**THE COURT OF APPEAL**

**[2015 No. 35]**

**Finlay Geoghegan J.**
**Peart J.**
**Irvine J.**

**BETWEEN**

**CAROLINE McNAMEE**

**PLAINTIFF/RESPONDENT**

**AND**

**MICHAEL BOYCE**

**DEFENDANT/APPELLANT**

**JUDGMENT of Ms. Justice Irvine delivered on the 4th day of February 2016**

1. This is the defendant's appeal against an order of the High Court (O'Malley J.) made on 18th November, 2014, following the conclusion of proceedings brought by the plaintiff wherein she claimed damages for sexual assault. The action was heard before a jury who found in her favour and proceeded to award her damages in the sum of €493,037.47. The Court further ordered that the defendant discharge the plaintiff's costs of the proceedings, the same to be taxed in default of agreement.

2. It is the defendant's contention that the trial judge erred in law in refusing two applications made on his behalf to have the proceedings dismissed on the grounds of the plaintiff's inordinate and inexcusable delay in the manner in which she pursued her claim. The first such application was made at the outset of the proceedings before any evidence was called. The latter was made at the conclusion of the plaintiff's evidence in chief. Accordingly, the defendant maintains that this Court should set aside the award and order of the Court made in the plaintiff's favour on 18th November, 2014.

**Factual Background**
3. The plaintiff was born on 4th April, 1975. In these proceedings, which she instituted on 20th June, 2001, she alleged that she was sexually assaulted by the defendant on many occasions between 1979 and 1992. She claimed damages for assault, sexual assault, battery, false imprisonment and the deliberate infliction of emotional suffering.

4. Relevant to the within appeal is the fact that in 1999 the defendant was tried in the Circuit Criminal Court in respect of six counts of sexual assault pertaining to the plaintiff. The plaintiff, the defendant and the defendant's wife gave evidence at the trial. The defendant was convicted on one count of sexual assault and was acquitted in respect of the other five counts. The assault the subject matter of the conviction was amongst certain claims which the High Court in this action later ruled to be statute-barred.

5. As appears from the detailed chronology set out below, the defendant's wife, Mrs. Helen Boyce, died on 7th July, 2005. Her death occurred during a period when there had been no activity in the current proceedings for several years. The plenary summons had been served in December, 2002 but no further step was taken until the plaintiff served a notice of intention to proceed on 5th July, 2011.

6. The sexual assaults pleaded in the statement of claim delivered on 20th December, 2011, principally concern the alleged digital penetration of the plaintiff's vagina by the defendant. These assaults were alleged to have taken place at the plaintiff's own home, at the defendant's home and on occasion when the defendant had taken her for a drive. The plaintiff maintained that all of the assaults occurred between 1979 and 1988.

7. In March, 2012 the plaintiff was granted liberty to deliver an amended statement of claim. In her amended pleadings the plaintiff made much more serious allegations against the defendant than had previously been advanced in the original statement of claim. She now included a claim for damages for rape, buggery and forced oral sex. Further, she maintained that the assaults had continued until 1992.

8. By notice of motion dated 8th May, 2012, the defendant brought an application seeking an order dismissing the plaintiff's proceedings for want of prosecution and on the grounds of inordinate and inexcusable delay. That application was advanced principally on the basis that his wife had died in 2005 and that she had been in a position to give evidence to assist with his defence in the criminal proceedings. Thus he maintained that he would have been better placed to defend the within proceedings if she was still alive and that it had been the plaintiff's delay in pursuing her claim that had denied him the benefit of her evidence. In response, the plaintiff maintained that any prejudice to the defendant arising from his wife's death could be overcome by the plaintiff agreeing that the transcript of Mrs. Boyce's testimony in the criminal proceedings could be admitted into evidence in the current proceedings.

9. At the time of the defendant's application, O'Neill J., who was the presiding judge, did not have sight of the transcript of the evidence that had been given by Mrs. Boyce in the criminal proceedings. However, in light of the plaintiff's submission, he agreed that any potential prejudice to the defendant arising from her death could likely be overcome by the trial judge permitting the defendant to rely upon the transcript of her evidence in the criminal proceedings. While not so specified in his order of the 9th July, 2012, the parties are agreed that O'Neill J. was satisfied that the trial judge would be best placed to decide the extent to which the defendant might be prejudiced as a result of Mrs. Boyce's unavailability as a witness and that accordingly he should be entitled to renew his application to dismiss the proceedings based upon such circumstances as might arise at any future point in the proceedings.

10. Before moving to consider the submissions of the parties and my conclusions, I will set out a chronology of the events which I consider material to the appeal:-

**Chronology of the Plaintiff**
4th April 1975: The plaintiff's date of birth

1979 – 1992: Period of alleged sexual assaults. The High Court ruled that the claims relating to assaults post dating 4th April, 1985, were statue-barred

4th April 1993: The plaintiff attains her majority

1995: The plaintiff makes her first complaint to An Garda Síochána.

27th February 1996: The plaintiff makes a formal statement to An Garda Síochána.

4th April 1996: The plaintiff turns twenty one.

1999: The defendant was tried in the Circuit Criminal Court on six counts of sexual assault. He was convicted on one count which was affirmed on appeal and was sentenced to three years imprisonment.

