

APPROVED

[2022] IEHC 132



THE HIGH COURT

BETWEEN

2016 No. 2173 P

PATRICK ROONEY

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 March 2022

INTRODUCTION

1. This judgment is delivered in respect of an application to dismiss the within proceedings. The proceedings take the form of a personal injuries action arising out of alleged medical negligence. The application to dismiss is advanced on a number of related grounds including (i) the failure to provide full and detailed particulars of the claim as required by the Civil Liability and Courts Act 2004; (ii) the continued failure to obtain a report from an independent expert supporting the claim for medical negligence; and (iii) the inordinate and inexcusable delay in prosecuting the proceedings. Objection is also made that notwithstanding that the Plaintiff's solicitors have been notified that the wrong defendant has been named in the proceedings, no steps have been taken to correct

NO REDACTION REQUIRED

this defect. It is said that there is no cause of action against the named defendant in circumstances where it does not have any responsibility for the hospital at which the medical treatment had been given.

PROCEDURAL HISTORY

2. These proceedings take the form of a personal injuries action. The action relates to the provision of medical treatment to the Plaintiff at the Mater Misericordiae University Hospital, Dublin (“*the Mater Hospital*”). It is pleaded that the Plaintiff underwent an angiogram and angioplasty under the care of a named consultant radiologist on 28 May 2014. It is further pleaded that the Plaintiff subsequently suffered pain in his left leg, and that on 19 June 2014 the remnant of an angioplasty balloon and catheter were found within his superficial femoral artery. Thereafter, the Plaintiff was required to undergo a below knee amputation, and, ultimately, an above knee amputation, on 20 June 2014, and 15 July 2014, respectively.
3. No proper particulars have been pleaded in respect of the alleged acts of negligence. The most that is said is that the Health Service Executive, its servants or agents, were negligent in that they (allegedly) caused or permitted the remnants of an angioplasty balloon and catheter to be left within the lumen of the Plaintiff’s left superficial femoral artery.
4. The absence of particulars is explained as follows at paragraphs 17 and 18 of the personal injuries summons:
 - “17. As of the date of the issue of Personal Injuries Summons, the Plaintiff is unable to include therein full and detailed particulars of the acts of the Defendant its servants or agents, constituting the wrong, particulars of negligence, breach of duty, including breach of statutory duty, particulars of injury and particulars of special damage in circumstances where the

Plaintiff issued a Personal Injury Summons in order to protect his position under the Statute of Limitations Act 1957 (as amended) and prior to having received full and complete medical records from the Defendant and expert reports from medical practitioners in the relevant field. The Plaintiff therefore reserves the right to adduce all the details required by Order 1(A) of the Rules of the Superior Courts including details of the circumstances of the wrong, particulars of negligence and breach of duty including statutory duty, particulars of personal injuries, loss and damage, upon receipt of any and all medical records and expert reports in this regard. The Plaintiff relies on the statement for the purpose of Order 1(A) Rule 6 of the Rules of the Superior Courts.

18. If the Plaintiff has not yet received reports from the medical expert who it is anticipated will give evidence on his behalf in respect of the negligence, breach of duty including breach of statutory duty and causation in relation to the personal injuries as sustained by him and losses and damage arising to him, he reserves the right to add to [the] Indorsement of Claim hereon upon receipt of same.”
5. The personal injuries summons was issued out of the Central Office of the High Court on 10 March 2016. A single defendant is named in the proceedings, the Health Service Executive. The summons was ultimately served on the Health Service Executive on 2 February 2017.
6. Shortly thereafter, the solicitors acting on behalf of the Mater Hospital, on instructions from the State Claims Agency, wrote to the Plaintiff’s solicitors on 5 April 2017. The letter raised a number of objections to the form of the proceedings, including specifically the failure to plead full and detailed particulars. The letter also explained that insofar as any allegations were to be made in respect of care provided at the Mater Hospital, the Health Service Executive was not the appropriate defendant in circumstances where the HSE does not own, operate or manage the Mater Hospital.

