BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 8 of 2008

BETWEEN

STEPHEN WARD	**First Appellant/Defendant**
VICTOR BOWEN (DECEASED) (Acting by his personal representative, Sharon Scott)	**Second Appellant/Defendant**

AND

ANNALIESE BAYNE	**Respondent/Plaintiff**

BEFORE: **The Honourable Peter D.H. Williams, the Honourable Sherman R. Moore, CHB and the Honourable Andrew D. Burgess, Justices of Appeal**

2012: **9 and 20 January; 2 March**

Mr. Alrick Scott and Ms. Makala Holder for the Appellants

Mr. Bryan Weekes and Mr. Satcha Kissoon of Weekes Kissoon Deane and Miss Liesel Weekes for the Respondent

JUDGMENT

PETER WILLIAMS JA

I. INTRODUCTION

[1] Twelve years ago an accident occurred in which Ms. Annaliese Bayne, the respondent/plaintiff was seriously injured. The defendants applied to strike out the action for want of prosecution. ***Cornelius J*** dismissed the application and the defendants appealed. We have the invidious task because of the circumstances of this case of determining whether the judge was right to dismiss the application.

II. PROCEDURAL MATTERS

(a) Amended Notice of Appeal

[2] Mr. Scott applied to amend the Notice of Appeal filed on 22 May 2008 in order to recast the grounds of appeal to conform to the appellants' written submissions. There was no objection and leave was granted to file a Re-Amended Notice of Appeal. References in this judgment are to the Re-Amended Notice of Appeal unless otherwise stated.

(b) Appointment of representative of Mr. Bowen's estate

[3] Mr. Bowen having died on 19 August 2005, it was necessary under the ***Rules of the Supreme Court, 1982 (RSC), Order 15 Rule 15*** for the court to order a person to represent the estate of the deceased for the purposes of the proceedings. This matter was not adverted to or dealt with in the High Court hearing. With consent, Mr. Scott undertook to file an application to this court and on 20 January 2012, it was ordered that Sharon Scott be

appointed to represent the estate and that the proceedings be continued in her name. The appellants were given leave to amend the Notice of Appeal accordingly and it was ordered that the costs of the application be costs in the appeal.

III. THE PROCEEDINGS

(a) Chronology of events

[4] The judge set out in tabular form at paragraph [4] of her decision a chronology of events showing the length of delay between various steps in the proceedings. We produce the table supplemented by additional information from the court file as follows:

CHRONOLOGY OF EVENTS

Year	Date	Event or Document	Length of time or delay
1999	4 October	Accident	
2000	26 September	Writ and Statement of Claim filed	11 months
2001	10 July	Judgment entered for plaintiff with damages to be assessed no notice of intention to defend having been filed by the defendants	9 months
		Application for assessment of damages	
	10 September	Application not heard	2 months
	6 December		
2002	7 March	Summons to set aside default judgment	8 months after judgment
	3 April	Affidavit of Stephen Ward	
	13 June	Default judgment set aside by ***Inniss J***	
		Defence filed	
	2 July		
2003	-	-	-
2004	30 September	Notice of Change of Plaintiff's Attorney filed	4 years after writ
	15 October	Plaintiff filed summons for directions	5 years 3 months after defence
		Order made on summons for directions	
	26 October		
2005	19 August	Mr. Bowen died	5 years after writ

	3 November	Plaintiff's List of Documents filed	1 year after order
2006	30 August	Affidavit verifying Plaintiff's List of Documents	9 months after List
	17 October	Defendants' List of Documents filed without affidavit verifying List	1 year after Plaintiff's List
2007	2 November	Defendants' application to strike out for want of prosecution	1 year after Defendants' List
	13 November	Affidavit of Mr. Scott in support of application	
	10 December	Affidavit of Ms. Bayne in opposition to application	
	11 December	Affidavit of Miss Michelle Russell in opposition to application	
2008	28 January	Second affidavit of Mr. Scott	
	28 February	Application heard	
	29 February	Application heard	
2008	9 May	Decision of ***Cornelius J*** dismissing application	
	15 May	Notice of Change of Attorney filed	
	19 May	Leave granted by judge to appeal	
	22 May	Notice of Appeal filed	
2009	-	-	-
2010	-	-	-
2011	-	-	-

