



APPROVED

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2022] IECA 113

Court of Appeal Record Number: 2020/87

Ní Raifeartaigh J.

Power J.

Binchy J.

BETWEEN/

PETER PRINGLE

PLAINTIFF/APPELLANT

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANT/RESPONDENT

**JUDGMENT of the Ms. Justice Ní Raifeartaigh delivered on the 18th day of May, 2022.**

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## **Introduction**

1. This is an appeal against a decision of the High Court dismissing two sets of proceedings initiated by the appellant, in 1992 and 1995 respectively, on the grounds of inordinate and inexcusable delay. The following is a very brief outline of the circumstances of this unique case.

2. The appellant was convicted of capital murder and robbery in 1981, and unsuccessfully appealed in 1981. He served almost fifteen years in prison before his conviction was quashed in 1995 on an application pursuant to s.2 of the Criminal Procedure Act 1993, on the basis that a newly-discovered fact rendered the conviction unsafe. This Act will be referred to hereafter as “**the 1993 Act**”. A retrial was ordered but did not proceed as the DPP entered a *nolle prosequi*. As was the normal practice, the DPP did not give reasons for doing so.

3. The appellant then brought an application pursuant to s.9 of the 1993 Act for a certificate from the Court of Criminal Appeal stating that there had been a miscarriage of justice. He was unsuccessful in this regard. The court was not satisfied that he had positively demonstrated that he was the victim of a miscarriage of justice; it said that it had quashed the conviction because the evidence demonstrated the risk that the conviction was unsafe, but that the evidence did not go so far as to demonstrate that the appellant was the victim of a miscarriage of justice. On appeal to the Supreme Court, the appellant complained that this approach violated the presumption of innocence but the Supreme Court upheld the conclusion of the Court of Criminal Appeal. It remitted the case back to the Court of Criminal Appeal to enable the appellant to adduce such further evidence as he wished, in order to prove that he was a victim of a miscarriage of justice. The judgment of the Supreme Court was delivered in 1997. The

appellant did not avail of this opportunity to continue to pursue his application for a s.9 certificate under the 1993 Act but instead chose to proceed with other proceedings he had initiated.

4. One of these was a set of proceedings he had commenced in 1995 seeking damages for negligence and breach of constitutional rights arising from the non-disclosure of the information (i.e. the same facts as were the subject of the s.2 application before the Court of Criminal Appeal). He had also initiated an earlier set of proceedings in 1992. These were very wide in scope as drafted (by the appellant himself while he was in prison) and traversed much of the same ground as a criminal appeal. Their scope was greatly reduced (by court order) so that this claim is concerned with the lawfulness of the sentence as imposed and subsequently served by him. These are the two sets of proceedings which he wishes to bring to trial.

5. Both sets of proceedings appear to have been ready, or almost ready, for trial in or about 2002/2003. However, the trial did not proceed at that time because of a particular step taken by the respondents. The latter served an expert report authored by a Dr. Evans upon the appellant in early 2003 ("**the Evans report**"). The report, created in late 2002, concerned a DNA test of the appellant's blood sample. The report purported to show a connection between the appellant and one of the cars used in connection with the events on the 7 July 1980. Further details of this and what happened thereafter are described below. For the present, it suffices to say that no significant further step in either of the proceedings or the litigation took place until the appellant brought a motion for discovery of materials relating to that DNA test in 2016, some thirteen years later. This was followed by the issue of a motion to dismiss for delay brought by the respondents, which is the subject of this judgment. The appellant contends that there are various good explanations for the delay, including in particular that he repeatedly sought

documentation related to the DNA report from the respondents but that his correspondence was entirely ignored by them.

6. The High Court determined that the appellant was responsible for inordinate and inexcusable delay. It also concluded that the respondents had suffered prejudice by reason of the fact that many relevant witnesses would no longer be available to them by reason of death or untraceability. It dismissed the proceedings on grounds of delay. The appellant now appeals against that decision.

7. Although on one view, the case presents as a relatively straightforward case involving the usual issues on a motion to dismiss for delay (i.e. whether the delay was inordinate and inexcusable, question of prejudice, balance of justice and so on), there is a difficult and key legal issue at the heart of the application. This is the question of whether or not the respondents would be legally entitled to adduce evidence with a view to establishing the appellant's involvement in the events of July 1980, the very events the subject of the criminal trial and in respect of which his conviction was quashed. The appellant maintains that the presumption of innocence prevents the respondents from doing so; the respondents maintain that it does not. This in turn is highly relevant to the prejudice alleged by the respondents, because they contend that they require a large pool of witnesses and that many of those witnesses are no longer available by reason of the appellant's delay. This dispute as to the proper parameters of the civil proceedings (particularly the negligence/breach of constitutional duty proceedings) has rendered the exercise of adjudicating upon this appeal considerably more complex than first appearances of the case might suggest.

8. Given the length of the judgment, I have divided it into a number of parts. Part 1 deals with the events and proceedings in the period 1980-2016, including the appellant's proceedings leading to the quashing of his conviction and his application for a certificate that there had been a miscarriage of justice. Part 2 deals with the issue of the motion under appeal and includes the evidence adduced in support of it by the respondents, particularly to demonstrate the prejudice allegedly suffered by them by reason of the appellant's delay in progressing the proceedings. Part 3 concerns the High Court judgment, the notice of appeal, and the parties' submissions. Part 4 contains my analysis and decision, in which the two (substantive) sets of proceedings are separately examined for the purposes of the motion to dismiss. This contains a discussion of such issues as whether the appellant was responsible for inordinate and inexcusable delay, the question of prejudice, and the balance of justice. The section on prejudice includes a discussion of the pleadings and their interaction with the presumption of innocence, as well as an overview of some relevant authorities. There is a Summary of Conclusions at the end of the judgment.



## **PART I: EVENTS AND PROCEEDINGS 1980-2016**

### **July 1980: Capital murder and robbery at Ballaghaderreen, County Roscommon**

9. A bank robbery occurred on the 7 July 1980 at the Bank of Ireland in Ballaghaderreen, Co. Roscommon. There were three raiders and they were wearing masks. The men were pursued by four members of An Garda Síochána in a patrol car which later collided with their vehicle. During the events which followed, the raiders shot dead two members of An Garda Síochána. Two of the raiders then hijacked a red Volkswagen car which was later found abandoned. When the car was examined two blood stains of the same type were found.

10. The appellant was arrested on the 19 July 1980 and interviewed over lengthy periods. The appellant either remained silent or informed the gardaí that on the advice of his solicitor he had nothing to say. He refused to give an account of his movements around the time of the events in question when requested to do so pursuant to s. 52 of the Offences Against the State Act 1939. He was asked to provide a blood sample and refused to do so.

11. On the 20 July 1980, during an interview in the presence of Detective Sergeant Connolly, the appellant suffered a nosebleed and a tissue containing his blood was taken by the Sergeant. There was no mention of this in any of the documents served or disclosed to the appellant before or during his trial, nor was there any mention of it in the course of the evidence during the trial. How it came to light will be discussed in detail below.

**12.** It was the prosecution case that during an interview conducted by Detective Sergeant Connolly and Inspector Culhane on the morning of the 21 July 1980, the appellant said: “*I know that you know I was involved but on the advice of my solicitor I am saying nothing and you will have to prove it all the way.*” In this judgment, I will refer to this as “**the disputed admission**”. Detective Inspector Culhane gave evidence at the trial that he cautioned the accused again, made a note of what the accused said, and read it over to him. He asked the appellant if that was correct and the appellant replied that on the advice of his solicitor, he was saying nothing. Detective Inspector Culhane is now deceased, having died in 2007. Given the importance of the disputed admission, Detective Sergeant Connolly and Inspector Culhane were key witnesses at the trial.

### **1980-1981: Trial in the Special Criminal Court and the unsuccessful appeal**

**13.** In November 1980 the appellant and his two co-accused stood trial at the Special Criminal Court (Hamilton J., His Honour Judge Fawsitt and District Judge McGrath) in November 1980 for the murders of Garda Byrne and Garda Morley (capital murder) and related robbery offences. The trial lasted for twenty-three days.

**14.** In cross-examination of Detective Sergeant Connolly and Detective Inspector Culhane, counsel for the appellant put forward that what had actually been said by the appellant was “*I know you think I was involved but on the advice on my solicitor I am saying nothing and you’ll have to prove it all the way.*” (Emphasis added). The trial court found as a matter of fact that he had said the words which were recorded by Detective Sergeant Connolly.

**15.** In addition to the disputed admission, there was forensic evidence at the trial which would be subsequently summarised by the Court of Criminal Appeal in the following terms:

“Forensic evidence relating to wool fibres which matched those taken from a jumper, the property of this accused and which he admitted having worn on the 7<sup>th</sup> July 1980, and which were found on lifts taken from the Ford Cortina VZM 208, on lifts taken from the driver’s seat of YAI 895 (the red Volkswagen car), on lifts taken from the driver’s seat of 9682 IZ (the white Volkswagen car), three fragments of red paint found in the white Cortina VZM 2018, and particulars of firearms residue found in the trousers of the accused”.

**16.** The appellant did not give evidence at any stage during the trial and did not put forward through his counsel an account of his movements on the day of the murders of the Gardaí or afterwards.

**17.** The appellant was convicted of capital murder and robbery, as were his two co-accused. He and his co-accused were sentenced to death in respect of the capital murder charges and to 15 years’ imprisonment in respect of the robbery charges. The death sentences were later commuted to a sentence of forty years imprisonment without remission by the President of Ireland.

**18.** The appellant sought leave to appeal his convictions to the Court of Criminal Appeal. He argued that the trial judge erred in considering that the words could only be construed as an

admission of guilt, and also that as a result of the length and nature of his questioning that it was not a voluntary admission.

**19.** In a judgment delivered on the 22 May 1981, the Court of Criminal Appeal (O’Higgins C.J., Finlay P. and Costello J.) upheld his conviction in *DPP v Pringle* (1981) 2 Frewen 57. In its judgment, the Court said at paragraph 15 that although there was a considerable amount of forensic and other evidence against the accused, “*it is clear that he would not have been convicted but for the fact that the Court of Trial construed certain words which the accused spoke after his arrest as amounting to an admission of guilt...*”

### **January 1992: The commencement of the Chancery proceedings and their progress until 2001**

**20.** A decade after his conviction, the appellant commenced proceedings before the High Court (Record Number 1992/326 P) seeking his release from prison together with declaratory orders that his prosecution and various related statutory provisions were repugnant to the Constitution of Ireland on a wide variety of grounds. Those proceedings were commenced by plenary summons dated the 16 January 1992. I will refer to these in this judgment as “**the Chancery proceedings**”.

**21.** In his statement of claim, the appellant sought to challenge his trial and conviction on a number of grounds, including that he did not make the admission alleged above. Unsurprisingly, a full defence was delivered on the 29 April 1992 pleading *inter alia* that the matters alleged in the statement of claim had already been adjudicated upon by the Special

Criminal Court and the Court of Criminal Appeal and that the proceedings were accordingly an abuse of process and *res judicata* as well as governed by estoppel.

**22.** The appellant brought a discovery motion and an order for discovery was granted on the 6 July 1992. This became significant for reasons which will be described below. For the moment, I will continue with the history of the Chancery proceedings.

**23.** On the 15 March 1993, the High Court ordered a trial of the abuse of process/*res judicata*/estoppel issues as a preliminary issue, together with a motion by the defendants for an order striking out the claim for a failure to disclose any reasonable cause of action.

**24.** On the 19 November 1993, the High Court (Murphy J.) ordered that, with one caveat, the proceedings should be struck out on the grounds that they disclosed no reasonable cause of action. The caveat is described in the order of the court as: “...*save for the particular matters referred to at page 22 of the Judgment herein, that is to say, so much of the appellant’s claim as challenges the death penalty imposed on him, the manner in which it was commuted, and the circumstances in which it was claimed that the commuted penalty was to consist of 40 years penal servitude without remissions and as alleges that the appellant was wrongfully transferred to different prisons during the course of his trial in the Special Criminal Court*”. Murphy J. gave liberty to the appellant to amend the statement of claim to narrow the scope of the pleadings to reflect this ruling.

**25.** By notice of appeal dated the 29 November 1993, the appellant appealed that order to the Supreme Court but took no further steps to proceed with either the appeal or the substantive proceedings at that time. As will be seen, in the intervening period, he initiated an application pursuant to s.2 of the Criminal Procedure Act 1993. Much later, in 2001, the appellant withdrew the appeal in respect of the judgment of Murphy J. and an amended statement of claim was delivered on the 12 June 2001.

**26.** By motion dated the 6 September 2001, the appellant sought to re-enter the proceedings before the High Court and sought an order directing that they be listed in the next list to fix dates.

**27.** An amended defence was delivered on the 11 February 2002. *Res judicata*, estoppel and abuse of process are pleaded at paragraphs 1 -3 of the amended defence with regard to the prosecution, trial and conviction matters raised by the appellant. It is pleaded that what had been permitted by Murphy J's order was a challenge to the death penalty and not to his prosecution, trial and conviction (paragraph 4). The remaining matters pleaded in the statement of claim are denied. In the course of submissions in this appeal, counsel for the respondent complained that the amended statement of claim far exceeded the parameters set down by Murphy J. and without expressing any conclusions on that, a quick perusal of the amended statement of claim suggests that there would be some merit in that complaint if it were to be formally pursued. However, no application was ever brought to strike out portions of the amended statement of claim.

28. To summarise, the Chancery proceedings were commenced in 1992, a ruling was delivered by Murphy J. in 1993, an amended statement of claim was delivered in 2001, and an amended defence in 2002. To understand what was happening in the interim, it is necessary to turn to the “miscarriage of justice” proceedings.

**1994-97: The proceedings under the Criminal Procedure Act 1993: the application to quash the conviction and the subsequent application for a “miscarriage of justice” certificate**

*21 June 1994-16 May 1995: The s.2 application and the quashing of the conviction*

29. It will be recalled that Detective Sergeant Connolly was one of the two witnesses to the disputed admission during the Garda interview with the appellant on the 21 July 1980. It will also be recalled that, as described above, discovery was ordered in the context of the Chancery proceedings initiated by the appellant. This discovery yielded up two documents in particular. The first was a photocopy of Garda notebook entries of Detective Sergeant Connolly which contained the following entry for the 21 July 1980: “*Pringle in upstairs office. Superintendent T. Maher-nose bleed – to Pat Ennis*”. The second was a manuscript document written by Detective Sergeant Connolly entitled “Summary Statement of Evidence” and consisted of a draft statement of evidence by this witness. It contained the following paragraph: “*On the night of 20/7/1980 when I was interviewing Pringle with superintendent Maher he (Pringle) got a slight nose bleed. He took a clean white tissue from his pocket and wiped the blood from his nose. I then took the tissue from him and handed it over to D/Sergeant P. Ennis*”. This information did not appear in the witness statement as served in the Book of Evidence nor was the appellant furnished with it in any other form prior to or during the trial.

**30.** As would be subsequently recorded in the Court of Criminal Appeal's judgment (delivered by O'Flaherty J.), the following then occurred. On the 5 February 1993, a Mr. Kent, solicitor of the office of the Chief State Solicitor, wrote to the appellant (in the context of the civil proceedings) and said that his instructions were that Detective Sergeant Connolly "*did send the tissue for analysis*" but "*does not recall whether the tissue was ever retained*". There was also a memo of the same date in which Detective Sergeant Connolly referred to the nose bleed and the tissue being handed to him by the appellant. He said: "*I later, on the same night, handed to tissue to Detective Sergeant P. Ennis, Ballistics Section of Garda Headquarters. I understand no analysis was carried out on the blood stains due to the insufficient amount of blood available on the tissue*".

**31.** The appellant made his application pursuant to s.2 of the 1993 Act on the 21 June 1994. Two of the three grounds of the appellant's application pursuant to s.2 of the Criminal Procedure Act 1993 ("the 1993 Act") to quash his conviction on the basis of a "new or newly discovered fact" related to the bloodstained tissue. The third ground concerned "CUSUM analysis", relating to the wording of the admission, and was unsuccessful. It is of no relevance to this case.

**32.** The Court of Criminal Appeal stipulated that each side should serve on the other, in advance of the hearing, a statement containing an outline of the evidence that would be given by each proposed witness as well as a statement containing an outline of the submissions that would be made. It also ordered that full discovery be made of all documents and files in the possession of the State relevant to the proceedings and further made clear that the documents



which had become available on discovery in the civil proceedings could be used. Detective Sergeant Connolly prepared a statement dated the 29 November 1994. Detective Sergeant Ennis and Garda Henry Murphy also prepared statements, both dated the 28 November 1994. (These dates are taken from the Notice to Produce later served by the appellant in the negligence proceedings discussed below). A transcript of the trial was made available, as well as the judgment of the Special Criminal Court. The statement of Detective Sergeant Connolly said: *“I believe that I handed the tissue to Detective Sergeant Pat Ennis. I am now aware that Detective Sergeant Pat Ennis states that he never received a tissue from me but all I can say is that after this lapse of time my recollection is that I did give the tissue to [him]”*. The statement of Detective Sergeant Ennis said: *“I am convinced that no such tissue was ever given to me and it equally follows that I never passed on any such tissue for scientific analysis. At the time that I was carrying out my tasks I was assisted by Garda Harry Murphy, a garda in the ballistics section.”*. Garda Henry Murphy’s statement said: *“I can say that my clear recollection is that at no stage did Detective Sergeant Ennis or myself receive a blood stained tissue and it follows that no such tissue was ever transmitted for analysis”*. It appears that in evidence, the witnesses gave evidence in accordance with these statements, although Detective Sergeant Connolly (by then retired, and referred to by the court as ‘Mr. Connolly’), said that after he handed over the tissue to Detective Sergeant Ennis they had a discussion about it, decided it had not sufficient blood on it to be of evidential value and it was discarded. The court’s judgment says: *“Detective Sergeant Ennis, of course, does not agree that this happened”*.

**33.** By judgment dated the 16 May 1995, reported at [1995] 2 IR 547, the Court of Criminal Appeal quashed the appellant’s conviction. In its judgment, while discussing the evidence at trial concerning the disputed admission, it observed that while it was now clear that the appellant had a nosebleed during an interview the night before the admission, but *“no mention*

*of this was made in the documents prior to the trial nor was any testimony given in relation to it at the trial” (p.559).*

**34.** One of the grounds of the appellant’s application under s.2 of the 1993 Act was that there had been a suppression of forensic evidence in relation to the bloodstained tissue. However, the Court of Criminal Appeal expressed itself to be satisfied “beyond any doubt” that no scientific examination was ever carried out on the tissue because it was never forwarded to the state forensic science laboratory. It accepted the evidence of the laboratory’s witnesses as to the systems and safeguards in place in the laboratory at the time and considered that criticisms made of them by the appellant’s legal team had no substance whatsoever.

**35.** With regard to what happened to the tissue within the Garda station, it is of interest to note that the Court of Criminal Appeal records that the notebook entry of Detective Sergeant Connolly was ordered by the Special Criminal Court to be made an exhibit while the case was at trial. It adds: *“However, it does not appear that the notebook was examined to any degree by counsel on either side in the course of the trial”*. Thus, the notebook entry was in fact available at the time of the trial even though it was never served on the appellant as such. The court described the oral testimony given by Sergeants Connolly and Ennis before it (the Court of Criminal Appeal), as described above. It said that the information conveyed by letter by Mr. Kent on the 5 February 1993 was obtained not from Detective Sergeants Connolly or Ennis but from a third party, Superintendent O’Sullivan and that it would be improper to draw any conclusions from *“such an unsatisfactory foundation”*.

**36.** It may be noted that in the course of its judgment, the Court observed: *“It would, in the Court’s view, be wholly unreasonable to expect witnesses to retain over a period of approximately fourteen years, a clear and unambiguous recollection of events”*. Emphasis was laid by counsel for the respondents upon this observation in the course of submissions on the motion to dismiss the subject of this judgment. It may also be noted that it is recorded that Detective Sergeant Connolly was in retirement at the time of the s.2 application. The court said that, because of the passage of time since the events, it would consider matters on the basis of the facts which were known to Detective Sergeant Connolly and Detective Sergeant Ennis at and around the relevant time of the events. It referred again to the notebook entry and the summary of evidence prepared within one or two weeks of the detention and then proceeded to its crucial conclusion as follows.

