THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 41

No: 2014/561

[Article 64 transfer]

Irvine J.
Hogan J.
Mahon J.

Leonard Gorman

Plaintiff/Appellant

and

The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General

Defendants/Respondents

JUDGMENT of the Court delivered on the 3rd March 2015by Ms Justice Mary Irvine

1. This an appeal against the judgment and order of the High Court (Hedigan J.) delivered on 10th July 2012 whereby he dismissed the plaintiff's claim for want of prosecution and on the grounds of inordinate and inexcusable delay.

Relevant background facts
2. By plenary summons issued on 29th January 2003 the plaintiff commenced proceedings in the High Court seeking damages from the defendants in respect of acts of assault, battery and false imprisonment which are alleged to have taken place at Dundalk Garda Station on 15th January 2001.

3. In his statement of claim delivered on 10th February 2003 the plaintiff pleaded that whilst in a cell in the station he was viciously attacked by three members of the Gardaí who beat him around the body with batons and kicked him while he lay on the ground. As a result he maintains that he was extremely shocked and suffered severe bruising all over his body.

4. A defence was delivered on 17th July 2003 wherein the defendants maintained that at all material times the plaintiff had been held in lawful custody. They denied all allegations of assault, negligence and impropriety and pleaded that any injuries he sustained were as a result of his intoxication, his failure to cooperate and the fact that he repeatedly assaulted members of An Garda Síochána.

5. The notice of trial was served in the proceedings on 30th September 2003. This was later struck out due to non attendance on 18th January 2005.

6. By letter of 8th October 2003 the defendants raised particulars arising from the statement of claim. This notice was replied to on 9th January 2004.

7. Voluntary discovery was sought from the defendants in October 2003. In May 2004 the Master made an order for discovery and the defendants complied with that order in May 2005.

8. On the 2nd March 2004 a supplemental notice for particulars was raised by the defendants. This was replied to on 20th march 2012.

9. On 22 March 2004 particulars were sought by the plaintiff solicitors arising from the defence and these were replied to on the 30th November 2005.

10. On 4th May 2004 the defendants were ordered to make discovery. A draft affidavit of discovery was delivered in November 2004 and the sworn affidavit on 6th May 2005.

11. On the 30th Nov 2005 the defendants sought discovery of the plaintiffs GP records and his hospital admission records held in Louth Co Hospital. The hospital records were furnished on the 18th May 2006.

12. It was intended that the defendants would have the plaintiff medically examined on 18th October 2005. That appointment was cancelled as the particulars of injury sought by letter dated 22nd March 2004 and the plaintiff's medical records had not yet been furnished.

13. On 12th October 2011, the defendants were requested to agree to the reinstatement of the Notice of trial. They refused and that refusal spawned two court applications; the first an application by the Plaintiff to reinstate the Notice of trial and the second a motion issued by the defendants to dismiss the claim for want of prosecution and further on the grounds of inordinate and inexcusable delay.

14. Both motions were listed for hearing before Hedigan J. on 10th July 2012.

Judgment of High Court
15. Having considered the principles to be applied on such an application, which were agreed between the parties, the High Court judge dismissed the proceedings. He reached the following conclusions, namely:-.

i. that the delay in the prosecution of the proceedings had been both inordinate and inexcusable,

ii. that any lack of cooperation on the part of the defendants in furnishing a copy of a video which they had sought ought to have been remedied by court application,

iii. the fact that eleven and a half years had passed since the events in question was unacceptable in such a straightforward action,

iv. that the balance of justice favoured dismissal. The case would not be heard until 2013, by then regardless of the existence of witness statements, prejudicial delay was inevitable,

v. That while the claim involved a grave allegation with a public interest dimension, that such interest would have somewhat diminished over the years.

Submissions on behalf of the plaintiff /appellant

16. Insofar as the delay prior to November 2005 was concerned, counsel for the plaintiff maintained that this could not be attributed to the plaintiff as the defendants had delayed in complying with an order for discovery that had been made in May 2004. The sworn affidavit was not delivered until 26th May 2005.

17. As to the delay post November 2005, counsel submitted that there was ongoing correspondence between the parties mostly in relation to a videotape which the plaintiff's legal advisers felt was a material proof required to advance the claim. This was not a case where the plaintiff's solicitors had been idle for any extended period. There was extensive correspondence concerning the videotape evidencing the plaintiff's clear intention of advancing his claim.

