

UNAPPROVED



THE COURT OF APPEAL

Record No.: 2020/261

Costello J.

Neutral Citation Number [2021] IECA 287

Donnelly J.

Noonan J.

BETWEEN/

CLAIRE SULLIVAN

(A PERSON OF UNSOUND MIND NOT SO FOUND

SUING BY HER MOTHER AND NEXT FRIEND CAROLINE SULLIVAN)

PLAINTIFF/RESPONDENT

-and-

HEALTH SERVICE EXECUTIVE

DEFENDANT/APPELLANT

**JUDGMENT of Ms. Justice Donnelly delivered this 28<sup>th</sup> day of October, 2021**

**Introduction**

1. The respondent to this appeal (hereinafter “the plaintiff”) is now 44 years old. She has made a claim for damages for personal injuries sustained by her allegedly as a consequence of the management by the appellant (hereinafter “the defendant”) of the circumstances leading to her birth on the 9<sup>th</sup> May, 1977. The personal injuries summons was issued on 2<sup>nd</sup> July 2018, some 41 years after her birth. The plaintiff suffers from brain damage, is intellectually disabled and is in sheltered, part time employment. Although no finding has been made, the defendant does not contest that she is under, and has at all material times been under a disability within the meaning of the Statute of Limitations, Act 1957 (“the 1957 Act”).

2. The defendant brought a motion to dismiss the proceedings on the grounds, *inter alia*, that to require the defendant to attempt to defend the claim would be unfair, unjust and unreasonable. Having heard the motion, the High Court (Cross J.) refused the relief sought. The defendant now appeals against that refusal.

### **Factual Background**

3. On the 8<sup>th</sup> May, 1977, the plaintiff's pregnant mother presented herself to St. Brigid's Hospital, Carrick-on-Suir (hereinafter "St. Brigid's"), a small District hospital, which had three maternity beds with no resident doctor, though there was a local GP who provided cover. The plaintiff claims that her mother advised the nurse in attendance, Nurse Anthony, of a bleed that she had during the previous night. The plaintiff's mother was admitted under the care of Nurse Antony, who recorded the bleed in the nursing notes as a "heavy show". The plaintiff claims that her mother continued to bleed and that in particular, Nurse Cox who came on duty as the night nurse saw that the mother's pad was heavily bloodstained and then noticed other heavily blood-stained pads in a utility room. Nurse Cox phoned the doctor in charge and he arranged for the plaintiff's mother to be taken by ambulance to Clonmel Hospital. The ambulance came from Clonmel, a journey of approximately 30 minutes. On the return journey to Clonmel, the plaintiff was born in the ambulance.

4. The plaintiff was kept in St. Joseph's Hospital, Clonmel (now South Tipperary General Hospital and hereinafter referred to as "St. Joseph's") until she was transferred to Ardkeen Hospital, Waterford (now University Hospital Waterford and hereinafter "Ardkeen") where she remained an inpatient until the 28<sup>th</sup> May, 1977. The plaintiff's mother was discharged from St. Joseph's on the 28<sup>th</sup> May, 1977.

5. The plaintiff intends to call expert evidence showing that she suffered from chronic partial asphyxia which was initiated by her mother's ante partum haemorrhage and which continued until her delivery.

6. The clinical records from St. Brigid's and from Ardkeen are available. The St. Brigid's records are contained in a ledger which recorded the nursing notes (the plaintiff's mother was not seen by a doctor there). The notes from St. Joseph's are no longer available, the plaintiff's solicitor having been told that they were destroyed in a fire in 2001. The Ardkeen records exist and they include a discharge letter from St. Joseph's written by a physician in St. Joseph's. This letter sets out details in relation to the plaintiff's condition on arrival at St. Joseph's and thereafter. The plaintiff's solicitor has been advised by the National Ambulance Service (a part of the defendant statutory body) that patient care records were not maintained at the time and that it had no records regarding the plaintiff's delivery. The defendant's solicitor has averred that the ambulance records are no longer available.

7. Nurse Cox is alive and has been interviewed by both parties. She has been listed as a witness for the plaintiff in their schedule of witnesses.

8. Nurse Antony is also alive. Neither party appears to have made contact with her. The solicitor for the defendant averred in her affidavit grounding the motion to dismiss, that they had contact details for her but had been advised by their own manager in charge of "Older Persons Services" that Nurse Antony had retired in 1990 due to ill-health and was now in her 80s and in poor health. The manager expressed concern that Nurse Antony would find any approach regarding this case distressing. In those circumstances, having consulted with counsel, a decision was made that, in balancing the distress that any approach to Nurse Anthony would cause against the likelihood of her having any useful recollection of this case given the duration of her retirement and her state of health, it would be inappropriate to contact her.

### **Procedural History**

9. A warning letter advising of the plaintiff's claim was sent on the 25<sup>th</sup> January, 2018. The personal injuries summons was issued on the 2<sup>nd</sup> July, 2018 and served on the defendants on the 12<sup>th</sup> July, 2018.

10. The plaintiff voluntarily provided the medical records from St. Brigid's and Ardkeen to the defendant on the 20<sup>th</sup> November, 2018.

11. The plaintiff was obliged to bring a motion for judgment in default of defence which was responded to by a replying affidavit of the defendant on the 26<sup>th</sup> March, 2019 saying that they had been unable to identify the individuals named in the records. The solicitor for the defendant states in her grounding affidavit that the defendant did not commence seeking information about the clinicians involved in the mother's care until September 2019.

12. The defence was only delivered on the 22<sup>nd</sup> October, 2019 following two motions for judgment in default of defence.

13. Notice of trial was served on the defendant on the 23<sup>rd</sup> October, 2019. The matter was specially fixed for hearing on the 16<sup>th</sup> June, 2020. The hearing was adjourned by reason of the cessation of sittings of the High Court due to Covid-19. It was specially fixed for hearing on the 22<sup>nd</sup> October, 2020. The plaintiff had procured all necessary expert reports and informed the court that the matter was ready to proceed on the 16<sup>th</sup> June, 2020. The defendant did not demur or indicate that there was any difficulty with the case proceeding either generally or on the date assigned.

14. On the 15<sup>th</sup> October, 2020 the defendant filed its notice of motion and sought to have it returned to the date of hearing. Neither the trial nor the motion could proceed on the 22<sup>nd</sup> October, 2020 due again to the Covid-19 pandemic.

15. The defendant's motion was "decoupled" from the trial and was heard by Cross J. on the 10<sup>th</sup> November, 2020 and judgment was delivered on the 11<sup>th</sup> November, 2020.

#### **The hearing of the motion in the High Court**

16. As the High Court judgment records:-

*"[w]hile the motion complains of both unreasonable and inexcusable delay and therefore by implication the principles established in the Rainsford v. Limerick*

*Corporation [1995] 2 ILRM 561 and Primor Plc v. Stokes Kennedy Crowley [1996] 2 I.R. at p. 459 cases, Mr. Hanratty made it clear that he is in effect basing his application on the grounds of O'Domhnaill v. Merrick [1984] I.R. p. 151."*

**17.** I will use the shorthand "*Primor* principles" to describe a motion grounded on post-commencement of proceedings delay and the "*O'Domhnaill* principles" to describe a motion taken because of pre-commencement of proceedings delay. The difference between the two will be discussed further, but it is important to state that the defendant never took issue with that description of their case. Indeed, ground 2 of the grounds of appeal expressly says that the motion judge erred "in failing to properly apply the principles established in *O'Domhnaill v. Merrick* and *Toal (No.1)* and *Toal (No. 2)*." On the other hand, other grounds of appeal suggest that the appeal is not confined to the *O'Domhnaill* principles. Ground 1 refers to an error in failing to dismiss "in the interests of justice" by reason of the lapse of time. Ground 14 refers to an error in failing to address or give sufficient weight to the prejudice to the public interest in the efficient administration of justice. Ground 16 refers to the failure to address or give any weight to the "abject failure of the [p]laintiff to provide any explanation of any kind whatsoever for the delay in issuing proceedings, and the implications of that failure", grounds which do not derive from these principles.

**18.** At the hearing of the motion, the defendant's primary contention was that the delay and in particular, the absence of records from St. Joseph's and the National Ambulance Service and the unavailability of Nurse Anthony would render any trial unfair. However, counsel for the defendant also relied on the failure of those looking after the plaintiff's affairs to give any reason for the delay in instituting proceedings on her behalf. Another factor put forward by the defendant was that the public interest required that the proceedings be dismissed due to the length of time that had elapsed.

19. In addition, the defendant raised in the motion and its written submissions in both the High Court and this Court the issue of Article 6 of the European Convention on Human Rights. While the defendant did not engage with this point in oral argument to any great extent it remains a ground of appeal.

