Neutral citation No: [2010] NIQB 84 | *Ref:* **GIL7918**

Judgment: approved by the Court for handing down | *Delivered:* **25/8/10**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

WILLIAM McFARLAND

Plaintiff;

and

NORMA GORDON

Defendant.

GILLEN J

Application

[1] Pursuant to an order made by Master Bell on 6 October 2009 this is an application by the defendant by way of preliminary issue for a ruling of the court that the plaintiff's claim is statute barred having been issued outside the time limit prescribed in Article 7 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order").

Background Facts

[2] On 9 April 2003 the plaintiff alleges he was riding his cycle along the footpath on Meadow Lane, Portadown. He was crossing the entrance to a church car park, when the defendant, who was driving her motor car intending to turn right from Meadow Lane into the car park, allegedly drove across his path. The plaintiff contends that as a result he was thrown over the handlebars of his bike into the driver's door of the car sustaining a fracture to his left shoulder joint, shoulder blade and breast bone. It is common case that there were no other witnesses to the accident.

[3] A letter of claim was written to the defendant on behalf of the plaintiff on 16 April 2003 by G R Ingram & Co, Solicitors("Ingram and Co") who were then acting on his behalf.

[4] Thereafter correspondence passed between the plaintiff's solicitors and Allianz Northern Ireland the insurers of the defendant ("the insurers "). From the outset Allianz denied liability on behalf of the defendant.

[5] It appears that in or about May 2003 Allianz obtained the copy of a police report. It did not contain any statement from the plaintiff, but recorded a statement by the defendant at the scene as follows:

> "I was turning right into the church from Meadow Lane. As I did this a man on a bicycle who was on the footpath drove into the side of me".

The report also records that the driver door was dented and the window smashed. The plaintiff was medically examined by Mr Peyton, Consultant Surgeon, on 30 January 2004 and a copy of that report furnished to Allianz.

[6] In an affidavit made for the purposes of this application sworn on 22 June 2010, the plaintiff avers, inter alia, that he was sentenced to a term of imprisonment of one year and one year on probation commencing 2 February 2004 arising out of charges of robbery and assault. The plaintiff further avers that Ingram & Co did not act for him at that time and he changed solicitors prior to the time of sentencing.

[7] It is the plaintiff's case that during the time he was in prison and on his release on 2 February 2005 he believed that the proceedings concerning his road traffic act were progressing.

[8] It is accepted by Ms Lamont, who appeared on behalf of the plaintiff, that the plaintiff made no contact with Ingram & Co between his imprisonment on 2 February 2004 and a visit to their office on 5 July 2007 notwithstanding that he had been released from prison on 2 February 2005. In the interim, correspondence exhibited to this application made clear that Ingram & Co had written to him at his last known address i.e. 4 Glenmachan Avenue, Portadown on 12 November 2004 without receiving response and that it had also contacted the Northern Ireland Legal Services Commission (LSC) on 18 November 2004 requesting that the offer of legal aid should remain open for a further 4 weeks. Correspondence of 10 February 2005 between Ingram & Co and the LSC records the former indicating that it had no forwarding address for the plaintiff and had been unable to locate him.

[9] The plaintiff concedes in his affidavit that after his imprisonment he never returned to his home at Glenmachen Avenue and on release from prison went to live at a separate address in Portadown for several months before moving to yet another address where he currently resides.

[10] When the plaintiff eventually did communicate with G R Ingram & Co on 5 July 2007, he learned that the file had been placed in their storage. That firm wrote to Mr McFarland at his new address on 2 August 2007 confirming that they had now retrieved the original file and asking him to contact Mr Ingram to discuss the matter.

[11] The plaintiff acknowledges that he did not return to Ingram & Co after 5 July 2007 but instead changed in February 2008 to Hagan & McConville, the Solicitors currently acting for him. That firm caused a writ to be issued on behalf of the plaintiff in this action on 23 June 2008 and a Statement of Claim was served on the defendant on 8 May 2009.

The Statutory Context

[12] Under the terms of Article 7 of the 1989 Order the basic limitation period of 3 years for personal injuries is preserved. Time should begin to run from either the date when the cause of action accrued or the plaintiff's date of knowledge.

[13] The court may allow an action to proceed, notwithstanding the expiry of the relevant period of limitation, by overriding the prescribed time limits. The circumstances of which the court may exercise its discretion are contained in Article 50 of the 1989 Order which provides:

> "50.-(1) If it appears to the court that it would equitable to allow an action to proceed having regard to the degree to which –
>
> > (a) the provisions of Article 7, 8 or 9 prejudice the plaintiff or any person whom he represents; and
> >
> > (b) any decision of the court under this paragraph would prejudice the defendant or any person whom he represents,
>
> the court may direct that those provisions are not to apply to the action or are not to apply to any specified cause of action to which the action relates.
> …
>
> (4) In acting under this article, the court is to have regard to all the circumstances of the case and in particular to –

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence is adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or, as the case may be 9;

(c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff existing after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable might be capable at that time of giving rise to action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of such advice he may have received."

Principles governing the application of the 1989 Order

[14] The discretion under Article 50 is expressed in the widest terms. Taylor v Taylor, The Times April 14 1984, is authority for the proposition that a trial judge must have regard to all the circumstances of the case, when considering whether to exercise his discretion to exclude a limitation period, not merely the six matters in particular contained in sub-sections (a)-(f) of the corresponding discretionary power to override time limits set out section 33 of the Limitation Act 1980 which is comparable to the 1989 Order.

