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Judgment: approved by the Court for handing down | *Delivered:* **23/2/2007**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MARK KING

Plaintiff;

And

BOARD OF GOVERNORS OF ST COLMAN'S HIGH SCHOOL, BALLYNAHINCH
BOARD OF GOVERNORS OF ST PATRICK'S HIGH SCHOOL, BALLYNAHINCH
BOARD OF GOVERNORS OF DRUMANESS PRIMARY SCHOOL, BALLYNAHINCH
SOUTH EASTERN EDUCATION AND LIBRARY BOARD

Defendants.

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HART J

[1] The plaintiff claims that he suffers from dyslexia and has considerable difficulties with reading, writing, and to some extent with mathematics. His claim is neatly encapsulated in reply No 6 in answer to the fourth named defendant's notice for particulars of 28th September 2004 where it is stated:

> "The plaintiff's obvious learning difficulties should have been addressed. He should have been assessed and thereafter provided with special support and/or

> remedial teaching. This should have commenced when he was in primary school and should have continued thereafter."

[2] Due to the time which has elapsed since the plaintiff was at school the defendants have raised the limitation issue and the matter came before the court as a result of an order of Master McCorry that this be tried as a preliminary issue. Mr Martin McCann appeared on behalf of the plaintiff, Mr David Dunlop appeared for the three schools, and Miss Anne Finegan appeared on behalf of the South Eastern Education and Library Board. I had the benefit of extensive written submissions from Mr Dunlop, which were adopted by Miss Finegan, and much of which was not contested by Mr McCann. In addition to an affidavit sworn by the plaintiff, there were affidavits from Rita McCrory, head of personnel of the Council for Catholic Maintained Schools on behalf of the three schools; and Mr William Harper, legal officer of the South Eastern Education and Library Board ("the Board"). I heard oral evidence from the plaintiff himself, who was cross examined, and I also had before me a psychological report prepared upon him by Mr Baldwin, a consultant psychologist with the Royal Liverpool Hospital since 1995. Prior to 1995 he held various posts as an educational psychologist with a local authority from 1977 to 1995, and was responsible for the day to day management of the service with 18 psychologists. Mr Baldwin assessed Mr King on 22nd September 2003.

[3] It is not in dispute for the purposes of the present application that Mr King suffers from dyslexia, but I will have occasion to refer to part of Mr Baldwin's report in due course. I propose to refer to the position of the various schools in the order in which Mr King attended them, rather than the order in which they are named in the proceedings.

[4] Prior to the decision of Garland J in Phelps v. London Borough of Hillingdon given on 23rd September 1997, it was not believed that a person who suffered from dyslexia was owed a duty of care by a school or education authority to identify, and take appropriate remedial steps to mitigate, the adverse consequences of dyslexia suffered by a pupil in their care. As will become apparent 23rd September 1997 is an important date in this case. The decision of Garland J was appealed, and his judgment was reversed by the Court of Appeal on 4th November 1998. The matter was then appealed to the House of Lords, and on 27th July 2000 the House of Lords reversed the decision of the Court of Appeal and restored the judgment Garland J.

[5] Briefly stated the effect of the decision in Phelps was that an educational psychologist may owe a duty of care in the performance of his or her duties on behalf of a local education authority, which in turn may be vicariously liable to a pupil suffering from dyslexia for any culpable failure to mitigate the adverse consequences of such a congenital defect. It is now established that dyslexia is

capable of being a personal injury to the person, and as a result a failure to diagnose it, or take adequate steps to mitigate its effects, may constitute damage. See the discussion by Sir Murray Stuart Smyth in Robinson v. St Helen's Metropolitan Borough Council CA [2002] EWCA Civ 1099 at paragraph 21.

[6] The plaintiff is now 35, and having been born on 15th July 1971 reached his majority on 15th July 1989. That being the case, the primary limitation period in this case expired on his 21st birthday on 15th July 1992. He was educated at St Patrick's PS, Ballynahinch, between 1975 and 1977. Between 1977 and 1980 he and his family were living in the north east of England where he attended local schools. They returned to Northern Ireland in 1980, and he then attended Drumaness PS, Ballynahinch, in 1980 and 1982. Between 1982 and 1987 he attended St Colman's High School, Ballynahinch.