20th June 2001: Plenary summons issued but not served.

8th July 2002: Plenary summons was renewed for six months on foot of an order following an ex parte application.

16th December 2002: Plenary summons served

7th July 2005: The defendant's wife, Mrs. Boyce, died.

5th July 2011: The plaintiff serves a notice of intention to proceed.

15th September 2011: Notice of motion seeking judgment in default of appearance.

22nd November 2011: The defendant enters an appearance.

20th December 2011: Statement of claim was delivered.

13th March 2012: An amended statement of claim was delivered.

9th July 2012: O'Neill J. refuses defendant's application to dismiss the proceedings for inordinate and inexcusable delay.

4th, 5th , 6th, 7th, 12$^{th}$ and 13th November 2014: The civil proceedings were heard before O'Malley J. sitting with a jury

**Applications made to O'Malley J.**

11. At the commencement of this action, counsel for the defendant made two applications to the learned trial judge. The first of these was based upon the plea in his defence that certain claims maintained by the plaintiff in her amended statement of claim were statute barred. The other was the first of his two applications made in the course of the hearing to have the proceedings dismissed on the grounds that there had been inordinate and inexcusable delay on the part of the plaintiff in the manner in which she had pursued her claim. In respect of the later application, the principal argument advanced on his behalf was that the transcript of Mrs. Boyce's evidence from the criminal proceedings, which had become available since the hearing of his earlier application to O'Neill J., was insufficient to counter the prejudice to which he would be exposed as a result of her being unavailable to give *viva voce* evidence on his behalf in relation to the claims likely to be made against him. Her evidence would have been critical to the credibility of the evidence that the plaintiff was likely to give concerning the assaults alleged against him and in particular as to whether or not an outdoor flush toilet existed at the defendant's premises, as to whether he had bought clothing for her and as to whether she overnighted regularly at his home.

12. Having considered the submissions of the parties overnight and having read the transcript of Mrs. Boyce's evidence in the criminal proceedings, the High Court judge gave two rulings the following morning. She first ruled that insofar as the plaintiff's complaints of sexual assault post-dated 1985, those claims were statute-barred. In relation to the latter application, which is to the forefront in this appeal, the High Court judge, in accordance with the relevant jurisprudence, first addressed her mind to the question of whether or not there had been inordinate delay in the prosecution of the proceedings. She answered this question in the affirmative noting that nothing had been done by the plaintiff between the date upon which she had served the plenary summons in December, 2002 and her service of a notice of intention to proceed in July, 2011. As to whether that delay could be considered excusable, the High Court judge concluded that no acceptable reason had been advanced by the plaintiff to justify the delay. The best evidence that she had been able to offer was an averment from her solicitor that she had some problems in taking instructions from her client because she had been moving around and working in different countries over the relevant timeframe.

13. The High Court judge then went on to address whether, having regard to all of the relevant circumstances, the balance of justice favoured the dismissal of the action or permitting it to proceed to a full oral hearing. She concluded that the balance of justice did not favour the dismissal of the action. When considering the circumstances relevant to her decision the factor to which the trial judge attached most weight was that it had taken the defendant ten years to enter an appearance. She concluded that the plaintiff could have entered judgment against him at any time during that period and that the only inference to be drawn from such conduct was that he had not intended to defend the proceedings at that time.

14. As to the prejudice which the defendant had asserted would likely arise by reason of his wife's unavailability to give evidence, the High Court judge concluded that he had not established any potential prejudice given that the truthfulness of Mrs. Boyce's evidence in the criminal proceedings had not been put in issue and it had been agreed that her evidence in those proceedings could be admitted as her sworn testimony in the within proceedings. Thus she refused the defendant's application on the grounds that the balance of justice warranted permitting the action to proceed.

15. The defendant renewed his application to have the proceedings dismissed at the conclusion of the plaintiff's evidence in chief on 12th November, 2014. The trial judge ruled against that application. Once again, the application was predicated upon the extent to which his ability to defend the allegations made against him had been adversely affected by virtue of his wife's unavailability to give

evidence on his behalf. In particular, he instanced the plaintiff's evidence to the effect that Mrs. Boyce, in the plaintiff's presence had allegedly queried him as to why the plaintiff was in a distressed state; a conversation which she maintained had happened in the defendant's home immediately following a particular sexual assault. This fact had never previously been asserted by the plaintiff and was one which had never been put to Mrs. Boyce in the course of the criminal proceedings. Her death had denied him the opportunity of challenging this aspect of the plaintiff's evidence, which he submitted could have influenced the jury as to whether the assault concerned had occurred. It was further submitted that the plaintiff's evidence as to the defendant's conduct had gone far beyond that which had been advanced by her in the course of the criminal proceedings and that he was prejudiced in not having his wife available to give such evidence as she may have been in a position to give relevant to these new allegations.

16. The trial judge proceeded to rule against the defendant on the grounds that in the course of cross-examination it could be put to the plaintiff that her evidence now was substantially different from that which she had given in the criminal proceedings. Further, insofar as her evidence concerned new allegations upon which Mrs. Boyce's evidence might have been relevant, she could be questioned as to why her present account of events had not been put to Mrs. Boyce in the course of the criminal proceedings and thus her credibility put in issue notwithstanding. Also, the defendant himself would be in a position to refute the plaintiff's evidence in relation to any aspect of her claim.

