

THE HIGH COURT

[2021] IEHC 44

[Record no. 1991/14045 P]

BETWEEN

SEAN O'BRIEN

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 22nd day of January, 2021

Introduction

1. By notice of motion issued on 12th March, 2020, the defendants applied to this Court for "an order dismissing the Plaintiff's claim for inordinate and inexcusable delay pursuant to the inherent jurisdiction of the Court and/or pursuant to Order 122, rule 11 of the Rules of the Superior Courts". The plenary summons in this matter issued on 22nd October, 1991. The proceedings are therefore almost 30 years old.
2. Counsel for the defendants was Conor O'Higgins BL, and counsel for the plaintiff was Eugenie Houston BL. In the hearing before me, which took place on 6th November, 2020, there was no material disagreement between counsel as to the principles which govern such an application. As set out in the classic statement of the law by Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459 at 475, the court, in exercising its inherent jurisdiction to dismiss a case for want of prosecution when the interests of justice require it to do so, must be satisfied that the delay was both inordinate and inexcusable. In the event that it is so satisfied, the court must then exercise a judgment on whether, on consideration of all relevant circumstances, the balance of justice requires the proceedings to be dismissed.
3. Counsel for the defendants relies also on the principle in *O Domhnaill v. Merrick* [1984] IR 151, in which it was established that a court might dismiss an action if there was a real risk of an unfair trial or an unjust result. In reality, this is a factor taken into account in assessing the "balance of justice" under the *Primor* test, and it is clear from a number of decisions of the Superior Courts that, once inordinate and inexcusable delay has been established, a relatively modest level of prejudice may suffice to tip the balance of justice in favour of dismissal.
4. As the consideration of whether the delay is inordinate and inexcusable, and whether the balance of justice favours dismissal, is dependent on the facts of the matter, it is necessary to set out the background to the application in some detail.

The proceedings

5. The main substantive reliefs sought in the general endorsement of claim on the plenary summons are as follows: -
 - "1. A declaration that the purported dismissal of the Plaintiff by the Minister for Justice from the Prison Service on or about the 2nd of June, 1989 was and is invalid and void.

4. *A declaration that the Plaintiff was at all material times herein, and is still employed by the defendants as an established Prison Officer.*
 5. *In addition and in the alternative the Plaintiff also claims damages for severe personal injury, loss and damage sustained by him as a result of negligence, breach of duty and breach of statutory duty of all the Defendants' respective servants or agents in or about a shooting incident in Portlaoise Prison on or about the 8th day of September, 1988.*
 6. *A declaration 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 that it further makes no provisions for any or any adequate compensation to established officers (including the Plaintiff) injured in the course of their employment and who are thereby rendered incapable of work or who may be severely impaired in their working capacity and who in consequence of such injury are rendered liable to summary dismissal on the order of the Government."*
6. The defendants delivered an appearance on 8th November, 1991. A statement of claim was delivered on behalf of the plaintiff at some time in 1992 – the exact date is not on the copy of the statement of claim made available to the court. It is pleaded in the statement of claim that the plaintiff commenced service as a prison officer in or about the year of 1979 and continued in this position without interruption "until his wrongful dismissal on the 23rd May, 1989...".
7. The statement of claim further pleads as follows: -
- "6. *On the 8th day of September, 1988 while the Plaintiff was engaged in his duties as a said prison officer at Portlaoise jail a high security prisoner with political status escaped from the custody of prisoner officers. The prisoner was successfully recaptured by the Plaintiff but during the incident the Plaintiff was negligently subjected to gunfire in his immediate vicinity from Army personnel who were endeavouring to prevent the escape of the said prisoner.*
 7. *As a result of the negligence of the defendants and each of them in the course of the aforesaid shooting incident, the Plaintiff suffered severe stress, trauma and psychological disturbance.*
 - 8a. *The Plaintiff continued to work after the traumatic shooting incident but was not permitted by the prison authorities to enter the prison security block where he formerly worked and he was obliged to carry out duties outside his normal range.*
 - b. *Furthermore, the Defendants and each of them, their servants or agents wrongfully, negligently and in breach of their duty of confidentiality to the Plaintiff caused or permitted information relating to and enabling the Plaintiff's family to be identified to be released, or given or made available to*

high security political prisoners in said prison where the Plaintiff was employed.

