motion seeking the trial of a preliminary issue on the Statute question which was adjourned to the trial itself. The question of whether the plaintiff was under a disability within the meaning of s.48A was the subject of expert medical evidence at the trial both on behalf of the plaintiff and on behalf of the school, albeit that the plaintiff's expert had not prepared a pre-trial report addressing proposed medical evidence on that issue. That expert was nonetheless allowed by the trial judge to give expert evidence on that question and was cross examined on that evidence. The parties then addressed the Statute issues including the s.48A issue in their closing written and oral submissions and the matter was addressed in the High Court's judgment.

22. Thirdly, while not pleaded in the defendants' defences "in any immediately recognisable fashion", to use the language of Collins J in the Court of Appeal judgment (at para 102), the first and second defendants in their closing submission before the trial judge ran the argument that, as the plaintiff accepted in her evidence that the sexual interactions between herself and the first defendant, as alleged by her, were consensual and occurred after the age of consent for criminal purposes (or at least some criminal purposes) of 17, her claims of civil wrongs could not succeed. The plaintiff's counsel maintains that this

line of defence came as a complete surprise to them. It appears from the contents of the Court of Appeal judgment, which I will discuss in more detail shortly, that counsel for the plaintiff addressed this line of defence in closing submissions by contending that there could be no meaningful consent or valid consent in law by virtue of the inherent power imbalance of a teacher/chaplain-pupil relationship in a secondary school context and pointed to a suite of uncontroverted evidence given by witnesses (including witnesses on the defence side, such as the school principal and the psychiatrist called on behalf of the school), that a sexual relationship of that type would be totally inappropriate and involve a clear breach of duty and abuse of trust.

Appeal of High Court judgment to Court of Appeal

23. The first and second defendants appealed the High Court judgment to the Court of Appeal. They sought not just the overturning of the High Court judgment but also a dismissal of the plaintiff's claims by the Court of Appeal, with no remittal to the High Court, on the basis, *inter alia*, that the fact of the plaintiff's consent to the alleged sexual relationship meant that she could not succeed on the causes of action advanced by her.

24. The defendants were successful on their appeal grounds to the effect that the trial judge had erred significantly in respect of many material aspects of his judgment. One of the issues they succeeded on was the question of the application of the Statute to those parts of the plaintiff's claim which related to events alleged to have happened after her 18th birthday.

25. The Court of Appeal did not, however, accede to the defendants' application to have the plaintiff's claims dismissed without the need for a re-trial. The Court of Appeal concluded that it was appropriate to remit the matter for re-trial to the High Court. The Court of Appeal in particular rejected the contention that the plaintiff's ostensible consent to the acts involved in the alleged sexual relationship between the age of 17 and 18 meant that she could not succeed in her claims. The Court of Appeal judgment engaged in a detailed consideration of the question of consent, which I will come to below.

26. In remitting the matter for re-trial, Collins J at para 231 of his judgment noted that "*any issues that require to be addressed prior to hearing such as the pleading issues touched*

on in this judgment... should be addressed by the parties without delay. There may be merit in seeking case management of the proceedings that but that would be a matter for the parties."

27. There was a further Court of Appeal hearing on the question of costs arising from that court's substantive judgment on the appeal. The Court of Appeal then delivered a separate judgment on the costs question on 13 November 2020.

28. I will address aspects of the substantive judgment of Collins J in the Court of Appeal when addressing the proposed amendments below.

Delay in bringing this amendment application

29. Notwithstanding the clear urging of Collins J that any matters that required to be addressed, such as the pleading issues, should be addressed without delay, the plaintiff did not issue this application to amend her proceedings until March 2022, some 20 months after the Court of Appeal's substantive judgment and some 17 months after that court's costs judgment.

30. Remarkably, no attempt was made in the grounding affidavit - or, indeed, in any affidavit in response to the defendants' replying affidavits on the motion - to explain this delay. Counsel for the plaintiff on his feet during the opening of the application before me sought to explain the delay as arising from time required to resolve the issue of costs as between the plaintiff and the third defendant (the third defendant having obtained a costs order in his favour against the plaintiff following the dismissal of the claims against him); by the fact that the plaintiff was pregnant for some of the period and by asserting that time was required to decide upon the amendments. Quite apart from the fact that these matters were not put on affidavit, they clearly do not amount to a valid excuse for the length of delay involved here. I will return to the question of delay as a factor in exercise of the court's amendment discretion below.

The matters sought to be addressed in the amendment application as issued

31. As noted earlier, the principal amendments sought in the amendment application as issued related to the s.48A issue, the consent issue and the grooming issue. There were also some tidy-up amendments sought resulting from the fact that no claims can be maintained against a third defendant in the re-trial, and from the fact that the false imprisonment claim is no longer being maintained for the re-trial.

32. The proposed amended statement of claim the subject of the application was, to put it mildly, surprisingly devoid of the degree of clarity and particularisation one would have expected in such an amendment application particularly given the history of a lengthy High Court trial and a detailed and considered Court of Appeal judgment and guidance from that court as to the appropriate framing of the issues between the parties.

33. The allegation of "grooming" was sought to be introduced by simply adding that word to the existing heading in the statement of claim of particulars of assault, sexual abuse, sexual behaviour and emotional suffering. Likewise with the addition of a complaint of "sexual exploitation". No particulars of the parameters of those claims were sought to be added to the subsequent 10 paragraphs which set out the plaintiff's original particulars of the circumstances grounding her claim in assault and sexual abuse. The consent issue was the subject of one proposed amended paragraph, as was the s.48A issue.

34. This lack of particularisation was a source of perfectly understandable complaint in defendants' replying affidavits and in their written submissions and indeed at an earlier partial hearing of this application (before Summer 2022) which ended up being adjourned for reasons which are not relevant to this judgment.

Developments on Day 1 of hearing of application

35. In questioning of the plaintiff's counsel during his opening of the amendment application, the court sought to establish precisely what it was that the plaintiff now sought to maintain by way of amendment to her pleadings, focusing on the grooming issue in particular. In exchanges with the court, counsel for the plaintiff confirmed that the plaintiff was relying on the existing particulars in the original statement of claim to ground the proposed claim

in grooming and that accordingly no new factual allegations were sought to be introduced. It was also clarified that proposed addition of a claim of "sexual exploitation" was effectively folded into the claim of grooming.

