Neutral Citation Number: [2007] IEHC 473

THE HIGH COURT

JUDICIAL REVIEW

2003 No. 798 J.R.

BETWEEN

CECILY CUNNINGHAM

APPLICANT

AND

THE PRESIDENT OF THE CIRCUIT COURT AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice William M. McKechnie delivered the 6th day of July, 2007.

Background

1. The applicant in the above entitled proceedings joined the Blood Transfusion Service Board (hereafter known as the B.T.S.B.) in 1967 and from 1974 onwards, held the grade of Principal Biochemist working largely in the Fractionation Department at Pelican House. She continued in that role until, having previously taken sick leave, she formerly resigned in February, 1999. This Department was responsible for the production of a substance known as Anti-D, which was a specific immunoglobulin given to mothers to prevent them becoming immunised to rhesus antigen. This substance had, as its raw material, human plasma which was obtainable from donors within the general public. It was normally produced in batch units which were then subdivided into doses. Unfortunately some batches became contaminated in that the relevant donors, who for the purpose of this case have been identified as patient "X" and donor "Y", had contacted Hepatitis C prior to their plasma being taken, and of course prior to its use in the manufacture of Anti D. Most tragically a great number of people became directly affected by the end product and many died. Many more suffered great and permanent damage to their person and their bodily structures. The entire episode and the enduring consequences which are felt even to this day, have seriously traumatised the lives of many people and their families.

2. In February, 1994 Dr. Jane Power, a Consultant Haematologist, established a definite link between the administration of Anti D and the subsequent development of Hepatitis C in some of those to whom the product was given. There was widespread condemnation with public and political outcry as a result. In 1994, the then Minister for Health, established an expert group to investigate "all the circumstances surrounding the infection of the Anti D Immunoglobulin product, manufactured by the Board." That report was published in January, 1995. In October, 1996 a Tribunal of Inquiry was set up under the former Chief Justice to enquire into and to make recommendations on this issue and all other related matters. Mr. Justice Finlay reported in March, 1997. That report was then sent to the Director of Public Prosecutions (hereinafter the "D.P.P." or the "Director"). A Garda investigation followed and ultimately the D.P.P decided to prosecute two people, Ms. Cunningham and a Dr. Walsh, who has since died. Alleging that the applicant had a responsibility for the production and issue of two contaminated batches in 1977 and two further such batches in 1991, the D.P.P levelled certain specific charges against her. On 28th July, 2003, Ms. Cunningham was charged with seven offences contrary to s. 23 of the Offences Against the Person Act, 1861. Four of these relate to the time period between 28th May, 1977 and 10th August, 1977, with the other three covering the period from 10th December, 1991, to 14th April, 1992. Each charge, which relates to a different lady, has a common form and reads as follows:-

> "For that you the said accused did, on or about the 10th December, 1991, at Holles Street Hospital, Holles Street, Dublin 2 in the Dublin Metropolitan District, unlawfully and maliciously cause a noxious thing, namely infected Anti D Immunoglobulin, to be taken by (injured party) thereby inflicting on (injured party) grievous bodily harm."

The continuation of this prosecution stands aside to await the final outcome of this judicial review application.

3. On 3rd November, 2003, the applicant was given leave, by O'Sullivan J., to seek an order prohibiting the continuation of her trial on the grounds of delay and prejudice. In specific terms she seeks a declaration "that the delay in instituting the criminal proceeding" and "in bringing them to a hearing" has prejudiced her generally and specifically with regard to her right to a fair trial, and that such delay is of a type where prejudice can be inferred. She relies on Article 38 and 40.3 of the Constitution in this regard as well as article 6 of the European Convention on Human Rights. Her Solicitor, Mr. William Egan of Egan Cosgrave and Associates, has sworn the grounding affidavit on her behalf. As is customary, the first named respondent has taken no part in these proceedings with the D.P.P. acting as "*legitimus contradictor*". In the Statement of Opposition which has been filed, there is a clear denial of any delay on the part of either the investigatory or prosecutorial agencies of this State and the allegation of prejudice is strongly rejected. In addition it is alleged that the Garda investigation was complex, containing much documentary material, and as a large number of complaints were received, the interview process itself involved more than 70 people. Given these and other circumstances the case was such as to be correctly described as being one of the most complicated ever mounted by that force. There was therefore no culpable delay which could justify the termination of the criminal proceedings. In support of this opposition, the principal replying affidavit was sworn by Detective Superintendent John O'Mahony, who together with a colleague of equal status, headed the criminal investigation into the matters referred to. There were two further affidavits sworn by Professional Officers with the D.P.P. who were cross examined on the role of that office in this case. Both parties made oral submissions supporting the comprehensive written documents previously submitted for this Courts assistance.

For completeness I should say that during the documentation process, an issue arose with regard to discovery which gave rise to a judgment of the Supreme Court delivered on the 26th February, 2006; *Cunningham v. President of the Circuit Court*, [2006] 3 I.R. 541. That issue is no longer relevant to this case.

4. At the outset it is important to set out the most significant dates, events and circumstances which constitute the background to this application. In so doing I propose to give, in general terms only, a chronology of such events and later in the judgment to comment in more detail on certain specific matters. This chronology is as follows:

> 24th Feb, 1977 – 3rd May, 1977: Manufacture, production and issue of Batch No. 237 - allegedly contaminated;
>
> 28th Feb, 1977 – 13th May, 1977: Manufacture, production and issue of Batch No. 238 – allegedly contaminated;
>
> 28th May, 1977 – 10th August, 1977: Dates of four alleged offences;
>
> 22nd July, 1991 – 1st Nov, 1991: Manufacture, production and issue of Batch No. 576 – allegedly contaminated;

9th Sept, 1991 – 20th Nov, 1991: Manufacture, production and issue of Batch No. 578 – allegedly contaminated;

10th Dec, 1991 – 14th April, 1992: Dates of remaining three alleged offences;

February, 1994: Dr. Joan Power, establishes a definite link between the administration of Anti-D products and the subsequent development of Hepatitis C in some recipients;

1994: B.T.S.B. puts in place a national screening programme to deal with this matter;

4th March, 1994: An expert group is established by the Minister for Health to investigate all relevant circumstances surrounding this contamination and infection;

January, 1995: The report of the expert group is finalised and published;

24th October, 1996: A Tribunal of Inquiry is established under Mr. Justice Finlay to enquire into all relevant matters;

6th March, 1997: The Report of the Finlay Tribunal is finalised and published;

11th March, 1997: The Finlay Report is sent to the D.P.P., with a request that its contents be considered;

18th June, 1997: D.P.P. seeks Senior Counsel's advices;

25th July, 1997: D.P.P. writes to the Garda Commissioner requesting an investigation into one area arising out of evidence given to the Tribunal by a member of the Irish Haemophilic Society.

This evidence suggested that 57 people who had been infected, had already died. The Commissioner was asked to ascertain whether any of these deaths had occurred within one year and a day of the deceased having become infected with contaminated products;

July, 1997: The Commissioner appoints Assistant Commissioner (A/C) James McHugh to lead this investigation;

1st August, 1997: A/C McHugh contacts the Irish Haemophilia Society and requests its assistance in obtaining relevant information;

August, 1997: Mr. Raymond Bradley, Solicitor, responds on behalf of the Society; which declines to furnish this information as to do so would breach confidentiality;

4th September, 1997: The Assistant Commissioner (A/C) informs the D.P.P. that, without the Society's co-operation, it would not be possible to further this investigation;

6th October, 1997: The D.P.P. writes to the Secretary General of the Department of Health indicating that no prosecution is possible under the existing criminal law;

22nd October, 1997: The D.P.P. writes a similar letter to the Commissioner;

27th November, 1997: Letters are received by the Gardaí from the McCole Family and from the Positive Action Group, alleging certain breaches of the criminal law in the Hepatitis C affair;

November/December, 1997: The Commissioner directs a criminal investigation into these complaints and appoints two senior members of the National Bureau of Investigation to lead the investigation;

December, 1997: D/Chief Superintendent Sean Camon, Head of this Unit, and other Gardaí meet with members of the Positive Action Group;

January, 1998: The investigation team, under D/Superintendent Martin Callinan and D/ Superintendent John O'Mahony, receive the names of 73 injured parties from Positive Action Group. Five of these subsequently withdrew their names;

20th January, 1998 – June, 1998: This team commences to take witness statements from the injured parties and by June, 1998 statements had been obtained from the seven injured parties in respect of whom the above charges relate, and also from patient "X" and donor "Y". A further statement was taken from one injured party on 30th October, 1998;

17th May, 1999: Gardaí interview Ms. Cunningham, who on legal advice declines to make a statement;

26th May, 1999: Gardaí interview Dr. Walsh and another doctor;

17th June, 1999: Gardaí receive a prepared statement from Dr. Walsh;

4th October, 1999: Gardaí conduct a second interview with Ms. Cunningham, who on legal advice declines to answer any of the substantial number of questions put to her;

October, 1999: Gardaí send investigation file to D.P.P;

February, 2000: The D.P.P. seeks further advices from Senior Counsel;

April, 2000: Senior Counsel advices was received by D.P.P.;

2nd June, 2000: The D.P.P. requests the Gardaí to further investigate a number of matters raised by counsel;

15th June, 2000: D/D Superintendent Martin Callinan writes to Mr. Martin Hayes of the B.T.S.B;

