Neutral Citation: [2017] IEHC 189

THE HIGH COURT

[1999 No. 8430 P.]

BETWEEN

JACKIE ENNIS

PLAINTIFF

AND

SPORTS TRAVEL INTERNATIONAL LIMITED AND SPORTS TOURS INTERNATIONAL LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 24th day of March, 2017.

1. This is an application brought by the defendants for an order dismissing the plaintiff's claim pursuant to the court's inherent jurisdiction on the grounds of delay.

Background Facts

2. The plaintiff is a 47 year old solicitor who went on a package holiday to Lanzarote in May 1998, which was organised by the defendants. The holiday included a range of sporting activities, one of which was cycling. On the 1st of June, 1998, the plaintiff went on an organised cycling trip arranged by the defendants as part of the package. She went in a group of people accompanied by two instructors. The bicycles and instructors were provided by the defendants. In the course of the cycle, the plaintiff fell off her bicycle and suffered injuries as a result. She appears to have suffered significant facial bruising and lacerations which required extensive suturing. She attended a local doctor, Dr. Zoido, immediately after the accident for treatment.

3. Following the plaintiff's return home, she consulted solicitors with a view to pursuing a claim for damages for personal injuries. Her solicitors wrote separate letters to both defendants on the 12th of August, 1998. In the letter to the first defendant, they said:

> "It is quite clear that no instruction or training was given to our client in relation to the use of the bicycle, she was not permitted an opportunity to familiarise herself with the bicycle despite the fact that the terrain covered in the cycle trip was very difficult and the bicycle supplied for her use was entirely unsafe. "

4. In the letter to the second defendant, the solicitors said:

> "It is clear that no proper adequate instruction or supervision was given to participants in this bike tour, including our client, and that the bicycle given to our client was in a dangerous condition."

5. That letter was replied to promptly on the 20th of August, 1998, by Mr. Leif Rasmussen, the general manager of Club La Santa that organised the holiday on the defendants' behalf. In that letter, Mr. Rasmussen takes issue with the allegations made and suggests that the accident was entirely the fault of the plaintiff herself. In the penultimate paragraph of this letter, he said:

> "And, last but not least, the medical doctor who treated her after the accident remembers her very well, both her and the situation after the accident. He, Dr. Antonio Zoido, remembers very clearly Ms. Jackie Ennis personal explanation to him being that it had been her own fault, having used the brakes in the wrong way! The doctor will testify, would (sic) the case go to court."

6. Proceedings were issued a year later in August 1999. With regard to the subsequent chronology of events, I propose to append to this judgment the chronology submitted by the defendants which is not in dispute. As appears from this, between August 1999, when the summons was issued and September 2003, when the defendants delivered replies to particulars, matters proceeded at a leisurely, albeit not an exceptionally slow, pace. No issue arises in this regard. The last event of relevance occurred on the 24th of September, 2003, when the plaintiff's solicitors wrote to the defendants' solicitors stating that they were reviewing the replies to particulars and would revert in due course.

7. Nothing further of any description occurred for over ten years. Even then, all that happened was that the plaintiff filed a Notice of Intention to Proceed in each of the years 2013, 2014 and finally on the 8th of December, 2015. Notice of Trial was served by the plaintiff on the 10th of March, 2016, and a trial date has now been allocated on the 6th of April, 2017. The within motion was issued by the defendants on the 2nd of June, 2016. The chronology demonstrates clearly that nothing was done by the plaintiff to progress this action for twelve and a half years. No excuse or indeed explanation of any kind has been offered by the plaintiff for this delay.

The Position of the Defendants

8. Apart from general prejudice of the kind that inevitably follows when delays of the magnitude that have occurred here arise, the defendants rely on two particular aspects of prejudice. The first is that Dr. Zoido died on the 4th of October, 2015. The second is that Mr. Rasmussen has since retired and has no recollection of the plaintiff's accident. In an affidavit sworn by Martin Joyce, a director of the first defendant, grounding this application, he says that Club La Santa no longer have any file relating to the matter although this appears to have been the position from about 2001. Mr. Joyce further avers that he has been unable to trace the identity or whereabouts of the guides and instructors who instructed the plaintiff prior to her bicycle ride and accompanied her on it.

