

THE HIGH COURT

[2023] IEHC 687

Record No.: 2013/10032 P

Between/

RICHARD O'DONOGHUE

Plaintiff

and

JOHN DAWSON, JOHN DAWSON JUNIOR,

MICHAEL CAREY and BRIDGET CAREY

Defendants

JUDGMENT of Ms. Justice Emily Farrell delivered on the 8th day of December 2023

1. The proceedings arise from an alleged assault and battery of the Plaintiff which is alleged to have been carried out by the First and Second Defendants on 30th January 2011, in a public house owned and/or controlled by the Third and Fourth Defendants. The Third Named Defendant was the holder of the Intoxicating Liquor Licence at the time. The Personal Injury Summons issued on 19th September 2013.
2. The Third and Fourth Defendants seek an order dismissing the proceedings as a result of the lack of any step having been taken in the proceedings for over two years, which application is brought under Order 122 r. 11 of the Rules of the Superior Court. The application is grounded on an affidavit sworn by the Third and Fourth Defendants' solicitor on their behalf.

3. The claim against the Third and Fourth named Defendants is a claim in negligence and breach of duty, including statutory duty. It is alleged *inter alia*, that these Defendants caused or permitted the Plaintiff to suffer injury; the particulars of negligence and breach of duty, including statutory duty, include allegations that they failed to anticipate that the Plaintiff would suffer injury, failed to devise or implement adequate security procedures, failed to carry out an appropriate risk assessment, provide adequate staffing or to provide any or any adequate training to staff. A full Defence was delivered on behalf of the Third and Fourth Defendants on 19th June 2014, in which it was pleaded, *inter alia*, that if the assault the subject of the proceedings occurred in the manner alleged by the Plaintiff, it happened suddenly and/or without warning and/or in circumstances where the Third and Fourth Defendants could not have prevented the Plaintiff's alleged injuries.
4. The Defence asserts that the Plaintiff had failed to serve a letter of claim within two months of 30th January 2011 as required by section 8 of the Civil Liability and Courts Act, 2004. The Plaintiff does not dispute this and claims, in his written submissions, that he was not made aware of that requirement by his then solicitors.
5. It is averred, in the replying affidavit, which was sworn by the Plaintiff's solicitor, that he was instructed by the Plaintiff that, arising out of the criminal investigation by An Garda Síochána, the First and Second Defendants were prosecuted in the District Court. He also avers that they pleaded guilty and that penalties were imposed on them. He also avers that no compensation was offered to the Plaintiff by the First or Second Defendants. The nature of the penalties imposed, and the date(s) of the plea and/or imposition of the penalties are not disclosed. No explanation has been given as to why the affidavit was sworn by the Plaintiff's solicitor rather than the Plaintiff himself. The events deposed to, and particularly the explanations proffered for the delay on the part of the Plaintiff pre-dated the deponent's involvement in the proceedings.
6. The following chronology is contained in the helpful written submissions filed on behalf of the Plaintiff. Substantially the same chronology was provided by the Third and Fourth named Defendants, on whose behalf helpful submissions have also been filed.

Date of Alleged Occurrence	30 th January 2011
Personal Injury Summons Issued	19 th September 2013
Affidavit of Verification by Plaintiff	19 th September 2013
Entry of Appearance for Third & Fourth Defendants	19 th November 2013
Third & Fourth Defendants issue Notice for Particulars	25 th November 2013
Plaintiff's Reply to Notice for Particulars from Third & Fourth Defendants	20 th February 2014
Motion For Third Party Discovery – An Garda Síochána [by Third and Fourth Defendant]	31 st March 2014
Discovery Order Made	29 th April 2014
Affidavit of Discovery sworn by of An Garda Síochána	2 nd June 2014
Notice of Motion, [Order 27, r. 9] of the Rules of the Superior Courts, Default of Defence [against Third and Fourth Defendant]	7 th May 2014
Order Extending Time for Delivery of Defence	4 th June 2014
Personal Injury Defence Delivered	19 th June 2014
Notice of Indemnity & Contribution served on First & Second Defendants	9 th July 2014
Affidavit of Verification Third & Fourth Defendants	6 th July 2015
Notice of Change of Name by Solicitors for Third & Fourth Defendants	20 th August 2018
Notice Of Intention to Proceed [by] Third & Fourth Defendants to Plaintiff and First & Second Defendants	3 rd December 2019
Notice Of Motion Seeking Relief under Order 122, r. 11 of the Rules of the Superior Courts	14 th May 2020
Notice of Motion brought by [original] Solicitors for the Plaintiff, seeking to be permitted to come off record	6 th July 2020
Order allowing [original] Solicitors for the Plaintiff, to come off record	14 th December 2020

Notice of Appointment as Solicitor for Plaintiff	22 nd April 2021
Notice of [Change of Solicitor to Current] Solicitor for the Plaintiff	26 th June 2021