26th June, 2000: The same Garda writes to Dr. Yap at the University of Edinburgh, seeking his opinion on certain points;

7th July, 2000: Dr. Yap responds by stating that he would not be in a position to deal with this request, until at the earliest, August;

18th July, 2000: Dr. Joan Power writes to Superintendent Martin Callinan;

3rd August, 2000: Mr. Hynes replies to the Superintendent's letter of the 26th June, 2000; Statement obtained from Dr. Emer Lawlor, which may in effect be a reply to the letter of the 15th June, 2000;

October, 2000: D/ Superintendent Sean Camon, who is then in charge of the investigation, sends a report to the D.P.P. updating him on progress. He points out that a response was still awaited from Dr. Yap;

January, 2001: The D.P.P. furnishes the Gardaí report to Senior Counsel and requests further advices;

March, 2001: Senior Counsel furnishes these advices. Junior Counsel was also retained, and supplied with a full set of documents, including all advices received from Senior Counsel, and asked to consider the entire file;

7th November, 2001: Meeting between Junior Counsel and members of the investigation team. Junior Counsel is requested to further advise;

12th November, 2001: D/Superintendent Callinan writes to Dr. Yap and asks if he was in a position to furnish the information previously requested in July, 2000;

11th December, 2001: Junior Counsel advises;

14th January, 2002: The D.P.P. forwards this opinion to the Gardaí;

January, 2002: The D.P.P. receives advices from Senior Counsel;

January, 2002: The D.P.P. meets with the Gardaí at which he requests clarification on a number of points;

21st January, 2002: D/Superintendent Callinan writes to the D.P.P. clarifying a number of points. Further enquiries are necessary in respect of the identification of further victims;

February, 2002: Junior Counsel asked to prepare draft Book of Evidence;

March, 2002: Copy of Garda investigation file forwarded to Junior Counsel;

May, 2002: Further opinion from Senior Counsel sought and obtained;

14th May, 2002: Consultation between D.P.P. and the investigation team in which further information is sought by the D.P.P;

7th June, 2002: The D.P.P. writes to the Gardaí enclosing a copy opinion from Senior Counsel;

20th November, 2002: D.P.P. seeks clarification on a number of matters including the willingness of patient "X" and donor "Y" to give evidence in court. As donor "Y" had changed address contact was difficult;

November, 2002: The D.P.P. meets with counsel;

December, 2002: The D.P.P. and Gardaí meet;

7th January, 2003: The Gardaí write to the D.P.P;

31st March, 2003: Junior Counsel raises queries regarding exhibits;

3rd April, 2003: The Gardaí reply to this letter and attach an additional statement from D/Superintendent Callinan;

April, 2003: Senior Counsel asked to review draft Book of Evidence. Further clarification requested by the D.P.P.;

15th May, 2003: The Gardaí respond to this query by way of an additional statement from Dr. Power;

1st July, 2003: The D.P.P.'s directions are finalised and faxed to the Gardaí on 4th July directing that the charges above identified, be proffered against Dr. Walsh and Ms. Cunningham;

23rd July, 2003: Ms. Cunningham arrested and charged.

5. Within the broad framework of the above facts, there are of course a number of specific areas which require more detailed analysis. These include the circumstances giving rise to the claim of specific prejudice which have been examined in considerable detail by the parties, but in particular by the applicant. She claims, *inter alia*, that the deaths of Mr. Hanratty, Dr. Walsh, Dr. J.J. Wilkinson, Dr. Jack O'Riordan and Dr. David Dane and the unavailability of Mr. Cann, all prevent her from producing corroborative evidence of her intended defence to these charges. In addition counsel on her behalf having looked at the Book of Evidence, highlighted the statements of certain witnesses and the reference to certain documents, which he claims are highly prejudicial to his client's right to receive a fair trial. Moreover counsel has made detailed observations on the chronology of the dates and events and has identified what he claims are definite periods of inactivity which remain unaccounted for and unexplained. Overall therefore, the case presented on her behalf raises an issue of prejudice and an issue of delay in the context of her right to a trial in due course of law under Article 38.1 of the Constitution.

Submissions

6. In order to understand the D.P.P.'s response and to follow the court's decision, it would I feel be helpful at this stage to outline the parties views on the law and my conclusions thereon. In this regard the applicant submits as follows:

(1) Even though there is no Statute of Limitations in this country dealing with the prosecution of indictable offences, there is nevertheless, within Article 38.1 of the Constitution (which gives to every person a right to a trial in due course of law), a right to a trial with reasonable expedition: *State (O'Connell) v. Fawsitt* [1986] I.R. 362, at 378 confirms this.

(2) What circumstances might give rise to a breach of this right must be viewed in the factual context of each specific case. In *D.P.P. v. Byrne* [1994] 2 I.R. 236 at 260, Denham J. said:-

> "Whereas there is no specific constitutional right to a speedy trial, there is an implied right to reasonable expedition, under the due process clause. An accused is entitled to have a trial free of abuse of process.
>
> I am satisfied that this right falls to be analysed on an *ad hoc* basis. In determining whether that right has been infringed the four factors identified by the Supreme Court in the United States of America in considering their speedy trial right in *Barker v. Wingo* (1972) 407 U.S. 514, are matters, *inter alia*, to be considered. Powell J. stated (at p. 530):-
>
> > 'A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant'"

(3) Before a court would prohibit the continuation of a trial, it would have to be satisfied that there is a real or probable risk that the accused person would not receive a fair trial. Such a person may establish this by persuading a court to infer, from excessive delay alone, the real existence of such a risk or alternatively by proving certain facts which give rise to a particular prejudice and thus to the risk of an unfair trial. Finlay C.J. in *D.P.P. v. Byrne* at pp. 244 and 245 is relied upon in this regard.

(4) The applicant then referred to *P.M. v. D.P.P.* [2006] 3 I.R. 172 which she described as having "refined" the above statements of law. That case was a sex abuse case in which issues of both complainant and prosecutorial delay were raised. When dealing with the latter Kearns J. (at pp. 185 and 186) said:-

> "I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient *per se* to prohibit the trial, but that one or more of the interests protected by the right to an expeditious trial must also be shown to have been so interfered with, such as would entitle an applicant to relief".

The judgment of Geoghegan J., in the same case, was also opened and in particular that part thereof which touched upon the decision of Keane C.J. in *P.M. v. Malone* [2002] 2 I.R. 560. Geoghegan J., (at pp 175 and 176) said:-

> "… the distinction between pre-complaint delay and post- complaint delay is clearly acknowledged. In so far as pre-complaint delay alone is relied upon to obtain injunctive relief, the risk of an unfair trial is the only issue. Where post-complaint delay is involved however the discrete right to an expeditious trial comes into play. As has often been adverted to, the two rights may in some respects overlap. Where the issue however is one of a fair trial the courts will normally not injunct the trial in the absence of evidence of probable actual prejudice in the defence. Where however there is a serious issue of blameworthy prosecutorial delay and the issue is the right to an expeditious trial, it would not always be essential to prove actual prejudice in order to obtain injunctive relief. The court is entitled to consider the anxiety caused by the delay. That anxiety however great may not necessarily constitute prejudice in the defence."

(5) From these cases Ms. Cunningham alleges that where the issue is one of pre-complaint delay an accused person must prove a probable risk of an unfair trial, a view which she says is also supported by the Supreme Court in *H. v. D.P.P.* 21st July, 2006, but that where the issue is one of prosecutorial delay there is no such requirement. In such circumstances, the passages above quoted from the judgments of Geoghegan J. and Kearns J. apply, where the relief sought is one of prohibition or injunction.

(6) In addition it was accepted that if the right to reasonable expedition had been breached, but not in a manner to jeopardise a fair trial, the "balancing process" referred to by Keane C.J. in *P.M. v. Malone* [2002] 2 I.R. 560 at p. 581 would have to be engaged in.

7. In response the following submissions were made by the second named respondent:

(1) The D.P.P's. starting point was that this case is governed by the judgment of Denham J. in *D.C. v. D.P.P.* [2005] 4 I.R. 281 where the learned judge at p. 283 said:-

> "Such an application [for the prohibition of a trial] may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the [Director of Public Prosecutions] an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. The [Director] having taken such a decision, the courts are slow to intervene. Under the Constitution it is for the jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.
>
> In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial, the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial.

It is this exceptional jurisdiction which the applicant wishes to invoke. Such jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this court is whether there is a real risk that by reason of the particular circumstances the applicant could not obtain a fair trial".

(2) Having failed to show any facts which could constitute such "exceptional circumstances", the applicant, according to the D.P.P., has failed this most basic test and therefore her application should not succeed.

(3) On the more general principles which deal with prosecutorial delay, the first case which the D.P.P. referred to, was *P.M. v. D.P.P.* [2006] 3 I.R 172, and in particular the judgment of Kearns J.. In his decision the learned judge described how up to then, there was reason to believe that there were two judicial lines of approach when dealing with delay. One was to the effect, that where a long lapse of time occurred before the making of a complaint, it was particularly important thereafter that there should be no blameworthy delay either on the investigation or prosecution side. Where either existed, an injunction should issue even in the absence of any prejudice to the applicant. The other line of approach was that even in such circumstances the applicant had to satisfy the court that he suffered or was in real danger of suffering from "some form of prejudice". Of the two approaches taken, Kearns J. preferred the latter and the Supreme Court so agreed.