### **The High Court Judgment**

20. In addressing the law in this area, Cross J. relied upon the judgment of Geoghegan J. in *McBrearty v. Northwestern Health Board & Others* [2010] IESC 27 when he held that the *Primor* principles concerned “*what happened after the commencement of the proceedings and not what happened before the commencement.*” He relied upon the judgment of Irvine J. in the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74 to hold that the test to be applied was that from the *O’Domhnaill* principles; “*whether, by reason of the passage of time, there is a real or substantial risk of an unfair trial or an unjust result.*”

21. Cross J. also relied upon the *dicta* of Irvine J. that when considering this jurisdiction:-  
*“a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff’s constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be paced at risk of an unfair trial or an unjust result.”*

22. He also referred to the judgment of the Supreme Court (McKechnie J.) in *Mangan v. Dockeray & Others* [2020] IESC 67 in which it was repeated that each case depends on its own factors and that:-

*“where the court is essentially concerned with delay post the commencement of proceedings, it will view the obligation of expedition much more strictly where there has been a considerable delay pre-commencement.”*

He held that there had been no post-commencement delay on the part of the plaintiff in this case and also that there was no countervailing culpable delay on the part of the defendant which militates against a dismissal.

**23.** Cross J. also referred to the following factors identified by McKechnie J.:-

*“(iv) The existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply.*

*(v) This latter point may be of very considerable significance, particularly in medical negligence cases as most treating doctors and certainly all consulted experts, will rely on such information for their evidence. (McBrearty at pg. 48)”*

**24.** Cross J. also set out the factors which McKechnie J. said had come to mind when considering the interests of justice. He then quoted the conclusion of McKechnie J. as follows:

*“In all of these circumstances, I do not believe that, on the evidence presently available, there is a serious risk of an injustice being done to either the second or third defendants in allowing this action to proceed, whereas the undoubted prejudice to the plaintiff would be enormous. In any event, there is a continuing obligation on a trial court to ensure that fair procedures and constitutional justice is always adhered to.”*

**25.** Cross J. in his findings rejected the plaintiff’s submission that the application should be refused because of the delay in bringing the motion; although he held it may be of relevance *“as part of the mixture of the case”* in assessing the substance of the justice of the matter.

**26.** At para. 41 of his judgment, Cross J. stated:-

*“Just as the failure to address the issue of the lapse of time between 1977 and 2018 of itself is not grounds to dismiss the procedures (sic) and indeed has not been*

*relied upon, I do not think that the failure of the defendants to bring this motion at an earlier stage can be grounds of itself to dismiss it.”*

It should be noted that there is no specific ground of appeal addressing the motion judge's conclusion on these issues.

**27.** Dealing with the oral evidence, Cross J. stated that whereas there were inconsistencies in the statements of Nurse Cox and possible criticisms of her intended testimony, those inconsistencies would have been present just as much in the 1980s as in 2020. These could be tested in court and if recollections dim and the court is not satisfied with the evidence adduced and if the plaintiff has failed on balance to prove her case, the case must fail.

**28.** In relation to Nurse Anthony he found as a fact that she was available to the defendant, but the defendant had chosen not to call her or even interview her. There was a lack of evidence as to her alleged unavailability to give evidence.

**29.** Cross J. held that there was no evidence that St. Brigid's had lost records that might otherwise be available. He accepted the evidence that there were no records taken in the ambulance in 1977 and rejected a submission by the defendant that there must have been records on the basis of the emails exhibited.

**30.** In relation to the records of St. Joseph's, he found that these had been lost and that these may have been of importance in defending the case. He held that the parties can, with the benefit of the subsequent tests and trials, litigate, discuss, argue and examine witnesses on the basis as to what, if anything, these subsequent scans and tests show. He held that the records in St. Joseph's do not and cannot refer to the issue of liability, but they do or might have been relevant to issue of causation, in other words what occurred to the plaintiff and her mother resulting in the disabilities suffered by the plaintiff. He said that having accepted that the subsequent tests and trials will at least to a certain extent fill the evidential gap of the absent records and enable the parties to litigate the issue of causation, the defendant had failed to



establish the necessary grounds for the application and there is not any real or substantial risk of an unfair trial or an unjust result. He concluded by saying that it was incumbent upon whoever is hearing the case by way of trial at any stage to intervene if he or she is of the view that an injustice presents itself due to any evidential deficit.

### **The Appeal**

**31.** The defendant identifies the issues in this appeal as follows:

Did the motion judge err in concluding that:-

- (i). the defendant did not establish any oral testimony deficit due to the delay?
- (ii). the defendant did not establish any medical record deficit due to the delay?
- (iii). the passage of time between the plaintiff's birth and the commencement of proceedings has not resulted in a real risk of an unfair trial or unjust result?

**32.** The plaintiff submits that the question to be determined was whether the High Court judge exercised his discretion within the parameters of the reasonable exercise of his discretion in determining that the defendant had not established a deficit in witness availability, or in the medical records, such as would lead to a real or substantial risk of an unfair trial or unjust result.

**33.** Despite the relative degree of agreement between the parties as to the issues involved in this appeal *i.e.* being ultimately a question of whether it was correctly decided in the High Court that the defendant had not established a real or substantial risk of an unfair trial or unjust result, the defendant continues to rely on matters which went beyond the risk of an unfair trial or result. These concern the consequences of no explanation having been given by the plaintiff for the delay and the importance of the public interest in ensuring that the trials took place within a reasonable time.

**34.** On the other hand, counsel for the defendant confirms that the primary relief he is seeking is under the *O'Domhnaill* principles and the proposition that to allow this trial to proceed would result in an unfair trial. Counsel maintains that the *O'Domhnaill* principles

require an explanation for the delay. He also relies upon the High Court decisions in *Byrne v. Minister for Defence* [2005] IEHC 147 and *Donnellan v. Westport Textiles Ltd.* [2011] IEHC 11 (Peart J. and Hogan J. respectively) in submitting that the public interest demanded that a case of this antiquity be stayed.

35. The plaintiff submits that the *O'Domhnaill* principles do not require an explanation for delay where the person is under a disability and also submits that the above cases do not govern the test.

36. The submissions of counsel for the defendant were focused, forceful and made in reliance on existing authority. Having said that there appears to be a tension at the heart of those submissions.

### **The legal principles**

37. The issues identified by the defendant as set out above, indicate a primary focus on the issue of unfair trial or unjust result. The defendant's written submissions stated that it was settled law that the *O'Domhnaill* principles were the appropriate ones for applications where the delay occurred prior to the issuing of proceedings. Those submissions also referred to *dicta* of McKechnie J. in *Comcast International Holdings Inc v. Minister for Public Enterprise* [2012] IESC 50. The *O'Domhnaill* principles were described as follows:-

- i) Is there a real and serious risk of an unfair trial, and/or of an unjust result;
- ii) Is there a clear and patent injustice in asking the defendant to defend; or
- iii) Does it place an inexcusable and unfair burden to so defend?

38. In the defendant's submissions headed "has the passage of time resulted in a real risk of an unfair trial of unjust result?" there is a sub-heading "*Public Interest*" which suggests that the defendant is of the view that the public interest is a factor in or is relevant to the application of the *O'Domhnaill principles*. In that sub-section it is submitted that "[e]ven if the trial judge could not find that the defendant would be prejudiced in defending the proceedings [...] the

trial judge should nevertheless have dismissed the case in the public interest.” In support of this argument the defendant relied upon the decision in *Byrne v. Minister for Defence*, a claim concerning loss of hearing allegedly incurred during service in the defence forces.

**39.** In *Byrne v. Minister for Defence*, Peart J. dismissed the action at the end of a full trial holding that where there was inordinate and inexcusable delay on the part of a plaintiff in bringing proceedings, the court had jurisdiction to dismiss the proceedings in the absence of prejudice to the defendant. This applied even in the absence of deciding the case on the issue of the Statute of Limitations, which, although pleaded, had not been relied upon in submissions to the High Court.

**40.** Peart J. stated that:-

*“there is a public interest, which is independent of the parties, in not permitting claims which had not been brought in a timely fashion, to take up the valuable and important time of the Courts, and thereby reduce the availability of that much used and needed resource to plaintiffs and defendants who have acted promptly in the conduct of their litigation, as well as increase the costs to the Courts Service, and through that body to the taxpayers, of providing a service of access to the courts which serves best the public interest.”*

Peart J. held that in the unusual circumstances of that case, the public interest trumped the plaintiff’s right of reasonable access to the courts. The alleged acts or omissions of negligence had occurred between 1974 and 1977. The plaintiff only brought proceedings in 1998 when he said he had loss of balance issues (which may have been related to another disease) in 1998 despite the fact that he had noticed hearing loss difficulties prior to that but had done “nothing about it”. Peart J. stated that this was a remedy which should be used sparingly lest a plaintiff unreasonably be deprived of a remedy to which he or she is entitled. Peart J. said that it was a

case that, if it were to stand alone, could have been and should have been commenced much earlier than 1998.