9. *After the aforementioned shooting incident and following the release of the said information the Plaintiff received psychiatric and medical treatment which caused him to be absent from work.*
 10. *On about the 23rd day of May, 1989 the Plaintiff received a letter from the Governor of the said prison informing him that due to his absenteeism he was being dismissed from his position as prison officer.*
 11. *The said purported dismissal was wrongful, unlawful and in breach of the terms and conditions of employment under which he was engaged."*
8. The statement of claim goes on to plead that the Plaintiff suffered loss and damage. The reliefs sought on the statement of claim are as follows: -
- "(1) A declaration that the purported dismissal of the Plaintiff from the Prison Service on or about the 23rd day of May, 1989 was and is invalid, void and unlawful.*
 - (2) A declaration that the Plaintiff was entitled to be paid or repaid all sums, loss of wages, overtime and retirement benefit.*
 - (3) An order for the payment to the Plaintiff of such sum when calculated.*
 - (4) Damages for negligence and breach of duty of care including breach of confidentiality together with damages for breach of contract of employment.*
 - (5) Further and other reliefs.*
 - (6) Costs."*
9. It is notable that the relief sought in relation to the alleged unconstitutional nature of s.5 of the Civil Service Regulations Act, 1956 in the plenary summons is not pursued in the statement of claim.
10. A defence was delivered on 31st May, 1993 on behalf of the defendants. The defence comprised denials of the matters set out in the statement of claim, and in particular denied at para. 2 that *"...on the 8th September, 1988...the Plaintiff successfully recaptured a high security prisoner who had escaped from the custody of prisoner officers in Portlaoise Prison as alleged or at all"*. All of the circumstances in relation to the alleged escape and recapture were denied, as was the allegation that the plaintiff had suffered injuries, stress, trauma or psychological disturbance as a result of the alleged incident.
11. In relation to the circumstances of his employment, the defendants plead as follows: -
- "1. The Defendants deny that the Plaintiff commenced service as a prison officer in or about the year of 1979 as alleged. The Plaintiff was appointed as a probationer to*

the Prison Service on 16th February, 1980 and following an extension of his probationary period due to the level of his sick leave the Plaintiff's appointment to the Prison Service took place on the 25th November, 1982.

8. *The Plaintiff was dismissed from the Prison Service on the 23rd May, 1989.*
11. *The Applicant was informed by letter dated 13th April, 1988 that the Minister for Justice intended recommending the dismissal of the Applicant to the government because of his absenteeism and was given the opportunity of furnishing any explanations or making any representations and following consideration of same it was decided to proceed with the recommendation of dismissal to the Government and the Plaintiff was informed of this by letter dated 14th November of 1988 following which the Plaintiff was dismissed from the Prison Service as aforesaid.*
12. *The Plaintiff had received a total of six written warnings regarding his absenteeism and his unsatisfactory sick leave record between April, 1983 and July of 1986 and was informed on at least three occasions that his job would be at risk unless his record improved and ultimately had been the subject of two previous recommendations for his dismissal in September of 1986 and May of 1987 (which following the receipt of representations by and on behalf of the Plaintiff were not then proceeded with) following which the Plaintiff was given a further final warning that if his absenteeism resumed that the procedure for his dismissal would be set in train. The Applicant was dismissed from the Prison Service on the 22nd May of 1989 as aforesaid following consideration of his record of service and in particular his absenteeism over the period of his service and the Defendants deny that his dismissal was invalid, void or unlawful as alleged or at all.*
14. *The Plaintiff's record or [sic] service and in particular his absences from service in the years of his employment were as follows:-*

| <i>YEAR</i> | <i>NUMBER OF ABSENCES</i> | <i>TOTAL DAYS ABSENT FROM SERVICE</i> |
|-------------|---------------------------|---------------------------------------|
| <i>1980</i> | <i>9</i> | <i>23</i> |
| <i>1981</i> | <i>13</i> | <i>47</i> |
| <i>1982</i> | <i>9</i> | <i>122</i> |
| <i>1983</i> | <i>14</i> | <i>187</i> |
| <i>1984</i> | <i>9</i> | <i>100</i> |
| <i>1985</i> | <i>16</i> | <i>125</i> |
| <i>1986</i> | <i>11</i> | <i>100</i> |

| | | |
|----------------------|----|----|
| 1987 | 8 | 24 |
| 1988 | 5 | 23 |
| 1989 (up to 23/5/89) | 10 | 31 |

