COURT OF APPEAL

Neutral Citation Number: [2015] IECA 74

Appeal No.: 2014/1232

[Article 64 transfer]

Peart J.
Irvine J.
Mahon J.

MARIA CASSIDY

PLAINTIFF/RESPONDENT

- V –

THE PROVINCIALATE

DEFENDANTS/APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 16th day of April 2015

Introduction
1. This is an appeal against the judgment and order of the High Court (Barrett J.) made on 28th February, 2014, whereby he refused the defendant's application to dismiss the proceedings, pursuant to the inherent jurisdiction of the court, on the grounds of inordinate and inexcusable delay.

Background facts
2. By personal injuries summons issued on 1st May, 2012, the plaintiff, a housewife and mother of four children, commenced proceedings claiming damages for personal injuries allegedly suffered by her by reason of assault, abuse, rape and false imprisonment on the part of a man, who I will refer to as PD, between the years 1977 and 1980. Given that the plaintiff was born in 1965, she would have been aged between twelve and sixteen years at the time of the alleged abuse.

3. The plaintiff claims that PD was an employee of the Religious Sisters of Charity, the defendant to this action, who owned certain premises at Donnybrook in Dublin consisting of a convent, a private nursing home and a laundry.

4. As appears from the personal injuries summons, the plaintiff maintains that the majority of the abuse alleged took place while she was visiting a friend who lived in a gate lodge at one of the entrances to the defendant's premises. The abuse is alleged to have been carried out in a hut and sometimes in a somewhat larger shed within the grounds. At other times it is maintained that the abuse occurred at locations well removed from the defendant's premises.

5. The plaintiff maintains that the unlawful conduct on the part of PD occurred as a result of the negligence and breach of duty on the part of the defendant in, *inter alia*, allowing him to have ongoing unsupervised contact with young children such as herself, and she maintains that the defendant, as his employer, is vicariously liable in respect of all of the wrongdoing alleged.

6. The plaintiff asserts that the events in question had a devastating effect on her childhood. Her academic performance, self esteem and ability to enjoy normal relationships were all allegedly adversely affected. She maintains that she has suffered from recurring depression, alcoholism, feelings of guilt and suicidal ideation. The plaintiff claims that she developed post-traumatic stress disorder, that this is ongoing, and that her psychological condition has adversely impacted on her ability to act in relation to the abuse. By affidavit of verification dated 21st May, 2012, the plaintiff deposed to the truth of all of the allegations referred to in her personal injuries summons.

7. An appearance was entered by the defendant on 11th May, 2012, and a notice for particulars delivered on 21st May, 2012. In her replies to particulars of 10th August, 2012, the plaintiff advised that she first disclosed her abuse to her A.A. sponsor in or around 20th November, 2009, and approximately six months later to her husband. She first reported the events in question to the gardaí in December 2011.

8. In its defence delivered on 17th January, 2013, the defendant maintained that the plaintiff's claim was statute barred by reason of the Statute of Limitations 1957, as amended, but reserved its right to bring an interlocutory application to have the proceedings dismissed on the grounds of inordinate and inexcusable delay. It denied that it ever employed PD and further denied all allegations of wrongdoing, negligence and/or vicarious liability. The personal injuries pleaded were also denied in full.

9. The defendant's motion to dismiss the claim on the grounds of delay was issued on 6th November, 2013. For the purposes of that application Sr. Phyllis Behan, the defendant's Provincial Leader, swore an affidavit on 1st November, 2013, wherein she, in summary, advised of the following facts:-

> (i) that it appeared likely that PD was dead although an ongoing Garda investigation had not yet established that fact with certainty;
>
> (ii) that having gone through the records of the Sisters of Charity she could find no record of PD ever having been in the defendant's employment;
>
> (iii) that two long term caretakers who had been employed at St. Mary's at the time of the plaintiffs alleged complaints had retired in 1982 and 1985 respectively and were both dead;
>
> (iv) that of the five men who had worked in the laundry at the relevant time three were dead and the whereabouts of the other two was unknown;

(v) that of the nineteen Sisters who had lived as part of the community at St. Mary's between 1975 and 1979, thirteen were deceased, three had left the congregation and three had survived. Of the three members of the community still alive, one is mentally unwell and the other two have no recollection of a PD having worked for the defendant.