2012	9 and 20 January 28 February	Hearing of Appeal Judgment on Appeal	3 years 8 months after decision 5 weeks

(b) Claim

[5] The plaintiff's claim is for damages arising out of a motor vehicle collision which occurred on Bawden Road, St. Lucy, between a Daihatsu motor car, registration number J 802, owned and driven by Ms. Bayne, the respondent/plaintiff and a Mack motor lorry, registration number L 73, owned by Mr. Stephen Ward and driven in the opposite direction by Mr. Victor Bowen, the first and second appellants/defendants respectively. The plaintiff pleaded that the collision was caused by the negligence of the second defendant. The plaintiff suffered serious injuries as a result of the accident, but particulars of the injuries were not pleaded. Particulars of the damages were given in relation only to the motor car.

(c) Defence

[6] The defence denied that the collision was caused as alleged in the claim and pleaded that the plaintiff was driving too fast and on the wrong side of the road and that the collision was caused wholly or in part by the plaintiff's negligence.

(d) Summons

[7] The defendants' summons was for an order that the action be dismissed for want of prosecution under the inherent jurisdiction of the court and/or because the plaintiff failed to issue a summons for directions to set down the action for trial and/or to produce documents within the time specified by the ***RSC*** and/or otherwise failed to prosecute the action with reasonable diligence. We discuss in paragraph [44] to [47] below the legal basis of the alleged breaches of the ***RSC***.

(e) Affidavit of Mr. Scott

[8] The summons was supported by an affidavit of Mr. Scott. He exhibited to his affidavit, a photocopy (with no visible date) of a Road Traffic Accident Report, which he received from the plaintiff's attorney-at-law. The Report contains the measurements taken by the police at the scene of the accident including a reference to the point of impact and a statement of the particulars of the accident. We do not know if photographs were taken at the scene. The accident was investigated by PC 1144 Belgrave and there has been no information that he is unavailable to give evidence. The Report concluded that "from the enquiries so far, blame cannot be attributed to any one driver".

[9] Mr. Scott acknowledged receipt of the Report by letter dated 18 September 2006. He also acknowledged that he had not filed the defendants' List of Documents and that he had agreed to sign and return the Certificate of Readiness as soon as he received the plaintiff's medical reports and bills and receipts for expenses.

[10] According to Mr. Scott's affidavit, he did not become aware of Mr. Bowen's death until 22 October 2007 (2 years after he died). On that date Mr. Scott wrote to the plaintiff's attorney stating that he had the Certificate of Readiness but that he had not received any response to his earlier request for the medical reports and proof of expenses. He stated (for the first time) that the defendants were severely prejudiced by the delay and that he was forced in the circumstances to apply to have the action struck out.

[11] Mr. Scott's affidavit at paragraph 13 alleged that there had been inordinate and inexcusable delay in the prosecution of the action but relied heavily on the death of Mr. Bowen as precluding a fair trial of the action, as follows:

> "The defendants' case relies materially on the oral testimony of the second defendant. As far as I am aware, the plaintiff and the second defendant were the only eyewitnesses to the accident. The death of the second defendant imperils the defendants' defence. It is not now possible to have a fair trial of the case."

[12] Mr. Scott alleged in the same paragraph that the defendants have been materially disadvantaged in their defence both on liability and in respect of quantum. He stated:

> "Further, the defendants are oblivious of the plaintiff's injuries and the likely claim and will be prejudiced economically and otherwise. For example, the defendants are in no position to challenge any medical evidence relating to the plaintiff. Had the plaintiff produced medical reports at an early stage, the defendants would have had the chance to determine whether it needed to have independent medical evidence to defend the claim for personal injuries and thus the need to have the plaintiff examined by a doctor of their choice."

[13] Mr. Scott concluded the paragraph in his affidavit by stating:

> "The prejudice to the defendants and the substantial risk to a fair trial are all caused by the inordinate and inexcusable delay on the part of the plaintiff after the defence was filed herein."

This court is therefore required to carry out a careful evaluation of the allegation of inordinate and inexcusable delay and particularly of the assertion that a fair trial of the action is no longer possible.