[7] In his oral evidence, as well as in his affidavit, the plaintiff described how he suffered throughout his school career from difficulties with reading and writing, saying that all the schools he attended recognised that he was very slow at reading in particular. Because of this he was kept back for a year whilst he was attending Drumaness PS, spending two years in P4 in 1982 and 1983. He said that at that time he was unable to read or write, other than to write his name. His teacher at that time was a Mr King (not apparently any relation), and the plaintiff said that he was not singled out in any way for any form of additional treatment or attention during this period when he spent two years in P4.

[8] However, when he was in either P5 or P6 at Drumaness PS he did remember one occasion when there was a discussion about his difficulties. He said that a remedial teacher was brought in for a period of some three to four months, during which he received specialist treatment from her. His reading progressed to such an extent that he was able to read half a book as he put it at this time. He was unable to remember the name of this teacher but, for reasons which will appear later, the teacher was probably a Mrs McErlean.

[9] Although the plaintiff was unable to say whether he received this attention in P5 or P6, as it was his evidence that whilst in P6 he was never asked to read and was just left to sit in the class receiving no attention, the specialist teacher probably taught him in his P5 year.

[10] When he went to St Colman's the position was the same in that, with the exception of Mrs Cunningham, no teacher took any steps to identify or assist his obvious difficulties with reading in particular. The exception was Mrs Cunningham who was his English teacher for a period of time. He said that she went out of her way to help him with reading, and providing books and tapes. She did all this entirely of her own initiative, and because it was her

initiative it was unauthorised. She also helped a number of pupils who had similar difficulties.

[11] After he left secondary school he returned to the north east of England for a period and worked in a factory and as a labourer.

[12] It is clear from the plaintiff's evidence that he was acutely aware of the drawbacks created for him in the employment field because of his difficulty with reading. In his oral evidence he said that the year after he left secondary school, which was therefore presumably in 1987 or 1988, he decided to make efforts to learn to read. and therefore went to what he refers to as the "tech" at Downpatrick in order to learn to read. Because he needed to earn money to support himself, and later his family, he was not able to go to the tech on a continuous basis, but there were periods when he was unemployed, or when he was able to attend night classes, and he attended remedial reading classes on these occasions over several years. He said that at some unspecified time his friends at the tech suggested that he was dyslexic, and that a teacher there who assessed him told him that he thought the plaintiff was dyslexic. The plaintiff said that this was the first time that anyone had ever explained to him the nature of his difficulties and the first time he had heard the term dyslexic. When pressed in cross examination he variously said that this occurred between seven and ten years after he left school, in other words it could have been as early as 1994 or as late as 1997. When he was undergoing remedial teaching at the tech he was often in small classes of three to six which sometimes had two teachers, or occasionally only one.

[13] In his report Mr Baldwin described the history which the plaintiff gave him of his educational progress after leaving school.

> "After leaving school he took up a place on a YTP Scheme he spent four days at work and one day at school. It was at this time, that it was suggested that Mr King could possibly be dyslexic, however no particular tuition of support would appear to have been provided."

[14] Mr Dunlop naturally questioned the plaintiff closely about this because that suggests that it was in 1987 or 1988 that the plaintiff first learnt that he was dyslexic because his evidence had been that this YTP Scheme was before he went to work in the north east of England. The plaintiff said that he must have been mistaken when he told Mr Baldwin this, and this was the wrong date. I did not find the plaintiff's evidence on this point satisfactory. I consider it probable that he did convey to Mr Baldwin that he has known that he suffers from dyslexia from a year or thereabouts after he had left school.

[15] The plaintiff's evidence was that although he had learnt from the teacher at the tech in the mid 1990s that he suffered from dyslexia, it was not until he was watching the news in September 1997 that he saw a feature on a girl who was dyslexic in England who was in the process of suing her former education establishments for compensation by virtue of their failure to diagnose the condition. He said that "accordingly I contacted my then solicitor, Madden & Finucane, in September 1997 and sought advice."

