

THE HIGH COURT

1996 10721 P

BETWEEN

VINCENT KELLY

PLAINTIFF

AND

DECLAN DOYLE AND MINISTER FOR THE ENVIRONMENT IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Charleton delivered on 23rd day of November, 2010

1. Declan Doyle, the first defendant, seeks to have the plaintiff's case against him struck out for inordinate and inexcusable delay. The litigation arises out of a collision between a motorcycle and a tractor over sixteen years ago on 26th July, 1994. Declan Doyle, the first defendant, was riding the motorcycle, whilst Vincent Kelly, the plaintiff, was his pillion passenger. The first defendant was not insured against injuries to other road users. Even if he had been, it was not then compulsory for a motorcyclist to insure in respect of injury to their pillion or side-car passengers. Damages are sought by the plaintiff against the State over this issue; but that is another day's work. I intend to briefly refer to the applicable legal principles; to then set out a chronology of the events relating to this case; and, finally, to make a decision.

Legal Principles

2. Delay is recognised in the Rules of the Superior Courts as a factor for striking out a claim, but only to a limited degree. Order 122, r. 11 of the Rules of the Superior Courts provides:-

"...In any cause or matter in which there has no proceeding for two years from the last proceeding had the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just."

3. The principles upon which the court proceeds, however, are usually not those set out in the foregoing Rules. Instead, the parties in this case, as in virtually every other case that has been reported, rely upon the inherent jurisdiction of the court to dismiss civil claims because of inordinate and inexcusable delay. The fundamental principles, in that regard, were first set out in 1979 by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 at 567, in the following way:-

1. "Inquiry should be made as to whether the delay on the part of the person seeking to proceed has been firstly inordinate and even if inordinate has it been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable would appear to lie upon the party seeking a dismissal and opposing a continuance of the proceedings.
2. Where a delay has not been both inordinate and inexcusable it would appear that there are no real grounds for dismissing the proceedings.
3. Even where the delay has been both inordinate and inexcusable the court must further proceed to exercise a judgment on whether in its discretion on the facts the balance of justice is in favour of or against the proceeding of the case. Delay on the part of a defendant seeking a dismissal of the action, and to some extent a failure on his part to exercise his right to apply at any given time for the dismissal of an action for want of prosecution, may be an ingredient in the exercise by the court of its discretion.
4. Whilst the party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of his solicitor, consideration of the extent of the litigant's personal blameworthiness for delay is material to the exercise of the court's discretion."

4. As to the third principle set out above, even where as it might be possible to weigh more heavily in the balance delay by a party that is legally represented, the relevant cases indicate that defendants who wish to let sleeping dogs lie, as opposed to exercising the procedures available in the Rules, may be excused if they are not legally represented. I will return briefly to this issue.

5. There has been some development in the case law since the above decision. In *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, Hamilton C.J. at 475 to 476 summarised the relevant principles in the following format:-

"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 a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to

- (i) the implied constitutional principles of basic fairness of procedures,
- (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
- (iii) any delay on the part of the defendant - because litigation is a two party operation, the conduct of both parties should be looked at,
- (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff's delay,
- (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
- (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
- (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

6. More recently, in *Stephens v. Paul Flynn Limited* [2005] IEHC 148, (Unreported, High Court, Clarke J., 28th April, 2005) analysed the legal principles on the basis of an assessment of:-

- (a) the degree of delay;
- (b) the excuse tendered for the delay;
- (c) the prejudice alleged to have been suffered by the defendant; and
- (d) the inaction of the defendant.

On this last point there are conflicting signals in the law reports. In *Anglo Irish Beef Processors v. Montgomery*, [2002] 3 I.R. 510, Fennelly J. expressed the view that a defendant should "not be lightly blamed for delay which is the fault of the plaintiff". (p. 519) The kind of delay which he identified as being capable of weighing against the defendant was delay "akin to acquiescence". In both *Stephens v. Paul Flynn Limited* and the subsequent case of *Rogers v. Michelin Tyre Plc.* [2005] IEHC 294, (Unreported, High Court, Clarke J., 28th June, 2005) Clarke J. stressed that the Supreme Court judgments in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510 and *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 should not be interpreted as reformulating the relevant principles to be taken into account, but rather as recognising that in any given case the weight to be attributed to each factor may shift. In *Wolfe v. Wolfe* [2006] IEHC 106, (Unreported, High Court, 15th March, 2006) Finlay Geoghegan J., also endorsed this approach:-

"I respectfully agree with the view expressed by Clarke J. in *Stephens v. Paul Flynn Limited* ... and *Rogers v. Michelin Tyres plc* ... that the decisions since *Primor plc v. Stokes Kennedy Crowley* do not mean that there has been a change in the factors which the court should properly take into account in assessing where the balance of justice lies but rather the weight to be attached to the various factors may need to be reconsidered...