36. Having heard submissions from counsel for the defendants, who legitimately made complaint as to not being in a position to understand the case sought to be made on the question of grooming in particular, the court directed the plaintiff's counsel to deliver a properly particularised proposed amended statement of claim addressing the precise amended case the plaintiff sought to make as regards grooming, in addition to setting out proper particulars of the proposed s.48A plea and the proposed pleading relating to the consent issue. That document was delivered as directed on the evening of the first day of the hearing of the motion (which had been set down for hearing for two days). With impressive and commendable alacrity, each defendant filed brief and helpful supplemental written submissions overnight arising from further proposed amended statement of claim and the hearing resumed the following day with submissions being focused on the further proposed amended statement of claim.

The further proposed amended statement of claim

37. The further proposed amended statement of claim as delivered on the face it went further than had been anticipated in the exchanges between court and counsel on the first day of the hearing of the application. It sought to plead an independent tort of grooming with some 45 particulars of same. It also sought to plead grooming in the alternative as a factor aggravating the damage resulting from the other torts pleaded against the first defendant. It also sought to plead as a new independent claim the tort of sexual exploitation with over 20 matters pleaded in support of that new claim.

38. The further proposed amended statement of claim also contained some more elaborate pleading on the question of consent and provided some further pleading on the s.48A issue.

39. For the avoidance of doubt, I am addressing in this judgment the proposed amendments which are the subject of the further proposed amended statement of claim.

Legal principles governing applications to amend pleadings

40. Before addressing the arguments presented for and against the amendments contained in the further proposed amended statement of claim, it is appropriate to make some reference to the legal principles governing applications to amend pleadings. These principles were not in dispute although their application to the circumstances of the plaintiff's amendment application were hotly disputed.

41. The applicable legal principles are well settled and are authoritatively summarised by Collins J in his recent judgment in *Stafford v Rice* [2022] IECA 47 ("*Stafford v Rice*"). Counsel for the school also placed heavy emphasis on the judgment of the Court of Appeal in *Quinn v Irish Bank Resolution Corporation* [2016] IECA 21 ("*Quinn v IBRC*").

42. In summary, the relevant principles are as follows. (This summary is drawn from para 23 of the judgment of Collins J. in *Stafford v Rice* unless otherwise indicated). The power of amendment is a broad one. Order 28 rule 1 is intended to be a liberal rule. An amendment should be allowed where it can be made without prejudice to the other party or where any prejudice can be addressed by the imposition of appropriate terms such as terms as to costs. Any prejudice being relied upon by a party seeking to resist an amendment must be prejudice resulting from the fact of the belated alteration in the pleadings rather than the presence if allowed of the amendment itself. Prejudice can be substantive (such as the death of a material witness or loss of potentially relevant evidence) or logistical (such as significantly disrupting the management and determination of the proceedings).

43. The addition of a new claim by way of amendment could cause serious prejudice to a defendant if that defendant would have a basis for a limitation defence to the new claim if the new claim was advanced by way of separate proceedings issued at the date of the amendment application. Accordingly, as a general rule an amendment setting up a new claim will not be permitted where that claim would or might be statute-barred if made in proceedings issued at the time of the amendment. However, that rule is not an absolute one and should not be applied overly rigidly.

44. Accordingly an amendment to existing pleadings to add a new cause of action arising out of "the same facts or substantially the same facts as have already been pleaded" may be

permitted (*Krops v Irish Forestry Board* [1995] 2 IR 113) ("*Krops"*). Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts. As Collins J notes in *Stafford v Rice* (at para 23(11)) such circumstances permitting a new claim to be made by way of amendment causes no material prejudice to the defendant because they are already on notice of a claim arising from the same facts which they will have had an opportunity to investigate. The court is not generally concerned with the merits of any proposed amendment or its prospects of success at trial once the proposed amended claim is not clearly doomed to fail. The applicant's conduct in the proceedings including any question of delay in bringing the amendment application are factors which the court can take into account in exercise of its discretion to amend (see *Moorehouse v Governor of Wheatfield Prison* [2015] IESC 21 and *Quinn v IBRC* at para 52).

45. While I have already summarised in broad terms the bases of opposition of the defendants to the application, I think it is more helpful to address the defendants' objections to the proposed amendments by each category of amendment given that different issues potentially arise in respect of each category of amendment.

Analysis of proposed amendments

46. I propose to deal with the proposed amendments in the following sequence:

(i) S.48A issue
(ii) consent issue
(iii) claims in grooming
(iv) other amendments

Section 48A issue

47. The application as issued sought permission to add the following paragraph to the statement of claim to address the s.48A issue:

"21. The Plaintiff relies on Section 48A of the Statute of Limitations Act 1957 (as amended by the Statute of Limitations (Amendment) Act 2000) and pleads that she was

under a disability and/or substantial impairment within the meaning of the act for the purpose of the applicable limitation period in respect of the within proceedings".

48. The further proposed amended statement of claim added the following proposed paragraph by way of elaboration of that plea:

"22. The Plaintiff was under a disability/substantial impairment within the meaning of the act by reason of the diagnosed psychiatric injuries which include recurrent depression, anxiety, suicidal ideation, low mood, anhedonia, fatigue, poor motivation, low self esteem, feelings of guilt, fear of not being believed and post traumatic stress disorder/ complex post traumatic stress disorder."

49. The defendants complained that the section 48A issue should have been the subject of pleading many years ago; that there has been no explanation for the delay in bringing the application and that the proposed amendment is inadequately particularised in particular in failing to specify the relevant disability and the periods of duration of that disability.

50. In my view, it is appropriate to permit the plaintiff to amend her statement of claim to include the proposed amendments relating to the s.48A answer to the defendant's Statute pleas. While this pleading should really have been the subject of a reply ten years ago, I do not see that the defendants are materially prejudiced in circumstances where this issue was the subject of evidence including expert evidence and full written and oral submissions at the original trial and where the proposed pleading the subject of the amendment application does not go beyond what was argued at trial and considered by the Court of Appeal. The defendants have been sufficiently on notice since the original trial some seven years ago of the basis of the plaintiff's s.48A case, including the factual position and expert evidence sought to be relied upon in support of that case. The defendants have the benefit of the transcript of the trial and know precisely how that issue was approached at trial.