(vi) that one former staff member had been located who had some recollection of a man by the name of PD who she thought may have worked as a general handyman in Maryville, the private nursing home. She believes that he was there when she arrived in 1977 and left in or around 1979/1980.

10. Sr. Behan maintained that, by reason of the matters last outlined, the congregation's ability to defend this claim, which relates to events that are alleged to have occurred more than thirty years ago, had been severely prejudiced.

11. For the purposes of resisting the defendant's application to dismiss the proceedings, the Plaintiff chose to rely upon the pleadings as verified by her affidavit of verification and did not seek to introduce any additional evidence to explain why so many years had been allowed to lapse before she issued her proceedings.

The Judgment of High Court
12. In his judgment of 28th February, 2014, Barrett J, having considered the well rehearsed *jurisprudence* as to the circumstances in which proceedings may be dismissed on the grounds of delay, declined the defendant's application. In so doing, he concluded that while the plaintiff's delay in instituting the proceedings had been inordinate it could be excused by reference to her upbringing, the fact that her abuser had had dominion over her and by reason of the fact that she had been subjected to many misfortunes of the nature advised by her in the personal injuries summons.

13. The High Court judge went on to conclude that there was no real or serious risk that, if the claim was allowed to proceed, the defendant would be at risk of an unfair trial. He was satisfied that the death of PD did not offer a solid basis for reaching such a conclusion. Further, he was satisfied that the defendant was in a position to call in aid of its defence evidence from a former staff member who had worked in the defendant's private nursing over the period 1977 to 1980.

14. While written submissions were furnished by both parties to this appeal, I will nonetheless briefly refer, in a somewhat skeletal form, to the principal arguments advanced in the course of the hearing.

Submissions on behalf of the defendant/appellant
15. Mr. Fanning, B.L., on the defendant's behalf, submitted that while the trial judge in his judgment had correctly outlined the principles to be applied, in refusing the application on the grounds that the plaintiff's delay was excusable, he had made a number of findings that were unsupported by the evidence. There was no evidence, he submitted, from which he could have concluded:-

(i) that the plaintiff hailed from a background of the type where people would not be expected to lightly sue, thus bringing her within the type of excusable delay found by Costello J. in *Guerin v. Guerin* [1992] 2 I.R. 287, upon which decision he had relied.

(ii) that the plaintiff's abuser continued to have dominion over her during any or all of the period of delay;

(iii) that the many social, physical and psychological difficulties described by the plaintiff in her pleadings had impacted on her ability to pursue the present litigation.

16. Insofar as the learned High Court judge had rejected the defendant's application based on second leg of the test which emerges from *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("the *Primor* test") and also on the test deriving from the decision of the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151 ("the *O'Domhnaill* test"), counsel submitted that he had erred in law and in fact in concluding that the evidence outlined in Sr. Behan's affidavit did not offer a solid basis to support her assertion that the defendant was at a real risk of an unfair trial if the action were permitted to proceed. He referred to the prejudice to the defendant arising from death of the plaintiff's alleged abuser and some eighteen other potential witnesses, the unavailability of a further number of witnesses, and a gap of some thirty or more years since the events in question. The fact that one witness had been identified who could recall that a man by the name of PD had done some work as a handyman at the defendant's private nursing home between 1977 and 1980 was not, he submitted, a sound basis from which the judge could have reasonably ruled out a real or serious risk of an unfair trial.

17. Regardless of the findings of the High Court Judge, counsel submitted that this Court was entitled to exercise its own discretion and reverse the decision of the High Court judge if satisfied that the justice of the case required such an approach. He submitted that it was manifestly clear that the plaintiff's delay in instituting the proceedings was inexcusable, that the balance of justice favoured the dismissal of the proceedings and that the defendant was at a real risk of an unfair trial.

18. Counsel relied upon the decision of Henchy J. *in O'Domhnaill v. Merrick* [1984] I.R. 151, Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 256, and Hardiman J. in *Whelan v. Bridget Lawn*, *Legal Personal Representative of James Whelan Deceased* [2014] I.E.S.C. 75.