7. This chronology is subject to the caveat by the Plaintiff, that “*the legal team for the Plaintiff have to reserve their position in respect of the said chronology as they have not had the opportunity themselves to examine the file of the former solicitors for the plaintiff so as to personally satisfy themselves as to the accuracy of the said chronology.*” The Plaintiff’s current Solicitor filed a Notice of Change of Solicitor on 26th June 2021.
8. The following additional dates are relevant, and are evident from the affidavits sworn by the Plaintiff and the Third and Fourth Defendants’ solicitors respectively as well as the affidavit of Siobhán O’Neill, Solicitor, sworn on the 2nd July 2020 which grounded the application of the Plaintiff’s original Solicitors to come off record:

Complaint made by Plaintiff to Law Society in relation to his original Solicitors	6 th April 2018
Plaintiff’s original solicitors wrote to the Plaintiff stating “ <i>in light in light of your unfounded complaint to the Law Society, we feel that it would not be appropriate for us to continue to act on your behalf in relation to the above matter. In the circumstances we would recommend that you instruct another firm of solicitors.</i> ”	4 th May 2018
Plaintiff notified of Decision by Law Society that the complaint was inadmissible	8 th May 2018
Letter from ‘JMS’, potential solicitor for Plaintiff	31 st October 2018
Letter from Plaintiff’s original Solicitor to ‘JMS’ confirming that the firm had no interest in continuing to act on behalf of the Plaintiff in any matter	6 th November 2018
Letter from ‘JMS’ stating the Plaintiff would not be taken on as a client	28 th January 2019

Letter from Plaintiff's original Solicitors notifying him of this motion and recommending that he "bring the same to the immediate attention of your solicitors."	18 th June 2020
Letter from Plaintiff's original Solicitors to Solicitors for Third and Fourth Defendants asking them to adjourn the motion to dismiss	2 nd July 2020
Plaintiff's second Solicitor requested the Documents discovered by An Garda Síochána together with the Affidavit of Discovery, from the Third and Fourth Named Defendants' Solicitor	20 th April 2021
Affidavit of Discovery, and documents, provided to Plaintiff's second Solicitor	Date Undisclosed

The applicable test

9. The parties are in agreement that the applicable test to be applied is the test set out in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 (in particular pp. 475-6), which has been considered by the Court of Appeal in a number of recent cases including *Cave Projects Ltd v. Gilhooley & Ors* [2022] IECA 245, *Gibbons v. N6 Construction Limited* [2022] IECA 112 and *Doyle v. Foley* [2022] IECA 193.
10. The Third and Fourth Defendants do not seek an order dismissing the proceedings in reliance on the *O'Domhnaill v. Merrick* [1984] IR 151 jurisprudence.
11. In *Gibbons v. N6 Construction*, Barniville J. summarised the *Primor* test as follows:

"79. There are three limbs to the Primor test. The defendant must first establish that the delay on the part of a plaintiff in the prosecution of the claim has been inordinate. If it establishes that the defendant must then establish that the delay has been inexcusable. If the defendant establishes, or if it is agreed, that the delay is both inordinate and inexcusable, "the court must exercise a judgment on whether, in its discretion, on the facts, the balance of justice is in favour of or against the proceeding of the case." (per Hamilton C.J. in Primor at para. (e) on p. 475).

80. *As the moving party on the application to dismiss, the defendant also has the burden of proving that the balance of justice favours the dismissal of the claim (see, for example, per Irvine J. in Cassidy at para. 35). However, as we shall see, the defendant does not have to establish the same level or degree of prejudice which must be established in order to have a claim dismissed under the second strand of jurisprudence described in O'Domhnaill. ... The onus remains on the defendant to establish that the balance of justice favours the dismissal of the case. The position in fact is, as was stated by Fennelly J. in the Supreme Court in Anglo Irish Beef Processors Ltd. v. Montgomery [2002] 3 IR 510 ("AIBP"), citing what Henchy J. stated in O'Domhnaill, that a person responsible for delay which is found to be inordinate and inexcusable:*

"will not be absolved of fault unless he can point to countervailing circumstances. If he can, the court may be able to treat him more favourably when it comes to assess the third consideration...namely whether 'on the facts the balance of justice is in favour of or against the proceeding of the case'." (per Fennelly J at p.519)

81. *Such countervailing circumstances would have to be "weighty to cancel out the effects of the plaintiffs' behaviour" and would include any disadvantage or disability affecting the plaintiff or delay or acquiescence by the defendants which might "redress the balance of fault" (per Fennelly J. at p.519). While these are matters which the plaintiff would have to point to in order to redress the balance of fault or cancel out the effects of its delay, they do not mean that a plaintiff bears the burden of proving that the balance of justice favours the case proceeding."*

12. Hamilton C.J. set out factors which are to be considered in assessing whether the balance of justice lay in favour of or against permitting the case to proceed at pp. 475-6 of *Primor*. It is clear from the authorities, including *Gibbons v. N6 Construction* and *AIBP Ltd v. Montgomery* [2002] 3 IR 510 that these factors are not exhaustive and, as Fennelly J. stated in *AIBP*, they "*should not be treated as distinct cumulative tests but as related matters affecting the central decision as to what is just.*" (p. 518).

