



## THE COURT OF APPEAL

Court of Appeal Record Number: 2021/102  
High Court Record Number: 1991/14045P  
Neutral Citation: [2022] IECA 19

**Birmingham P.**

**Noonan J.**

**Binchy J.**

**BETWEEN/**

**SEAN O'BRIEN**

**PLAINTIFF/APPELLANT**

**-AND-**

**MINISTER FOR JUSTICE, IRELAND,  
AND THE ATTORNEY GENERAL**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT (*Ex Tempore*) of Mr. Justice Noonan delivered on the 20th day of January, 2022**

1. Birmingham P: I should say that I have had an opportunity to discuss this with Noonan J. in advance and read the judgment in draft and I agree with the draft and the conclusions which he proposes.
2. Noonan J: This appeal is brought by the plaintiff from the judgment of the High Court (Sanfey J.) delivered on the 22<sup>nd</sup> January, 2021 whereby the court dismissed the plaintiff's claim, essentially on the basis of delay.

3. The relevant chronology and facts as they appear from the affidavits and pleadings herein are as follows.

- The plaintiff was born on the 6<sup>th</sup> April, 1959 and lives in Offaly.
- **16<sup>th</sup> February, 1980** – The plaintiff was appointed a Prison Officer to the Irish Prison Service. At the relevant times, he was stationed in Portlaoise Prison.
- **15<sup>th</sup> November, 1983** – The plaintiff appears to have been involved in an accident at work in which he injured his left hand. He was examined on behalf of the defendants in relation to this injury by Mr. Nial Mulvihill, consultant orthopaedic surgeon, on the 16<sup>th</sup> January, 1986, perhaps in connection with a compensation claim. It would appear that in the over two years between the accident and Mr. Mulvihill's examination, the plaintiff had been consistently off work. Mr. Mulvihill offered the view that he would have expected the plaintiff's symptoms to resolve completely within three to four months of the accident and could not account for his complaints.
- **18<sup>th</sup> May, 1988** – A paramilitary prisoner in Portlaoise attempted to escape and was allegedly pursued and apprehended by the plaintiff. In the course of the escape attempt, a member of the Irish Army on duty at the prison discharged a firearm and the plaintiff claims that the bullet narrowly missed him. After this event, the plaintiff claims to have developed severe and persistent psychiatric symptoms, essentially Post Traumatic Stress Disorder. The circumstances of this incident which the plaintiff alleges are fully contested by the defendants.
- **8<sup>th</sup> August, 1988** – The plaintiff attended Dr. Patrick McKeon, a consultant psychiatrist, for treatment of his PTSD. Over the course of the following 30 years or so, the plaintiff periodically attended Dr. McKeon. The history of Dr. McKeon's involvement with the plaintiff is set out in a very detailed and lengthy psychiatric report from Dr. McKeon dated the 27<sup>th</sup> October, 2020.

- **17<sup>th</sup> April, 1989** – The Prison Service Acting Chief Medical Officer, Dr. John A. Geoghegan, expressed the view that the plaintiff's absences were not caused by any ongoing health problem.
- **23<sup>rd</sup> May, 1989** – The plaintiff was dismissed from the Prison Service on the basis of alleged absenteeism following six written warnings in that regard. In the affidavit grounding this application, sworn by Karen Duggan, Deputy Assistant Chief State Solicitor, she avers that during the course of the plaintiff's approximately nine years' employment as a Prison Officer, he was absent for 782 days. A catalogue of these alleged absences is given in the defendants' defence from which it appears that the overwhelming majority of these absences occurred before the shooting incident.
- **22<sup>nd</sup> October, 1991** – The plenary summons herein issued. It is not known when the plaintiff first consulted his solicitors. The summons seeks declarations that the plaintiff's purported dismissal was invalid and that he is entitled to certain arrears of wages. Damages are also claimed for personal injuries arising out of the shooting incident which appears to be incorrectly dated the 8<sup>th</sup> September, 1988. Further, a declaration is sought that section 5 of the Civil Service Regulations Act, 1956 is unconstitutional in that it purports to permit the Government to dispense with the services of an established officer without the benefit of severance pay or compensation and fails to provide for compensation for officers injured in the course of their employment who are thereby rendered incapable of work.
- **8<sup>th</sup> November, 1991** – The defendants entered an appearance.
- **Unspecified date in 1992** – The statement of claim was delivered which makes no mention of the constitutional claims.
- **31<sup>st</sup> May, 1993** – The defendants delivered their defence putting all matters in issue.

