Neutral Citation Number: [2009] IEHC 438

THE HIGH COURT

2000 9144 P

BETWEEN

N. C. (A PERSON OF UNSOUND MIND NOT SO FOUND SUING

BY HER MOTHER AND NEXT FRIEND M. C.)

PLAINTIFF

AND

P. Mc G., G. C., K. M., C. M., THE MINISTER FOR EDUCATION,

THE MID-WESTERN HEALTH BOARD, IRELAND, THE ATTORNEY GENERAL

AND THE MINISTER FOR HEALTH AND CHILDREN

DEFENDANTS

Judgment of Mr. Justice McCarthy dated the 18th day of September 2009

1. This is an application by the first defendant, made by notice of motion dated 10th October, 2007, to strike out the plaintiff's claim for want of prosecution, due to the plaintiff's failure to set the matter down for trial; the matter was proceeded with not merely on the basis a failure to set the action down but also on the basis of alleged delay generally in terms of its prosecution. The principal grounding affidavit is that of Mr. John Devane, Solicitor for the first defendant sworn on the same day. The notice of motion was made returnable for the 17th December, 2007 and was adjourned from time to time due to the exigencies of the list until ultimately heard. The principal replying affidavit is that of Mr. Glen Cooper, of Dundon Carolan, solicitors for the plaintiff, sworn on 17th December, 2007 and further affidavits by both solicitors, with one sworn by the defendant, the last being that of Mr. Cooper of 30th January, 2009 have been sworn. There are also before the court motions issued by the first defendant for leave to amend his defence for the purpose of pleading the statutes of limitation and a motion issued by the plaintiff for directions as to the management hereafter of the action. Of course the latter are relevant only if the relief now sought by the first defendant is refused.

2. This is one only of a number of similar or related actions. Those which are similar are the actions of N.G., M.R. and A.O'M., (all of whom are also persons of unsound mind, not so found, and who also sue by their mothers and next friends, B.G., L.R. and E.O'M., respectively. There are five additional actions which are related, namely, those of M.C., B.G. and L.R. (mothers and next friends as aforesaid) and those of P.O'M. and E.O'M. (husband and wife and the latter of whom is, as aforesaid, a mother and next friend, also). It seems to me clear that the present and the three similar actions are on all fours so far as this motion is concerned and similar motions have been issued in all nine. The focus at the hearing was upon the present and similar actions (i.e. the children's cases). There is no substantial disagreement between the parties that the disposition of the three other primary cases must be same as the present one, in due course. Different considerations may apply to those of the parents. No separate argument was considered so far as they are concerned and I will of course, in so far as the parties may require hear them further: *prima facie*, however, it would appear that the point made on their behalf that their actions must follow, in point of time, those of their children, would appear to be well made having regard to their nature.

3. I have been furnished by counsel for the plaintiff with a chronology of events in terms of the pleadings and proceedings, which I set out hereunder:-

CHRONOLOGY

- 4th August 2000: Plenary Summons issued.
- 30th August 2000: Appearance by State Defendants.
- 28th September 2000: Appearance by School Defendants.
- 14th June 2001: Letter to John Devane Solicitor requesting that he file Appearance on behalf of P.McG..
- 30th July 2001: Filed Notice of Motion for Judgment in Default of Appearance by P.McG..
- 31st July 2001: Order renewing the Plenary Summons for six months.
- 5th September 2001: Appearance by Mid-Western Health Board.
- 22nd October 2001: Hearing of Notice of Motion for Judgment in Default of Appearance by P.McG..
- 25th February 2002: Order for substituted service upon the second named Defendant G.C. by delivery to John Devane
- 27th November 2002: Entry of Appearance on behalf of P.McG..
- 5th December 2002: P.McG. files motion to strike out for failure to deliver Statement of Claim.
- 21st February 2003: Hearing of P.McG.'s motion to strike out for failure to deliver Statement of Claim.

- 6th March 2003: Statement of Clam delivered.
- 15th April 2003: P.McG. Notice for Particulars.
- 28th May 2003: School's Notice for Particulars.
- 12th January 2004: P.McG.'s motion to strike our claims for failure to reply to particulars.
- 29th January 2004: Plaintiffs Replies to P.McG.'s particulars.
- 29th January 2004: Plaintiffs replies to School's Notice for Particulars.

26th February 2004: Defence by P.McG..