13. The factors identified by Hamilton C.J. include the implied constitutional principles of basic fairness of procedures. The importance of litigation being conducted in a timely manner is a further constitutional imperative. That justice should neither be delayed or denied was emphasised by O’Flaherty J. in *Primor* (p. 521).
14. There is a vast body of jurisprudence emphasising the imperative of proceedings being conducted in a timely manner, having regard to the Constitution and the courts’ obligations under the European Convention on Human Rights: *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 IRLM 290; *Collins v. Minister for Justice & Ors* [2015] IECA 27; *Gorman v. Minister for Justice* [2015] IECA 41; *Millerick v. Minister for Finance* [2016] IECA 206; *Sweeney v Keating* [2019] IECA 43; *Barry v. Renaissance Security Services Limited* [2022] IECA 115.
15. In *Collins*, Irvine J. stated:
- “Quite independently of guarantees of basic fairness of procedures, these specific constitutional obligations also pre-suppose that litigation will be conducted in a timely fashion. If...justice is put to the hazard in a given case by undue and excessive delay, how, then, can the courts fulfil their constitutional mandate under Article 34.1?”* (para. 38)
16. Baker J. stated, in *Sweeney v. Keating*: *“A laissez faire attitude to the progress of litigation by the plaintiff cannot be tolerated given that delay may constitute a violation of Art. 6 ECHR rights.”* (para. 26)
17. In *Comcast International Holdings Inc & Ors v. Minister for Public Enterprise & Ors* [2012] IESC 50, having considered the authorities, Clarke J. remained of the view expressed previously by him in *Stephens v. Flynn* [2005] IEHC 148 (and upheld by the Supreme Court [2008] 4 IR 31) and *Rodenhuis and Verloop B. V. v. HDS Energy Ltd.* [2010] IEHC 465, [2011] 1 IR 611. He stated that the application of the *Primor* test must be approached *“on a significantly less indulgent basis than heretofore.”* (para. 3.10). Clarke J. held that this also applied to a defendant who did not avail of the procedures provided in the Rules of the Superior Courts to accelerate the proceedings. He concluded:

“3.13 I do, remain of the view that tightening up is required. While the court will, understandably, be concerned to balance the interests of justice arising in the case before it and, in that regard, to consider all relevant facts, nonetheless the overall approach of the courts, if unduly lax, has the potential to create injustice by delay across a whole range of cases whose facts may never come to be considered by a judge, but its progress is adversely affected by a culture of delay.”

18. As Collins J. stated, in *Cave*, it is important to avoid an over-correction by reason of the recalibration in the application of the *Primor* principles having regard to the court’s obligations under Article 6 ECHR, and indeed the Constitution, and that proceedings should only be dismissed where allowing the claim to proceed would result in some real and tangible injustice to the defendant. (para. 37)
19. The determination of the Supreme Court in *Kirwan v. Connors & Ors* [2023] IESCDET 34 has been opened to the court by counsel on behalf of the Plaintiff. That determination, which granted leave to appeal to the Supreme Court on a point relating to the application of the *Primor* principles, expressly states that “*No aspect of this ruling has precedential value as a matter of law*”. I am bound by the judgments of the Supreme Court and Court of Appeal, and do not place any weight on the determination in that case.
20. In the Court of Appeal in *Kirwan v. Connors & Ors* [2022] IECA 242, Power J. held that whether or not a litigant is represented, “*no plaintiff is entitled to institute proceedings and then to leave them lie, unprosecuted, indefinitely.*” This judgment is the subject of the grant of leave to appeal by the Supreme Court in [2023] IESCDET 34.

Nature and Extent of Prejudice

21. It is clear from the authorities that prejudice is not limited to fair trial prejudice and that prejudice may include other matters including reputational damage: *Primor*; *Gibbons v. N6*; *Cave Projects Ltd v. Gilhooley & Ors*.

22. The Third and Fourth Defendants do not assert that any specific witness has become unavailable to them in defending the within proceedings, nor do they submit that they, or the business run by them, has suffered any tangible prejudice as a result of the ongoing proceedings such as increased insurance costs or difficulty renewing the Intoxicating Liquor Licence. However, they assert that the Plaintiff's delay in prosecuting the proceedings causes them general prejudice in the defence of the proceedings and reputational damage.
23. In *Cassidy v. The Provincialate* [2015] IECA 74 and *McNamee v. Boyce* [2016] IECA 19 Irvine J. held that a defendant only has to prove "moderate" prejudice arising from that delay in order to secure a dismissal of the proceedings under the *Primor* principles. Similarly, in *Gibbons v N6*, it was held that the defendant had established that there was "moderate" prejudice. Whilst the phrase "marginal prejudice" was used by Irvine J. in *Cassidy* and *Millerick*, the Third and Fourth Defendants contend that they have suffered moderate prejudice, and that on that basis, the proceedings should be dismissed.
24. Whether moderate prejudice will justify the dismissal of proceedings, or whether more serious prejudice must be established depends on the circumstances of the case: *Cave Projects Ltd v. Gilhooley & Ors; Sheehan v. Cork County Council* [2023] IEHC 46.
25. Hardiman J. stated, in *Gilroy v. Flynn* [2004] IESC 98 (p.6), [2005] 1 ILRM 290, 293-294 that:
- "... the Courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued."*
26. As Finlay Geoghegan J. said in *Manning v. Benson & Hedges Ltd.* [2004] IEHC 316, [2004] 3 IR 556, [2005] 1 ILRM 190, 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.*" Similarly, in *Rogers v. Michelin Tyres* [2005] IEHC 294, Clarke J. stated that as the delay affected the ability of witnesses to recall the minutiae of an important meeting some ten years earlier, the defendant had suffered "*at least a moderate degree of prejudice in defending this action.*"