[16] This news feature in all probability referred to the action brought by Pamela Phelps against Hillingdon London Borough Council. The plaintiff's evidence was that he discussed the implications of this with his family as he raised questions with them as to what had occurred and then went to see his solicitor. I think the plaintiff's evidence in this respect may be inaccurate because Mr McCann subsequently placed correspondence before the court from his then solicitors, Madden & Finucane, which showed that the plaintiff's instructions were taken on 24th September 1997. It would therefore seem that any discussion between the plaintiff and his family was probably after he had been to see his solicitors, because further instructions were given on 8th May 1998.

[17] One of the issues is whether the plaintiff could or should have issued a protective writ because the writ in this case was not issued until 6th November 2002, and it is convenient to deal with this at this point. After the plaintiff had given his evidence on the first day of the hearing, Mr McCann very properly drew to the court's attention that the plaintiff's evidence as to the discussion he had with his solicitor about funding the proceedings may have been inaccurate. From the documents placed before the court by Mr McCann it is apparent that letters of claim were written on behalf of the plaintiff by Madden & Finucane to each of the schools and to the CCMS on 2nd June 1998. These letters were terse, and the material allegation was that the schools were guilty of a "failure to provide adequate education for our client's (sic)". No details were given as to the nature of the alleged failure. On 9th June the CCMS replied on behalf of each school saying that no offer of compensation would be made, and in addition the principal of Drumaness PS replied by letter of 5th June 1998 stating that he was not a teacher at, or the principal of, the school at the material time. No letter of claim was sent to the Board at this stage.

[18] Madden & Finucane were alert to the limitation issue as early as 24th October 1998, when they raised it in a letter to the Legal Aid Department, and they pressed the legal aid authorities for a decision in a letter of 5th December 1998. By letter of 1st February 1999 the Legal Aid Department informed Madden & Finucane that legal aid had been refused, and an appeal was lodged by notice dated 9th February 1999. The appeal was then pursued through the legal aid procedures.

[19] In the interim Madden & Finucane wrote to the plaintiff on 12th March 1999 informing him that his application for legal aid had been refused and that an appeal had been lodged against the refusal. The letter continued –

> "As already explained, proceedings should normally be issued within 3 years of the cause of action. It would therefore be prudent for proceedings to be issued as soon as possible. Since your application for Legal Aid has been refused it would be necessary for you to pay for the issuing of proceedings if you wish proceedings to be issued. We would require you to lodge the sum of £155 in our office before we can issue proceedings.
>
> Please contact us immediately if you wish proceedings to be issued.
>
> Unless we hear from you within 7 days from the date of this letter we shall presume you do not wish to issue proceedings without Legal Aid"

[20] In Rowe v. Kingston upon Hull City Council and Essex County Council [2003] EWCA Civ 1281 Keene LJ pointed out that the burden of showing that it would be equitable to allow the plaintiff to proceed rests upon the plaintiff and is a heavy burden. Having referred to the balancing exercise which the court has to perform, including the matters specifically set out in Article 50 of the 1989 Order, he continued –

> ". . . but the essential question under [Article 50] in such cases is whether, given the passage of time, the court could fairly try the claims that the defendants culpably failed to ameliorate the claimant's condition".

[21] At paragraph 31 Keene LJ quoted the following passage from the speech of Lord Oliver of Aylmerton in Donovan v. Gwentoys Ltd [1990] 1WLR 72 at 479-480 -

> "A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within proscribed limits to disadvantage a defendant in this way does not mean that the defendant is not

> prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the court is directed to consider all the circumstances of the case and to balance the prejudice of the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant".

[22] In Robinson v. St Helen's Metropolitan Borough Council [2002] EWCA Civ 1099 Sir Murray Stuart-Smith referred particularly to the question of proportionality in the context of the exercise of discretion at [33]. This passage is significant because it deals with the limitation issues in the context of a claim for dyslexia where the circumstances were very similar to the facts of the present case.