(f) Affidavit of Ms. Bayne

[14] Ms. Bayne filed a very long and detailed affidavit in response. She alleged that it was she that has suffered by the delay and if the action were struck out she would be extremely prejudiced as she has suffered substantial personal injuries, loss and damage.

[15] She gave a description of the accident at paragraph 7 of her affidavit, as follows:

> "As I was proceeding through the S-bend in the road, I suddenly saw a large Mack truck travelling at a great speed in my direction. He was approaching me on a slight corner but was in the middle of the road. Due to the size of the truck and the overgrowth on the side of the road all I could do was press brakes, seeing as I had nowhere to go as there was a gully to my immediate left. I did not have time to react before his vehicle struck me. I am not aware whether the driver of the Mack truck applied brakes before the vehicle struck me."

[16] She suffered serious injuries as a result of the accident. She had to be pulled out of the car by the ambulance crew. At the time she was eight months pregnant. The first medical report exhibited to the affidavit is that of Dr. Jerome Jones dated 16 March 2004. Dr. Jones stated that she "sustained closed, mid-shaft femur fracture". She is left with significant disability.

[17] Ms. Bayne appears to have been involved in another motor car accident subsequent to the one which is the subject of this claim. Although she did not refer to any other accident in her affidavit, Dr. Jones in his report referred to the other accident. The affidavit also exhibited a medical report of Mr. Winston Seale which deals with the accident of 2 June 2001 but makes no mention of the 4 October 1999 accident.

[18] Ms. Bayne explained the delay in the litigation. She stated that the writ was filed on the instructions of the insurer of her car and that the attorney-at-law on the record took instructions from the insurance company. The attorneys on record were really acting in the interest of the insurance company to secure the loss from the property damage rather than to recover damages for the plaintiff's personal injury.

[19] Ms. Bayne's interests have not always been well represented in this matter. Her action was commenced by attorney No. 1. Three years later, attorney No. 1 was replaced on the record by attorney No. 2 (acting in association with attorney No. 3). Two and a half years after, attorney No. 2 was replaced on the record by attorney No. 4 (Miss Liesel Weekes), who remains on the record with an address for service of the plaintiff. At the High Court hearing the plaintiff was represented by attorneys No. 3 (Miss Michelle Russell), No. 5 (Mr. Kissoon) and No. 6 (Mr. Weekes). In the appeal she was represented by Mr. Weekes, Mr. Kissoon and Miss Weekes.

[20] Ms. Bayne in her affidavit detailed the circumstances of the accident and her serious injuries. She relied on the facts that she had already obtained a default judgment against the defendants (which was set aside by consent) and that a summons for the assessment of damages had been filed prior to the default judgment being set aside. Later in the proceedings, a Certificate of Readiness had been prepared, indicating that the matter was ready for trial. She also stated that forensic consultants had been retained to reconstruct the accident scene to assist the court in view of the second defendant's death. She concluded that she would be prejudiced by a striking out of her action and requested that the court's discretion be exercised in her favour by dismissing the summons to strike out.

(g) Affidavit of Miss Russell

[21] Miss Michelle Russell also swore an affidavit in support of the plaintiff. She stated that the defendants had themselves been guilty of delay. She cited as evidence of such delay that it was not until 7 March 2002 that the defendants took their first step in the action by applying to have the default judgment set aside, that they did not file their List of Documents until 17 October 2006 (a year after the plaintiff filed her List) and that they filed no documents between July 2002 when they filed their defence and October 2006 when they filed their List of Documents. She stated that the defendants could not rely on their own delay as a basis for having the action struck out. She relied on the fact that in September 2006 a Certificate of Readiness was served on Mr. Scott's office for signature in an effort to obtain a date for trial. She stated that a number of attempts were made to have the matter tried and that it was "improper" for the defendants to seek to strike out the action.

IV. HIGH COURT DECISION

[22] From the judge's introduction to her decision, it is clear that she was fully aware of the issues with which she had to grapple. She stated:

> "Reduced to its baldest, seven years have passed since the filing of the writ, five since the filing of the defence, and in the interim, the chief and only eyewitness for the Defendant has died, two years prior to filing this application."