51. Notwithstanding the regrettable delay in bringing the amendment application relating to this issue, in my view, given that there is going to be a re-trial, the amendment is required to allow determination of the real questions in controversy between the parties. In exercise of my discretion on this issue, I have particular regard to the fact that an inability on the

part of the plaintiff to make a case in answer to the defendant's Statute defences could lead to the fatal prejudice of the plaintiff not being able to make her case at all at the re-trial, notwithstanding that there was expert evidence before the court as to various psychological injuries which the plaintiff had been suffering from such that she had established an arguable basis in evidence for her s.48A claim. I also have regard to the fact that the defendants have not pointed on affidavit to any particular prejudice which they would stand to suffer in the event that this amendment is permitted.

52. Counsel for the school submitted that if I were to make the amendment sought it should be subject to an undertaking on the part of the plaintiff to provide particulars as to the dates of and duration of the alleged disability. I am persuaded by the plaintiff's submission that the terms of s.48A itself and the judgments of the High Court (Ryan J. as he then was) and Supreme Court (Murray J. as he then was) in *Doherty v Quilligan* [2011] IEHC 361 and [2015] IESC 54 make clear that psychological as opposed to psychiatric injury may be sufficient to meet the disability test under the provision and that it is not necessary that the plaintiff's capacity to bring the action has been substantially impaired at the same level throughout the entirety of the relevant period in order to come within the terms of the provision. The plaintiff has pleaded from the outset that she suffered significant psychological injuries including depression and PTSD. The defendants are aware of the plaintiff's case in that regard and were in a position to deal with it at the original trial, including by calling evidence from Dr. O'Connell, psychiatrist. It will be a matter for the plaintiff to address in evidence (including expert evidence) at the re-trial how her psychological/psychiatric injuries were such as to constitute a disability within the meaning of s.48A preventing her from bringing her action within the limitation period. I am satisfied that the matter is sufficiently pleaded at this point to enable the defendants to meet her case on that issue at the re-trial.

53. The plaintiff has sought a (potentially) related amendment to her statement of claim, which I will also permit, to include "complex PTSD", as a particular of injury based on the evidence given by the expert psychiatrist, Dr Cryan, retained on the plaintiff's behalf at the original High Court trial. The first defendant complains that this amendment should not be permitted as it involves an attempt by the plaintiff to tailor her case to reflect the evidence given by Dr Cryan on her behalf at the trial which, it is said, was not supported by calling evidence from any of the plaintiff's treating clinicians and that "complex

PTSD" is in any event not a recognised disorder in DSM V. The first defendant also raised an issue in relation to the propriety of the plaintiff relying on an allegedly inadequately briefed medical expert who was not a treating clinician. In my view, those complaints go to the ultimate weight of that evidence and the merits of the s.48A defence which in fairness was accepted by counsel for the first defendant as disclosing an arguable defence (as indeed would appear to have been the position adopted by Collins J in the Court of Appeal judgment). They are not complaints which disentitle the plaintiff to the amendment sought on this issue.

54. I will accordingly permit the plaintiff to amend her statement of claim to include the two paragraphs set out above at paragraph 47 above, and the amendment to add "complex PTSD" as a further particular of injury in order to address the section 48A issue and to ensure that the real questions in controversy relating to the defendants' Statute defences are determined at the re-trial.

Consent issue

55. The first defendant's position at trial was - and firmly remains - that there was no sexual relationship between himself and the plaintiff. The Court of Appeal judgment noted that the plaintiff was not cross-examined by either the first defendant or the school on the basis that if as she claimed there was a sexual relationship between her and the first defendant, no civil wrong was committed as on her own case the sexual interaction occurred after her 17th birthday. However, at the close of the trial, the defendants in their written and oral submissions sought to contend that the plaintiff's action must fail as, on her own case, she was over the age of consent (17) at the time of the alleged sexual interaction such that by analogy with the position which obtained under the criminal law, no wrong could have been committed against her. The plaintiff's counsel sought to counter that argument by submitting that the fact that she was 17 could not detract from the fact that a sexual relationship between teacher and pupil was inherently an abuse of power and exploitative such that any apparent consent could not amount to consent in law.

56. The trial judge held that the first defendant had wrongfully physically and sexually assaulted and sexually abused the plaintiff but, in error, he arrived at that conclusion without engaging with the consent defence.

57. The consent issue was the subject of considerable argument before the Court of Appeal with the first defendant and school maintaining that not only had the trial judge erred in failing to engage with that issue but the Court of Appeal should dismiss the plaintiff's case outright and not remit the proceedings for re-trial. They maintained this position on the basis that on the plaintiff's own case the fact of her consent to the sexual relationship meant that her claims were bound to fail. The Court of Appeal accepted that the trial judge erred in failing to engage with the consent issue but did not accept the defendants' dismissal argument and held instead that the case should be remitted to the High Court for retrial.

58. In light of the arguments made before me on the proposed amendments to the statement of claim said by the plaintiff to be necessary to determine the real questions in controversy on this issue, it is necessary to consider in a little detail what was said by Collins J on the consent issue and the basis upon which he reasoned that a re-trial was necessary on this issue.

59. At para 112 of the Court of Appeal judgment, Collins J summarised the position as follows:

> *"It is clear, therefore, that at the conclusion of the High Court hearing, the issue of consent was a very significant one for the High Court Judge. Both Fr Conroy and the School were contending that, even if the High Court found as a matter of fact that the sexual acts complained of by Ms McDonald had in fact taken place, that did not give rise to any cause of action against them because Ms McDonald had the capacity to consent to those acts and had in fact consented to them. Ms McDonald, on the other hand, contended that she had been exploited by Fr Conroy and submitted that, despite the fact that she was 17 when their relationship became sexual, the nature of the relationship between teacher and pupil meant that she had lacked the capacity to consent in the circumstances."*

60. Collins J then found that the trial judge erred in not addressing the issue of consent in reaching the conclusion that the first defendant " *wrongfully, physically and sexually assaulted…and sexually abused* " the plaintiff (paras 114 to 117).