41. *Donnellan v. Westport Textiles Ltd.* was also a hearing loss claim arising out of defence force service, with the added complication that the plaintiff also sued his former employer as being jointly responsible for his hearing loss. The claim against the State related to a 10 month period between 1973 and 1974 and the claim against his former employer related to a period between 1978 and 1979. Proceedings were only brought in 2000. The State brought a motion to dismiss on the grounds of inordinate and inexcusable delay. The motion was heard in 2010. There was thus both pre and post commencement delay.

42. Hogan J. noted that the starting point was the *Primor* principles. He held that when proceedings, even if not statute-barred, were brought twenty-six years after the events, it behoved a plaintiff to move with very considerable expedition. He held that there had been inordinate and inexcusable *post-proceedings* delay. He then went on to address the balance of justice. He said that even in the absence of specific prejudice the court retained an inherent discretion to strike out proceedings for gross delay. It was in those circumstances that he addressed the *O'Domhnaill v. Merrick* line of authority which he said “*stresses the inherent duty of the courts arising from the Constitution to put an end to stale claims in order to ensure the effective administration of justice and basic fairness of procedures and in order to secure compliance with the requirements of Article 6 ECHR.*”

43. Hogan J., referring to *Byrne v. Minister for Defence*, stated that in an appropriate case the court can strike out proceedings, even though the third limb of the *Primor* test might not have been established. Acknowledging that it would only be in an exceptional case, he said that this was one:-

“*where the delay between the events complained of in 1973-1974 and (even assuming that the case could come to trial in this calendar year) a hearing date in 2011*

*is simply so great that this court can no longer fulfil its own constitutional mandate contained in Article 34.1, namely to administer justice. Even if every allowance is made in favour of the plaintiff and one assumes (and I suspect that it is a large assumption) that there will be no real issues of either causation or ascertainment of loss, the fact remains that the very antiquity of the events in dispute prevents the court embarking in the striking words of Kelly J. in Kelly v. O'Leary [2001] 2 I.R. 526 at 544 in 'the form of forensic inquiry which is envisaged in the notion of a fair trial in accordance with the law of this State.' The claim thus has, in the equally powerful language of Henchy J. in Sheehan v. Amand [1982] I.R. 235 at 239, been allowed 'to fade into the dim uncertainties of the past as to be beyond the reach of fair litigation.'"*

**44.** Hogan J. stated that:-

*"quite apart from any considerations of the personal rights contained in Article 40 and Re Haughey-style basic fairness of procedures, the speedy and efficient dispatch of civil litigation is of necessity an inherent feature of the court's jurisdiction under Article 34.1. As I ventured to suggest in my own judgment in O'Connor v. Neurendale Ltd. [2010] IEHC 387, this constitutional imperative means that the courts have a jurisdiction (and, in an appropriate case, a duty) to exercise their powers in a way which will best ensure that a litigant's right to a hearing within a reasonable time is best vouchsafed. In any event, and for good measure, the same right is guaranteed by Article 6 ECHR: see Gilroy v. Flynn [2005] 1 ILRM 290 and McFarlane v. Ireland [2010] ECHR 1272. One might add that this duty also extends to protecting the public interest in ensuring the timely and effective administration of justice."*

He then turned to the public interest.

**45.** Hogan J. said that it was "*probably unnecessary*" to express any view on the opening of Peart J. that the *Primor* principles must be confined to post-commencement delay, and that

the wider discretion based on general fairness regardless of whether the delay is excusable or not should be confined to pre-commencement delay. Hogan J. otherwise agreed with the analysis of Peart J. in *O'Brien v. Minister for Defence*, stating “[i]f the courts were compelled to entertain claims of this antiquity in the absence of clear prejudice to the private interests of other litigants, it would not only set at naught the constitutional and ECHR considerations to which I have referred, but the courts would be failing in their duty to protect the public interest in the manner outlined by Peart J”.

**46.** It is noteworthy that both those cases involved plaintiffs who were not suffering under a disability. The situation in *Donnellan v. Westport Textiles Ltd.* also involved findings of extensive post-commencement delay that could not objectively be excused. In *O'Brien v. Minister for Defence* there was a finding that the case was only brought when the plaintiff considered his symptoms took a turn for the worse and that therefore the delay was inexcusable.

**47.** The defendant’s submission in this regard is bound up with the reference in *O'Domhnaill v. Merrick* to “*inordinate and inexcusable delay*”. The defendant referred to the following passage from Henchy J. where at p. 157 of the reported judgment he stated:

*“Whether delay should be treated as barring the prosecution of a claim must inevitably depend on the particular circumstances of a case. However, where, as in this case, the delay has been inordinate and inexcusable, such delay is not likely to be overlooked unless there are countervailing circumstances, such as conduct akin to acquiescence on the part of the defendant, or inability on the part of an infant plaintiff to control or terminate the delay of his or her agent. In all cases the problem of the court would seem to be to strike a balance between a plaintiff’s need to carry on his or her delayed claim against a defendant and the defendant’s basic right not to be subjected to a claim which he or she could not reasonably be expected to defend.”*

(Emphasis added)

Henchy J. concluded that by holding “*that the lapse of 24 years between the cause of action and the hearing of the complaint - a delay which is virtually entirely the fault of the plaintiff or her advisers – is so patently and grossly unfair to the defendant that her claim to have the case against her dismissed is unanswerable.*”

**48.** It is important to recall however that the plaintiff in *O’Domhnaill v. Merrick* commenced her proceedings at age 20 years, and her action would only have been statute barred at age 24 years, being 3 years after she reached her majority, which was at that time 21 years. Henchy J. specifically noted that:-

*“technically, [the plaintiff] was still an infant but, having regard to the wide range of legal capacity which the law attributes nowadays to persons of 18 years and upwards, she would not be entitled to separate herself from the delay as she might possibly have done if she had been a younger person.”*

**49.** In *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135 and *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140, the Supreme Court confirmed the inherent jurisdiction of the courts to dismiss claims otherwise brought within the statutory time frame where the delay is such that it would be unjust to call on a defendant to defend his or her self. The Supreme court confirmed that “*the existence of culpable negligence on the part of a plaintiff whose claim has been delayed is of considerable relevance but that it is not an essential ingredient for the exercise by the court of its jurisdiction*” (Finlay C.J. *Toal v. Duignan (No. 2)* at p. 143). In that case, the plaintiff’s only disability was that he was an infant and from the time he became aware his physical condition might give rise to a cause of action, it was just over a year until he issued proceedings. There was no suggestion of culpable delay.

**50.** The difference between the *Primor* principles and the *O’Domhnaill* principles was addressed by the Court of Appeal in *Cassidy v. The Provincialate*. That case involved a claim regarding historical sexual abuse. With regard to the *Primor* principles, Irvine J. noted that the

third limb did not require the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the *O'Domhnaill* tests; the third leg of the *Primor* principles did not require a defendant to establish prejudice to the point that it faces a significant risk of an unfair trial. If a defendant established inordinate and inexcusable delay it may then urge the court to dismiss proceedings having regard to a whole range of factors, including the relatively modest prejudice arising from that delay. She indicated that the *O'Domhnaill* principles may be used where the defendant cannot establish inordinate and inexcusable delay.

**51.** I consider the example that Irvine J. gave of a situation where a defendant might not succeed in establishing culpable delay on the part of a plaintiff to be particularly revealing. Irvine J. stated at para. 34:-

*“It is clear from the relevant case law that a defendant may be able to rely upon the O'Domhnaill jurisprudence where it might otherwise fail the Primor test due to its inability to establish culpable delay on the part of the plaintiff. For example, in a case of alleged sex abuse where for all of the period of delay a plaintiff may maintain that they lived under the dominion of their abuser, the defendant would be unlikely to succeed in a Primor application, particularly if the plaintiff had evidential support for the allegation regarding dominion.”*

Dominion is not the same as a disability set out in s. 48A of the 1957 Act as inserted by s. 2 of the Statute of Limitations (Amendment) Act, 2000. In those circumstances, the Court was acknowledging that something akin, but of lesser legal significance, to a disability under the 1957 Act, *i.e.* dominion, would mean a plaintiff was not to be considered culpably negligent in failing to bring a claim at an earlier date.