**37.** The Court of Criminal Appeal held that the conflict of evidence as to what happened to the tissue might have impacted upon the credibility of Detective Sergeant Connolly. The court held that *“if counsel for the accused at the hearing had had available to him the knowledge that Sergeant Connolly would say he had handed the blood stained tissue to Detective Sergeant Ennis and that [the latter] would say that he had not received the tissue, then this conflict as to the credibility of Detective Sergeant Connolly might have raised a reasonable doubt in the mind of the Special Criminal Court, resulting in a rejection of the disputed statement by the court. Accordingly, on the third point raised in submissions in this Court, the Court finds that a newly-discovered fact exists in the case which renders the conviction of the appellant unsafe and unsatisfactory.”*

**38.** The judgment records that the DPP submitted that the court should order a retrial and that the appellant made no contrary submission in that regard. Accordingly, the court ordered a

retrial. Subsequently, on the 24 May 1995, the DPP entered a *nolle prosequi* before the Special Criminal Court and therefore the appellant did not face a retrial in respect of the murder charges. Although it was not so stated at the time, the reason for this is given by Ms. Guerin on affidavit in the present proceedings. She says the reason for the retrial being abandoned was the death of a material witness, namely the senior Garda who had extended the relevant detention period. At that time, the absence of a witness such as this, to formally prove his state of mind leading to an extension of detention, would have been fatal to a prosecution (see the decision in *DPP v. Byrne* [1987] 1 IR 363 which was expository of the pertaining law; it was necessary to call the witness to prove the relevant state of mind justifying the extension of detention). The legal position in that regard appears to have since been altered by s.5(4)(b)(ii) of the Criminal Evidence Act 1992 but that is of no relevance to the present case.

*The s.9 application for a certificate of miscarriage of justice*

**39.** On the 6 July 1995, after it became clear that there would be no retrial, the appellant applied for a certificate pursuant to s. 9 of the 1993 Act that there had been a miscarriage of justice. The Court of Criminal Appeal refused the application by judgment dated the 28 July 1995. Delivering the judgment of the court, O’Flaherty J. said that it was clear that the 1993 Act did not envisage that a certificate would be issued in every case where a conviction was quashed. He identified two situations when a certificate would be appropriate: (1) “Where it is *established that the applicant was innocent* of any involvement in the crime alleged”; and (2) where a court concluded “that a conviction had resulted in *a case where a prosecution should never have been brought in the sense that there was no credible evidence implicating the applicant*”. (Emphasis added).

40. The court then went on to explain why it was refusing a certificate in the present case notwithstanding that the conviction had been quashed:

“To say that there are cases where the conviction should be quashed (as here) but, notwithstanding that, to refuse to issue a certificate is not to encroach on the place of the presumption of innocence in our criminal code. The presumption is, of course, fundamental to a *trial* in course of law. But the inquiry we make under the Act of 1993 is different: we have to find positively that a miscarriage of justice occurred in a given case. That the accused was improperly found guilty in the sense that that finding should not, in the circumstances as ultimately found, have been open to the court of trial.

*Our findings, as set out in the judgment, do not go that far.*

In the course of our judgment we held that the matter of the credibility of Detective Sergeant Connolly was something that *might* have raised a reasonable doubt in the mind of the Special Criminal Court resulting in a rejection of the disputed statement by the Court. We went on to hold that in the circumstances the conviction of the applicant was unsafe and unsatisfactory but found that on the evidence presented to the trial Court and the Court of Criminal Appeal (at the original hearing) both Courts were correct and the only basis for reaching the conclusion that the conviction was unsafe and unsatisfactory was the consideration of the newly-discovered facts to which reference was made in the judgment.

In our present judgment, this finding, together with the fact that we ordered a re-trial, is insufficient for us to be able to make a positive finding that a miscarriage of justice occurred in the circumstances of [the appellant’s] case.

The court, accordingly, will decline to certify under section 9 that there has been such a miscarriage of justice”. (Emphasis added).

**41.** The court accepted that a point of exceptional public importance had been raised and certified a question for the Supreme Court, asking whether it was correct in its conclusion.

**42.** The Supreme Court by judgment of the 4 March 1997 [1997] 2 IR 225, affirmed the view taken by the Court of the Criminal Appeal. It held that that the fact that the applicant's conviction had been quashed as being unsafe and unsatisfactory could not on its own entitle the applicant to a certificate that there had been a miscarriage of justice. The burden of proof rested on the applicant to prove on the balance of probabilities that there had been a miscarriage of justice. The Supreme Court referred the case back to the Court of Criminal Appeal to allow the applicant to renew his application in accordance with the principles outlined in the judgment and to enable him to adduce such further evidence as he wished, with a view to trying to establish that he was entitled to a certificate under s. 9.

**43.** Blayney J. said that he agreed with the reasoning of the Court of Criminal Appeal. He said the court did not attempt an exhaustive definition of the term “miscarriage of justice” and in his view, the Supreme Court should not attempt such a definition either, because it was sufficient to show that the test “*cannot be applied to the facts of this case*”. The provisions of s.2 opened the door for the application to be brought, but once properly brought, it should be treated in the same way as any normal appeal. In the course of this discussion, it may be noted that he said: “*The newly-discovered fact was the doubt about the credibility of Sergeant Connolly.*” He said this showed that the conviction was unsafe and unsatisfactory, but there

was no reason why the quashing of his conviction should be treated any differently from a normal appeal. He said:

“....the mere fact of the applicant’s conviction having been quashed as being unsafe and unsatisfactory could not on its own entitle the applicant to a certificate that there had been a miscarriage of justice”.

**44.** It is also interesting to note that Blayney J. was not convinced that the failure to furnish the draft summary of evidence of Detective Sergeant Connolly necessarily affected the constitutional validity of the trial. Nor was it clear, he said, whether the conflict as between Sergeants Connolly and Ennis concerning the tissue was known at the time of the trial. He was therefore questioning whether there had been a failure on the part of the respondents in terms of their disclosure obligations:

“[Counsel’s] main submission on behalf of the applicant was that he had had an unconstitutional trial and that this constituted a miscarriage of justice. He said that there had been a failure by the prosecution to make a full disclosure to the defence before the trial of all relevant material – the omitted material being the fact that there was a conflict between the evidence of Detective Sergeant Connolly and that of Detective Sergeant Ennis as to whether the former had handed to the latter the blood stained tissue which had been given to him by the applicant. This submission, however, is not supported by any finding made by the Court of Criminal Appeal. *There is no finding that the existence of the conflict was known before the trial, and obviously, if it was not known, it could not have been disclosed.* Mr. White sought to counter this by saying that if Detective Sergeant Connolly’s first draft of his evidence, in which he referred to the blood stained tissue, had been given to the defence, then the fact that there was a dispute between Detective

Sergeant Connolly and Detective Sergeant Ennis might have been revealed. *This implies that the first draft of Sergeant Connolly's evidence ought to have been given to the defence, but this is far from certain. It would have been quite reasonable for Sergeant Connolly to take the view that the blood-stained tissue as irrelevant since it had never been analysed and, accordingly, there was no point in referring to it. In these circumstances, I cannot see how the failure to furnish the defence with a copy of the first draft of Sergeant Connolly's evidence could have affected the constitutional validity of the trial*". (Emphasis added).

45. Blayney J. also rejected a submission on behalf of the appellant that the presumption of innocence had been "revived" once the conviction was quashed and that this was relevant in the s.9 application. He said that the presumption was "*fundamental to a criminal trial*" but that "*an inquiry as to whether a s.9 certificate should be given is not a criminal trial*". It was an inquiry as to whether there was a miscarriage of justice and the onus of proof was on the applicant, adding "*The presumption of innocence has no place in such an inquiry*".

46. Lynch J. identified three relevant questions as follows:

- On whom is the burden of proof that a newly-discovered fact shows that there is a miscarriage of justice?
- What is the standard of proof required?
- What is the meaning of "miscarriage of justice"?

47. Like Blayney J., he rejected the appellant's submission that the presumption of innocence was relevant to the onus of proof, saying "*this is to call in aid the presumption of innocence where it does not arise*". The presumption did not exist *in vacuo* or in any and every



circumstance: *“It exists in the context of the criminal law and criminal prosecutions”*. He gave the example of a claim for wrongful arrest, assault and false imprisonment by the State. In that situation the plaintiff could not rely upon the presumption of innocence and give no evidence of the circumstances of the arrest; *“he must give evidence which prima facie shows that there was no reasonable basis for the arrest. Such evidence will then transfer the onus or burden over onto the State to show circumstances which justify the arrest in law”*. He said that in a s.9 application, the criminal proceedings are at an end and the presumption no longer has any application. It followed that the burden of proof to show a miscarriage of justice rested on the applicant and the standard of proof was the balance of probabilities, as in any civil claim.

**48.** As to the meaning of the phrase “miscarriage of justice”, Lynch J. said that the “primary meaning” was that the person was on the balance of probabilities as established by relevant and admissible evidence innocent of the offence of which he was convicted. There may be other cases, he said, such as the example referred to by the Court of Criminal Appeal (namely that there was no credible evidence supporting prosecution) *“or perhaps a case involving such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial or constitutional procedure at all”* (page 247).

**49.** Following the Supreme Court decision, the appellant chose not to pursue his application for a certificate pursuant to s.9 as permitted by that court. Instead, he chose to pursue a different set of proceedings in which the central claims are for damages due to negligence and breach of constitutional rights. As we will see however, the respondents have sought to introduce the concept of miscarriage of justice into those proceedings by way of defence.

**50.** I pause to summarise some points which emerge from the appellant's two applications (s.2 and s.9) under the Criminal Procedure Act 1993:

1. The conviction was quashed because it was considered unsafe in light of a "newly-discovered fact" (within the meaning of the 1993 Act) which had emerged.
2. That in itself was not sufficient to show there had been a "miscarriage of justice" within the meaning of s.9 of the 1993 Act and this was why the certificate under s.9 was refused.
3. The Court of Criminal Appeal and Supreme Court took the view that the presumption of innocence has no place in a s.9 application as distinct from a s.2 application.
4. The phrase "miscarriage of justice" in the context of the 1993 Act could mean (a) that an innocent person has been convicted; or (b) that a person was prosecuted in circumstances where there was no credible evidence grounding the prosecution; (c) there was a fundamentally flawed trial which cannot be said to have been in accordance with the constitutional notion of a fair trial.
5. Information about the bloodstained tissue was contained in (a) Detective Sergeant Connolly's notebook entry; and (b) Detective Sergeant Connolly's draft statement. Taking each of these in turn:-
6. The notebook entry which contained reference to the bloodstained tissue was available at the trial and indeed was made an exhibit by reason of the fact that it also contained the disputed admission, but no one appears to have noticed that it contained the bloodstained tissue reference at that time.

7. The draft statement of Detective Sergeant Connolly, which did contain reference to the blood stained tissue- in contrast to his final statement which formed part of the Book of Evidence - was still available in the mid-1990s.
8. The material non-disclosure referred to throughout the s.2 application judgments appears to relate not to the draft statement or the notebook entry (contrary to what one might think at first sight) but to the fact that there was a conflict between Detective Sergeant Connolly and Detective Sergeant Ennis as to what happened to the tissue. The “newly discovered fact” appears to have been regarded by the Court of Criminal Appeal and Supreme Court as the conflict as between Detective Sergeant Connolly and Detective Sergeant Ennis.
9. It is not clear that this conflict was known to anyone before or during the trial (per Blayney J); all that can be said at this stage is that the conflict had become apparent by the time the two witnesses made their statements and gave evidence to the Court of Criminal Appeal on the s.2 application in 1994; when it first became apparent is not entirely clear, as far as I can see. It is possible, therefore, that the ‘newly discovered fact’ came into existence only in the mid-1990s.
10. It would be wrong to think of those judgments as having established that there was a material non-disclosure of a particular document (such as the draft statement or the notebook entry). The newly discovered fact appears to have been the existence of a conflict between two key witnesses in respect of a particular fact (i.e. the handing over of a bloodstained tissue).

**December 1995: The commencement of a second set of plenary proceedings (the “negligence proceedings”) and the progress of those proceedings until 2001**

51. In the period between the judgments of the Court of Criminal Appeal and Supreme Court in the miscarriage of justice application, the appellant had commenced a second set of plenary proceedings by plenary summons dated the 5 December 1995 (Record Number 1995/9551P). The plenary summons seeks “*damages for negligence, breach of duty (including breach of statutory duty) and failure to vindicate constitutional rights*”. I will refer to these proceedings in this judgment as the “**negligence proceedings**”, although this is intended merely as a shorthand description and it should not be forgotten that the claim is for damages in respect of both negligence and breach of constitutional rights, although in the normal course a trial court would not reach the claim for damages in respect of breach of constitutional rights unless the common law claims were not sufficient to dispose of the matter. It is necessary to refer to the pleadings in some detail because that is necessary to conduct the assessment of whether the proceedings should be dismissed for delay, and in particular of the question of whether the respondents have suffered prejudice arising from the unavailability of witnesses.

*The statement of claim in the 1995 (negligence) proceedings*

52. The statement of claim was delivered on the 4 January 1996. At paragraphs 5-17 there is a narrative of the arrest, detention, conviction and sentencing of the appellant, in the course of which (at paragraph 13) it is pleaded that the disputed admission “*constituted the gravamen of the prosecution case*” and (at paragraph 15) that the Special Criminal Court “*concluded that such other evidence as was adduced against the Plaintiff was in itself incapable of establishing*

*guilt so as to support the conviction of the Plaintiff*”, which view was “*endorsed*” by the Court of Criminal Appeal. The particulars of default, negligence and breach of duty and violation of the appellant’s constitutional rights allege that he “*was not provided with material information as to the retention by...[D/Sgt] Thomas Connolly of the said bloodstained tissue for purposes of forensic scientific examination*”. It recites the history of events concerning the discovery of this information and the subsequent application and quashing of the conviction pursuant to s.2 of the Criminal Procedure Act 1992. At paragraph 18 of the statement of claim, it pleads that the case against the appellant was prosecuted “*upon a basis of concealment and non-disclosure of facts which went to the root of the credibility*” of Detective Sergeant Thomas Connolly, who, it pleads, was “*an essential prosecution witness*”. It continues (at paragraph 19) that “*in causing, and/or permitting the concealment of and non-disclosure of the said facts from the appellant prior to his trial, at his trial, and subsequent application as to conviction before the Court of Criminal Appeal*”, the defendants’ servants or agents were negligent and failed to vindicate his constitutional rights to the observance of fairness of procedures in the conduct of the prosecution.

**53.** The statement of claim then goes on to plead (at paragraph 20) that “*on foot of the said death sentence as commuted to some forty years penalty servitude*”, the appellant suffered 14 years and 10 months loss of liberty and further and other damage “*in consequence of same*”. Presumably this is intended to allege a causal link between the alleged negligence and the fact of the appellant’s imprisonment. It claims damages for negligence and breach of duty including breach of statutory duty, and damages for failure to vindicate constitutional rights. Exemplary damages are also claimed on the basis that the negligence alleged deprived him of “*the opportunity of adequately defending himself on foot of the said charges*”, as are aggravated

damages on account of “*injury to his feelings, dignity and reputation by reason of the said conviction and consequent subsequent incarceration*”.

**54.** It may be noted that the statement of claim does not explicitly use the phrase “miscarriage of justice” anywhere. Nor does it explicitly assert the appellant’s innocence or that he was wrongfully convicted, although of course these matters are deposed to, and vigorously so, in the present application.

*The defence in the 1995 (negligence) proceedings*

**55.** A full defence was delivered on the 22 April 1996. *Inter alia*, it is pleaded that the appellant’s action was statute-barred and that he had been guilty of laches. It also denies that the words uttered by the appellant to Detective Sergeant Connolly “*constituted the gravamen of the prosecution against the appellant at his trial*” and pleads that the trial court arrived at its verdict (a) on the basis of a finding that the cumulative effect of the appellant’s statements when in custody constituted an admission of involvement in crimes committed and (b) the Special Criminal Court’s finding in relation to items of forensic evidence which linked the appellant with vital aspects of the commission of the crime for which he was convicted. This presumably responds to the appellant’s pleading (as described above) that the disputed admission constituted “*the gravamen*” of the prosecution’s case. It also links in with paragraph 15 of the defence, referred to below. It is also pleaded (at paragraph 5) that the appellant in the original appeal to the Court of Criminal Appeal did not challenge the finding of fact by the Court of trial that he had actually spoken the disputed words.

**56.** The defence denies that the defendants failed to discharge their duties in the disclosure of information to the appellant. It denies that the defendants caused or permitted the

concealment or non-disclosure of facts from the appellant prior to this trial or at all. It denies negligence and breach of duty and failure to comply with constitutional rights to fair procedures. The claims for damages (including aggravated and exemplary damages) are all denied.

**57.** Significantly for present purposes, the defence pleads at paragraph 15 that *if* there has been any breach of duty or negligence (which is denied), disclosure of such evidence at his original trial “*would not have led to the appellant’s acquittal or to a finding by the trial court or any subsequent court that there had been a miscarriage of justice in the appellant’s case.*” (Actually, the precise wording of ‘non-disclosure’ would not have led to acquittal etc., but this is clearly a typographic error and what was meant was ‘disclosure’). If one pauses to consider this carefully, this plea appears to contain two distinct limbs, one relating to the original trial and the question of acquittal at that trial (“*would not have led to the appellant’s acquittal*”), the other (in the alternative) relating to the question of whether there was a miscarriage of justice with reference to the trial court or any other court (“*would not have led to ...a finding by the trial court or any subsequent court that there had been a miscarriage of justice in the appellant’s case*”). Notably it introduces the concept of “miscarriage of justice” into the proceedings for the first time.

**58.** The defence also pleaded at paragraph 17 that by reason of the decision of the Court of Criminal Appeal refusing to certify a miscarriage of justice pursuant to s.9 of the 1993 Act, the appellant was precluded from pursuing a claim for damages as set out in the statement of claim in these proceedings.

*The reply delivered by the appellant*

**59.** The appellant took no further action or steps to advance these proceedings until May 1998 when he served a notice of change of solicitor. The appellant subsequently served a reply to the defence on the 5 August 1998. Paragraph 2 pleads, essentially, that the manner in which the appellant conducted his appeal before the Court of Criminal Appeal is not capable of amounting to an admission that he uttered the words. Reference is made to the fact that the appellate court is bound by findings of fact made by the trial court unless they are manifestly perverse. Thus, it is clear that the appellant's position is that the only reason the Special Criminal Court's factual finding that he uttered the disputed words was not challenged on appeal was because it would have been fruitless or impermissible to challenge it, not because he accepted the factual finding made by the trial court.

**60.** At paragraph 3, the appellant joins issue on the matter of whether the disclosure would have led to the appellant's acquittal or to a finding by any court that there had been a miscarriage of justice. At paragraph 4, he denies that he was precluded from pursuing a claim for damages by reason of the fact that he did not obtain a certificate pursuant to s.9 of the 1993 Act. Reference was made to the Supreme Court decision of the 4 March 1997 in this regard. At paragraph 5, the appellant denies that he was statute-barred or guilty of laches and pleads in particulars, *inter alia*, that his claim relates to the failure of the defendant to vindicate his constitutional rights, that his action is "*based on the fraud of the defendants their servants or agents*", and that his right of action was "*concealed by the fraud of the defendants their servants or agents*". Reference is made to his incarceration until the 24 May 1995 and it is pleaded that he was a person under a disability within the meaning of s.48 of the Statute of Limitations 1957.



**61.** Notice of trial was served on the 21 September 1998.

*Amended Defence*

**62.** In light of the ruling of the Supreme Court in respect of the appellant's application for a certificate pursuant to s.9 of the 1993 Act, the defendants sought and were granted leave to amend their defence to include a further pleading. This referred (at paragraph 19 of the amended defence) to the Supreme Court decision of the 4 March 1997 and pleaded that the plaintiff had "submitted" to the jurisdiction of the Court of Criminal Appeal in respect of the s.9 certificate procedure and, having exercised that option, was barred from proceeding against them in these proceedings. This amended defence was delivered on the 26 May 1999.