(4) Kearns J. then referred to what Keane C.J. had said in *P.M. v. Malone* [2002] 2 I.R. 560. At p. 581 of the report the former Chief Justice stated:-

"Where, as here, the violation of the right has not jeopardised the right to a fair trial, but has caused unnecessary stress and anxiety to the applicant, the court must engage in a balancing process. On one side of the scales, there is the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay. On the other side, there is the public interest in the prosecution and conviction of those guilty of criminal offences. In all such cases, the court will necessarily be concerned with the nature of the offence and the extent of the delay."

Approving of and adopting this balancing approach Kearns J. went on at p. 18 to say:-

"It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, whilst he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial.

As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances. A court may have the ability to direct that a particular trial be brought on speedily and be given priority, although precisely how this would be policed or operated in practice may be problematic."

(5) It is claimed in general that, the courts in the recent past have decidedly shifted the focus in all delay cases onto the issue of prejudice. The judgment of the Supreme Court in H. v. D.P.P. [2006] IESC 55, (a sex delay case) is illustrative of this point where the Murray C.J. said:-

"…I am satisfied that it is no longer necessary to establish such reasons for the delay. The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The court would thus restate the test as:-

> The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in the light of the circumstances of the case."

Accordingly where these principles apply, there is now no longer any necessity to justify what has been commonly referred to as complainant delay, with the only question being, whether or not the prejudice claimed, is such as to give rise to a real or serious risk of an unfair trial.

(6) A number of other cases were also referred to, including *P.H. v. D.P.P.*, S. Ct. U/R 29/1/07, where Hardiman J. held that if the missing evidence, or even the essence of it, which was sought to be relied upon as establishing prejudice could be obtained from another source, then that may be sufficient to "avoid the inference that there is a real or serious risk of an unfair trial". Kearns J. in *C.K. v. D.P.P.*, S. Ct.; 31/1/07, pointed out that where appropriate 'directions or warnings' from a trial judge are a sufficient protection against prejudice, no injunction or prohibition will issue. The learned judge also mandated every applicant, who seeks to prematurely stop his trial on sex abuse cases, to fully and actively engage with the facts, as otherwise his application may not give a true picture of the existence or absence of real prejudice. In this respect Kearns J. was endorsing what Hardiman J. had said in *J.B. v. D.P.P.*, S. Ct. U/R 29/11/06.

(7) In conclusion it is claimed on behalf of the D.P.P. that these cases demonstrate the following:-

1. In order to raise prejudice an applicant has to fully engage with the facts and to clearly explain why the missing witnesses or documents was essential to his defence.

2. That prejudice will not be sufficient to prohibit a trial if it relates to evidence, the essence of which can be obtained from other sources.

3. That where prejudice is established the onus is on the applicant to establish why one cannot rely on warnings from the trial judge to ensure a fair trial.

> It is submitted, that these principles when applied to the circumstances of this case, lead inescapably to the conclusion that the applicant has failed to discharge the onus of proof which is upon her, and thus this Court should not entertain the relief which she now seeks.

Conclusions:

8. In the United States of America, the Sixth Amendment of the Constitution, insofar as it is material, provides as follows:-

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial …"

Although this is a stand alone right in American law, it is frequently spoken of and discussed in conjunction with, or else in the context of, the Fourteenth Amendment which provides:-

> " … nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws".

In the Constitution of Ireland there is no express right to parallel that contained in the Sixth Amendment, but the right to a trial with reasonable expedition has undoubtedly a constitutional basis in Article 38.1 of the Constitution. That article reads:-

> "No person shall be tried on any criminal charge save in due course of law". Such a right, whether expressed positively (as a right to a speedy trial, or as a right to a trial with reasonable expedition), or negatively (as a right to a trial without undue or excessive delay), is now so well established in our constitutional jurisprudence that its protection is readily enforceable at that level.

9. In addition however, this right also has an existence independent of the Constitution. In *The State (Healy) v. Donoghue* [1976] I.R. 325 at pp. 335 and 336 of the report, Gannon J., having specified certain rights to which an accused person is entitled to, went on to describe such rights as being:-

> "…Among the natural rights of an individual …" and, having incorporated within that phrase "rights such as the right to reasonable expedition …"

The learned Judge continued:

> "The rights I have mentioned are such as would necessarily have a bearing on the result of a trial. In my view, they are rights which are anterior to and do not merely derive from the Constitution, but the duty to protect them is cast upon the courts by the Constitution".

(See the endorsement of much of this particular passage, by O'Higgins C.J. at p. 349 of the report.) Hence it seems clear that the right in question has an origin which pre-dates the establishment of the Constitution and thus of necessity must also have a foundation outside of that Constitution.

10. That such is the case was also identified by Warren C.J. in *Klopfer v. North Carolina* 386 US 213(1967), where in his judgment, he explained that the source of such a right within the US, derives from their English law heritage. He then traced its history from the Assize of Clarendon (1166) through the Magna Carta (1215), via Coke and his Institutes, and thereafter through the law schools and ultimately into the US Constitution. This recognition by the Chief Justice of the origin of such a right and of its common law history was quoted with approval by Murphy J. in *State (O'Connell) v. Fawsitt* [1986] I.R. 362 and by Keane J., in *P.C. v. D.P.P.* [1999] 2 I.R. 25 at pp.65 and 66. Indeed Keane J. pointed out that Lavery J., *In the Matter of Paul Singer (No.2),* (1960) 98 I.L.T.R 112 at p. 66 referred to such a right as "a right enjoyed for centuries". Therefore it seems to me that there is the highest authority for the proposition that this right exists in and as part of the common law, and of course of far more importance, it also derives from the constitutional provisions above mentioned.

11. As is clear and as is clearly accepted, the constitutional basis of this right is not found in any specific provision of the Irish Constitution which might be comparable to the Sixth Amendment in the US Constitution. Rather it is within the "due course of law" general provision contained in Article 38.1. This manner of incorporation into our Constitution should not be taken to mean that such a right is in anyway abridged, weakened or otherwise diluted. Its status, scope, applicability and remedy for its breach, are in no way adversely affected by its identification within Article 38.1. This I believe is not controversial but in any event follows from the judgment of the Supreme Court in *D.P.P. v. Byrne* [1994] 2 I.R. 236.

12. In that case, which dealt with a variety of issues, judgments were delivered by Finlay C.J., with whom Egan J. agreed, by Blayney J, with whom O'Flaherty J., agreed and by Denham J. At p. 244 of the report the Finlay C.J., having referred to Article 38.1 of the Constitution, and having quoted a passage from the *State (Healy) v. Donoghue* , [1976] I.R. 325, which identified the right to a trial with reasonable expedition, went on to say:-

> "In some constitutional structures the right to a speedy trial or to a trial with reasonable expedition is separately provided for from the right to a trial in due course of law or by due process of law. The most obvious and well known example of this is the existence in the Constitution of the United States of America of the Sixth Amendment and Fourteenth Amendment. The Sixth Amendment provides the right 'to a speedy and public trial, by an impartial jury' and the Fourteenth Amendment provides 'nor shall any state deprive any person of life, liberty or property without due process of law'. As is clearly implied in *The State (Healy) v. Donoghue* [1976] I.R. 325 by this court as well as by the High Court, the importance of the protection of the right to a trial with reasonable expedition is not in anyway lessened by the fact that the constitutional origin of it in our law arose from the general provision for a trial in due course of law rather than from a separate express provision of a right to a speedy trial".

Although the Chief Justice was in the minority as to the ultimate conclusion reached, nevertheless I believe that this passage had the approval of the other members of the courts.

13. Finlay C.J. then instanced two ways in which a real or probable risk of an unfair trial could arise. Firstly, a court might be satisfied from "an excessive length of time itself" to raise such an inference, or secondly, (and more frequently) an accused person may establish on facts a particular prejudice. Having approved of what Powell J. said in *Barker v. Wingo* 407 US 514 [1972], on the question of prejudice, Finlay C.J. went on to say at pp. 245 and 246:-

> "… I am driven to the further conclusion that, of necessity, instances may occur in which a delay between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable would give rise to the necessity for a court to protect the constitutional right of the accused by preventing the trial, even where it could not be established either that the delay involved an oppressive pre-trial detention, or that it created a risk or probability that the accused's capacity to defend himself would be impaired. This must lead of course to the conclusion that, on an application to prohibit a trial on the basis of unreasonable delay, or lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined."

14. I have always believed that this case established the following:

> (1) That the right to reasonable expedition may be violated where an accused person can, by reason of excessive or unreasonable delay, establish prejudice leading to a real or probable risk of an unfair trial.
>
> (2) That delay, between the alleged commission of the offence and the proposed date of trial, (a time period which covers both 'complainant' delay and 'prosecutorial' delay), which in itself can be categorised as unreasonable or excessive, can, without any reliance on prejudice, actual or presumptive, result in a breach of this right, and;
>
> (3) That where a violation on either basis has been established, the appropriate remedy is to prohibit the trial, there being no obligation to balance the vindication of that right with the exercise of any other constitutional right.
>
> (4) The reference by Denham J. (see para. 6(2) *supra*) to a "balancing test", was set in an entirely different context and had nothing whatsoever to do with the vindication of this right.