- 27th February 2004: Demand letters for Defence to School, Health Board and State.
- 3rd June 2004: Further demand letters for Defence to School, Health Board and State.
- 30th June 2004: Further demand letters for Defence to School, Health Board and State.
- 30th July 2004: Defence by School.
- 28th October 2004: Filed Notice of Motion in Default of Defence against the State and Health Board.
- 22nd November 2004: Hearing of Notice of Motion in Default of Defence against the State and Health Hoard.
- 31st January 2005: Health Board Defence received.
- 28th February 2005: Filed Notice of Motion in Default of Defence against the State.
- 14th March 2005: Hearing of Notice of Motion in Default of Defence against the State.
- 14th March 2005: Defence delivered by the State Defendants.
- 15th March 2006: Notice requesting voluntary discovery from the School and the Health Board.
- 31st March 2006: Health Board refuses to make voluntary discovery

4th April 2006: School states it is taking instructions.

- May 2006: Attempt to file Notice of Motion for discovery, but problems with solicitors on record in Central Office.
- 8th June 2006: Notice of Change of Name of Solicitor delivered by the Solicitors for the Plaintiff.
- 27th June 2006: Appearance on behalf of the School re-filed.
- 5th September 2006: filed Notice of Motion for Discovery, against the School and the Health Board.
- 30th November 2006: Motion for discovery adjourned.
- 23rd January 2007: Further Affidavit in support of motion for discovery against the School and the Health Board.
- 26th January 2007: Order for Discovery against the School (by consent).
- 2nd March 2007: Order for Discovery against the Health Board.
- 8th October 2007: Demand letter to School for discovery, threatening motion
- 23rd November 2007: Filing, of P.McG.’s motion to strike out for want of prosecution (served 3rd December).
- 28th November 2007: Affidavit for Discovery by the School.
- 12th December 2007: Notice of Trial issued by the Plaintiff.
- 17th December 2007: P.McG.'s motion adjourned.
- 4th January 2008: Plaintiffs witness schedules.
- 14th January 2008: P.McG.'s motion further adjourned.
- 11th February 2008: P.McG.'s motion further adjourned.
- 13th February 2008: Filing of P.McG.'s motion to amend Defence.
- 18th February 2008: Request by P.McG. for consent to amend Defence.
- 26th February 2008: Demand letters for Defendants' witness schedules.
- 29th February 2008: P.McG. witness schedule.
- 31st March 2008: P.McG.'s motion to amend Defence adjourned.

• 7th April 2008: Notice for further and better particulars by P.McG..

• 9th April 2005: John Devane Solicitor seeks consent to late entry of Appearance on behalf of G.C.

• 24th April 2008: Plaintiff files application for directions.

4. N.C.'s proceedings were the first to be issued, those of M.R. (on the 4th August 2000) the second (on 13th November, 2000) those of A.O'M., the third (on 9th March, 2001) and those of N.G. the last (on 10th May, 2001). Appearances were entered at different times on behalf of Mr. McG. in respect of different plaintiffs but in the case of the three remaining children. Apart from those to which I have referred, there are no substantial differences in the chronology of matters as set out. No issue arises because of the trifling inadvertent error in Mr. Devane's affidavit of 10th October where he refers to the entry of an appearance on behalf of his client in 2001, when of course, that was done in 2002.

5. As will appear from the pleadings, these plaintiffs are mentally handicapped to a greater or lesser degree and no blame of any kind can be attributed to them in respect of any delay which has occurred. They were respectively born on 4th March, 1980 (the present plaintiff), the 11th March, 1981 (N.G.), the 21st September, 1981 (M.R.) and 6th September, 1983 (A.O'M.). It does not appear to be seriously in contention that the plaintiffs were students at a school and training centre, known as St. Vincent's, Lisnagry, County Limerick at all material times. The plaintiff herein attended the school in 1989 and alleges that during her time there she was "unlawfully subjected to episodes of assault and/or battery and to episodes of physical and physiological abuse and of a sort in the nature of sexual abuse", in particular 1996 and 1997. It is alleged that this took place at the hands of the first and second defendants. The third and fourth defendants are nominees of the religious order who owned and managed the school and the identities of the remaining defendants are self explanatory. The allegations pertain to divers dates unknown in 1996 and 1997. The first defendant, by his defence traverses all of the plaintiff's allegations or denies her entitlement to the relief sought: of possible relevance is the fact that the first defendant also pleads that when the plaintiff transferred to another school or training centre, she was removed therefrom when an allegation of abuse was made against a teacher there and "if the plaintiff has been without education or training and is deteriorating, the same was caused or contributed by the plaintiff's parents removal of the plaintiff from… (the second school…)".