Submissions on behalf of the plaintiff/respondent
19. Mr. McGrath, S.C., on the plaintiff's behalf, submitted that there was nothing unusual about substantial pre-commencement delay in cases of alleged sex abuse such as the present one and that the trial judge was correct in his conclusion that her delay could be excused based upon the matters pleaded by her in her personal injuries summons.

20. Counsel submitted that this Court should be slow to interfere with the decision of the trial judge given that the defendant had failed to identify any error of principle in his judgment.

21. He also maintained that the defendant had not discharged the burden of proof which rests with the moving party on an application to dismiss proceedings based upon prejudicial delay and that the evidence it had advanced fell well short of that required to justify the dismissal of a claim concerning such grave allegations.

22. Counsel supported the findings of the trial judge to the effect that the defendant was not prejudiced by virtue of the death of PD particularly as there were several witnesses named in Sr. Behan's affidavit who might in fact be in a position to give evidence on the defendant's behalf. He submitted that the burden of proof required the defendant to make real efforts to trace any potential witness and that it was insufficient merely to state that their whereabouts was unknown. He instanced the fact that the defendant had sought to maintain that it was prejudiced because the whereabouts of two former employees who had worked in the laundry at the relevant time was unknown, yet it had not advised as to what, if any, efforts had been made to trace these two potential witnesses.

23. Counsel submitted that the defendant, at a minimum, should have placed advertisements in newspapers seeking to ascertain their whereabouts. Without knowing the totality of the evidence that might be available at trial, the defendant could not, he maintained, demonstrate sufficient prejudice to justify the proceedings being dismissed on the basis that it was at risk of an unfair trial.

The Jurisdiction of the Court of Appeal

24. As the parties were not *ad idem* as to the jurisdiction of this Court when dealing with the appeal from Barrett J., an order made by him in the exercise of his discretion, I will briefly refer to this issue which was recently considered at some length in *Collins v. Minister for Justice Equality and Law Reform and The Attorney General* [2015] I.E.C.A. 27, another case in which the court was asked to dismiss proceedings on the grounds of inordinate and inexcusable delay.

25. Following a consideration of a long line of authority in which somewhat divergent views had been expressed, this Court concluded that the judgment of McMenamin J. in *Lismore Builders (in receivership) v. Bank of Ireland Finance Limited* [2013] I.E.S.C. 6 correctly described the circumstances in which an appellate court may review an order made by a High Court judge in the exercise of his/her discretion. At p. 5 para.4 of his judgment he stated as follows:-

> "Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgment of Geoghegan J. in *Desmond v. M.G.N. Limited* [2009] 1 I.R. 737...."

26. Geoghegan J. in Desmond expressed some concern regarding the more traditional view that a discretionary order should not be interfered with by an appellate court unless the judge at first instance could be identified to have made an error of principle in the exercise of that discretion. He warned that to impose such a restriction could have a very significant impact on orders involving substantive rights. At p.743 he stated as follows:-

> "The expression "discretionary order" can cover a huge variety of orders, some of them involving substantive rights and others being procedural in nature including mundane day-to-day procedural orders such as orders for adjournments etc. I think in reality over the years since *in bonis Morelli; Vella v. Morelli* this Court has exercised common sense in relation to that issue. The court would be very slow indeed to interfere with a High Court judge's management of his or her list, but in a case such as this particular case were much more substantial issues are at stake for the court, while having respect for the view of the High Court judge, must seriously consider whether in all the circumstances and in the interests of justice it should re-exercise the discretion in a different direction."

27. In *Collins* the Court considered the nature of an application to dismiss proceedings on the grounds of inordinate and inexcusable delay and concluded that such applications require the presiding judge to decide mixed questions of law and fact rather than questions which might be considered to be of a truly discretionary nature. It also expressed itself satisfied that, given that applications of this type are resolved by reference to facts which are fully set out on affidavit, it is difficult to advance any valid reason as to why the merits of the High Court decision on such an issue should not be fully reconsidered on an appeal, should the interests of justice so require.