I know of no case to this day, (leaving aside 'sex delay' cases), which has either modified or overruled *Byrne*. In fact in *P.M. v. Malone* [2002] 2 I.R. 560, which was a "special category case", Keane C.J. referring to Byrne said at pp. 577 and 578:-

> "it is now clear that delay of itself, even where neither actual nor presumptive prejudice to an accused is demonstrated, may be a ground for restraining the continuance of the trial"

Notwithstanding this endorsement it is still said by both parties that subsequent cases have "refined" *Byrne*; a topic which I will again touch upon later in this judgment.

15. In *Knowles v. Malone and Others*, (Unreported, High Court, McKechnie J., 6th April 2001), I said, in relation to the passage from *Byrne* first quoted but being conscious of the entirety of the judgment:-

> " [that]… in my opinion [the passage] can only mean that the right, to include and embrace all of its constituents and elements, should differ in no way than as if such right had an independent base in a separate and distinct provision of the constitution. If this be correct the right is a stand alone right, the breach of which, in itself, and without more, can, in the appropriate circumstances attract the required and necessary relief. In saying this I fully appreciate that it also belongs to the family of rights, duties, obligations and responsibilities which are deducible from Article 38.1 of the Constitution and furthermore I clearly acknowledge that the right must also be considered in the context of that composite Article when it is appropriate to so do. Nevertheless if circumstances so warrant, the right in isolation could be invoked and relied upon. If I am right in this it must follow that when so relied upon, as a stand alone right, there is no necessity, if an invasion is established, to further consider it in the overall context of Article 38.1 and thus, no requirement to satisfy any residual test, as for example, whether the accused person can receive a trial "in due course of law". This question of course may also be posed, but in my view it is not a compulsory adjunct where a breach of the former right has been successfully relied upon."

It should be noted that the above passage did not deal with what is the correct approach so as to determine when, how, or in what circumstance a violation of this right might be established.

16. For my part I consider this right to be hugely significant and one of the core guarantees contained in the Constitution. As stated many times, this right exists not necessarily to serve an accused person (though it may) but also to serve the people, as in many instances a speedy trial may not suit a guilty person. Moreover it plays a crucial role in inspiring public confidence in the judicial system, with the courts being charged, as part of administrating justice, with its full and effective implementation. I therefore would be loathe to see its downgrading and sincerely hope that its standing has not been diminished as a consequence of the problems which "sex delay" cases have brought about. A strong and purposeful right to a trial with reasonable expedition is a yardstick by which our entire Constitution can be judged, in particular the value which we place on fundamental rights, as measured at least in part, by both domestic and international respect for such rights. Due and proper authority much therefore be afforded to it.

17. In this jurisdiction, as previously stated, the Supreme Court spoke of this right in 1964 when dealing with a habeas corpus application brought by Mr. Paul Singer, the basis of which was an allegation of delay in his return for trial: (*In the Matter of Paul Singer (No. 2)* (1964) 98 I.L.T.R 112). The right was firmly established at a constitutional level in the *State (O'Connell) v. Fawsitt* [1986] I.R 362. Where such a right exists, infringements occur and litigation follows: that is exactly what happened in this jurisdiction, e.g. see *Cahalane v. Judge Murphy* [1994] 2 I.R. 262 and *Hogan v. President of the Circuit Court* [1994] 2 I.R. 513. Incidentally none of the above cases were sex abuse cases – *Paul Singer* was essentially a fraud and forgery case; *Fawsitt* involved an assault occasioning actual bodily harm; *Cahalane* dealt with forgery and a conspiracy to defraud the Revenue; *Hogan* involved 49 offences of larceny, falsification of accounts and forgery, and *Byrne* (see para. 12 *supra*) was a prosecution under s. 49 of the Road Traffic Act 1961. Therefore issues of delay, dealing with both summary and indictment prosecutions and the judicial response thereto, were well recognised and established before our court system became engulfed in what we now commonly describe as "sex delay" cases. Up to about 20 years ago the number of such cases coming before our criminal courts were few and the number which sought Stateside orders or Judicial Review were even fewer. Then almost overnight as it were, revelation followed revelation. Not a day or a week could pass without the public been informed of yet another scandal. To compound the problem, these events often stemmed from a distant past with the perpetrators frequently belonging to religious orders or else occupying high positions of trust. Because of the vast numbers involved, the positions of authority held by such persons and the vulnerability and suffering of their victims, society was presented with truly a scandal of enormous proportions. Matters were made worse because the general public had no forewarning or even a suspicion of what was happening. A problem of an immediate and instant nature thus arose. Since many of these incidences had taken place several years previously, the question was how could an accused person be prosecuted, in a manner which did not violate his right to reasonable expedition or otherwise infringe Article 38.1 of the Constitution. However critical the problem was, the finding of a solution was even more so. Because if such persons could not as a matter of principle be prosecuted, than both the public and political structures of this country, could have lost faith in our judicial system. With no help or assistance forthcoming from the

legislature, it fell upon the courts to deal with this matter. It is therefore entirely unsurprising that a special jurisdiction was developed to deal with such cases. These cases therefore fall into a particular category of their own. This was first suggested by the Supreme Court in *G. v. D.P.P.* [1994] I.R. 374 at 380 and further developed in *Hogan v. President of the Circuit Court* [1994] 2 I.R. 513 where at p. 521 the Finlay C.J., speaking for the court, said:-

> "For example, cases consisting of charges by young children in regard to assaults on them at an early age which are not brought to the attention of the authorities by such children until very many years after they occurred involve wholly different considerations from those applicable to the present case."

The same theme was continued by Denham J., in *B. v. The Director of Public Prosecutions* [1997] 3 I.R. 140, when she described such cases as falling into a "special category" (p. 196). In *H. v. The Director of Public Prosecutions*, S. Ct., U/R, 31/7/2006, the history of this unique jurisprudence was thoroughly outlined by Murray C.J. It was again recognised by Hardiman J. in *J.B. v. Director of Public Prosecutions*, S. Ct., U/R, 29/11/06, and again by that court, via the judgment of Kearns J., in *C.K. v. D.P.P.*, S. Ct., U/R, 31/01/07.

So there is no doubt but that in many important respects such cases were dealt with in a manner quite different to other cases within the criminal justice system.

18. Quite an important point therefore arises as to whether certain discrete principles of law which have been developed in sex abuse cases should have widespread application within the general criminal law? In particular I am referring to the right to reasonable expedition in a non sex delay case, to the circumstances in which a violation of that right may be established by delay itself, being one which does not lead to the risk of an unfair trial, and to the necessity or not in a post violation situation, of engaging in a balancing test for the purpose of remedy. Unfortunately, as appears from the submissions above summarised, these points were not as such debated in this case and therefore I should refrain from expressing any concluded views thereon. However some observations are apposite.

19. Prior to July, 2006 it was the established and practiced jurisprudence of the Superior Courts, to consider the issue of delay between the date of the offence and the making of the complaint, by reference to certain special features, including the making of a number of assumptions which the courts had developed over the years, in order to deal with the unique nature of sex abuse cases. In *H. v. D.P.P.*, S. Ct., U/R, 31/07/06, the Supreme Court, having traced the history of this particular jurisprudence, entirely reassessed all previous case law and came to the conclusion that it was no longer necessary to explain what is commonly described as 'complainant delay'. Thereafter the only test would be whether there was a "real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial or that the trial would be unfair as a consequence of the delay". It came to that conclusion by reason of its "extensive experience" supplemented by "knowledge incrementally assimilated" over the past decade. As a result, by reason "of the courts knowledge and insight" into these cases, the previous necessity of explaining this type of delay was no longer required. An exception was grafted onto this principle but could only apply in the rarest of circumstances. That decision, I suggest, could not surely have any wider import than sex abuse cases. This view is, I believe supported by, or is at least consistent with what Hardiman J. said in *J.B. v. D.P.P.*, S. Ct., U/R, 29/11/06, – "We have gone down the road of permitting cases of this nature to be brought after a period of time which would be fatal to any other case"-, and with the Supreme Court's decision in *C.K. v. D.P.P.*, S. Ct., U/R, 31/01/07, along with many of the other cases above cited. I therefore greatly doubt that the current jurisprudence with regard to sex abuse cases, can in principle and without distinction, be transposed into the broad corpus of our criminal law.

20. In so saying I would have no difficulty in accepting that certain observations made throughout these cases could and in all probability do have general import. For example, if missing evidence can be obtained by other means then the unavailability of the original source may not be a ground for prohibiting the trial, *P.H. v. D.P.P.*, S. Ct., U/R, 29/01/07. Equally so, it makes perfect sense that an applicant who seeks an order of prohibition must engage fully with the facts as otherwise an incomplete picture emerges, J.B. v. D.P.P., S. Ct., U/R, 29/11/06. And furthermore of course, I would respectfully agree with the point made by Denham J. in *D.C. v. D.P.P.*, [2005] 4 I.R. 281, where the learned judge warns an applicant against 'minutely parsing and analysing' the proposed evidence, so as to identify some area of difficulty or complexity and then hope to injunct a trial on that basis. These matters are evidently quite capable of common application and I am sure that upon inquiry there may be others of a similar nature.