> "The question of proportionality is now important in the exercise of any discretion, none more so than under s. 33. Courts should be slow to exercise their discretion in favour of a claimant in the absence of cogent medical evidence showing a serious affect on the claimant's health or enjoyment of life and employability. The likely amount of an award is important factor to consider, especially if, as is usual in these cases, they are likely to take a considerable time to try. A claim that the claimant's dyslexia was not diagnosed or treated many years before at school, brought long after the expiry of the limitation period, extended as it is until after the claimant's majority, will inevitably place the defendants in great difficulty in contesting it, especially in the absence of relevant witnesses and documents. The contesting of such a claim would be both expensive and likely to divert precious resources. The court should be slow in such cases to find that the balance of prejudice is in favour of the claimant."

[23] It is common case that the court must consider the position of each defendant when, as in the present case, there are a number of defendants whose circumstances may be different.

[24] As Keene LJ pointed out in paragraph 39 in Rowe, the issue which will have to be decided in the present case if the case proceeds to trial is what a teacher in the 1970s and 1980s ought reasonably to have done.

[25] The first question I have to decide is when the plaintiff knew that he had dyslexia. It is agreed that it is irrelevant that the plaintiff did not know that he had a potential claim in law against any of the defendants until Phelps was decided. See Robinson v. St Helen's Metropolitan Borough Council. I have already referred to the statement contained in Mr Baldwin's report that the plaintiff was told he had dyslexia whilst on a YTP Scheme after he had left school, which would place his knowledge in 1987 or 1988. I find it hard to see how he could be mistaken in what he told Mr Baldwin, and therefore I consider it probable that he was aware from in or about 1987 or 1988 that he suffered from dyslexia. If, however, I am wrong about that, he undoubtedly knew from the mid 1990s when he said that a teacher at the tech told him that he had dyslexia. In those circumstances, even if the plaintiff did not become aware of this until the end of the seven to ten year period after he left school that he described, that would place his date of knowledge at the latest in September 1997 when he became aware of the possibility that he could bring a claim as a result of seeing the television broadcast. In that event the writ had to be issued by September 2000. It was not, however, issued until November 2002.

[26] This brings me to his reasons for not issuing the protective writ that he was advised to issue. He was aware of the need to protect his position and, for whatever reason, was not prepared to follow the course recommended by his solicitors by issuing a protective writ at the cost of £155. I am satisfied that he knew that this could have safeguarded his position and decided to await the outcome of the legal aid application. That resulted in a further delay of three years and eight months before proceedings were issued.

[27] I now turn to consider the question of prejudice to each of the defendants, and I will first deal with the three schools in the order in which the plaintiff attended them.

[28] As he attended St Patrick's PS between 1975 and 1977 the school is faced with dealing with issues which relate to a period between 30 and 32 years ago. No records survive and it appears that there is only one teacher who can be identified who taught the plaintiff, and it is stated that "she has only a brief recollection of the plaintiff". Clearly the difficulties faced by St Patrick's in defending the claim against it are very great because of the period of time which has elapsed.

[29] The plaintiff attended Drumaness PS between 1980 and 1982. No records survive in relation to his attendance, and there are no teachers at the school at present who taught him. However, the headmaster was a Mr McEvoy who retired from teaching in 1990. He recollects that the plaintiff received attention from a part-time remedial teacher, Mrs McErlean, and was referred to an educational psychologist, Mr McKeever. Mr McEvoy also recalls that the plaintiff's parents were opposed to the plaintiff going to a special

school as was apparently recommended, and insisted that he should go to St Colman's. No records now exist of any referral by any of the schools attended by the plaintiff to the Board's Educational Psychologist Service. The Board's Educational Psychology Department did have a file in relation to the plaintiff but, in accordance with the Board's policy, it was shredded in 1997 when the plaintiff reached the age of 26. The Board had no knowledge of an impending claim by the plaintiff until it received the writ under cover of a letter of November 2002. Mr McKeever is still employed by the Board but has no recollection of dealing with the plaintiff. Given that this would be some 25-27 years ago this is hardly surprising. The peripatetic teaching service was disbanded many years ago and Mrs McErlean has not been traced.