The said decision to dismiss the Plaintiff herein was taken on reasonable grounds and subsequent to the Plaintiff having been given numerous oral and written warnings including final warnings. The same is not invalid or unlawful or unreasonable."

12. It is notable that the statement of claim does not pursue the issue raised in the general endorsement of claim on the plenary summons as to the constitutionality of s.5 of the Civil Service Regulations Act, 1956, and seeks no relief in that regard. Paragraph 15 of the defence contains a denial that this section is "unconstitutional as alleged or at all". A notice for particulars was raised by the defendants on August 19th 1993 on the matters set out in the statement of claim. It is accepted that the plaintiff did not reply to this notice, and the next event in the proceedings appears to have been service of a notice of change of solicitor by the plaintiff's present solicitors on 19th September, 2019, and a notice of intention to proceed served by those solicitors on the same date.

The affidavits

13. The grounding affidavit in the present application was sworn by Karen Duggan, Deputy Assistant Chief State Solicitor. Ms. Duggan states that the plaintiff's solicitors wrote to the defendants on 27th February, 2020 seeking discovery of documents relating to the plaintiff's dismissal, the incident of 8th September, 1988 and the plaintiff's absences. She avers at para. 15 of her affidavit that "no explanation whatever has been given by the plaintiff as to the reasons for his delay".
14. Ms. Duggan goes on to complain that the plaintiff's delay "has the effect of making it vastly more difficult to defend the claim, the facts of which date from as far back as 1980 when the Defendant began his employment as a prison guard" [para. 16]. It is suggested that "...a core issue between the parties would be the exact circumstances of the attempted escape and whether the Plaintiff was actually subjected to gunfire in his vicinity, as alleged...all of the witnesses to this event are no longer in the employment of the Irish Prison Service or the Army and it is not remotely credible that they will be in a position to provide accurate information concerning the event so many years later" [para. 17].
15. The defendants also take issue with the fact that the plaintiff "does not appear to have any proper medical report on the matter of his alleged psychological injuries arising from this shooting incident...", and Ms. Duggan avers that "the only item that the Plaintiff has provided in support of this part of his claim... [is] a letter from Patrick McKeon of St. Patrick's Hospital of 1 June 1989...". It appears that the defendants caused an

examination of the plaintiff to be conducted on or about 16th January, 1986 by Mr. Nial Mulvihill, Consultant Orthopaedic Surgeon. On that occasion, Mr. Mulvihill *concluded "that he was at a loss to explain symptoms of pain described by the Plaintiff that were purportedly keeping him out of work"*. Ms. Duggan comments that *"it would be absurd to expect Mr. Mulvihill now to give evidence on the condition of a patient who he examined almost 34 years ago"*.

16. The position of the defendants is perhaps best summarised by the averment at para. 19:
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"19. I respectfully say that the very least that could have been expected of the Plaintiff was that he would reignite his proceedings only after having attempted to get the matter ready for trial insofar as possible. Instead, he seeks to litigate a claim for mental injuries that does not seem to be grounded on any adequate expert medical evidence. He asks for discovery but declines to give replies to particulars. The obstacles to a fair trial are genuinely insurmountable, which is a fact entirely attributable to the Defendant's own conduct."