- **19<sup>th</sup> August, 1993** – The defendants served a notice for particulars which has never been replied to. This was the last step in the proceedings for a lengthy period.
- In the following years, the plaintiff continued to attend Dr. McKeon intermittently. He had advised Dr. McKeon that in January 1991, he started a security company and in 1993–1994 he established a separate alarm installation firm. Post the service of the defendants’ notice for particulars, the plaintiff attended Dr. McKeon in October 1994 and March and June 1995. In February 1997, the plaintiff advised Dr. McKeon that his girlfriend was now running the security company. He attended again in 1999 and 2000 and thereafter there was a gap of some five years when he re-attended in 2005. He attended again in 2007 and 2008. Thereafter, there appears to have been a ten year gap before the plaintiff had an intensive engagement with Dr. McKeon in the course of nine consultations between June 2018 and February 2019.
- The former General Secretary and President of the Prison Officer’s Association, P.J. McEvoy, swore an affidavit on the 19<sup>th</sup> October, 2020 in which he avers that from 2011, he became significantly re-engaged in the plaintiff’s case. In particular, Mr. McEvoy says that he wrote all letters sent by the plaintiff to a variety of politicians and to the Taoiseach. The plaintiff also appears to have had interactions with Mr. Niall Collins TD in September and November 2015 who raised a question in the Dáil with the Minister for Justice.
- The papers disclose that Mr. Martin Ferris TD became involved on behalf of the plaintiff in 2015. In a supplemental affidavit, Ms. Duggan also refers to an article in the Sunday Times on the 23<sup>rd</sup> October, 2016 under the headline “IRA Jail Chief Ferris backs PTSD Warder”.

- **August 2017** – The plaintiff’s current solicitor, Mr. Kevin Winters, avers that he was first instructed on this date. In that regard, Dr. McKeon notes in his report that:

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“[The plaintiff] said his family arranged for him to see another solicitor in Belfast, Kevin Winters, as he and his family had concluded that the solicitors who acted for him were reluctant to take on the Department of Justice.”

The plaintiff further advised Dr. McKeon that Mr. McEvoy was now liaising on the plaintiff’s behalf with Mr. Winters.

- **19<sup>th</sup> September, 2019** – A notice of intention to proceed was served by Mr. Winters on the plaintiff’s behalf. This was over two years after Mr. Winters was instructed and 26 years after the last step in the proceedings.
- **27<sup>th</sup> February, 2020** – The plaintiff sought discovery from the defendants.
- **21<sup>st</sup> March, 2020** – The defendants brought a motion seeking to dismiss the plaintiff’s claim for delay, which is the subject of this appeal.

4. The relevant averments in the various affidavits filed in this motion are dealt with comprehensively in the judgment of the High Court and I propose to refer briefly to some of the relevant points. Although I have referred to Dr. McKeon’s report in a little detail, it should be borne in mind that this report post-dated the defendants’ grounding affidavits and indeed the fixing of the hearing of this matter. It was introduced very much at the eleventh hour and was objected to by the defendants. Accordingly, the trial judge decided to deal with it on a *de bene esse* basis in the course of his judgment.

5. In her first affidavit, Ms. Duggan observes that the plaintiff did not appear to have any proper medical report concerning his alleged psychological injuries arising from the shooting incident and it would not be possible at this remove for either the plaintiff or critically the

defendants to obtain expert opinion of a psychiatrist that would be of any meaningful assistance.

6. She noted that the plaintiff had sought discovery while declining to give replies to particulars. She says that the obstacles to a fair trial are genuinely insurmountable and this is in fact entirely attributable to the plaintiff's own conduct, although she appears to inadvertently refer to the defendants' conduct. She notes that Mr. Mulvihill was at a loss in 1986 to explain the plaintiff's symptoms that were purportedly keeping him out of work. She refers to the conclusion of Dr. Geoghegan, who is now deceased. She said that it would be absurd to expect Mr. Mulvihill now to give evidence on the condition of a patient he examined then 34 years ago. She points to other matters of prejudice arising from the passage of time.