21. There is, however, one further point in this context which I should mention. It is the suggestion in some of the cases that "directions and warnings" by a trial judge may be a sufficient alternative to stopping a trial, with the type of charge given by Haugh J. in *D.P.P. v. R.B.*, (approved of in the judgment of the appeal court, namely the Court of Criminal Appeal, 12th of February, 2003), being cited in this regard. In my view, such "directions and warnings" are part of a trial judge's ongoing obligations to ensure fair procedures, with the nature and extent of such directions being largely depending on the 'run of the case'. I must say that I would see a delay point, taken by way of judicial review, rather differently. A dismissal of such proceedings, in the belief that at a subsequent trial the judge will give a particular direction or issue a particular warning is not the answer. Either it is a point in its own right appropriate to judicial review or it is not.

22. At paragraph 14 above I referred to the *D.P.P. v. Byrne* [1994] 2 I.R. 236, and to its alleged "refinement" in subsequent cases. In virtually all of such cases, where the issue of delay was in play, the case of *Barker v. Wingo* 407 U.S. 514 (1972), was cited with approval, and for the most part the same extract from that judgment was repeated. It is therefore worthwhile to have a closer look at the legal analysis of the Supreme Court, with a short summary of the opinion of Powell J. being as follows:-

> (a) The right to a speedy trial is "generically" different from other constitutional rights which are designed to protect accused persons. It is so for three reasons. Firstly, there is a societal interest in upholding that right which exists separate from and at times opposite to the interests of the accused; secondly, a deprivation of such a right can work to the advantage of an accused person and thirdly, it is a more vague concept than other rights in that it is impossible to determine with precision when the right has been violated. (Chapter II of judgment)
>
> (b) In looking for a solution to this matter the court considered two "rigid" approaches. The first suggestion was the imposition of a specified time limit for the holding of a criminal trial, after which a violation of this right would result. This was rejected by the court as involving itself in "legislative or rule making activity (p. 523)". The second approach was referred to as the "demand rule". This meant that unless an accused person demanded a speedy trial he would be taken to have "waived" forever any reliance on the sixth amendment. This was also rejected as "a defendant has no duty to bring himself to trial" (at p. 527). That duty was on the State. (Chapter III of judgment)
>
> (c) The conclusion of the court was that "…the approach we accept is a (p.530) balancing test, in which the conduct of both the prosecution and the defence are weighed. A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different

ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (Chapter IV of judgment)

(d) The last of these specified factors, mainly "prejudice", should be assessed "in the light of the interests of defendants which the speedy trial right was designed to protect" (p.532). Three such interests were identified, namely:

(i) to prevent oppressive pre-trial incarceration;

(ii) to minimise anxiety and concern of the accused; and

(iii) to limit the possibility that the defence will be impaired." (p.532). (Chapter IV of judgment)

23. As appears from the courts discussion on the issue of "prejudice", three matters in particular were identified as being relevant. It seems to me that apart from "anxiety and concern", the other two factors have limited, if any, application in this jurisdiction. In the first place, given our bail laws and the constitutional right to bail, it is difficult to see how there could be, with the vast majority of detainees, any "oppressive" pre-trial incarceration. That is unless such laws were in themselves oppressive or were applied oppressively. Secondly, if delay has impaired an accused persons ability to fairly defend himself, then by virtue of our undisputed domestic law his trial will be prohibited. So the only remaining factor which might be of relevance to us is the question of "anxiety and concern". As the above factors were not intended to be exclusive there must therefore be scope to more individualise this right for the purposes of Irish Law.

24. Leaving these matters aside for a moment however, there are a number of other critical issues arising out of *Barker*, and other U.S. law cases, which perhaps should be highlighted. Firstly, the reference in *Barker* to a "balancing test" and an "ad hoc" approach (emphasis added) relate only to determining whether a violation has occurred; thereafter such an approach played no part whatsoever in the resulting remedy. Secondly and likewise, the "interests" referable to prejudice are relevant to breach or no breach but not otherwise. Thirdly, although Mr. Barker was unsuccessful, the court did in fact deal with remedy, and whilst it described the prohibition of a trial as being "a severe remedy of dismissal"(p.522), it nevertheless said that "it is the only possible remedy". (Chapter II of judgment). This view of remedy was again adopted by the Supreme Court in *Strunk v. United States* 412 U.S. 434, (1973) where at p. 440 the court said:- "In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy'". See also *United States v. Abdel-Ilah Elmardoudi*; 501 F. 3. 935, 944 (8th Cir. 2007), where it is recorded that "The government does not dispute that dismissal with prejudice is the only remedy for a Sixth Amendment speedy trial violation."

And finally, such a remedy underlies society's interest in having a system of law whereby that core constitutional right can be maintained.

25. Given the unconditional reliance which our courts have placed on *Barker v. Wingo* 407 U.S. 514 (1972), it must at least be arguable, that what Keane C.J. said in *P.M. v. Malone* [2002] 2 I.R. 560, about the balancing process (see para. 6(4) supra) applies to sex abuse cases only and not otherwise. That reference of Keane C.J. was of course followed by the Supreme Court in *P.M. v. D.P.P.* [2006] 3 I.R. 172, (see para. 7(4) *supra*). I say at "least arguable" because *Barker* contained no such suggestion. In fact quite the contrary in that the remedy of "dismissal with prejudice" was clearly reaffirmed, a position, according to my limited research which continues to this day. Finally on this topic there is one further point worthy of mention. The issue of "stress and anxiety" as previously stated, was identified in *Barker* as being an interest which the constitutional right was designed to protect. These matters where they exist must be considered as part of the four factors above mentioned. (See para. 22 *supra*). If having reviewed all such factors, the court shall find no violation then that's an end to the matter. But if the contrary conclusion is reached it seems that "stress and anxiety" re-enter the equation for the purpose of the balancing exercise. It is not although clear, to me, why these matters must be considered again. In any event as I have previously said, it must be arguable that the special jurisprudence should remain with the special case.

26. Notwithstanding these reservations however, it is only proper that I should consider this case in accordance with the submissions made and therefore I propose firstly to determine whether the applicant's right to a trial in due course of law has been imperilled by the presence of specific prejudice. Secondly, I will then look at her right to a trial with reasonable expedition and if violated, whether an injunction should be issued, in respect thereof. In so doing I will be conscious of; (a) the obligation on an accused person to engage with the facts, (b) any minute analysis of the evidence trying to identify an unsustainable point, (c) the rules on admissibility and the weight of any such admissible evidence, and finally; (d) the obligations of a trial judge to conduct the trial in accordance with the principles of constitutional justice and fair procedures.

27. In the context of this approach I should however first mention, *D.C. v. D.P.P.* [2005] 4 I.R. 281, a decision heavily relied upon by the D.P.P.. In my view, this case has little if anything to do with the present case as no issue of delay was involved. D.C. is a *"Dunne" (Dunne v. D.P.P.* [2002] 2 I.R. 305) and *"Braddish" (Braddish v. D.P.P.* [2001] 3 I.R. 127), type of case. (i.e. "the searching for and the preservation of evidence by the Gardaí") In addition whilst it is true to say that the D.P.P. is an independent statutory person, he does not have to disclose his reasons for prosecuting or not prosecuting, as the case maybe. Whilst his decisions must be in conformity with natural and constitutional justice (as applicable to his position) as well as being presumed to have been taken in accordance with fair procedures (see *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317), nevertheless he is not charged with doing justice between parties, much less being constitutionally responsible for the administration of justice. In any event, if an accused person has an arguable point of law, which if upheld would prevent his trial from proceeding, than it is far more practicable to test the validity of that point by way of judicial review, rather than having to stand down a jury, already assembled and sworn, so as to determine that issue of law at the bar.

Specific Prejudice:

28. The claim for prejudice in this case must be looked at in the context of the applicant's defence, although of course there is no onus on her to give any evidence unless she so wishes. In broad terms, the defence as suggested is that at all times Ms. Cunningham discharged her duties and responsibilities with due diligence and in accordance with the training and information then available to her. Moreover, she adhered to good practices and always followed what such practices entailed. In addition, she conducted herself under and in accordance with the instructions of her superiors, to whom she was answerable at all times. Furthermore, given the scientific and medical progress in society's present understanding of blood products and also the enhanced testing techniques currently available, it would be impossible to do justice in her case which must be judged against the state of medical knowledge as it was in 1977 and in 1991. Hence the allegation of prejudice. It should be noted that this is a summary of what the applicant submits and whilst important for the purpose of this case, I could not be certain that even if established it would afford to her a full defence on the s. 23 charges (s. 23 of the Offences against the Person Act 1861).

29. Prior to considering this question of prejudice could I say that whilst the charges relate to 1977 and 1991, those dates should not be looked at in the same way as if for example the events complained of, related to acts of sexual abuse, or frauds on the Revenue, or theft from individual persons. It was not until 1994 that Dr. Power's link was established and made public. Moreover, there then followed the establishment of the expert group and the holding of a public inquiry. Therefore, neither the alleged victims or the public at large or the investigatory agencies of this State had any grounds to engage with these events before the completion of such matters. These factors, are therefore in my view, distinguishing features of this particular case.