61. Collins J this went on to consider the contention of the defendants that, if the sexual acts alleged by the plaintiff had in fact occurred, those acts were clearly consensual and that the Court of Appeal should therefore take the view that the plaintiff's action must fail and that remittal to the High Court for a re-trial would serve no useful purpose (para 119).

62. Collins J observed (at para 123) that "*none of the parties identified any authority bearing directly on the issue of what, for the purposes of the civil law, is the age of consent to sexual activity such as that alleged to have occurred here*".

63. In the course of his analysis of the parties' arguments on the consent issue, Collins J. noted (at para 138) there was a significant amount of evidence given in the High Court – none of which appears to have been disputed in any way – to the effect that a sexual relationship between teacher and student such as that alleged by the plaintiff would be "*inappropriate, exploitative and likely to be seriously harmful to the student*", noting that evidence to that effect was given by the first defendant himself and by the school principal and another teacher in the school. Both psychiatrists who gave evidence at trial also agreed that such a sexual relationship would be an abuse of power and exploitative (para 142). At para 140, Collins J stated that the fact that secondary school rules (including the second defendant's rules) prohibit such relationships reflects "*an appreciation of the risk that such relationships may be exploitative precisely because of the imbalance of power between teacher and pupil*."

64. At para 143, Collins J then stated:

> "*Considered against the backdrop of this evidence, the argument made by Fr Conroy, but also by the School, that any sexual relationship between Fr Conroy and Ms McDonald was consensual and that its consensual character absolutely excludes any claim for civil redress by Ms McDonald seems rather surprising. If there was such a sexual relationship, it involved a gross breach of trust by Fr Conroy, as teacher and as Chaplain. It is, perhaps, particularly surprising that the School should be of the view*

that sexual relations between teacher and student ought to be entirely beyond the reach of the civil law provided that the student is 17 and consents, in circumstances where its own principal expressly recognises the harm such relations can cause to the student and where such conduct was prohibited by the School (and, it seems, by schools generally). If that is indeed the position as a matter of the law of tort in this jurisdiction, it might be thought to give rise to a significant question whether, having regard to the imperative requirements of Article 40.3 of the Constitution, that law is adequate to protect the personal rights of children."

65. Collins J then noted that whether the parameters of the tort of assault are capable of adaption and development so to address the particular issues that appear to arise when persons in authority have sexual relations with children over whom they exercise authority – in other words whether the civil law might be developed in a manner parallel to (if not identical to) developments on the criminal law side – "*raises difficult and complex issues which do not appear to have ever been considered in this jurisdiction.*"

66. He went on to consider *inter alia* some decisions from other jurisdictions which had grappled with the type of issues arising in such circumstances including a Canadian Supreme Court case, *KM v HM* (1992) 96 DLR (4th) 289, where that court held that the sexual assault by a father of his child constituted both an actionable battery and a breach of fiduciary duty.

67. Collins J noted (at para 152) that "*no claim for breach of fiduciary duty is made here and it may well be too late for such a claim to be made at this stage, though the fact (if fact it be) that the limitation period has expired does not necessarily preclude an amendment*" referencing *Krops*. He added that "*in any event, a finding that a claim for breach of fiduciary duty lies in the circumstances here would require a significant development of the law, in circumstances where, historically, its focus has been on the protection of economic and/or property interests*."

68. Collins J then noted that the plaintiff's counsel had contended that the plaintiff's claim embraced a claim in "negligence/breach of duty" albeit that this was disputed by the defendants. He observed that "*it is not at all obvious to me why, in principle, a claim in negligence/breach of duty could not lie in the circumstances here, particularly if it be the*

case that (as both Appellants submit) no claim in assault lies because Ms McDonald consented to the sexual activity with Fr Conroy. Whether such a claim would or should succeed is, of course, another matter entirely."

69. Collins J. concluded as follows on the question of whether the plaintiff's claims should be dismissed due to alleged consent or remitted (at para 155):

> "*In these circumstances, it appears to me that this Court could not properly conclude – as the Appellants have invited it to conclude – that, in effect, Ms McDonald's claim for assault cannot succeed. No clear factual findings on the issue of consent are before this Court and it is not for this Court to make findings of fact as if it were the court of trial. Equally, in my view, the legal position is not so clear as to properly permit this Court to conclude that Ms McDonald's claim must necessarily fail, as the Appellants submit. It seems to me, to the contrary, that the claim raises significant legal issues which appear not to have been considered in this jurisdiction to date. These issues merit proper consideration and adjudication and, given that they have not been properly adjudicated on to date, the proper course is to not to dismiss the proceedings but rather to remit them to the High Court for re-hearing. The High Court can address all issues and determine afresh whether the assault claims ought to succeed or fail, as well as any other issues properly within the scope of the Plaintiff's claim.*"

70. I have set out a summary of the analysis of Collins J. on the consent issue in some detail in order to put in proper context the arguments now arising as to the amendments said by the plaintiff to be necessary to properly address the consent issue at the re-trial.

Amendments relevant to consent as originally sought

71. The plaintiff sought to address the consent issue in a number of ways in her application as issued. She sought to add the words "*negligence and breach of duty, including breach of statutory duty and fiduciary duty*" and "*sexual exploitation*" in the omnibus heading of the wrongs she alleges against the first defendant. (She also sought to add the claim "*grooming*" to this heading but I will come back separately to that matter below). She then sought to add the following paragraph to her amended statement of claim specifically addressing the consent issue:

"21. At all material times, the First Defendant was a person in authority and who was in a position of trust as a teacher of the plaintiff. The first defendant groomed the Plaintiff, exploited his position at her school and he knew or ought to have known that the plaintiff could not consent and/or that her consent was vitiated and that the Plaintiff lacked the capacity to give any meaningful and/or free and fully informed consent to the sexual acts with the first defendant."