27. The prejudice which will be caused to a plaintiff if proceedings are dismissed under Order 122, rule 11 RSC is a factor which must also be considered. Clearly, if the proceedings are dismissed, the Plaintiff will have lost the opportunity of pursuing, as against the Third and Fourth Defendants, a claim for damages arising from their alleged negligence and breach of duty (including breach of statutory duty) in relation to the alleged assault on 30th January 2011. As *Simons J.* held in *Sheehan v. Cork County Council*:

“the right to litigate is not absolute: it must be balanced against other rights, including, relevantly, the right of defence. This is reflected, in part, by the imposition of limitation periods. It also underlies the inherent jurisdiction to dismiss proceedings on the grounds of delay.” (para. 22)

Was there Inordinate delay?

28. The parties agree that neither a Notice of Intention to Proceed nor a Notice of Change of Solicitor constitutes a proceeding for the purposes of Order 122, rule 11 RSC: *Anglo Irish Beef Processors v. Montgomery* [2002] 3 IR 510.
29. The last step taken by the Plaintiff in the proceedings was the issuing of the Motion for judgment in default of defence, which issued on 7th May 2014. The reliefs sought in the Notice of Motion included an order setting the action down for trial by Judge alone.
30. Time for delivery of the Defence was extended by six weeks by the High Court (Cross J.) on 3rd June 2014 and the Defence was delivered by the Third and Fourth Defendants on 19th June 2014. The affidavit of verification was filed in respect of the Defence on 6th July 2015.
31. A Notice of Intention to Proceed was served by the Third and Fourth Defendants almost four and a half years later, on 3rd December 2019. This application was brought by Notice of Motion filed on 14th May 2020.
32. It has been accepted by the Plaintiff *“that the delay in this case can be considered inordinate”* in his written submissions, and, that the delay in prosecuting the proceedings *“could be considered inordinate”* in oral submissions.

33. In considering the extent of the delay, it is appropriate to have regard to the applicable limitation period and the terms of Order 122 r. 11 RSC, which permits a defendant to bring a motion to dismiss proceedings where there has been no proceeding for a period of two years. As Simons J. stated, in *Sheehan v. Cork County Council* (para. 16), “*There would be little point putting in place procedural safeguards at the outset of the proceedings, only to allow those proceedings to drag on indefinitely thereafter.*”
34. The motion was issued almost six years after the delivery of the Defence by the Third and Fourth Defendants, close to five years after the affidavit of verification and two years after the Plaintiff complained his original Solicitors to the Law Society and had been advised to seek alternative representation.
35. Having regard to the steps taken, in particular the raising of a Notice for Particulars and obtaining non-party discovery from An Garda Síochána, I do not find that the Third and Fourth Named Defendants delayed unduly in delivering their Defence. The affidavit of verification was not served or filed until July 2015, and ought to have been served much earlier. However, the Plaintiff took no action during that period; he did not request the affidavit of verification and there is no evidence of any steps having been taken in relation to the other defendants (who appear not to have delivered a Defence). None of the evidence before the Court suggests that the Plaintiff was impeded in progressing the case by reason of the late filing of that affidavit, and no such argument was advanced on his behalf.
36. In *Gibbons v. N6 (Construction) Ltd* the Court of Appeal held that the plaintiff was guilty of inordinate and inexcusable delay for the entire period from March 2012 (when the proceedings issued) to the date on which the application to dismiss was brought, and thereafter.(para. 107-109, per Barniville J. (as he then was)). This included a lengthy period of time during which the first defendant’s defence was outstanding. At para. 111, Barniville J. upheld the finding of the High Court (Butler J.) that the delay of the defendant in delivering its defence did not impact in any way on the plaintiff’s ability to progress his case.

37. As was noted in *Gibbons*, the Notice of Trial could not be served before the defence was delivered by the other defendants. In this case, the question whether the First and Second Defendants have delivered a defence was left unanswered and a motion for judgment in default of defence has not been issued against those defendants. A Notice of Trial has not been served and it was not submitted that the pleadings had closed, although the Plaintiff did submit that the Third and Fourth Defendants could have served Notice of Trial. Furthermore, in *Doyle v. Foley Costello J.* upheld the finding by the High Court (O'Regan J.) that there is no obligation on a defendant to serve a Notice of Trial and that a defendant who did not do so cannot be held to have improperly delayed proceedings (para. 69). A similar finding was made by Irvine J. in *Millerick*. Irvine J. held:

“36. 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.