7. The letter on behalf of the Mater Hospital concluded as follows:

“Please confirm, as a matter of urgency:–

1. Whether you have received requisite supportive expert opinion from an appropriately qualified expert(s) alleging negligence against our client;
2. If not, please confirm why you issued and served the Summons in those circumstances and confirm that you intend to discontinue the proceedings;
3. If you have, please confirm you will deliver full Particulars of Negligence informed by that expert opinion without delay;
4. If you have, please confirm you will deliver Particulars of Personal Injuries without delay;
5. If you have, please confirm you will deliver Particulars of Special Damages without delay;
6. That you will make an application to substitute the Mater Misericordiae University Hospital for the Health Service Executive. Please note that we consent to that application and that the cost of that application is for yourselves.

Until such time as the Mater Misericordiae University Hospital has been appropriately named, we will not be in a position to enter an appearance on their behalf. Further, it appears at this stage that no stateable case has even been made against our client, despite over a year passing since issue of the proceedings.

Needless to say, until such time as you have amended the title of the Defendant, clarified the position, and responded fully and satisfactorily to these queries, we will not be in a position to investigate the claim, to raise a Request for Further Information or to enter our Defence.”

8. Regrettably, no response was received from the Plaintiff’s solicitor to the above letter of 5 April 2017. The solicitors acting on behalf of the Mater Hospital wrote to the Plaintiff’s solicitor on a number of occasions thereafter. Again, no substantive reply was ever made to these letters.

9. A notice of change of solicitor was filed on behalf of the Plaintiff on 10 May 2018. It has been explained that, following the dissolution of the original firm of solicitors acting for the Plaintiff, one of the solicitors in the former partnership retained carriage of the proceedings.
10. Ultimately, the solicitors who had previously been acting on behalf of the Mater Hospital entered an appearance on behalf of the Health Service Executive. A notice of motion was issued on 10 February 2020 seeking, *inter alia*, to have the proceedings dismissed for failure to comply with the requirements of section 10 of the Civil Liability and Courts Act 2004. In addition, it was sought to dismiss the proceedings pursuant to the High Court's inherent jurisdiction as an abuse of process and on the grounds of inordinate and inexcusable delay. This first motion had been adjourned initially at the request of the Plaintiff's solicitor. Thereafter, the motion was adjourned generally having regard to the restrictions on certain court sittings introduced as part of the public health measures in response to the coronavirus pandemic. It seems that the motion was ultimately relisted, without reference to the parties, on 18 September 2020 and was struck out for non-attendance on that date.
11. The solicitors acting for the Health Service Executive (and the Mater Hospital) issued a second motion, in broadly similar terms, on 19 March 2021. A replying affidavit was filed on behalf of the Plaintiff by his solicitor on 25 June 2021. The content of that affidavit is discussed at paragraphs 26 *et seq.* below.
12. The second motion ultimately came on for hearing before me on 7 March 2022. The Defendant had filed detailed written legal submissions which helpfully summarise the leading authorities on the dismissal of proceedings. Judgment was reserved until today's date.

LEGAL PRINCIPLES GOVERNING APPLICATION TO DISMISS

13. The principles governing an application to dismiss proceedings on the basis of inordinate and inexcusable delay are well established. The leading judgment remains that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 (“*Primor*”). The Supreme Court summarised the position thus (at pages 475/76 of the reported judgment):

“The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:–

- (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
- (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
- (c) even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
- (d) in considering this latter obligation the court is entitled to take into consideration and have regard to
 - (i) the implied constitutional principles of basic fairness of procedures,
 - (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff’s action,
 - (iii) any delay on the part of the defendant — because litigation is a two party operation, the conduct of both parties should be looked at,
 - (iv) whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant in the plaintiff’s delay,

- (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case,
- (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant,
- (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and be other than that merely caused by the delay, including damage to a defendant's reputation and business."

14. As appears, a court must consider three issues in sequence: (i) has there been inordinate delay; (ii) has the delay been inexcusable; and (iii) if the answer to the first two questions is positive, it then becomes necessary to consider whether the balance of justice is in favour of or against allowing the case to proceed. In a case where the entire responsibility for delay rests upon a professional advisor retained by a plaintiff, then the court can and should take into account the fact that a plaintiff may have an alternative means of enforcing his or her rights, i.e. by way of an action in negligence against that professional advisor (*Rogers v. Michelin Tyre plc* [2005] IEHC 294 (at pages 10 and 11), and *Sullivan v. Health Service Executive* [2021] IECA 287 (at paragraph 56)).
15. The *Primor* principles are complemented by a separate but overlapping jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial and/or an unjust result. This complementary jurisdiction had first been considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151.