**The Defendant's Submission**

17. Mr. Colman Fitzgerald S.C. on the defendant's behalf submits that the trial judge erred in law in rejecting the defendant's application to dismiss the proceedings at the outset of the hearing. He maintains that the High Court judge erred in the manner in which she approached her assessment of the issue as to whether or not the balance of justice favoured the dismissal of the action. He argues that the trial judge placed insufficient weight on the plaintiff's obligation to prosecute her action with diligence in light of the pre-commencement delay in the present case. As to post commencement delay he submits that when assessing where the balance of justice lay, the responsibility for the delay between the date upon which the plenary summons was issued, namely 20th June, 2001, and the date upon which a notice of intention to proceed was served, namely 5th July, 2011, falls upon the plaintiff. She could have moved to enter judgment against the defendant at any time but chose not to do so.

18. Mr. Fitzgerald also argues that the trial judge drew an incorrect inference from the failure on the part of the defendant to enter an appearance following the service of the summons upon him in December, 2002. She should not have concluded that such failure was indicative of an intention on his part not to defend the proceedings. In further support of the defendant's appeal, counsel lays emphasis on the fact that the case was not a complex one such as might excuse delay of the magnitude concerned. There was no reason why the action should not have proceeded to trial in early course once the proceedings had been commenced.

19. Counsel also submits that the trial judge failed to properly assess the likely prejudice to the defendant arising from the plaintiff's inordinate and inexcusable delay at the time she gave each of her rulings. Having read the transcript of Mrs. Boyce's evidence in the criminal proceedings, counsel argues, particularly in the light of the vastly enhanced nature of the sexual abuse pleaded in the amended statement of claim, that the High Court judge ought to have concluded that the absence of Mrs. Boyce as a witness would probably result in substantial prejudice to the defendant in his ability to defend the claim. It ought to have been clear that the plaintiff was likely to give evidence substantially beyond the remit of that which she had given in the criminal proceedings. Thus the High Court judge ought to have concluded that Mrs. Boyce, had she been alive, would likely have had some evidence to offer which might have been potentially supportive of the defendant's denial of the accusations made against him. This was particularly so in circumstances where a substantial proportion of the assaults were alleged to have taken place at the Boyce's family home. In this regard the transcript of Mrs. Boyce's evidence in the Circuit Criminal Court would do nothing to mitigate anything alleged against the defendant beyond the remit of the charges the subject matter of the criminal proceedings.

20. As to the refusal of the High Court judge to dismiss the proceedings at the conclusion of the plaintiff's evidence in chief, counsel relies upon the fact that in the course of her evidence the plaintiff for the first time referred to a conversation alleged to have taken place between Mr. and Mrs. Boyce in her presence in their family home. She maintained that following the first sexual assault perpetrated upon her by the defendant, she had walked into the kitchen and that Mrs. Boyce had asked her husband why she, the plaintiff, looked upset. She maintained that Mr. Boyce had responded by saying that she was playing up and that he was taking her home. This was evidence which the plaintiff had never given before and was evidence which the defendant had submitted was extremely prejudicial to his interests particularly in circumstances where Mrs. Boyce was not available to give evidence as to whether or not the incident had ever occurred. The fact that the defendant could deny that such an incident had occurred did not mean that he was not prejudiced by the absence of his wife to support his account of events. This would have been an issue core to the credibility of the plaintiff and upon which he was denied the evidence that his wife might have been in a position to offer on his behalf.

21. Finally, Mr. Fitzgerald argues that had the proceedings been prosecuted with even modest diligence that it would have been heard long prior to Mrs. Boyce's death. He accepts that the proceedings had to await the conclusion of the criminal proceedings, but these had been determined a number of years before the plenary summons was issued.

**The Plaintiff's Submissions**

22. Mr. Craven S.C. on the plaintiff's behalf submits that the trial judge was clearly alive to the potential prejudice to the defendant arising from Mrs. Boyce's death as she had read the transcript of her evidence in the criminal proceedings at the time when she ruled on the defendant's first application.

23. Counsel submits that, unlike many other cases concerning applications to dismiss proceedings on the grounds of inordinate and inexcusable delay, the only potential prejudice to the defendant in this case arose for consideration in the context of the unavailability of Mrs. Boyce to give evidence. The defendant did not maintain that he had any difficulty in remembering any of the circumstances likely to be relevant to his defence of the claim and neither did he rely upon the unavailability of any other potential witnesses. Further, the defendant had never disputed being present at the locations where the plaintiff maintained she had been assaulted.

24. Insofar as the defendant relied upon potential prejudice to his defence of the proceedings, Mr. Craven submits that the trial judge was correct to conclude that any such prejudice could be overcome by the use of the transcript of Mrs. Boyce's evidence from the criminal proceedings. He went so far as to suggest that the potential use of the transcript of her evidence in the criminal proceedings in lieu of her viva voce evidence, would have the effect of insulating her evidence from the rigors of cross-examination which the plaintiff and her witnesses would be obliged to undergo.