28. For the aforementioned reasons, I am satisfied that, while this Court must give due consideration to the conclusions of the High Court judge, it is nonetheless free to exercise its own discretion as to whether or not the claim should be dismissed, if satisfied that the interests of justice dictate such an approach.

Principles to be applied

29. There are two separate, but often described as overlapping, lines of *jurisprudence* which fall to be considered. The first, the *Primor* test, involves an examination by the court of whether or not there has been inordinate and inexcusable delay on the part of the plaintiff. If both such elements are established, and the onus is on the defendant in this regard, the Court then moves on to consider whether the balance of justice nonetheless rests in favour or against the dismissal of the proceedings. This three strand test was first described in some detail by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and later considered in greater depth by Hamilton C.J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where he advised at pp.475-476 as follows:-

> "The principles of law relevant to the consideration of the issues raised on this appeal may be summarised 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 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 judgement 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 that merely caused by the delay, including damage to defendant's reputation and business."

30. It is clear from this decision that the third leg of the *Primor* test requires the court to carry out a balancing exercise in the course of which it will put the interests of each of the parties and their conduct into different sides of a scales for the purpose of deciding whether the balance of justice favours allowing the case to proceed to trial. In this regard it is to be noted that one (emphasis added) of the factors that may go into that scales is whether the delay relied upon gives rise to a real risk that it is not possible to have a fair trial. This question however constitutes the sole consideration of the court when engaged with the alternative line of *jurisprudence* to which I will now refer.

31. In addition to its right to dismiss a claim on the grounds of inordinate and inexcusable delay, the court also retains a jurisdiction to dismiss a claim, in the absence of culpable delay on the part of the plaintiff, if satisfied that the interests of justice require such an approach, as was explained by Geoghegan J. in *McBrearty v. North Western Health Board* [2010] I.E.S.C. 27. This latter jurisdiction was first considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151 where Henchy J. expressed himself satisfied that a court might dismiss an action if it was satisfied that to ask the defendant to defend the action would place that defendant under an inexcusable and unfair burden. He explained the potential consequences for justice in cases which were substantially delayed in the following manner at p. 158 of his judgment:-

> "While justice delayed may not always be justice denied, it usually means justice diminished. In a case such as this, it puts justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial. For a variety of reasons a trial in 1985 of a claim for damages for personal injuries sustained in a road accident in 1961 would be apt to give an unjust or wrong result, in terms of the issue of liability or the issue of damages, or both. Consequently, in my opinion, the defendant, who has not in any material or substantial way contributed to the delay, should be freed from the palpable unfairness of such a trial."

32. While the *Primor* jurisdiction is usually exercised in proceedings where there has been post-commencement delay or a combination of pre- and post-commencement delay, the *O'Domhnaill* jurisdiction is most usually employed where, at the time the application to dismiss is brought, such a significant length of time has elapsed between the events giving rise to the claim and the likely trial date that the defendant can maintain that, regardless of the absence of blame of the part of the plaintiff for that delay, it would be unjust to ask to the defendant to defend the claim. The question most commonly considered by the court when exercising its *O'Domhnaill* jurisdiction is whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result.

The difference between the Primor and O'Domhnaill Tests

33. Many of the more recent decisions which have considered the *O'Domhnaill* jurisdiction have been delivered in what may be described as historic sexual abuse cases in which proceedings were commenced very many years after the acts of abuse were alleged to have been perpetrated. Three such decisions are those of Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 526, Hardiman J. in *Whelan v. Bridget Lawn and Others* [2014] I.E.S.C. 75 and Hogan J. in *I.I. v. J.J* [2012] I.E.H.C. 327.

34. It is clear from the relevant case law that a defendant may be able to rely upon the *O'Domhnaill jurisprudence* where it might otherwise fail the *Primor* test due to its inability to establish culpable delay on the part of the plaintiff. For example, in a case of alleged sex abuse where for all of the period of delay a plaintiff may maintain that they lived under the dominion of their abuser, the defendant would be unlikely to succeed in a *Primor* application, particularly if the plaintiff had evidential support for the allegation regarding dominion. However, that defendant could nonetheless maintain that, regardless of the absence of any culpable delay on the plaintiff's behalf, they should not be required to defend the claim because the period of delay since the events complained was such that it was at real risk of an unfair trial or an unjust result.