**63.** This specific issue was tried, at the request of the respondents, as a preliminary issue before the High Court (O'Donovan J.). The court delivered judgment on the 13 July 1999, holding that the appellant was *not* precluded from pursuing the jury proceedings because he had not in fact exercised his option under the 1993 Act as he had not been granted a certificate to do so by the Court of Criminal Appeal. He said that merely because the Supreme Court had "*permitted*" the appellant to renew his application to the Court of Criminal Appeal for a certificate did not mean that he was "*obliged*" to do so. He said: "*I can see no good reason why the Plaintiff should be required to pursue a course of action which, while it might well be in the public interest, is not necessarily in his own interest*".

**64.** I will return in detail later to the significance of the various pleadings by the parties in the present context. It is sufficient to note at this point that each side has a very different view as to the scope of the issues in the case arising from the pleadings described above.

### **2002/2003: The service of the Evans report and the adjournment of both sets of proceedings**

**65.** By 2002, it appears that both sets of proceedings were awaiting the allocation of a trial date. At this point, the respondents served a report which I described in the introduction to this judgment as “**the Evans report**”.

**66.** It will be recalled that in 1980, the appellant had declined to provide a blood sample while he was in detention during the Garda investigation. However, a sample of blood had been taken from him while he was imprisoned at Portlaoise Prison in or around 1994. According to the appellant’s submissions, this was provided on a voluntary basis shortly before the miscarriage of justice application. In October 2002 it was sent for DNA analysis to the Forensic Science Service in Birmingham. The sending of the blood for testing in 2002 (although not the original taking of the sample in 1994) was done, it appears, in contemplation of the then-pending civil trials.

**67.** In a report dated the 4 December 2002, a forensic scientist, Carole Dawn Evans, determined that there was what she described as “strong support” for the proposition that there was a match between a hair sample taken from the rear of the White Ford Cortina used in the bank robbery, on the one hand, and the voluntary blood sample provided by the appellant.

**68.** The appellant was advised of the report and findings of Ms. Evans by letter dated the 23 January 2003 and a copy of the report was furnished to him on the 4 April 2003. The letter of the 20 January 2003 referred to the cases being “*shortly in the list to fix dates*” and said that “*we are anxious to avoid any suggestion of unfairness or ambush*”. This is presumably a reference to the fact that the respondents were at the time under no legal obligation to share the report with the appellant in advance of the civil trials.

**69.** The two sets of plenary proceedings were adjourned on consent as a result of this development, and then, from time to time, and then ultimately adjourned “generally” (on the 9 March 2005, and the 27 March 2007 respectively).

**70.** In the context of the issues arising on this appeal, it is worth pausing to consider the implications of the service of the Evans report. This was a negligence action. It might be asked what possible relevance the service of a new report, based on new evidence (a blood sample taken from the appellant years after the trial) *purporting to connect the appellant with a car used in the robbery*, could have had in that context? Obviously, it had nothing to do with disclosure prior to or during the trial or any failures of the prosecution in that regard. Put bluntly, this was new evidence which the respondents intended to deploy at the trial to show the appellant was probably guilty of the offences which were the subject of the trial. It could not have had any other purpose.

**71.** As we shall see, the respondents contend that the question of guilt or innocence of the appellant is (and always was) ‘in’ the negligence action, a position hotly disputed by the appellant. But it is perhaps worth noting that even *if* the respondent’s defence intended to bring

this issue (guilt or innocence) into the case from the very beginning by pleading their defence in the manner in which they did, and even *if* the terms of the defence were somewhat cryptic or ambiguous in this regard (what did the respondent mean by pleading there was no miscarriage of justice, for example?), the service of the Evans report surely made explicit what had hitherto been implicit in the respondent's position. It was a significant 'shot across the bows' in terms of how the respondent's strategy might be pursued at trial, namely that they would seek to adduce evidence on the issue of whether the appellant was involved in the robbery and shooting or not. (I leave aside the question of the burden of proof for the moment; I am concerned at the more general level of whether the 'issue' of guilt/innocence was 'in' the trial at all).

**72.** In that context, perhaps surprisingly, the appellant's response was not to protest at the suggestion that the Evans report was intended to be deployed at the negligence trial at all. Instead, the trial was (quite reasonably) adjourned to enable him, his advisers and experts to consider its contents. Later, much later, his response was to seek the materials underpinning the report in order to better instruct the appellant's experts to challenge the probative value of the report. However, this approach engages with the report on its merits; it does not constitute an objection to its relevance to the case. I accept of course that any objections as to admissibility of the evidence would have to be reserved to the trial, but one might have thought that queries would be raised even in correspondence as to its relevance to the issues in the trial, or that, when seeking additional materials relevant to the report, the appellant's position might have been reserved in terms of objecting to its admissibility on grounds of (lack of) relevance. Further, no consideration appears to have been given to whether a motion might be brought to strike out any portions of the defence which the respondents might rely at the trial to support the admission into evidence of the Evans report. Curiously, perhaps, the appellant's objection that the issue of guilt/innocence cannot fall within the parameters of the case does not appear

to have been raised on the appellant's behalf until the motion to dismiss was brought by the State and it formed part of the submissions. This is not to say that he was not entitled to raise it at that stage, or that it is not a significant matter. But it is perhaps surprising that it was never raised before, given the stark message that was being sent by the respondents by the service of the Evans report about how they would seek to run their case. The appellant had different legal advisers at different times and perhaps there was a difference of opinion. In any event, I will return in further detail below to the question of whether the appellant is correct in the submissions he now makes, namely that the issue of 'guilt/innocence' is irrelevant to the negligence case and is in any event impermissible as a plea. Nonetheless it is worth observing that the service of the Evans report was a significant milestone in the history of the case. In my view, it made clear in 2003 (if it had been in any doubt before that) that the respondents would *seek to* prove the appellant's guilt of the offences in the negligence proceedings. Whether they would be permitted to do so is a different matter, but there can have been no doubt about their intentions from this point on.

***2010: The appellant seeks details of the DNA testing by letter***

**73.** The next relevant event is that of the 22 April 2010, when the appellant's solicitor (Mr. Greg O'Neill) wrote a letter to the Chief State Solicitor's Office seeking details of the testing conducted by Ms. Evans for the purpose of independent examination. The date may be noted: this was *seven years* after the appellant had received the Evans report. No reply was received.

**74.** A change of solicitor occurred and further letters requesting the information were sent by the appellant's new solicitor, Ms. Bartels, on the 21 May 2010, the 3 November 2011, the 14 November 2011, and the 23 November 2011. No reply of any kind was received. This is somewhat surprising, to say the least, given the appellant's history. It was hardly too much to

afford him the courtesy of a reply, particularly when numerous letters were sent. On the 20 December 2011 the appellant served a notice of intention to proceed in the first plenary proceedings and then in January 2012, a similar notice regarding the second plenary proceedings. The absence of replies to Ms. Bartels' letters has been commented upon. Nonetheless, it is somewhat surprising to see Ms. Bartels averring on affidavit that, not having received a reply to her letters, she found herself in a most difficult situation as to how to progress the case without the requested material and that their "*hands seemed to be tied by reason of the attitude taken by the [respondents]*". The obvious option of bringing a motion for discovery did not, apparently, occur to anybody.

**75.** A further letter was sent by the appellant seeking details of the testing on the 23 July 2013. Ms. Bartels describes being advised by counsel not to set the matter down in circumstances where "*the defendants were holding the Report of Ms. Evans over our heads and still had not disclosed the material that had been sought...*". In October 2013, Senior Counsel indicated he was unable to commit to the case given his prior engagements and she herself was absent from work for personal reasons until March 2014. Meanwhile the appellant continued his research in connection with the DNA evidence and contacted one Dr. Gilkerson in the University of Texas-Pan American as well as a Doctor Vanek.

**76.** I should record that a number of notices of intention to proceed were served, but nothing appears to have happened, as far as the respondents are concerned, other than that, until the 21 December 2015, when in addition to serving a notice of intention to proceed, the appellant's solicitor sought voluntary discovery of documentation relating to the DNA analysis. No reply

was received and a further letter was sent on the 11 March 2016, threatening a motion. A motion for discovery then issued.

## **PART II: THE MOTION TO DISMISS FOR DELAY AND THE EVIDENCE BEFORE THE COURT ON THAT MOTION**

### **May 2016: The motion for discovery and the motion to dismiss for delay**

#### *The discovery motion issued by the appellant*

**77.** The appellant issued a discovery motion on the 20 May 2016, returnable to the 20 June 2016. It may be noted that this was some *thirteen years* after the service of the Evans report. It sought four categories of material, all related to the DNA analysis carried out by Ms. Evans. The motion was grounded upon the affidavit of Ms. Bartels which exhibited the correspondence seeking the relevant materials. She averred that the preliminary expert advice received by the appellant indicated that the Evans report contained “*serious conceptual, procedural and scientific issues*” and that it failed to demonstrate that the DNA matched that of the appellant. No report or letter from any expert was exhibited to support these averments.

**78.** On the 31 May 2016, the respondents wrote to the appellant’s solicitors referring to the delay in the proceedings and calling on him to discontinue the proceedings.

#### *The motion to dismiss for want of prosecution issued by the respondents*

**79.** This was followed by a motion to dismiss for want of prosecution returnable for the 17 October 2016. This came on for hearing before the High Court (Stewart J.) on the 31 January

and 2 February 2018 and constitutes the motion the subject of this appeal. As the respondents have relied heavily upon alleged prejudice caused by delay, it is necessary to carefully examine the evidence put before the court on this motion concerning the issues in the case and the witnesses alleged to be no longer available to the respondents. The most relevant affidavits for the respondents in that regard are those of Ms. Therese Guerin and Mr. Owen Wilson, but I propose to summarise all of the affidavits.

### **The Affidavit Evidence in the Motion to dismiss for delay**

#### *The affidavit of Therese Guerin, CSSO*

**80.** The affidavit grounding the motion to dismiss was an affidavit sworn on the 22 July 2016 by Therese Guerin, Solicitor to the CSSO. She said that the proceedings related to matters which took place more than 35 years ago in respect of which there were approximately 115 witnesses, including those to the robbery, its aftermath and the progress of the Garda investigation. She said it would be impossible after such a length of time for many if not all of the witnesses, even those who are still alive and in sufficiently good health to give evidence or to recall the events accurately. She said that insofar as the appellant's case related to the safety of the disputed admission on the 21 July 1980, Detective Inspector Culhane who witnessed the admission had died in 2007. She then went on to say:

*“ I am informed that an Garda Sióchána have also had difficulty in tracing all the retired members who were involved in the investigation and at present cannot confirm with certainty the availability of all witnesses. One potentially important witness in this regard would have been Supt. Tom Maher who, along with Det. Sgt Connolly was present when the plaintiff had his nose bleed. I am informed that Supt. Maher is deceased. I am*



*instructed that approximately thirty or more of the witnesses from the trial have since died but that it has not been possible to prepare a comprehensive list by reason of the difficulties in identifying retired members and making contact with all the witnesses”.*

Later in her affidavit she said that it was “*of singular importance to the case*” that Detective Inspector Culhane died in 2007 because he was the only other witness present at the time the appellant made the admission and “*would have been available to corroborate Det. Sgt Connolly’s evidence had the plaintiff not delayed in pursuing litigation*”.

**81.** It was clear from this affidavit that the State intended to seek to prove the appellant’s connection to the offences in respect of which his conviction had been quashed.

*The affidavit of the appellant’s solicitor*

**82.** In reply, Ms. Bartels, the appellant’s solicitor, swore an affidavit on the 27 March 2017. She referred to the time spent in prison by the appellant on foot of the convictions which were later quashed by the Court of Criminal Appeal and commented that “*The State therefore must take responsibility for this period of time in relation to any delay issue*”. She said that the State had made no complaint about delay up to the year 2002 when the actions were listed for hearing, which was a period of 22 years after the offences. She also said that the respondents caused delays by setting down a preliminary issue for trial, which issue was ultimately won by the appellant.

**83.** She says that the proceedings were ready for trial and awaiting dates to be assigned when the appellant received the Evans report in 2003. It had been intended to make an application for a specially fixed date on the 30 April 2002, but the report arrived by letter dated the 20

January 2003. She commented that *“this letter clearly had great implications for both sets of proceedings. The content of the letter from the State was an indication that the State now believed that the Appellant was indeed involved in the bank robbery and the murder of a member of An Garda Siochana and that moreover that new evidence was now available in relation to this contention”*. She said that the cases were adjourned on consent because it was not possible to proceed until the allegation in the report had been addressed by the appellant and his legal team. She described the cases being adjourned on a number of occasions and how the applications to adjourn generally (2005, and 2007, respectively) must have been with the consent of the respondents and she submitted that this amounted to acquiescence and an acknowledgment that the appellant would have to deal with the Evans report. She said that the respondents never sought to re-enter the cases or to dismiss them for want of prosecution, until the appellant brought his motion for discovery.

**84.** Ms. Bartels said that the then-solicitor for the appellant, Mr. Greg O’Neill, contacted an expert (Mr. Mark Webster) who produced a preliminary report in January 2004. The appellant received further advices from another expert (Dr. Robert Gilkerson) in September and October 2007, who informed him that certain materials, including, the electropherograms of the sequencing reactions, would need to be made available if he were to provide a conclusive opinion on the report. She described the correspondence sent by Mr. O’Neill, to which no reply was received. Mr. O’Neill retired in 2011 and she took over the cases. She described trying to put together the papers from various sources, putting order on them, having meetings with counsel, and letters issued by her to the CSSO, seeking the material related to the Evans report, to which she received no reply. She described discussions with the appellant and counsel’s advices concerning the wisdom of setting the case down for trial without those materials. She referred to counsel going out of the case, and her own maternity leave for a particular six-month

period in 2013/14. She again contacted Dr. Gilkerson who again advised that he could not evaluate the veracity and integrity of the scientific analysis without the sought-for material. She also received an opinion from a third expert (Dr. Daniel Vanek).

**85.** She said that following consultation with the appellant and counsel it was clear they would need the materials to challenge the report, and that in the absence of co-operation from the respondents in releasing the materials, they would have to formally seek discovery. She therefore sought voluntary discovery by letter, to which she received no response despite reminders, and eventually issued a motion for discovery, which prompted a letter from the CSSO dated the 1 June 2016 complaining about delay. The motion to dismiss for delay followed in due course. None of the expert letters or opinions referred to were exhibited.

**86.** Ms. Bartels criticised the reference by Ms. Guerin to the 115 witnesses in her affidavit, saying that *“this ignores the nature of the cases being brought by the Appellant, and the fact that these actions are not intended as any re-run of the criminal trial that took place in 1980...”* and that the cases related to a claim that *“the Appellant’s trial proceedings were tainted by reason of non-disclosure and hence the violation of his constitutional entitlements to the observation of fairness of procedures”*. She said that the specific missing witnesses referred to by Ms. Guerin *“are not required for the fair disposal of the issues between the parties in the Appellant’s two actions”* and that *“no input is needed from any garda or civilian witness to deal with the matters raised in both of these actions”*. At another point in her affidavit, she submitted that the jury proceedings involved legal issues and that *“the facts of the case are not relevant to the legal issues involved”* and that all such issues have been dealt with at the original trial and on appeal.

**87.** Ms. Bartels referred to the availability of a complete transcript of the original trial and appeal, although she did not specify precisely how that might be deployed in the proceedings. For example, was it envisaged by the appellant that its role would simply be to prove what happened at the trial, or was it being suggested that it would prove the truth of the evidence of particular witnesses? What would the situation be regarding witnesses whose evidence was in dispute?

**88.** Ms. Bartels referred repeatedly to the failure of the State to respond to the numerous letters sent on behalf of the appellant over the years and said that “*it appears that the Defendants took a conscious decision to refuse to cooperate with the appellant’s solicitors in handing over the material...*”. She also pointed out that Ms. Guerin averred that the sample was taken in 1994 “*in contemplation of these proceedings*” but failed to explain why it took eight years for the sample to be sent off for testing.

**89.** Ms. Bartels emphasised that the appellant had always wanted the actions to go ahead, that he is of the view that the State is embarrassed by the case and that this explains why there has been no co-operation has been forthcoming, and that he has suffered severe personal injury and mental distress arising from his experiences during the investigation, trial, sentence, appeal and incarceration. She also said that the appellant should be given the opportunity to clear his name. She submitted that the delay is excusable and that the balance of justice lies in the matters proceeding to trial.

*The affidavit of the appellant dated the 3 April 2017*

**90.** The appellant also swore affidavits in reply to the affidavit of Ms. Guerin. The first is dated the 3 April 2017. Many of the matters dealt with are the same as those described above in the affidavit of Ms. Bartels and I will attempt to highlight matters which are exclusive to the appellant's affidavits. In his first affidavit, having referred to the murders and his arrest and detention, he avers: *"I wish to state categorically that I did not have hand, act or part in these events. I am totally innocent of the allegations that were made against me"*. He refers to the 15 years he spent in prison and avers: *"I further say that when I was eventually released from prison, following the quashing of my conviction by the Court of Criminal Appeal, I was penniless and received no assistance whatsoever from the State to get my life back in order. I say that my prolonged and wrongful incarceration, and the possibility of my being executed, has badly affected me psychologically and I have found it difficult, even at this stage of my life, to properly reintegrate into society and function as a normal human being"*. He also avers that *"the preparation of these cases has been to the forefront of my life since my release and despite the obstacles that have been placed in my way to finalise these cases, I have made every effort to seek redress for the wrongs done to me"*.

**91.** The appellant described the progress of the cases up until the service of the Evans report in January 2003. He says that he was *"totally shocked"* by the report and that he knew it was *"factually incorrect"* because he had nothing to do with the events in Ballaghaderreen. He thought it was a *"further attempt by the State to blacken my name and to scupper my proceedings against Ireland and the Attorney General"*.

92. He says that he was, at this time, totally reliant upon his (then) solicitor Mr. Greg O'Neill to try to progress his cases as best he could, and that he was unemployed and had no money. He was aware that Mr. O'Neill was receiving advices from counsel as to next steps and experts. He says that he himself spent a lot of time doing research into the issues in the report despite not being a scientist. He describes Mr. O'Neill having made contact in late 2003 with an expert, Mark Webster, to give a preliminary opinion, which was done in early 2004. This is not exhibited.

93. He said that Mr. O'Neill subsequently left the practice he was then in, and set up in independent practice. This led to difficulties with the release of his file to Mr. O'Neill, but that this was resolved "*some 18 months later*" and the files were released in May 2006.

94. He said that between 2006 and 2011, he was repeatedly assured by Mr. O'Neill that matters were being progressed. He said that he himself "*became very busy in the area of human rights and was asked to do a number of lecture tours in relation to my experiences as a person who had suffered a miscarriage of justice*". He worked voluntarily for a number of human rights organisations in relation to the abolition of the death penalty. He got married. He and his wife established a charity to assist people who have suffered wrongful incarceration to fit back into society. In 2008 he was diagnosed with certain health conditions which required that he devote his energies into his treatment and recovery.

95. The appellant said that he continued to do research himself and that he sent an email to Mr. O'Neill in July 2007 attaching an article that might assist them. He wrote to Mr. Barry Scheck, an expert in the United States, (although he does not appear to have received a reply). He became acquainted with a Dr. Robert Gilkerson in the US, in 2007 and obtained some

preliminary views from him also. He described the latter's comments on the Evans report as highly critical, although he does not exhibit the email in which Dr. Gilkerson is said to have expressed these views. He sent Mr. O'Neill the details for Dr. Gilkerson and asked him to request the electropherograms from the State. He continued to think that his solicitor was progressing matters as best he could. He sent an email to Mr. O'Neill in February 2009 which he exhibited.

**96.** He said that in 2009 and 2010, he found it difficult to reach Mr. O'Neill and became increasingly frustrated. Most of the contact appears to have been by telephone, but by letter dated the 2 April 2011, he warned that he might withdraw the cases from Mr. O'Neill. Some time later in 2011, he became aware, without warning, that Mr. O'Neill had ceased practice. He then approached Ms. Bartels and she agreed to take carriage of the cases in August 2011.