[23] The judge stated the law, that the court's power to dismiss an action for want of prosecution should be exercised only where there had been inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible or of serious prejudice to the defendants: ***Birkett v. James [1978] A.C. 297 HL***. She held that the delay was neither inordinate nor inexcusable (paragraph [23] of the decision) and by implication that there was no such delay as to give rise to a substantial risk that a fair trial would be impossible (paragraph [25]). It is important to examine carefully the reasoning by which the judge arrived at her decision.

[24] The judge found that the plaintiff was not solely responsible for the delay, expressing the opinion that the defendants' contribution to "the delay was so significant as to cause the application to fail" (paragraph [28]). She stated that the plaintiff "proceeded with dispatch" and obtained a judgment. In her view, for the first two years of the litigation the plaintiff "was ahead of the game" and no delay up to the time that the defendants filed their defence could be attributed to the plaintiff (paragraph [18]). She also noted the fact that the defendants served their List of Documents a year after the plaintiff filed her List (paragraph [18]). She considered that the defendants gave every indication that they were proceeding to trial by requesting documents and by filing their own List (paragraph [11]).

[25] The judge found that it was the discovery of Mr. Bowen's death rather than the delay that prompted the application to strike out (paragraph [20]) following a course of inactivity by the defendants (paragraph [28]), who gave the impression that strict time limits were not being insisted upon (paragraph [22]) and also did not pursue their case with sufficient dispatch (paragraph [23]). Finally, she accepted the explanations of the plaintiff as to the difficulties she experienced with her original attorneys and considered that these difficulties were not her fault as she was pursuing the matter (paragraphs [10] and [24]).

[26] The judge stated that even if she had found the delay inexcusable and inordinate, the defendants still had to show that because of such delay there was substantial risk that a fair trial was not possible and that the delay was likely to cause injustice to the defendants. The judge acknowledged that the death of a witness "would usually seriously prejudice an applicant" but she also stated that "a causal link must be proved between the delay and the inability to have a fair trial or other prejudice", relying on the statement of ***Slade LJ*** in ***Rath v. Lawrence [1991] 3 All ER 678*** at ***page 688***. She then said that the court must ask itself who is responsible for the delay during the period before Mr. Bowen died and concluded that given the previous history of the case, it was unlikely that it would have been heard prior to Mr. Bowen's death. The judge was of the opinion that the defendants by their inactivity were content to allow the matter to drift and therefore significantly contributed to the delay and to any prejudice they may suffer to such an extent as to cause the application to fail (paragraph [28]).

[27] On 9 May 2008, the judge dismissed the application. On 19 May 2008, she granted leave to appeal. It is unclear whether an order to stay the proceedings until the determination of the appeal was also made on 19 May as there is reference to a stay of the proceedings in a draft order approved by both counsel but the order drawn and prepared by Mr. Scott and filed makes no reference to a stay.

V. APPEAL

[28] The main grounds of appeal that we have to consider can be summarised as follows:

(a) The judge erred in finding that the delay was not inordinate;

(b) The judge erred in finding that the delay was excusable; and

(c) The judge erred in holding that the appellants were not prejudiced and that a fair trial of the action was still possible.

We set out the substance of Mr. Scott's written and oral submissions and discuss the same. Mr. Weekes' submissions were that the decision of the court below is correct for the reasons given by the judge.

(a) Inordinate and (b) inexcusable delay

[29] Inordinate delay can be defined as delay materially longer than the time usually regarded by the profession and courts as an acceptable period. Mr. Scott relied principally on the period of inactivity between 2 July 2002 when the defence was filed and 15 October 2004 when the summons for directions was filed, a period of two years and three months prior to Mr. Bowen's death. He stated that "this period of delay qualifies as inordinate". Mr. Weekes relied on the reasons of the judge for holding that the delay was not inordinate as stated in paragraph [24] above.

[30] Inexcusable delay can be defined as delay for which there can be no objective excuse but which makes some reasonable allowance for the personal circumstances of the plaintiff. Mr. Scott submitted that there was no good reason why the plaintiff could not have brought the action on for trial within one or two years after the defence was filed. He also stated that the judge did not refer to the evidence or reasons on which she relied to excuse the plaintiff's delay because there were none and therefore the judge ought to have held that the delay was inexcusable. On the contrary, the judge made some reasonable allowance for the "explanations" of the plaintiff which she "accepted" in respect of her difficulties with her attorneys, some of whom were working more in the interest of her insurers than of herself as stated in paragraph [18] above.