35. Having reflected upon many of the authorities in relation to the "delay" *jurisprudence,* I am satisfied that the third leg of the *Primor* test, which obliges the defendant to prove that the balance of justice favours the dismissal of the claim, does not carry the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the *O'Domhnaill* test.

36. While the *O'Domhnaill test*, i.e. is there a real risk of an unfair trial or an unjust result, is one of the factors which may be relied upon by a defendant in seeking to prove the third leg of the *Primor* test, the defendant relying on that test does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay. That this is so seems clear from the decision of Kearns J. in *Stephens v. Flynn* [2008] 4 I.R. 31 where he accepted that the defendant need only establish moderate prejudice arising from delay as justification for dismissing the proceedings on the third leg of the Primor test. In the following brief passage at p.38 para.22 he summarised the findings that that been made by Clarke J. in the court below:-

> "In considering where the balance of justice lay, he concluded that there had been a very significant delay. Not only had the plaintiff failed to render that delay excusable, he had failed to do so by a significant margin. He also concluded that the defendant, were he to be compelled to meet the case, would suffer prejudice, although he did not place that prejudice at a higher degree than moderate. He also held that there was no significant delay on the part of the defendant in exercising his right to apply for the dismissal of the action for want of prosecution."

37. Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O'Domhnaill jurisprudence*. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceedings if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the

defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?

38. Considering its jurisdiction having regard to the test in *O'Domhnaill ,* a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result.

European convention Article 6
39. In some of the more recent decisions concerning prejudicial delay, reference has been made to the constitutional imperative to bring to an end a culture of delays in litigation so as to ensure the effective administration of justice and the application of procedures which are fair and just.

40. Further, the Courts own obligations, stemming from Ireland's obligations under Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, have been deemed to be material to a decision as to whether or not proceeding should be dismissed on the grounds of delay. In a number of recent decisions, including those in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 (Hardiman J.), *Michael McGrath v. Irish ISPAT Limited* [2006] I.E.S.C. 43 (Denham J.), and *Rodenhuiz and Verloopb v. The HDS Energy Limited* [2011] 1 I.R. 611 (Clarke J.), the court has considered in some detail whether a recalibration or tightening up of the criteria relevant to delay applications is warranted. The upshot of such discussion, which it is not necessary to recite in the context of this judgment, is that the court, when dealing with an application to dismiss a claim on the grounds of delay, should factor into its considerations Ireland's obligations under Article 6 of the Convention.

Decision
41. I will first of all consider the judgment of the High Court against the Primor test.

Inordinate delay
42. While the parties are both agreed that it cannot be stated that this action is necessarily statute barred, because such an issue is always a matter for the defence of a claim, it is not disputed by the plaintiff that she had been guilty of inordinate delay in instituting these proceedings.

Was the delay excusable?
43. Given that this Court is required to give due weight to the findings of the High Court judge in the course of its considerations, it is to be noted that he concluded that the plaintiff's delay might be excused for the following reasons:

> (i) he was not satisfied that the plaintiff had ever escaped the dominion of her alleged abuser;
>
> (ii) he believed that she did not come from the type of background where she might be expected to commence court proceedings lightly or swiftly and;
>
> (ii) he believed that she continued to suffer from a myriad of miseries which appeared on their face to be connected to the abuse.

44. I regret to say that, having considered the evidence that was available to the learned High Court Judge, I am not satisfied that there was a sound evidential basis for these three findings. Firstly, there was no evidence that the plaintiff's abuser continued to have any dominion over her after the abuse alleged ceased in 1980, when she was sixteen years of age. In her personal injuries summons she does not plead, as she might have done, that PD continued to exercise any dominion over her. There is no assertion that she ever saw or met PD once the abuse ceased. Neither does she assert that he threatened her that if she ever reported the abuse that she might regret it.