She continued:-

It remains the position as set out clearly and succinctly by Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery*...that "each case must be judged on its own merits" (p. 520) and also at p. 518:

"...Subject to that, however, the court should aim at a global appreciation of the interests of justice and should balance all the considerations as they emerge from the conduct of and the interests of all the parties to the litigation. The separate considerations mentioned by Hamilton C.J. should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just."

Chronology

7. I now briefly set out the chronology of the events which are relevant to the balancing exercise inherent in the disposal of this claim.

(1) 26th July 1994: the accident, the subject matter of these proceedings, happened. The plaintiff was riding pillion on the first defendant's motorcycle. They were friends. On rounding a country bend, the motorcycle, instead of taking the corner, apparently went straight ahead and collided with the rear wheel of a tractor coming in the other direction. The plaintiff was seriously injured, losing a leg. The defendant does not seem to have suffered serious injuries. There was an independent witness to the accident and she unequivocally points responsibility towards the first defendant.

(2) 22nd June 1995: the first defendant, having been convicted in the District Court of dangerous driving, appealed to the Circuit Court. The matter was heard before His Honour Judge Gerard Buchanan. His judgment was as follows:-

"I am satisfied in this case to accept the evidence of Mr. Conyard [the driver of the tractor] and Ms. Phelan [a driver in a car travelling behind the tractor]. I am satisfied from the evidence of Sergeant Burnes that the Defendant came around this blind corner from his point of view, at an excessive speed. The tractor would have been driven on its correct side of the road, I accept that it had been driven on its correct side. It may have crossed over the non-existent white line, but it was being driven correctly and properly on its correct side of the

road. Mr. Doyle, in my opinion, came around the corner too fast and possibly because of the pillion passenger, he went out of control and came across the road as both Mr. Conyard and Ms. Phelan say. The only difficulty I have is to whether this amounts to dangerous driving, and the accident obviously had very serious consequences. Taking that into account to an extent, but I have come to the conclusion that it does not amount to dangerous driving, and accordingly I find the defendant not guilty of dangerous driver, but guilty of careless driving."

- (3) 5th December 1996: a plenary summons is issued in this case. At
- (4) 9th January 1997: the first defendant enters an appearance. A defence was never filed.
- (5) 15th February 1997: a motion for judgment in default is brought against the first defendant by the plaintiff. Three weeks are given for a defence. None is filed.
- (6) 22nd February 1999: an application for discovery is brought as against the Minister for the Environment, and the other State parties, in relation to the issue as to whether the State was obliged to require that pillion passenger of motorcycles be insured by the driver against injury, or was otherwise liable to the injured party in damages in respect of the failure to require that.
- (7) 28th July 1999: an amended statement of claim is served. An earlier statement of claim is undated.
- (8) 27th March 2000: Johnson J. refuses to order discovery against the State defendants.
- (9) 19th November 2003: the Supreme Court disposes of the appeal in relation to discovery and makes the same order as in the High Court.
- (10) 24th November 2004: a notice of change of solicitors is served by the plaintiff. The defendant also changes solicitors at one point. Some correspondence in the case was delayed in consequence of these changes which do not appear to have been made in accordance with the appropriate Rules of Court.
- (11) January 2005: at some stage during this month, a letter written by Patrick Hanratty, S.C., acting for the plaintiff, indicating that the case to be brought against the Minister for the Environment and the State parties is unlikely to be successful, is drawn to the attention of the plaintiff. The first defendant claims that he also saw this letter. He also claims that at or around this time it was indicated to him that the case was being withdrawn.
- (12) 18th March 2005: Murphy J. decided the case *Delargey v. The Minister for the Environment* [2006] IEHC 267, (Unreported High Court, Murphy J., 18th March, 2005). This indicated, it is argued, some prospect of success, by analogy, in relation to the plaintiff's claim against the State parties.
- (13) 14th October 2005: the plaintiff's solicitors write to an incorrect solicitor on behalf of the first defendant consenting to the late filing of a defence.
- (14) 15th December 2005: the first defendant discontinues separate proceedings claiming damages against the tractor driver for negligence, which he had earlier initiated at an unspecified date.
- (15) 26th November 2006: the first defendant is seriously injured in a road traffic accident. His injuries are difficult to overstate. He has lost a leg, has suffered reactive depression, is in constant pain and finds it extremely difficult to sleep. Some time after this, the first named defendant, having received a bank loan based on the prospect of success in his road traffic action, takes the plaintiff for a drive. They fall out, having continued to be friends since the motorcycle crash, and there were allegations and counter-allegations made in relation to assurances given, or what was otherwise said.
- (16) 27th November 2008: the plaintiff serves a notice of intention to proceed. An issue, however, arises, as to whether it was ever served, perhaps because of the change of solicitors.
- (17) 25th May 2009: the plaintiff brings a motion for judgment against the first defendant. This is struck out due to an error in attendance in court on the part of both sides.
- (18) 30th June 2009: the first defendant's case in respect of the accident of the 29th November 2006 reaches a settlement for a substantial figure.
- (19) 13th July 2009: the defendant brings a motion to dismiss the case on the ground of delay. Unfortunately this did not get on for hearing very speedily. At the same time, another motion for judgment in default is brought by the plaintiff against the first defendant.
- (20) 29th November 2009: the first defendant is in hospital with severe physical and psychiatric injuries arising out of his accident.