[31] We must not be taken to be endorsing in any way the unacceptable delays in civil litigation. However, we are of the view that the correct position in the circumstances of this case is to accept the judge's findings on the delay. In coming to this conclusion, we adopt the approach of ***Lord Diplock*** in ***Birkett v. James*** where he stated at ***page 317*** that:

> "[M]atters on interlocutory orders are best left to the decision of the judges of the High Court whose daily experience and concern is with the trial of civil actions. They are decisions which involve balancing against one another a variety of relevant considerations upon which opinions of individual judges may reasonably differ as to their relative weight in a particular case. That is why they are said to involve the exercise by the judge of his "discretion." That, and the consequent delay and expense which appeals in interlocutory matters would involve, is also why no appeal to the Court of Appeal from his decision is available except with the judge's leave or that of the Court of Appeal. Where leave is granted, an appellate court ought not to substitute its own "discretion" for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account; or (2) as in Ward v. James [1996] 1 Q.B. 273, in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations."

[32] The authorities make it clear that High Court judges rather than appellate judges are in the best position to evaluate whether delay is inordinate and inexcusable within the context of the circumstances of the case and the judicial culture of the High Court. This Court should therefore be reluctant to reverse a finding on delay made by a High Court judge except in the clearest of cases where the finding was wrong.

[33] There was additional delay after the decision as the appellants did not file the record of appeal in compliance with the timeframe stipulated in ***RSC, Order 59 Rule 18***. The judge's decision was given on 9 May 2008 but the appeal was not set down for hearing until 9 January 2012, a delay of three years and eight months. Mr. Scott stated that the appellants were not responsible for the delay in filing the record as all the documents for the record were not available from the court. There was a systemic failure which Mr. Scott submitted should not be held against the appellants. We have not taken into account the delay after the decision.

(c) Prejudice precluding a fair trial

[34] Even if there has been inordinate and inexcusable delay, the defendants still had to show that they were prejudiced by the delay and that a fair trial of the action was no longer possible. Prejudice has been defined as some detriment which prevents the defendant from being able to properly defend himself because of "the fading recollections of potential witnesses, their death or their untraceability" to such an extent that a fair trial is no longer possible: ***Lord Diplock*** in ***Birkett v. James*** at ***page 322***. The prejudice "is the justification for the dismissal of the action": ***Lord Diplock*** in ***Birkett v. James*** at ***page 324***. Mr. Scott stated that the "fundamental point" of his submissions was the prejudice to the defence caused by the death of Mr. Bowen. Mr. Scott relied on the bare fact of the death and the unavailability to give oral evidence as precluding a fair trial. This issue is the chief point that we have to determine in the appeal.

[35] Mr. Scott submitted that oral evidence was necessary to assess the credibility of Mr. Bowen, as follows:

> "The case for the appellants relies materially on the oral testimony of Mr. Bowen. The only eyewitnesses to the accident were Ms. Bayne and Mr. Bowen. The evidence of Mr. Bowen in the circumstances was of the utmost importance to the appellants' case on liability. The other evidence available, namely the police report, can be no satisfactory substitute for the evidence of Mr. Bowen on the issue of liability. A fair trial is impossible in the absence of Mr. Bowen."

[36] Mr. Weekes relied on the decision of the judge but he also sought to support the decision based on what can conveniently be called "the Evidence Act point". Mr. Weekes' point was that Mr. Bowen having died, "first-hand" hearsay in oral or documentary form of Mr. Bowen's account of the accident was admissible by ***section 50*** of the ***Evidence Act, Cap 121*** thereby limiting the prejudice to the defendants' case.

[37] Mr. Ward in his affidavit in support of the summons to set aside the default judgment swore as to information provided to him by Mr. Bowen on the circumstance of the accident, as follows:

> "7. [Mr. Bowen] informed me, and I verily believe, that at the time of the accident, he was driving at a reasonable speed, and was on his left and proper side. He was able to bring his vehicle to a halt before the collision occurred."