45. Secondly, as to the conclusion of the trial judge that the delay in the commencement of the proceeding could be excused by reason of the plaintiff's apparently disadvantaged upbringing, I regret to say that I am not satisfied that there was evidence to support that finding. Indeed, most of the evidence was to the contrary. The endorsement of claim states that the plaintiff attended St. Mary's National School in Donnybrook and later St. Anne's Secondary School in Milltown. These facts would imply that she came from a relatively normal middle class background. Further, from her replies to particulars it is clear that she later worked as a currency clerk and assembly worker, and that she did a number of FAS courses in relation to retail sales and computers. There are no facts pleaded which would radically distinguish her from other litigants who day in day out pursue their rights or seek redress by the institution of court proceedings.

46. I am also satisfied that the facts pleaded are not remotely of the type considered by Costello J. in *Guerin v. Guerin* [1992] 2 I.R. 287, the decision relied upon by the trial judge in support of his conclusion that the delay could be excused by reference to the plaintiff's upbringing. In that case a boy who had suffered a serious brain injury in a car accident at four years of age instituted proceedings many years later following a chance meeting with a solicitor. The first named defendant sought to have the claim dismissed on the grounds of delay and Costello J., having heard extensive evidence from the plaintiff, his mother, two of his brothers amongst others over several days concluded at p.293 as follows:-

> "The delay of over twenty years in instituting these proceedings is indeed an inordinate one but is one which I think the courts should excuse. The plaintiff's family lived in one of the poorest sectors of the community, the permanently unemployed. With fourteen children to rear and dependent on welfare payments for their livelihood they must have lived most of their lives at or below subsistence level. Theirs was an economically and socially deprived world from which the world so familiar to lawyers in which people sue and are sued was remote and arcane. If, as I am sure was the case, they did not appreciate that their son might have had a cause of action to compensate him for the injury he had sustained, I do not think they should be blamed for this. Nor should Peter Guerin be blamed when having attained adulthood he failed to seek legal advice. He left school at a young age and has since been mainly unemployed. It seems to me that he had accepted his misfortune with considerable fortitude and that it never entered his head, until a chance meeting with a solicitor in 1984, that he had a right to seek compensation for what had happened to them. I would excuse both the plaintiff's parents and the plaintiff himself for the failure to institute these proceedings before 1984."

It was open to the plaintiff to swear an affidavit seeking to excuse her delay by reference to evidence beyond that contained in her personal injuries summons but she chose, for whatever reason, not to do so.

47. As to the conclusion of the trial judge that the "myriad of miseries" which the plaintiff had allegedly experienced in her lifetime

could excuse the delay, there was again next to no evidence to support such a finding. Unlike most cases were a plaintiff will seek to excuse delay of the type involved in these proceedings, no psychological or psychiatric evidence was put before the court to support what is otherwise a bald assertion on her part, namely that she suffers/suffered from the many difficulties referred to in the personal injuries summons. Further, there was no evidence to support the assertion at para. 18 of the summons that these had affected her ability to advance her proceedings. Indeed, insofar as the plaintiff relied upon a psychological condition to excuse her delay, there were no facts pleaded to show for what part, or parts, of the thirty year period of delay she was under such a disability. When asked by the defendant, in its notice for particulars dated 21st May, 2012, to state when she developed the post-traumatic stress disorder upon which she relied to contend that she had been disabled in her ability to advance the proceedings, she said in her reply of 10th August, 2012, that this "was a matter for evidence".

48. Having reviewed all of the evidence that was before the learned High Court judge, I am satisfied that there was insufficient evidence to excuse the plaintiff's delay in the issuing of these proceedings. This is particularly so in circumstances, where, during that period of delay, she married, reared a family and held down a number of positions of employment.

49. In all of these circumstances, I am quite satisfied that the plaintiff has been guilty of inordinate and inexcusable delay within the meaning of the *Primor* test.

Balance of justice

50. Notwithstanding the fact that the plaintiff has been guilty of inordinate and inexcusable delay, it is nonetheless necessary to consider whether the balance of justice might, notwithstanding such a finding, still favour allowing this action proceed to trial.

51. The first matter to be noted in relation to this issue is that the defendant has not been guilty of any culpable delay in its conduct in these proceedings, a factor that often adversely affects the right of a defendant to assert that the proceedings should be dismissed. It neither acquiesced in any delay on the part of the plaintiff nor induced her to incur any expense in pursuing a claim which it now maintains ought to be dismissed.