**52.** The authorities cited to this Court are to the effect that:



- a) Regardless of whether the delay is pre or post commencement of proceedings, where a defendant establishes inordinate and inexcusable delay on the part of a plaintiff, the defendant may rely upon the third leg of the *Primor* principles to ask the court to dismiss the proceedings where the balance of justice requires this (a lesser standard than whether there is a real and substantial risk of an unfair trial or unjust result).
- b) Where a defendant cannot establish culpable delay on the part of the plaintiff prior to the commencement of proceedings, the defendant may nonetheless succeed in an application to dismiss the claim where he or she can establish on the balance of probabilities that there is a real and substantial risk of an unfair trial or unjust result.

**53.** Arising from the aforesaid it appears that the defendant seeks a third way, to the effect that where it cannot establish *culpable delay* on the part of the plaintiff, and must advance its application based on the *O'Domhnaill* principles, that in applying those principles the court should weigh the absence of an explanation for the delay when assessing whether there is a real and substantial risk of an unfair trial or an unjust result. The defendant also seeks to have the court take into account in this assessment of the *O'Domhnaill* test, that there is a public interest in not hearing stale claims.

**54.** The defendant submits before the High Court and this Court that it sought the relief on the basis of the *O'Domhnaill* test. Indeed, it was noted by the motion judge that the failure of the plaintiff to explain the lapse of time between 1977 and 2018 was neither relied upon by the defendant nor advanced as a ground in and of itself to dismiss the proceedings. In my view, in a situation where a case is being presented on the basis that there is a real and substantial risk of an unfair trial or unjust result, an issue of unexplained delay falls away because culpable delay is not a matter the defendant needs to establish in order to succeed. Moreover, in

circumstances like the present it is important to bear in mind that the Oireachtas have legislated, in a manner which is presumed to be constitutional, that the time limitations set out in the 1957 Act for bringing actions do not apply where the person is under a disability within the meaning of the Act.

**55.** The *O'Domhnaill* principles apply not to prevent a person from taking an action but to disallow them from succeeding in the action where to do otherwise would violate a defendant's constitutional right to a fair trial and just outcome. It is important therefore to recall that the balance that has to be struck between taking from a plaintiff who is under, and continues to be under a disability, the chance to be fairly recompensed for injury and a defendant who should not be put on the hazard of an unfair trial and unjust result, is different to that of a capable plaintiff who nonetheless delays as regards the taking of an action.

**56.** There are differing causes and therefore degrees of disability (for example the technical disability of the over-18 minor - 21 then being the age of majority - in *O'Domhnaill v. Merrick*) which differences may nonetheless permit a court to conclude that there has been culpable delay. Thus, one person may suffer from such a degree of disability as to never be held accountable for a failure to initiate proceedings, while in another case a court may justly reach a different conclusion. Moreover, the plaintiff who takes an action (or on whose behalf an action is taken) is obliged to prosecute those proceedings without delay (*O'Domhnaill v. Merrick* and *Donnellan v. Westport Textiles Ltd.*). As Henchy J. implies in *O'Domhnaill v. Merrick* (see further McCarthy J. in *Toal v. Duignan (No 2)* at pp. 158-159) such post-commencement delay could lead to the alternative course of an action for professional negligence. There is, therefore, a clear incentive for those who act for plaintiffs in cases taken many years after the allegedly tortious events, to act with all due dispatch, lest they ultimately face being sued for not acting expeditiously.

**57.** In the present case, the issue of *culpable delay* was not in those terms advanced by this defendant. The High Court certainly did not understand it to be making that case. At its highest the defendant advanced the point that there was an unexplained delay prior to the issue of the proceedings. An unexplained delay does not automatically amount to an inexcusable or culpable delay (although in an appropriate case an inference may be drawn that there is no reasonable explanation for the delay). In this appeal it is unquestioned and probably unquestionable, that the plaintiff was under such a disability that she could not bring these proceedings herself. She is not a person capable of taking these proceedings. There has been no post-proceeding delay on the part of the plaintiff. The only possible delay was between 2011 and 2018, that is the period between her mother first attended the solicitor and proceedings being issued. In the present case, any culpable delay *at that time* on the part of her mother or mother's agents in moving to issue proceedings cannot be attributable to this particular plaintiff given the nature of her disability.

**58.** I would point out that the delay between 2011 and 2018 does not appear on the facts before us to have added or subtracted to any of the issues of prejudice/risk of an unfair trial to which the defendant points. The fire in relation to the records (for which it is possible that the defendant might bear some responsibility for permitting documents to be destroyed by fire) took place in 2001 and those records were long gone. We have not heard anything about when precisely it is alleged that Nurse Anthony was not available to the defendants. She retired on grounds of ill health in 1990 before she reached the age of 60 and the court has been given no information as to her state of health at any time since such that a conclusion could be drawn that, but for the delay since 2011, she would have been in a position to give evidence at the trial. The information before the court is that there were no ambulance records kept in relation to patient care, so the passage of time is irrelevant to this lack of evidence. The G.P. attached to the hospital has since died but we note the affidavit filed on behalf of the defendant does not

disclose when he passed away. In any event, as we set out below, while there are no records from his practice available, his role, on the evidence before us, appears quite peripheral as he never saw the plaintiff's mother on the night in question.

**59.** Moreover, the defendant was dilatory in investigating this matter. Furthermore, the defendant delayed in taking this motion in circumstances where there already had been a specially fixed trial and a schedule of witnesses exchanged. Those matters are not crucial to the issue in this appeal, as the primary consideration is not one of where the balance of justice lies (the defendant not having established inordinate and inexcusable delay on the part of the plaintiff). The issue in this appeal is whether there is a real and substantial risk of an unfair trial on the basis of the lapse of time since the event giving rise to the action occurred.

**60.** In so far as the defendant relies upon on a stand-alone public interest ground even if no prejudice is found to have been incurred by them, I am not sure that such broad *dicta* of Hogan J. above could apply in situations where no issue of culpable pre or post-commencement delay has been found in relation to a plaintiff who is under a disability. I consider that his *dicta* and indeed that of Peart J. must be understood in the context of the particular facts of those cases. If the courts were to impose *specific periods of time* beyond which a claim cannot be permitted to proceed, this could be considered akin to the imposition of a statute of limitations by the courts. The Oireachtas has chosen not to legislate in that fashion. The courts must balance rights between the parties, taking into account the constitutional rights of all concerned; that is a task which requires assessment on a case by case basis and not the imposition of a “guillotine” by declaring that a case that is taken after *a specific period of years* has elapsed must be struck out. The decision of the Supreme Court decision in *Nash v. DPP* [2015] IESC 32 supports that view.

**61.** *Nash v. DPP* had not been raised during the appeal and subsequent to the hearing, the Court invited the parties to make further submissions addressing that decision. *Nash v. DPP*

concerned an attempt to stop a murder trial on the grounds of delay but the Supreme Court (Clarke J.) took the opportunity to discuss the jurisprudence concerning delay and fair trials in civil as well as criminal proceedings. The Superior Courts had obtained a huge familiarity with the effect of delay on the fairness of trials in the criminal sphere as a result of a significant increase in criminal prosecutions of old cases; in particular criminal trials of historical, mainly sexual abuse, cases in the 1990s and 2000s.

**62.** In relation to the earlier cases dealing with historical sexual abuse prosecutions, many of the early decisions concerned the assessment of *complainant* delay as distinct from delay on the part of the prosecuting agencies. As Hogan and White, *Kelly: The Irish Constitution* (5<sup>th</sup> Edn., Bloomsbury Professional, 2018) observe at para. 6.5.271:-

*“In the landmark decision of H v DPP, the Supreme Court held that as a result of the accumulated experience of previous cases, the reasons for complainant delay in reporting sexual offences were well understood, such that courts need not examine the reasons for complainant delay in individual cases, but rather should focus on whether, given the period of delay involved in a particular case, it remains possible to secure a fair trial or not.” (Emphasis added).*

**63.** The Supreme Court in *H v. DPP* [2006] 3 I.R. 575 did not find on the evidence before it that a fair trial was not possible. In that case the alleged offences were committed about 35 years prior to the accused being charged and about 40 years before the Supreme Court decision. The Supreme Court confirmed however that in *exceptional cases*, where it would be unfair or unjust to put an accused *on trial*, a trial could be stayed. In some subsequent cases the Supreme Court has confirmed that advanced age or health issues do not amount to exceptional circumstances in and of themselves, but it is necessary to consider the facts individually. Where the issue is a risk of an unfair trial, the Supreme Court has repeated that the risk must

be real, serious and unavoidable; the ability of the trial judge to give rulings and directions must be taken into account.