72. In the affidavit grounding the amendment application it was explained that "*the real issues in controversy as regards the issue of consent would be addressed by the proposed new paragraph 21 which pleaded that the plaintiff's consent was vitiated and that she lacked capacity to give any meaningful and/or free and fully informed consent to the sexual acts*." The grounding affidavit also stated that the plaintiff had sought to formally plead negligence and breach of statutory duty to address the argument made at the hearing that she consented to sexual acts with her teacher, and made reference to it being noted in the Court of Appeal judgment that there appeared to be some dispute as to whether any claim for negligence/breach of duty was made by the plaintiff against the first defendant. The grounding affidavit made no reference to breach of fiduciary duty.

73. Both defendants opposed this amendment as originally sought on the basis of the plaintiff's delay in bringing the amendment application and on the basis that it was not properly particularised. The first defendant further opposed this amendment on the basis that it represented a position which is in direct contradiction of the plaintiff's evidence at the original trial to the effect that the alleged sexual acts between herself and the first defendant were consensual. It is fair to say that this proposed amendment was not opposed with quite the same degree of vigour as the proposed addition of the claim in grooming.

74. In seeking to address the complaint that the consent plea was not sufficiently particularised, the plaintiff was invited by the Court on the first day of the hearing of the amendment application to add further particulars of the proposed new paragraph 21 (as set out at paragraph 71 above) pleading on the consent question in her proposed further amended statement of claim.

75. This she did in her further proposed amended statement of claim by proposing the following paragraph:

> *"27. By reason of the fact that the Plaintiff was a pupil under the age of 18 in school and the first Defendant was the Chaplain/teacher in the school and in a position of authority and where she was in his care and the care of the school, the Plaintiff, as a pupil and a vulnerable child, was incapable of giving consent at law to a sexual relationship given the unequal position of the parties.*

76. Subject to the question of the allegation that the first defendant groomed the plaintiff, which I will shortly come to, in my view the proposed new two new paragraphs on the consent issue as set out at paragraphs 71 and 75 above are necessary to determine the real issues in controversy at the re-trial. I will also allow the formal amendment to include "negligence and breach of duty including breach of statutory duty" in the heading addressing the particulars of wrongs alleged as against the first defendant. (A plea in negligence and breach of duty including breach of statutory duty as against all defendants including the first defendant was already contained in the original statement of claim at paragraph 6 in any event.)

77. That additional pleading seems to me to be consistent with the case made by the plaintiff in answer to the defendants' consent case at the original trial and is necessary for determination of the real questions in controversy at the re-trial. This case does not go beyond the case in substance advanced at the original trial and the plaintiff is not seeking to introduce any new factual allegations by way of particulars in support of these pleas. The defendants have not averred on affidavit as to any specific prejudice flowing from the inclusion of these proposed amendments on the consent issue and the negligence/breach of duty issue as against the first defendant. The maintenance of such a defence on the part of a school and school teacher in circumstances where it is alleged that the school teacher had a sexual relationship with a student is one that requires to be determined by reference not just to the defendants' contention but also to the plaintiff's answer to that contention. To shut out the plaintiff from addressing that defence at re-trial runs the risk of causing a real injustice. I do not believe that the plaintiff's delay in bringing this application, unjustified as it is, is such as to trump the justice of having the consent issues properly determined at trial. The defendants' line of defence on the consent

issue is one that clearly raises important issues of principle and is one that should be determined following all relevant evidence and submissions for and against that line of defence.

78. Insofar as the first defendant contends that such amendments should not be permitted as they involve a contradiction of the plaintiff's evidence at trial, I do not accept that this is so. As Collins J has already identified, there is clearly an arguable case to the effect that the fact that the alleged sexual interaction occurred on a consensual basis cannot constitute a valid consent for the purposes of the various civil wrongs advanced (including assault and negligence/breach of duty) given the obvious power imbalance between a 17 year old schoolgirl and the authority figure of a teacher and chaplain in that school and the inherent impropriety of such a relationship.

79. In this context, it seems to that it would also be appropriate to permit the application to amend the statement of claim to include a claim for breach of fiduciary duty. I am satisfied that this claim is within the *Krops* test, as it is asserted to arise from the same factual matrix that is the subject of the pleading in the original statement of claim. While Collins J. has pointed out that for the plaintiff to succeed in such a claim would require a significant development in our law, the claim is, in my view, an arguable one. Given the novelty of the issues presenting in this case on the pleadings as they stand (with the permitted amendments already indicated), and given the nature of the teacher/chaplain-pupil relationship in issue here, it seems to me to be appropriate to include that alternative formulation of a breach of duty claim given that it arises from the same factual matrix. I further note that a claim in breach of the fiduciary duty already exists on the pleadings as against the second defendant and I do not see that the first defendant is materially prejudiced in the event that this head of breach of duty is added to the plaintiff's pre-existing claims against him in negligence and breach of duty.

Amendments relevant to "sexual exploitation"

80. While dealing with proposed amendments said to be relevant to the consent issue, it is appropriate next to turn to proposed amendments set out in the plaintiff's further amended statement of claim which seek to plead in some detail for the first time an alleged self-standing tort of "sexual exploitation".

81. The proposed further amended statement of claim contains the proposed addition of the following new paragraphs in the statement of claim:

> *"By reason of position of the first defendant as chaplain/teacher and the Plaintiff as a pupil under his care, any sexual relationship between the Plaintiff and the First Defendant amounted to sexual exploitation.*
>
> *Allowing the Plaintiff into his bedroom in the Gambia, sleeping on/in his bed and giving her a special hug together with giving her a phone and sending sexually explicit text messages amount to sexualise behaviour and sexual exploitation.*
>
> *Further, engaging in a sexual relationship with a 17-year-old pupil in his care as a chaplain/teacher amounts to sexual exploitation.*
>
> *The First Defendant is guilty of Sexual Exploitation, namely inviting, inducing or coercing the Plaintiff, a child, to engage or participate in sexual, indecent or obscene acts.*

82. Some 25 particulars of matters said to substantiate the separate claim in sexual exploitation are then set out which in substance reprise the particulars already contained in paragraphs 10 to 20 of the original statement of claim. These particulars range from an allegation that the first defendant initiated the sexual side of the relationship following on from the plaintiff's 17th birthday to allegations that he controlled the plaintiff by insisting that their relationship continue to be a secret; details of the sexual conduct engaged in; allegations that the first defendant failed to have any regard to the effect that the engaging in sexual acts might have on the plaintiff and allegations of burdening the plaintiff with his insistence on secrecy and the lies, particularly to her parents about her whereabouts at weekends and the need to constantly cover her tracks; and pressuring the Plaintiff to have sexual intercourse.