18. Counsel submitted that even if the trial judge was entitled to find that the delay had been inordinate and inexcusable, he should nonetheless, have concluded that the balance of justice favoured allowing the action proceed for the following reasons, :-

i. the allegations the subject matter of the claim were grave and there was a public interest in having such serious allegations fully investigated,

ii. the plaintiff had no alternative remedy,

iii. the defendants had not been able to point to any specific prejudice arising from the delay and they had a number of contemporaneous witness statements in relation to the events in question,

iv. there was no period of complete inactivity such that the defendants might have been lulled into believing that the plaintiff was not proceeding with his claim,

v. the conduct of the defendants was not without fault. They had been guilty of delay in dealing with the plaintiff's solicitors requests in relation to the videotape in a timely manner and had generated some delay in furnishing discovery,

vi. there had been no complaint from the defendant's solicitor urging expedition or warning that any prejudice was emerging due to the rate at which the proceedings were advancing.

The submission of the defendants/respondents

19. Counsel for the defendants submitted that the trial judge had correctly concluded that the plaintiff's delay had been inexcusable. This, he reminded the court, had been accepted by the plaintiff in the court below. The claim was, as was stated by the High Court judge, not a complex one and should have been capable of being advanced to trial in a modest time frame.

20. Counsel submitted that the judge had correctly concluded that the unavailability of a readable copy of the video tape sought by the plaintiff's solicitor afforded no valid excuse for the delay. Further he maintained that the claim could have proceeded in its absence as the wrongdoing the subject matter of the claim is all alleged to have taken place in a Garda cell and the video relates to events prior to the plaintiff's arrest at or near MacDonald's takeaway restaurant in Dundalk. Accordingly, the content of the video could never be determinative of the liability issue. Further, the plaintiff had not acted with any degree of expedition in seeking to obtain the videotape and could have made a court application if satisfied that the defendants were in breach of their obligations.

21. As to whether the balance of justice was correctly assessed by the High Court judge, counsel submitted that the judge's approach could not be faulted. Counsel agreed with his finding that delay of the type that had occurred in this case was bound to be prejudicial regardless of the absence of any identifiable or specific prejudice. The existence of witness statements did not negate that type of general prejudice. A jury should not, he submitted, be asked to decide between two different accounts of what had happened 10 years previously.

22. As to the conduct of the defendants, the fact that the defendants had engaged in a significant amount of correspondence with the plaintiff solicitors over the years did not disentitle them to bring the appropriate application. They were not obligated to write warning letters complaining of delay and had every entitlement to move to have the claim dismissed.

23. Counsel submitted that the High Court judge had correctly applied the relevant principles and was correct in the decision he made having regard to the provisions of Article 6.1 of the European Convention on Human Rights. He further stressed the Constitutional right of his clients to have their good name cleared and that because of what was at stake for both parties there was a special onus on the court to make sure that cases of this nature were heard expeditiously.

24. Finally, Counsel submitted that, without seeking to minimise the gravity of any unlawful assault, another factor to be taken into account by the court when assessing where the balance of justice lay was the seriousness of the injury contended for. In this regard and on the plaintiff's own pleadings his injuries were relatively modest. To the defendants knowledge treatment he received was in the immediate aftermath of the events in question.

Principles to be applied

25. The principles which govern the circumstances in which proceedings may be struck out for delay are set out in some detail by Finlay P. in *Rainsford.* These were later approved of by the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 499 where Hamilton C.J. stated as follows: –

"The principles of law relevant to the consideration of the issues raised on this appeal may be summarised as follows: –

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

(b) it must, in the first instance, be established by the party seeking 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 I 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 way 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."

26. These being the relevant principles, it is important also to note, as was stated by Finlay P. in *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, that the onus of proof on an application to dismiss a claim on the grounds of inordinate and inexcusable lies on the party who seeks that relief.

27. The rationale behind the court's jurisdiction to dismiss a claim on the grounds of delay is that, as was stated by Diplock L.J. in *Allen v. Sir Alfred McAlpine & Sons Limited* [1968] 2 Q.B. 229 at p254:-

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

28. In considering whether or not the delay has been inordinate the court may also have regard to any significant delay prior to the issue of the proceedings: see *Cahalane and another v. Revenue Commissioners and others* [2010] IEHC95 and *McBrearty v. North Western Health Board* [2010] IESC27. However, given that this is assault action to which a six year limitation period applies, this principle is not of relevance to the present case.