**64.** The judgment of Clarke J. in the Supreme Court in *Nash v. DPP* contains a very helpful exposition of the fundamental issues in the jurisprudence on lapse of time in criminal and civil cases. He accepted the proposition that “*fundamental constitutional concepts of fairness in the legal process are, quite properly, at the heart of this jurisprudence*”. He said that there was “*a high constitutional value in proceedings, whether criminal or civil being determined after a trial on the merits*”. He said that there was a significant constitutional weight to be placed on the side of credible cases, whether criminal or civil, going to trial and being determined on the merits in accordance with the law and the evidence but there may be competing considerations of which he could identify, at least at the level of broad and high principle. Clarke J. identified three such considerations.

**65.** Clarke J. acknowledged that those who may be subject to an adverse finding as a result of court processes, civil or criminal, have a general constitutional right, similar to those under the European Convention on Human Rights, to have their rights, obligations or liabilities determined in a timely fashion. He said that this was independent of the entitlement to a fair trial. He gave the example of the frequently cited US Supreme Court decision of *Baker v. Wingo* [1972] 407 U.S. 514 where a significant aspect of the rights that must be taken into account in a criminal charge is the anxiety and concern of an accused caused by a significant delay in a criminal case coming to trial, noting however that the remedy for a breach of the right to an early or expeditious trial will not necessarily be that the trial must be prohibited. In relation to civil cases, Clarke J. said at para. 2.9:-

*“Similar principles have been identified, as a stand-alone element of the jurisprudence, in the civil context. In Toal v. Duignan (No. 2) [1991] I.L.R.M. 140, Finlay C.J. stated that the Court has an inherent jurisdiction in the interests of justice*

*to dismiss a claim where the length of time which has elapsed between the events out of which it arises and the time when it comes on for hearing is, in all the circumstances, so great that it would be unjust to call on the defendant to defend himself against the claim made. It seems clear that this inherent jurisdiction to dismiss a claim exists even in the absence of culpable delay on the part of a plaintiff. (See for example Manning v. Benson and Hedges Limited [2004] 3 IR 556 at 567).”*

Clarke J. went on to say that there may be a particularly serious breach of the constitutional entitlement to a timely trial, such that in extreme cases, the breach will override the constitutional imperative that there should be a trial on the merits and thus the breach will require the case not to go to trial. Other breaches may not be sufficiently serious to warrant interfering with the presumption in favour of trial and some other remedy may be sufficient.

**66.** Clarke J. held that in many cases, probably most, the key consideration will be whether there is a risk that *the trial* on the merits will be *unfair*. In considering what was meant by an unfair trial, he said that the starting point is to acknowledge that there will very rarely be a perfect trial where all evidence which either side might theoretically wish to have available is before the court; that can happen even where the case has come before the court with commendable expedition. He then stated at para. 2.12:-

*“But such lack of perfection does not mean that the trial will be unfair for to require such perfection as a necessary ingredient of a fair trial would automatically lead to the vast majority of cases being incapable of being tried and, thus, to the whole scale denial of the rights and obligations of those parties who had an interest in a proper trial and a proper determination of whatever rights, obligations or liabilities the evidence and the law required. In that context it is apposite to note the telling comment of Henchy J., in O’Domhnaill v. Merrick [1984] IR 151, to the effect that justice delayed does not always mean justice denied but can often mean justice*

*diminished. Henchy J. went on to say that, in some cases, delay can 'put justice to the hazard to such an extent that it would be an abrogation of basic fairness to allow the case to proceed to trial'.*"

**67.** Clarke J. went on to identify two ways in which such unfairness may be established. First, the lapse of time may be so great and the divergence from any semblance of a real trial on the merits so substantial, that it can be appropriate to come to the view that the conduct of a trial would be nothing more than that in name. He said that at a certain point the absence of evidence which might otherwise have been available coupled with the effect of lapse of time on the ability of the court to assess other evidence, may lead to a stage being reached where the case has gone beyond the reach of fair litigation. This may lead the court to find that, not necessarily through anyone's fault, time and events have passed to such an extent that the establishment of facts, determined by an analysis of evidence which can properly be tested, which process is at the heart of a court system, is just no longer possible.

**68.** Clarke J. said that there were other cases where the consequences of lapse of time and events is not so severe that it is possible to say that no meaningful trial could be conducted. A party may not be able to say that they cannot have a fair trial at all but may say that it is unfair that they should have an impaired or diminished trial where that is the result of culpable delay on the part of the other party. Clarke J. said that where it was possible for the court to identify that a party was culpable in respect of the lapse of time then a different analysis would arise. There may be cases where due to the fault of one side (typically in civil proceedings, the plaintiff), there has been a significant increase in the extent to which the trial falls short of perfection from the perspective of the other side. In such cases justice is diminished through no fault of the defendant. In those circumstances there may be no constitutional unfairness in the trial, but the culpable delay may render it unfair to subject a defendant to a significantly less than perfect trial where the degree of impairment has been materially contributed to by



culpable delay on the other side. Such cases will, necessarily, involve a balance in which the undoubted desirability of having a trial on the merits on the basis of a consideration of all relevant and admissible evidence must be given full and significant weight.

**69.** The final lapse of time issue was that in order to ensure adherence to the obligation of the State to afford all litigants, civil or criminal, a timely trial, the courts had significant power to impose adverse consequences in respect of serious procedural failure including cases where such failure leads to delay. Termination of proceedings may be a proportionate response to such failure although normally only justified in cases of very significant failure and frequently, although not necessarily, where such failure leads to prejudice.

**70.** At para. 2.19 Clarke J. summarised the position as follows (emphasising that these applied to civil as well as criminal proceedings):

*“Thus, it seems to me, in summary, the fundamental principles can be expressed in the following way:-*

*(a) There is a significant constitutional imperative in favour of all issues of rights, liabilities or obligation, whether criminal or civil, being determined on the merits as a result of a trial at which all admissible and relevant evidence is analysed and the law properly applied to the facts which thereby emerge;*

*(b) In order that such a trial on the merits not proceed it is necessary that there be a sufficiently weighty countervailing factor involving important constitutional rights which, in the circumstances of the case, outweigh the constitutional imperative for a trial on the merits;*

*(c) In the context of lapse of time the countervailing factor may, if sufficiently weighty in the circumstances of the case, be one of:-*

*i. culpable delay which is such that it would, having regard to the period of time over which the proceedings or potential proceedings have been left hanging*

*over the relevant party, be a sufficient breach of constitutional fairness so as to make it proportionate to prevent the proceedings from going ahead;*

*ii. a lapse of time which, irrespective of whether blame can be attached to any person, has rendered it impossible that a true trial on the merits can be conducted and has, therefore, placed whatever controversy might have been the subject of the trial beyond the reach of fair litigation or;*

*iii. culpable delay where a trial on the merits is, nonetheless, still possible but where, in the context of the issues in the case and the evidence which could or might be or have been available, the trial which could ultimately be conducted is, by reason of lapse of time caused by culpable delay, significantly further from the ideal of a perfect trial than would have been the case had no such culpable delay occurred. Where, therefore, justice is diminished through fault, a clear balancing exercise arises in such cases. It will only be appropriate to prevent a final decision on the merits where it is proportionate so to do as a response to any culpable delay established.”*

**71.** This synthesis of the principles to be applied is helpful in categorising what the defendant has urged upon the Court in this case. It seems to me that Clarke J. identified the competing constitutional issues as those between the parties, which may include emanations of the State such as the DPP in criminal cases. That is not surprising as ultimately the State in broad terms represents the people of Ireland and the right to a fair and timely trial also applies to the people. In that sense I accept the defendant’s argument here that it is entitled to rely upon those constitutional rights. I take issue however with the defendant’s reliance upon the public interest criteria relied upon by Peart J. and Hogan J. in so far as it is being submitted that the Court has to take into account the rights of third-party litigants to a timely trial. The State must ensure that constitutional and Convention rights are accorded to those who bring

cases, but the rights of third parties cannot be catapulted into the important assessment of the competing constitutional rights of the parties to the litigation before it. In the overall sense, the State fulfils its obligations as regards timely trials by, amongst other matters, providing for, a Statute of Limitations, procedural time limits for litigation steps, sufficient scaffolding for the administration of justice such as judges, court staff and court rooms and a mechanism, such as that at issue in this appeal, for the resolution of competing constitutional rights of the opposing parties. To that extent I do not accept that a specific time limit imposed for the protection of the wider (but not litigating) public represents the correct approach to addressing the circumstances in which a trial on the merits must be stopped because of the lapse of time.