83. It will be recalled that the original proposed amended statement of claim sought simply to add the words "sexual exploitation" after the word "grooming" and before the words sexual abuse in the particulars of wrong alleged against the first defendant. No further

amendments were sought at that point to the particulars of fact set out that paragraph 10 to 20 of the original statement of claim.

84. Counsel for the plaintiff said that this newly pleaded tort was necessary in order to address the consent issue. This was a shift in position on the part of counsel for the plaintiff in circumstances where he had clarified in answer to questions from the court on the first day of the amendment application hearing that the (very bare) references to sexual exploitation in the original proposed amended statement of claim were effectively folded into the grooming allegation and where, as already noted, the grounding affidavit had advanced the proposed new paragraph 21 (set out at para 71 above) as being the paragraph relevant to the consent issue.

85. Counsel for the plaintiff also asserted that each of the proposed new particulars had been the subject of evidence in the original High Court trial such that the defendants could not be said to be taken by surprise or otherwise prejudiced by permitting such matters to be the subject of amended pleading at this point.

86. It does not seem to me to be appropriate to allow an alleged new and self-standing tort of sexual exploitation into the pleaded case at this late remove, some 7 years after the original trial (where no case as to an independent tort in sexual exploitation was sought to be made) and some three and a half years after the Court of Appeal judgment urged that any amendment application would be brought without delay. Even accepting that the particulars of this alleged tort as set out in the further proposed amended statement of claim do not contain any allegations of fact which were not the subject of evidence at the original trial, it does not seem to me that that of itself is sufficient justification for the amendment of the pleadings in a fundamental way to introduce an alleged new self-standing tort some 18 years on from the events the subject of that claim. No authority was advanced for the existence of such a tort as a self-standing tort; there is nothing before me to demonstrate that such a tort exists independent of the other torts which the plaintiff has pleaded. While one can understand how the term “exploitative” can be used as a descriptive label for the breach of duty alleged to have been involved here, it is quite another thing to say that there is an entirely separate tort of sexual exploitation when no authority has been advanced for the existence of such tort.

87. Furthermore, it does not seem to me that the inclusion of this apparently novel tort is necessary for the determination of the real questions in controversy between the parties at the re-trial. The plaintiff will be able to make her case in assault and negligence/breach of duty (including breach of fiduciary duty) and will be permitted to answer the defence of consent raised against those alleged wrongs. As I shall shortly come to, she will also be permitted to make her case in "grooming". I do not see in the circumstances how the addition of an apparently novel self-standing tort of sexual exploitation, unsupported by authority, meaningfully adds to her case.

88. Accordingly, I will not permit the amendments in the proposed amended statement of claim (as set out at paragraph 81 above).

For Trial Judge to determine appropriate range of evidence on consent issues

89. I would finally observe on the consent issue, for the avoidance of doubt, that it will ultimately be for the trial judge hearing the re-trial to determine the appropriate range of evidence that will be permissible to determine the issues relating to the alleged assault, negligence/breach of duty (including breach of fiduciary duty) and the questions of consent/visitation of consent. The fact that I am not permitting the amendment of the statement of claim to include an independent tort of sexual exploitation does not mean that the facts the subject of the various particulars set out in the proposed further amended statement of claim on this issue would not legitimately be the subject of evidence in the context of the issues that will arise on the permitted original and amended pleading on the question of assault, negligence/breach of duty (and, as we shall come to, grooming) and the consent defences and answer to same. It will be a matter for the trial judge to determine the appropriate range of admissible evidence on the consent questions in light of the amendments I am permitting to the statement of claim.

Proposed claims in grooming

90. I will turn now to the plaintiff's application to amend her statement of claim to introduce a proposed new, self-standing claim of the alleged tort of grooming which is also sought to be advanced in the alternative as an aggravating factor as regards the other torts pleaded

and the ability of the plaintiff to consent in light of the unequal position between the parties.

91. As noted earlier, the application to amend as originally issued simply sought to add the word "grooming" to the general heading of particulars of the civil wrongs alleged by the plaintiff against the first defendant, with no amendments sought as to the matters of fact particularly used to support those wrongs. Arising from the court's direction to provide a properly particularised proposed amendment relation to grooming, the plaintiff provided the following:

PARTICULARS OF THE ACTS OF GROOMING BY THE FIRST DEFENDANT

The First Defendant groomed the Plaintiff. This grooming comprised of a combination of behaviour by which the Plaintiff was befriended, to gain her confidence and trust, using a process by which the First Defendant prepared the Plaintiff, significant adults and the environment for the abuse.

The First Defendant grooming behaviour involved acts of individual kindness with the aim of gaining access to the Plaintiff and maintaining the Plaintiff's compliance with the abuse and secrecy to avoid disclosure.

Grooming is pleaded as both a standalone tort and, further or in the alternative, an aggravating factor as regards the other torts as pleaded against the First Defendant and the ability of the Plaintiff to consent to the sexual acts in light of the unequal position between the parties.

The Particulars of the Acts of Grooming by the First Defendant are;

(a) Utilising his position as a person in authority in the school environment to befriend the Plaintiff and to gain access to her, maintain her compliance with the abuse and secrecy to avoid disclosure;

92. There then followed some 45 further particulars of acts said to be particulars of the acts of grooming, ranging from events alleged to have happened related to the trip to The Gambia to events alleged to have happened on a trip to Cologne (which were addressed in evidence in the original trial). I will return to this list of particulars shortly.

93. Counsel for the defendants complained that it was wholly unsatisfactory that these claims in grooming, particularly as an independent tort, were being presented for the first time some seven years after the original trial, notwithstanding the defendants' complaint during the course of that trial that no application had been made by the plaintiff to introduce any claim in grooming; that the plaintiff was guilty of inexcusable delay in effectively only particularising the proposed claims in grooming mid-way through the amendment application hearing, some three and a half years after the Court of Appeal judgement; and that the defendants stood to be materially prejudiced in meeting these detailed claims at a remove of some 18 years from the events in issue. This was particularly so, they said, in relation to the emphasis now sought to be put on the content of text messages as part of the alleged grooming in circumstances where the plaintiff gave evidence during the original High Court trial that her phone had been robbed during a mugging and that she was not in a position to produce these texts. The defendants also complained that many new particulars of fact were sought to be included in the proposed amendment which were not in the original statement of claim.