6. Whilst the sequence of events as to the pleadings and proceedings is self explanatory, the parties have of course sought to address the facts behind the course of events. Mr. Devane says that he also requested the plaintiff's solicitors by letters to set the matter down for trial within a period of twenty-one days therefrom but this was not so done until after the service of motion to strike out. The matter has proceeded in the ordinary course (and with expedition) since that date (12th December, 2007) and hence it appears to me that it is what one might describe as "the cut-off point" in respect of the period of delay alleged.

7. In his first replying affidavit of the 17th December, 2007, Mr. Cooper on behalf of the plaintiff makes the obvious point that due to the degree of intellectual disability suffered by those who he describes as the principal (alleged) victims, the process of taking instructions had to be assisted with the help of parents and trained child psychologists and that he as solicitor has not attempted to deal directly with the present or the other child plaintiffs – a prudent course in accordance with "best practice". He says that there has not at any time been a lack of prosecution but there have been what he describes as "frustrating delays", and he singles out the procurement of defences from various (other) parties and a long process of discovery against the school and the Mid-Western Health Board (now and hereinafter the Health Service Executive) which commenced with a request for discovery without court order on the 15th March, 2006 and apparently concluded with the delivery of an affidavit of discovery on behalf of the school on 28th November, 2007. He asserts that the plaintiffs and their next friends and parents have been at all times anxious to have the cases "progressed" and in particular, in this context, he says that in 2007 the plaintiff obtained discovery orders against the school and the Health Service Executive. The motion in that regard was filed on 5th September, 2006, an earlier attempt to do in May, 2006 apparently failing for administrative reasons connected with a change of name of the solicitors for the plaintiffs and necessitating the delivery (and I infer, filing) of a notice of change of solicitor on 8th June, 2006, with, apparently, the entry of an appearance, again, by the school, for procedural reasons which are not clear to me. It appears that it had been necessary to issue a motion for judgment in default of appearance against the first defendant and the second defendant was "untraceable" and substituted service was effected – although this was in 2002.

8. He says, also, that it was appropriate to await the disposition of the criminal proceedings (in November, 2002) before proceeding. From the plaintiff's perspective, one can understand why this might have been so, even though as a matter of law, the first defendant, might or might have been himself able, or desired, to postpone the proceedings pending the criminal trial. In any event, as appears from the chronology above, he sought to strike out the proceedings for failure to deliver a statement of claim, by motion of 5th December, 2002, a somewhat unorthodox application (given the date of entry of appearance). It seems proper to infer, however, that the first defendant awaited the disposition of the criminal proceedings before taking any step and as a mater of practicality, one can see why it was most desirable from the plaintiff's perspective to await the conclusion of the criminal trial before proceeding – on the basis that it might reasonably be inferred by a plaintiff that he might obtain significant additional information about or pertaining the matters in complaint in civil proceedings on the same or related matters *(inter alia*, if, say, the accused were to give evidence). This would be of great value to any plaintiff in the position of the present plaintiff or her advisors if that had occurred, especially in a case of such complexity as the present one and in the nature of the allegations by a person of unsound mind, always posing, as they do, exceptional difficulties of proof. One need hardly say, although I accept that this is not a relevant factor, that a plaintiff's position might be considerably advanced as a matter of practicality if a defendant is convicted. The utility of hearing the evidence in a case where difficulties about taking instructions arose is obvious – and is far beyond the norm.

9. It appears that whilst discovery was pursued against the Health Service Executive and those who have been called the state defendants, (the Ministers for Education and Health respectively, the State and the Attorney General) proceedings have now been abandoned against those parties either because they had no involvement in the school or on the basis that it is conceived that no vicarious liability could be imposed upon them: this was not, of course, conclusively established so far as the State was concerned until the recent decision of the Supreme Court in *L.O'K v. The Minister for Education and Science, Ireland and the Attorney General,* (Unreported, Supreme Court, 19th December, 2008). Whilst I have not been explicitly addressed upon the point, one might say in passing that whilst no vicarious liability could arise, this does not exclude direct or immediate liability, in, say, negligence by servants or agents of the Health Service Executive or the state defendants in a given case. It does seem to me to be fair, to characterise the events from 26th February, 2004 (when the first defendant delivered a defence) to the 23rd November, 2007 as going somewhat beyond