17. Mr. Kevin Winters, the solicitor acting on behalf of the plaintiff, swore a replying affidavit of 16th September, 2020. He avers to having been instructed by the plaintiff for the first time *"in or about August of 2017"*. He states that *"the Plaintiff was unsure about the precise status of the case he had initiated almost 30 years previously. He was unable to give a precise narrative on the timeline with regards to his engagement with previous solicitors."*
18. Mr. Winters sets out the steps that he took to establish that the proceedings *"had not in fact terminated but were still marked as live and ongoing"*. Mr. Winters avers that he was constrained to obtain a copy the papers from the High Court. He refers to the steps he took to progress the proceedings after such a long delay, corresponding with the defendants in this regard. He refers to issuing a plenary summons against a firm of solicitors who had previously represented the plaintiff in respect of that firm's alleged negligence. He also refers to *"having engaged on behalf of the plaintiff with Professor Patrick McKeon in order to obtain a PTSD report. At the time of swearing hereof I still await receipt of a formal report from Professor McKeon"*.
19. The plaintiff also swore an affidavit on 1st July, 2020 in response to the defendant's application. The plaintiff disputes the circumstances in which he was dismissed and says that he *"was never provided with a dismissal notice as required"*. He alleges that, at the time he was dismissed, he was suffering from *"PTSD"* as a result of the shooting incident. He claims that he was never consulted in relation to the notice for particulars served by the defendants, and sets out certain difficulties he had with solicitors representing him at the time. He alleges that, at a time which he does not specify, he *"was suffering badly from severe depression. My PTSD had intensified. I was suicidal and I was not in any fit state to give instruction to any firm of solicitors. Professor McKeon will be able to confirm same with my medical records. It was not until a much later stage, in or about August 2017, that I felt I was in a position to reengage on my claim."*

20. The plaintiff contends that the defendants are not prejudiced in dealing with the case, as reports relating to the investigation of the shooting incident *"ought to be available as a matter of record"*. He accepts *"that for any Plaintiff to advance their cause of action...they must do so as quickly as possible. Given my serious mental health deficit I was unable to advance my case in a manner that would normally be ascribed and expected of a Plaintiff"*.
21. There is a further affidavit from Mr. Winters sworn on 16th September, 2020 which exhibits a medical report from Dr. Patrick McKeon of 25th June, 2020. This comprises a two-page letter, in which Dr. McKeon, described in the letter as a *"Consultant Psychiatrist"* states that the plaintiff attended him *"regularly from 1988 to 1994 and then annually until 1997. During that time he felt he never regained his confidence or composure, remained preoccupied with the shooting incident, was watchful, hyper-vigilant and unable to trust people. He avoided people, never went near Portlaoise Prison and was unable to return to work as a prison officer. He was dismissed from his post in an atypical manner in May 1988"*.
22. It appears that the plaintiff returned to see Dr. McKeon in April 1999, and attended him from April 1999 until January 2000. He had intermittent contact with Dr. McKeon in 2005 and from 2007 to 2008, but it is not suggested that he attended Dr. McKeon since then. Dr. McKeon concludes that *"my clinical impression is that Mr. O'Brien has prolonged and disabling post-traumatic stress disorder that has been evident since 1988"*.
23. There are further affidavits from Mr. Ciaran Reilly, Assistant Governor of Portlaoise Prison, of 2nd September, 2020, and Ms. Duggan, who swore a further affidavit on 15th September, 2020. Mr. Reilly states that he phoned Mr. Michael Horan, the Governor of Portlaoise Prison at the time of the plaintiff's dismissal in May 1989, on 21st June, 2020 in order to ascertain the reasons for the dismissal. Mr. Horan apparently *"declined to become involved in the matter, citing to me the passage of time and his lack of recollection of the reasons for the Plaintiff's dismissal"*.
24. Ms. Duggan states that the first named defendant arranged an interview with a witness to the shooting incident, former army gunner Thomas Spillane. She states that Mr. Spillane states that he was on duty at the time of the escape and fired a containing shot during its course. Mr. Spillane stated that he *"has a clear recollection of the initial part of the escape, although he did not see the apprehension of the escapee"*.
25. Ms. Duggan makes reference to questions raised in the Dáil in September and November 2015 of the Minister for Justice as to whether a review of the plaintiff's claim would occur. She also refers to an article of 23rd October, 2016 in the Sunday Times which describes written correspondence from Martin Ferris, an inmate of Portlaoise jail who claimed to have witnessed the shooting incident, and which correspondence was exhibited to the plaintiff's affidavit. The Sunday Times article also referred to the plaintiff having raised the issue of his dismissal with the former Taoiseach Enda Kenny and with the Prison Officer's Association. Ms. Duggan comments that *"...throughout the period when the Plaintiff was seeking redress for his dismissal through his elected representatives, the*

media and the Prison Officers' Association he made no effort to progress his proceedings which he had issued in 1991".