This affidavit was sworn to more than three years before Mr. Bowen died. However, Mr. Bowen swore no affidavit as to the circumstances of the accident in support of the application. The judge did not find it necessary to deal with the submissions under the ***Evidence Act*** (paragraph [29] of the decision) nor does this court. It will be for the judge at any trial of the action to determine the admissibility of the evidence the defence may wish to tender.

[38] We do not agree that in the circumstances of this case a fair trial of the action cannot take place unless Mr. Bowen gives oral evidence. It is manifestly the case that the trial judge can make a proper determination of liability without seeing and hearing Mr. Bowen give evidence. There are many accidents in which one or both of the drivers of vehicles in collisions are killed or subsequently die and it is still possible to determine how the accident happened and to assess liability. Moreover, in this case there is a Police Report on the accident as stated in paragraph [8] above. There is evidence that Mr. Bowen gave an explanation of how the accident happened to his employer Mr. Ward, which formed part of Mr. Ward's affidavit in support of the application to set aside the default judgment. Further, it is reasonable to expect that Mr. Bowen would also have given a statement to the police, the insurers of the lorry and to Mr. Scott, his attorney. It is also reasonable to expect that the insurers would have carried out a thorough examination of the damage to the vehicles in order to properly defend (or admit liability in) any suit brought against Mr. Bowen.

[39] If support were needed for the position that a fair trial can take place without oral evidence from Mr. Bowen, it can be found by way of analogy with a very recent decision of the English High Court in ***Rehman v. Brady [2012] EWHC 78 (QB) (25 January 2012)***. The facts of this case are that Mr. Brady while driving his car knocked down a seven year old girl who was crossing the road. The claimant's case was that the accident was caused by Mr. Brady's negligence in driving too fast, failing to keep a proper look out and thereby failed to avoid a collision. Mr. Brady's case was that the claimant ran from behind a parked vehicle into the path of his car. However, Mr. Brady died before the trial. There was no witness statement from Mr. Brady and none of the witnesses saw precisely the moment when the claimant was struck and thrown into the air.

[40] At the trial, seven years after the accident, Mrs. Justice Sharp relied on the Police Report and the Police Accident Investigation Report which included photographs taken at the scene of the accident. She also relied especially on expert accident reconstruction evidence. There was no suggestion from the report of the case that the judge was unable to make a proper determination of liability without the oral evidence of Mr. Brady. On the contrary, the judge carried out a thorough analysis of the accident reconstruction expert's evidence in the context of the other evidence and reached the conclusion that the cause of the accident was the fact that Mr. Brady was driving well in excess of the speed limit (20 mph) for that residential area.

[41] The legal position in relation to prejudice and fair trial is set out in the commentary of The Supreme Court Practice 1999, the last edition on the old Rules prior to the introduction of the new English Civil Procedure Rules on 26 April 1999. The note at paragraph ***25/L/7*** is a succinct summary of the principles derived from the cases, as follows:

> "Bald assertion of prejudice or of a substantial risk that a fair trial was not possible [is] insufficient. There has to be some indication of prejudice, e.g. that no witness statement was taken at the time so that a particular witness who would have been called on a particular issue had no means of refreshing his memory or that a particular witness was of advanced age and no longer wished to give evidence or had become infirm or unavailable in the period of inordinate and inexcusable delay...Evaluation of the degree of prejudice caused by delay since issue of the writ, however, is likely to require consideration of the context of such delay and, therefore, of the effect of the total lapse of time since the events giving rise to the dispute…whether such prejudice will justify the striking out of the action will vary from case to case; the defendant should produce compelling evidence of substantial prejudice to justify dismissal of the proceedings."