**97.** The appellant described having made contact with an English QC, and various other experts, including a Dr. Daniel Danek, who was, he said, also critical of the Evans report. Again, this has not been exhibited. He said that everyone agreed that it was necessary to have sight of the materials connected with the Evans report that his solicitor(s) had sought in correspondence. It eventually became clear that it would be necessary to issue a motion for discovery and this was done. He was highly critical of the State for its failure to respond to the correspondence from his solicitors seeking the Evans report, and he was also critical of the respondents for bringing a motion to dismiss only when the discovery motion was brought. The appellant characterised the entire approach of the respondents since 2003 as a tactical one designed to cover up a matter which is of embarrassment to them.

*The affidavit of Owen Wilson, office of the Chief State Solicitor*

**98.** An affidavit was sworn by Owen Wilson of the Office of the Chief State Solicitor, dated the 12 July 2017, Mr. Wilson referred to the view of the appellant's solicitor that the question of his guilt or innocence had no bearing on either of the above actions. He said that the suggestion that the defendants should be able to deal with the case in the absence of the State witnesses who dealt with the appellant in the course of his detention and trial would be "*wholly artificial*". He said that the reality was that the events surrounding the robbery and murders in 1980 were central to both sets of proceedings.

**99.** *Inter alia*, he said that that because one of the issues in the proceedings was whether material evidence was not disclosed in the course of the trial, "*the court can only assess the materiality of this evidence in the context of the overall case against the plaintiff*".

**100.** He continued on to make a different point, suggesting that because the appellant seeks damages including aggravated and exemplary damages, "*it is of course highly relevant whether the plaintiff was properly convicted of the offences charged, and this assessment could never be conducted solely on the plaintiff's claim that he was innocent of those offences*". He continued on to say in unmistakeably blunt terms:

"I say, therefore, that the question of whether the plaintiff is innocent or not of the offences for which he is convicted is central to both sets of proceedings..."

**101.** It was in the context of that view of the scope of the case that Mr. Wilson proceeded to lay out the prejudice upon which the State relies as follows. He referred again to the death of



Detective Inspector Culhane, who he said was important given the importance of the admission as to the conviction of the appellant. As to missing witnesses, he said that he had been informed that nine members of an Garda Síochána were deceased, including Superintendent Tom Maher, and Detective Sergeant John Tarpey, who were involved in the detention and questioning of the appellant. He also referred to Garda James Boyle, now deceased, about whom I will say more below. He said that there are a number of civilian witnesses who the defendants would rely on, although he did not specifically say what their relevance is. He set out the available information in relation to eighteen civilian witnesses and such information as is available about each of them and their current whereabouts.

**102.** In addition to the unavailability of witnesses, he said there is a fundamental unfairness to conducting such a hearing given the passage of almost forty years since the events at issue and that there would be a real and substantial prejudice to the defence.

**103.** It will be recalled that the appellant did not give an account at his trial of his whereabouts at the time of, or in the days following, the robbery and murders. Mr. Wilson averred that the appellant published a book in October 2012 entitled *'About Time: Surviving Ireland's Death Row'*. He said that at Chapter 10 of this book, the appellant gives (for the first time) an account of his movements at the time of the murders. Mr. Wilson says that the book sets out the following account. The appellant says that he bought a bottle of whiskey on the 7 of July 1980 and spent the next twelve days until his arrest drinking in or around Galway in a drunken haze. He says he gave someone his car and met with Mr. Shevlin with whom he stayed until his arrest. He accepts that Mr. Shevlin helped to cut and dye his hair but does not refer to either Ms. Curtin or Ms. McInerney. (These three individuals were civilian witnesses in the Garda

investigation in 1980). Mr. Wilson points out that this was an account that had never been offered before or during his trial. Mr. Wilson says that the appellants would wish to adduce certain evidence to contradict this account including various sightings of him by certain civilian witnesses, a conversation with a Mr. Henahan, an attempt by Garda Boyle to arrest him in Dunmore, his sighting by particular guards driving a brown Cortina, the evidence of certain civilian witnesses of their assistance in cutting and dying his hair, and forensic evidence linking him to the cars used in the robbery. I note that some of these (civilian) witnesses are mentioned in the list of civilian witnesses who have either died or in respect of whom there is no longer any information.

**104.** In particular, Mr. Wilson relied upon the fact that Garda Boyle is now deceased. He averred that Garda Boyle was called to give evidence at the trial in the Special Criminal Court and described how he had attempted to stop the appellant two days after the incident. He identified the appellant as the man in court. The appellant in his published book suggests that Garda Boyle in fact identified another man in court, a man who left the court after the identification and was never seen again. Mr. Wilson said that in order to resolve any ambiguity on this matter and to reject the account given by the appellant in his book, it would be necessary to call Garda Boyle to clarify whether he identified the appellant or whether some other person had attended the trial, been identified, and left the court. However, Garda Boyle is now deceased.

**105.** As to the respondents' failure to reply to correspondence from the appellant, Mr. Wilson submitted that this failure took place in 2010 and 2011, which was long after the delay on the part of the appellant. He pointed out that the appellant was free to pursue a discovery motion but did not do so.

**106.** He said that the suggestion that the appellant was unable to litigate his claims while in prison ignores the fact that many prisoners institute claims while in prison, either personally or through their representatives and that indeed the appellant instituted his Chancery proceedings while still in prison. He submitted that the other explanations offered for the appellant's delay are entirely inadequate. He also observed that the expert material referred to by Ms. Bartels was not exhibited and the account was of a hearsay nature.

*The affidavit of the appellant dated the 11 September 2017*

**107.** The appellant swore a further affidavit dated the 11 September 2017. He pointed out that the DPP decided not to prosecute him following the quashing of his convictions by the Court of Criminal Appeal. He also said that it is essential that he be given the opportunity to finally clear his name, given the implication in Mr. Wilson's affidavit that he was involved in the offences. He said that the civil trial would not involve a re-trial of the criminal matter and that evidential issues raised by Mr. Wilson can be dealt with by the witnesses who are available as well as appropriate rulings by the trial judge. He suggested that he, as well as the State, may be prejudiced by the absence of certain prosecuting Gardaí. He referred to the availability of the transcript of the trial. He said that a number of the witnesses whose absence is now relied on, did not give evidence at the trial. He said that the evidence sought to be relied on by the prosecution, particularly in relation to wool fibres, "*has become known since as junk science and such evidence would not be admitted nowadays having regard to what is known now of this so-called scientific evidence*". He said that the relevant State forensic scientist claimed at his trial that he had matched the wool fibres by using the technique of Thin Layer Chromatography (TLC) but that there is no TLC method which will prove that a wool fibre

taken from one location came from any particular garment. With regard to the alleged MtDNA match, he says: *“I say that the hair in question is not from me and I can and shall prove this fact in Court if and when I am given an opportunity to do so”*.

*The affidavit of Sean McDermott dated the 8 November 2017*

**108.** Mr. Sean McDermott, acting Director General of Forensic Science Ireland at Garda Headquarters, swore an affidavit dated the 8 November 2017 in which he addressed the averments of the appellant concerning the TLC scientific technique. He said that he examined the statement of Dr. Tim Creedon as prepared for the original trial (which he exhibits) and avers that its contents are scientifically correct. He rejected the appellant’s contention that TLC is *“junk science”* and says it is a well-established separation technique. He says that it is not true that such evidence would no longer be admitted but explains that other techniques for comparison of dyes from fibres have been developed over the years and are now in common use. He made various other comments on the TLC evidence of Dr. Creedon and said that based on an analysis of the latter’s report, he believed that the finding of a match between the wool fibres found in the vehicles and the appellant’s sweater was correct and consistent with the application of a good scientific practice.

## **PART III: THE HIGH COURT JUDGMENT AND THE SUBMISSIONS ON APPEAL**

### **3 December 2019: The High Court judgment**

**109.** The High Court (Stewart J.) delivered judgment on the 3 December 2019. She decided to deal with the motion to dismiss, and granted the application of the respondents to have both the Chancery proceedings and the jury proceedings struck out.

**110.** Having set out the history of the proceedings, she observed that the legal principles applicable to applications of this nature were well established in *Primor Plc. v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, from which she quoted at some length, and more recently in the Court of Appeal decision of *Flynn v Minister for Justice, Equality and Law Reform* [2017] IECA 178, from which she also quoted at some length as follows, observing that principles (8), (10), (13), (15) and (16) (underlined below) were applicable to the case at hand.:-

- “(1) The court has an inherent jurisdiction to dismiss a claim on grounds of culpable delay when the interests of justice require it to do so.*
- (2) The rationale behind the jurisdiction to dismiss a claim on grounds of inordinate and inexcusable delay is that the ability of the court to find out what really happened is progressively reduced as time goes on, putting justice to hazard.*
- (3) 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.*

- (4) *In considering whether or not the delay has been inordinate or inexcusable the court may have regard to any significant delay prior to the issue of the proceedings. Lateness in issuance creates an obligation to proceed with expedition thereafter.*
- (5) *Even when delay has been 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 case proceeding.*
- (6) *Relevant to the last issue is the conduct of the defendant and the extent to which it might be considered to have been guilty of delay, to have acquiesced in the appellant's delay or implicitly encouraged the appellant to incur further expense in pursuing the claim. Delay in this context must be culpable delay.*
- (7) *The jurisdiction to dismiss proceedings on grounds that, due to the passage of time but without culpable delay on the part of the appellant, a fair trial is no longer possible, is a distinct jurisdiction in which there is a more onerous requirement to show prejudice on the part of the defendant, amounting to a real risk of an unfair trial or an unjust result.*
- (8) *In culpable delay cases the defendant does not have to establish prejudice to the point that it faces a significant risk of an unfair trial. Once a defendant establishes inordinate and inexcusable delay, it can urge the court to dismiss the proceedings having regard to a whole range of factors, including relatively modest prejudice arising from that delay.*
- (9) *Prejudice to the defendant may arise in many ways and be other than that merely caused by the delay, including damage to the defendant's reputation and business.*
- (10) *All else being equal, persons against whom serious allegations are made that affect their professional standing should not have to wait over a decade before being afforded opportunity to clear their name.*

- (11) *The courts are obliged under Article 6(1) of the European Convention on Human Rights to ensure that all proceedings, including civil proceedings are concluded within a reasonable time. Any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its considerations, not only its own constitutional obligations but the State's Convention obligations.*
- (12) *The courts must make it clear that there will not be an excessive indulgence of delay, because, if they do not, they encourage delay, leading to breach by the State of its Convention obligations.*
- (13) *There is a 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. There should be no culture of endless indulgence. (The court notes this is not the same as saying that there can be no indulgence).*
- (14) *The courts can bring to their assessment of any (if any) culpability in delay the fact that the cost of litigation may act as a disincentive to prompt action.*
- (15) *As in every case, the courts must bring to their considerations a necessary sensitivity to the personal and social background of persons who present before them.*
- (16) *Where an appellant is found guilty of inordinate and inexcusable delay there is a weighty obligation on the appellant to establish countervailing circumstances sufficient to demonstrate that the balance of justice would favour allowing the claim proceed.* (Emphasis added).
- (per Irvine J. in *Flynn*)

**111.** Stewart J. said that that she had no hesitation in finding that there had been inordinate and inexcusable delay in view of the fact that the appellant had taken no steps to prosecute his action between April 2003 and December 2015 other than serving a number of notices of

intention to proceed in 2011 and 2012. She said that it was not acceptable that the appellant sought to justify his inaction by alleging failure on part of the State to deal with his requests for documentation, given the effectively total inaction on his part for a period of 12 years (April 2003-December 2015) to pursue his claim. She found that the onus rested firmly upon the appellant to issue the necessary motions to obtain discovery of the information sought. That being so, the issue was whether, notwithstanding the delay on the part of the appellant, there were extenuating circumstances which would justify the court finding that, on the balance of justice, the appellant should be allowed to bring these matters to conclusion.

**112.** She said that with regard to the jury proceedings, the claim was one of allegedly improper conduct on the part of the Gardaí and the State defendants in failing to make disclosure before the trial in the Special Criminal Court. This would require oral testimony, including from those who witnessed the alleged events around the 7 July 1980. She noted that approximately thirty or more of the witnesses from the original trial had since died, including Superintendent Tom Maher who was present along with Detective Sergeant Connolly during the course of some of the interviews as averred on affidavit. This constituted a “*real prejudice*” for the defendants in defending the claim. She continued:-

*“I should also note in passing that as these are civil proceedings, the presumption of innocence operable in a criminal trial would not apply in these civil proceedings. The onus therefore would be on the Plaintiff to adduce evidence and the defence is entitled to test and counter that evidence as appropriate with its own witnesses and testimony. In my view the passage of time seriously hampers the Defendants’ ability to effectively deal with and defend the Plaintiffs claim.”*



**113.** She found that similar issues would arise in the proper disposal of the Chancery proceedings and that the passage of time would also impinge on the accuracy of those witnesses who may be called to give evidence and bearing in mind that not all witnesses would be available. This amounted to “*an insurmountable prejudice*” for the defendants.

**114.** She also said that she acknowledged that the appellant would undoubtedly like access to the DNA analysis but said that because of the passage of time, other avenues were available to the appellant, given the technological developments in forensic science and the development of domestic and European statutory regulations governing the provision of information and privately held data to individuals.

**115.** Stewart J. concluded that the interest of justice required that both sets of proceedings be struck out.

## **The appeal**

**116.** The appellant now seeks an order setting aside the judgment and orders of the High Court; an order compelling the respondents to make discovery as per the motion of the 20 May 2016; and an order dismissing the respondent’s motions to dismiss the proceedings for want of prosecution; or, in the alternative, adjourning those motions pending discovery.

**117.** The grounds of appeal include complaints that the High Court erred:

- In failing to make the order for discovery before determining the delay and/or because in the particular circumstances, the evaluation could not be properly be

made in the absence of discovery of the documentation relating to the DNA analysis;

- In failing to take adequate account of the failure of the respondent to provide to the appellant the material it held relevant to the DNA or to respond to the correspondence seeking that material;
- In failing to give due weight to the importance of the ‘new evidence’ which the respondents in effect contended showed that the appellant did indeed commit murder;
- In failing to conduct a proper analysis of the witnesses who would actually be required at a hearing, as she had been invited to do by the appellant;
- In placing undue emphasis on irrelevant matters, in particular the alleged evidence against the appellant at his trial, and also his application “to restore his good name and presumption of innocence”;
- In failing to have adequate regard to affidavits which detailed the “continual efforts of the appellant to progress both sets of proceedings”, particularly in circumstances where the respondents refused to hand over material which was germane to both sets of proceedings;
- In concluding that the balance of justice required that the proceedings be struck out
- In failing to give adequate weight to the rights of the appellant to vindicate his good name, particularly in circumstances of the service of the DNA report in 2003;
- In failing to separately assess both sets of proceedings, in particular having regard to the fact that the Chancery proceedings involved a point of law and statutory interpretation relating to the imposition of the death penalty.

**118.** The respondents plead that the trial judge correctly assessed the balance of justice and that her ruling does not disclose any error of law. The statement of opposition pleads, *inter alia*, that the appellant seeks to elevate the importance of the documentation relating to the DNA test in a manner which is wholly inconsistent with the facts of his case and the evidence against him at his trial in 1980. They plead that the evidence was not confined to forensic evidence, much less the DNA evidence which is dealt with in the Evans report of 2002 (served in 2003). The case rested on a combination of forensic and witness testimony, much of which was now unavailable to the respondents. Even if the material sought on discovery did undermine the Evans report, the respondents would be prejudiced in seeking the defend the claims in the absence of the now unavailable material. The respondents also stand over the finding of inordinate and inexcusable delay (and indeed complain that the appellant had conceded this in oral argument, and therefore should not be allowed to raise it on appeal). They plead that as there was inordinate and inexcusable delay on the part of the appellant, the respondents did not bear the onus of proving prejudice to the extent of proving a real risk of an unfair trial under the *Flynn* principles. The trial judge, they plead, was correct in finding that, absent 30 of the original witnesses, including a witness who was present for the disputed admission, there was a “*real*” and “*insurmountable*” prejudice to the respondents. They respondents maintain that the entire evidential context presented at the original trial is material to an assessment of the significance of the non-disclosure issue as well as any damages that might be evaluated. They point out that the DNA report of 2002 was not furnished to anyone other than the appellant and question his reliance on his right to a good name in that context. Further, they say, he had the opportunity to seek to vindicate his good name by renewing his application before the Court of Criminal Appeal for a certificate of miscarriage of justice (after the Supreme Court judgment of the 4 March 1997) but chose not to do so.

**119.** The respondents also plead that the argument now advanced by the appellant that the two sets of proceedings should be separately assessed was never advanced before the High Court, and that he should not therefore be permitted to raise it on appeal for the first time. They opposed the argument on substantive grounds also.

**120.** At the oral hearing, counsel on behalf of the appellant indicated that he was not proceeding with the ground of appeal relating to the fact that the trial judge had decided to hear the motion to dismiss first. This was a sensible approach. Even if the appellant obtained discovery and this ultimately led to a report from his expert(s) taking issue with the Evans report, I cannot see how this would either (a) justify the delay which had taken place previously; or (b) remedy the prejudice the respondents claim to have suffered by reason of this delay. That being so, there was little if any necessity for the discovery motion to go first; and of course, if the motion to dismiss were to prove successful (as it ultimately did) before the High Court judge, it would be unnecessary to decide the discovery motion.

## **Outline of the submissions of the parties**

### *The appellant's submissions*

**121.** The appellant criticises the respondents for seeking to downplay the importance of the 2002 DNA evidence. He maintains that the service of this evidence had a “profound effect” on the proceedings because the State was in effect alleging that he was indeed a murderer, despite never having sought to retry the appellant in a criminal trial. He submits that having regard to the fact that his convictions had previously been quashed precisely by reason of non-disclosure by State agencies, the State had a unique responsibility in the litigation to respond to his

requests for information about this new evidence by providing him with the material requested. He submits that the trial judge failed to give appropriate consideration and weight to the conduct of the State with regard to the seeking of the new DNA evidence (some eight years after it came into possession of his blood sample) and failure to provide information about the testing despite numerous requests for same. He also submits that counsel for the respondent acknowledged at the hearing that the production of the new DNA report was a “significant event”.

**122.** The appellant submits that there could not be a proper evaluation or assessment of culpability in relation to delay, and the balance of justice, in the absence of the discovery sought. He contends that any evaluation of the delay issue could not be fair in the absence of the appellant being allowed to demonstrate that the claim in the DNA report was incorrect.

**123.** The appellant accepts that the leading cases on delay include *Primor PLC v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, and *Flynn v. Minister for Justice* [2017] IECA 178. He also refers to *Gorman v. Minister for Justice Equality and Law Reform* [2015] IECA 41, which he says highlights the nature and complexity of individual cases, and *Mangan v Dockeray* [2020] IESC 67 where the balance of justice test is carefully considered, and a summary of principles set out by McKechnie J. at paragraphs 109-110 of his judgment. The appellant maintains that, in assessing responsibility for the delay, the trial judge failed to give due weight to numerous relevant factors. He lists these as: that the respondents had custody and control of the appellant’s blood sample since 1994; that the proceedings had been delayed by a number of motions brought by the respondents, including a trial of a preliminary issue which they lost; that the respondents had decided to send material for DNA testing in October 2002 after the pleadings were closed and the cases were awaiting hearing; and that the respondents ignored

repeated requests for disclosure by the appellants in relation to the very tests which the respondents themselves had procured and brought into the proceedings very late in the day. The appellant places considerable emphasis on the respondents' failure to respond to the correspondence and/or to hand over the material requested. He contends that even if the delay was deemed "inordinate", it could not be described as "inexcusable" having regard to the particular circumstances and complexity of the case. The appellant had sought material which was vital to demonstrating that the allegation was untrue but was thwarted by the respondents "in an unconscionable manner".