16. The difference between the legal tests governing these two complementary jurisdictions has been explained with admirable clarity by the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74 (at paragraphs 33 to 38). As appears from that judgment, the two principal distinctions are as follows. (For ease of exposition, I propose to adopt the same shorthand as employed by the Court of Appeal in *Cassidy*, and will describe the tests as “the *Primor* test” and “the *O’Domhnaill* test”, respectively.)
17. First, whereas it is a necessary ingredient of the *Primor* test to establish that the delay is “*inexcusable*”, the *O’Domhnaill* test does not require that there have been culpable delay on the part of a plaintiff. Secondly, whereas both tests require that some consideration be given to whether the delay has prejudiced the defendant in the defence of the proceedings, the degree of prejudice required differs between the two tests. Under the *O’Domhnaill* test, nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice.
18. The rationale for this distinction is described as follows in *Cassidy v. The Provincialate* (at paragraphs 37 and 38):

“Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O’Domhnaill* jurisprudence. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much

better position to defend the proceedings if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?

Considering its jurisdiction having regard to the test in *O'Domhnaill*, 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 placed at risk of an unfair trial or an unjust result."

19. The Court of Appeal has recently reaffirmed these principles in *Sullivan v. Health Service Executive* [2021] IECA 287 (at paragraph 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."

20. A pithy statement of the distinction between the two lines of authority is to be found in the judgment of the High Court (Butler J.) in *Carroll v. New Ireland Assurance Company* [2021] IEHC 260 (at paragraph 20) as follows:

“The difference between what the court is considering at the terminal phase of its analysis in each of the categories set out above has been recognised in a number of recent cases. The key factor is that where a plaintiff is responsible for inordinate and inexcusable delay, a defendant does not have to establish that it will be impossible for him to have a fair trial in order for the proceedings to be struck out. More modest prejudice may tip the balance of justice against allowing the proceedings to continue. Further, the court will in any event take account of the prejudice that inevitably results from a lengthy delay in the conduct of litigation, the prejudice being commensurately greater the longer the period of delay. In contrast, where a plaintiff has not been guilty of inexcusable delay, there is a positive onus on a defendant not only to establish prejudice but to establish that that prejudice is of a kind and a level which will, in fact, impede a fair trial.”

21. The application of these principles to the circumstances of the present case is considered under separate headings below.

APPLICATION OF PRINCIPLES

(I). INORDINATE DELAY

22. The index event giving rise to these proceedings, namely the angioplasty, had been performed on 28 May 2014. The within proceedings were instituted on 10 March 2016. The proceedings had been instituted on what is described as a “*protective basis*”, i.e. the summons was issued out of the Central Office of the High Court—notwithstanding the absence of a report from an independent expert supporting an allegation of negligence—in order to stop time running for the purposes of the two-year limitation period. The party issuing a summons on a protective basis will normally defer service of the proceedings until such time as the requisite independent report has been obtained. If the summons has not been served within twelve months of the date of issue, it will then be necessary

to seek leave to renew the summons: see, generally, *Murphy v. Health Service Executive* [2021] IECA 3.

23. On the facts of the present case, the proceedings were served on 2 February 2017, i.e. within the initial twelve-month period allowed. The proceedings have, however, been issued against the incorrect defendant. As explained earlier, the Mater Hospital is neither owned nor operated by the Health Service Executive.
24. The requisite independent report had not been obtained as of the date of the service of the proceedings and has still not been obtained. In consequence, the claim has not been properly pleaded in accordance with Part 2 of the Civil Liability and Courts Act 2004. The proceedings have stalled at this first stage, and no progress has been made in readying the action for hearing. The pleadings are not closed, and matters such as discovery and the exchange of expert reports cannot be attended to.
25. In summary, no progress has been made in the proceedings notwithstanding that almost eight years have elapsed since the date of the index event, and six years have elapsed since the date of the institution of the proceedings. This delay is inordinate. Indeed, the Plaintiff has, through his solicitor's replying affidavit, conceded as much.

(II). INEXCUSABLE DELAY

26. The next matter to be considered is whether or not the delay is inexcusable. The principal explanation offered on behalf of the Plaintiff is that there had been difficulties in obtaining an independent report from an interventional radiologist. (A report has been obtained from a consultant vascular surgeon, but a further report is deemed necessary). The Plaintiff's solicitor has averred that none of

the doctors contacted thus far have been in a position to provide a medical report.