[42] No evidence of prejudice was disclosed in Mr. Scott's affidavit. It was merely stated in paragraph 13 that "the defendants' case relies materially on the oral testimony of [Mr. Bowen]". No evidence was given as to what investigations, if any, of the circumstances of the accident were made on behalf of the defendants. It was assumed that Mr. Bowen's oral evidence at the trial was necessary for a proper determination of liability. The reality as we all know from our experiences in these courts is that in motor vehicle accident cases plaintiffs very often tend to give evidence blaming defendants for the accident and defendants seek to exonerate themselves by blaming plaintiffs. In the circumstances, the judge has to resolve blameworthiness by reference to police reports and external factors such as the damage to the vehicles. There was nothing extraordinary about the circumstances of the instant case. The vehicles were being driven in opposite directions when they collided. It follows that one or the other or both of the vehicles must have been travelling offside. An accurate determination of liability in these circumstances is often more likely to be obtained from the police measurements in relation to the point of impact of the collision and from the evidence of the police investigating officer than from the recollections of the drivers. We therefore reject the appellants' contention that a fair trial is not possible unless Mr. Bowen gives oral evidence.

[43] We should also add that we do not agree with Mr. Scott's submission with regard to the prejudice caused by the non-disclosure of the plaintiff's injuries and the late production of medical reports (paragraph [12] above). It was always open to the defendants (in effect their insurer) to have the plaintiff medically examined in order to fix a reserve in the event of their being held liable (as is the usual practice of insurers). It is still possible for the appellants to have the respondent medically examined for the purpose of obtaining a report on the injuries she sustained in the accident so as to be able to make an assessment of the compensation to which she would reasonably be entitled.

VI. DISCUSSION

[44] We need to consider whether the three specific provisions of the ***RSC*** were breached as alleged in the summons as set out in paragraph [7] above. First, there is the alleged failure of the plaintiff to issue a summons for directions in breach of ***Order 25, Rule 1(1),*** which provides for the plaintiff to take out a summons for directions within one month after the pleadings are deemed to be closed. The pleadings were deemed to be closed 14 days

after service of the defence (filed on 2 July 2002). However, ***Order 25, Rule (1)(4)*** provides that if the plaintiff does not take out a summons the defendant may do so or apply for an order to dismiss the action. The defendants could themselves have taken out a summons for directions and in any event the defendants took no action to dismiss the action until five years after the breach of ***Rule (1)(1)***.

[45] The second alleged breach of the ***RSC*** was a failure to set down the action for trial under ***Order 34 Rule 2*** failing which a defendant may apply to dismiss the action. It should be noted that an order for a three day trial was made on 26 October 2004 under the summons for directions. Again, the defendants in this case made no complaint and took no action for a period in excess of three years in circumstances where under the Rule they themselves were given a power to apply to have the action set down for trial. They could have lodged the stipulated documents under ***Rule 3*** and obtained from the Registrar under ***Rule 6*** the date fixed for the trial and communicated the same to the plaintiff.

[46] The third alleged breach of the ***RSC*** was a failure "to give production of documents" in breach of ***Order 24 Rule 16(1)***. The plaintiff's List of Documents contained a Notice to Inspect. However, the documents disclosed were inconsequential: a letter, two invoices and a receipt. It was for the defendants' attorney to make a formal application to the court for specific documents or for a Further and Better List of Documents, neither was done.

[47] It follows that there was no merit in the alleged breaches of and non-compliance with the ***RSC*** to warrant striking out. Significantly, the three matters of complaint were within the power of the defendants to remedy. In any event if the court had found that there were breaches of the ***RSC*** which required some remedial order, the normal order would have been a peremptory order in the form of an "unless order", not a draconian order of striking out.

[48] The judge had to carefully evaluate the facts and circumstances of this case to determine whether the inherent jurisdiction of the court should have been exercised to strike out the claim. The judge was required to arrive at a decision that was balanced and proportionate. We appreciate Mr. Scott's submissions, ably and forcefully presented on behalf of the appellants. However, to strike out a plaintiff's claim for damages for serious personal injuries which has some prospect of success without a trial would be unbalanced and disproportionate in the absence of very compelling reasons for doing so. In our opinion, the decision of the judge not to strike out cannot be faulted.