29. In addition to its right to dismiss a claim on the grounds of inordinate and inexcusable delay, there is also what was described by Geoghegan J. in *McBrearty .v. North Western Health Board* [2010] IESC 27, a jurisdiction which permits the court to dismiss a claim, even where there has been no fault on the part of the plaintiff, if satisfied that the interests of justice would require such an approach. This jurisdiction was first considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151 where Henchy J. expressed himself satisfied that a court might dismiss an action if it was satisfied that to ask the defendant to defend the action would place that defendant under an inexcusable and unfair burden. However, as this is not the basis upon which the defendants' application to dismiss was based, there is no need to consider further the circumstances in which this type of jurisdiction may be exercised.

30. In recent times, the constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures, has been emphasised in a number of judgments dealing with delay. The relevant constitutional provisions are contained in Article 34.1, which requires the courts to administer justice and Article 40.3.2 which guarantees the citizen the right to protect their good name.

31. These specific constitutional obligations pre-suppose that litigation will be conducted in a timely fashion. If, as Henchy J. stated in *O'Domhnaill*, justice is put to the hazard as a result of undue and excessive delay, how then can the courts fulfil their constitutional mandate under Article 34.1? Moreover, where, as in the present case, the right to a good name of a number of members of An Garda Síochána, has been put at issue by the plaintiff, the effective protection of that right as guaranteed by Article 40.3.2 requires that such claims be adjudicated upon within a reasonable time.

32. These views have been consistently expressed in recent times. Thus in *Quinn v Faulkner t/a Faulkner's Garage and another* [2011] IEHC 103 Hogan J. criticised the courts' prior tolerance to inactivity on the part of litigants when he stated:-

> "While as Charlton 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 led to a culture of almost "endless indulgence" towards such 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] 1 I.L.R.M. 290 and those of Clarke J. in *Rodenhuis and Verloop BV v. HDS Energy Limited* [2010] IEHC465."

33. Further, as Hedigan J, himself stated in the course of his judgment, in recent times Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms has been considered to be material to the courts conclusions on an application such as that under consideration.

34. Similar sentiments were expressed by Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 where at pp.293-294 he stated as follows:-

> "[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attached to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued ….[F]ollowing such cases as *McMullan v. Ireland* [ECHR422 97/98 29th July 2004] and the European Convention on Human Rights Act 2003, the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."

35. In *Michael McGrath v. Irish Ispat Limited* [2006] IESC 43, Denham J. considered the extent to which the *Primor* principles might need revision in light of the Convention and concluded that the court's discretion to decide whether it was in the interests of justice that a claim be dismissed for want of prosecution was to be exercised both in accordance with settled constitutional principles and "in light of developing European jurisprudence on reasonable time".

36. In his judgments in *Stephens v. Paul Flynn* [2005] IEHC148 and *Rodenhuis & Verloop BV v. HDS Energy Ltd* [2011] 1.I.R. 611, Clarke J. also questioned whether there should be a recalibration or tightening up of the criteria by reference to which the actions of the parties might be judged. He stated that while the overall test and applicable principles remain the same, the application of those principles might require some typing up to avoid excessive indulgence: At para.11 of his judgment he advised as follows:-

> "It is necessary, in a system where the initiative has left largely up to the parties to progress proceedings, for the courts to make clear that there will not be an excessive indulgence of delay, because of the courts do not make that clear, it follows that the courts actions will encourage delay and, thus, will encourage a situation of cases will not be completed within the sort of times which would be consistent with compliance with Ireland's obligations under the European convention on human rights."

37. In *McMullen,* the court when considering a sixteen year delay in the context of Article 6. 1 of the Convention gave some guidance as to what might be considered to be reasonable in terms of the duration of proceedings when it concluded that:-

> (i) Legal proceedings for determination of civil rights and obligations should be resolved within a reasonable time.
>
> (ii) Reasonableness is to be assessed by reference to the circumstances of the case, its complexity, the conduct of the applicant and of the relevant authorities and the importance of what is at stake.
>
> (iii) The State is obliged to organise its legal system to comply with the reasonable time requirement of Article 6.
>
> 38. The guidance from the European Court of Human Rights is clearly to the effect that the Irish courts are under a convention based obligation to ensure that proceedings, including civil proceedings are concluded within a reasonable time. This means that the Irish courts must be vigilant about culpable delay and when faced with an application to dismiss a claim on the grounds of delay, should factor into its considerations Ireland's obligations under Article 6 of the Convention.