the category of a "frustrating delays". It seems to me to have been legitimate however to seek the discovery, and, if that be so, merely the discovery seems to have been pursued, by reference to the chronology, with reasonable expedition, although perhaps the plaintiff was too forebearing. It seems to me it would have been wrong in an action of this kind not seek to have the case proceed against all defendants together. Mr. Cooper, of course, makes the point in his second affidavit that the matter is now ready to proceed, subject to disposition of the motions (including the present motion aforesaid). I should say that in this context one of the documents was obtained on discovery was the assessment prepared under the aegis of the Health Service Executive and I must reject the proposition that it is not relevant to this application: it is suggested that this (and other similar reports) create prejudice against the first defendant. He can be assured whatever else and whether relevant or not, they cause him no prejudice.

10. I think that one can ignore the second affidavit of Mr. Cooper of 7th February, 2008 (dealing with the progress of the case between the date of the swearing of the first affidavit and that second): Mr. Devane's affidavit on this appeal is in the same category.

11. The first defendants' affidavit of the 29th February, refers to a degree to the merits and as to the sequence of events (and by implication, the capacity of each plaintiff to have proceeded more expeditiously), he refers to the fact that five of the plaintiffs are adults (true) and were interviewed by Gardaí and Social Workers in 1997 and 1998. I take it that he is here referring to the related cases by the child plaintiff's parents; of more significance, however, is that fact that he says that the latter were interviewed "extensively" by the Gardaí and Social Workers in the presence of their parents. I take the first defendant's point that the next friend must have had a considerable body of information as to the detail of the allegations (if only) by reason of her or that of her husband's presence when interviews were being conducted, if not from what their children said to them. It seems to me that the need for discovery against the school arose because of investigations conducted by it or on its behalf, as set out in the affidavits of Mr. McG. and Mr. Devane, respectively dated 7th and 11th February, 2008 (which said affidavits appear to have been resworn on 29th and 21st February in the same, if not in substantially the same form). Furthermore, Mr. McG. points out that a meeting was held by the school at a hotel in 1998 to keep parents informed of developments but it is not clear from his affidavit whether or not this was an on-going process.

12. Mr. McG. and Mr. Devane assert that the plaintiff is prejudiced in having to meet allegations made in the years 1997 and 1998: frankly I do not think that this is one of those cases where this is so in as much as the first defendant has been aware since the outset, so to speak, and certainly at least before March, 1998 of the matter and it appears proper to infer that Garda investigations were on-going over a period time thereafter, culminating in a charge, ultimately disposed in November, 2002. It must have been manifest to Mr. McG. that the proceedings were continuing, at least in respect of the present plaintiffs, if not their parents since there was no long period of silence which might have lulled him into a false sense of security. Some detail of the allegations, would, as a minimum have been afforded to him in the witness statements of the complainants on the charges dealt with as aforesaid. I note that this pertained to two only complainants. I do not know whether or not disclosure by the prosecutor extended to any statements which might have been taken from other persons in relation to the allegations (which were apparently made against 31 persons). Nonetheless, the case is quite different to one which might have been brought to the attention of a defendant many years after alleged wrongful conduct of this type – being a class of case of which there have been a great many in recent years. The difficulty in such cases is, one would have thought far greater. Nothing is said, however, beyond this assertion of prejudice and or suggesting, say, the possible destruction of evidence, the deaths of witnesses, or changes in the places where wrongful acts are alleged to have occurred. It seems to me, accordingly that this is a case where one is considering only imputed prejudice or, at least, a case where there is no evidence of any thing which shows actual prejudice in defending the case. The detail could not have been forgotten by him in the time which elapsed and in the event which occurred.

13. He asserts that the continuation of the proceedings is a cause of his continued suspension as a teacher. He makes the point also that he has very limited financial resources (presumably confined to his salary) and has expended considerable sums in defence of the proceedings. Mr. Cooper says however that the former is due to the fact that the Health Service Executive has concluded that the first defendant "represents an on-going risk to vulnerable children": it seems to me likely that the fact of the continuation of the proceedings (i.e. the fact of allegations of wrong doing which are still being persisted in) might well be something which would give rise to suspension, in itself. One would have thought that it would be a certainty that a party would be suspended if such a conclusion had been reached by the Health Service Executive (rightly or wrongly). It seems to me that it is probable that it is a combination of both and I think that this is one of the occasions when one might reach conclusions of fact, as a matter of reason, on the basis of affidavits, notwithstanding a degree of controversy. One does not doubt that his family have suffered trauma as a result of these allegations and the manifold consequences thereof, whether the present proceedings or the criminal charges.