The Plaintiff's Response

9. In essence, the plaintiff says that there is no real prejudice arising in this case to the defendants because the central issue is that the bicycle that was supplied to her was unsafe. That is something that can be dealt with by expert evidence. The plaintiff complains that it took four years to get the defendants to disclose the make and model of the bicycle in question so that they could have an expert assessment carried out. They further submit that any shortcomings in relation to the defendants' ability to defend the case arise entirely from the fact that they failed to investigate it properly in the first place, to canvass the issues with relevant witnesses and take statements from them. Accordingly the plaintiff says that in reality, the defendants are in no worse position now than they would have been in 2003 when the last step in the action was taken. They suggest that the evidence of the instructors would not be material given that the case is about the suitability of the bicycle.

10. With regard to Dr. Zoido, the plaintiff submits that the letter of the 20th of August, 1998, from Mr. Rasmussen consists of pure hearsay and is entirely inadmissible as evidence that Dr. Zoido would have had any relevant evidence to give in this case. Even if that

were not so, they say Dr. Zoido's evidence would in any event be irrelevant in circumstances where the issue is the suitability of the bicycle, not how the plaintiff rode it.

11. Counsel for the plaintiff conceded, sensibly in my view, that the delays that have occurred in this case are both inordinate and inexcusable and the only issue with which the court is concerned is the balance of justice. He placed reliance on the judgment of Laffoy J. in *Cahalane v. the Revenue Commissioners* [2010] IEHC 95 where despite a delay of 20 years, the court considered that no real prejudice had been demonstrated by the defendants and the case could proceed.

Discussion

12. It is undoubtedly true to say that the defendants appear to have done very little about properly investigating this accident despite the fact that they were almost immediately on notice of it and clearly made some preliminary inquiries at least, from Dr. Zoido in particular. Thereafter, despite the institution of proceedings in 1999, they took no action to pursue the investigation to the point where ultimately it was found that there was no file available in relation to the matter. The plaintiff says that she ought not be blamed for any ensuing prejudice that arises because of these failures on the part of the defendant. Had they done what they ought to have, there would be no prejudice.

13. In particular the failure of the defendants to pursue the availability of witnesses, particularly the instructors, at the material time is not something for which the plaintiff should now have to bear responsibility. Counsel for the plaintiff relied in that regard on the decision of the Court of Appeal in *Granahan v. Mercury Engineering* [2015] IECA 58 where Irvine J. delivering the judgment of the Court, identified the failure of the defendants to trace witnesses or make any efforts in that regard as a factor which militated against the defendant subsequently alleging prejudice as a result. However, as a matter of fact in that case, the court considered that the defendant was unlikely to suffer prejudice due to the potential unavailability of the witnesses identified. As Irvine J. noted (at para. 44):

> "For the aforementioned reasons I am not satisfied that the defendant is likely to suffer even moderate prejudice due to the potential unavailability of witnesses. Its concerns in this regard cannot be equated to the type of prejudice that potentially arises for a defendant who, as a result of delay, has lost, through death or illness, the evidence of some crucial witness."

14. As I have already noted, this case is concerned in the first instance with where the balance of justice lies and perhaps secondarily, with whether a fair trial can now be had, the former being the *Primor* test and the latter that identified in *O'Domhnaill v. Merrick* [1984] I.R. 151.

15. It seems to me that even if the defendant had fully investigated the accident at the relevant time and taken statements from all relevant witnesses including the instructors and the doctor, that could not of itself fully address the prejudice it will now suffer if this case proceeds. Statements might have been taken to deal with the case as it is pleaded from the instructors. Even if they had made statements at the time, which might assist their recollections to some degree, it is perfectly possible and indeed likely that they might be asked in evidence about matters not covered in their statements. For example, the plaintiff might allege that she had been told X or Y by an instructor. There is no reasonable prospect in my view that a witness could reliably recollect events of now almost nineteen years ago that go beyond the content of a contemporaneous statement. Of course the plaintiff may well still have a clear recollection of the events – parties who undergo traumatic and life changing episodes are likely to remember them long after they have faded from the memories of those who were peripherally involved in such events as part of their day to day employment. All of this happened the best part of a generation ago.