The Appellate Jurisdiction of the Court of Appeal

39. The first matter to be considered on this appeal is the approach to be adopted by this court when dealing with an appeal against of a decision of a High Court judge made in the exercise of his or her discretion. This issue was considered at some length by this court in its recent decision in *Collins v. Minister for Justice, Equality and Law Reform Ireland and The Attorney General* [unreported 19th February 2015], another case in which the court was asked to dismiss proceedings on the grounds of inordinate and inexcusable delay.

40. Following a consideration of a long line of authorities in which somewhat divergent views as to the court's jurisdiction on such an appeal had been expressed, this Court concluded that the judgement of McMenamin J. in *Lismore Builders (in Receivership) .v. Bank of Ireland Finance Ltd.* [2013] IESC 6 correctly described the circumstances in which an appellate court may review an order made by a High Court judge in the exercise of their discretion. At page … he stated as follows:-

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

41. In *Desmond,* Geoghegan J, expressed concern about the more traditional view that a discretionary order should not be interfered with by an appellate court unless the judge at first instance made an error of law in the exercise of that discretion. Such a restriction, he pointed out could have a very significant impact on orders involving substantive rights. At page (to be completed) he stated as follows: –

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

42. In *Collins* the court considered the nature of an application to dismiss proceedings on the grounds of inordinate and inexcusable delay and concluded that such applications required the presiding judge to decide mixed questions of law and fact rather than questions which might be considered to be truly discretionary. It also expressed itself satisfied that in circumstances were applications of this nature were determined by reference to facts which were fully set out on affidavit that it was difficult to advance

any valid reason as to why the merits of the High Court decision on such an issue should not be fully reconsidered on an appeal, should be interests of justice so required.

43. It follows that on this appeal the Court, while obliged to give due consideration to the conclusions of the High Court judge is nonetheless entitled to decide, should the interests of justice so dictate, to exercise its own discretion as to whether or not this claim should be dismissed on the grounds of inordinate and inexcusable delay.

Decision

44. Having considered the evidence that was before the High Court and the submissions made on behalf on the parties on this appeal, the Court is satisfied that the defendants have discharged the burden of proof and have established to the satisfaction of this Court that the plaintiff has been guilty of inordinate and inexcusable delay.

45. As the plaintiff in the course of the hearing of this appeal ultimately conceded that the delay had been inordinate, it is not necessary to consider that aspect of the case further. Suffice to say that it is difficult to envisage how an assault action commenced in January 2003 could still be in some type of extended gestation process almost ten years later, that being the point at which the defendants moved to strike out the claim.

46. In considering whether delay is excusable, one of the factors material to the court's consideration is the complexity of the case. Here we have what was correctly described by the High Court judge as the simplest of cases. The claim concerns a factual dispute between the parties as to whether or not the plaintiff was assaulted on a particular day. That issue will be resolved by reference to the plaintiff's own oral testimony and the evidence of the witnesses called by the defendants. This is not a case in which delay has arisen due to any difficulty in identifying the names and later tracing the whereabouts of potentially valuable witnesses. Further, this is not the type of action where the plaintiff's solicitor, as often happens in personal injuries cases, has had to engage experts to advise on complex liability or causation issues.

47. The only other issue in the proceedings is the extent of any injuries sustained by the plaintiff. As to such injuries, it appears that the Plaintiff was seen at the Accident and Emergency Department of Louth County Hospital on the day of the alleged assault. In his replies to particulars delivered on the 9th Jan 2004, the plaintiff advised that the only medical treatment he received was from his general practitioner whom he attended on four or five occasions . He did not require specialist intervention and no consultant was apparently engaged for the purposes of providing expert testimony. Given the fact that the plaintiff's medical condition and prognosis appears to have been ascertained with some certainty within months of his assault, there is no reason why this jury action was not pushed on for trial with due expedition. In fact, a notice of trial was initially served as early as 13th November 2003 and a request made in January 2004 that the defendants would make an offer in settlement of the plaintiffs claim. It would thus appear that, from a damages perspective at least, the case was ready for trial, in 2004.