14. In his submissions, Mr. McMahon S.C., on behalf of the plaintiff, states that some of the statements taken by the Gardaí from "the victims/parents were received by the parents/solicitors between end of 2003 and early 2004", although this fact is not deposed to on affidavit. Similarly, he says that the Health Service Executives assessment was received by the families "between end of 2003 and the middle of 2004". Whilst I have no doubt as to Mr. McMahon's accuracy in relation to this I consider that I must exclude it in as much as there is no evidence to this effect. Similarly, some delay appears to have occurred in the course of an application to the Residential Institutions Redress Board by one M.K. (being an application which I infer was one in which Mr. Cooper was solicitor for Mr. K.). Reference is made in Mr. McMahon's submissions to an affidavit which Mr. Cooper "has sworn" in that regard but it is not before me. Similarly submissions are made in writing pertaining to the engagement of the Health Service Executive in the institution in question under the Child Care Act, and the extent of interviews conducted but, again, these matters are not in evidence so I disregard them. It is said in such submissions, however, that the Health Service Executive "held the evidential key to pursuing the case" and this, if only as matter of commonsense, appears to be a reasonable conclusion, and as indicated above the inquiry by the school would appear to be of evidential value also.

15. In *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, Finlay P. reviewed the existing authorities on dismissal for want of prosecution and stated (at p. 567):

> "From these decisions it is possible to elucidate certain broad principles which are material to the facts of this case and would appear to constitute the legal principles underlying this problem of the dismissal of an action for want of prosecution or that permitting by the extension of time for pleading of it to continue in this country at present.
>
> (1) Inquiry should be made as to whether the delay on the part of the person seeking to proceed has

been firstly inordinate and even if inordinate has it been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable would appear to lie upon the party seeking to dismiss and opposing a continuance of the proceedings.

(2) Where a delay has not been both inordinate and inexcusable it would appear that there are no real grounds for dismissing the proceedings.

(3) Even where the delay has been both inordinate and inexcusable the court must further proceed to exercise a judgment on whether in its discretion on the facts the balance of justice is in favour of or against the proceeding of a case. Delay on the part of a defendant seeking to dismiss of the action and to some extent a failure on his part to exercise his right to apply at any given time for the dismiss of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion.

(4) Whilst a party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material the exercise of the court's discretion. "

16. The Supreme Court in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 4 further clarified the principles of law relevant to an application to dismiss an action for want of prosecution. In the course of delivering the judgment of the Court Hamilton C.J. (at pp. 475 and 476) stated as follows:

(a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;

(b) it must, in the first instance, be established by the party seeking a dismissal of the proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;

(c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;

(d) in considering this latter obligation the court is entitled to take into consideration and have regard to

(i) the implied constitutional principles of basic fairness of procedures,

(ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,

(iii) any delay on the part of the defendant - because litigation is a two party operation, the conduct of both parties should be looked at,

(iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,

(v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,

(vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,

(vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than merely caused by the delay, including damage to a defendant's reputation and business. "

17. Whether or not inordinate delay arises is a mixed question of fact and law dependent on the circumstances of each case. It is thus of limited value to have regard to the periods of time involved in other cases but nonetheless they provide some assistance in affording a judge trying an issue of this kind with at least very broad parameters. In *Primor* the proceedings were commenced on 21st December, 1984 and the statement of claim delivered on 8th January, 1986, the motion to dismiss for want of prosecution dated 19th May, 1993. That was against the background of the fact the allegations of negligence against the defendants pertained respectively to a period prior to 1978 in respect of what I might term the first defendant therein and in respect of a number of years ending 31st December, 1982. The matters were commercial in nature and neither party was labouring under any special disadvantage quite different from the position here.

18. In J.*R. v. The Minister for Justice Equality and Law Reform* (Unreported, Supreme Court, 1st February, 2007) (Denham J. per curian) the plaintiff alleged that on occasions commencing in or about 1960 she was sexually and otherwise abused by her brother, father, and mother, that she called to Raheny Garda Station at the age of twelve in 1967 and complained to members of An Garda Síochána but that no action was taken thereon, that the extreme forms of abuse in question continued until in or about 1996 in circumstances where she said that the failure, refusal and neglect of An Garda Síochána to heed her complaints permitted the abuse to continue until 1996 and, further, that by reason of the manner in which she had been treated by the Gardaí she was inhibited from confiding in any other party or seeking assistance. She sought damages against the State by a summons issued on 6th February, 1998 but the matter was permitted to proceed, notwithstanding the fact that any records pertaining to that Garda station were no longer available and that several members of An Garda Síochána identified as having served there at the relevant time were either deceased or too old to assist: again this case does not fall into this category either as to elapsed time or, say, absence of witnesses or otherwise.