25. As to the trial judge's assessment of the issue as to whether or not the balance of justice favoured the dismissal of the proceedings, counsel submits that the defendant had contributed to the delay in the proceedings and had acquiesced therein. He could have entered an appearance at any time following the service of the summons. In the alternative he could have applied to set

aside the court order renewing the summons or brought a motion to dismiss the claim for want of prosecution at an early stage. Instead he sat back until May, 2012 before issuing a motion to dismiss the claim for want of prosecution notwithstanding his wife's death in 2005.

26. Insofar as the trial judge refused the second application made by the defendant to dismiss the proceedings at the conclusion of the plaintiff's evidence in chief, counsel argues that this Court should be slow to interfere with such an order which was made by the trial judge in the exercise of her discretion. She, he submits, was uniquely well placed to assess the prejudice to the defendant in the context of the claim as it progressed. The defendant's application could not be equated to the standard type of interlocutory application made by a defendant to dismiss proceedings on the grounds of delay. This was an application based upon an argument that the defendant had been prejudiced in the course of proceedings and in circumstances where the trial judge was fully appraised of all of the circumstances and of the evidence which had been given at the point in time when that application was made. Counsel submits that the trial judge was correct when she reasoned that at the conclusion of the evidence it could be explained to the jury, if needed, that they must bear in mind that the transcript of Mrs. Boyce's evidence did not cover all of the evidence given by the plaintiff and that they could be directed as to how in such circumstances they could do justice to the defendant.

27. As to the relevant case law, counsel submits that the facts of the present case are distinguishable from many of the cases in which the conduct on the part of the plaintiff was deemed material to the court's consideration of how it should decide the issue of where the balance of justice lay. In particular, this case could be distinguished from the facts in *Cassidy v. The Provincialate* [2015] IECA 74 given that the defendant had contributed to and acquiesced in the delay in the present case. Further, counsel relies upon the decision of Mahon J. in *McLoughin v. Garvey* [2015] IECA 80 to submit that even if the proceedings had been pursued expeditiously there would nonetheless have been a considerable period of delay between the assaults complained of and the hearing date such that the defendant would have had difficulty in establishing any additional prejudice arising from that period of delay which the Court had deemed to be inordinate and inexcusable.

28. Counsel on behalf of the plaintiff also submits that the High Court judge correctly assessed the balance of justice in accordance with the principles laid down in *Primor plc v. Stokes Kennedy Crowley [*1996] 2 I.R. 459. Insofar as the defendant seeks to rely upon the jurisprudence arising from the decision in *O'Domhnaill v. Merrick* [1984] I.R. 151, the prejudice alleged to arise by virtue of the unavailability of Mrs. Boyce to give oral evidence did not, he maintains, come anything close to the level of prejudice which would require intervention by the court on the grounds that there was a real risk of an unfair trial or an unjust result.

**Principles to be Considered**

29. The rationale which underpins the inherent jurisdiction of the court to dismiss proceedings on the grounds of inordinate and inexcusable delay was explained by Diplock L.J. in the following simple terms in *Allen v. Sir Alfred McAlpine and Sons Limited* [1968] 2 Q.B. 229 at p. 255 where he stated:-

> "The chances of the court being able to find what really happened are progressively reduced as time goes on. This puts justice to the hazard."

30. That said, there are two slightly differing lines of jurisprudence which deal with the circumstances in which a court may consider dismissing an action on the grounds of delay. The first of these emanates from the decision of Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 and which was later expanded upon by Hamilton C.J. in his judgment in *Primor*. The *Primor* decision requires the court to engage with a three strand test. The nature of this test is comprehensively set out by Hamilton C.J. at pp 475 to 476 of his judgment where he states as follows:-

> "The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:
>
> (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgement on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to:
>
> (i) the implied constitutional principles of basic fairness of procedures,
>
> (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
>
> (iii) any delay on the part of the defendant – because litigation is a two-party operation, the conduct of both parties should be looked at,
>
> (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
>
> (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
>
> (vi) whether the delay gives rise to substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
>
> (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to defendant's reputation and business."

31. As can be seen from the above, the court must first decide if there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting their action. It is only if the court so finds that it is required to decide whether the balance of justice rests in favour of dismissing the case or in allowing it to proceed. When considering this issue the court must carry out a balancing exercise based on a consideration of all of the relevant circumstances and in particular the factors identified in *Primor* and to which I have just referred. Prejudice resulting in unfairness to the defendant, or the risk that a fair hearing is not possible, are just two such factors. Further, the court must have regard to the actions of the defendant and their contribution to or acquiescence in the delay.