The defendant's submissions

26. At the outset of the defendant's submissions, I was informed that the plaintiff wished to adduce in evidence a psychiatric report on the plaintiff by Dr. Patrick McKeon of 27th October, 2020, and an affidavit by Mr. P.J. McEvoy, the former General Secretary and President of the Prison Officers' Association, sworn on 19th October, 2020. Dr. McKeon's report, which appears to have been completed some ten days prior to the hearing of the application and which was not exhibited to any affidavit, was a lengthy report which concluded with a clinical diagnosis and prognosis in relation to the plaintiff's mental state.
27. Counsel for the defence objected to the admission of this evidence, and also to the admission of Mr. McEvoy's affidavit, as the State had not had an opportunity to respond to same. I ruled that I would allow counsel to address the report and affidavit *de bene esse*, and consider the admissibility of the report and affidavit in the course of my judgment.
28. The defendants proffered lengthy written submissions which were addressed by counsel during the course of the hearing. Those submissions addressed the principles governing the present application, which as I have indicated are not significantly disputed between the parties. I will therefore briefly summarise the submissions of the defendants in relation to the application of the *Primor* principles to the facts of the case.
29. The defendant draws particular attention to the gap of twenty-six years and one month between the service of the notice for particulars by the defendants and the service of the notice of intention to proceed on 27th February, 2020. It is submitted that this delay is "*plainly inordinate*".
30. In relation to whether the delay is inexcusable, the defendants submit that they must show that "*no reasonable or credible explanation has been offered, or can reasonably be said to exist, which would account for, or excuse, the delay...*", per Quirke J. in *O'Connor v. John Player & Sons Limited* [2004] IEHC 99 at para. 66.
31. It was submitted that none of the symptoms to which Dr. McKeon refers in his letter of 25th June, 2020 prevented the plaintiff from issuing the proceedings and in particular the statement of claim in 1992. As the defendants comment at para. 29 of the written submissions: -

"The penultimate paragraph of Dr. McKeon's letter of 25th June, 2020 states that it is his 'clinical impression' that the Plaintiff has prolonged and disabling PTSD. He does not say whether it is his impression that this disability lasted for all of the period between 1993 and August 2019, or just part of it. Critically, Dr. McKeon does not say whether the disability which he suspects exists is of such severity that it made the Plaintiff incapable of prosecuting his action..."

32. In relation to the suggestion that the negligence of former solicitors representing the plaintiff could excuse delay, the defendants comment as follows: -

"It is submitted that the Plaintiff has in fact provided no credible evidence in opposing this application that his professional advisers are culpable for the extraordinary delay in this case. Moreover, it would seem from the content of the affidavits filed in support of the Plaintiff's case that he believes that having instructed a solicitor, he bears no responsibility himself to stay informed about his case, let alone ensuring its progression".

33. The defendants submit that they do not have any responsibility as defendants to progress the matter, particularly when it is dormant for so long. They also make the point that the plaintiff's pursuit of means of agitating his claims other than through the litigation suggests that he was equally capable of progressing his claim for damages, but chose not to do so.
34. It is submitted that there are no circumstances adduced by the plaintiff that would suggest that the inordinate delay is excusable.
35. As regards the balance of justice, the defendants rely on what they contend is the inherently prejudicial nature of the delay between 1993 and 2020, contending that the capacity of witnesses to recall details associated with the events will have been *"considerably impaired"*.
36. In relation to the psychological injury, the defendants submit that soldiers who participated in the apprehension of the escaping prisoner *"cannot be asked at this remove to give an account that is sufficiently reliable to avoid the risk of inaccuracy"* [para. 49 written submissions]. It is said that Mr. Spillane, the witness contacted by the defendants, will not be able to give cogent evidence, given that he did not witness the actual capture of the prisoner.
37. It was submitted that the defendants are clearly prejudiced in challenging the plaintiff's claim that he has suffered injury related to the shooting incident. The defendants made complaint – valid at the time of delivery of the written submissions – of the fact that the plaintiff had not obtained a medical report, and the defendants submitted that it would not be possible to obtain reliable expert evidence at this stage, as any expert appointed by the defendants would have to examine the plaintiff for the first time to determine whether the plaintiff has the alleged post-traumatic stress disorder, and whether it is attributable to the events alleged by the plaintiff.
38. As regards the dismissal, the defendants contend that they would have relied upon the evidence of Mr. Mulvihill, who examined the plaintiff in January 1986, and the evidence of Mr. John A. Geoghegan, the Acting Chief Medical Officer who, according to Ms. Duggan's affidavit, concluded in 1989 that the plaintiff's absences were not caused by any ongoing medical problem. It appears that Mr. Geoghegan passed away in 2005, and the court was informed that it had not proved possible to trace the whereabouts of Mr. Mulvihill,