[30] Whether Mrs McErlean could be traced or not is unclear. Presumably if she is still alive she may be receiving a pension, or be eligible for a pension, from the Department of Education and therefore it may be that she could be traced. It is apparent from the plaintiff's evidence that Mr McEvoy's recollection, however far it may go, is accurate in that the plaintiff did receive some part time remedial teaching. This, however, does not necessarily assist the plaintiff. That he was given some remedial teaching and referred to Mr McKeever suggests that his reading difficulties were identified and efforts were made to deal with them. It also appears to be the position that Mr McEvoy recalls the suggestion being put to the plaintiff's parents that he go to a specialist school and this was refused. Therefore, in the absence of any suggestion that Mr McEvoy is unable to give evidence it may be that Drumaness PS is in a position to point to steps that were taken to deal with the defendant's reading problem. However, both the school and the Board still face obvious difficulties in seeking to establish what exactly was done many years ago in the absence of Mrs McErlean, and, most important of all, in the absence of any recollection by Mr McKeever of what steps he took or recommended, a recollection that cannot be assisted by any relevant documents as the file on the plaintiff was destroyed in 1997. The destruction of the file is a matter of particular importance and represents considerable prejudice to both Drumaness PS and the Board.

[31] The plaintiff attended St Colman's High School between 1982 and 1987. The school has some limited records in relation to the plaintiff, including his attendance record, and an initial assessment of his reading and mathematics ages. Whether these would throw any light on what was or was not done to assist the plaintiff with his reading whilst at St Colman's I cannot say. There is, however, one other record which has survived and which I consider to be of some significance, and that is the annual report book. The comments in it over the years contain repeated references to the plaintiff being disruptive and troublesome in class and not concentrating. One entry for the summer term of 1984 is particularly significant. The principal, H Graham, recorded "I have asked Mark to come to me for extra help on several occasions – but he doesn't want help!". Mr Graham died in 1989 and therefore whatever he might have

been able to say about the assistance that was offered to the plaintiff in the school cannot now be known from direct evidence. It appears that there are still some teachers at the school who taught the plaintiff but, with the exception of Mrs Cunningham and Mrs Caffrey, the staff have little recollection of the plaintiff. I infer from the wording of the affidavit that both Mrs Cunningham and Mrs Caffrey have a greater recollection of the plaintiff than other members of staff. There are brief entries in the comment section of the reports which over the years bear the initials of MC. This teacher taught the plaintiff different subjects over the years, English in 1984 and Mathematics at other times. However it may be that this teacher is not Mrs Cunningham, because there are later entries signed M. Coll who is no longer in post at the school.

[32] The position is therefore that Mrs Cunningham is available and presumably able to give evidence. How clear or extensive her recollection of the plaintiff may be after a period of 20 to 25 years is unknown. Mr Graham's dealings with the plaintiff, to judge by the entry from the summer of 1994 report which I have quoted may well have been of considerable significance, but Mr Graham died in 1989. St Colman's may be in a better position to respond to the plaintiff' claim than the other defendants, but still must face a considerable handicap because of the absence of more detailed written records and the non-availability of Mr Graham, despite the availability of Mrs Cunningham. The passage of time therefore amounts to a considerable, but perhaps not insurmountable, hurdle for the school.

[33] So far as the Board is concerned, it has no records whatever available to it as a result of the destruction of the file in 1997. I take into account that the file was routinely destroyed in 1997 and the plaintiff did not indicate any claim until letters of claim were sent to the schools, but not the Board, in June 1998. The Board therefore faces very considerable difficulties in contesting this case because of the passage of time, although the availability of Mr McEvoy and his apparent recollection of what happened when the plaintiff was attending Drumaness PS may assist the Board to mount its defence, not withstanding Mr McKeever's lack of recollection of the plaintiff and the destruction of the plaintiff's file. Nevertheless, the passage of perhaps as many as 27 years from the relevant events must create considerable difficulty for the Board.