**124.** He further contends that the trial judge was wrong in saying that counsel for the appellant conceded at the hearing that the delay was inexcusable as well as inordinate and that the real issue was the balance of justice. He says that the trial judge therefore laboured under an erroneous understanding that the appellant had conceded that the delay between 2003 and 2015 was inexcusable.

**125.** The appellant submits that the trial judge failed to have regard to the following matters when considering the balance of justice:

- a. the nature of the case – in particular the fact that the appellant spent approximately 15 years in prison before his conviction was quashed, and that his claim relates to the alleged negligence or wrongdoing of the respondents relating to a trial and conviction for the most serious offence of murder;
- b. the complexity of the case;
- c. the delay of eight years on the part of the State before sending the blood sample for DNA analysis;

- d. the significant effect on the proceedings of the service of this new evidence, described by the trial judge in a question to counsel as having “changed the whole course of the proceedings”;
- e. the continued refusal of the respondents to furnish the material or even reply to the correspondence requesting same which was unfair conduct on the part of the State, which itself was involved as investigator and prosecutor in the original criminal trial. He cites *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2012] IESC 50, a case also involving motions to dismiss for delay brought by the State, in which Hardiman J. referred to the unique position of the State and the need for consistency of approach between the different arms of the State. The appellant points out that the State entered a *nolle prosequi* some days after the quashing of his conviction and yet seeks to insist upon his guilt in these proceedings;
- f. Acquiescence on the part of the respondents insofar as there was agreement to an adjournment of the proceedings on a number of occasions and a failure to object to notices of intention to proceed;
- g. The appellant’s right to a good name under the Constitution and the fact that it had been put in issue by the respondents; the State was in these proceedings “maintaining the position that the appellant is a murderer”;
- h. That the court failed to consider the evidence in relation to the appellant’s efforts to secure the services of DNA experts and their preliminary reports.

**126.** The appellant complains that the trial judge failed to conduct any meaningful analysis of the issue of prejudice to the respondents because she failed to properly consider what witnesses

or proofs would actually be relevant to the proceedings, and simply accepted without analysis the respondents' submissions that all the witnesses from the original trial *with the addition* of other witnesses, would necessarily be required. He says that this falls short of what the Supreme Court in *Mangan* described as necessary, namely that there must be a "detailed examination of the circumstances, such as excusability, prejudice and the like, including where justice falls". No regard was had to the appellant's arguments that the issues to be decided in his actions are not such as to require a re-running of the criminal trial. Counsel on behalf of the appellant said that it was in fact doubtful if the State would seek to re-run the issue of the appellant's guilt, not least because of the issue of aggravated damages that this would raise if it did so (unsuccessfully).

**127.** Reference is made to *Gaffney v. Commissioner of An Garda Siochana* [2017] IECA 52 to suggest, with regard to the absence of Detective Sergeant Culhane, that statements, Books of Evidence and transcripts may be used to minimise any prejudice, including to refresh witness' memories.

**128.** Counsel on behalf of the appellant submitted that the principle, expressed in some cases, that litigation is a two-way operation and that regard should be had to the conduct of both parties, was relevant despite the more recent pronouncements of the Superior Courts concerning the onus being on an appellant to move cases along. It was also submitted that these were unusual circumstances involving a serious miscarriage of justice case arising from a failure to disclose relevant material in a criminal trial.

**129.** The appellant further argues that the Chancery proceedings involve purely technical legal argument and no prejudice could possibly arise for the defendants from the passage of time.



*The respondents' submissions*

**130.** The respondents refer to a number of authorities within the *Primor* line of authority; *Rainsford v. Limerick Corporation* [1995] 2 ILRM 561, *Primor* itself, *Gilroy v. Flynn* [2005] 1 ILRM 290, *Stephens v. Paul Flynn Ltd* [2005] IEHC 148, and *Desmond v. MGN Ltd* [2009] 1 IR 737. They also refer to the *O'Domhnaill v. Merrick* line of authority ([1984] IR 151) including *Toal v. Duignan (No.1)* [1991] ILRM 135, *Hogan v. Jones* [1994] 1 ILRM 512, *Byrne v Minister for Defence* [2005] 1 IR 577, *McBrearty v. North Western Health Board & Ors.* [2010] IESC 27, *Donnellan v Westport Textiles Ltd* [2011] IEHC 11, *Collins v Minister for Justice & Ors.* [2015] IECA 27, and *Cassidy v The Provicialate* [2015] IECA 74, noting that Irvine J in *Cassidy* said that the two lines of authority were “separate but often described as overlapping”, with the *Primor* authorities more usually being applied to post-commencement delay.

**131.** The respondents accept that in *Mangan v Dockeray*, the Supreme Court allowed a case to proceed despite a 25-year delay but they point out that the court described it as “*a very unusual case*”. There was no specific missing witness and further, there were medical records on which witnesses would be able to rely. The respondents submit that this stands in contrast to the present case.

**132.** They submit that in light of the jurisprudence relating to the European Convention on Human Rights, there is now less emphasis upon the traditional *Primor* considerations of blameworthy delay or prejudice to the defendant and more on the overall justice of allowing the action to proceed, and that the courts have placed a greater obligation of expedition on

appellants in recent years. In this regard, they cite the *dicta* of Hardiman J. in *Gilroy* where he said that changes in the law (including the European Convention on Human Rights Act 2003) “*meant that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end*”. They also refer in this regard to *Stephens* where Clarke J. said that the weight to be attached to the factors outlined in *Primor* would have to be “significantly reassessed” and that “delay which would have been tolerated may now be regarded as inordinate” and “*excuses which sufficed may no longer be accepted*”. He added: “*The balance of justice may now be tilted in favour of imposing greater obligation of expedition and against requiring the same level of prejudice as heretofore*”. On appeal, Kearns J. agreed and noted the “changed legal landscape” effected by the 2003 Act. They accept that members of the Supreme Court in *Desmond* expressed different opinions as to whether the European Convention had altered the basic principles but say that nonetheless the cases demonstrate that the courts have imposed greater obligation on appellants to proceed expeditiously and that the focus is on the justice of allowing an action to proceed rather than on considerations of blameworthy delay or prejudice.

**133.** Applying the principles established by the authorities to the facts, the respondents submit that the very fact that the events in question took place some 40 years ago should in itself determine the application in light of the caselaw referred to. They submit that there is no reality to asking the courts to consider events that took place in 1980 and that there is a public interest in ensuring that court resources are not diverted into attempting to establish what took place so long after the events in question.

**134.** The respondents submit that over and above that consideration, the principles in the caselaw would support the dismissal of the actions in any event. The appellant delayed for

more than 11 years in instituting the Chancery proceedings, and more than 15 years in instituting the jury proceedings. No proper excuse for that delay in initiating proceedings has been offered, they submit. Having delayed the institution of proceedings, there was an onus on the appellant to advance his claim but instead, there were further delays. There was a change of solicitor two years after the determination of the preliminary issue in 1999, and there was a further delay of after the service of the Evans report in 2003. The reasons offered for all the delays, it is submitted, are inadequate. It was not until 2010 that the appellant instructed a new solicitor to inquire into the DNA evidence and *“While no doubt much will be made of the failure of the Respondents to respond to correspondence in what was effectively two moribund sets of proceedings, there was nothing preventing the Appellant from applying to court for discovery of the material sought”*. He then waited more than five years to make any discovery application.

**135.** In addition to what they submit are inordinate and inexcusable delays, the respondents submit that they are prejudiced by the delay. They refer to the affidavit evidence in the case and point to the death of Detective Inspector Culhane (who was in the room at the time the disputed admission was made, and who died in 2007); and Garda Boyle (who claimed to have identified the appellant as the driver of the car who ran away when he stopped the car in Dunmore, whereas the appellant has said more recently that he was in Galway at the time. They also address the appellant’s argument that the respondents are not required to prove what happened and that his guilt or innocence is immaterial to the proceedings. They say that the whole basis of his claims is that material evidence was not disclosed to him, and that the materiality of the evidence can only be assessed in the context of the overall case against the appellant. Further, they submit, the question of his guilt or innocence is indeed relevant, and indeed central, to the question of damages in the proceedings. They say that he must prove that

the wrongful conviction caused loss, but that if on the balance of probabilities, he would have been convicted anyway, he would not be able to prove loss. They also submit that, if successful in showing negligence, the damages could not be the same for a guilty man as for an innocent man, even leaving aside the issue of causation.

**136.** The respondents reject the appellant's suggestion that the transcript of the trial could be used at the hearing as a solution for missing witnesses. They say there is no explanation as to how this would operate, in particular regarding conflicts of evidence. Further, at the time of trial, the appellant had given no account of his movements, whereas he has done so "latterly". The witnesses who dealt with the movements of the appellant before and after the offences were not called at the original trial for that reason, but would now be required in order to contradict the account the appellant has now given of his movements. This evidence was simply not available from the original trial transcript.

**137.** The respondents therefore submit that the suggestion that the failure of the respondents to reply to correspondence or agree to discovery of material outweighs all of those circumstances should be rejected, saying:

*"Even if Ms. Evans' analysis were the only evidence against the Appellant (which it most certainly is not), the simple reality is that the appellant is now asking the Court to consider the adequacy of a test carried out 15 years ago when he failed to even query it himself for 7 years. That this test is but one element of a much wider case against the appellant relating to events 37 years ago, based on witness and forensic evidence, which is now largely unavailable, merely highlights the unsustainable nature of the objections being made by the appellant to the present application".*

**138.** Finally, they point out that while the respondents did agree to adjourn the matter for “some time” to deal with the Evans report, the actual delay on the part of the appellant thereafter was one of seven years (2003-2010).

## **PART V: ANALYSIS AND DECISION**

### **General principles to be applied**

#### *The role of the Court in this appeal*

**139.** The role of an appellate court in an appeal from a motion to dismiss for delay was clarified in *Collins v Minister for Justice & Ors.* [2015] IECA 27 . In *Collins*, it was concluded that such applications require the presiding judge to decide mixed questions of law and fact rather than questions which might be considered to be of a truly discretionary nature. It was also satisfied that, given that such cases are usually supported by evidence which is set out on affidavit, there is no reason why the merits of the High Court decision should not be fully reconsidered on an appeal, should the interests of justice so require.

**140.** Accordingly, while I must give due consideration to the conclusions of the High Court judge, the Court is free to exercise its own discretion as to whether or not the claim should be dismissed, if satisfied that the interests of justice dictate such an approach.

#### *The principles to be applied in a “delay” case*

**141.** 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* and later approved of by the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459. In the latter case, 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 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 appellant'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 appellant's delay,*

*(v) the fact that conduct by the defendant which induces the appellant 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."*

**142.** This basic framework continues to apply although since the comments of Hardiman J. in *Gilroy v. Flynn* [2004] IESC 98, and of Clarke J. in *Gerald J.P. Stephens v. Paul Flynn Ltd.* [2005] IEHC 148 and *Rodenhuis & Verloop BV v. HDS Energy Ltd* [2011] 1 I.R. 611, less indulgence is extended to dilatory litigants than was previously the case, for reasons which are discussed in those judgments. In *Donnellan v Wexford Textiles Ltd.*, [2021] IEHC 323, the High Court (Hogan J.) discussed the “*constitutional imperative*” to ensure that hearings take place within a reasonable time (and he referred to the same right under article 6 of the European Convention on Human Rights). Thus what has clearly emerged in the jurisprudence is the public interest in the timely and effective administration of justice, and the role of the courts in protecting this interest.

**143.** The modern approach to this area was described in detail by this Court in a series of cases since its establishment: *Cassidy v. The Provicialate* [2015] IECA *McNamee v. Boyce*, [2016] IECA 19; *Flynn v Minister for Justice* [2017] IECA 178 and more recently, *McGuinness v Wilkie and Flanagan Solicitors* [2020] IECA 111. In *Mangan v. Dockeray*, the Supreme Court again restated the applicable principles (see paragraphs 104-110 of the judgment of McKechnie



J.), and added some points which had been consistently made in the caselaw: (i) each case is fact-specific; (ii) the obligation of a party to proceed with expedition will be viewed more strictly in a case where there has, in addition to delay post-commencement of proceedings, been a delay pre-the commencement of proceedings; (iii) delay and certainly culpable delay on the part of a defendant may constitute countervailing circumstances which militates against a dismissal; (iv) the existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example, the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply. (v) The latter point may of considerable significance in medical negligence cases as most treating doctors and certainly all consulted experts will rely on such information for their evidence.

**144.** There is also overlap between the *Primor* line of authority and the *O'Domhnaill v. Merrick* line of authority, and the overlap (as well as the distinction between them) has also been described in more recent cases referred to. The former line of authority stresses the inherent duty of the courts arising from the Constitution to put an end to stale claims in order to ensure the effective administration of justice and basic fairness of procedures and (especially in more recent years since the enactment of the European Court of Human Rights Act 2003) in order to secure compliance with the requirements of article 6 ECHR. The *Primor* test tends to focus on potential injustice to a litigant.

**145.** We have already seen (at paragraph 110 above) that the trial judge quoted at length from the judgment of Irvine J. in the *Flynn* case which sets out the principles constituting the modern approach in detail. Having regard to that framework of analysis, it is clear that the Court must first ask itself whether there was there inordinate and inexcusable delay on the part of the

appellant in progressing his civil proceedings. If so, the Court should move to the balance of justice. Although both the “negligence” and “Chancery” proceedings travelled together at all times, I will analyse each separately, turning in the first instance to the negligence proceedings, about which there was far more argument both in the High Court and on appeal.

## **The negligence proceedings**

***The first question: Was there inordinate and inexcusable delay on the part of the appellant in progressing his negligence proceedings?***

*The period up until the service of the Evans Report in January 2003*

**146.** The overall backdrop is that the murders and robbery for which the appellant stood trial and the (original) appeal took place in 1980 and 1981, some forty-plus years ago. The two sets of proceedings with which we are here concerned were commenced in 1992 and 1995 respectively. The 1992 proceedings were issued while he was still in prison. The Court of Criminal Appeal quashed his conviction in May 1995 on the basis of new or newly discovered fact within the meaning of the 1993 Act. The new or newly discovered fact was that there was a conflict between two Garda witnesses as to what had happened to bloodstained tissue taken from the appellant during his detention, in circumstances where one of those Gardaí was a crucial witness on a different but key issue in the trial, namely whether the appellant had made an admission to the Gardaí. The 1995 negligence proceedings issued after that event, in December 1995.

**147.** When one considers the period between the commencement of the negligence proceedings and the service of the Evans report, it may be noted that a key event is that the

respondents sought and obtained a trial of a preliminary issue, which was determined in favour of the appellant. Any delay thereby caused can in no way be laid at the door of the appellant, although it might be noted that the decision on the preliminary issue was handed down in 1999, and there appears to have been some further delay in setting it down for trial. Indeed, it still had not obtained a trial date by the end of 2002. Nonetheless, and as the appellant points out in his submissions, the respondents did not raise delay as a problem when the trial date was being discussed in 2002 nor was any emphasis laid upon it during the appeal. The respondents' complaint related primarily if not exclusively to the post-2003 delay on the part of the appellant.

**148.** It is also noteworthy that the State, although it had the appellant's blood sample in its possession since 1994, did not send it for testing until 2002 and did not serve the Evans report upon the appellant until January 2003.

**149.** In those circumstances, I would not regard the appellant's role in the progressing of the proceedings prior to January 2003 as involving inordinate or inexcusable delay on his part.

#### *The period 2003-2016*

**150.** The real problem for the appellant in the present case is the time that elapsed after 2003, in particular between January 2003 (when the Evans report was served upon him) and May 2016 (when the discovery motion issued which appeared to prompt the State to issue its motion to dismiss). This is a period of some 13 years and 4 months.

**151.** The first point of note is that the appellant was not in prison during this period. Therefore the question of whether his imprisoned status impacted upon his capacity to advance civil

proceedings is entirely irrelevant to an assessment of whether the post-2003 delay was excusable or not, contrary to the suggestion to that effect made on his behalf in the course of submissions. The appellant has averred that he was unemployed and unable to pay for solicitor or counsel, and that his imprisonment impacted upon his ability to re-integrate into society and earn a livelihood. Nonetheless, he does appear to have had legal representation throughout the entire period, including not only the services of experienced solicitors but also counsel including Senior Counsel.

**152.** It is entirely true to say that the service of the Evans report necessitated a period of delay so that the appellant could consider the report and instruct expert(s) if he wished to do so. One of the submissions made on behalf of the appellant is that the State *acquiesced* in the post-2003 delay by agreeing to the adjournment of the cases. However, this point takes the appellant only so far. After the service of the Evans report in January 2003, the State agreed that the cases, which were at that point ready for trial and awaiting the fixing of trial dates, would be adjourned in order to enable the appellant to consider and take action on foot of the report. There is nothing surprising about the State's agreement that the cases be put back for *some* time to allow for this. But even allowing a good deal of latitude in terms of the time required to consider the implications of the report and to instruct experts, the lapse of time which then in fact occurred went far beyond what was reasonable or what the respondents might be considered to have acquiesced to. In terms of court procedures, the next relevant event (after the service of the Evans report in 2003) was the issuing by the appellant of a motion for discovery in 2016. Thus, the most important period to be considered for the purpose of the motion to dismiss is the period 2003-2016, albeit that this also needs to be considered against the backdrop that the original trial was in 1980.

**153.** This period 2003-2016 can be further divided into two periods: 2003-2010, where there was no interaction at all between the appellant and the State; and 2010-2016, when the appellant was seeking discovery by means of correspondence without obtaining any response from the State thereto.

**154.** The appellant places considerable emphasis upon the fact that the State failed to respond to his correspondence seeking discovery of materials relating to the Evans report. Indeed, arguably this was the matter upon which he placed most emphasis. The State's response was characterised as a breach of fair procedures and unconscionable behaviour in view of the particular history of this case, which involved the quashing of a murder conviction for non-disclosure of relevant material.

**155.** In my view, given the history of the case, it was indeed shameful that the State failed even to acknowledge the appellant's correspondence seeking disclosure of materials related to the Evans report, let alone address the request on a substantive basis. The original conviction was quashed on the basis of non-disclosure of relevant material. One might have expected that, given this history, the State agencies might have extended an even more than usual courtesy and sense of expedition in dealing with a request for disclosure and a greater sensitivity to the issue of disclosure now arising, whereas in fact the opposite proved to be the case.

**156.** However, deeply disappointing and disillusioning as this response on the part of the State was, it only brings the appellant so far in seeking to attribute blame for the passage of time in progressing the proceedings. The obvious means at his disposal to force a response from the State existed in the form of a discovery motion, but none was brought until 2016. The distinction between civil and criminal proceedings should be noted at this point. The requests

from the appellant arose in the context of *civil* litigation that he had initiated and in respect of which he bore his own responsibility to make progress. There is no discovery procedure in criminal cases and the obligations on the State to disclose relevant materials arises from the Article 38 guarantee of trial in due course of law. An accused person cannot resort to a discovery motion to compel the State to make disclosure of relevant material. In contrast, on the civil side, a party has the obvious remedy of bringing a discovery motion if he is dissatisfied with the State's response to requests for documents. The State was not prosecuting the appellant; this was civil litigation initiated by him against the State and it is in that specific context that the appellant's criticism of the State's lack of disclosure falls to be considered.

**157.** The reality is that while one can, and should, readily criticise the State for failing to respond to the appellant's repeated requests (by correspondence) for materials connected with the Evans report, the onus fell upon the appellant who was bringing a case to use the obvious procedural mechanism of a discovery motion once he had reached a stalemate in correspondence. The appellant did not do so until 2016.

**158.** In *Flynn*, a similar argument had been put forward by a litigant in respect of the State, but Irvine J. said that:

*“the onus is on a appellant to prosecute their claim with reasonable diligence and if a defendant fails to co-operate, for example by ignoring correspondence in relation to discovery, the Rules of Court provide a method whereby that co-operation can be secured”. Mr. Flynn had, as was considered material in O'Domhnaill, the ability to control any such delay.”*(paragraph 33)

**159.** A comparison might well be drawn with the judgment of this Court in *Gorman*, where the appellant(s) sought to excuse a delay in part on the basis of the failure of the State to furnish a readable copy of a videotape within a reasonable time and in response to which Hogan J. observed: “*If the video tape was the only piece of evidence holding up the proceedings it should have been pursued with diligence*”. The same might be said of the material belatedly sought in the discovery motion by the appellant in the present case. If the Evans report was as significant as he claimed, and the related material so entirely necessary to enable him to take issue with it, then he should have moved much more quickly to obtain it. It was not a situation where numerous other matters were being considered or litigated; this appears to have been the sole point of stalemate.