16. The content of the defendant's letter of the 20th of August, 1998, to which objection is taken by the plaintiff represents a reasonably contemporaneous account of a conversation that Mr. Rasmussen had with Dr. Zoido who treated the plaintiff in the immediate aftermath of the accident. In personal injury litigation, the evidence of such medical witnesses is frequently of crucial importance not only to medical aspects of the case but to liability issues as well. It is not uncommon for plaintiffs to make admissions against interest in an unguarded moment to a treating doctor before the prospect of litigation emerges. Such admissions can often be decisive to the outcome of the litigation.

17. It is undoubtedly true that Mr. Rasmussen's letter contains hearsay insofar as Dr. Zoido's evidence is concerned and could not be admitted as proof of the truth of that evidence. It seems to me however that it is at least for the purposes of this application, prima facie evidence that Mr. Rasmussen had a conversation with Dr. Zoido shortly after the accident and as a result, became aware that Dr. Zoido had potentially evidence of significant relevance to give concerning the liability issue in this case. I put it no higher than that.

18. Although counsel for the plaintiff has emphasised that this case is all about the suitability of the bicycle, I do not think that is an accurate characterisation of the claim as initially made and later pleaded. The opening letters from the plaintiff's solicitors make clear that complaint was made of the inadequate instruction, supervision and training of the plaintiff and that she was not permitted an opportunity to familiarise herself with the bicycle in advance. These are allegations that could only be answered by the instructors. Similarly in her statement of claim, the plaintiff in her particulars of negligence pleads that the defendants were negligent in "c. fail[ing] to provide the plaintiff with safe or adequate instructors and/or supervision" and "f. fail[ing] to provide the plaintiff with any or any adequate supervision instruction or training in relation to the correct operation of the said racing bicycle." It is further alleged that the plaintiff was expected to cycle on a road which was unsuitable for an inexperienced cyclist and that the instructors failed to have regard to the fact that she was such a cyclist. These allegations also could only be answered by the instructors.

19. Similarly with regard to Dr. Zoido, his evidence might have been of critical importance or it might have amounted to nothing. At a minimum it is not disputed that he attended on the plaintiff after the accident. But the fact of the matter is that the importance or otherwise of Dr. Zoido's evidence will never now be known and the defendants are at the very least deprived of the possibility that such evidence could have been highly material. Of course even if Dr. Zoido had made a contemporaneous statement at the behest of the defendants, that would no longer have any relevance.

20. As I have already noted, even if the matter had been properly investigated at the time and statements taken, that could not of itself negative the prejudice that has accrued to the defendants. This was recognised by the Court of Appeal in *Gorman v. Minister for Justice* [2015] IECA 41. In that case, the plaintiff confronted with a motion to dismiss for delay submitted that the defendants had not been able to point to any specific prejudice arising from the delay that had occurred and they had a number of contemporaneous witness statements in relation to the events in question. Irvine J. delivering the Court's judgment dealt with this submission in the following way:

> "[61.] The fact that the defendants have available to them a number of witness statements taken in the aftermath of the

plaintiff's allegations, does not mean that they would not be prejudiced in meeting a claim of this nature some twelve or more years after the events in question, 2013 being the year in which the learned High Court judge concluded the case was likely to be heard.

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

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

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

21. The plaintiff also argued that there was acquiescence on the part of the defendants who remained silent in the face of three Notices of Intention to Proceed and delayed bringing this motion until after the Notice of Trial was served. This issue was considered recently by the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206. The judgment of the court was delivered by Irvine J. who said:

"[32.] In the light of the submissions made by Mr. McGovern concerning the defendant's failure to identify any specific prejudice arising from the delay, a further point needs to be made concerning the approach of the Court to the third leg of the *Primor* test. It is clear from the relevant authorities that in the presence of inordinate and inexcusable delay even marginal prejudice may justify the dismissal of the proceedings. (See *Cassidy v. The Provincialate* [2015] IECA 74). That is not to say, however, that in the absence of proof of prejudice the proceedings will not be dismissed. The Court is entitled to take into account all of the circumstances of the case including the list of factors outlined by Hamilton C.J. which are conveniently summarised in the head note of the *Primor* decision.