52. Of great significance to determining where the balance of justice lies, is the specific prejudice which the defendant maintains has arisen by reason of the plaintiff's inexcusable delay in pursuing these proceedings. In this regard I am satisfied that it would be hard for a defendant to demonstrate greater prejudice than that which arises for the defendant in this case, by reason of the fact that PD is believed to be dead.

53. In *Whelan v. Bridget Lawn and others* [2014] I.E.S.C. 75 Hardiman J., in the context of an application to dismiss the plaintiff's claim on the grounds of delay in a sexual assault action, stated that the "grossest imaginable prejudice" in a case where the basic facts are disputed by one person against another is the death of the defendant.

54. In *Whelan*, proceedings had been instituted in December 2008, within the relevant limitation period, by the plaintiff who alleged that between the years of 1989 and 1992 she had been abused by her grandfather, who was still living at the time. The proceedings were commenced when he was ninety one years of age, and he was still alive at the time the defendant moved to dismiss the claim on the grounds of delay. The principal prejudice alleged was the death of the plaintiff's grandmother who had lived with her husband, the alleged abuser, in the house where the plaintiff maintained the various assaults had taken place.

55. Charlton J., in the High Court, dismissed the proceedings on the basis that the defendant was at a real risk of an unfair trial, and this decision was upheld by the Supreme Court. By the time the appeal was heard, the defendant himself had died, and it was in this context that Hardiman J. stated at para.12 that the "grossest imaginable prejudice is the death of the defendant himself in a case where the basic facts are disputed by one persons word against another's."

56. Having discussed earlier in this judgment the differences between the *Primor* and *O'Domhnaill jurisprudence*, it is worth noting that in *Whelan* the court did not consider whether or not the plaintiff had been guilty of inordinate and inexcusable delay, as the proceedings had been issued within the limitation period, but choose to dispose of the application to dismiss the proceedings on the basis of the *O'Domhnaill* principles.

57. In the present proceedings, for the purposes of considering the third leg of the *Primor* test, namely, where the balance of justice lies, I am satisfied that the death of PD has visited the grossest imaginable prejudice upon the defendant. In this regard I fundamentally disagree with the conclusion of the learned High Court judge on the issue. It must be remembered that the defendant is sued on the grounds that it is vicariously liable for the wrongdoing of PD. Had PD been alive he might well have denied the allegations made against him, and the defendant would have had the benefit of his evidence in that regard. Even on a straight swearing battle as between the plaintiff and PD, PD's evidence may have been preferred to that of the plaintiff for any number of reasons. He may have been in a position, from facts only known to him, to challenge and undermine her evidence. He may have been able to call other witnesses such as work colleagues, friends or family capable of supporting his testimony or undermining that of the plaintiff. Accordingly, the defendant has not only lost the benefit of PD's own evidence but also the evidence of witnesses who might otherwise have been in a position to defend the allegations made by the plaintiff.

58. In cases where, by reason of the passage of time, the evidence available has become eroded to the point that a jury is left to choose between two different narratives advanced by plaintiff and defendant, there is a real risk that justice will be put to the hazard, as was advised by Hogan J. in *I.I. v. J.J.* [2012] I.E.H.C. 327. However, the situation becomes much more perilous from a defendant's perspective in a scenario, such as would emerge in this claim, where the jury would not have the benefit of any evidence or narrative from the person against whom the fundamental allegations are made. An action in which the defendant can call no evidence at all on the central issue, as would occur if this case were allowed to proceed to trial, would clearly lack the concepts of mutuality and fairness which are essential for the administration of justice.

59. In the absence of PD, the defendant is not in a position to challenge or counter the allegations of abuse which the plaintiff makes. The only possibility it would have of undermining the plaintiff's claim would be by reference to factual statements made by the plaintiff in the course of her evidence. However, in circumstances where, almost to a man or woman, those who were alive at the time of the alleged abuse are dead or incapable of giving evidence, the defendant is once again left in a hopelessly vulnerable situation. Further, those witnesses that might have been able to assist in giving evidence referable to the issue as to whether or not the defendant ought to be deemed vicariously liable for the actions of PD, should findings of abuse be made against him, are effectively non existent.