**72.** Clarke J. went on to consider whether the decision to dismiss on the grounds of delay should be taken by a trial judge. He accepted that there may be some situations where it may be constitutionally unfair to allow a trial to proceed *“in circumstances where nothing which would be likely to emerge at the trial would alter the proper assessment of where the balance of justice lies in the case in question.”* He said that in many cases an assessment of the extent of difficulties will much more easily be made by a trial judge, in light of the evidence actually tendered where *“the extent of departure from the ideal of a perfect trial is sufficiently significant to warrant interfering with the constitutional imperative that proceedings should be tried on their merits”*. He said a trial judge will almost invariably be in a better position to determine whether the ability to assess the credibility or cogency of evidence has been impaired by lapse of time.

**73.** At para. 2.22. Clarke J. stated:-

*“In those circumstances, I am of the view that it is preferable, except in clear cases, that the issue be left to the trial judge whether in civil or criminal proceedings. That position should only be departed from where, in advance of trial, the result of the outcome of any analysis of the competing interests is sufficiently clear to warrant the*

*case not even going to trial. It must again be emphasised that, even where the case goes to trial, it remains one of the most important duties of the trial judge to assess, if the issue is raised, whether any of the lapse of time issues which emerge render it appropriate to reach a determination other than on the merits in all the circumstances of the case.”*

74. I conclude therefore that the remaining issue in this particular appeal, having regard to the submissions made, is the same as most cases involving pre-commencement delay, namely whether the motion judge was correct in holding that there was no real and substantial risk of an unfair trial or unjust result because of the lapse of time since the event alleged to constitute negligence.

#### **Application to the facts**

75. The defendant relied, in part, on the expert opinion of Dr. Boylan, consultant obstetrician and gynaecologist, who gave an opinion that it was “almost impossible to give a clear and conclusive opinion on the care received by [the plaintiff] from an obstetric point of view given the fact that it was 43 years ago, the notes are so scanty, those that are available are incomplete and Ms. Cox’s memory is at such variance with the notes.” It was since clarified that the two pages of notes from St. Brigid’s were complete in themselves. Furthermore, the motion judge held that there was no evidence that St. Brigid’s had lost any records that would have been available earlier and the defendant does not contradict that finding.

76. As Clarke J. held in *Nash v. DPP* it is rare to have a perfect trial. Evidence that might have existed of an event, such as the recording of CCTV footage, may simply not be available because the camera was not working that day. Applied to the present case, if the admission was to a hospital in the State today it is likely that more extensive records would be kept. It seems that the nursing ledger kept in St. Brigid’s was the extent of the records kept there and

to that extent the defendant has the most pertinent records from that hospital. I will deal with the oral evidence and lack of other notes below.

77. The defendant relies upon a report of Dr. O'Donovan, consultant paediatrician, who reviewed the notes that existed relating to the birth and care delivered afterwards as well as more recent reports, scans and an MRI. He concluded that the absence of any medical record for the plaintiff's delivery and early neonatal care makes it impossible to evaluate any potential causative links between the plaintiff's delivery, early neonatal care and long-term complicated seizure disorder. I will return to this under the heading "absence of records from St. Joseph's Hospital".

### **Oral evidence**

#### *a) Nurse Anthony*

78. The apparent unavailability of Nurse Anthony forms a large part of the defendant's submission that her absence renders a fair trial impossible. The extent of the evidence before the High Court was that she had retired in 1990 due to ill-health, is now in her mid-80s and may be in poor health and there was a concern that she might find an approach distressing. This was balanced against the likelihood of her having any useful recollection of the events.

79. While the defendant may have its reasons for adopting this humane attitude to approaching Nurse Cox, I agree with the motion judge that there is an absence of evidence upon which the Court could conclude that she is not available or that the defendant has been placed at an evidential disadvantage due to her unavailability. The burden of proof lies on the defendant and it had not been discharged in this case.

#### *b) Nurse Cox*

80. Nurse Cox was interviewed by both the solicitor for the defendant and later the solicitor for the plaintiff. Both parties exhibit their attendances. It is unnecessary to go into specific detail except to say that Nurse Cox says that she has a recall of this night and often thinks about

the plaintiff and wonders how she is. She often sees the plaintiff's mother who runs a local shop.

**81.** It is unnecessary here to detail the apparent inconsistencies/consistencies between her statements to the solicitors and with the hospital notes that each side highlights in their submissions to the court. The defendant takes issue with the finding of the motion judge when he concluded that "*whereas there are inconsistencies and possible criticisms of Nurse/Midwife Cox, these inconsistencies would have been present in the 1980s just as much as in 2020.*" The defendant submits there is no basis for this. I do not read the judge's finding as anything other than suggesting that in so far as inconsistencies with the notes exist, that would not be a ground of unfairness due to delay because that could have been present in the 1980s. Similarly, a witness might be just as internally inconsistent in a trial heard without delay as one proceeding after a much lengthier delay. Most importantly, Nurse Cox had given an explanation as to why she remembers this night and that is not surprising in a small hospital in a local community. It was recognised by Geoghegan J. in *McBrearty v. North Western Health Board and Others* at para. 107 that a witness may be more likely to recollect such events which occurred in a small hospital than would be the case where the events occurred in large hospitals.

**82.** I do not accept therefore that there is any basis for the defendant's claim that the alleged inconsistencies of Nurse Cox must be attributed to the lapse of time and are such as to render the continuation of this trial unfair.

*c) Dr. Flannagan*

**83.** The defendant claims that Dr. Flannagan, who was the GP on call to the hospital has since died and there appears no reasonable prospect of recovering his records of the events of that morning when Nurse Cox phoned him. The defendant claims that the motion judge failed to address this deficit in his judgment and found that the cases relied upon by them were not relevant because the defendant had passed away. The defendant submits that in order to rebut

the case that, given the plaintiff's mother's haemorrhage, it would not have been reasonable to admit her to St. Brigid's Hospital, the defendant would be required to have Dr. Flannagan's oral evidence available to it "especially in circumstances where the notes are so scant." The lack of notes is at best a neutral factor, but it cannot be the responsibility of the plaintiff if the defendant did not ensure that greater records were taken at the time. Importantly however, it does not appear to be alleged that Dr. Flannagan was informed of the initial admission but of the transfer to the hospital.

**84.** Dr. Flannagan was peripheral to what occurred. He was not consulted at the time of admission to St. Brigid's Hospital. He was contacted at the time of the decision to transfer the plaintiff's mother to St. Joseph's. The notes of St. Brigid's are available however and Nurse Cox can be examined/cross-examined in relation to them. She has told the solicitor for the defendant that she made the decision to transfer the patient to the hospital and the notes simply record that "Dr. informed".

**85.** I do not accept in all the circumstances that there is any real or substantial risk of an unfair trial based upon the unavailability of Dr. Flannagan or of his notes (if any) of that conversation.

*d) The ambulance records*

**86.** The defendant claims that the ambulance records are no longer available and therefore there is no record of whether the haemorrhage continued in the ambulance or of the plaintiff's condition at birth, including her APGAR scores and cord pH. The plaintiff on the other hand exhibits a series of emails with the National Ambulance Service.

**87.** The motion judge accepted on the basis of those emails that there were no records taken in the ambulance in 1977. The motion judge rejected the submission by the defendants that in effect there "must have been" records, correctly in my view. The plaintiff exhibited emails in which they asked for "copy ambulance records". When the reply came back referring to patient

care report forms that are currently in use not being in operation in 1977, the plaintiff asked whether the ambulance crews kept records of calls in 1977 and would those be in existence. The relevant employee of the defendant replied saying “we do not have any Ambulance patient records going back to 1977 the earliest records we may have are 1981 for the Ambulance service in South Tipp.”

**88.** The defendant never engaged in any considered way as to what ambulance records were kept at that time. There was a mere assertion that the ambulance records would have contained information concerning, *inter alia*, whether the plaintiff’s mother continued to haemorrhage while waiting for the ambulance to arrive and during the period she was in the ambulance. The defendant says this is crucial to establishing whether the plaintiff had an acute asphyxia event or whether she was suffering from a chronic partial asphyxia event. The onus was on the defendant however to establish that there were such records and that they no longer existed. The solicitor for the defendant averred in her affidavit that “the ambulance records are no longer available” but unlike the evidence of the plaintiff, no basis for that averment is given. Moreover, in so far as the defendant complains about personnel records no longer being available, there is no evidence of that or indeed of any other search amongst older or retired ambulance personnel who may recall the identity of those persons who were involved in what must have been a notable and relatively uncommon event, the birth of a baby on the way to hospital.