7. The first replying affidavit on behalf of the plaintiff was sworn by Mr. Winters who says that when he was first instructed, the plaintiff was unsure about the status of his case instituted some 30 years previously. He says that the plaintiff suffered from severe PTSD for over a quarter of a century and it is only in more recent years that he has been in a position to re-engage in his action. He also avers that there is no prejudice to the defendants in defending the case now as a result of the delay, despite what Ms. Duggan said in the affidavit under reply.

8. The plaintiff himself also swore a replying affidavit. He says he was never consulted by his solicitors about the notice for particulars and thereafter, transferred his instructions to another firm of solicitors and subsequently a third firm. The solicitor representing him was struck off and he says that at that stage he was suffering from severe depression and his PTSD had intensified. He says he was suicidal and was not in any fit state to give

instructions to any firm of solicitors. He does not say when this occurred. Importantly however, he avers that Dr. McKeon will be able to confirm same with his medical records.

**9.** I pause here to note that despite the length of Dr. McKeon's report in October 2020, at no time does he suggest or confirm that the plaintiff was not in a fit state to give instructions to a solicitor.

**10.** The plaintiff goes on to say that it was not until a much later stage, in or about August 2017, that he felt he was in a position to re-engage with his claim. He does not refer to his engagement with a range of other parties in the previous years including Mr. McEvoy, various politicians and journalists. He again avers that due to a serious mental health deficit, he was unable to advance his case in the manner that would normally be expected of a plaintiff and again, I note that this is unsupported by Dr. McKeon.

**11.** An affidavit of Kieran Reilly, Assistant Governor of Portlaoise Prison, discloses that Mr. Reilly contacted the former Governor during the plaintiff's employment, Michael Horan, who indicated that he would be unable to assist by reason of lack of recollection due to the passage of time. In a further affidavit, Ms. Duggan avers that she interviewed Army Gunner Thomas Spillane, who was responsible for firing a shot during the incident in question. Gunner Spillane indicated that he does have a clear recollection of the initial part of the escape but did not see the apprehension of the escapee.

**12.** In his detailed judgment, the trial judge set out the background facts and relevant extracts from the pleadings and affidavits. He summarised the arguments advanced by the parties. He turned then to an analysis of those arguments.

**13.** He noted that counsel for the plaintiff had submitted that the effect of the introduction of the Personal Injuries Assessment Board Act, 2003 meant that the plaintiff required a PIAB

authorisation in order to proceed with his claim, presumably at least insofar as the personal injuries aspect is concerned. Counsel appears to have extrapolated from this that the introduction of the Act had some form of suspensive effect on the proceedings which deprived the court of jurisdiction and therefore, the entitlement of the defendant to seek to have the claim dismissed.

**14.** The Act came into force on the 1<sup>st</sup> June, 2004 and counsel submitted that this meant that the case was stayed from that date pending the issuing of an authorisation. This submission was dealt with summarily by the judge who noted “bluntly” that s. 6(1) of the Act expressly provides that “nothing in this Act affects proceedings brought before the commencement of this section”. Accordingly, the proceedings are not a “relevant claim” within the meaning of s. 9 and 10 of the Act and the question of issuing an authorisation does not arise. I am entirely in agreement with the views of the trial judge on this point.

**15.** He then turned to a consideration of the delay jurisprudence and in particular the seminal judgment of the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459. The principles set out in that judgment are by now so well known that it is unnecessary to quote them verbatim or in any detail. Suffice to say that the onus lies upon a defendant seeking to dismiss a claim on the basis of delay, and delay in this sense refers to culpable delay, to establish that the delay is both inordinate and inexcusable. If both of those things are established, then the court must go on to consider the balance of justice and in that context, evaluate questions of prejudice to both parties.