19. In *Mannion v. Benson and Hedges Limited* [2005] 1 I.L.R.M. 190 that, and related cases, was or were a claim or claims against, amongst others, *Benson and Hedges Limited* arising from the sale, manufacture and distribution of cigarettes. A

number of summonses had been issued over a period of years and Mary Mannion's had been so issued in May, 1998 (in circumstances where she had been diagnosed with emphysema, allegedly attributable to smoking in May, 1995). The summons was served in April, 1989 and an appearance entered thereto, and after threat against that plaintiff of a motion to dismiss the proceedings for want of prosecution by reason of the failure to deliver a statement of claim one was delivered in November, 2002. Particulars were raised thereon in January 2003 and replies were afforded in June 2003 with further particulars sought in September, 2003 and replies thereto in February, 2004. Ms. Mannion alleged that she had commenced smoking in 1948. In that case amongst the factors relevant, however, was the risk that the defendants might not be afforded a fair trial by reason by lapse of time between the alleged wrongful acts and the accrual of the cause of action. And furthermore, it appears from the judgment of Finlay Geoghegan J. that the:-

> "Wrongful acts alleged go back to the start by each defendant of the sale/distribution/manufacture of cigarettes in Ireland which appears to have been in the early twentieth century. They also expressly refer to acts prior to the commencement of smoking by each of the plaintiffs i.e. prior to 1948, 1942 or 1945 and 1968 respectively. The wrongful acts alleged are multiple"

and, further, that "the defendants as a matter of probability has (sic) suffered prejudice by reason of the inexcusable period of delay since the accrual of the cause of action". Again, no comparison with this case in terms of relevant times elapsed or prejudice arising.

20. An explicit observation on the length of time which might be considered inordinate was made by Quirke J. in *O'Connor v. John Player and Sons Limited* [2004] 2 I.L.R.M. 321 (also proceedings involving allegations of negligence in and about the manufacture distribution and supply of tobacco and cigarettes and being, apparently one of, 138 similar claims – the relationship of this case that aforesaid is not manifest from the report even though *Benson and Hedges (Dublin) Limited* were also a defendant therein. The summons had been issued on 23rd December, 1997, and was served just before it expired whereupon appearances were entered. Thereafter, however, the plaintiff took no step until in or about March, 2002, and several of the defendants then, in September, applied by notices of motion to dismiss the proceedings, statements of claim being delivered only November of the same year. Quirke J. pointed out that the statements of claim, were, accordingly, delivered only after a period in excess of 3 years and 10 months from the date of entry of appearance and 4 years and 11 months from the date of service of the plenary summons (being approximate figures) and said that:-

> "It would be difficult to envisage circumstances where such a delay between the issue and service of proceedings and the delivery of statement of claim would not be described as inordinate and no such circumstances have been suggested by, on behalf of the plaintiff".

Quirke J. further took the view that the fact of the proceedings comprised a claim for damages arising out events covering a period in excess of 50 years added weight to the proposition that such delay was inordinate, again there is no reality to comparing this case therewith: its falls into the same category (in terms of dissimilarity) as Mannion.

21. In *Enwyns v. Independent Newspapers* [2003] 1 I.R. 583, the action was one for libel published on 19th April, 1995, the article in question having been written by the second named defendant arising out of the statements of another person, now deceased, during a television programme. The summonses were issued on 8th December, 1995 and a statement of claim was not delivered until 14th February, 2001. The Supreme Court followed *Primor Plc*. The plaintiff apparently did nothing between February 1996 and November 2000 and the motion to dismiss was issued on 23rd March, 2001. The court emphasised the discretionary nature of the remedy of dismissal and, on the facts, the application was granted on the balance of justice. In the circumstances of the case I do not think similarly that there is any real comparison with the present case.