It is submitted, therefore, that the delay is excusable.

27. The course of the correspondence between the Plaintiff's solicitor and various potential independent experts, as set out in her affidavit, is summarised in tabular form below.

1 February 2017	Solicitor requests report from St. Luke's Radiology, Oxford
3 February 2017	Request declined with recommendation for another consultant
9 February 2017	Solicitor requests report from Foscoote Hospital
9 March 2017	Reminder letter to Foscoote Hospital
24 April 2018	Second reminder letter to Foscoote Hospital (13 months later)
25 April 2018	Foscoote Hospital recommend another consultant Solicitor requests report from recommended consultant
16 May 2018	Request declined
6 June 2018	Solicitor requests report from McCollum Consultants, Manchester
9 March 2020	Second request for report from McCollum Consultants (having secured funding)
10 March 2020	Request declined

28. It is apparent from this chronology that there were lengthy periods of inactivity on the part of the Plaintiff's solicitor in pursuing the requisite independent medical report. For example, a period of thirteen to fourteen months elapsed

before the request made to Foscote Hospital on 9 February 2017 was chased up. It is also apparent that McCollum Consultants confirmed on 6 June 2018 that they had two experts who could assist, and that the report would be available within six to eight weeks from the date of instruction. It seems that the reason that a report was not commissioned in June 2018 was financial. It is averred that the Plaintiff was not in a financial position to obtain a report, but subsequently secured a source of funding in January 2020. McCollum Consultants were contacted again in March 2020. McCollum Consultants suggested a number of consultants, but none were able to assist.

29. There is no evidence before the court of what steps, if any, have been taken to progress matters since March 2020. Indeed, it appears that no significant steps may have been taken during this period. In her affidavit of June 2021, the Plaintiff's solicitor submits that the Covid 19 situation in Ireland and the response taken by the Government "*hindered and prevented*" her office from progressing the matter. No supplemental affidavit has been filed.
30. For the reasons which follow, I have concluded that the delay in the present case has been inexcusable. The Court of Appeal has held that a delay in obtaining expert reports, even where the delay is attributable to financial difficulties on the part of a plaintiff, does not excuse delay in prosecuting a claim. See *Gallagher v. Letterkenny General Hospital* [2019] IECA 156 (at paragraph 42) as follows:

“In this case it will be necessary for the plaintiff to obtain the expert advice and evidence of experts in many different fields of medical expertise as to causation and liability and as to condition and prognosis. He will need reports from occupational therapists in relation to future care needs and the reports of actuaries to quantify his claim. This is not by any means an exhaustive list of what would be required to bring this case to trial. Of necessity, this must involve inevitable expense. Therefore, while the plaintiff's financial difficulty amounts to a very genuine and significant

explanation for the inability to progress his case, and one which is not contested by the second named defendant, it cannot amount to an excuse for the delay in prosecuting his claim. I therefore conclude that the second named defendant has established that the delay in this case was inexcusable as well as inordinate.”

31. The second explanation offered is that the delay since March 2020 is referable to the public health measures introduced in response to the coronavirus pandemic. With respect, this does not represent a justification for the delay in obtaining the requisite independent expert report. The provision of legal services by practising solicitors and the attendance at court offices has always been deemed as an “*essential service*” for the purposes of the public health regulations. There would, therefore, have been no impediment to the Plaintiff’s solicitor travelling to attend at her place of business. In fact, it is apparent from the exhibited correspondence that, even before the pandemic, most of the communications between the Plaintiff’s solicitor and prospective experts were being carried out by way of email. There is no reason why this could not have continued even if the solicitor herself was working from home. The medical records could have been transmitted by way of email or a filesharing platform. Alternatively, the medical records could have been sent by post: the postal service continued throughout the pandemic.
32. There would have been no necessity for there to have been a face to face meeting between the solicitor and the expert for the purposes of preparing a report. In the unlikely event that a discussion was required, this could have been facilitated using an online platform such as Zoom or Microsoft Teams. As the candidate experts were all resident in England, it is likely that any discussion would have been on an online platform even if there had been no public health restrictions.

33. In summary, therefore, the submission that a period of six years and counting is necessary to obtain an expert report in the present case, and that this excuses the delay in prosecuting the proceedings, is rejected.