**16.** The judge held that by any standard, the delay in this case was clearly inordinate. He also found it to be inexcusable and importantly, at para. 55 of his judgment, the judge noted:

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“However, there is nothing in the report [of Dr. McKeon] which suggests that the plaintiff was unable to instruct a solicitor to progress his litigation, or having done so, to ensure that he received effective representation and that the litigation progressed without undue delay.”

**17.** On the balance of justice issue, the judge said that two matters fell to be considered first whether the defendants had contributed to the delay and secondly the degree of prejudice caused to the defendants by that delay. With regard to the averment in the plaintiff’s replying affidavits to the effect that it was open to the defendants to seek to dismiss the case and they failed to do so at an earlier stage, the judge noted the observations of Irvine J., speaking for this court in *Millerick v Minister for Finance* [2016] IECA 206, to the effect that it is the duty of the plaintiff to progress his or her case and not the defendant. In effect, the court considered that a defendant is perfectly entitled to remain inactive, provided he does not behave in such a way as to represent, expressly or by implication, to the plaintiff that he is acquiescing in the delay.

**18.** The trial judge noted the considerable prejudice that the delay had caused to the defendants which he identifies as including the inevitable difficulty of reliably recalling events of over three decades earlier and the fact that it would now be virtually impossible for the defendants to have any meaningful medical assessment of the plaintiff’s complaints carried out. Two witnesses, Dr. Geoghegan and Mr. Mulvihill, both critical to the absenteeism component of the case, were effectively unavailable and similarly, the former prison governor.

**19.** Accordingly, he dismissed the claim.

**20.** Perhaps somewhat surprisingly however, that did not prove to be the end of the matter. The court invited the parties to make submissions in writing on the question of costs. A

submission was duly made by the plaintiff but contrary to the court's directions, was not confined to the issue of costs. Instead, the plaintiff's legal team submitted that the defendants had failed to draw to the court's attention the decision of the Supreme Court in *Mangan v Dockeray* [2020] IESC 67, a judgment delivered on the 4<sup>th</sup> November, 2020, two days before the commencement of the High Court hearing.

**21.** It was submitted that the failure to put this judgment before the court meant that the court's decision had been arrived at in error and without jurisdiction. It was further submitted that the plaintiff should be granted liberty to apply to the court to vary its judgment, in effect by reversing it, and to submit unspecified new evidence. The judge concluded that none of these orders was appropriate and the correct course for the plaintiff to pursue was to appeal. Costs were awarded to the defendants.

**22.** In his notice of appeal herein, the plaintiff essentially re-agitates the same arguments, suggesting that the High Court misapplied the law in relation to delay by, in particular, failing to have regard to *Mangan v Dockeray*. The PIAB issue is again raised. There is a complaint concerning the judge's dismissal of the constitutional challenge, which seems curious given that this was abandoned in the statement of claim.

**23.** Dealing first with the *Mangan v Dockeray* question, I agree entirely with the views of the trial judge in this regard. Whilst he observed that it was unfortunate that it was not drawn to his attention, having read it, he remained of the view that it would not have changed anything in terms of the outcome. I also have some difficulty in understanding how the plaintiff can criticise the defendants for failing to bring this authority to the court's attention when precisely the same criticism can be made of the plaintiff, and indeed with more force in circumstances where the plaintiff claims it favours his case.

24. That is not to say of course that it prevents the plaintiff from relying on it in this appeal but only insofar as that jurisprudence operates to modify the pre-existing legal position. That arises not uncommonly in circumstances where between the hearing in the High Court and the Court of Appeal, an authoritative judgment is delivered which has a substantial bearing on the parameters of the issue under consideration. In our adversarial system, it is the duty of the parties to draw all relevant authorities to the court's attention but to suggest that a failure to do so somehow deprives the court of jurisdiction is an unstateable proposition. That argument is fundamentally misconceived and as the trial judge said, and I agree with him, the remedy is to appeal.

25. At this juncture, it is perhaps convenient to examine *Mangan v Dockeray*. It was, on its facts, a very different case from the present one. The plaintiff was born on the 11<sup>th</sup> January, 1995 with severe cerebral palsy as a result of an hypoxic brain injury suffered during the course of, or shortly after, his birth. As a person of unsound mind not so found, the Statute of Limitations could not operate against him. A plenary summons was issued over 13 years later on the 17<sup>th</sup> June, 2008.