Case for dismissal

8. The first defendant points out that it is now fifteen years since the road traffic accident that led to these proceedings. Twelve years have passed since the statement of claim was delivered. Furthermore, the first defendant has discontinued his separate action against the tractor driver and has himself being seriously injured in a crash that happened in 2006. The nature of his physical and psychiatric illness brought about by the 2006 accident disclose that he suffers from constant pain and that the medication used in an attempt to alleviate this condition includes one drug which is eighty times more powerful than morphine. The side effects of this drug can include sleeplessness and memory loss. There is no clear evidence, on the basis of which I could establish a probability, whereby it has been rendered impossible for the defendant now to adequately defend himself because of what has occurred since the time of the accident. At no time did the first defendant ever make the case that because of an unexpected movement by the plaintiff, as his pillion passenger, his motorcycle was thrown out of control. His account of the accident, when giving evidence in defence of himself on the dangerous driving charge before Judge Buchanan, indicates a clear recollection up to the time when he came to take the bend and saw the tractor. Thereafter, as is all too common, the first defendant recalls waking up in hospital. He had no difficulty making a case in detail and replying to testing cross-examination at that time. The nature of his instructions is therefore clear.

Issue of fact

9. An issue of fact has arisen between the parties. It concerns a meeting between the first defendant and the plaintiff sometime in 2007. As I have indicated in the chronology, the first defendant obtained money by way of bank loan, and bought a motorcar. He brought the plaintiff for a drive. In consequence of whatever was said and done on that drive, the defendant formed the view that the plaintiff was now intent on suing him again, having previously indicated in some way that his case was hopeless. The parties have not spoken since. In addition to that, allegations are made concerning a telephone call. I do not intend to recite these allegations. It suffices to say that the allegations are denied. For everything that is said, there is either a denial or a counter-allegation. I am unable to resolve any of these issues because all of this evidence is on affidavit; so, there is no cross-examination and no view of witnesses. At the end of the day, however, even had I resolved any issues of fact in favour of the first defendant, I take the view that once a case is commenced through a court proceeding, then action in accordance with the Rules is what is appropriate; and not personal communications. Whereas the inaction of the defendant can, of course, be taken into account in deciding the issue of balance that is inherent in an application of this kind, statements by the plaintiff that the case was at an end would need to be clearly proved. The actions of represented parties, through letters from solicitors and applications to the court, weigh more heavily. There are none in this case. There is provision in the Rules for a notice of discontinuance to be served by a plaintiff, for a plaintiff to bring a motion to strike out an appearance for failure to deliver a defence, for a defendant to set the case down for trial once the pleadings have closed and the plaintiff has not set the case down, and for motions to be brought in early course by a defendant indicating that the delay has become intolerable.

Analysis

10. There has been inordinate and inexcusable delay in this case. That delay, however, is not one-sided. At all material times the first defendant was legally represented by different solicitors. If, and this is a matter I cannot resolve, at some time after the Supreme Court refused the plaintiff's application for discovery against the State parties in November 2003, the first defendant began to believe that the case was over, then methods were available to formalise that situation. There is default by both parties. I cannot see that a failure by the first defendant to put in a defence, a failure by the plaintiff to insist on a defence in order to set the matter down for trial and a failure at that time to lodge a motion seeking to dismiss the matter for want of prosecution, or to bring a motion to dismiss because of inaction over two years in the proceedings is anything other than inexcusable. It is certainly the case that the plaintiff and the first defendant were friends in the past. By entering the public sphere of litigation, however, their interactions became less important than the methodology which is provided by the Rules of the Superior Courts for establishing certainty within litigation. Fundamentally, I cannot be impressed at the occasions which I have mentioned in the chronology where the first defendant failed to lodge a defence having been given time. That is not in accordance with the proper conduct of litigation.

11. A delay of this kind is an indictment of the manner in which some personal injuries cases are pursued. The Court has no power, however, and, furthermore, it would be wrong, to show displeasure by dismissing a case. The ultimate test with a delay of this magnitude is as to whether a fair adjudication can nonetheless take place. The first defendant has suffered a serious accident and has, like the plaintiff in the accident, the subject matter of the proceedings, also lost a limb. The clear recording of his instructions at the time of his criminal conviction for careless driving before Judge Buchanan in June 1995, and the inference which the Court must make that his solicitors recorded his instructions, makes it improbable that a fair adjudication of this matter cannot take place. Any memory loss by him or inability to concentrate has not been proved.

12. I will therefore dismiss the application. Further, having heard argument on the issue of costs, I decline in my discretion to award any costs because both parties are at fault in delaying this action.