(III). BALANCE OF JUSTICE

34. Given my finding that there has been inordinate and inexcusable delay in the prosecution of these proceedings, it is necessary next to consider whether the balance of justice is in favour of or against allowing the proceedings to go to full trial. The factors to be considered in this regard have been enumerated by the Supreme Court in the passages from *Primor* cited at paragraph 13 above, and in the subsequent case law discussed at paragraphs 15 to 20 above. As appears, the range of factors to be weighed in the balance is broad. The exercise is not confined to a consideration of the effect of the delay upon a defendant's ability to defend the proceedings. It can also include factors external to the defence of the proceedings, such as, for example, reputational damage caused by the prolonged existence of the proceedings.
35. One of the factors to be considered is whether there has been any culpable delay or acquiescence on the part of the defendant. Here, the putative defendant, the Mater Hospital, and the named defendant, the Health Service Executive, have both approached these proceedings in an entirely reasonable manner. The solicitors acting on behalf of the Mater Hospital wrote to the Plaintiff's solicitors within two months of receipt of the personal injuries summons to raise the objections now advanced as part of the application to dismiss. This correspondence has been summarised earlier (at paragraph 6 above). As appears, the Plaintiff was afforded an opportunity to mend his hand in respect of

the content of the pleadings and the identification of the correct defendant. No substantive response was ever made to the correspondence, and it became necessary thereafter for the solicitors to come on record for the Health Service Executive in order to escalate matters by bringing an application to dismiss the proceedings.

36. In assessing where the balance of justice lies, it is necessary to have some regard to the legislative reforms introduced in respect of personal injuries actions. It is also necessary to have some regard to the specific difficulties which a claim for professional negligence presents for a defendant.
37. The limitation period for personal injuries actions has been reduced to two years under Part 2 of the Civil Liability and Courts Act 2004. Moreover, the level of detail required in pleadings has been enhanced. A plaintiff's pleadings must contain full and detailed particulars of the claim of which the action consists, and of each allegation, assertion or plea comprising that claim. The practical consequence of these legislative amendments has been summarised as follows by the Court of Appeal in *Morgan v. Electricity Supply Board* [2021] IECA 29 (*per* Collins J., at paragraphs 11 and 12). Personal injuries claims are required to be pleaded in a manner which states clearly and precisely what act or omission of the defendant is alleged to have caused injury, and why it is said that such act or omission was wrongful. The reflexive instinct of practitioners to plead broadly and generally has to be curbed.
38. The rules in relation to the service of proceedings have also been tightened up. Whereas the time period within which proceedings must be served remains the same, i.e. twelve months from the date of issue, the threshold to be met in an application to renew a summons outside that period has been raised under the

amended Order 8 of the Rules of the Superior Courts. The court must be satisfied that there are “*special circumstances*” which justify an extension of time. A summons may only be renewed for a period of three months.

39. The default position, therefore, is that personal injuries proceedings will have been issued within two years of the date of the alleged negligent act, and that a defendant will have been served with a detailed statement of the claim against them within a further period of twelve months. Put otherwise, the default position is that, at the very latest, a defendant will be on notice of the nature and extent of the claim against them within an aggregate period of three years.
40. Compliance with these procedural requirements has an especial importance in the context of a claim for professional negligence. The courts have long since recognised the specific difficulties which a claim for professional negligence presents for a defendant. Even if the claim is groundless, the publicity engendered by the proceedings can be damaging to the defendant’s professional reputation and practice. The mere existence of a claim may result in the defendant having to pay increased insurance premiums. Having regard to these considerations, a defendant may be under duress to settle the proceedings by making a payment to a plaintiff notwithstanding that the claim lacks any merit, i.e. to dispose of the “*nuisance value*” of the claim.
41. To guard against these dangers, the courts have said that it is irresponsible, and, potentially, an abuse of the process of the court to commence professional negligence proceedings without first ascertaining that there are reasonable grounds for so doing (*Cooke v. Cronin* [1999] IESC 54). An independent expert report will be required in the vast majority of medical negligence claims, but

there will be certain circumstances where such is not an essential precondition (*Mangan v. Dockeray* [2020] IESC 67).