26. However, at the time it was issued, there was only available to the plaintiff's solicitor an expert obstetric opinion and that expert advised that before liability could be established, it would be essential to have the opinion of a paediatric neurologist. The plaintiff's solicitor, having issued the summons but not served it, spent the following five years seeking such an opinion and approached some eleven different experts without success before finally obtaining one.

27. Senior counsel had advised that this was essential and that the summons could not be served until such opinion had been obtained for well-known reasons of professional propriety with which everyone is by now familiar. As soon as the solicitor obtained a

supportive report, an application was made to the High Court to renew the summons which was strongly opposed but ultimately granted.

**28.** The proceedings in their original form had named only the obstetrician who had delivered the plaintiff as defendant, but following the service of those proceedings on the obstetrician, he applied to join the paediatrician and hospital concerned as third parties on the basis of evidence available to him of their negligence. This evidence was not available to the plaintiff who nonetheless applied to join the third parties as co-defendants.

**29.** This was shortly followed by a motion by the new defendants to dismiss the plaintiff's claim against them on the basis that no cause of action was pleaded against the second and third defendants and as the plaintiff was in possession of no evidence against them, his claim was bound to fail. The plaintiff on the other hand submitted that it would be unjust to dismiss his claim in circumstances where the defendant he had sued was in possession of evidence which that defendant proposed to rely on to establish negligence on the part of the second and third defendants.

**30.** It will immediately be appreciated that the factual matrix of this case was very far removed from the one with which we are here concerned. The defendants' application was acceded to by the High Court which dismissed the claim against the second and third defendants. The plaintiff appealed unsuccessfully to the Court of Appeal and the Supreme Court gave leave to appeal on specified grounds identified at para. 30 of the judgment of the court delivered by McKechnie J.

**31.** That judgment considered in detail the provisions of O. 19, r. 28 and the jurisprudence concerning the dismissal of claims that are bound to fail or are otherwise an abuse of process. This was the primary focus of the judgment and questions one and two of the three questions framed by the Supreme Court. The third question, however, did concern whether the

plaintiff had been guilty of inordinate and inexcusable delay in prosecuting his claim against the second and third defendants and that aspect of the claim is relevant here.

**32.** The delay jurisprudence is very helpfully summarised in the judgment of McKechnie J. at paras. 104 to 110. Of importance to this appeal, he recognised that the earlier judgment of the Supreme Court in *Primor* remains what was described as the *locus classicus* and he summarised, at para. 105, the main points as being: -

“... ”

- The delay complained of must be both inordinate and inexcusable: it is for the moving party to so prove.
- Even where such is established, the balance of justice test must be applied: does it favour the continuation or termination of the proceedings?
- In considering the latter, there may be several diverse factors at play, but in essence all lead to an assessment of whether it is unfair to allow the action to proceed or is unjust to strike the action out.
- The individual circumstances of every case and the conduct of each party feed into this assessment ...”

**33.** He referred separately to the jurisdiction arising under the well-known judgment in *O’Domhnaill v Merrick* [1984] IR 151 which can be shortly summarised as relating to cases where the delay is such that a fair trial can no longer be had, even where no blame attaches to the plaintiff for the delay involved. In the final two paragraphs of this section of the judgment, McKechnie J. said: -

“109. In addition, it is worth repeating a few points which have consistently been made in the case law: -

- (i) The ultimate outcome of a delay/prejudice issue must invariably depend on the particular circumstances of any given situation: 'Every case is different. Factual resemblances are only of limited value'. (*McBrearty* at pg. 36)
- (ii) In cases where the court is essentially concerned with delay post the commencement of proceedings, it will view the obligation of expedition much more strictly where there has been a considerable delay pre-commencement. (*McBrearty* at pg. 25)
- (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) This latter point may be of very considerable significance, particularly in medical negligence cases as most treating doctors and certainly all consulted experts, will rely on such information for their evidence. (*McBrearty* at pg. 48)

110. Finally, the following passage in the judgment of Cross J. in *Calvert v Stollznow* [1980] 2 N.S.W.L.R. 749, which was approved by Murphy J. in *Hogan v Jones* [1994] 1 ILRM 512, should be noted:

'Considerations of justice transcend all other considerations in these matters. Of course justice is best done if an action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice.'