...

39. ... a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay.”

38. It is clear from the agreed chronology and the evidence before the court that no steps were taken in the proceedings by the Plaintiff after the filing of the Third and Fourth Defendant's Defence in June 2014 or since the filing of their affidavit of verification in July 2015. Very limited actions were taken by the Plaintiff with a view to progressing the proceedings; he instructed a second solicitor in April 2021 and his current solicitor in June 2021. Between those dates, the second solicitor obtained copies of the documents which had been provided to the Third and Fourth Defendants by way of discovery in June 2014.

39. In all the circumstances, I am satisfied that the Plaintiff is guilty of inordinate delay in the progressing of his claim.

Was the Delay Excusable?

40. The excuses proffered for the delay in the Plaintiff's solicitor's affidavit related to the fact that there existed "*unhappy differences*" between the Plaintiff and his original solicitors and that it took time to instruct new solicitors. These differences are stated to have led to the making of a complaint to the Law Society. Similarly in the written submissions, sole reason advanced to explain the delay were the difficulties between the Plaintiff and his original solicitor and the resultant need to instruct another firm of solicitors to act on his behalf.

41. At the hearing, it was contended that the disposal of the civil proceedings was also delayed by reason of the criminal prosecution brought against the First and Second Defendants. The Plaintiff's solicitor's affidavit avers that there the First and Second Defendant pleaded guilty and had been sentenced in the District Court, but he does not state when this occurred. There is no evidence which establishes, or from which it could reasonably be inferred, that the Plaintiff was delayed or prevented from progressing the proceedings, by reason of the criminal prosecution. It has not been asserted that the Plaintiff was impeded from preparing the necessary proofs with a view to serving Notice of Trial by reason of the criminal prosecution which has concluded. The criminal proceedings in respect of the events of 30th January 2011 were disposed of summarily by the District Court, and as such, it is unlikely that this occurred recently. Therefore, I find that the delay in prosecuting these proceedings is not excused by reference to the criminal prosecution, particularly having regard to the fact that the PIAB authorisation against the Third and Fourth Defendant was granted on 5th June 2013, the Third and Fourth Defendants' Defence was delivered on 19th June 2014 and that the Plaintiff (who was the injured party) has not disclosed the date on which those proceedings concluded.

42. Additional evidence relating to the Plaintiff's complaint to the Law Society is contained in the affidavit of his original solicitor sworn in support of her application to come off record. She avers that the complaint to the Law Society was made on 6th April 2018

and that the Law Society wrote to her on 3rd May 2018 stating that the complaint was not upheld. The Plaintiff's original solicitor averred:

“As a result of the findings from the Law Society of Ireland and my difficulty in obtaining instructions from the Plaintiff, I wrote to the Plaintiff on 4 May 2018 detailing that it would not be appropriate, given the circumstances of his complaint, to act any further on his behalf. I recommended within the said letter that the Plaintiff should obtain new legal representation for the within proceedings.

...

Despite the significant and repeated efforts made above, I remain in the position where I have been unable to obtain ongoing instruction despite significant and repeated efforts to do so.”

43. The letter of 4th May 2018 stated that the original solicitor considered it was no longer appropriate for her firm to act for the Plaintiff in relation to these proceedings and recommended that the Plaintiff instruct another firm of solicitors. A motion to come off record was not brought until 6th July 2020, after the motion to dismiss the proceedings had issued.
44. The Plaintiff did not oppose or attend at the application to come off record, nor has he taken issue with the averment of his original solicitor that she was unable to obtain ongoing instructions despite significant and repeated efforts to do so.
45. It is accepted in the Plaintiff's written submissions, that logically the Plaintiff must have been aware that the professional relationship with his original solicitor was severed well before 4th May 2018. Notwithstanding this, the Plaintiff contends that he should not be held responsible for the period during which his original solicitors delayed in applying to come off record. As Ní Raifeartaigh J. stated in *McAndrew v. Egan* [2017] IEHC 345, the responsibility for advancing a case lies at the door of the plaintiff. The plaintiff in that case also had to find alternative solicitors. Ní Raifeartaigh J. held:
- “If there is an onus on a plaintiff to advance their proceedings even where he or she is legally represented, there must be a similar onus to do so where he or she is not, provided a reasonable period of time to find a new legal team has*

been allowed to pass. ... the plaintiff is not entitled to stall the proceedings indefinitely while he searches for a new legal team. There comes a point where he must accept that he has to deal with the proceedings even without a legal team.” (para. 27)