42. This has resulted in a convention whereby proceedings alleging professional negligence will not normally be issued without the intended plaintiff's lawyers having first had sight of an independent expert report. This convention is not absolute, and proceedings are sometimes issued notwithstanding the absence of the requisite report. This is done to protect the intended plaintiff's position in respect of the two-year limitation period. This practice is sometimes referred to as issuing a "*protective writ*" or issuing proceedings on a "*protective basis*". It is imperative, however, that the requisite report be obtained thereafter with reasonable expedition (*Murphy v. Health Service Executive* [2021] IECA 3 at paragraph 93). Depending on the views expressed by the independent expert, it may become necessary to discontinue the proceedings.
43. The same rationale which underlies the practices governing the issuance and service of proceedings alleging professional negligence extends to an application to dismiss such proceedings on the grounds of delay. There would be little point putting in place procedural safeguards at the *outset* of the proceedings, only to allow those proceedings to drag on indefinitely thereafter. The detriment suffered by a professional defendant in terms of, for example, damage to their reputation or having to pay increased insurance premiums, will be prolonged by the delay in prosecuting the proceedings. Indeed, a defendant will suffer additional prejudice in terms of their ability to defend the proceedings as witnesses' recollection of events fade.
44. The distinguishing feature of the present case is the failure to plead any particulars of negligence. This remains the position some eight years after the

date of the complained of surgical procedure. Thus, this is not a case where there has merely been delay in the *progress* of the proceedings: in a very real sense, the proceedings were never properly commenced. It is a statutory requirement under Part 2 of the Civil Liability and Courts Act 2004 that a case be properly pleaded. This requirement has still not been complied with in the present case.

45. The deficiencies in the pleadings would have been capable of remedy at an earlier stage. A court is likely to show some indulgence to a plaintiff in a medical negligence case where there has been a short delay in obtaining the requisite medical expert reports, and, in consequence, in delivering an amended summons with proper particulars. Had an application been made, within a period shortly after the institution of the proceedings on 10 March 2016, to strike out the proceedings as not properly pleaded, a court is likely to have dealt with the application by making an “*unless*” order. More specifically, the court would direct that the proceedings be dismissed *unless* an amended personal injuries summons, which complied with the pleading requirements, had been delivered within a prescribed period of weeks. However, time has moved on. It is now almost eight years from the date of the index event. There is a limit to the indulgence which a court can—consistent with its parallel obligation to vindicate the right of defence—afford to a plaintiff.

46. It would be unfair to the Mater Hospital, and, more especially, to the named consultant, to require them to defend such a vague and unsubstantiated claim having regard to the inordinate and inexcusable delay. The legislative intent is that a defendant will be on notice of the nature and extent of the claim against them within an aggregate period of three years at the very latest. This legislative intent reflects the reality that recollections will fade with the passage of time. It

is imperative therefore that a defendant know the nature and extent of the claim in good time. The named consultant will have suffered additional prejudice in terms of reputational damage and an obligation to notify his insurers of the claim, with the potential implications in terms of premiums payable.

47. More generally, both the Mater Hospital and the named consultant will have been prejudiced in their ability to defend the proceedings by the delay and the failure to particularise the claim of negligence. It is difficult to quantify the extent of this prejudice precisely because of the Plaintiff's failure to provide particulars. In the absence of details of the nature of the negligence alleged, a defendant cannot begin to formulate their case.
48. One issue which typically arises for consideration in the defence of a medical negligence claim is whether to join a third party to the proceedings. The claim in the present case is that remnants of an angioplasty balloon and catheter had travelled to a site in the Plaintiff's leg. One issue which might have arisen for consideration by the defence—had particulars been provided—is as to whether the alleged difficulties might have occurred as the result of a defect in the equipment used in the surgical procedure. Had proper particulars been provided, the Mater Hospital may have wished to consider joining the manufacturer as a third party. Any such application is likely to be successfully resisted at this stage. A potential third party, unlike the Mater Hospital, has had no indication that proceedings have been taken.
49. On the assumption that the action is not dismissed, these proceedings are unlikely to go to trial for at least another twelve to eighteen months. This time would be expended in the Plaintiff complying, belatedly, with the procedural requirements in respect of pleading by now obtaining an independent expert

report and delivering an amended summons; the preparation and delivery of a defence; the discovery of documents; and the exchange of expert reports. The case would then have to await the allocation of a hearing date in the Personal Injuries List. The ongoing delay will have had an effect on the ability of witnesses to recall the events of 28 May 2014.