even if he were in a position to give evidence in relation to matters which occurred 34 years previously. The governor of the prison at the time of the dismissal, Mr. Horan, has also indicated that he is unable to assist in relation to the matter.

39. In these circumstances, the defendants submit that they are irreparably prejudiced in the conduct of their defence by the plaintiff's delay, and that the balance of justice "*decisively*" favours dismissal of the proceedings.

The plaintiff's submission

40. The plaintiff also proffered through his counsel extensive written submissions. At the outset of her oral submissions, counsel for the plaintiff acknowledged that the constitutional issue had "*...not been ventilated*" in the statement of claim, but submitted that the pleadings were not closed, and that an amendment of the statement of claim was "*possible*". Both oral and written submissions by counsel for the plaintiff proceeded on the basis that the constitutional issue was part of the proceedings, despite the absence of any application before the court to amend the statement of claim. It was submitted that the constitutional issue was of general public importance "*that transcends the interests of any of the parties*", and did not depend on witness evidence, as it was "*entirely provable by documents*". It was suggested that the passage of time did not affect such an issue.
41. In relation to the personal injuries claim, counsel contended for a particular interpretation of the Personal Injuries Assessment Board Act 2003 ('PIAB Act' or 'the Act') to support her arguments. Counsel referred to s.10(b) of the PIAB Act, which prohibits the bringing of proceedings in respect of a relevant claim, defined in s.9 of that Act as "*a civil action to which this Act applies*", unless conditions specified in chapter 1 part 2 of that Act are satisfied.
42. As the term "*proceedings*" is defined in the PIAB Act as "*proceedings in court*", counsel contended that there was a preliminary issue to be addressed as to whether this Court has jurisdiction to entertain the defendants' motion in respect at least of the personal injuries element of the claim. It was submitted that it does not, and that the defendant was not entitled in the circumstances to initiate the present application. It was also suggested that, if the plaintiff were correct in suggesting that the High Court did not have jurisdiction to entertain the present application in respect of the personal injuries element of the claim, this Court "*should consider whether to entertain the within motion (a proceeding) in this hybrid action would be an error in jurisdiction at this particular juncture...*".
43. The plaintiff relied on the decision of O'Neill J. in *Sherry v. Primark Limited* [2010] IEHC 66. In that case, the court had to decide whether the joining of a defendant in existing proceedings predating the coming into force of the Act constituted the "*bringing of proceedings*", such that the proceedings were not properly before the court in that the plaintiff had failed to obtain an authorisation from PIAB under the Act in advance of bringing proceedings against that defendant.