46. At paragraph 36 of his affidavit, the Plaintiff’s solicitor (who came on record on 26th June 2021) states that the Plaintiff had found it very difficult to instruct another firm of solicitors. The only evidence of any steps taken by the Plaintiff to instruct a new solicitor after the breakdown of the relationship with his original solicitor and before the second solicitor came on record, is the correspondence between JMS and the Plaintiff’s original solicitor between 31st October 2018 and 28th January 2019. The second solicitor formally came on record on 20th April 2021 and the current solicitor did so on 26th June 2021.
47. That the Plaintiff was, or ought reasonably to have been, aware that he needed to find a new solicitor is abundantly clear from the correspondence between JMS Solicitors and the Plaintiff’s original solicitors. On 31st October 2018, the Plaintiff’s original solicitor was informed that authority had been given by the Plaintiff to JMS to act in the proceedings. The letter of 6th November 2018 from the Plaintiff’s original solicitors to JMS (exhibited by the Plaintiff’s solicitor) states “*We confirm that this firm has no interest in continuing to act on behalf of Mr. O’Donoghue in any matter including [these proceedings]*”. By letter dated 28th January 2019, JMS informed the Plaintiff’s original solicitors that they did not intend to take the Plaintiff on as a client. No evidence has been put before the court of any efforts made or difficulties encountered by the Plaintiff in seeking to instruct a new solicitor after January 2019.
48. On 18th June 2020, the Plaintiff was informed of the motion to dismiss the proceedings by his original solicitors and advised to bring it to the immediate attention of his new solicitors. They also wrote to the Third and Fourth Defendants requesting an adjournment of the application to dismiss the proceedings to facilitate their application to come off record.

49. On 2nd July 2020, the original solicitors informed the Plaintiff that they had instructed counsel to draft a motion to come off record.
50. While the motion to come off record did not issue until after the Third and Fourth Defendants had issued this motion seeking to dismiss the proceedings, the Plaintiff accepts that he knew that the relationship between him and his original solicitors had broken down by the time he made the complaint to the Law Society on 6th April 2018.
51. No explanation has been proffered to excuse the delay in progressing the case prior to the breakdown of the relationship between the Plaintiff and his original solicitor before 6th April 2018, the date on which the Plaintiff complained his original solicitor to the Law Society.
52. It is also contended that the Plaintiff cannot be held responsible for the delay caused by the need to instruct a third solicitor, due to the retirement of his second solicitor. I accept such a proposition. Clearly the Plaintiff had no option but to instruct another solicitor in 2021 and this occurred through no fault on his part. However, this does not avail the Plaintiff as the time taken to replace his second solicitor was very short and this occurred after this motion had issued. The evidence does not include the date on which the second solicitor retired nor the date on which the Plaintiff was informed of the impending retirement. This second and third solicitors came on record within ten weeks of each other.
53. The Plaintiff does not contend that there has been culpable delay on the part of the Third or Fourth Defendants save that it was argued they had failed to serve Notice of Trial. Unless there is default or acquiescence on the part of a defendant, little weight should be attached to their delay: *Doyle v. Foley*; *AIBP v Montgomery*; *Millerick*. It was submitted on behalf of the Plaintiff that there was nothing to prevent the Defendants setting the case down for hearing. There is no indication in the papers to show whether or not the First or Second Defendants have entered an appearance and, if so, delivered a defence to the proceedings; no such defence(s) is/are included in the papers nor are they referred to in the chronology. It does not appear that the Plaintiff has brought a motion for judgment in default of appearance or defence against either against the First and Second Defendants. Neither the Plaintiff nor his current solicitor have the original

file. It therefore appears the Plaintiff cannot be satisfied that pleadings are closed. This is also considered at paragraph 37 above.

54. A motion for judgment in default of defence was issued against the Third and Fourth Defendants, but the Defence was delivered on 19th June 2014. I do not consider this to be a culpable delay on the part of these Defendants, particularly having regard to the fact that they raised a Notice for Particulars and obtained non-party Discovery from An Garda Síochána. The date of service of the Personal Injury Summons which issued on 19th September 2013 is not before the court. The Third and Fourth Defendants have not acquiesced in, or caused, the Plaintiff's delay.

55. I am satisfied that the Plaintiff's delay in prosecuting the proceedings after the delivery of the Third and Fourth Defendants' Defence and affidavit of verification is not excusable. Whilst short periods of the delay may be excused by reason of the Plaintiff having to change solicitor on two occasions, the latter was a very brief, but unspecified, period of time almost a year after this motion issued. The period April 2018 to May 2020, when the motion issued cannot be excused by reference to the need to change solicitor as the Plaintiff was clearly aware by April 2018 that the relationship between him and his original solicitor had broken down.

56. No excuse has been proffered for the delay in prosecuting the proceedings prior to April 2018, save that it has been asserted that they could not be determined prior to the conclusion of the criminal proceedings. For the reasons set out above, I do not accept that the Plaintiff's delay in prosecuting these proceedings can be excused by reference to those criminal proceedings.

57. I am satisfied that the inordinate delay from the delivery of the Defence in June 2014 and filing of the affidavit of verification in July 2015 until the issuing of the motion to dismiss the proceedings in May 2020 is inexcusable.