32. The other strand of jurisprudence emanates from the *O'Domnhaill* decision whereby the court, when deciding whether or not to dismiss a claim on the grounds of delay, is not required to find the plaintiff guilty of inordinate or inexcusable delay but merely must be satisfied that it is in the interests of justice to dismiss the case because the passage of time has resulted in a real risk of an unfair trial or unjust result. In order to dismiss proceedings in the absence of inordinate and inexcusable delay, the defendant must establish a somewhat higher level of potential prejudice than that required under the third leg of the *Primor* test and must be in a position to demonstrate that in defending the action he would be placed under an unfair burden. In *O'Domnhaill* Henchy J. remarked, in the course of his judgment at p. 158 that:-

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

33. In *Stephens v. Flynn* [2008] 4 I.R. 31 Kearns J. concluded that a defendant need only establish moderate prejudice arising from delay as justification for dismissing the proceedings on the third leg of the *Primor* test. In the following brief passage at p. 38 para. 22, he summarised the findings that had been made by Clarke J. in the court below in the following manner:-

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

34. In my own decision in *Cassidy* I set out in some small degree of detail the difference between the *Primor* and *O'Domhnaill* tests and in doing so stated why I considered it appropriate that the burden on a defendant who seeks to have the claim against them dismissed in the absence of any inordinate or inexcusable delay on the part of the plaintiff should rightly have to establish nothing short of a real risk of an unfair trial or unjust result. At para. 37 I stated as follows:-

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

35. Accordingly, where a plaintiff has not been guilty of inordinate and inexcusable delay, the defendant must establish that they are at a real risk of an unfair trial in order to have the proceedings dismissed. However, where the defendant proves culpable delay on the part of the plaintiff in maintaining the proceedings, the defendant need only prove moderate prejudice arising from that delay in order to succeed under the *Primor* test.

36. Yet another principle which has emerged from many recent judgments of the superior courts dealing with the issue of delay is that in considering whether or not the post commencement delay has been inordinate, the court may have regard to any significant delay prior to the issue of the proceedings: (see *Cahalane and Another v. Revenue Commissioners and Others* [2010] IEHC 95 and *McBrearthy v. North Western Health Board* [2010] IESC 27). These decisions support the proposition that where a plaintiff waits until relatively close to the end of the limitation period prior to issuing proceedings that they are then under a special obligation to proceed with expedition once the proceedings have commenced.

37. In a number of recent decisions (see Hogan J. in *Quinn v. Faulkner Trading as Faulkners Garage and Another* [2011] IEHC 103), the court has emphasised the constitutional imperative to end stale claims so as to ensure the effective administration of justice and basic fairness of procedures. The court itself, by reason of the obligations created by Article 34.1 of the Constitution, is obliged to ensure that proceedings are dealt with in an expeditious manner. Indeed in *Quinn* Hogan J. criticised the court's prior tolerance of inactivity on the part of litigants when he stated at para. 29 as follows:-

> "While as Charleton J. pointed out in *Kelly v. Doyle* [2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which lead to a culture of almost "endless indulgence" towards delays led in turn to a situation where inordinate delay was all too common: see, *e.g.* the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, [2005] ILRM 209 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Ltd* [2010] IEHC 465."

**Decision**

38. Before reaching her decision on the first of the defendant's applications to strike out the proceedings, the trial judge clearly reflected overnight on the submissions that had been made by the parties and undoubtedly considered the transcript of the evidence that Mrs. Boyce had given in the Circuit Criminal Court proceedings, as this was handed into court in the course of the argument.

39. In her ruling, the High Court judge first addressed her mind, as required by the *Primor jurisprudence*, to the issue of whether or not the plaintiff had been guilty of inordinate and inexcusable delay in the manner in which she had conducted her proceedings. On the evidence, she expressed herself satisfied, as O'Neill J. had done two years previously, that the plaintiff had indeed been guilty of inordinate delay, and furthermore that she had failed to offer any reasonable excuse for same. That she so found was, in my view, inevitable having regard to the chronology of events referred to earlier and to which I will later return. Indeed, the plaintiff herself takes no issue with such findings.

40. The trial judge then embarked upon a consideration of the third leg of the *Primor* test, namely, whether in the light of her findings of inordinate and inexcusable delay, the balance of justice lay in favour of or against the dismissal of the claim.

41. In deciding that the balance of justice favoured permitting the action to proceed, I regret that I have come to the conclusion that the trial judge fell into error in a number of material respects.

42. In deciding where the balance of justice lies, the Court must, for a second time, look at the entire period of delay so as to consider the relative culpability of the parties and must also consider the nature and extent of any resultant potential or actual prejudice. It is clear from the ruling of the High Court judge that this was the approach that she intended to pursue. However, I am satisfied that she was incorrect in holding the defendant responsible for the delay between the service of the plenary summons (16th December, 2002) and the plaintiff's motion for judgment in default of appearance (15th September, 2011). While it is undoubtedly the case that the defendant acquiesced in that period of delay, the primary blame for the fact that such a delay occurred ought to have been visited upon the plaintiff given that during that period the defendant had not taken any step which would have precluded her from proceeding to bring an application for judgment against him.

43. Unfortunately, the trial judge appears to have overlooked the onus that rests on the litigant to prosecute their action in a manner consistent with the proper administration of justice. Here, the plaintiff issued a plenary summons on 20th June, 2001, however, she did not serve the summons as required under the Rules of the Superior Courts 1986 within the twelve months provided for in Order 8 rule 1 and as a result had to bring an ex parte application to the court to renew the summons on 8th July, 2002. Having obtained such an order she did not serve it for another five months and thereafter, rather remarkably, took no step to pursue her claim for a further nine years. The motion for judgment in default of appearance, which she brought on 15th September, 2011, could just as easily have been issued by her in 2002 or 2003. All of that period of delay, and for which the plaintiff has offered no reasoned excuse, was of her own making.