22. In *Brennan v. Fitzpatrick*, (Unreported, Supreme Court, 21st November, 2005) the summons was issued on 16th June, 1989 in respect of events which had occurred in June 1986 and the statement of claim delivered on 28th November, 1990. This action was one for medical negligence. Notice of trial was served in May 1996. The notice of trial had been struck out on 4th December, 1998. The order of the High Court dismissing the action was made on 20th March, 2000, so one presumes on the basis of a motion issued in the weeks or months preceding. Again, I think that it is fair to say that the present case does not bear a comparison. Apart from questions of delay, there appeared to have been, on the facts as set out in the judgment of Denham J. no coherent legitimate reasons for the delay which arose, yet again quite different.

23. *Byrne v. The Minister for Defence and Others* [2005] 1 I.R. 577 were proceedings for personal injuries arising out of the alleged negligence of the State, giving rise to deafness in circumstances where the plaintiff had served in the army between 1974 and 1977. Peart J. elaborated the principle that even without prejudice to a defendant the court had jurisdiction in the event of inordinate and inexcusable delay to dismiss the action. Peart J. took the view that there had been inordinate delay in bringing the proceedings (something which is not of course the case here) and the period of time in question speaks for itself in terms of Peart J. conclusion that when commenced the claim was "stale". Again, in my opinion these facts are so different as to be of little assistance here.

24. In *Desmond v. M.G.N. Limited* (Unreported, Supreme Court, 15th October, 2008), Kearns J. approved these principles and further stated:

> "It must be stressed that the factors which the courts take into consideration in assessing the balance of justice are not expressed to have been listed in exhaustive terms. Nor is a court precluded from dismissing proceedings where one or more of the factors enumerated above are not present if the circumstances of the case otherwise merit dismissal.
>
> Of some considerable significance in this context is the fact that the legal landscape with regard to delay has undoubtedly altered following the coming into operation of the European Convention on Human Rights Act 2003. Section 4 of that Act requires that judicial notice be taken of the Convention provisions. Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that: -
>
> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is

entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' (Emphasis added)

Neither party to this appeal has sought to argue that the Convention, even in the form in which it has been incorporated into Irish domestic law, provides horizontal enforceable rights as between private litigants. Both parties, however, accepted that when exercising its discretion the Court must remain mindful of obligations imposed on it by the Convention given that these obligations exist quite independently of the action or inaction of the parties to the litigation. This point was stressed by Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 when in the course of his judgment he stated at pp. 293 and 294:-

'...the courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued..., following such cases as *McMullen v. Ireland* [ECHR 422 97/98, July 29, 2004] and the European Convention on Human Rights Act 2003 the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time. These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional advisor, may prove an unreliable one.'

Subsequently, in *Stevens v. Paul Flynn Limited* [2005] I.E.H.C. 148, Clarke J., in dismissing a plaintiff s claim for want of prosecution said:

'Notwithstanding the fact that the Supreme Court in that case i.e. *Gilroy v. Flynn* permitted the continuance of the action, it seems clear that the court was of the view that there may be a need to reconsider the previously established principles in the light of those recent developments.'

Having considered the matter I am satisfied that the two central tests remain the same. The Court should therefore:

(1) Ascertain whether the delay in question is inordinate and inexcusable; and

(2) If it is so established the Court must decide where the balance of justice lies.

However it seems to me that for the reasons set out by the Supreme Court in *Gilroy* the calibration of the weight to be attached to various factors in the assessment of the balance of justice, and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such a delay are issues which may need to be significantly reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligations of expedition and against requiring the same level of prejudice as heretofore.

This Court agreed with the reasoning of Clarke J. in that case and I therefore am of the view that the requirements of the Convention add a further consideration to the list of factors which were enumerated in *Primor* as factors to which the courts should have regard when deciding an issue of this nature. Furthermore it is a consideration which operates regardless of the wishes or intentions of one or both parties to the litigation."

25. However, Geoghegan J. did not find himself in agreement with Kearns J., and, in particular (with respect to the relevance of the European Convention on Human Rights), he effectively stated that the starting point for the proposition that the European Convention on Human Rights was relevant in any adjudication on the question of delay was the judgment of Hardiman J. in *Gilroy*. He characterised references to the convention therein as being *obiter dicta*.

I think that it is worth noting that in that libel action (and the nature of the cause of action was a relevant factor), the offending article was published on the 8th January, 1998, the proceedings were commenced on 12th May, 1998 and the pleadings were closed in February, 1999, notice of intention to proceed being served in February, 2005 and the motion to dismiss being dated the 25th May, 2005: the matter was accordingly ready for trial, assuming that the notice of intention to proceed indicated such readiness, in February, 2005, seven years after the alleged wrong and six after the closure of the pleadings. The action was permitted to proceed.