As in *McBrearty* (pg. 19), this may be relevant in that whilst the passage of time has been considerable, there is no dispute but that the relevant medical records, notes and files are available: Ms. Taylor has so averred on more than one occasion.”

**34.** The Supreme Court went on to consider that in all the circumstances of the case, justice required that the plaintiff’s claim be allowed to proceed and accordingly the defendants’ applications were dismissed. An important factor in the court’s judgment was that the issues of liability and causation would fall to be determined by reference to medical records, as distinct from the recollection of witnesses. It is a feature of most clinical negligence cases that they are largely dependant on such medical records and, while not quite in the category of “documents” cases, nonetheless prejudice from delay is often ameliorated to a significant degree by the availability of contemporaneous records.

**35.** Far from being a change in the law and a new development in our jurisprudence, *Mangan* firmly approves *Primor* as representing “the most generalised statement of the law on this topic” and it remains, as McKechnie J. said, the *locus classicus*- see para. 105. Contrary to what the plaintiff contends, therefore, this has brought about no change in the law in my view and as the High Court judge found, it provides no basis whatever for arriving at a different conclusion.

**36.** As the trial judge found, it cannot be gainsaid in this case that a delay of 26 years between the last step in the proceedings and the attempted resuscitation of the action is other than inordinate. The focus then shifts to whether it is excusable. The sole and only excuse advanced by the plaintiff is that his PTSD was such as to prevent him from being able to instruct his solicitors over such a lengthy period. That this is palpably incorrect is manifest from many of the matters to which I have already referred.

**37.** First and foremost, despite the fact that Dr. McKeon has seen the plaintiff on numerous occasions over some 30 years, at no time did Dr. McKeon ever suggest that the plaintiff's condition was such as to prevent him from instructing his solicitor. To put it at its highest from the plaintiff's point of view, it is perhaps possible that, for periods during the 26 years, his condition was such as to prevent him proceeding. That is however, no more than unsubstantiated speculation because even if it were so, it is clear from Dr. McKeon's report that there were many periods during which the plaintiff did not appear to be suffering to any significant extent from the effects of PTSD, although he may have been deeply affected by other matters, extraneous to these proceedings, to which Dr. McKeon refers.

**38.** However, an analysis of the dates contained in Dr. McKeon's report shows that between the date of the shooting incident on the 18<sup>th</sup> May, 1988 and the notice for particulars on the 19<sup>th</sup> August, 1993, Dr. McKeon saw the plaintiff on more than forty occasions up to and including the 12<sup>th</sup> October, 1992. It seems evident that throughout that period, the plaintiff was in fact in a position to instruct his solicitors, as the dates of the various procedural steps show. Furthermore, Mr. McEvoy's evidence demonstrates that from at least 2011, he was actively involved on the plaintiff's behalf in lobbying politicians, speaking to journalists and latterly, instructing Mr. Winters.

**39.** All of this evidence entirely contradicts the assertion by the plaintiff, rather vaguely made, that his mental state was such that he could not progress the matter for some twenty-four years, up until the time he instructed Mr. Winters in August 2017. Given the extraordinary passage of time that had occurred up to the instruction of Mr. Winters, it is somewhat surprising that Mr. Winters waited a further two years before entering an appearance and serving a notice of intention to proceed. One would have expected that he would have acted with much greater alacrity in dealing with this claim. Instead, he appears



to have focused almost entirely on suing the plaintiff's former solicitors which can hardly be taken as an excusing factor in progressing this litigation.

**40.** I am accordingly satisfied that the trial judge was perfectly correct to reach the conclusion that no satisfactory or credible explanation was offered by the plaintiff for this inordinate delay which must therefore be regarded as inexcusable.