94. Counsel for the plaintiff sought to meet these complaints by saying that all of the matters the subject of the detailed proposed particulars were the subject of evidence in the original trial such that the defendants could not seriously complain of prejudice. He also says that the formulation of the claim in grooming simply mirrors that set out in the seminal Irish authority of *Walsh v Byrne* in which the tort of grooming was held to be a self-standing tort in Irish law. He emphasizes that *Walsh v Byrne* was the subject of submissions before the trial judge, was addressed by him in his judgment and addressed in some detail in the Court of Appeal.

95. It is again useful to briefly summarise how Collins J addressed the issue of the tort of grooming in the Court of Appeal judgment. He commenced by making reference to the finding of the trial judge that the tort of grooming had been established in line with *Walsh v Byrne.* He noted that no such tort had in fact been pleaded by the plaintiff. While he

noted that the fact that a claim in grooming was not made in the original statement of claim was not surprising given that the statement of claim pre-dated the decision of the High Court in *Walsh v Byrne*, he went on to say that if the plaintiff wished to make the case that such a tort had been committed she ought not to have been allowed to do so without first obtaining leave to amend her statement of claim.

96. He noted (at para 163) that "*In every case, it is important that there should be clarity as to what claims are being advanced by a plaintiff (just as it is important that there should be clarity as to what defences are being relied on by a defendant). Where the claim is in respect of a novel tort – and there was no dispute before us that grooming is a novel tort (if it exists) – it is all the more important that the claim should be clearly pleaded. That would have permitted the defendants to interrogate the claim through particulars. It is wholly undesirable that such a claim should be allowed to be advanced "*on the hoof" *so to speak*." He then noted that "*In any event, it seems that grooming was in the case by the time that Dr Cryan came to give her evidence and all of the parties addressed themselves to Walsh v Byrne in their closing written submissions in the High Court. It was common case before this Court that Walsh v Byrne was the only Irish authority on the tort of grooming. The Court was not referred to any authority from any other jurisdiction recognising the existence of such a tort*."

97. He then went on to consider the High Court judgment in *Walsh v Byrne* and how the trial judge dealt with the grooming issue in his judgment. He briefly summarised the parties' submissions to the Court of Appeal on the question of how the trial judge had dealt with the grooming issue. Collins J (at para 175) records counsel for the plaintiff in his submissions to the Court of Appeal as maintaining the position that there is a standalone tort of grooming which "*had started when Ms McDonald was sent by her family to talk to Fr Conroy following a breakup with a boyfriend. That was so, according to* [counsel], *even though that contact was initiated by Ms McDonald and her family and even though any disclosure was not initiated by Fr Conroy and, the evidence suggested, he had simply listened to Ms McDonald…. Later in his submissions,* [counsel for the plaintiff] *indicated that he was relying on grooming not as a stand-alone tort (which, he said, was not necessary for his case) but rather as a fall-back argument in the context of his fundamental assertion that Ms McDonald's consent had been vitiated*."

98. Collins J concludes his discussion of this issue by stating (at para 176):

> *"176. The appeals here give rise to significant questions about whether there is a stand-alone tort of grooming and, if so, what its constituent elements are and how it relates to established torts such as sexual assault. Issues of consent also arise on the facts here. In my opinion, it would not be appropriate to attempt to resolve these difficult issues in these appeals. If Ms McDonald wishes to pursue a claim for grooming at the rehearing of these proceedings, she must first seek leave to amend her Statement of Claim to include such a claim. Assuming that leave is given, that claim should be particularised in the ordinary way and ultimately determined by the High Court by reference to the whatever arguments and evidence may be adduced at the rehearing."*

99. As already noted, Collins J specifically stated at the end of his judgment that any issues that require to be addressed prior to the rehearing on remittal such as the pleading issues touched on by him in his judgment should be addressed by the parties "without delay".

100. In my view, the proposed amendments in relation to grooming should be permitted for the following reasons.

101. The defendants complained that the set of 45 particulars now set out in the further proposed amended statement of claim as supporting the claim in grooming contains many new matters which were not in the original statement of claim. In fact, the list of particulars now set out in support of the grooming claim largely involves a re-statement or elaboration on matters which were already the subject of the pleading in the original statement of claim (at paragraphs 10 to 20), such as the first defendant's alleged influence and executive power in relation to school trips and the choosing of mentors; allegations regarding him permitting the plaintiff and other students to be in his room overnight during that trip and to spend the night on/in his bed during that trip; giving the plaintiff a hug at the end of the Gambia trip and telling her she was special; sending private text messages to her that became increasingly personal and sexual in nature; organising a social night in his home following the Gambia trip; purchasing a specific mobile phone for the purposes of texting her; advising the plaintiff that he wanted to wait until she was 17 before engaging in a sexual relationship with her; kissing her after a cinema trip;

placing the plaintiff at a position where she felt unable to discuss the relationship with anyone, along with allegations of other factual aspects of the relationship.

102. In so far as there were any new matters of factual detail included in the list of particulars which were not in the original statement of claim, the defendants were not in a position to dispute the assertion of counsel for the plaintiff that all of the matters the subject of this list of particulars were the subject of evidence in the original trial. This is important in that it cannot reasonably be said on the part of the defendants that they are taken by surprise by any of the allegations contained in this list of particulars. It also seems to me that the matters pleaded in support of the grooming claim arise out of "substantially the same facts as already have been pleaded" (in addition to being the same facts as were the subject of evidence at the original trial) such as to satisfy the requirements of *Krops*.

103. The formulation of the cause of action in the proposed further amended statement of claim follows the *Walsh v Byrne* formulation which was the subject of argument and submissions (and indeed determination, albeit incorrectly) in the original trial so that, again, the defendants cannot be taken by surprise at reliance on that formulation now.