**89.** Moreover, there are notes available in the discharge letter from St. Joseph’s about events in the ambulance and the condition of the baby on arrival there. For the reasons set out in the section dealing with the records from St. Joseph’s I am also not satisfied that, even if these records are missing because of delay, that their absence causes a real or substantial risk of an unfair trial or an unjust result.

*e) The absence of records from St. Joseph’s Hospital*



**90.** The only record that exists from the first 10 days of the plaintiff's life is a discharge letter accompanying her when she transferred to Ardkeen Hospital. This records that she developed cyanosis and convulsions 27 hours after birth. Contact having been made with Dr. Cosgrave in Ardkeen it appears he suggested a) sugar and b) "Phenobarb 7.5mg/8 hrly to 4-5 days review". The plaintiff was said to "now [be] off Phenobarb & twitching & Cyanosed again". Her "NA K Urea Ca Glucose all normal on 18/5/77. On 10/5/77 NA 132 and Urea 2.5 K 4.5 Ca 8.5 Glucose 56." The notes records "Baby feeding well but very high pitched cry". There is a postscript added, "F.H. nil 3 other children alive and well. Child was born in ambulance with no labour pains and came with rupture of membranes. Cried & was conscious on way up here." In a further postscript it says "7 1/2 mg Phenobarb given prior to transfer."

**91.** On arrival at Ardkeen there is another note presumably from a junior doctor who records "10 day old baby admitted from Clonmel with history of convulsions and occasional cyanosis since birth. Was precipitant delivery in ambulance with no labour pains." It goes on to record certain other details with an observation "o/e healthy vigorous baby not twitching, not cyanosed." It then records further details of examination and the diagnosis: "1. Brain damage during delivery [2] ? Metabolic defect hypoglycaemia or a hypocalcaemia". A later discharge letter of the 23<sup>rd</sup> June 1977 reveals that the diagnosis in Ardkeen was "hypocalcaemic convulsions".

**92.** Dr. O'Donovan states in his report that "[w]ith no medical records pertaining to the plaintiff admission to St. Joseph's, it is not possible to comment on the infant's clinical status during the days after birth (Encephalopathic or not) or early neonatal care (Exact timing of seizures, investigations and treatments)". Dr. O'Donovan opines that neonatal hypocalcaemia (low calcium) is well described and for the purpose of determining the cause the condition is divided into early onset hypocalcaemia (presenting within the first 72 hours of birth) and late onset hypocalcaemia (presenting 72 hours or more after the birth). He says with no medical

records it is not possible to comment on the timing of the onset of neonatal hypocalcaemia or the possible etiology of the low Ca level. He notes that her low Ca level responded to treatment at Ardkeen.

**93.** Dr. O'Donovan's opinion is that it is very likely that her early neonatal "convulsions" were related to the low Ca levels because after the Ca level was restored to the normal range the twitching stopped.

**94.** Dr. O'Donovan says that following a neonatal hospital course complicated by birth in an ambulance and neonatal hypocalcaemia with associated seizures, the plaintiff developed a seizure disorder. He says that while epilepsy is a potential outcome following brain injury and neonatal seizures in the setting of severe hypoxic-ischemic brain injury, the medical information available would not support the view that the plaintiff suffered such an injury.

**95.** The solicitor for the plaintiff exhibited the expert report of Dr. Michael Munro, Consultant in Neonatology. Dr. Munro refers to another report from Mr. Clements, Consultant Obstetrician, but this has not been exhibited. This apparently records that if the plaintiff's mother's assessment that she presented with a serious haemorrhage at St. Brigid's is to be accepted, then she should have been transferred immediately to St. Joseph's. He also refers to Mr. Forbes (Consultant Neuroradiologist) who concluded that an MRI scan performed on the plaintiff in 2013 demonstrated brain injuries consistent with either neonatal "symptomatic hypoglycaemia" or "chronic partial asphyxia". The report also concludes that there was no evidence of any severe acute asphyxiating events on the plaintiff's MRI scan.

**96.** Dr. Munro opined that the plaintiff's seizures and having a high pitched cry are in keeping with neurological signs expected in hypoxic ischaemia encephalopathy. He said her low sodium levels would be in keeping with an asphyxiating event. He said the fact that there is no mention of the plaintiff requiring any resuscitation, intravenous fluids or any support would fit with the asphyxiating event being partial or chronic rather than acute or severe. Dr.

Munro also concluded that there was no reason that the plaintiff would develop hypoglycaemia in the neonatal period having been demonstrated to be normoglycaemic after a seizure episode. He concludes that on the balance of probabilities she did not suffer from symptomatic neonatal hypoglycaemia. He refers to the description of the plaintiff being conscious and crying in the ambulance demonstrating the likelihood that she needed very little if any in the way of resuscitation. There was no mention of such resuscitation on arrival in St. Joseph's in the subsequent discharge note. He says that these events, along with the MRI scan rule out the plaintiff suffering from a severe acute asphyxiating event prior to, or after delivery and therefore her delivery in the ambulance was not the cause of her brain damage.

**97.** Dr. Munro concludes that the MRI scan and the medical records suggest that the plaintiff suffered from a chronic partial asphyxiating event, by definition of at least 30 plus minutes duration. He says this on balance would be the antepartum haemorrhaging of her mother and continuing until her delivery. He says her seizures at day 10 were most likely secondary to hypocalcaemia and were very transient and would not have been expected to contribute to her brain damage. As to causation he says that on the balance of probabilities the plaintiff's brain damage was caused by a chronic partial asphyxiating event and that the damage demonstrated on the MRI was not caused by any neonatal events. The plaintiff's mother's antenatal haemorrhage would have on the balance of probabilities, initiated the chronic hypoxic ischaemic event that the plaintiff suffered from. He identified as a critical issue whether the plaintiff's mother had been haemorrhaging on admission to St. Brigid's. He is of the view that if she was not and her antenatal haemorrhage began after her admission then the time from the haemorrhage to delivery was certainly long enough to cause the plaintiff's brain damage. He opines that if she had been haemorrhaging on admission but transferred immediately to St. Joseph's she would likely have foetal monitoring instigated and distress may have been picked up. The plaintiff relies upon Mr. Clement's report in relation to that latter aspect of her claim.

**98.** The defendant submits that the most important aspect of the appeal is the manner in which the motion judge dealt with the absence of records in their totality. The motion judge acknowledged that the absence of records was a more difficult matter to resolve than any other aspect. The motion judge held that the records in Clonmel “*may have been of importance in defending the case*” but did not consider that it had been demonstrated that there was any real or substantial risk of an unfair trial. He did so because on the issue of causation he held that the subsequent “tests and trials” (referencing back to the recent tests and scans carried out on the plaintiff) would enable the parties to “litigate and discuss and argue and examine witnesses” as to what those tests and scans actually showed. The motion judge noted however that it was up to the plaintiff to establish causation.

**99.** These findings of the motion judge were robustly criticised by counsel for the defendant. Counsel also submitted that the motion judge had appeared to accept a submission from the plaintiff’s counsel which was unsupported by evidence and was in fact counsel’s own theory. He pointed to the transcript in which counsel for the plaintiff had submitted that it was possible to reconstruct what occurred. Counsel submitted that the complete absence of records from St. Joseph’s meant that, at the very least, there was a real and substantial *risk* of an unfair trial; the *risk* being all the defendant had to prove.

**100.** Counsel for the plaintiff understandably took issue with that characterisation of his submission and the finding by the motion judge. He explained that the plaintiff’s case was that the plaintiff suffered partial asphyxia which was initiated by her mother’s antepartum haemorrhage and which partial asphyxia continued until her delivery. He referred the Court to Dr. Munro’s report and the reference therein to the view of Dr. Forbes, an expert from the UK, who interpreted the MRI scan and noted there was no evidence of a severe acute asphyxia. Counsel also referred to the notes that were in existence, being the full notes from St. Brigid’s and the discharge letter from St. Joseph’s, which contained an explanation of what occurred in

St. Joseph's. Counsel points to the absence of focus in Dr. O'Donovan's report on the contents of the discharge letter which is dealt with more fully in Dr. Munro's note.

**101.** Counsel for the plaintiff submits that the relevance of the medical report of Dr. Munro is that his conclusions relate to objective scientific facts which are not affected by the efflux of time. These will be hugely important in deciding the issue of causation. The plaintiff's case is that the clear medical evidence is that the plaintiff suffered a chronic partial asphyxiating event which would have gone on for some time and it was this, not a severe acute asphyxiating event, that led to her brain injury. This was based on the MRI scan of 2013. This is also based on the information available as to why this brain injury was not due to hypoglycaemia or hypocalcaemia. Counsel relied on Dr. Munro's reference to the finding of hyponatremia (low sodium) and the absence of mention of the requirement of resuscitation/intravenous fluids as fitting with an asphyxiating event being partial and chronic rather than an acute and severe event. The other evidence said to demonstrate causation is the actual neurological symptoms that are recorded in the notes, the seizures in the day after her birth, the high-pitched cry, the plaintiff's lack of cognitive ability and her epilepsy which is also associated with chronic partial asphyxia.