[33.] As to Mr. McGovern's reliance on the defendant's inaction to support his contention that the balance of justice would favour permitting the claim proceed, the decision of Fennelly J. in *Anglo Irish Beef Processors Limited* is of some relevance. In his judgment he draws a distinction between culpable delay on the part of a defendant, such as where they fail to comply with time limits for the delivery of pleadings, and mere inaction such as where a defendant simply does nothing to advance the claim or seek to have it dismissed. In distinguishing mere inactivity on the part of a defendant from actual delay or acquiescence he concludes that it is the plaintiff who bears the primary responsibility for prosecuting the action expeditiously and that lesser blame should be apportioned to a defendant where they have been guilty of mere inactivity as opposed to actual delay….

[36.] It is clear from the authorities that the conduct of both parties to proceedings has to be examined in considering an application of this kind. Having said that, the judgment of Fennelly J. in Anglo Irish Beef Processors Limited makes clear that it is the conduct of the litigation by the plaintiff, that is the primary focus of attention. A defendant does not have an obligation to bring the proceedings to hearing. Litigation involves one party bringing a claim against another and unless there is some behaviour on the part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material. It is obviously not a consideration on the first question as to whether the delay is inordinate and inexcusable. The only way it can arise therefore is in the balance of justice. The question at that point is whether the defendant caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff. This understanding of the law is also consistent with the later authorities of the Supreme Court and the High Court.

[37.] In my view, the Minister in the present case cannot be deemed culpable for mere inactivity. After all, it is the plaintiff who commences legal proceedings and draws the defendant into the legal process…

[38.] Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?"

22. I cannot accept the proposition that a failure to respond to the service of a Notice of Intention to Proceed and nothing more by bringing a motion to dismiss could be construed as some form of acquiescence by the defendants herein. It was perfectly reasonable for them to adopt a wait and see approach to determine if the plaintiff was really serious about pursuing the case before acting. The fact that the plaintiff served two further such notices in successive years only serves to underline the prudence of that approach, confronted with the obvious uncertainty and lack of resolve on the part of the plaintiff to proceed. It was only upon service of the Notice of Trial that the defendants could finally be sure that the plaintiff was, after all, intent on proceeding. Accordingly in my view there was no culpable delay whatever on the part of the defendants in this case.

Conclusion

23. To my mind, it cannot be gainsaid that a trial of this action which would take place nineteen years after the events complained of could not yield a just result. Although counsel for the plaintiff relied on the decision in *Cahalane* as being a case where a twenty year delay had not prevented a trial going ahead, I am satisfied that the facts of that case are entirely distinguishable from those that arise here. That was a claim against the Revenue who, as Laffoy J. herself remarked, had a vast amount of records available to them

with which to defend the case and little or no evidence of actual prejudice was led by the defendants. Furthermore she remarked (at para. 45) that the conduct of the defendants in that case induced the plaintiff to incur expense in pursuing the proceedings.

24. Nothing of the kind arises here and it seems to me that the defendants would have been well justified in assuming after a silence enduring for a decade that the plaintiff had decided to drop the case. The adage of letting sleeping dogs lie referred to in some of the authorities is apt here. The Constitution and Article 6.1 of the European Convention on Human Rights make clear that every person has a right to a trial, be it criminal or civil, within a reasonable time. I cannot see how a trial after a delay of nineteen years could on any view be regarded as a vindication of those rights from the defendant's perspective. Whether one applies the *Primor* balance of justice test, which requires only moderate prejudice to have a claim dismissed, or the *O'Domhnaill v. Merrick* test requiring that a fair trial can no longer be had, it seems to me by either yardstick that the plaintiff's claim must be dismissed.