44. In this regard, s.6(1) of the Act states that “...*nothing in this Act affects proceedings brought before the commencement of this section*”. However, O’Neill J. held that “*proceedings*”, for the purpose of the Act, included the joining of additional defendants on an application by the plaintiff.
45. Counsel for the plaintiff relies on this decision as supporting the proposition that:
- “The Defendant is prohibited from asking the Court to exercise its jurisdiction in respect of the personal injuries claim. It is submitted that the personal injuries claim effectively has been stayed effective 1 June 2004 by operation of law and that no further step at all can be taken in the absence of a PIAB authorisation”.*
- [Emphasis in Original]
46. It was submitted that the effect of s.10 of the PIAB Act is “...*to stop the clock and stay the within action with effect from 1 June 2004 and ongoing...*” [para. 19 written submissions, emphasis in original]. The plaintiff submits that “...*the next step is the apparent requirement now to obtain an authorisation from PIAB, the issuing of which it is submitted would have the effect of re-starting the clock on the within action*” [para. 24]. The plaintiff accordingly argues that the delay in the proceedings, properly regarded, is from the date of delivery of the notice for particulars (August 1993) to the date of the coming into force of the PIAB Act, i.e. 1st June, 2004.
47. As regards the constitutional elements of the *Primor* test, it was submitted that the assessment of whether the delay was inordinate and inexcusable must take account of the matters set out in the report of Dr. McKeon of 27th October, 2020. In relation to the balance of justice, the plaintiff urges that the constitutional issue, being of general public importance, transcends the interests of the parties and requires determination by the court.
48. The plaintiff also argues that the legality of the plaintiff’s dismissal can be litigated without prejudice to the defendants, as “*whether the plaintiff in fact was dismissed at all is a matter provable entirely by documents within the defendants’ possession and control...*” [para. 40, Emphasis in Original].

Analysis

49. As the plaintiff’s counsel laid considerable emphasis on the points made by her in relation to the PIAB Act, characterising it as a “*preliminary issue*” going to the court’s jurisdiction, I propose to deal with that issue firstly.
50. Section 6(1) of the PIAB Act provides bluntly that “*nothing in this Act affects proceedings brought before the commencement of this section*”. As the present proceedings pre-date the commencement of the Act, s.6(1) applies squarely to the present proceedings. These proceedings are not a “*relevant claim*” within the meaning of s.9 of the Act, and s.10(b) does not apply to them.
51. The decision of O’Neill J. in *Sherry* related to a fundamentally different situation. In that case, by seeking after the commencement of the Act to join a co-defendant to existing

proceedings, the plaintiff was deemed to be bringing proceedings in respect of a relevant claim against that defendant, and was thereby bound to satisfy the "*specified conditions*" to which reference is made in s.10(b). That decision has no relevance to the present case, which does not involve proceedings brought after the enactment of the PIAB Act or the commencement of s.6 of that Act.

52. In the present case, the defendants invoke the inherent jurisdiction of the court to dismiss proceedings in which the delay in prosecution is inordinate and inexcusable, and where the balance of justice requires it. There is nothing in the PIAB Act which interferes with the exercise of this jurisdiction in an appropriate case.
53. The first criterion in *Primor* is whether or not the applicable delay is inordinate. Whether that delay comprises "*...the period since the commencement of the proceedings up to the date of hearing of the motions to dismiss by the High Court judge...*" [per Hogan J. in *Tanner v. O'Donovan* [2015] IECA 24] as submitted by the defendants, or from the delivery of the notice for particulars by the defendants on 19th August, 1993 until the service of the notice of intention to proceed by the plaintiff on 19th September, 2019, or, as the plaintiff submits, from August 1993 until the date of coming into force of the PIAB Act on 1st June, 2004, the delay is clearly inordinate by any standard.
54. I am urged that the lengthy recitation of the plaintiff's undoubted difficulties and afflictions over the years as recited in Dr. McKeon's report excuses his inaction in progressing his proceedings. Although it has not been properly brought before the court, I am prepared to address the contents of that report in the context of this application. It is an extremely comprehensive report, which draws not only on Dr. McKeon's contacts with the plaintiff over a 30-year period, but also draws on a number of sources, including correspondence with various relatives, and other people including the plaintiff's solicitors, together with a number of documents which touch upon the history of the plaintiff.
55. Dr. McKeon sets out at length his observations in relation to the plaintiff's mental state. He concludes that the plaintiff "*has severe, disabling and chronic post-traumatic stress disorder*". However, there is nothing in the report 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. While what he perceived as a wrongful dismissal and negligent behaviour of the State's representatives in relation to the shooting incident may have caused him pain or trauma, whether as a result of post-traumatic stress disorder or otherwise, he initiated the proceedings in order to obtain redress and compensation. There is no explanation in Dr. McKeon's report as to why he did not follow this process through to its completion. Indeed, Mr. Winters avers in his affidavit that, when he was first instructed, the plaintiff "*...was unsure about the precise status of the case he had initiated almost 30 years previously. He was unable to give a precise narrative on the timeline with regards to his engagement with previous solicitors*" [para. 4].
56. An affidavit from Mr. P.J. McEvoy, former General Secretary and President of the Prison Officers' Association, sworn on 19th October, 2020, is also proffered in support of the