60. I am quite satisfied that the death of PD alone is of such prejudicial magnitude that it warrants the court determining the balance of justice issue against the plaintiff. However, the death of all of the other witnesses referred to by Sr. Behan in her affidavit puts the issue beyond doubt. As already stated by Kearns J. in *Stephens*, even moderate prejudice against a backdrop of inordinate

inexcusable delay may be deemed sufficient to tip the scales of justice in favour of dismissing the proceedings. It would be patently unfair and unjust to ask this defendant to defend this action after the lapse of time involved in the light of the prejudice that has been visited upon it due to the plaintiff's inexcusable delay. Accordingly, I am satisfied that the defendant has established on the evidence adduced that the balance of justice warrants the dismissal of the proceedings.

61. Lest there be some doubt as to the test that ought to be employed on an application such as the present one, it is worthwhile considering whether the defendant's application should also succeed on an application of the *O'Domhnaill* principles. In other words, is there a real or serious risk of an unfair trial or an unjust result if this action were to be permitted to proceed to trial?

62. As I have already dealt to some extent with the manner in which the defendant is likely to be prejudiced by reason of the plaintiff's delay in prosecuting her claim when considering the third leg of the *Primor* test, it is unnecessary to revisit these facts when considering whether the defendant is at risk of an unfair trial or an unjust result. However, in addition to what has been already stated, the defendant's ability to obtain a fair trial has been made all the more precarious by the following facts:-

> (i) many of the acts of alleged abuse took place at locations well removed from the defendants premises;
>
> (ii) the plaintiff herself was not a resident or in the care of the defendant at the time of the alleged abuse and therefore, presumably, would not have been known to members of the community or to those who worked there in the same way as a child who was so resident might be remembered. For the same reason, the defendant does not have any documents or records concerning the plaintiff's health or welfare as might be the case if she had been in the defendant's care at the relevant time.
>
> (iii) the plaintiff never reported the abuse of which she now complains to anybody until November of 2009. The accuracy of her account of events cannot be tested against any even remotely contemporaneously account of what is now alleged to have occurred.

63. Against the aforementioned background, can it realistically be contended that, because one witness has been located who remembers a man by the name of PD working at the defendants nursing home over thirty years ago and because there may potentially be four other people alive who lived or worked at the defendants premises over the period of alleged abuse, the defendant is thus not at risk of an unfair trial or an unjust result? The answer in my view is a resounding 'No'

64. I reject the submission made by counsel on behalf of the plaintiff that the defendant's application should fail because it has taken insufficient steps to establish the whereabouts of four of the potential twenty nine witnesses that might have been available to the defendant in these proceedings. That type of criticism might be valid in a case where it is alleged that something occurred in the presence of a particular individual and the defendant had not sought to track that person down. However, the witnesses whom the plaintiff complains the defendant should have more hotly pursued are so peripheral in the content of the enormous prejudice caused by the death of PD that such an argument is unsustainable.

65. Having considered the evidence that was before the High Court, I am quite satisfied that to allow this action proceed would, to use the words of Henchy J., "put justice to the hazard", given that I am fully convinced that the issues between the parties are now long "beyond the reach of fair litigation". The defendant would not only be at risk of an unfair trial but to my mind would enjoy no prospect whatsoever of a fair hearing or a just result. Any trial as might take place would, as Kelly J. stated in *Kelly v. O'Leary* [2001] 2 I.R. 526 at p.544, "be far removed from the form of forensic enquiry which is envisaged in the notion of a fair trial in accordance with the law of this State" and would amount to what was described in *O'Keeffe v. Commissioners of Public Works* (Unreported, Supreme Court, 24th March, 1980) as a "parody of justice". Further, the Court itself would be unable in the circumstances to fulfil its constitutional mandate under Article 34 of the Constitution, given that this can only be met by the provision of a fair trial based on procedures which are fair and just for both parties.

In the aforementioned circumstances, I have come to the conclusion that the defendant is also entitled to have this action dismissed in the exercise by the Court of its jurisdiction as per the O'Domhnaill test.