Balance of Justice

58. If the proceedings are not permitted to proceed against the Third and Fourth Defendants, the Plaintiff will have lost the opportunity of pursuing his claim in damages

against those Defendants in respect of personal injuries arising from their alleged negligence or breach of duty, including breach of statutory duty. The submission that the Plaintiff would be impeded in his ability to vindicate and protect his good name is misconceived – no remedy of that nature has been sought against the Third and Fourth Defendants, nor does the Defence of the Third and Fourth Defendants put the Plaintiff's good name in issue.

59. The Third and Fourth Defendants do not rely on any specific prejudice caused by the unavailability of a witness or inability of a witness to give evidence, nor is there evidence of damage to the Third and Fourth Defendants' business, by reason of difficulties obtaining insurance, increased costs of insurance, the renewal of the Intoxicating Liquor Licence or otherwise. However, they rely on general prejudice and reputational damage. In particular, the Third and Fourth Defendants submit that, as the case is one which will be dependent on oral testimony, the ability to achieve a fair trial is prejudiced by the Plaintiff's delay.
60. The Plaintiff accepts that this case will turn on oral testimony. His written submissions state that proof of the factual matters in dispute "*will be dependent on oral testimony based on human recollection*". He relies primarily on the judgment of Collins J. in *Cave Projects Limited v. Gilhooley & Ors.* As Collins J. noted, Noonan J. held that there was little dispute as to fact and that most of the submissions related to issues of law, in a judgment on an application for summary judgment in that case. Collins J. found that each case will turn on its own facts, including in relation to the assessment of the balance of justice (para. 36).
61. That memories fade over time has been accepted by the Superior Courts on numerous occasions including *Sheehan v. Cork County Council*, *Gilroy v. Flynn*, *Manning v. Benson & Hedges Ltd.* and *Rogers v. Michelin Tyres*. In particular, it was held in *Gilroy v. Flynn* that delays of four or five years will probably reduce the potential of witnesses to give meaningful assistance or to act as a witness. In *Rogers v. Michelin Tyres* Clarke J. found that the defendant suffered "*at least a moderate degree of prejudice*" by reason of the reduced ability of witnesses to recall the details of an important meeting ten years earlier. In this case, were it not for the inordinate and inexcusable delay on the part of the Plaintiff, these proceedings could have been heard in 2015. *O'Riordan v Maher*

[2012] IEHC 274 is distinguishable; this is not a case where it could be said that the ability of the Third and Fourth Defendants to defend the proceedings has not been impaired. The quality of any trial which would now take place would be inferior to that which could have taken place in or about 2015.

62. The date on which the Third and Fourth Defendants were first made aware of the proceedings is not known to the court, but it is accepted that the Plaintiff had not served a letter of claim. The PIAB authorisation in respect of these Defendants issued on 5th June 2013.
63. The effect of delay on the part of the Plaintiff is compounded by the fact that the case is not ready to obtain a hearing date as the Plaintiff and his solicitor do not have the original (or, it would appear, complete) file. Therefore, the memories of the Third and Fourth Defendant and any witnesses they might wish to call will have faded more significantly by the time the proceedings could be heard. There is no evidence before the Court as to the steps taken to obtain the original file nor has any timeframe been given within which it is anticipated the Plaintiff would be ready to serve Notice of Trial. That it is appropriate to have regard to any further delay in the proceedings being brought on for hearing is evident from *Myrmidon CMBS (Propco) Limited v Joy Clothing Limited* [2020] IEHC 246 and *Sheehan v. Cork County Council*.
64. As in *Millerick*, the Plaintiff has not sought to contend that there was anything particular to these proceedings which prevented him from advancing his claim with reasonable expedition. No explanation has been given, for example, for the Plaintiff not seeking the Garda Statements for over ten years.
65. Save insofar as the Plaintiff complains that the Third and Fourth Defendants did not serve Notice of Trial, it was not submitted that they acquiesced in the Plaintiff's delay, or otherwise caused or contributed to that delay. There is no evidence of positive acquiescence on the part of the Third or Fourth Defendants, nor of any reassurance given by them to the Plaintiff. The Plaintiff was not caused to incur any further or unnecessary expense by any conduct on the part of the Third and Fourth Defendants.