[49] The judge's decision given on 9 May 2008 pre-dated the commencement on 1 October 2009 of the new ***Supreme Court (Civil Procedure) Rules, 2008 (CPR)***. As the old ***RSC*** would now be of limited application, we suggested to Mr. Scott that he set out the legal position on striking out under the ***CPR***. This he did with admirable clarity. ***Part 26*** of the ***CPR*** gives the court power to strike out as part of its very broad general powers of case management. The ***CPR*** are very similar to the English Civil Procedure Rules 1998, which were the genesis of the ***CPR***. ***Lord Woolf MR*** (who provided the inspiration for the new English Rules) stated in the Court of Appeal case of ***1926 Biguzzi v. Rank Leisure Plc [1999] 1 W.L.R. 1926*** at ***page 1932***:

> "Under the CPR the position is fundamentally different. As rule 1.1 makes clear the CPR are 'a new procedural code with the overriding objective of enabling the court to deal with cases justly'. The problem with the position prior to the introduction of the CPR was that often the courts had to take draconian steps, such as striking out the proceedings, in order to stop a general culture of failing to prosecute proceedings expediously."

[50] In the English Court of Appeal case of ***Axa Insurance Company Limited v. Swire Fraser Limited (Formerly Robert Fraser Insurance Brokers Limited) [2001] C.P. Rep. 17, Auld LJ*** said at ***paragraph 14***:

> "The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking out the case."

The judge's decision was therefore also in conformity with the spirit of the ***CPR***.

[51] Where there has been a long delay in prosecuting a case, it will be important for the judge after deciding an interlocutory application to give directions. It follows that the judge who hears the interlocutory application will sometimes be required to proceed to hear the substantive action expeditiously. Under the ***CPR, Part 25.1(2)(g)*** active case management entails "fixing timetables or otherwise controlling the progress of the case". Efficient case management can best be achieved in a system where cases are individually assigned to a designated judge who is responsible for the progress of the case from filing to disposal.

VII. DISPOSAL

[52] We therefore need to give "directions to ensure that the trial of the case proceeds quickly and efficiently" (***Part 25.1(2)(l)***). An order was made on the summons for directions for the medical reports and special damages to be agreed if possible. It is also likely that the parties will need to file Further and Better Lists of Documents. They will almost certainly need to amend their pleadings to give better particulars in view of the passage of time. The ***CPR*** came into operation on 1 October 2009 prior to the hearing of this appeal. Under ***Part 73.3(4), Transitional Provisions,*** where a summons for directions has been taken out in proceedings before the commencement date of the ***CPR*** the parties may agree to have the case referred to a case management conference under ***Part 27*** so that the ***CPR*** will govern the future conduct of the proceedings. We therefore direct that the parties arrange a date for a case management conference. Time limits should be circumscribed where appropriate in the interest of an early date for trial of the action. However, we do not think that we should set out a timetable for various steps to be taken except that we direct that the case should be dealt with as a matter of urgency. In the circumstances of this case a pre-trial review under ***Part 38*** conducted by the trial judge will probably be necessary to expedite the hearing. We direct that the timetable should be organized in such a manner that the trial can be completed by 31 July 2012 so that the decision can be given by September 2012.

[53] We need to state explicitly that the above directions should be carried out in the spirit in which they are given, namely, that Ms. Bayne is entitled even at this late stage to have her action heard and determined. Mr. Scott in support of his contention that the action should be struck out stressed that the plaintiff had not set out the nature of her claim or given particulars of the injuries she had suffered and that in the event of a trial it would be necessary for her to amend her statement of claim. He stated that this would create "another fight on leave to amend and that there would be a new fight all over again as to prejudice and so on and it would be unfair to allow a plaintiff to amend at that stage". We do not agree. This approach will be inappropriate for a resolution of the case and contrary to our directions. The new ***Rules*** state that "the duty of the parties" is "to help the court to further the overriding objective" (***Part 1.3***) so as "to enable the court to deal with cases justly" (***Part 1.1(1)***). In order to achieve the objective of the ***CPR*** the parties are expected "to co-operate with each other in the conduct of the proceedings" (***Part 25.1(2)(d)***).

[54] The appeal is therefore dismissed and the decision of ***Cornelius J*** is affirmed. The appellants are ordered to pay the respondent's costs. We invite the

parties to agree the costs and in default of agreement they are at liberty to apply to the Court and to make written submissions on the procedure for the quantification of the costs. The proceedings should be concluded expeditiously in accordance with our directions.

Justice of Appeal

Justice of Appeal

Justice of Appeal