**160.** One should not lose sight of the fact, either, that between 2003 and 2010, the appellant did not even use the method of correspondence to seek the documentation related to the Evans report. The first letter seeking the documentation was dated the 22 April 2010. Thus, in the first period of seven years from the service of the Evans report (2003-2010), the appellant failed to take any steps at all to seek the relevant documentation from the State; and in the second period (2010-2016) he merely sent a series of letters but failed to bring a motion for discovery.

**161.** The appellant and his solicitor have sworn affidavits explaining what was going on ‘behind the scenes’, as it were, in terms of changes of solicitor and preliminary advices from experts (although none of those preliminary advices were exhibited). Nothing in that narrative (set out earlier in this judgment) provides a reasonable excuse for the delay between 2003 and 2016. According to the appellant’s own narrative, the experts were advising that the materials should be obtained so that they could progress their opinions; it is difficult therefore to

understand why the obvious procedural mechanism of discovery to obtain those materials was not deployed.

**162.** For the avoidance of doubt, although the submission may not have been made in explicit terms, I would also reject any suggestion that any failure of the respondents to bring a motion to dismiss at an earlier point amounted in any sense to acquiescence on the part of the respondents. Again, to quote Irvine J. in *Flynn*,

*“...a mere failure to apply to have a claim dismissed is not to be treated as a culpable act of acquiescence. Whilst defendants often choose to serve an application to dismiss proceedings on receipt of a notice of intention to proceed, their failure to do so cannot be held against them. Often times an appellant, notwithstanding service of repeated notices of intention to proceed, will not bring their proceedings on for trial thus relieving the defendant of any further expenditure on the proceedings. It is entirely legitimate and understandable that defendants might decide to ‘let sleeping dogs lie rather than invite upon themselves litigation claiming damages’ as was endorsed by Fennelly J. in Anglo Irish Beef Processors Ltd.”* (paragraph 35).

**163.** It also may be noted that the appellant has averred that he was involved in public speaking events concerning miscarriage of justice cases; that he and his wife founded an organisation concerning such matters; and that he wrote and published a book describing his experiences, apparently published in 2012. This is not a case where the appellant has claimed to be so psychologically downtrodden or depressed that he was incapable of exerting the required pressure upon his solicitor to take the necessary steps in litigation. Further, insofar as he has



made reference to medical/health issues at one particular period, no medical reports have been exhibited. In the round, therefore, and even taking what the appellant says about the effects of his fifteen-year imprisonment upon him at its height, the narrative does not provide what in law could be considered to be an excuse for the delay within the meaning of the phrase “inordinate and inexcusable delay”.

**164.** Accordingly, I agree with the trial judge that the delay was not only inordinate but inexcusable.

**165.** I would observe in passing that whether or not the appellant’s counsel accepted this in oral argument or not in the High Court is not of any importance. I am of the view that, having regard to the evidence, the delay was inordinate and inexcusable and whether or not the appellant conceded this is neither here nor there. I mention this merely because it was a matter of some contention between counsel as to whether such a concession had been made.

***The Second question: the balance of justice***

**166.** Having reached the conclusion that there was inordinate and inexcusable delay in progressing the two sets of proceedings, I proceed now, in line with the framework established in the *Primor* line of authority, to consider whether the balance of justice favours allowing the proceedings nonetheless to proceed or, alternatively, whether the trial judge’s decision to dismiss the proceedings should be upheld.

**167.** In this regard, I propose to have regard to such matters as the overall context and nature of the case; the question of reputational damage; and the question of prejudice to the

respondents if the case were allowed to proceed. With regard to prejudice, it will be recalled that in cases where inordinate and inexcusable delay has been found to exist, it is not necessary for the respondents to establish a real risk of an unfair trial; there is authority for the proposition that only moderate prejudice in such a case may be sufficient to tip the balance. However, the overarching issue is the balance of justice, having regard to all the circumstances of the particular case before the Court.

**168.** The analysis which follows concerns the negligence proceedings and not the Chancery proceedings. I will return to the latter at the end of the judgment.

*The gravity of the overall context*

**169.** There is no doubt but that the issues raised by the appellant's proceedings are of the utmost gravity. The appellant served almost fifteen years' imprisonment on foot of a conviction for capital murder and robbery which was subsequently quashed when new information came to his attention, being information which was not available to him before or during the original trial. The Court of Criminal Appeal concluded that his conviction had been unsafe. He now seeks, in the negligence proceedings, to obtain damages in respect of this course of events. Given this context, no one would dispute that the litigation brought by the appellant raised extremely serious issues, both for the State and for him. He alleges that the State engaged in serious wrongdoing; he alleges not only negligence and breach of his constitutional rights but also that there was concealment of information relevant to his criminal trial, and that this wrongdoing led to his conviction and the imposition of the death penalty (which was later commuted) and lengthy incarceration. The State denies that that there was any wrongdoing and further denies that he is entitled to any damages in respect of what happened. Given this overall

context, the case may be described as unique in the history of the State and self-evidently involving issues of the utmost gravity.

*Reputational issues*

**170.** The stakes are high on both sides. The appellant points to the potential impact of the dismissal of the proceedings upon his good name, a constitutionally protected interest. He says that by serving the Evans report upon him in 2003, the State was in effect and once again accusing him of involvement in the capital murders and robbery, the most serious possible allegation it could make against him, and that he should be permitted to remove that stain upon his character by being permitted to continue the litigation which he commenced.

**171.** It is again only fair to point out that the appellant had control of his own proceedings and did not move with appropriate expedition. Insofar as his good name has been put in issue by the respondents in the negligence proceedings, this was by way of defence raised in proceedings brought by the appellant and over which he had control. It is also worth noting that he already has the benefit of the decision of the Court of Criminal Appeal which has ruled that his conviction was unsafe.

**172.** Insofar as the appellant seeks to advance his argument with regard to reputational damage with reference to the service of the Evans report specifically, this seems to me to overstate the significance of the report to some degree. The prosecution at the original trial had relied upon the cumulative effect of the disputed admission together with various pieces of forensic evidence. The defence to the negligence proceedings pleads both that the disclosure would not have affected the ultimate outcome of the trial *and* that there was no miscarriage of justice. Thus, his good name had already been put in issue in the pleadings. This is not to suggest, at

the other extreme, that the Evans report is insignificant. It is of course significant that the respondents have served an expert report which purports to show that the appellant had a connection to the crimes in respect of which he has brought litigation seeking damages, and indeed I have discussed earlier how this move by the respondents clearly demonstrated their intentions to seek to prove his connection to the events of the 7 July 1980. Rather my point is that while the Evans report is significant, this should not be overstated. Its service arises in a context of (a) the issues already raised by the pleadings in the litigation commenced by the appellant; and (b) the overall evidence (including the original forensic evidence) upon which the State seeks to rely in defending civil proceedings in any event. The report is a piece of evidence by which the State seeks to prove its defence as pleaded; it does not, in and of itself, introduce a new issue into the proceedings. There was no change in the pleadings; the Evans report was a piece of evidence that was being served which could not of itself alter the parameters of the case. The more important point is that the case as a whole undoubtedly impacts upon the appellant's reputation, particularly in light of the respondents' pleas that there was no miscarriage of justice in his case and/ or their 'non-materiality' plea.

**173.** On the other side, it is also fair to note there is potential reputational damage to members (or former members) of An Garda Síochána, and perhaps persons employed (or formerly employed) by the prosecution authorities, particularly in circumstances where the appellant's claim includes allegations of concealment (and not mere non-disclosure) and a claim for aggravated and exemplary damages. In the *Flynn* case, the Court (per Irvine J.) said:

*"In my view, it is clearly material for any judge considering an application to dismiss proceedings for inordinate and inexcusable delay to have regard to the likely effect on a defendant or defendants of having proceedings such as these hanging over their personal*

*and professional reputation for more than a decade. The character of this claim is one which imputes acts of gross professional misconduct to a member / members of An Garda Síochána when on duty. Defendants against whom allegations of such misconduct are made are in a very different position, from many other types of defendant, for example the defendant in the moderate road traffic claim. Delay in the prosecution of such proceedings will routinely have no effect on the reputation or career prospects of the defendant and if the claim is an assessment of damages only they will be saved even the stress of having to give evidence. Here, the very existence of the proceedings casts a shadow over the reputations of those against whom the allegations have been made. Hence it behoves the Court to ensure that those charged with such serious allegations of professional misconduct are afforded the opportunity to protect their good name as is guaranteed by Article 40.3.2 of the constitution with reasonable expedition.”*

**174.** In the present case, it would be unfair to those accused by the appellant of wrongdoing connected to the original investigation and trial if they were unable to protect their reputations by reason of the prejudice caused by the passage of time. I repeat my observation that in addition to alleging negligence, the appellant alleges that the relevant material was “concealed” from him. Further, he has pleaded “fraud” when dealing with the question of limitation periods. Thus, the appellant alleges not only negligence, but also concealment and fraud. These are most serious allegations against members of An Garda Síochána, and, as noted earlier, the accusations may in fact have been intended to cast the net wider, to include persons within the prosecution services. Their reputations have also been put in issue in the proceedings and that is a factor to which the Court must also have regard.

**175.** In summary, the issue of reputational damage has a number of dimensions as described above. I certainly accept that the proceedings have the potential to cause reputational damage on both sides of the case, and that this is a factor to be weighed in the balance (although not exclusively in favour of the appellant).

*The question of prejudice*

**176.** At the outset, it is worth recalling what was stated by this Court in the *Flynn* case concerning the level of prejudice that a respondent must show in a case where inordinate and inexcusable delay has been established:

*“First, as was stated by Hamilton C.J. in Primor, the separate matters identified in his judgment as material to the consideration of the balance of justice are not exhaustive or cumulative but are matters to be considered material to the central issue, which is what is just in all of the circumstances. Potential prejudice is only one of a range of matters to be considered by the court when coming to its conclusion. Second, once there has been a finding of inordinate and inexcusable delay even moderate prejudice will suffice to justify the dismissal of the proceedings. (See, for example, the decision of Kearns J, in *Stephens v. Flynn Ltd* [2008] IESC 4). Proof of specific prejudice is not required.”*  
(paragraph 50, emphasis added).

**177.** The most challenging aspect of this appeal relates to the Court’s assessment of the degree of prejudice to the respondents caused by the inordinate and inexcusable delay. This difficulty arises from two sources: (a) a fundamental legal dispute between the parties concerning the scope of the issues encompassed by the negligence proceedings; and (b) the fact that the respondents presented their evidence as to prejudice solely on the basis that their

characterisation of the scope of the proceedings was correct; they did not address the situation which would arise if they were incorrect and the case had to run on a much narrower basis. It is necessary to explain this further.

**178.** The respondents' case on prejudice caused by delay was heavily founded upon the proposition that many of the witnesses called *at* the original criminal trial would no longer be available. The respondents also rely on the absence of witnesses concerning matters which have transpired *since* the criminal trial (such as Garda Boyle, allegedly required to rebut an account published by the appellant in 2012). The respondents' affidavit evidence concerning the missing witnesses was set out in detail earlier in this judgment (see Part 2 of this judgment). But are all the witnesses listed by the respondent as dead or untraceable in fact relevant to the precise issues in the negligence proceedings? The appellant strongly disputes that they are.

**179.** Broadly speaking, the appellant argues that the case raises narrow legal issues and that the State is greatly overstating the factual matters that would have to be proved at the trial and grossly inflating the number of witnesses who would be required to defend the case, which in turn leads to an exaggeration of the prejudice caused to the respondents by reason of missing witnesses/delay. He submits that the negligence trial would not in any sense be a "re-run" of the criminal trial because the key issues are legal ones such as negligence and breach of constitutional rights. Further, the appellant contends that the availability of the transcript of the original criminal trial would be of assistance in filling any gaps in the evidence. Significantly, he contends that the respondents would not be legally permitted to pursue any line of defence which would suggest that he was guilty of the offences in respect of which his conviction was quashed. The issues, he contends, are therefore confined to whether or not there was negligence, breach of duty and breach of constitutional rights by the State, and the quantum

of damages flowing from that in circumstances where he spent almost fifteen years in prison on foot of his conviction. He urges the Court to conclude that these are narrow legal issues which do not require a vast pool of witnesses on either side, and therefore that the respondents have not suffered any or any significant prejudice by reason of the delay.

**180.** The respondents argue that the prejudice they allege is real, not overstated and not legally impermissible. In this regard, they rely upon two key arguments:

- (1) First, they point to the ‘non-materiality’ plea in the defence and submit that the ‘materiality’ of the non-disclosure could only be assessed by the trial court in the negligence action in the context of the totality of the evidence which was available at the trial in the Special Criminal Court;
- (2) Secondly, they submit that the issue of damages could not be assessed without the trial court in the negligence action forming a view as to whether the appellant was or was not actually involved in the events of the 7 July 1980.

**181.** Thus, the respondents contend that the missing witnesses are relevant both to liability and to the damages. In oral argument, it was frankly stated that the respondents consider the issue of the guilt/innocence of the appellant to be relevant to issues in the trial, including the quantum of damages if that point were to be reached.

**182.** Whose view of the correct and legitimate parameters of the case is correct? The High Court accepted the respondents’ view of the parameters of the case and therefore went on to accept their submissions on prejudice, which in turn was a significant factor in the decision to



dismiss the case. However, although the trial judge accepted the State's position on the parameters of the case, she did not enter upon an examination of why she accepted that the question of 'guilt/innocence' was within the parameters of the negligence action. This is perhaps not surprising in view of two facts. First, neither side drew the court's attention to relevant authorities on the presumption of innocence. Secondly, the question of the scope of the pleadings was not directly before the court but rather arose somewhat indirectly in the context of the prejudice issue, which itself was a sub-issue within the overall question of delay.

**183.** In my view, this is an extremely problematic aspect of the High Court decision and of the situation arising in this appeal. The respondents brought the motion to dismiss. *Inter alia*, they allege significant prejudice arising from the unavailability of witnesses said by them to be relevant to the issues in the proceedings. The relevance of the witnesses was in dispute between the parties and could only be resolved by means of a careful examination of (a) what had been pleaded; and (b) the legitimacy or otherwise of the respondents' view that as a matter of law they were entitled to seek to defend the case (*inter alia*) by putting in question the innocence of the appellant. Yet neither the High Court nor this Court were furnished with the arguments or authorities or submissions necessary to conduct such an examination.

**184.** I propose now to examine this issue to some degree, although as will be seen, I ultimately conclude that the Court cannot rule upon the parameters of the case as pleaded for reasons I will explain. The discussion which follows looks first to the pleadings, and secondly to some relevant authorities, in order to explore various possibilities as to the parameters of the case if it were to go to trial.

***The scope of the negligence proceedings as it appears from the pleadings***

*Issue 1: The parameters of the case as disclosed by the pleadings*

**185.** The first port of call in any assessment of the scope of the issues in the substantive proceedings is of course the pleadings of the parties. I have set out details of the pleadings earlier in this judgment (Part 1). The appellant's case appears relatively (and perhaps deceptively) simple on the face of the pleadings. The plenary summons sets out claims for damages for negligence, breach of duty (including breach of statutory duty) and failure to vindicate constitutional rights. The statement of claim makes clear that the negligence which is being alleged consists of the non-disclosure (sometimes referred to in the pleadings as "*concealment*") of information concerning the blood-stained tissue. That is the only basis for negligence which has been pleaded.

**186.** It is then pleaded that the defendants were negligent and failed to vindicate the appellant's constitutional rights to the observance of fairness of procedures in the conduct of the prosecution. Thus, the non-disclosure is linked with unfair procedures in respect of the trial. It may be noted that the claim is two-fold: negligence and breach of constitutional rights. The usual approach of any trial court would be to address the constitutional claim only if necessary and I will discuss matters hereafter on the basis of it being a negligence claim primarily.

**187.** It is pleaded that "on foot of the said death sentence as commuted to some forty years penal servitude", the appellant suffered 14 years and 10 months' loss of liberty and further and other damage "*in consequence of same*". Exemplary damages are also claimed on the basis that the negligence alleged deprived him of the opportunity of adequately defending himself

on foot of the charges, as are aggravated damages on account of *“injury to his feelings, dignity and reputation by reason of the said conviction and consequent subsequent incarceration”*.

**188.** The language of “causation” or “loss” is not explicitly used in the statement of claim but it is clear that the appellant maintains that negligence on the part of the prosecution caused him to suffer certain losses, namely: to be wrongly convicted, to suffer the imposition of a death sentence which was commuted to a lengthy period of imprisonment, and to have endured that lengthy period of imprisonment. On its face, therefore, the appellant’s claim appears to be a simple one: the respondents were negligent, this negligence caused him to suffer conviction and imprisonment, and he is entitled to damages (of various kinds) for his loss, being loss of liberty for almost fifteen years.

**189.** I pause to state what is in any event obvious from the above. The question of the appellant’s guilt or innocence is not addressed in the appellant’s pleadings. Nor are phrases such as *“miscarriage of justice”* or *“wrongful conviction”* used in the statement of claim.

**190.** Let us turn now to the parameters of the case as envisaged by the respondents. It is manifestly clear from the respondents’ submissions before the High Court and in this appeal (and from their affidavits supporting the motion to dismiss) that they wish (and consider themselves entitled) to put the question of the appellant’s guilt or innocence of the criminal charges in issue in the negligence trial. In other words, the respondents intend, if the negligence trial is to proceed, to put in issue in that trial the question of whether the appellant was or was not involved in the robbery and killings in July 1980. How do we know that they intend to do this?

**191.** First of all, they explicitly said so on this application, both on affidavit, and in their submissions. Secondly, this approach was implicit as far back as the service of the Evans Report in 2003, which if relevant at all could only be relevant to that issue. Thirdly, this view underpins the respondents' submission that they would need all the original trial witnesses, including in particular all witnesses to the disputed admission. Fourthly, it underlies the respondent's submission that Garda Boyle's testimony would have been necessary to prove the physical whereabouts of the appellant in July 1980 (and specifically to contradict the appellant's account of where he was as described in his 2012 book). There can be no doubt at all that this is the strategy the respondents wish to deploy. Whether they are entitled to do so is a separate question which also needs to be considered. In my view, there are therefore two separate questions: (a) whether this issue has been pleaded by the respondents, explicitly or implicitly; and (b) even if it is pleaded, whether it is legitimately pleaded and/or could properly form part of the parameters of the negligence trial. To answer the first question, one must turn to the defence delivered on behalf of the respondents in the negligence action.

**192.** Leaving to one side the pleas within the defence on matters such as limitation period and/or laches, as well as the preliminary issue which was unsuccessfully raised by the State (i.e. that the appellant was debarred from bringing the negligence proceedings by reason of his failure to obtain a certificate of miscarriage of justice), for present purposes the most relevant pleas appear to be as follows;

- (1) The denial of negligence;
- (2) The denial of any entitlement to any form of damages;
- (3) The denial at paragraph 4 that the disputed admission constituted the gravamen of the prosecution against the appellant at his trial, and a plea that the trial court

arrived at its verdict (a) on the basis of a finding that the cumulative effect of the appellant's statements when in custody constituted an admission of involvement in crimes committed and (b) the Special Criminal Court's finding in relation to items of forensic evidence which linked the appellant with vital aspects of the commission of the crime for which he was convicted; and

- (4) the plea at paragraph 15 that if there has been any breach of duty or negligence (which is denied), non-disclosure of such evidence at his original trial "*would not have led to the appellant's acquittal or to a finding by the trial court or any subsequent court that there had been a miscarriage of justice in the appellant's case.*"

**193.** Thus, the respondents in their defence to the negligence action, in addition to the rather ordinary or typical denials of negligence and damages that one might typically expect in a negligence action, have sought to introduce some additional concepts. The first of these is that the appellant would have been convicted even if the undisclosed information had been disclosed at the time; (what I will refer to as the '**non-materiality**' plea, i.e. that the undisclosed information was not so material as to have made any difference to the outcome of the criminal trial). This plea emerges from both paragraphs 4 and the first limb of paragraph 15. In the language of negligence claims, this is effectively a denial of causation of loss.