*i. Conclusion on the absence of medical records*

**102.** The records from St. Joseph's are undoubtedly missing and this is the hospital where the plaintiff was brought in the immediate aftermath of her delivery in the ambulance and where she spent her first 10 days. It is not correct to say however, that there is an absence of medical records as to her condition on arrival at St. Joseph's or her notable medical history there or her condition when she left. This is because the discharge or transfer report from St. Joseph's is available amongst the records preserved in Ardkeen, the hospital to which she was transferred. This may not be "perfect" evidence, but it is not a right to a perfect trial that a defendant has,

rather it is the right not to be put at the real and substantial risk of being subjected to an unfair trial or an unjust result.

**103.** I consider that in talking about the “trials and tests”, the motion judge was not being blindsided - to use the phrase of the defendant - by the advocacy of the plaintiff’s counsel. Instead, he was addressing his mind to the evidence before him as to the evidential basis on which each side was presenting its case. The plaintiff’s case as to liability is concerned with the admission of her mother to St. Brigid’s instead of securing her transfer to St. Joseph’s. That is a matter in which there are records, Nurse Cox is clearly available and the defendant has not proved the unavailability of Nurse Anthony. The issue of causation, linking the injuries sustained by the plaintiff, to the alleged negligence of not sending her immediately to St. Joseph’s, is covered by Dr. Munro by reference to the records available and to the availability of a recent MRI scan, which the plaintiff alleges, demonstrates no evidence of a severe acute asphyxiating event/s. The MRI scan suggests a brain injury consistent with two possibilities and Dr. Munro, using the records available at the time, demonstrates that on the balance of probabilities it was the chronic partial asphyxiation that caused the injuries and not hypoglycaemia.

**104.** The defendant’s argument as against that is to suggest that it is a theory and that they should not be put “on the hazard of a Court attempting to resolve difference in expert opinions in circumstances of incomplete medical records and an absence of witness evidence, all of this 43 years after the event.” In submissions, counsel for the defendant highlighted that part of Dr. O’Donovan’s report in which he stated that the causes of epilepsy were many; they could be genetic, structural, metabolic, immune, infectious or unknown. He referred to the diagnosis in Ardkeen which, as set out above, referred to brain damage during delivery but also queried metabolic deficit, possibly being hypoglycaemia or hypocalcaemia.

**105.** The principle of constitutional fairness leans in favour of having a trial decided on its merits but of course this is subject to the constitutional rights of a defendant not to be subjected to a real and substantial risk of an unfair trial or unjust result because of the delay in the proceedings being taken even by a plaintiff who is not guilty of culpable delay. The onus was on the defendant in this motion to establish that its constitutional rights would be breached by being subjected to a trial in this case. In these proceedings, the High Court was left to decide the issue on the basis of some, though not all, of the expert's reports on which the parties intended to rely at trial. In response to the defendant's motion in which the defendant relied upon Dr. O'Donovan's report, the plaintiff exhibited her own report as set out above (which pre-dated Dr. O'Donovan's) dealing with the causation issue and addressing the precise matters raised in the diagnosis in the Ardkeen notes from information available then and in the subsequent MRI. Reliance on the available records is central to the plaintiff's case on the causation issue. I do not consider that the defendant in its own evidence had engaged sufficiently with the nature of the case being made by the plaintiff.

**106.** I am satisfied that the motion judge was correct in the very specific circumstances of this case to refuse to strike out this claim on the grounds that there is a real and substantial risk of an unfair trial or unjust result. The defendant had simply not demonstrated the required unfairness or possible injustice having regard to the state of the evidence before the motion judge, given the available notes and the recent scans which were not time dependent, the expert evidence addressing those particular matters and the nature of the case being made by the plaintiff. The motion judge also correctly pointed out, relying on the judgment of McKechnie J. in *Mangan v. Dockeray & Others*, that it was always incumbent upon a trial judge to intervene at any stage if he or she is of the view that an injustice presents itself due to any evidential deficit. The defendant has not established that this was, in the words of the Supreme Court in *Nash v. DPP*, a *clear case* where the issue ought not to be left to the trial judge. For

the reasons set out, I do not accept the defendant's submission that this case has gone beyond the reach of fair litigation.

### **Conclusion**

**107.** This is a case in which there has been a lapse of time of some 44 years between the event in question, the plaintiff's birth, and the date of the hearing of this appeal. The defendant brought a motion to dismiss after a specially fixed date had already been adjourned due to the Covid-19 pandemic. The case was mainly brought on the *O'Domhnaill* principles that there was a real and substantial risk of an unfair trial or an unjust result based upon the unavailability of evidence, documentary and testimonial, because of the passage of time.

**108.** I have addressed each of the aspects of the absent records and unavailable witnesses. I am satisfied that the motion judge did not err in holding that the defendant had not discharged the onus of establishing that there was such a risk in this case. The full records are in existence from St. Brigid's, where the decision was taken to admit her rather than send her to St. Joseph's. The defendant has not satisfied the Court that it cannot have a fair trial as to whether the plaintiff's mother was presenting with a haemorrhage rather than a "heavy show" at the time of admission. It is not strictly correct to say that there is no record of what occurred in St. Joseph's because, although their records were destroyed in a fire in 2001, the discharge or transfer letter sent with the plaintiff to Ardkeen when she was 10 days old survived in the Ardkeen records. The combination of the records available and subsequent scans, especially an MRI scan in 2013, form the basis of the plaintiff's contention that the brain injury from which the plaintiff suffered was caused by a partial asphyxiation before delivery. If the evidence of the plaintiff to the effect that her mother was haemorrhaging on admission to St. Brigid's is accepted, the plaintiff contends that the partial asphyxiation was attributable to the delay in sending her mother to St. Joseph's where her foetal distress would have been picked up and the birth managed accordingly. In those circumstances, which of course remain to be



tested in a court, the defendant has not established its case that there is a real risk that it cannot get a fair trial or have a just result. The judge hearing the trial will ensure that should such a risk be established at the hearing of the action the defendant will not be prejudiced.

**109.** The defendant further urged upon the Court that the public interest required a case of this antiquity to be stayed even in the absence of prejudice. There is no stand-alone public interest jurisdiction to stay trials (either civil or criminal) by reference to the rights of other litigants not party to the proceedings. There are competing constitutional rights of the parties at issue as well as constitutional obligations on the State and the courts to ensure that constitutional rights are vindicated in so far as practicable. The inherent jurisdiction to dismiss cases where, despite being brought within the time frame permitted under legislation, the passage of time has meant that there is a real and substantial risk of an unfair trial or an unjust result regardless of whether the plaintiff was culpable or not is a vindication of the rights of defendants. The inherent jurisdiction to dismiss cases where, either pre or post commencement of proceedings, there has been culpable delay on the basis of a wider consideration of the interests of justice, including a consideration of prejudice to the defendant, is also a full vindication of the defendant's rights. The balancing between those competing rights requires a careful analysis of the facts.

**110.** Although the defendant relied on the *O'Domhnaill principles*, the defendant also raised the issue of the lack of an explanation by the plaintiff for the delay. As set out at para. 57 above, there is no suggestion that this particular plaintiff could have been responsible for any of the pre-litigation delay. Unexplained delay is not to be equated automatically with inexcusable or culpable delay (although in an appropriate case an inference may be drawn that there is no reasonable explanation for the delay). The relevant consideration at issue in the present case is whether the defendant can have a constitutionally fair trial *i.e.* a trial which is not beyond the reach of fair litigation, despite the lapse of time which has occurred. For the

reasons set out, I am satisfied that the defendant has not established that this is such a clear case that it can be said prior to the trial commencing that the defendant cannot have a constitutionally fair trial. The trial judge will be in a position to assess the fairness of the trial in light of the evidence before him or her.

**111.** In this appeal I am satisfied that the motion judge's order to refuse the defendant the relief sought must be upheld.

**112.** As regards costs, given that the defendant's appeal has failed, it would appear to follow that the plaintiff is entitled to the costs of her appeal, to be adjudicated in default of agreement.

**113.** If the defendant wishes to contend for a different form of order in this appeal (including the order for costs), it will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the defendant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

*In circumstances where this judgment is being delivered electronically, Costello and Noonan JJ. have authorised me to record their agreement with it.*