30. The Book of Evidence contains statements from over 60 witnesses together with numerous volumes of exhibits. In support of her claim of prejudice the applicant relies upon some of this evidence. The relevant sections highlighted are those set forth at para. 8 of the grounding affidavit as elaborated upon in the supplemental submissions. These can be summarised as follows:

> (1) Statements from experts in which it is alleged that plasma should not have been taken from people who were jaundiced or those who had received multiple blood transfusions. In addition and in any event, all such plasma should have been stored for a period of six months prior to its use in the manufacture of Anti D, and;
>
> (2) Statements from experts in which it is suggested that by 1976 that was an awareness within the medical community that non "A" and non "B" Hepatitis, could create significant problems in transfusion medicine.

31. I cannot agree that these matters are such as can correctly be described as constituting prejudice. The matters referred to are quite evidently vital from a prosecution's point of view and if such statements related to contemporary practices, standards or state of knowledge, then apart from the question of admissibility, no objection could be taken to them. Quite frequently, but admittedly more on the civil side, the courts in this and in other jurisdictions have to retrospectively examine events, standards and practices of past times. Medical negligence cases are a prime example. Whilst it is important for the trial judge to remain vigilant as to the period of time by which a standard is to be judged, nevertheless once conscious of that requirement, I can see no further difficulty, at least in principle, in having a fair hearing relative to matters even those pertinent to 30 years ago.

32. The second element of complaint relates to an interdepartmental memo of the B.T.S.B. dated 29th May, 1968, which is signed by J.L. Wilkinson (who is now deceased). It purports to say that "the practice of accepting donor volunteers who have at any time had infectious hepatitis or jaundice of unknown origin is to be discontinued forthwith". This memo has been introduced via the evidence of Mr. Keating, an employee of the B.T.S.B. Whether this memorandum can ever be produced at the trial must be determined by the rules of evidence. Whilst it is entirely outside the competence of this court to make any such ruling, I would nevertheless refer to ss. 4, 5, 6 and 30 of the Criminal Evidence Act 1992 in this regard. This issue, however, is and must remain a question of admissibility to be determined by the trial judge.

33. Thirdly, Mr. Martin Hynes, the Chief Executive of the B.T.S.B. and Dr. Emer Lawlor, a Consultant Haematologist with that Board, have made statements which are included in the Book. Mr. Hynes purports to confirm the applicant's employment, her training and work with the Board - all at a time when he would not have been personally familiar with such matters. Dr. Lawlor, who also suggests that Ms. Cunningham held the rank of a Principal Biochemist, refers to a document (not drawn up by her) which sets out the principal duties of a person holding that post. Again may I respectfully say, that if objection is taken to any part of either statement then the issue is one of admissibility which must be resolved in the manner above indicated. Likewise with the statement from Professor Hoppe, in which he recalls the applicant's training with him, at his laboratory and recounts what information he gave to her on the production of Anti D and the safety measures involved therewith. Although now deceased it is not claimed that his death has prejudiced the applicant in her defence.

34. The next matter of complaint relates to records known as 'quantation request forms/results', which date from November and December, 1976. These were compiled on raw material used for the production of Anti D and are relied upon to show that patient "X" had jaundice and was suffering from infective hepatitis when plasma was taken from her. Whilst the records are signed by one M. Moran (Lab Technician) and the late Dr. Wilkinson, their "provenance" is uncertain. They are sought to be introduced via the evidence of Dr. Lawlor and Mr. John Keating. In the same vein there is a request dated November, 1976, which seeks to have a test carried out for Hepatitis B on patient "X", which request contains a history of jaundice. Mr. Keating is the source of this document. As with the above matters the admissibility or otherwise of these documents is a matter for the trial court.

35. There is a memorandum, referred to at para. 8(9) of the grounding affidavit, which it is claimed is in the applicant's handwriting. If there should be a dispute about its authenticity, the rules governing the admissibility of such a document are perfectly clear-cut in this regard and can be relied upon.

36. Doctors Garrett May, Sean O'Toole and Dermot Cahill, all in General Practice, have made statements which deal with four women who developed jaundice following the administration of Anti D in August, November and December 1977. If the reports referred to in these statements came from the doctors in question, as seems to be the case, then it is to be expected that such persons in the normal way will be called to prove them.

There is then an objection made to a statement from Dr. Lawlor which refers to an investigation which followed receipt of the above mentioned reports. Apparently this investigation involved the testing of samples taken from the affected women, which were sent by Dr. O'Riordan to Dr. David Dane at the Department of Virology, Middlesex in England. These samples tested negative for Hepatitis B. Again the resolution of whether this information is admissible or not is clearly a matter for the trial.

There are statements from one Moya Biggs (Research Assistant to Dr. Dane) and Dr. Tedder regarding the negative results found by Dr. Dane on the above samples. These results were communicated to Dr. O'Riordan on 2nd of September, 1977. Dr. Dane is dead. It is suggested by these witnesses, what Dr. O'Riordan would have understood by the negative results. Whilst it is difficult to see how this evidence could be allowed, nonetheless the ruling on it, is again, a matter for the trial judge.

37. Complaint is also made about documents referring to a 'Scientific Committee' of the Board, which met weekly from 1976 through to 1977. Statements in this context, which have been given by several witnesses, place the applicant at some of these meetings. It is however, alleged that whilst "agendas" have been produced for such meetings, there is no record of the "discussions" which were had, and accordingly this prejudices the applicant. I respectfully cannot agree how this could be so on the evidence available.

38. In 1991, by reason of the more enhanced testing techniques then available, the samples sent to Middlesex in 1977, which had been stored, were then tested and found to be positive. Statements from Dr. Garson and Dr. Lawlor refer to this. Whether these are admissible and if so, what inferences may be drawn from them, is, as with all of the other matters herein listed, a question of evidential ruling. I therefore cannot believe that any of the matters complained of are such, as could correctly be described as "prejudice", so as to create a real or probable risk of an unfair trial. Noting the obligations on the trial judge, I cannot see how

injunctive relief could issue on these grounds.

39. In 1977, the structure within the B.T.S.B. was as follows:

Mr. Sean Hanratty, a Senior Technical Officer, was the applicant's immediate superior. He died on the 2nd October, 1996. Senior to him was Mr. McCann who was the Chief Technical Officer, and who now lives outside the jurisdiction. Dr. Terry Walsh, the applicant's co-accused, was the Assistant National Director and he has died since being charged in July, 2003. Dr. Wilkinson who was the Deputy National Director died in November, 1998 and Dr. O'Riordan, the National Director who retired in 1986, died on 11th March, 1999. It is claimed on behalf of the applicant that the deaths of these individuals deprive her of the chance of exploring and of obtaining supporting evidence from them, confirming that at all times she acted with due diligence, that her role was that of a relatively minor technician and that she was regarded as a junior subordinate by such persons.

It is unclear to me as to what precisely these individuals would have said, as a matter of probability, if alive and available to give evidence. The matter is put no higher than what I have just described and I doubt very strongly if the applicant has fully engaged with the facts on this issue, as she is obliged to do. For example, there is no evidence as to what contact, if any, she has had with Mr. McCann and why he cannot make himself available for her criminal trial. In any event it seems to me that in the absence of contradictory evidence, the applicant's own evidence in this regard, if she decides to give such evidence, may very well have a powerful influence on the relevant issues. Even if she exercises her right to remain silent, I could not conclude on the state of evidence offered, that their deaths alone would be sufficient in themselves to prevent this trial from continuing. Moreover, given the relevant dates, and given the history of the events and circumstances above described, I do not believe that realistically it would ever have been possible to have a criminal trial when these individuals were alive. That is apart from Dr. Walsh. Accordingly, I cannot hold that the unavailability of such persons creates for the applicant a real risk of an unfair trial.

40. It is also stated that Dr. Dane is dead and that therefore there will be no opportunity of ascertaining what communications were had between him and Dr. O'Riordan and what the latter understood by such communications. It is in this context that the statements of Moya Biggs and Dr. Tedder, referred to at para. 36 above, are relevant. Any difficulties arising in this manner can be dealt with by the trial judge.

41. In the context of this issue it is also worthwhile looking at the evidence which is available. Mr. Stephen O'Sullivan, a Biochemist who worked with the B.T.S.B. from 1973 until 1979, (and whose employment was terminated in 1982) made a statement in which he places the applicant, his immediate boss, at various meetings of the Scientific Committee during the years 1976 to 1977. As set out in para. 46 of the affidavit of D/Superintendent O'Mahony, the problem of Hepatitis like reactions to Anti D, was brought up at a meeting of that Committee held on the 25th November, 1977. With regard to a further meeting which took place around mid 1977, Mr. O'Sullivan says "I knew immediately something was wrong and so did the others around the room". He continued, having referred to the functions of the persons who attended the meetings by saying, "(that) Miss Cecily Cunningham would speak on the Anti D Immunoglobulin project". Dr. James Kirrane can also place the applicant at various meetings of this committee during the same years. Again as set out at para. 47 of the Superintendent's affidavit, Dr. Kirrane speaks of an item on the agenda for the meeting dated 25th November, 1977. He says in respect thereof, that such item may have referred to the link between Anti D and jaundice in certain patients, which had been reported on at the time by the General Practitioners who are referred to at para. 36, above.

42. Dr. Emer Lawlor, who was a Registrar in the B.T.S.B. for six months in 1975, spent a further period there from November 1976 to May 1977 as Medical Officer and thereafter was a Locum Consultant from November, 1988 until her full-time employment in March, 1996. Accordingly, it must be taken that, at least in general, she had a connection with the Board, in or about the relevant periods. And finally Mr. John Keating, who joined the B.T.S.B. in 1966, describes the taking of a sample from donor "X". He says that in the years 1976 to 1979, staff in the B.T.S.B. were aware that probably there existed residual strains of Hepatitis, other than "A" and "B".