48. This Court rejects the submission advanced on the plaintiff's behalf that the delay in the prosecuting of the proceedings can be excused by reason of the defendant's alleged failure to provide a copy of a video tape capturing the plaintiff's attendance at McDonalds take away restaurant, Dundalk, on the day of his arrest.

49. It is not immediately clear as to why this video tape is of significance to the liability issue in the proceedings as all of the allegations against the defendants relates to events which are alleged to have taken place while the plaintiff was in custody in the Garda Station. However, having decided that it was necessary, it is quite difficult to understand as to why, the first request for a copy having been made on 22nd November 2004, the plaintiff had not obtained a readable copy of the video tape seven years later, that being the point at which the defendants moved to have the proceedings dismissed on the grounds of delay.

50. The defendants cooperated with the plaintiffs request for a copy of this video tape, albeit somewhat tardily. Having received a copy of the tape, on 2nd September 2005, the plaintiff's solicitor wrote to the defendants to advise that the video that had been forwarded was not the correct one as, having viewed the video, the plaintiff was not to be seen on that particular recording. On 13th September 2005 the defendants requested the return of the video to check its contents. The video tape was not returned.

51. Six months later, on 18th May 2006, the plaintiff's solicitors wrote to his counterpart seeking a response to his earlier letter. The defendants did not reply. One might have thought at that stage a court application for further discovery or inspection was warranted but no such application was made. In fact nothing at all was done to pursue a copy of the video tape over the following two and a half years. When considered against the backdrop of an assault alleged to have taken place in January 2001, eight years earlier, this further two and a half years delay is difficult to comprehend.

52. A letter sent on 22nd August 2008 was the start of a burst of activity on the part of the plaintiff's legal advisers directed towards obtaining a copy of the correct video tape. In particular, in December 2008 a number of telephone calls were made to the Chief State Solicitor's office seeking to clarify the position regarding the video tape. While it might be contended that the plaintiff's solicitors were merely showing marked tolerance to delays on the defendant's side, the fact of the matter is that there then followed another 11 month period during which the issue was allowed go cold once again.

53. A further letter and telephone call in November 2009 did not achieve a resolution of the issue and the question of the pursuit of the video tape was not re-activated until late 2010. It was only on 11th November 2010, more than five years after the first request for sight of the video tape, that the plaintiff obtained the second copy of the video tape.

54. Unfortunately, the plaintiff's solicitor found that second video tape to be unreadable and advised the defendant's solicitor of this fact by letter of 30th November 2010. The defendants in reply sought the return of that copy and, finally, six month later wrote again to the plaintiff's solicitor advising that the relevant footage was to be found one hour and thirteen minutes into the recording. That was the state of play regarding the video tape at the time the defendants moved to dismiss the proceedings.

55. The Court is satisfied from a consideration of the affidavit evidence that the delay over the six year period last mentioned was inexcusable. From the correspondence it cannot be said that the plaintiff's solicitor had become diverted in any way by the emergence of other complexities in this litigation. If the video tape was the only piece of evidence holding up the proceedings it should have been pursued with diligence. At the time the first copy was furnished by the defendants in September 2005 almost four years had elapsed since the events which are the subject matters of the proceedings. Further, the delay in obtaining the video tape cannot be ascribed to any obstruction on the part of the defendants. They actually sent two copies of what they considered to be the relevant CCTV footage to the plaintiff's solicitor. The first was sent in September 2005 and the second in November 2010.

56. The Court is quite satisfied that if the issue of the video tape had been pursued in a purposeful fashion it could have been obtained, at worst , within a period of six to nine months. It follows that the delay in the prosecuting of these proceedings cannot be

excused by reference to the engagement between the parties regarding the video tape. If requests and correspondence were ignored or long fingered then further warning letters should have been sent after which, if a readable copy of the video tape had not been forthcoming, the plaintiff should have called in aid the rules of court to secure its production.

Balance of justice
57. Having concluded that the delay in the present proceedings was both inordinate and inexcusable, the Court must now consider all of the factors which are relevant to determining where the balance of justice lies; whether it lies in favour or against allowing the proceedings advance to trial.