[34] Finally, in deciding whether to exercise the court's discretion the way in which this matter has been pursued by the plaintiff is of some relevance. The writ not issued until 6th November 2002, more than four years have elapsed since then, and the action has still not been set down for trial. The matter has only come before the court because the Board applied to the Master for an order that the limitation issue be tried as a preliminary issue, an order made on 8th September 2005.

[35] A factor that has to be taken into account in the balancing exercise is whether there is cogent medical evidence showing a serious affect on the

plaintiff's enjoyment of life and employability, see Sir Murray Stuart Smith in the passage from Robinson v. St Helen's Metropolitan Borough Council quoted above. The plaintiff has described how he has worked at labouring jobs with the exception of a period whilst he worked in a factory. He described how his reading and mathematical difficulties have had an adverse affect upon his ability to get or keep better paid jobs. Were he able to succeed in this case I consider that he would be able to make a case that any damages would substantial, though at present one cannot quantify them to any extent. Certainly they would be within the High Court jurisdiction.

[36] On any showing the plaintiff has not pursued this claim expeditiously. He had the opportunity to protect his position by issuing a protective writ in March 1999, and, for whatever reason, deliberately chose not to adopt that course. Proceedings were not issued until November 2002, more than three and a half years later, and they have not been pursued vigorously since then. Where there has been such a long delay bringing the proceedings in the first place it is incumbent upon a plaintiff to make every effort to bring his case to trial rapidly. So far as each of the defendants is concerned, whilst their position varies, each is affected to a greater or lesser extent by the very long period of time which has passed since the events which the court will have to consider when assessing the plaintiff's case. St Patrick's PS and the Board have no records which would enable them to respond to the plaintiff's case. The Board, in defending any case made in relation to the services provided, or not provided as the case may be, by Mrs McErlean and Mrs McKeever will be considerably hampered by the passage of time and the absence of the relevant records. Drumaness PS is in a similar position in some respects, but there is available to it the evidence of Mr McEvoy, who, it appears, has a significant degree of recollection of relevant matters. To that extent Drumaness PS is in a better position to defend the claim brought against it than the other defendants, but is reliant upon the evidence of a witness who will be asked to recall matters that occurred between 25 and 27 years ago. This cannot be satisfactory. Finally, St Colman's is faced with the difficulty that whilst Mrs Cunningham is still on the staff and recalls teaching the plaintiff, she will be required to consider events that occurred between 20 and 25 years ago. The principal, Mr Graham, who would clearly have be a very important witness in the light of the extract from the report which I have quoted earlier, died in 1989. The existence of the report book and the entries acknowledged by the plaintiff's father and stepmother each year, means that there is relevant documentary evidence of the plaintiff's progress through the school subject by subject, year by year. Nevertheless, the interpretation of these entries which were made between 20 and 25 years ago, notwithstanding the availability of Mrs Cunningham, will be very difficult, and the school will face considerable handicaps in this respect due to the passage of time.

[37] On his own evidence the plaintiff may have been aware of the nature of his disability almost 20 years ago, and certainly was aware of it more than 10

years ago. No proceedings were issued in this case until 2002 and the case has not been proceeded with rapidly thereafter. Each of the defendants faces very considerable difficulties created by the destruction of records, the death or unavailability of witnesses and the passage of time. In the case of Drumaness PS and St Colman's these difficulties are less substantial than they are in the case of the Board and St Patrick's PS, but they are none the less substantial. Looking at the position of each of the defendants, I am satisfied that it would not be possible to fairly try the claims that the defendants culpably failed to ameliorate the plaintiff's condition. In those circumstances I am not prepared to exercise my discretion in favour of the plaintiff to disapply the limitation period and I answer the preliminary issue referred by the Master accordingly. The plaintiff's action against each of the defendants therefore fails and is dismissed.