43. Whether this evidence is supportive of the prosecution's case or supportive of the defence case remains an issue for determination during the criminal trial, but the identification of these individuals confirm, that there is available from potential witnesses information relative to the appropriate time, including events, circumstances and knowledge. In addition, it should be noted that there is no allegation that important or relevant documents have been lost, destroyed or are otherwise missing or that any records have been altered or tampered with. In fact there is a good deal of contemporary material available.

In all of these circumstances I cannot agree that the applicant has established any specific prejudice in this case.

Prosecutorial Delay: Gardaí

44. On the 11th of March, 1997, a copy of the Finlay report was sent to the D.P.P with a request to consider its content. Having taken Senior Counsel's advices and having reviewed the document, the D.P.P. wrote to the Garda Commissioner on the 25th of July, 1997. He requested the carrying out of an investigation into an allegation made by a member of the Irish Haemophiliac Society, that 57 people had died as a result of contaminated blood products. On the 1st of August, 1997, Assistant Commissioner McHugh spoke with the administrator of this society and requested certain information including the identity, of all or any, of these 57 persons who had died within the previous 12 months. Mr. Raymond Bradley, Solicitor, who responded on behalf of the society, indicated that by reason of confidentiality the requested details would not be forthcoming. Accordingly, on the 4th September, 1997, the D.P.P. was so informed that without the society's co-operation it would not be possible to further pursue this matter. It should be noted that the above request from the D.P.P. did not relate to persons infected with Hepatitis C.

45. The latter investigation did however commence sometime after the 27th November, 1997, when the Gardaí received formal complaints from the McCole family and from Positive Action Group which represented more than 750 recipients of infected Anti D products. These complaints alleged that arising out of the "Hepatitis C affair", certain breaches of the criminal law had taken place. In response the Commissioner immediately appointed two senior members from the National Bureau of Criminal Investigation. In December, 1997, the Head of that Unit, Detective Chief Superintendent Camon, met with members of the Positive Action Group, and in January, 1998 two members of his team received the names of 73 persons, whom it was alleged were suffering from Hepatitis C, by reason of contaminated blood products. Five of these individuals subsequently withdrew their names but only after a certain amount of inquires had been conducted into their cases. That left 68 persons for full investigation.

46. In order to meaningfully engage in this process, the Gardaí were obliged to familiarise themselves with the evidence given throughout the 27 day hearing of the Finlay inquiry, and to review the ultimate report of that Tribunal. Although necessary and instructive to so do, this task was of little evidential value in that the material gathered by this Tribunal could not be used in a criminal trial. It was therefore essential for the Gardaí to set about obtaining such independent evidence as would justify, or not as the case may be, the bringing of criminal proceedings.

47. Commencing in January, 1998 the Gardaí set about interviewing the injured parties and taking statements from them. The first

such statement was obtained on the 20th January, 1998, and by June of that year all seven ladies in respect of whom the charges in the Book of Evidence relate, as well as patient "X" and donor "Y", had been interviewed and statements taken from them. During the course of the inquiry one lady, who was not a member of Positive Action, came forward and her complaint was separately investigated. In all about 70 injured parties had their complaints investigated. Because of the complex nature of the problem, the sensitivity of the complainants and their understandable apprehension relative to confidentiality, a substantial amount of time was necessarily taken up by the Gardaí in dealing with such persons. In addition, and following the availability of such evidence, the Gardaí had to interview and take statements from the General Practitioners who treated the injured parties. As part of this process, documents and records were requested in order to corroborate these medical statements. In some instances this involved the carrying out of searches stretching back more than 20 years. Moreover, in depth contact had to be made with the Blood Transfusion Service Board which by its nature was both complex and awkward. Initially the CEO of that Board consulted his own legal advisors, and as a result of the advice received, he remained conscious of the Board's legal obligations to the individuals in questions, and of its potential liability for the personal injuries, loss and damage suffered by such persons. Therefore, the consultative process with the B.T.S.B. was protracted.

48. The engagement with the B.T.S.B. involved the Gardaí in examining the individual files of the injured party and in obtaining photocopies of a great deal of documentary material. In order to understand such documents it was necessary for the Gardaí to heavily engage with the Board, with a view of being informed of, and thereafter understanding the workings and operations of that body. In all during the course of the investigation the Gardaí took 382 witness statements emanating from over 762 job sheets prepared by the incident room. Their investigation spread into Great Britain and included the obtaining of maternity records, hospital records, reports from doctors, psychotherapists and counsellors. The inquiry by any standard was widespread and general, thorough and difficult.

49. Quite an important part of this investigation involved meeting with, and endeavouring to get records, reports and statements from, a number of expert witnesses. These included Dr. Eamon McGuinness from the Coombe Hospital, who furnished the Gardaí with details of his dealings with and his knowledge of the patients known as patient "X" and donor "Y". Dr. Denis Reen, an Immunologist at Crumlin had information with regard to patient "X". From the University of Edinburgh, Dr. Peng Lee Yap, was contacted and requested to outline in detail his laboratory work relating "to genetic analysis and comparisons including genotyping of the hepatitis C virus and his findings in relation to eleven individuals who included all the injured parties the subject of the charges". (See para. 19 of the affidavit of Detective Superintendent O'Mahoney.) That Detective also sets out, in the same affidavit, the Gardaí's contact with Dr. Smith from the University of Edinburgh, Professor Hoppe from Hamburg, Moya Briggs from Middlesex Hospital, Dr. Garson from University College, London, Professor Tedder from the Royal Free and University Hospital and with Dr. Craske from the Manchester Public Health Laboratory. To make contact with these medical personnel in the first place, and then to obtain statements and reports from them, took a very considerable time. This was due in part to the nature of their occupations, their unavailability and the type and kind of evidence which they had to offer. In all, much time was involved.

50. In May, 1999 the Gardaí interviewed Ms.Cunningham, who on legal advice declined to make a statement. They also interviewed another doctor and Dr. Walsh who subsequently furnished a prepared statement on the 17th June, 1999. On the 4th October, of that year, a second interview was conducted with Ms. Cunningham who on legal advice again declined to answer any of the substantial number of questions put to her. Ultimately the Gardaí in October, 1999, sent its completed investigation file to the D.P.P.

51. I fully accept that the obtaining of statements from the doctors mentioned at paras. 47 and 49 above, together with all vouching and supporting documentation was time consuming, and that proper allowance must be duly given for the other commitments and duties of such doctors. In addition there is no doubt but that the position of the B.T.S.B., including its vulnerability to legal action, played its own part in the cautious approach of that body to the criminal investigation then underway. Moreover, the investigation team had to examine the individual files of each injured party, which in many instances led to further inquiries. As previously stated more than 380 witness statements were taken. There is no doubt therefore, that given the multiple number of injured parties involved, (to whom great sensitivity was rightly shown), the medical and scientific nature of the problem, (and its original identification), the passage of time between the administration of the contaminated products and the establishment of the link with Hepatitis C, the involvement of the B.T.S.B. and the individual role of its staff members and the necessity to consult and obtain expert opinion, the magnitude and duration of the Gardaí investigation was in my opinion reasonable and objectively justified.

52. Subsequent to the furnishing of its investigation file in October 1999:

(1) The D.P.P. in June, 2000 asked the Gardaí to carry out further investigations dealing with related queries and clarifying other matters.

(2) The Gardaí engaged in follow-on correspondence with Dr. Yap and others.

(3) D/C Superintendent Camon in October, 2000 updated the D.P.P. with a further report.

(4) Meetings were then had with the D.P.P. and his counsel, and these continued throughout 2002 into 2003, and;

(5) From time to time during this last mentioned period the Gardaí were asked to further inquire and/or clarify certain matters.

There is no suggestion of any separate or independent delay by the Gardaí in their secondary involvement in this matter after October, 1999.

53. From the above I am fully satisfied that the response of the Gardaí to these unfolding tragic events was exemplary and was carried out in a manner consistent with the thoroughness which the subject matter required and in as speedy a manner as was possible. This not only with their own investigation up to October, 1999 but thereafter when interacting with the D.P.P. In my view no delay of any description can be attributable to the Gardaí arising out of their involvement with this matter.

Prosecutorial Delay: The D.P.P

54. The applicant also makes a complaint of delay against the Director of Public Prosecutions. This complaint is both general and specific. General in that it took the D.P.P. from October, 1999 to July, 2003 to issue directions leading to the arrest, caution and charge of the applicant with the offences set out in the Book of Evidence. This was some three years and nine months, a period which is claimed is both inordinate and inexcusable. The 'specific' complaint, which must also be viewed as part of the wider complaint, relates to four identifiable periods which it is submitted are individually and collectively excessive with no or no proper justification being offered in respect thereof. The first is said to have occurred between October, 1999 and February, 2000, a period of about four months. The second is between April, 2000 and June, 2000, a period of about two months. The third is between

October, 2000 and January, 2001, a period of some three months and, the fourth is between March, 2001 and November of that year, some eight months. In all these cover an accumulated period of about seventeen months.