58. In determining where the balance of justice lies it is, of course, of particular importance to have regard to the fact that the allegations upon which the claim is founded are extremely grave. An allegation of a brutal assault allegedly perpetrated by members of An Gardai Síochána, the authority charged with upholding and protecting the rights of citizens in the State, ought to be investigated and dealt with expeditiously. Clearly, the public interest is best protected by the earliest possible appraisal of the truth or otherwise of such a serious complaint. It is nevertheless not in the public interest that such an important allegation be resolved in circumstances where, by reason of the passage of time, there is a real possibility of an unjust and unsatisfactory outcome.

59. One of the questions that the court is obliged to consider when dealing with the balance of convenience, as per the decision of the Supreme Court in *Primor*, is whether or not the defendant has been prejudiced as a consequence of the delay complained of. In this regard Kearns J, in delivering the judgment of the court in *Stephens .v. Flynn Ltd* [2008] IESC 4 seems to have accepted that the defendant need only to establish moderate prejudice arising from the delay as justification for the dismissal of an action. In the following brief passage he summarised the findings that had been made by Clarke J. in the court below:

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

60. This Court is satisfied that if this historic claim were to be permitted to proceed to trial, that the defendants would likely suffer general prejudice over and beyond what might be described as moderate, even though they have not been in a position to contend for any specific prejudice as might often arise in proceedings where, by reason of the passage of time, essential witness or documents are no longer available.

61. The fact that the defendants have available to them a number of witness statements taken in the aftermath of the plaintiff's allegations, does not mean that they would not be prejudiced in meeting a claim of this nature some twelve or more years after the events in question, 2013 being the year in which the learned High Court judge concluded the case was likely to be heard.

62. While such statements would of course assist their authors to refresh their memories of the events recorded, it is inevitable that in the course of the trial evidence would be led or allegations made concerning circumstances not captured in those documents. In that event the defendants' witnesses might not be in a position to answer or challenge such allegations. Anything which goes beyond that referred to in the witness statements would likely pose problems of a type that would not have been encountered had the action been determined while matters remained reasonably fresh within the minds of those concerned. In this regard this court agrees with the conclusions of the High Court judge when he stated that he was in no doubt that the delay would have impacted upon the defendant's ability to test the veracity of the claim. As Finlay Geoghegan J. said in *Manning v. Benson & Hedges Ltd*. [2005] 1 I.L.R.M. 180, 208:

> "Delays of four to five years as a matter of probability will reduce the potential of such witnesses to give meaningful assistance or to act as a witness."

Regardless of the integrity of witnesses, it is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the more fragile and unreliable the evidence becomes. This is of particular concern in cases where there is no documentary or other objective evidence to support a claim where there is conflicting oral testimony. As has been stated so often on applications such as the present one, memories fade and justice is put to the hazard.

63. Another factor that the court is entitled to take into account when considering the balance of justice in proceedings claiming damages for assault or personal injuries negligently inflicted is the seriousness of the injuries allegedly sustained. That is not to minimise the significance of any injury deliberately inflicted on a citizen by a member of An Garda Síochána.

64. If, for example, the plaintiff was maintaining that as a result of the assault he would never work again or would in some other way be permanently incapacitated, then the court would have to weigh those factors in the balance. However, the injuries he complains of are confined to bruising from which, according to the pleadings and particulars, he has made a complete recovery. In these circumstances, there is less of a concern that justice will be undermined by the dismissal of the proceedings.

65. Yet another reason for requiring that claims involving modest injuries be dealt with expeditiously is that even after a relatively short delay the assessment of the validity and extent of such a claim becomes more difficult. The same risk of prejudice does not generally arise in cases where the injuries sustained are very severe. In those latter types of cases the injuries will often be readily apparent upon a medical examination carried out several years after they were sustained. Not only will the defendant have available to it, for the purpose of dealing with the issues of causation and quantum, the type of objective evidence to be found in medical records such as x rays, scans, test results etc., but these will also be available, if relevant, to guide a judge or jury to a just and fair result. Where, as here, however, the claim is for far more moderate injuries which have no longer term consequences, then there is all the greater need for expedition, precisely because the adverse impacts of such injuries may fade and disappear relatively quickly

66. Also relevant to the court's decision as to where the balance of justice lies is the conduct of the defendants and the extent to which they themselves have been guilty of delay, have acquiesced in the plaintiffs delay or have implicitly encouraged the plaintiff to incur further expense in pursing the claim. In this regard, the court will distinguish between delay or acquiescence on the part of a defendant from delay which might be considered culpable, as was stated by Fennelly J. in *Anglo Irish Beef Processors Limited v. Montgomery*[2002] 3 I.R. 510.