44. The defendant was certainly in default in failing to enter an appearance, but that did not, as the trial judge assumed, entitle the plaintiff to enter judgment against him in the central office without further notice. She would have to have filed a statement of claim in the central office, in lieu of service on the defendant, and then proceeded to issue a motion for judgment, on notice to the defendant. Until that happened he was at no risk of judgment being entered against him and only following the issue of such a motion would he have been faced with the decision as to whether or not to seek to enter an appearance for the purpose of defending the action. Thus the trial judge erred in concluding that judgment could have been entered against the defendant at any time up to the 15th September, 2011, due to the fact that he had failed to enter an appearance to the summons.

45. Of significant importance in terms of the plaintiff's culpability for the delay between the date of the issue of the plenary summons in June, 2001 and her motion for judgment in September, 2011 is the fact that this is a case in which there was significant pre-commencement delay as can be seen from the chronology set out earlier. As already stated, there is a substantial body of legal authority which advances the proposition that where a plaintiff issues their writ at the outer end of the period provided for by the Statute of Limitations, they are then under an even greater onus to proceed with diligence once the proceedings are commenced. The justification for such an approach is an acceptance of the fact that the greater the delay between the events complained of and the hearing of the action, the greater the risk of an unfair trial. As is so often quoted in judgments concerning delay "memories fade" and this "puts justice to the hazard".

46. According to the plaintiff, the assaults complained of took place between 1979 and 1992, thus making it all the more important that when she issued these proceedings that she pursue her claim with diligence. She was 18 years of age in April, 1993 and by the time she issued the summons in 2001, over 20 years had lapsed since the date upon which she alleged the earliest assaults had occurred, namely when she was four years of age. While it has to be accepted that the plaintiff could not have pursued these proceedings to a conclusion while the criminal proceedings were in being, and that this may explain some of the pre-commencement delay, the same cannot be relied upon to relieve her of her obligation to pursue her claim with dispatch once she issued her summons given the potential consequences of that pre-commencement delay.

47. Culpability is of course irrelevant when it comes to a consideration of pre-commencement delay as the Statute of Limitations permits proceedings be issued up to the very limit of the relevant statutory period. However, the court is entitled to consider the effect of post-commencement delay against the backdrop of the timeframe of events that preceded the issue of the summons, a factor that the trial judge appears to have overlooked. In my view, the plaintiff's delay, when viewed against the backdrop of the pre-commencement delay, made her conduct all the more indefensible, a matter which should have weighed heavily against her when it came to a consideration of whether the balance of justice favoured the dismissal of the action.

48. I am also not satisfied that the trial judge was entitled to infer from the defendant's failure to enter an appearance until such time as a motion for judgment was issued against him ten years later, that during that period he had no intention of defending the proceedings. Whilst perhaps undesirable, it is nonetheless common case that defendants summonsed to litigation do not enter an appearance to proceedings until such time as a motion for judgment issues against them. It is not uncommon for defendants to believe that if they sit tight and do nothing the claim might not proceed. It is to be remembered, as already advised, that they are on not at risk of judgment being entered against them without further notice. Also, in not entering an appearance they obtain the advantage of getting sight of the statement of claim before making their decision as to whether or not they will defend the action, as the statement of claim as filed in the central office must be exhibited in the affidavit grounding the motion for judgment. However, once it becomes clear that a plaintiff is intent on pursuing their claim the vast majority of defendants seek an extension of time to enter an appearance after which they proceed to defend the action.

49. It may well be the case that the trial judge drew an incorrect inference from the defendant's failure to enter an appearance based upon her mistaken belief that the plaintiff could have entered judgment in the office against the defendant without issuing a further motion against him. However, this was not the case. Accordingly, insofar as she inferred that the defendant's failure to enter an appearance was indicative of his willingness to allow the plaintiff enter judgment against him in respect of his alleged wrongdoing, she fell into error. That she did so is also somewhat borne out by the fact that when the plaintiff did issue her motion for judgment in default of appearance the defendant sought time to enter an appearance and then proceeded to fully defend the claim.

50. Having considered all of the relevant circumstances I am satisfied that were it not for the plaintiff's delay in pursuing her action following the issue of her plenary summons, a delay which was all the more inexcusable in the light of the pre commencement delay, her action might well have been disposed of before the death of Mrs Boyce in 2005. After all, these are not proceedings that required compliance with difficult proofs. Witnesses did not have to be found or located after a long number of years. No discovery, a procedure that often slows down a plaintiff's ability to obtain an early trial date, was required. Neither was this a case in which significant expert evidence needed to be obtained to deal with issues of liability or quantum, as is often the case in civil proceedings.

51. This brings me to consider briefly the trial judge's conclusion that the defendant had not established that he was prejudiced by the fact that his wife was not available to give evidence. I do not agree with her conclusion that any potential prejudice in this regard could be adequately overcome based on the defendants ability to rely upon the transcript of Mrs. Boyce's evidence in the criminal proceedings. Neither do I accept that the prejudice likely to flow from the fact that the plaintiff was making allegations of a severity and frequency that had not previously been made by her could be sufficiently countered by putting to the plaintiff, in the course of cross examination, the fact that she had not raised these matters at an earlier time.