55. Up to October, 1999, it is difficult to see how any complaint of delay could be levelled against the D.P.P.. It will be recalled that a copy of the Finlay report was sent to him on the 11th March, 1997, for the purposes of reviewing its content. On receipt of same it was reasonable for that office to take a period of time to familiarise itself with the transcripts from the Tribunal as well as its ultimate report. On the 18th June, Senior Counsel's advices were sought, and on the 25th July, as previously stated, the Gardaí were asked to follow up on a particular piece of evidence given to the Tribunal by a member of the Irish Haemophiliac Society. By the 4th September of that year, that Garda inquiry had terminated and the D.P.P. was so informed. It was not until November, 1997 that the Gardaí received the complaints which led to the investigation above described. That investigation culminated in the file being forwarded to the D.P.P.'s office in October, 1999. Accordingly, up to then it is not possible to sustain any allegation of delay against the second named respondent.

56. The file submitted by the Gardaí to the D.P.P. in October, 1999 involved fifteen sample cases including those of patient "X" and donor "Y". The material submitted was substantial and the file contained several volumes of documents. Although it might be claimed that the D.P.P. should have been familiar with the entire background at that stage, including the evidence given at the Finlay Tribunal and the report thereof, it must be acknowledged that what the office received from the Gardaí was different in detail and purpose from the earlier documentation, and accordingly, it had to be carefully scrutinised as this would constitute a prosecution, if there should be one: This process lasted about four months, until the D.P.P. sought Senior Counsel's advices in February, 2000. This period is the first specific period relied upon by the applicant. In my view, however, it is difficult to conclude that even with the D.P.P.'s background knowledge this period in isolation could be deemed inordinate or excessive.

57. With admirable speed Counsel advised by April, 2000, and within two months Detective Superintendent Camon was asked to further investigate and clarify several matters arising out of such advices. This is the second specific period relied upon. Again in my opinion looked at in isolation, one could not conclude otherwise than by agreeing that this period was reasonable.

58. By October, 2000, the Gardaí had furnished an updated report to the D.P.P., detailing the matters which had been attended to but also identifying those matters which were still outstanding. Included amongst the latter was a reply from Dr. Yap which was still awaited. In January, 2001 this report was sent by the D.P.P. to Senior Counsel whose advices thereon were received in March of that year. The third specific period is therefore that between October, 2000 and January, 2001, a period of three months. As with the two previous periods specifically above identified, I could not consider anything objectionable about this period. In or about the same time that Senior Counsel advised, Junior Counsel was separately asked to consider the entire documentation.

59. A gap then emerges between March, 2001 and October of that year when a different Professional Officer took over this file in the D.P.P.'s office. The person who had originally been dealing with this matter left in September, 2001 to commence a new appointment in October of that year. There is a profound paucity of information covering this period, though it is suggested that the matter was under "internal consideration" and that "internal memos" may exist. However, no supporting detail, much less documentation, is offered in this regard. Given that by March, 2001 the file had been within the office for almost eighteen months, I firmly believe that if there was activity during this period, the same would have been highlighted in the evidence given. It therefore seems to me that in the time leading up to the departure of the original Professional Officer, little of substance if anything had been done, and in effect the importance of the file may have receded during this changeover period. Whatever might be the true position, the evidential situation is scant if not bare, and frankly is unsatisfactory. This is the fourth specific period relied upon by the applicant.

60. Between January, 2002 and April, 2003 the Gardaí were asked on a number of occasions by the D.P.P. to carry out further inquires and/or to clarify certain matters. These occasions were; January, 2002 (response date was, at least in part, within the month), May, 2002, (response date unknown), November, 2002, (the response date was most likely January, 2003), 31st of March, 2003, (response date 3rd of April, 2003), and April, 2003, (response date 15th of May, 2003). Whilst the full extent of the additional involvement of the Gardaí is not known, what is known however is that there appears to have been only two further statements obtained over this period of time. One, from Detective Superintendent Callinan and one from Dr. Power. It is therefore most likely that all of the substantive evidence was available by October, 2000.

61. Throughout 2002 and 2003, it would appear that in addition to the matters last mentioned, the Book of Evidence was prepared, a number of meetings between the D.P.P., Counsel and the Gardaí took place and some correspondence was had between those last mentioned. On the 15th of May, 2003, the Gardaí supplied the additional statement above mentioned from Dr. Power. On the 1st July, the D.P.P. issued directions and Ms. Cunningham was arrested, cautioned and charged on the 23rd July of that year.

62. I am quite prepared to accept that the documentation which the D.P.P. had to consider was difficult and complicated and necessarily involved the obtaining of several advices from counsel, that further contact with the investigating team was required, that both the Offences against the Persons Act 1861, and the Non Fatal Offences against the Persons Act 1997 had to considered, and that a period of reflection would also have been reasonable. However, making all due allowances for these and other attendant complexities, it is difficult to see how a period of three years and nine months, from receipt of the original file to the decision to charge (or to the actual charging), could be justified. Within this time there are the four specific periods above mentioned. Whilst I am satisfied that the first three in isolation were both reasonable and justified, I cannot so agree that a similar conclusion can be reached in respect of the period, from March, 2001 to October of that year. At the beginning of this period the vast bulk of the required documentation was within the office of the second named respondent and had been for almost eighteen months. Accordingly, it was incumbent upon him to continue his review of the case at least at the same rate of progress as previously achieved. In fact given the background history of the relevant events, a degree of urgency was undoubtedly required. In such circumstances I have to conclude that this eight month period was excessive and has not been remotely justified by the evidence before me. In addition, I must also conclude that the overall period of three years and nine months, for which the applicant bears no responsibility, is excessive and has not been nearly justified by the evidence of the second named respondent. Accordingly, I am of the view that the applicant's right to a trial with reasonable expedition has been violated.

63. I have arrived at this conclusion by reason of the duration of blameworthy prosecutorial, which in my view has not been justified by the D.P.P. I believe that this approach, which did not involve a consideration of the third or fourth factor identified in *Barker v. Wingo* 407 U.S. 514 (1972), (see para. 22(c) *supra*), is in accordance with *D.P.P. v. Byrne* [1994] 2 I.R. 236. If however, I am incorrect in this regard, I would consider the third factor, namely the applicant's assertion of her right to reasonable expedition, to have a neutral bearing in this case. With regard to the fourth factor, no question of pre-trial incarceration arises and given my findings on the issue of specific prejudice, I am satisfied that her ability to properly defend the criminal proceedings has not been jeopardised. Accordingly, that leaves the question of "anxiety and concern". The evidence in this regard is contained in paras. 35 to 37, of the grounding affidavit which was sworn by the applicant's solicitor on her behalf. While some weight must be given to these matters, there are not however in my opinion, of such influence or significance as would be decisive in their own right. Even this view

however, on "anxiety and concern", does not alter the conclusion which I have reached on the violation of the applicant's right to reasonable expedition.

64. Given this finding, I would then without more, if I was free to so do, follow *Barker* and prohibit the continuation of this trial. I would so do not only in vindication of the applicant's right to a speedy trial but also in vindication of society's interest in upholding such a right. In accordance with the submissions however, this approach is said to be incorrect and even after making such a finding I must, it is suggested, engage in a balancing process. As Keane C.J., said in *P. v. Malone* [2002] 2 I.R. 560 at p.581:-

> "On one side of the scales, there is the right of the accused to be protected from stress and anxiety caused by any unnecessary and inordinate delay. On the other side, there is the public interest in the prosecution and conviction of those guilty of criminal offences"

Or as Kearns J. said in *P.M. v. D.P.P.* [2006] 3 I.R. 172 p. 185:-

> "…It means [that is, the passage which I have quoted from Keane C.J.] that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial…"

That "something more" can only in this case relate to stress and anxiety. Given the evidence tendered in this regard, I have no doubt whatsoever but that the nature and extent of the same falls significantly short of outweighing society's right in having the criminal prosecution brought to a conclusion. The evidence of stress and anxiety has not been averred to by the applicant herself but rather by her solicitor and no medical reports have been tendered to support her personal or psychological difficulties. In addition it must be noted that her rheumatoid arthritis pre-dates any relevant event for the purposes of this case, and that the description of the "stress, depression, tiredness and panic attacks" referred to in the affidavit, are all matters which accused persons like the applicant might potentially be prone to. There are not in my opinion of such a nature as to fall within the type of "stress and concern" as envisaged by case law. On the other hand, given the enormity of the events giving rise to the criminal prosecution, the devastation which has undoubtedly been caused to the injured parties and their families and the significant number of such persons involved, I have no doubt, as previously indicated, that society's interests are significantly greater than those of the applicant in this case.

65. Accordingly, following the above analysis I must refuse relief in this case.

66. In conclusion, I am satisfied that the applicant's right to a trial with reasonable expedition has been breached but that such a breach has not resulted in any specific prejudice and has not otherwise impaired her ability to defend the criminal proceedings. Secondly, notwithstanding the absence of any real or probable risk of an unfair trial, I would nevertheless, if free to so do, injunct the continuation of the proceedings as being the only remedy available to vindicate the applicant's right and also society's interest in upholding that right. Thirdly, I am not however, according to the submissions, free to adopt this course but rather must engage in the balancing process above described. Having done so, I have no hesitation in coming to the conclusion that society's interest in having this prosecution brought to finality, outweighs the applicant's entitlement to have a trial stopped for breach of her right to reasonable expedition.

67. Therefore the relief sought is refused.