66. The Plaintiff relies heavily on the existence of the statements which were taken by An Garda Síochána which, it is contended, can be used to refresh witnesses' memories, thereby mitigating the prejudice which would otherwise arise. Furthermore, it was argued that video recordings are in existence of the cautioned interviews of the First and Second Defendants, the notes of which have been discovered. The Statements indicate that those interviews were taped, but there is no evidence before the Court to indicate that any party has sought those recordings, or ascertained whether they are still in existence.
67. Most of these statements were taken within 10 days of the date of the alleged assault. The unsigned records of the interviews of the First and Second Defendants taken on 9th February 2011 are before the Court. Neither the Third or Fourth Defendant made a statement; there is no basis for suggesting that any request or demand to make a statement had been made. Their daughter, who was on duty on the night in question, made a statement on 9th February 2011. The affidavit sworn by the Plaintiff's solicitor states she was the only member of staff on that night. The adequacy of staffing levels on 30th January 2011 is clearly a matter in dispute in the proceedings and is not a matter addressed in her statement. The witness statements are directed solely at the questions whether or not the Plaintiff was assaulted and by whom. Counsel for the Plaintiff identified certain passages in the witness statements which it is contended were relevant to the issues in dispute between the Plaintiff and these Defendants, but it is clear that the purpose of Garda interviews was not to ascertain whether any fault lay on the Third or Fourth Defendants.
68. The statements did not address the allegations made against the Third and Fourth Defendants in the proceedings, such as the adequacy of staffing levels, staff training and security procedures, or the reason, if any, for the particular staffing levels on the night in question. A key allegation in this case is that the specific incident was foreseeable and ought to have been prevented by the Third and Fourth Defendants, their servants or agents. The statements did not address that issue. I note, however, that in his signed statement, the Plaintiff states that the assault occurred "*out of the blue*" and that he then received a second blow to the head.

69. In the normal course, had there not been inordinate and inexcusable delay, the proceedings are likely to have been heard in or about 2015. There would necessarily have been an unavoidable element of faded memory since the events of 30th January 2011. However, this has been compounded by delay on the part of the Plaintiff prior to the motion issuing in May 2020, which delay was avoidable, inordinate and inexcusable. As noted above, the proceedings are still not ready to be listed for hearing, nor has any indication been given to the court of the current state of readiness. I reject the contention that the availability of the Statements made to An Garda Síochána which are before the Court amounts negatives the increased risk of injustice arising from the Plaintiff's delay, for the reasons set out above.

70. As Collins J. held in *Cave Projects Ltd*:

“37. It is entirely appropriate that the culture of “endless indulgence” of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. ...”

71. The trial of the action to which the parties are entitled is a fair trial, not a perfect one. Unlike cases where the issue of dismissal is being considered under the rubric of *O'Domhnaill v. Merrick*, the balance of justice may favour dismissal of the proceedings where moderate prejudice to the defendant is established.

72. In this case, due to the inordinate and inexcusable delay on the part of the Plaintiff, the trial of the action has been delayed very significantly and is not yet ready to be set down for hearing. Whilst there would have been a period of approximately four/five years between the incident the subject of the proceedings and the case being heard had there been no such delay, the unavoidable fading of memories and reduced reliability of the evidence of witnesses on crucial issues of fact has been greatly increased by the failure of the Plaintiff to proceed with his case since the delivery of the Defence in June 2014. I find that the quality of the evidence available to the parties, and in particular the Third and Fourth Defendants, will be adversely affected, resulting in an increased risk to the fairness of the trial. Insofar as his evidence would relate to the assault itself, the Plaintiff

could refresh his memory by reference to the statement which he gave the Gardaí on 5th February 2011. The Third and Fourth Defendants do not have that benefit. Therefore, I find that the delay has caused moderate prejudice to the Third and Fourth Defendants.

73. The excuses relied upon for the delay do not excuse the lengthy period between the delivery of the Third and Fourth Defendants' Defence and the bringing of the motion. The only action taken by the Plaintiff since he brought a motion for judgment in default of defence against the Third and Fourth Defendants in 2014 was instructing two new solicitors in April and June 2021, and copies of the documents discovered to the Third and Fourth Defendants in 2014, were sought in 2021. In addition, a replying affidavit was sworn by his current solicitor in respect of this motion. The Defendants did not cause or contribute to the delay.

74. Notice of Trial has not been served, and it is clear from the written and oral submissions made on behalf of the Plaintiff, that his solicitor, who has been on record since June 2021 does not have the Plaintiff's entire file and is unable, even at this stage, to confirm the chronology. Therefore, there is no basis on which the Court can consider that there is any realistic prospect of the case being ready for hearing imminently.

75. Having taken account of the fact that an order dismissing the proceedings is a very serious remedy as it causes hardship to a plaintiff who loses his opportunity to seek compensation for the alleged wrongdoing of the defendant, and all the circumstances, I find that the balance of justice lies in favour of the dismissal of the proceedings. The period of inordinate and inexcusable delay caused by the Plaintiff has compromised the Third and Fourth Defendants' ability to defend the proceedings and the court's ability to adjudicate fairly on the issues. For the reasons set out herein, I consider that the dismissal of the proceedings is proportionate and just in all the circumstances.

76. I shall make an Order dismissing the proceedings under Order 122 r. 11 RSC.

77. As the Third and Fourth Defendants have been completely successful in this application, it my provisional view that they are entitled to their costs, having regard to the provisions of section 169 of the Legal Services Regulation Act, 2015 and Order 99 RSC. Should either party wish to apply for a different order, that party should notify

the High Court Registrar within seven days to arrange for the proceedings to be listed before me on Monday, 18th December 2023. If such notification is not received within seven days, the Order will be perfected in the terms proposed herein.



Emily Laneell

No Redaction Needed