67. On the facts of this case the Court is satisfied that the defendants have not been guilty of what might be described as culpable delay. The defendants' defence was delivered promptly and followed up by two entirely appropriate and prompt letters/notices for particulars delivered on 8th October 2013 and 22nd March 2004 respectively.

68. The defendants were, however, guilty of delay in complying with an order for discovery made in favour of the plaintiff on 4th May 2004. The defendants were obliged to deliver their discovery affidavit within six weeks. A draft affidavit was provided five months after the order was made and the sworn affidavit only delivered in May 2005. However, the period of delay between the delivery of the draft affidavit and the sworn affidavit does not appear to have prejudiced the plaintiff in his ability to advance the action in that his solicitors by letter dated 22nd November 2004 request a copy of the video tape and the photographs referred to in the draft affidavit of discovery. Accordingly, the Court is satisfied that the plaintiff did not suffer any significant prejudice as a result of the late delivery of the sworn affidavit.

69. Earlier in this judgment the Court dealt with the delay stemming from the tardy approach of the parties to the issue of the video tape which was first sought by the plaintiff's solicitors in late 2004. In the context of considering whether the defendants are any way culpable in respect of this delay from 2004- 2011, that being the period in respect of which the parties were engaged upon the issue, the court has already stated that it is satisfied that the primary responsibility for moving the case forward during that period rested with the plaintiff and that it was his conduct - rather than any default or obstruction on the part of the defendants - which was responsible for that delay.

70. The court has also considered whether it would be unjust, by reason of the defendant's actions, to dismiss the proceedings at this stage. Relevant to this consideration is the fact that the defendants did not impose any significant financial, personal or other burdensome obligation on the plaintiff in the course of defending their position. The standard notices for particulars were served and the discovery sought was restricted to the plaintiff's hospital admission and general practitioner records. The former were delivered on 18th May 2006. The latter were never provided, possibly due to the death of his general practitioner. Further, the defendants did not put the plaintiff to the inconvenience of being medically examined, as had been intended, due to the fact that his medical records and updated particulars of personal injury had not been furnished as of the date when that examination was planned.

71. The not insignificant correspondence exhibited on the present application would tend to support the plaintiff's submission that the defendants could never have doubted the plaintiff's intention to pursue his case. Several letters contain statements to the effect that the plaintiff was anxious to have his claim dealt with. However, neither can it be stated that the defendants did anything to indicate that they were excusing the plaintiff's delay in advancing his claim. Their conduct was not such that, when they considered the claim was heading into the realms of antiquity, they should be debarred from complaining of the injustice of being asked to defend an action which had been delayed for such an extensive period.

72. The Court is also satisfied that the fact that the defendants only moved to dismiss the claim when the plaintiff sought their consent to the reinstatement of the notice of trial does not in itself afford any ground for valid complaint. It is precisely when a step such as that is taken that a defendant is most likely review the consequences of the reinstatement of such notice and if satisfied as to the unfairness and the possibility of an injustice will bring forward motion to dismiss the claim.

73. In terms of looking at where the balance of justice lies in this case it is important to recognise that in dismissing this plaintiff's claim the decision of the High Court have the effect of ending his constitutional right of access to the courts. However that is not an unqualified right and is one which must be balanced against the right of the defendants to protect their good name as is their entitlement under Article 40.3.2 of the Constitution. These constitutional obligations presuppose that litigation will be conducted in a timely fashion. Nobody against whom serious allegations of the nature at the heart of these proceedings are made, particularly where their professional standing is at stake, should have to wait 12 or 13 years before being afforded opportunity to clear their good name.

74. This Court is not only satisfied as to the conclusions of the learned High Court judge in respect of the inordinate and inexcusable nature of the delay in this case. It is also entirely in agreement with his conclusion that the balance of justice favoured the dismissal of the action taking into account not only the principles of law advanced in *Primor,* but the more recent jurisprudence of the court concerning its own obligations and those of litigants as arise by virtue of Article 6 (1) of the Convention.

75. For all of the aforementioned reasons this Court will dismiss the appeal.