**194.** The second, and at first sight rather unusual, pleading is that there was no miscarriage of justice (what I will refer to as the '**no miscarriage of justice plea**'). This emerges from the second limb of paragraph 15. No attempt was ever made by the appellant to have those pleas struck out and as matters stand, they are contained in the defence. In the appellant's reply, he took issue with the pleas but did not plead that there was anything improper about any of them

being included in the defence. But what does a “miscarriage of justice” mean when deployed in this context? It is a phrase which is notoriously capable of being interpreted in various ways. I will return to that issue shortly. For the moment, I merely take note of the important pleas which are contained in the defence: denial of negligence, denial of loss, denial of entitlement to damages of any kind, the ‘non-materiality’ plea (or denial of causation), and the ‘no miscarriage of justice’ plea.

**195.** To which of these legal pleas (if any) could the issue of the appellant’s guilt or innocence of the robbery and killings possibly be relevant? The appellant says ‘none’; the respondents disagree. Who is correct?

**196.** I will discuss three of the defence pleas which might be thought to have a possible relevance to the respondents’ assertion that they are entitled to try to put the appellant’s involvement in the events in issue: (1) the ‘no miscarriage of justice’ plea; (2) the ‘no damages of any kind’ plea; and (3) the ‘non-materiality’ plea.

**197.** The first possibility in this regard is the ‘no miscarriage of justice’ plea contained in the defence. Various definitions of the phrase “miscarriage of justice” abound within Irish and English authority, and the issue was discussed by the Court of Appeal and Supreme Court in the appellant’s own application pursuant to s.9 of the 1993 Act, as we saw in Part 1 of this judgment. In *Adams* [2012] 1 AC 48, the Supreme Court of the United Kingdom identified four potential categories of case that might fall within the term “miscarriage of justice”: (1) cases where the fresh evidence clearly shows that the defendant is innocent of the crime of which he was convicted; (2) cases where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it; (3) cases where the fresh evidence

renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant; and (4) cases where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

**198.** In the present case, the respondents used the phrase “miscarriage of justice” in their defence without explaining what they meant by it. On one view, the respondents might thereby be thought to be putting the innocence of the appellant in issue. On another, they might merely have been seeking to suggest that the original criminal trial was not fundamentally wanting in fair procedures. Or they might have been pleading that there was sufficient evidence to have put the appellant on trial. And so on. The point is that the phrase “miscarriage of justice” in the respondents’ defence is ambiguous, and one possible meaning is that the respondents were deploying it to question the appellant’s innocence in the civil proceedings. Curiously, however, the respondents did not in this appeal point to the ‘no miscarriage of justice’ plea in the defence when arguing that they were entitled to put the appellant’s innocence in issue at the trial, and therefore I will not pursue this further here. Instead the respondents relied on two other pleas, namely the denial that the appellant was entitled to damages, and the ‘non-materiality’ plea (which straddles paragraphs 4 and 15 of the defence), to which I now turn.

**199.** First, the respondents submitted that the question of guilt/innocence would be relevant to the quantum of damages if this point were to be reached by the trial court i.e. if the appellant were successful on liability. Quite simply, they submitted that, if the appellant won on liability and the court had to assess damages, the quantum of damages would be much greater for a person who was innocent of an offence than for a person who was guilty of an offence. Thus,

it was contended that the issue of the appellant's guilt or innocence was highly relevant to damages.

**200.** Of potential relevance to this argument is a decision of this Court which was delivered since the appeal hearing took place, namely *G.E v Commissioner of An Garda Síochána* [2021] 2 IECA 113. This case involved a claim for false imprisonment in the context of the detention of an asylum-seeker where the formalities of the detention had not been observed. The key question was whether there was a “bright-line” rule that a person was entitled to no more than nominal damages where, despite the fact that they had in fact been unlawfully detained, they “could” have been lawfully detained. Admittedly, the present case concerns the tort of negligence and Murray J. in the judgment of the Court in *GE* rooted his analysis in the particular history of the tort of false imprisonment. Nonetheless there is some resonance insofar as the respondents in the present case have pleaded that although the appellant was convicted in a trial which lacked the undisclosed information, he “would” have been convicted anyway if the trial had had the undisclosed information available to it. There is a detailed discussion in the judgment of Murray J. of “counterfactuals” and how they impact upon liability and damages. Of course, this judgment did not feature in argument before us because it had not been delivered at the time of our hearing, and I do not propose to discuss it in detail.

**201.** The second way in which the respondents sought to argue that the issue of guilt/innocence was relevant was in relation to their ‘non-materiality’ plea. Having reflected upon this submission, I find it less than persuasive for the reasons I now set out.

**202.** The non-materiality plea by the respondents in their defence is a plea to the effect that even if the undisclosed information had been available at the time of the original trial, it would



not have made a difference to the outcome i.e. the appellant would not have been acquitted in any event, having regard to the rest of the evidence. On closer examination, the plea seems to me to be in substance a denial of causation and loss in the sense those concepts are used within the tort of negligence, even if that language is not used by the respondents. The respondents are saying that even if there was a negligent breach of duty, this did not *cause* the alleged loss (being the conviction and subsequent imprisonment), because (they say) he would have been convicted anyway. I pause again to emphasise that the argument is that he *would* have been convicted anyway; not that he *should* have been convicted anyway. I also pause to observe that, unlike the argument stemming from damages, this goes to liability as distinct from quantum of damages.

**203.** At first blush, it may seem odd that a civil court would be requested to engage in the process of deciding what conclusion a criminal trial court might have reached in an earlier trial (in this case, some forty years ago) if certain information had been available to it. In fact, it is not quite as odd as it might seem; the process of assessing the chance of something happening and awarding damages in respect of that chance is a familiar one to the law of tort. The situation which arises where a litigant sues his or her solicitor for professional negligence in respect of their conduct of litigation involves precisely such a scenario. Indeed, the English case of *Acton v. Graham Pearce* [1997] 3 All ER 909 illustrates this process in action in a case of a man convicted by a criminal court, whose conviction was quashed by reason of new evidence, and who then sued his defence team in negligence.

**204.** In *Acton*, the new evidence was, as the appellate court described in rather dramatic terms, that a key prosecution witness was a “pathological liar” who had created memoranda on dates after they were purportedly made. The court assessed the “chance” that the convicted man

would have been acquitted if the new evidence had been available at the original trial as a 50% chance, and awarded him damages on that basis. If that approach were to be followed in this jurisdiction, the trial court in the appellant's negligence action would find itself in the position of having to evaluate the 'chance' that the appellant would have been acquitted if his legal advisers had known, at the time of his trial, of the information which only came to light during the Chancery proceedings and the subsequent s.2 application to quash his conviction.

**205.** Interestingly, in *Acton* the court readily accepted that in general, a civil court should avoid hearing an action which would involve rehearing a previous action in a criminal court; however, it said that it might become necessary to do so in the interests of justice and that this type of case was one such exception to the general rule. Obviously, that case is distinguishable from the present case on the basis that the convicted man was suing his defence team, whereas here the appellant sues the State (the Gardaí and the prosecution officers being its agents). The duty of care would fall to be considered in that different context. Nonetheless, the case is interesting for demonstrating the kind of task the trial court might have to conduct by reason of the respondents' non-materiality plea.

**206.** Let us continue down this path of the non-materiality plea and try to anticipate the kind of evidence the trial court would need, in an ideal world, in order to engage in such an exercise i.e. that of assessing what would have happened at the criminal trial if the 'newly discovered fact' had been available at that time. This was not teased out on this appeal and so the following is constructed from my own reflections on the issue. Speaking broadly, and leaving aside, temporarily, the issue of the passage of time, I would imagine that the following would be the kind of evidence one might expect in such a trial. First, the transcript of the original trial could be adduced as a record of what evidence was in fact put before the trial court in the original

criminal trial by way of prosecution case against the appellant. Secondly, one might expect oral evidence from witnesses as to the *disclosure systems* being used by the prosecution generally at that time (i.e. 1980) to ensure that all relevant material was disclosed to accused persons over and above what was contained in the Book of Evidence (i.e. “general disclosure systems evidence”). Thirdly, one might expect oral evidence from witnesses who actually dealt with the disclosure of relevant material in the particular trial of the appellant and his then co-accused. This might be one or more Garda members, such as the Garda who created the Garda file and/or who liaised with the Chief State Solicitor’s Office in the matter of disclosure, together with any solicitor from the latter office who was at the other end of that liaison process (i.e. “particular systems of disclosure in this case”). Fourthly, one would expect to hear from Detective Sergeant Connolly and Sergeant Ennis as to what happened to key documents, objects or information in their possession (such as the draft statement or “summary of evidence” of Detective Sergeant Connolly, his notebook entry, and the tissue itself). Fifthly, one would expect the court to have sight of any documentation from the material period which would shed light on any of those matters. From this pool of evidence, the court would hope to reconstruct precisely what happened, as a matter of fact, to the notebook entry, the tissue and the summary of evidence, against a backdrop of what was usually done in such cases in terms of disclosure.

**207.** Next, having established the facts as best it could, the court would then move to consider the question of duties owed and whether there was a breach of duty such that there had been negligence on the part of the respondents or their agents (or indeed concealment or suppression, as alleged by the appellant). Various possible conclusions might emerge. It might be that the systems at the time were inadequate to the point of being negligent. It might be that there was an accidental or inadvertent failure despite a good system being in place. It might be that the

acts or omissions of an individual or several individuals deliberately ignored or circumvented the systems in place. It might be that there was no breach of any duty at all.

**208.** Only if the court considered that negligence (at least) had been established would it then proceed to the difficult task of deciding whether the appellant would have been convicted even if the undisclosed material had been available at the original trial. Presumably this would be done on the balance of probabilities, having due regard to the evidence *actually* given at the trial, which is fully recorded in the transcript. Such an assessment might perhaps be done along the lines of what the court did in *Acton v Graham Pearce*. It would involve the unusual but not unknown process of a civil court assessing on the balance of probabilities what conclusion a criminal court might/would have reached on the standard of proof beyond reasonable doubt. I observe in passing that this is not the same inquiry as that which was previously conducted by the Court of Criminal Appeal in respect of the appellant's s.2 application, where the question was whether his conviction was unsafe and whether it should be quashed.

**209.** The point I wish to make at this stage of the analysis is that nowhere in this process as described, or within those parameters, do I see an obvious role for the new evidence that the respondents wish to rely on (that is to say, evidence generated some twenty years after the criminal trial), such as the Evans report, which purports to prove the appellant's involvement in the offence by connecting him to the car used in the robbery. Nor do I see why it would be necessary to re-try the issue of whether the appellant in fact made the disputed admission (such that the absence of Inspector Culhane would be highly problematic); or indeed to call all of the witnesses called at the original trial (whether lay witnesses or witnesses concerning forensic evidence). Nor do I see, again within these particular parameters of the case, the relevance of the evidence of now-deceased Garda Boyle, who could have given evidence about the

appellant's whereabouts in the period after the offences (whether to rebut the 2012 account in the appellant's book or otherwise). In short, the 'non-materiality' plea does not self-evidently appear to me to encompass the question of whether the appellant was innocent or guilty of the offence *per se*. It puts in issue whether the appellant *would* have been convicted if the information that came to light in the 1990s had been available, not whether he *should* have been convicted if all the information now available were known at that time.

**210.** Accordingly, and to summarise the conclusions resulting from the above discussion, of the two arguments put forward by the respondents to support their view that the issue of the appellant's guilt/innocence is relevant to the negligence action, the argument based on the 'non-materiality' plea has failed to persuade me, at least at first sight. Of the two possibilities nominated by the respondents (denial of damages, and the 'non-materiality plea'), the respondents' submission that the question of guilt/innocence would be relevant to the quantum of damages appears to be the only one of possible relevance to the question of guilt/innocence. This does not render it of minor consequence however; if the respondents are correct, it could make the difference (if all the witnesses were available) between, for example, nominal damages, on the one hand, or substantial damages, on the other. Thus, they say, they are entitled to call all the relevant witnesses and the appellant's inordinate and inexcusable delay has caused them to suffer significant prejudice because many of the relevant witnesses are no longer available.

**211.** But this immediately raises the next and more fundamental question: the *legitimacy* or otherwise of the respondent seeking to put the appellant's innocence in issue in the negligence proceedings. In other words, even if the issue of guilt/innocence might be relevant to quantum of damages, the next question is whether the respondents are *entitled* to bring this issue into

the pleadings and/or the trial at all having regard to the presumption of innocence, a presumption which the appellant says he enjoys. Of course, it is not in dispute that the presumption of innocence has its *primary* application in a criminal trial, and the negligence proceedings are not a criminal trial. But it is also true to say that, at least in the jurisprudence of the Strasbourg court, the presumption of innocence does not lose *all* its force outside the criminal field; it may have *some* limiting effects in related civil actions. The extent of that limiting effect has been repeatedly examined by the European Court of Human Rights in respect of article 6(2) of the Convention on Human Rights, where the presumption of innocence plays as fundamental a role as it does in our Constitution. I turn now to this issue, but only briefly.

*Issue 2: The potential impact of the presumption of innocence on the scope of the trial*

**212.** Unfortunately, these European Court authorities were not opened to the Court nor was there any argument in respect of them. In those circumstances, I propose to mention some of them briefly and only for the limited purpose of showing that the respondents' submission as to the permissible parameters of the negligence action needs close and careful attention. For a useful summary of some of leading cases concerning the presumption of innocence in various different civil contexts after a person has been acquitted or the proceedings discontinued, see paragraph 97 of *Allen v. United Kingdom*, (Application No. 25424/09, Grand Chamber, 12 July 2013). So, to take some examples:

- i. Even if a person is acquitted in criminal proceedings, or those proceedings are discontinued, a court is entitled to refuse that person's application application for compensation on the grounds of 'miscarriage of justice' if the evidence so warrants it: see *Allen v. United Kingdom*, Application No. 25424/09. (This is similar to the

finding of the Court of Criminal Appeal and the Supreme Court in the appellant's litigation pursuant to s.9 of the 1993 Act).

- ii. Even where a person is acquitted in criminal proceedings or such proceedings are discontinued, a court may refuse to award compensation in respect of a claim that the agents of the State acted in a wrongful manner by using search and seizure powers on the basis of a suspicion that had been unfounded from the outset (*Bok v. the Netherlands*, Application No. 45482/06, 18 January 2011).
- iii. Where a person is acquitted in criminal proceedings, the victim may recover compensation on the civil burden of proof, but only if the language and reasoning of the civil court is compatible with the presumption of innocence. (see *Ringvold v Norway*, Application No. 34964/97, ECHR 2003-II; *Y v Norway* Application No. 56568/00, ECHR 2003-II).

**213.** The European Court of Human Rights has emphasised that decisions are highly context-sensitive, and that:-

*“In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6(2)”* (paragraph 126, *Allen*).

This can result in some fine lines being drawn, as can be seen from the Norwegian cases cited above. Indeed, the UK Supreme Court criticised the European Court's reasoning in *R (on the application of Hallam) v Secretary of State for Justice* [2020] AC 279 (see for example paragraphs 49 -52 of Lord Mance's judgment and his comment that: *“To require a civil court to tergiversate, by using words designed to obscure the fact that the law may find facts proved on a balance of probabilities which were not proved to the standard necessary for criminal*

*conviction, does not assist either the law or the public or the defendant*”). I will return to the *Hallam* decision again below.

**214.** The case of *Allen v. United Kingdom*, itself a case concerning compensation for miscarriage of justice, is particularly interesting, because it illuminates the Grand Chamber’s view as to what is and is not permissible in the context of a miscarriage of justice claim for compensation. In it the Grand Chamber appears to have ruled *out* the possibility (and not merely the necessity) that a court in a miscarriage of justice claim would enter upon an assessment of whether or not the person was guilty or innocent. The applicant had been convicted of the manslaughter of her infant son and sentenced to three years’ imprisonment in what is sometimes colloquially described as a “shaken baby syndrome” case. Following a review by the authorities of cases of this type, the applicant was granted leave to appeal out of time and her conviction was quashed on the grounds it was unsafe because the new evidence “*might reasonably have affected the jury’s decision to convict*”. (In this regard, it may be noted that the language of the conclusion is expressed in terms not dissimilar to those of the Court of Criminal Appeal in the appellant’s s.2 application). The court did not order a retrial as she had already served the full sentence imposed and it was considered that any retrial would be pointless and not in the public interest. The applicant then applied for compensation for miscarriage of justice pursuant to s.133 of the Criminal Justice Act 1988 but was refused. One of the conditions for compensation in s.133 was “*that the new or newly discovered fact shows beyond a reasonable doubt that there has been a miscarriage of justice*”. She brought judicial review proceedings in respect of this refusal but was unsuccessful in the High Court. Her appeal to the Court of Appeal was dismissed and leave to appeal to the House of Lords was refused, whereupon she brought a case in Strasbourg.



**215.** It is interesting to note that in its judgment, which concluded that there was *no* violation of the presumption of innocence, the Grand Chamber observed in passing (at paragraph 128) that there was nothing in the statutory criteria themselves that called into question the innocence of an acquitted person and the legislation itself did not require any assessment of the applicant's criminal guilt. For this reason, the court saw nothing wrong *per se* with requiring proof of a miscarriage of justice. And later in its judgment, it said that the reason the domestic courts were found not to have violated article 6(2) was because they did not use language or reasoning which undermined the presumption of innocence, and that the focus had been properly confined to the question of whether there was a miscarriage of justice *only*. It seems to me, from the discussion at paragraphs 133 and 134 in particular, that the Chamber considered there to be an important *distinction* between demonstrating a miscarriage of justice, on the one hand, and demonstrating innocence, on the other. It noted that there was a divergence of opinion in *R (on the application of Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18 as to the meaning of the phrase "miscarriage of justice". However, it said that what was important was that the judgments of the High Court and Court of Appeal had *not* required the applicant to satisfy Lord Steyn's test of demonstrating her innocence.

**216.** Again, it is important to emphasise that the *Allen* case arose in the context of a statutory scheme for compensation for miscarriage of justice; so too did authorities in this jurisdiction such as *Shortt*, *Hannon*, and the *Pringle* decisions on the s.9 application. What an appellant *must* prove in such an application may not necessarily be the same as what the State *may* prove to resist a claim for damages. Nonetheless, the relatively recent European authority suggests that one has to tread very carefully in this area. There are passages in *Allen* which arguably do not sit easily or comfortably with certain passages in the Supreme Court judgments in the

appellant's own case. In this regard, it is very interesting to note that the UK Supreme Court in *Hallam* recently criticised the approach of the European Court of Human Rights and refused to grant a declaration that the "miscarriage of justice" provisions contained in s.133 of the Criminal Justice Act 1988 as amended were incompatible with article 6(2) of the Convention. By this time, s.133 had been amended, with effect from the 13 March 2014, so as to confine the term "miscarriage of justice" in the compensation framework to cases where "the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence"; in other words, the person seeking compensation for a miscarriage of justice under that system has to establish that he or she did not commit the offence. The UK Supreme Court upheld the validity of that system after a close analysis of the Strasbourg jurisprudence.

**217.** In my view, in order to reach a definitive conclusion on the legitimate scope of the pleadings in the appellant's negligence action, it would be necessary for a court to hear submissions on all of the relevant authorities and to rule directly on the question of the scope of the pleadings. Relevant authorities would include (1) the Irish authorities including the *Pringle* judgments and others concerning the Act of 1993 (which are discussed in *DPP v. Abdi* [2019] IECA 38; and see the Supreme Court determination in *Abdi* [2022] IESCDET 5, accepting a further appeal on the interpretation of the phrase "miscarriage of justice"), as well as this Court's judgment in *GE v. Garda Commissioner*, and any forthcoming Supreme Court judgment in that case; (2) the jurisprudence of the European Court of Human Rights including *Allen v. UK*, and (3) the English authorities, including *Hallam*. Only then would it be appropriate to rule conclusively on whether the respondents are entitled to adduce evidence questioning the appellant's innocence in the negligence proceedings.