plaintiff. Mr. McEvoy states that *"from 2011 I became significantly re-engaged in Sean's case. I wrote all the letters Sean sent to politicians and to the Taoiseach as Sean was unable to do any of this himself"*. However, Mr. McEvoy is not in a position to say anything about the plaintiff's inactivity prior to 2011, and does not explain why the efforts of himself and the plaintiff were directed towards seeking assistance from politicians rather than progressing the plaintiff's legal proceedings, which he had by that stage neglected for an inordinate amount of time.

57. The balance of justice requires consideration of all aspects of the case. Two matters in particular fall to be considered: firstly, whether the defendants have contributed to the delay; and secondly, the degree of prejudice caused to the defendants by the delay.
58. The plaintiff alleges in his affidavit that *"it was open to the defendants to make an application to dismiss the case if they felt it was taking too long or was otherwise without merit"*. I do not think that, particularly in a case which was dormant for so long that the defendants might have been entitled to assume that the plaintiff did not intend to pursue it, any culpability could be attributed to the defendants in this regard. As Irvine J. commented in *Millerick v. Minister for Finance* [2016] IECA 206 at para. 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 lead 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".

59. The delay has caused considerable prejudice to the defendants in the defence of the personal injuries element of the proceedings. Even if witnesses to all crucial elements of the alleged pursuit and capture of the escaping prisoner by the plaintiff – for which, if the plaintiff's account is accurate, it should be said that the plaintiff deserves the highest praise – could be found, the recollection of such witnesses must necessarily be impaired by the passage of over 32 years since those events.
60. In addition, it would seem an impossible task for any medical expert on behalf of the defendants to come to conclusions, on the basis of examining the plaintiff for the first time in 2021, as to whether or not the plaintiff experienced symptoms as a result of the events in 1988 of which he complains, and if so, the extent to which his symptoms since then are attributable to those events and not to unrelated causes.
61. Resolution of the wrongful dismissal claim would require evidence as to the circumstances which contributed to the decision to dismiss the plaintiff, and in particular the conclusion that the plaintiff was responsible for chronic absenteeism. Two witnesses – Mr.

Geoghegan and Mr. Mulvihill – will not be available to give evidence which would undoubtedly be relevant to the issue. The governor of the prison at the time, Mr. Horan, will not be available to give evidence.

62. In relation to the alleged constitutional claim, I do not propose to consider this aspect of the matter. There is no issue regarding the constitutionality of legislation in the statement of claim, and I am not prepared to deal with the issue on the basis that an application might be made to amend the statement of claim at some unspecified time in the future.
63. I will remark however that, while I am urged that the alleged issue regarding the constitutionality of s.5 of the Civil Service Regulations Act 1956 is an issue of "*general public importance*" which transcends the interests of the parties to the action, there is no evidence before me of any particular public clamour to have the issue decided, or that even the plaintiff regards it as particularly urgent, having failed to include it in his statement of claim, or otherwise pursue it over the last 32 years.
64. While the plaintiff may be commended for his bravery in the events which he maintains give rise to his personal injury claim, and certainly appears to have encountered a degree of misfortune and suffering over the years, his delay in progressing the proceedings has been inordinate and inexcusable. In my view, the prejudice to the defendants of allowing the matter to proceed notwithstanding such an extraordinary delay is such that the balance of justice strongly favours dismissal of the proceedings.
65. Accordingly, I will order that the plaintiff's claim be dismissed. As this judgment will be communicated electronically, I will invite brief written submissions from the parties within fourteen days of communication of this judgment in relation to costs, and any other relevant matter, after which I intend to make appropriate orders without further reference to the parties.