**41.** Turning then to the balance of justice, the authorities make clear that where there is blameworthy delay of the order that occurred in this case, relatively moderate prejudice on the part of a defendant will suffice to dismiss the claim. I agree with the conclusions of the trial judge that there is considerably more than moderate prejudice arising in this case. These have been identified already. A central feature of the defendants' defence to the claim that the plaintiff was unlawfully dismissed is the question of the plaintiff's absenteeism which the defendants say was a total justification for his dismissal after six written warnings. That absenteeism commenced in 1980 shortly after the plaintiff was employed, now over forty years ago.

**42.** I have already noted that the vast majority of the plaintiff's absent days predate the shooting incident and are accordingly unrelated to it. There is clearly a serious factual dispute concerning the reasons for the absenteeism which, if the case proceeds, will have to be dealt with by witnesses for the defence who cannot reasonably be expected to give evidence that could be regarded as reliable after such an interval. One of the reasons claimed by the plaintiff for certainly some of his absent days appears to relate to the injury he suffered in 1983 which, it is clear, Mr. Mulvihill could not explain in 1986 and could not reasonably be expected to recollect now. His evidence and that of Dr. Geoghegan are clearly of particular significance therefore in the context of the wrongful dismissal claim.

**43.** Another matter of potentially significant prejudice to the defendants is that, as averred by Ms. Duggan, no meaningful medical examination of the plaintiff's psychiatric complaints can now be conducted by the defendants. It would, quite simply, be impossible for any psychiatrist now examining the plaintiff to determine whether whatever complaints he now manifests are the result of something that happened thirty four years ago. Every plaintiff pursuing a personal injuries claim has an obligation to submit to a medical examination by a doctor or doctors of the defendant's choosing to determine whether, and to what extent, his injuries are as he alleges them to be and are related to the event, or events, of which he complains. Absent that, the defendant is deprived of the possibility of mounting a defence on causation and quantum.

**44.** The situation is made even worse in this case by virtue of the fact that Dr. McKeon's report makes clear that there are other factors in the plaintiff's life that have a major bearing on his current psychiatric symptoms. Furthermore, a crucial component of the plaintiff's claim concerns the precise circumstances of the shooting incident which appear to be in considerable dispute. In this respect also, witnesses would be asked to bring to mind events of the distant past, with little realistic prospect that they could do so reliably.

**45.** All of these factors to my mind, when taken together, strongly support the trial judge's conclusion that the balance of justice weighs heavily in favour of the defence.

**46.** Finally, on the issue of the constitutionality of s. 5 of the Civil Service Regulations Act, 1956, here again I agree with the conclusion of the trial judge that this is simply not in the case, did not feature in the statement of claim and cannot be resurrected now as a factor that should mitigate against the dismissal of the action.

**47.** In oral submissions before the court this morning, counsel for the appellant argued that the High Court had no jurisdiction to dismiss a constitutional claim on the grounds of delay,

as this issue could be raised at any time. She relied on the judgment of the Supreme Court in *State (P. Woods) v Attorney General* [1969] IR 385 and in particular the dicta of Henchy J. at p. 399: -

“When a court is presented with the question of the constitutionality of a legislative enactment, it can do only one of two things; it can find it to be constitutional, or it can strike it down as unconstitutional.”

**48.** Counsel submitted that this meant that the court was obliged to determine the constitutional issue and thus, had no jurisdiction to dismiss the case on delay grounds. I think this is a misinterpretation of the words of Henchy J. They clearly have application to a situation where the court arrives at a point where it is necessary to decide the constitutionality question in order to decide the case. However, it is well settled that the court will not embark on the determination of such a question, save as a last resort, where the case can be determined on other grounds. Constitutional issues do not fall to be determined in a vacuum but in the context of the facts of the case in which they arise. Thus, certain facts must first be established by the plaintiff to bring him or herself within the ambit of the provision sought to be impugned.

**49.** In the present case, the circumstances surrounding the dismissal of the plaintiff are fully in issue and would fall to be determined before any consideration of the constitutionality of the statute could arise. Those are the very facts which the defendants say they are now unable to contest by reason of the delay of the plaintiff in pursuing his case.

**50.** I therefore would dismiss this appeal.

**51.** Binchy J: I have listened carefully to the judgment of Noonan J. just delivered and I am in full agreement with it also.