**218.** As of this point in time, before any court or judge has had an opportunity to rule squarely on whether the question of the appellant's guilt/innocence may permissibly be raised as an issue in the negligence proceedings, I am not prepared to assume, as the trial judge did, that the scope of the case is as wide as the respondents contend. A court could only rule on such an important issue in light of a detailed examination of the authorities following legal argument, and this has not taken place to date.

*An alternative scenario; trying to assess prejudice on the basis of a narrower view of the parameters of the case*

**219.** This presents a conundrum for the Court. The respondents presented their case on prejudice on the basis that their view of the scope of the issues in the trial was correct. For the reasons I have set out, I am not prepared to accept that view unless and until it is properly argued on the basis of relevant authority. Thus, I am unable to determine whether the prejudice to the respondents is indeed as great as they have asserted.

**220.** This conclusion led me to attempt to consider how much prejudice the respondents have established even if one assumes, temporarily, that the scope of the case is much narrower than they have asserted. Suppose, for example, we assume, again temporarily, that the trial would run on the narrower basis described earlier at paragraphs 206-209 above, along the lines of an 'ordinary' negligence trial without any issues of guilt/innocence coming into it. Can we identify what prejudice there would be to the respondents in that scenario?

**221.** Here I encounter a different problem. In a sense, the respondents have put all their eggs in one basket. The affidavits which were sworn on their behalf listed witnesses who were said to be no longer available, but the ‘wish-list’ of witnesses was premised on the respondents’ view of the case as entitling them to introduce the question of guilt/innocence into the case. The respondents did not produce a different basket, as it were, in the alternative, to cover the eventuality that the Court might reject their argument about guilt/innocence being ‘in’ the case. To be fair, the appellant did not address the matter in detail either; he confined himself to general assertions about the pool of witnesses being much smaller than the respondents were proposing and the issues being straightforward. He did not seek to address who those witnesses might be even in general terms, although I accept that the onus of demonstrating that the case should be dismissed (and therefore prejudice within that case) falls upon the respondents.

**222.** In circumstances where neither party fleshed out the parameters of the case if the issue of guilt/innocence were excluded from it, I have attempted to construct a sense of how the case might run in that alternative scenario (again I refer to paragraphs 206-209 above) and I now take the further step of trying to ascertain what prejudice there would be to the respondents in that alternative scenario based on the information currently available to the Court.

**223.** Before doing so, I wish to preface that with some preliminary observations. It might be thought that since the Court of Criminal Appeal has already held that there was non-disclosure of a fact which led to the quashing of the appellant’s conviction, the issue of whether there was a negligent breach of duty would be relatively straightforward. This is not necessarily so. A negligence claim involves an assessment of whether there was a duty owed by the respondents to the appellant; the nature and scope of that duty; and whether it was breached in the particular factual circumstances of the case. If the case were to proceed, there would need to be a thorough

analysis of whether there had been a failure to reach the standard of duty required, based on a reconstruction of the facts concerning what was disclosed in 1980/81 and what emerged in the 1990s. It will also be recalled that in his Supreme Court judgment on the s.9 application, Blayney J. said that it was “*far from certain*” that the first draft of Detective Sergeant Connolly’s evidence “*ought to have been given to the defence*”, that it would have been “*quite reasonable for Sergeant Connolly to take the view that the blood stained tissue was irrelevant*” and that he could not see “*how the failure to furnish the defence with a copy of the first draft of Sergeant Connolly’s evidence could have affected the constitutional validity of the trial*”. As I have suggested earlier, there would presumably have to be a careful examination of the systems of disclosure in existence at the time, whether they were adequate, and whether what happened was a systems failure or due to some other cause, and then whether it constituted a negligent breach of duty.

**224.** Also, if I am right about the “non-materiality” plea being the putting in issue of causation and loss (and therefore falling permissibly within the parameters of the negligence case), the court would then (and only if it finds there was negligent breach of duty to the appellant) have to engage in the difficult task of deciding whether the appellant would have been convicted even if the undisclosed material had been available at the original trial. Presumably this would be done on the balance of probabilities, it being a civil case; and perhaps it would be done in light of the ‘assessing the chance of an acquittal’ basis as described in *Acton v Graham Pearce*, referred to earlier. It would involve the unusual but not unknown process of a civil court assessing on the balance of probabilities what conclusion a criminal court might have reached on the standard of ‘beyond reasonable doubt’.

**225.** Within those parameters, what prejudice have the respondents demonstrated to the Court? It is true to say that the transcript of the original trial would be helpful as a record of what evidence was in fact put before the trial court in the original criminal trial. I have reservations about whether the transcript could be put to any further use, but for the moment it suffices to say that I agree with the appellant that the transcript would be to some degree useful, but perhaps only to this extent i.e. to establish what was in fact put before the criminal trial court. However, even in that context, the transcript only goes so far. The focus on the criminal trial was substantially different to the focus one would expect in the negligence proceedings.

**226.** What about witnesses and documents with regard to the matters I have suggested would need to be canvassed in the proceedings (within the narrower parameters described)? The Court simply does not have enough information currently about the ideal pool of witnesses from the respondents' point of view, and the actual pool of available witnesses. Therefore it cannot measure the difference between those two pools. For example, who was in charge of disclosure within the Gardaí for this trial? Who was in charge within the prosecution service? Are they still available? Are there documents concerning these matters? Are there witnesses who could give evidence about disclosure systems generally at the time? This evidence was neither laid before the High Court nor available to this Court on appeal.

**227.** The point might validly be made that, whatever about other witnesses, Sergeants Connolly and Ennis would be central to this exploration. In this regard, I take into account that the Court of Criminal Appeal, writing in 1995, observed as follows in relation to the oral testimony of the two witnesses, Detective Sergeant Connolly and Detective Sergeant Ennis:

*““It would, in the Court’s view, be wholly unreasonable to expect witnesses to retain over a period of approximately fourteen years, a clear and unambiguous recollection of events”.*

If the negligence action were allowed to proceed, Sergeants Connolly and Detective Sergeant Ennis would be asked to recollect the same events some forty, not fourteen, years later. It will also be recalled that at the time of the 1995 judgment, Sergeant Connolly was then in retirement. One might seriously question the fairness of asking witnesses to recollect the precise details of events which took place in 1980 in circumstances where the Court of Criminal Appeal considered such evidence to be significantly affected by the passage of time as far back as 1995.

**228.** However, an important rejoinder to this point is that this same prejudice existed in 2003, and yet there was no objection by the respondents to the trial proceeding at that time. If those witnesses’ had gone beyond the point of probative utility by the time of the Court of Criminal Appeal decision in 1997, *any* trial of negligence thereafter, *no matter when*, would have suffered from the same problem, namely that their memories were irretrievably impaired. Does that mean that the trial of negligence was *never* triable after the new evidence came to light? In my view, it does not. Rather it suggests that the inordinate and inexcusable delay on the part of the appellant did not create this particular problem. But there can be no doubt that his inordinate and inexcusable delay after 2003 has exacerbated it.

**229.** A second and even more important point with regard to these two witnesses, Detective Sergeant Connolly and Detective Sergeant Ennis, is this. It is not entirely clear to me how central these two witnesses would be in assisting the court in the tasks described above, which are various and complex, in ascertaining whether there was negligent breach of duty and

causation of loss. The evidence of those two witnesses would comprise but two pieces of a jigsaw of evidence on a number of issues. While their evidence was key to the judgment of the Court of Criminal Appeal in the mid-1990s, that court's task had a different focus to that in a potential negligence trial. But even assuming, for present purposes, that the evidence of these two witnesses would be severely affected by the passage of time, it is not entirely clear to me how important their evidence would be in the overall context of the negligence trial. It may be that there would be some documentary evidence, or recollection from other witnesses about systems, which might be of assistance in piecing together what happened at the factual level. Or there may not. Perhaps all other witnesses to the issues arising would be similarly affected by the passage of time. The problem for this Court is that it simply does not know, because the narrower version of the trial was not the prism through which this motion was addressed when the respondents' deponents swore affidavits on their behalf addressing the issue of loss of witnesses. The respondents' affidavits simply proceeded on the assumption that the negligence action would involve in large degree a re-run of the criminal trial.

**230.** Accordingly, my analysis of the prejudice to the respondents on this alternative, narrower view of the case is therefore also inconclusive. It is entirely possible that there is prejudice and indeed significant prejudice to the respondents in meeting the negligence claim even within the narrower parameters posited for the purpose of this discussion. However, I am not satisfied that this Court has sufficient evidence before it *at this time* upon which to rest any such conclusion on the balance of probabilities, nor that the appellant had a proper opportunity to address this argument. I return below to the question of what this means for the overall conclusion in this appeal.



### **The Balance of Justice in relation to the negligence claim**

**231.** I am keenly aware of the number of years that have now elapsed since the key events in 1980 as well as the remarks of the Court of Criminal Appeal, some 17 years ago, about the impact of the passage of time on the memories of Detective Sergeants Connolly and Ennis, whose evidence, on any view of the case, would be have to be relevant to at least some degree. I also bear in mind my earlier conclusion that the appellant is responsible for inordinate and inexcusable delay during the period 2003-2016, a significant period of time. I also appreciate that it is not necessary for the respondent to establish a real risk of an unfair trial because this is a case in which the Court has accepted that there was inordinate and inexcusable delay on the part of the appellant. Putting these matters together, it might be thought that the passage of time here since the murders on the 7 July 1980 demands that this case be brought to an end forthwith and that the High Court's judgment should be upheld. However, fundamentally the Court must look at the balance of justice and, in my view, this requires a slightly different approach because of the unique aspects of this particular case.

**232.** First, the case is unique insofar as it involves a claim by a man who was sentenced to death for capital murder and robbery (which was subsequently commuted to a lengthy sentence of imprisonment), who served 15 years in prison, and who claims that this was the result of negligence on the part of the prosecution authorities. Indeed, the appellant contends that not only was there negligence but that there was fraud and concealment of relevant material by agents of the State before and during his trial. To say that the issues raised are serious would be an understatement. Much is at stake for all parties concerned, including but not limited to extraordinary reputational damage on both sides. The case undoubtedly raises issues of general

public importance. That this factor must be given appropriate weight the decision of the Court is underscored by *Comcast International Holdings*.

**233.** Secondly, part of the overall context is that, without in any way losing sight of the fact that the Court has found the appellant responsible for inordinate and inexcusable delay in advancing his proceedings, it is a fact that the respondents failed to answer correspondence from the appellant for six years, which correspondence sought information relating to a DNA report served on him in 2003 when the case was almost ready to go to trial. I have acknowledged that the appellant could have brought a motion to compel discovery of the material connected with this report and therefore bears significant responsibility for the delay. However, I would not, in the context of considering the balance of justice, discount the failure of the State to co-operate by providing the material, and worse, by failing even to respond to his solicitors' letters to the extent of acknowledging them or refusing to provide the sought-for materials, especially in a context where the correspondence concerned a man whose conviction had already been quashed for a failure to disclose. In my view, the State's inexplicable and dismissive attitude to this correspondence should be factored into the balance of justice assessment.

**234.** Thirdly, when one counts the years that have passed for the purpose of assessing prejudice, it begs the question as to when one should start counting; from the dates of the murders? The trial in the Special Criminal Court? The discovery of the newly discovered fact? The commencement of the negligence proceedings? The service of the Evans report? This in turn depends on what one considers to be the proper scope of the negligence action, which brings me back to the problems identified at some length in this judgment. The respondents' case on prejudice was put forward in this motion on the basis of an underlying assertion or

assumption that they would be allowed to put in issue at the negligence trial the question of whether the appellant was guilty or innocent of the offences the subject of the original criminal trial. They argue that this would be relevant both to liability and damages, in various ways discussed in further detail above. To put it crudely, they submitted that they would have to re-run the criminal trial; and that they were entitled, indeed, to go further and adduce evidence probative of guilt which had arisen *since* that criminal trial. The problem for this Court is that this, a crucial and key assumption, requires careful and further exploration in light of relevant authorities. I have explained in some detail why I think it would be unjust to reach any conclusion on the precise scope of the issues in the case in circumstances where this issue was not clearly in focus and arose almost incidentally in the submissions because of the issue of whether the respondents had suffered prejudice by reason of delay, and where there was little or no argument on the issue, and no reference at all to some relevant authorities.

**235.** Fourthly, my attempt to assess the degree of prejudice to the respondents on the alternative basis, i.e. that of a potential trial in which the parameters are narrower and the issue of guilt/innocence is excluded runs into several problems. One of these is, quite simply, that this is not the way the respondents argued the case and therefore the appellant has not an opportunity to address it squarely. Another is that the respondents did not direct their affidavit evidence towards this issue and therefore the Court lacks precise details of the degree of prejudice in this alternative scenario of how the trial would run.

**236.** Thus, I arrive at the following conclusions. Given the seriousness of what is at stake and the particularly unique circumstances of the case, and the current incomplete state of the evidence as to relevant and available witnesses as well as the uncertainties as to the parameters of the substantive proceedings, I am of the view that it would be premature to reach a decision

as to whether or not to terminate the substantive proceedings. I would set aside the order of the High Court and remit the motion to the High Court so that it may be adjudicated upon at some future point in time but only *after* two further events have taken place: (1) there has been full argument followed by a court ruling upon the scope of the proceedings, including in particular a ruling on whether the respondents are entitled to put the appellant's guilt, as they allege, in issue in the proceedings (including related matters such as the burden of proof); and (2) the respondents have addressed by affidavit the actual prejudice that they would suffer by reason of the appellant's delay if the case were to run on the narrower version described above (i.e. without the question of guilt/innocence being within it). I would leave it to the High Court and the parties to choose the appropriate mechanisms (such as motions and/or trial of preliminary issue) by which they consider that those issues can be addressed. It may be that in order to save on costs, this could all be done prior to trial and, perhaps, prior to any trial date being fixed.

**237.** The respondents may establish in the future that the balance of justice does ultimately favour the dismissal of the case, but in my view that point has not yet been reached in view of the uncertainties facing the Court as described in this judgment. If the respondents do establish in the future that the case should not proceed, the same result will have been achieved albeit later in time. The alternative is that the appellant would be cut off for ever from litigating the substantive proceedings, and it does not seem to me that the balance of justice favours that outcome when so many legal and evidential questions face this Court. Justice in a case such as this requires more than a broad-brush series of assumptions about a number of key matters.

## **The Chancery Proceedings**

**238.** It will be recalled that the Chancery proceedings which the appellant issued in 1992 were very broad-ranging in their original form but were dramatically reduced in scope by order of the High Court (Murphy J.) dated the 19 November 1993. What was left in the case was “ *the particular matters referred to at page 22 of the Judgment herein, that is to say, so much of the appellant’s claim as challenges the death penalty imposed on him, the manner in which it was commuted, and the circumstances in which it was claimed that the commuted penalty was to consist of 40 years penal servitude without remissions and as alleges that the appellant was wrongfully transferred to different prisons during the course of his trial in the Special Criminal Court*”. Murphy J. gave liberty to the appellant to amend the statement of claim to narrow the scope of the pleadings to reflect this ruling.

**239.** The appellant amended his statement of claim but did so in a manner which appears to have gone far beyond what was permitted by the High Court, although I express no concluded view on the matter as this question is not before us. It is clear, however, that the only permissible basis on which this action may proceed is within the parameters established by the High Court in 1993, and those parameters involve pure issues of law.

**240.** The reality of the situation appears to be as follows. The appellant initiated the Chancery proceedings in 1992 in order to litigate his conviction and sentence in full; it will be recalled that at this point in time he was still in prison and drafted the proceedings himself. When it came to light that information had not been disclosed before or during the criminal trial, he diverted his energies away from these proceedings and into his proceedings under the 1993 Act, first into the s.2 application and subsequently into the s.9 application. It was only when

the Supreme Court in March 1997 upheld the decision of the Court of Criminal Appeal to refuse him a certificate pursuant to s.9 that his interest in the Chancery proceedings may have been revived, along with the negligence proceedings to which he again also directed his attention. But even then, it took four years before he withdrew his appeal in respect of the order of Murphy J. and served both an amended statement of claim and notice of intention to proceed (June and September 2001 respectively). If it was, as is now argued, a case about issues of pure law, it is hard to see why it could not have proceeded at that time, but instead it was also adjourned (on consent) after the service of the Evans report in 2003. The reality seems to be that both cases travelled together without much thought being given as to whether the Chancery proceedings were affected by the service of the Evans report. Perhaps the waters were muddied by the appellant's own service of an amended statement of claim which at first sight appears much wider in scope than what was permitted by Murphy J.

**241.** The appellants are as guilty of inordinate and inexcusable delay in these proceedings as they are in respect of the negligence action. However, the respondents have not mounted any prejudice arguments in respect of the Chancery proceedings specifically. The entire argument on prejudice was in reality directed towards the negligence action. Given the overall circumstances and the fact that the case (confined within the parameters set by Murphy J.) involves pure issues of law, I am of the view that the trial judge's conclusion should be reversed in this respect also and that the appeal should be allowed in respect of the Chancery proceedings. If the respondents are of the view that the amended statement of claim exceeds the scope of the permission given by Murphy J., they can avail of the appropriate mechanisms for dealing with that issue in due course.

## Summary of Conclusions

**242.** My conclusions are as follows:

- i. The appellant was responsible for inordinate and inexcusable delay in progressing both sets of proceedings after 2003. In this regard, I agree with the conclusion of the High Court judge.
- ii. In the negligence proceedings, there is a key legal issue which has to be determined before the prejudice asserted by the respondents on this motion can be properly assessed. This key legal issue is the precise scope of the issues in the case having regard to the presumption of innocence and the extent to which it may or may not limit the respondents in terms of how they present their defence to the appellant's claim.
- iii. This key legal issue was not squarely before the High Court or this court, nor was it the subject of submissions based on potentially relevant authorities. Further, it is a legal issue of considerable complexity. I do not consider it appropriate to rule upon it in this appeal, given the manner in which it has arisen.
- iv. In circumstances where I cannot rule definitively on the scope of the pleadings/parameters of the trial, I cannot reach appropriate conclusions on the prejudice issue, which is one of the relevant factors in a motion to dismiss.
- v. For reasons explained in the judgment, I find myself also hampered in assessing the degree of prejudice even on an alternative view of the case, namely a version of the case/trial which is narrower than that asserted by the respondents.
- vi. Given the degree of uncertainty attending these key matters, together with the serious and unique nature of the case, and notwithstanding the inordinate and inexcusable delay on the part of the appellant, I do not consider that the balance of justice is to dismiss the proceedings at this point in time. I propose therefore to set aside the High Court judgment

but to ensure that these uncertainties are properly addressed and that an assessment of whether the case should proceed will take place only after the scope of the proceedings has been clarified.

vii. I would therefore set aside the order of the High Court and remit the motion to the High Court so that it may be adjudicated upon at some future point in time but only *after* two further events have taken place: (1) there has been full argument followed by a court ruling upon the scope of the proceedings, including in particular a ruling on whether the respondents are entitled to put the appellant's guilt in issue in the proceedings (including related matters such as the burden of proof); and (2) the respondents have addressed by affidavit the prejudice that they would suffer by reason of the appellant's delay if the case were to run on the narrower version described above (i.e. without the question of guilt/innocence being within it). I would leave it to the High Court and the parties to choose the appropriate mechanisms (such as motions and/or trial of preliminary issue) by which they think these issues can be addressed.

viii. The second set of proceedings (the "Chancery" proceedings) must remain within the parameters of the relevant court order of Murphy J. and as such concern matters of pure law. Notwithstanding the inordinate and inexcusable delay, I would allow the appeal in respect of those proceedings also.

**243.** I wish to record that my colleagues Power J. and Binchy J. are in agreement with this judgment.

**244.** There will be a hearing as to the costs arising in respect of this appeal and the Court will communicate with the parties with a view to fixing a date in that regard.