52. At the time the first application was made to the trial judge, it ought to have been clear to her that the claim about to be advanced by the plaintiff was one which would allege assaults of a type and frequency that had never been advanced by her in the criminal proceedings, where only six counts of sexual assault were pursued. In this regard it has to be remembered that the plaintiff amended her statement of claim several years after the death of Mrs. Boyce to claim damages in respect of frequent and repetitive acts of rape and buggery, offences in respect of which the defendant had never been charged. In such circumstances, and given that her testimony in the criminal proceedings was supportive of her husband's denials, I believe the trial judge should have anticipated that Mrs. Boyce, if she had been alive, might well have been in a position to offer some evidence which had the potential to cast in doubt the plaintiff's claims concerning assaults of such savagery having taken place unbeknownst to her in the environs of her home.

53. Based on the trial judge's ruling, the defendant was to be confined to such benefit as he could derive from relying on the transcript of the evidence that his wife had given in the criminal proceedings in order to challenge the plaintiff's credibility. He was not to have the benefit of his wife's oral evidence on any matter which had previously been raised by the plaintiff in the criminal proceedings and which either directly or indirectly concerned her. Further he was to lose the benefit of any evidence that she might have been able to give in relation to any new allegations not previously canvassed in the criminal proceedings. The fact that he could question the plaintiff as to why she had delayed until 2012 to make allegations of rape and buggery did not, in my view, in any way mitigate against the potential prejudice arising from the fact that his wife was not available to give such evidence as she may have been able to give as to the likelihood of such assaults ever having taken place.

54. Even if the plaintiff's claim had not been extended, as per her amended statement of claim, I am of the opinion that the loss of Mrs. Boyce's potential evidence to the defendant was sufficient to justify the trial judge deciding that the balance of justice favoured the dismissal of the action because of the likely degree of prejudice which would be visited upon him by reason of her being unavailable to give viva voce evidence. In the context of a jury action I believe that there would be an enormous qualitative difference between the jury hearing and seeing a witness give their evidence on the one hand and the same evidence being read out to them on the other hand. To have a witness such as Mrs. Boyce, as happened in the criminal proceedings, step into the witness box and contradict the evidence given by the plaintiff on some material fact would, to my mind, be likely to carry far more weight and influence than if her evidence was read out to the jury and they were told that they should accept that evidence as her account of the relevant event.

55. The credibility of a witness is often determined, not by their words but by their demeanour and by the manner in which they were observed when giving their evidence. Did they falter or were they hesitant when answering questions under cross examination? Did they shift uncomfortably in their seat and avert their eyes from their examiner? None of these factors come into play when evidence is read from a transcript. A transcript is arid, devoid of character and a poor means of imparting sincerity or sensitivity. It is for this precise reason that an appeal court is not permitted to interfere with a finding of fact made by a trial judge if the same is supported by any credible evidence as it is the trial judge that has had the opportunity of seeing the witness as opposed to reading the transcript of the evidence. Mrs. Boyce, had she been available might have been a truly impressive witness for the defendant and the fact that her evidence from the criminal proceedings could be read out to the jury was no substitute for her viva voce testimony.

56. Given that the trial judge had read the evidence which Mrs. Boyce had given in the Circuit Criminal Court proceedings, I believe that she ought to have concluded that it was likely that she would have had significant evidence to offer in respect of the allegations made against the defendant had she been alive at the time of the hearing. That this is so is, I believe, relatively clear from the transcript of the third day of the criminal proceedings on 19th February, 1999. On that date, a major credibility issue arose due to the evidence that had been given by the plaintiff concerning the first time she alleged she had been digitally penetrated by the defendant.

57. The plaintiff gave evidence that she was four years of age at the time and that this had occurred in a shed which housed an outdoor toilet at the defendant's home. She described standing on the toilet bowl of a flush toilet at the time the assault was perpetrated. The defendant, in his evidence, denied the assault and further asserted that they had had no outdoor toilet. What they used as a toilet was a metal bucket which was kept in an external shed. Thus he challenged the fact of the assault and also sought to discredit the plaintiff's evidence by denying the existence of the toilet bowl upon which she alleged she had been positioned.

58. Mrs. Boyce, in giving evidence on her husband's behalf, also denied that they had any formal outdoor toilet, thus challenging the credibility of the plaintiff's evidence concerning the assault.

59. There were two other issues of substantial importance which were dealt with by Mrs. Boyce in her evidence in the criminal proceedings. The first of these concerned the plaintiff's evidence to the effect that she regularly stayed overnight and often for lengthy periods during her holidays at the Boyce's home. The latter was her assertion that Mr. Boyce regularly bought her presents of clothes. The first of these issues was one which was extremely material to the credibility of the plaintiff's allegations particularly having regard to the frequency of the assaults allegedly perpetrated by the defendant. Mrs. Boyce in the criminal proceedings said that she was certain that the plaintiff had never stayed overnight in their house, thus once again calling into question the credibility of the plaintiff on a critical issue. Further, she stated that not only had her husband never bought clothes for the plaintiff; he never even bought clothes for himself.