104. Counsel for the school contended that the tort of grooming was bound to fail on the basis that the acts said to ground the tort could only arise between the Gambia trip and the plaintiff's 17th birthday (when sexual relations with the first defendant were alleged to have first begun) which was only a period of "weeks". I do not accept that contention. On the current state of Irish authority as represented by *Walsh v Byrne*, the case as pleaded in grooming in the further proposed amended statement of claim clearly gives rise to an arguable case, particularly given the teacher-student nature of the relationship, the fact that the plaintiff was under the first defendant's direct care while on the Gambia trip and the facts and circumstances of the alleged behaviour of the first defendant concerning the plaintiff. It will be for the trial judge at the re-trial to determine whether *Walsh v Byrne* represents good law and if so whether the plaintiff has made out a case in grooming on the case she seeks to make, if the facts she alleges are accepted to be true.

105. It also seems to be that the amendment should be allowed to determine the real questions in controversy between the parties. If the plaintiff's allegations are true, on the face of it the first defendant's actions in the lead up to the alleged sexual relationship with

the plaintiff and during the course of that sexual relationship up to her 18th birthday are such as to potentially amount to either an independent tort in grooming or could serve as an aggravating factor in respect of the other causes of action alleged. It cannot be overlooked that all of the complained of activity took place while the plaintiff was a schoolgirl and when the first defendant was, as a teacher and chaplain, a person of authority and influence in relation to the school children (such as the plaintiff) under his care and tutelage.

106. As regards the question of prejudice, I am not persuaded that material prejudice to the defendants would arise by the fact of the amendment if the amendment was permitted at this juncture. In my view the defendants overstated such likely prejudice given that the matters of fact provided as particulars in support of the claim are matters which were largely contained in the original pleadings and which were in any event all the subject of evidence in the original trial. No new investigations are required on the part of the defendants to meet the facts alleged in support of the grooming claim. Insofar as it is said that the reliance on the content of text messages creates a prejudice to the defendants in the absence of those text messages at this remove, allegations of private and sexualized text messages were part of the original pleadings and at the original trial such that any prejudice resulting from the absence of such messages was a prejudice which was present at the time of that trial on the case as originally made (and still made) by the plaintiff. As such, any prejudice that might arise is not prejudice that would flow from the fact of a belated alteration of the pleadings to include a tort of grooming arising from the same facts. It will be for the trial judge to determine the appropriate range of admissible evidence on matters relating to the text messages taking into account the apparent circumstances of the text messages themselves being no longer available.

107. I turn now to the question of the plaintiff's conduct and delay in relation to her application to amend her claims to include allegations of grooming. The plaintiff took some 20 months from the Court of Appeal judgment (and some 17 months from the Court of Appeal costs judgment) to seek to amend the statement to claim to include a claim of grooming. The application as issued contained no proper or comprehensible pleading as to what the tort of grooming was said to consist of; as already set out, detailed particulars of the claim in grooming were only provided for the first time at the end of the first day of the hearing of the application to amend, some three and a half years after the Court of

Appeal judgment. The application to add this detailed new claim arises some eleven years after the proceedings were instituted and the original statement of claim was delivered and some seven years after the original High Court trial, during which no application was made to amend the statement of claim to include a formal claim of grooming.

108. This conduct of the plaintiff as regards the advancement of this aspect of her claims, together with her very significant delay in seeking to make that claim in a proper fashion, are such as to weigh in the scales against the grant of the amendment. However, I think that such conduct including delay can be appropriately marked in costs and is not such as to disentitle the plaintiff from making a case in grooming at the re-trial. In arriving at that conclusion, I have regard to the gravity of the allegations; the fact that the claims in grooming arise out of substantially the same facts as were the subject of the original pleading and evidence at the original trial; the fact that those claims were (at least in broad albeit unpleaded terms) were the subject of submissions at the original trial (and before the Court of Appeal) and where I am not persuaded that the defendants will be materially prejudiced by the fact of this belated amendment.

109. Finally, I should note that counsel for the school urged me to conclude that the plaintiff's approach to the application to amend her pleadings fell within the exceptional category of abuse of conduct which was found to exist in *Quinn v IBRC* (where the Court of Appeal effectively found that the plaintiffs there had made a deliberate tactical decision to hold back a claim "of very significant magnitude" from the case as originally pleaded and sought to shift position following an adverse decision on a preliminary issue - see judgment para 66)). While I regard the plaintiff's approach to the amendment application as unsatisfactory (particularly as regards the approach taken to the proposed new claim in grooming and the delay in bringing the amendment application as a whole), I do not believe that the plaintiff's approach to the application was motivated by improper considerations or any strategic decision to deliberately hold back an application that could and should have been made at an earlier stage at the proceedings. Rather, the circumstances appear to reflect a delay in engaging with the pleading issues in a properly structured and timely way. For the reasons already outlined, I believe that the interests of justice are best served by the question of the plaintiff's conduct being addressed in an appropriate order as to costs rather than in denial of the amendment application.

110. In all those circumstances, I will grant the plaintiff's application to amend her statement of claim to include the proposed claims in grooming.

Other proposed amendments

111. As regards the remaining amendments sought to be made to the plaintiff's plenary summons and statement of claim, I will permit the deletion of false imprisonment as a claim; the proposed change to the plaintiff's description and the addition of an extra particular of vicarious liability as against the second defendant. While the defendants opposed the proposed removal of the claims as against the third defendant, I think it would be in ease of the judge dealing with the re-trial to have the claims pleaded against the third defendant in the original statement of claim removed for ease of presentation. The third defendant will remain named as a party in the proceedings which is appropriate in circumstances where the third defendant has the benefit of a costs order against the plaintiff.

Conclusion

112. I will circulate a revised version of the plaintiff's further proposed amended statement of claim which highlights in underline those amendments which I am permitting as a result of this judgment.

113. I should only add that, once any revised defences to the amended statement of claim have been delivered, the plaintiff should make an application for a trial date without delay and for all necessary case management steps (including exchange of reports as required under SI 391/1998) to ensure that the re-trial occurs as soon as is reasonably possible with all of the necessary pre-trial steps being completed properly and expeditiously.

APPROVED by Mr Justice Cian Ferriter
Monday 12 February 2024