26. One does not apply times elapsed giving rise to delay in a mechanical manner, as a matter of principle, and each case depends on its own facts but they serve, I think, to give some general guidance on the facts (apart from the elaboration of principles of law). Such guidance is all supportive of the proposition that whether on the balance of justice or otherwise this is not a case which should be dismissed.

27. It seems to me that there will be many cases which are marginal as to whether or not a delay is inordinate. Litigation might be conducted, at what one might describe as a leisurely pace, but taking the matter in the round, the delay might not be inordinate perhaps, even if the matter was relatively straight forward. Whilst each case must depend on its own circumstances, there will come a time when delay might shade from a considerable (and to be deprecated) tardiness to arguably inordinate and, of course, there will be cases where the delay will be so gross as to afford the courts no difficulty in a finding that a delay is inordinate. It seems to me that it is hard to see that any one of the cases to which I have referred were anything other than clear cases when one took all of the factors into account, in accordance with the authorities. I do not think, in deciding whether or not there is a delay, one can say that a delay might exist if a case ought to have been ready for trial, say, after three years but that, say, four years would be an inordinate period to reach that stage, if, broadly speaking, there was no lengthy period of inactivity but progress was being made with a case, say, of great complexity. Neither do I think that the parties (or generally) are necessarily to be condemned for forbearance towards others, say, in terms of agreeing to the extension of time limits. It does not seem to me to be in the public interest (even where it legitimate or understandable delay has taken place on the part of an opposing solicitor, or even where that is caused by human oversight or error) that no quarter should be given. The rules are a means to an end only. Furthermore, I think that it is reasonable for the courts to accept that solicitors or counsel cannot be expected, in the ordinary course of events, to address a given case exclusively.

28. This was a matter of great complexity, special difficulties arose because the present plaintiff (and those in similar cases) were persons of unsound mind, in all cases they were persons who were minors at the time of the alleged wrongs, the allegations are of a sexual import of a kind classically associated with inhibitions in speaking about them, the necessity arose of dealing with the plaintiff and other similar plaintiffs through intermediaries, discovery was necessary (even against parties against whom proceedings were subsequently abandoned) difficulty was encountered obtaining such discovery and also procuring defences and there was a need (and I go that far) to await the conclusion of the criminal trial. This was thus, in my view, a marginal case. There will be cases were there is no real justification in awaiting the outcome of a criminal trial, but it seems to me that because of the nature of these allegations and, especially, the disability of the plaintiff and others similarly situated it would have been imprudent of a solicitor not to await events: the first defendant did not enter an appearance until after disposition thereof and certainly was not pressing the matter before it – quite understandably; nevertheless he was in default. I would accept, however, that by analogy with the position which might apply when there is "a late start" to proceedings, even where they are commenced within the limitation period, there was a somewhat higher obligation of expedition from the disposition of criminal proceedings onwards because of the elapsed time. Thereafter the action proceeded, however, without sufficient expedition and it should, perhaps, have been ready for trial in or about 2005 or 2006: one cannot be precise. There is no question, of course, but that it was appropriate to proceed against all defendants to trial together. Incidentally in this connection, contribution and indemnity is sought by the school from the first defendant, so he will remain in the action in any event: this is not, however, a matter which is to be taken into account but I merely refer to the point for the sake of completeness.

29. In any event as I have said, this is a case which is marginal but where the plaintiff has fallen into the category of case as so to be condemned as somewhat dilatory to the point of inordinate delay.

30. I have no doubt, however, but the delay is excusable, and even if I am wrong in taking the view that it is excusable that this is a case where the balance of justice favours permitting the plaintiff to proceed.

31. It seems to me that one has regard to the factors to which I have referred above in the context of analysis of the delay and that even if, having taken those factors into account, one is still left with the conclusion that if delay of an inordinate kind arose these factors in themselves excuse the delay. They are of course, even if they afford no adequate excuse for the delay, factors of the first importance in the context of the balance of justice in the case, and there is no prejudice, such that there is no risk that the first defendant will not obtain a fair trial: this is borne out by the fact that Mr. Devane, on the 25th January, 2007, indicated that if a notice of trial was not served, he would so on behalf of his client and subsequently on 12th April, 2007, Mr. Devane, called upon the plaintiff to so set the matter down. In all the circumstances of the case the first defendant has accordingly failed to discharge the burden of proof lying upon him on this application.