60. The jury in the criminal proceedings had the benefit of seeing Mrs. Boyce deliver her evidence in respect of each of the aforementioned issues which were clearly material to its assessment as to whether or not she had been abused in the manner and at the frequency alleged.

61. From what we know of the outcome of the criminal proceedings, Mr. Boyce was not convicted in respect of any assault alleged to have taken place at the Boyce family home. That outcome might well have been influenced by Mrs. Boyce's evidence as to the non existence of a flush toilet, an important island of fact in a contest that might otherwise have had to be determined by reference to the plaintiff's allegation and the defendant's denial of that event. Likewise the jury may have been influenced by Mrs. Boyce's evidence on the other issues to which I have just referred, namely, whether they believed the plaintiff had stayed overnight at the Boyce's home on a regular basis and whether or not Mr. Boyce had bought the plaintiff gifts of clothing, as she had maintained.

62. I am satisfied that the trial judge ought to have anticipated a re-run of these same allegations in the course of the proceedings that were about to commence and thus the potential prejudice to the defendant arising from the loss of the evidence that Mrs. Boyce would likely have been in a position to give concerning these or indeed any other new allegations.

63. Reading out to the jury what Mrs. Boyce had stated in the criminal proceedings in relation to the existence or non-existence of a flush toilet or her evidence on any other matters material to the plaintiff's credibility in terms of its effectiveness simply cannot be equated to having her sit into the witness box and give that very same evidence.

64. In the foregoing circumstances, I am of the opinion that, properly considered, the High Court judge ought to have concluded that the balance of justice favoured the dismissal of the proceedings in light of the plaintiff's inordinate and inexcusable delay and should have dismissed her claim at the outset of the proceedings. That being so, it is not necessary to deal in any great detail with the defendant's renewed application to dismiss the proceedings at the end of the plaintiff's evidence in chief. However, what emerged in the course of her evidence, I believe, supports, albeit retrospectively, my view that the trial judge erred in failing to dismiss the proceedings in advance of the plaintiff giving evidence.

65. In the course of the plaintiff's evidence, she referred to the fact that she was first assaulted by the defendant, as already mentioned, when standing on a toilet bowl of an outdoor toilet at the defendant's home. She went on to give evidence that in the aftermath of this assault, she went into the defendant's house where, allegedly, Mrs. Boyce asked her husband why she, the plaintiff, was in a distressed state. The plaintiff maintained that Mr. Boyce's response was to the effect that she was acting up and that he was about to take her home. The plaintiff had never before recounted this statement, which in the course of her evidence, she had attributed to Mrs. Boyce. Hence, Mrs. Boyce had never been afforded the opportunity of dealing with the allegation. If she had, she might have denied ever having seen the plaintiff distressed or having made any such statement, in which case the plaintiff's credibility would have been substantially challenged on the issue not only by the defendant himself but also by his wife. The potential prejudice to Mr. Boyce as a result of not having his wife available to give evidence concerning this incident, which was alleged to have taken place in the immediate aftermath of a heinous sexual assault, could not to my mind, have been overcome or counterbalanced by the fact that the defendant was in a position to question the plaintiff as to why, on no prior occasion, she had mentioned this alleged verbal exchange.

66. This is just one example of why I believe the trial judge ought to have ruled that the balance of justice favoured the dismissal of the proceedings before the proceedings ever commenced.

**Conclusion**

67. This is indeed a tragic claim in which the plaintiff has advanced extremely serious allegations of sexual abuse against the defendant.

68. It is an enormous sanction to dismiss a claim of such a nature on the grounds of delay, having regard to the very significant consequences of doing so from the plaintiff's perspective, and particularly so on appeal after she has been awarded substantial damages by a judge sitting with a jury.

69. However, there are clear principles which must be applied so as to ensure the effective administration of justice and basic fairness of procedures. These require that proceedings be conducted within a timeframe such that a defendant will not be unduly prejudiced by inordinate or inexcusable delay. The court must endeavour to ensure that proceedings are conducted in a manner which will reduce the risk of an unjust result or an unfair trial. Delay must not allow justice be put to the hazard.

70. In the present case, the plaintiff was guilty of inordinate and inexcusable delay in the manner in which she pursued her claim. Her default in this regard occurred against a backdrop of a significant period of pre-commencement delay thus further elongating the period between the events in dispute and the trial date. I am satisfied that her delay exposed the defendant to a significant risk of prejudice in terms of his ability to defend the very serious allegations made against him. That prejudice stemmed principally from the death of his wife in 2005. Had the plaintiff not been guilty of inordinate and inexcusable delay and had she pursued her claim in the manner required of her having regard to the pre-commencement delay, it is likely that her claim would have been heard at a time when Mrs. Boyce was alive and in a position to give evidence supportive of her husband's defence, as indeed she had done in the criminal proceedings on a number of key issues, Her unavailability to give such evidence was undoubtedly prejudicial to the extent that the trial judge ought to have dismissed the action on the grounds that the balance of justice mandated such an approach.

71. Having regard to the aforegoing findings, it is not necessary to consider whether, applying the principles which emerge from the decision on *O' Domhnaill v. Merrick,* a similar result would have been warranted.