[15] The exercise of the court's discretion to "disapply" the time limits prescribed by the 1989 legislation is unfettered (see Thompson v Brown [1981] 1 WLR 744.

[16] The burden of proof in an application under Article 50 rests upon the plaintiff (see Barrand v British Cellophane, The Times February 16 1995).

[17] More recently in Cain v Francis, McKay v Hamlani & Anor [2009] 2 All ER 579, the Court of Appeal in England determined that in exercising his unfettered discretion on an application under s33 of the 1980 Act to disapply a 3 year primary limitation period on a personal injury case, a judge had to consider whether it was fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay in commencement. The length of the delay was not, of itself, a deciding factor. Nor was the financial prejudice to the defendant of having to pay damages if the arbitrary time limit were to be disapplied. That was because, in fairness and justice, the defendant ought to pay the damages if, having had a fair opportunity to defend himself, he was found liable. At paragraph 73, Smith LJ said:

> "It seems to me that, in the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in the issue but the delay may have arisen for so excusable a reason, that, looking at the matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay or its length are not good ones."

Applying the principles to the present case

[18] The delay in this case amounted to 2 years and 2 months beyond the primary limitation period before the writ was issued. Whilst this may not

come within the category of extreme delay, nonetheless it is substantial in the context of a case where there are no witnesses, an inadequate police report, and where the court will be relying virtually exclusively on the recollection of the defendant and the plaintiff on the issue of disputed liability. Already 7 years have passed since the accident happened.

[19] The reasons given for the delay are wholly unacceptable and lie entirely at the feet of the plaintiff himself. He must have been well aware that his solicitor, Ingram & Co, had no means of contacting him if he did not take the elementary step of informing them in the first instance that he was in prison and, more importantly, upon his release that he had moved address on two occasions. I consider it perfectly understandable that this firm of solicitors took the commonsense view that with the passage of time and the failure of the plaintiff to contact it, the file should be closed and the matter put into storage. That firm was correct not to issue proceedings in the absence of a legal aid commitment from the plaintiff and final instructions from him.

[20] I consider it appropriate for the defendant insurance company to have adopted a similar stance in light of the deafening silence from the plaintiff's advisors over the years. It was reasonable to have disposed of the file in its possession and to have taken no further step by way of investigation.

[21] The delay did not come to an end even when the plaintiff belatedly visited his own solicitor in July 2007. Despite a request from Ingram & Co to return to the office on 2 August 2007 to discuss the matter, the plaintiff chose to ignore this and took no further step for a further 7 months or thereabouts when he attended with a new firm of solicitors. No reason at all is proffered for this further delay notwithstanding the fact that he must have been by now aware that the case was prima facie statute barred. For whatever reason there was yet further delay of several months before the writ was issued in June 2008. I consider that the delay was not only a lengthy and protracted one but no adequate explanation whatsoever has been given by the plaintiff for any of the various delays. Time limits are there to be observed and not treated with casual indifference as has happened in this instance.

[22] Having regard to the delay, the evidence likely to be adduced at trial by the plaintiff or the defendant is likely to be less cogent. In this case the court will be relying on the recollection of the plaintiff and the defendant in the absence of any police statement by the plaintiff or detailed account from the defendant and where no point of impact is recorded on the police report. Inevitably cases of this ilk fall to be determined on detailed recollections of viewing, timings and distances prior to impact. What view did the parties have of each other prior to impact? What distance was between them when they first saw each other? How much time elapsed during which evasive action could have been taken? What was said after the impact? The passage of years will inevitably radically diminish the opportunity for accurate

recollection of such matters rendering them potentially unreliable and less cogent than if the matter had been processed expeditiously.

[23] These difficulties are enhanced by the absence of the insurer's file which has been destroyed over the period of time. It cannot be recollected what was in that file but one can readily imagine it is likely to have contained a detailed statement from the defendant touching upon the matters that I have mentioned above when the matter was at the forefront of her mind and fresh to her memory. That can no longer be provided to refresh her memory. Any other investigative steps by the insurance company have now been lost. It is probable the police officer will have little recollection other than the report itself.

[24] The conduct of the defendant has been flawless in this matter and has played no part in the delay.

[25] The plaintiff was under no disability during any of the period of delay. He had available to him expert legal advice on the issue of delay if the had wished to avail of it.

[26] Although steps were taken by the plaintiff to obtain medical evidence, the defendant has been denied the opportunity to have their own medical examination over the years that the plaintiff was untraceable.

[27] My discretion is unfettered and in exercising it, I am not confined to the six factors set out in Article 50. I must have regard to all the circumstances of the case and to consider whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay in commencement. The delay of 2 years 2 months prior to the issue of proceedings is not of itself a deciding factor unless I am satisfied, as I am in this instance, that it has had a detrimental effect on the cogency of the evidence likely to be adduced and that there is no good reason for its occurrence.

[28] Whilst the defendant did know that there was a claim and had received medical evidence, I am satisfied that real prejudice has accrued to this defendant detrimentally affecting her ability to give cogent and accurate evidence about the accident for the reasons I have already outlined.

[29] I have therefore concluded that the defendant has been disadvantaged in the investigation of this claim and assembly of evidence to an inappropriate extent. The reasons for the delay are inexcusable. Looking at the matter in the round, I do not consider it fair and just that this matter should be allowed to proceed and I therefore refuse to disapply the time limit under the 1989 legislation. I dismiss the plaintiff's claim.