50. The court is entitled to take judicial notice of the fact that memories fade as time passes. It is correct to say that contemporaneous medical records, where available, will have an important role to play in a medical negligence action (*Mangan v. Dockeray* [2020] IESC 67 (at paragraph 136)). Nevertheless, it would be inaccurate to characterise all such actions as “*documents cases*”. The direct evidence of witnesses of fact will still have a bearing on the outcome of proceedings. Not everything will have been recorded in the medical records. This is especially so where, as in the present case, the alleged negligence relates to the performance of a surgical procedure, rather than, for example, the making of a diagnosis. Events may have unfolded faster than any contemporaneous notetaking. The resolution of the claim may require an assessment of judgement calls made by the medical practitioners during the course of the procedure and this may necessitate elaboration by oral evidence.
51. Moreover, in many medical negligence actions, the question of informed consent will be in issue. This may necessitate the resolution of disputed recollections of what was said to the patient by the treating medical staff.
52. The delay might also affect the ability of the court to determine the question of whether there has been negligence. The legal test is whether the person against whom negligence is alleged has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty

of if acting with ordinary care (*Dunne v. National Maternity Hospital* [1989] I.R. 91). As part of the analysis, it may be necessary to consider whether the medical practitioner deviated from a “*general and approved practice*” (ibid). Such practices will change over time. There is an artificiality in expecting a trial judge, hearing an action in the year 2023 or 2024, to attempt to ascertain what the general and approved practice would have been almost a decade earlier.

53. If and insofar as the judgment in *Walsh v. Mater Misericordiae University Hospital* [2022] IEHC 126 might be read as suggesting, as a general proposition, that liability in a medical negligence action will turn almost exclusively on contemporaneous records, and that oral evidence will have a very minor role to play, I would respectfully disagree for the reasons outlined above. In any event, the circumstances of the present case are distinguishable from those at issue in *Walsh*: first, that case concerned an allegedly negligent diagnosis, and, secondly, full particulars of negligence had been pleaded by the time the application to dismiss had come on for hearing.
54. On the other side of the scales, it is necessary to weigh the prejudice to the Plaintiff. In the event that the proceedings are dismissed, then the Plaintiff will have lost the opportunity to pursue a claim for damages arising out of what he alleges had been the negligent provision of medical treatment. The proceedings will have been dismissed without any adjudication—one way or another—on the merits. A decision to dismiss the proceedings will thus engage the Plaintiff’s constitutional right to litigate, i.e. his right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law (*Tuohy v. Courtney* [1994] 3 I.R. 1 at 45). However, the right to litigate is not absolute: it must be balanced against other rights, including,

relevantly, the right of defence. This is reflected, in part, by the imposition of limitation periods. It also underlies the inherent jurisdiction to dismiss proceedings on the grounds of delay.

55. Whereas the loss, by a plaintiff, of the opportunity to pursue a claim for damages is undoubtedly a significant detriment, it does not automatically trump the countervailing rights of a defendant. There is an obligation upon a plaintiff to pursue their claim with reasonable expedition. By definition, the carrying out of the *Primor* balancing exercise will only ever arise where a finding of culpable delay has been made against a plaintiff and/or their agents. A defendant does not have to establish that it will be impossible for him to have a fair trial in order for the proceedings to be dismissed in circumstances where a plaintiff is responsible for inordinate and inexcusable delay. More modest prejudice may tip the balance of justice against allowing the proceedings to continue.
56. (The threshold for the dismissal on the grounds of delay is higher in cases where a plaintiff has been or continues to be under a disability: see, most recently, *Sullivan v. Health Service Executive* [2021] IECA 287).
57. As emphasised by the Court of Appeal in *Sweeney v. Keating* [2019] IECA 43 (*per* Baker J., at paragraph 26), a *laissez faire* attitude to the progress of litigation cannot be tolerated:

“Material also to an application to dismiss proceedings for inordinate and inexcusable delay is the fact that the court itself is obliged, in furtherance of its constitutional obligations to administer justice and its obligation to have regard to the European Convention on Human Rights (‘ECHR’), to ensure that litigation is concluded in an expeditious manner (see, for example the decision in *Quinn v. Faulkner* [2011] IEHC 103). A *laissez faire* attitude to the progress of litigation by the plaintiff cannot be tolerated given that delay may constitute a violation of Art. 6 ECHR rights.”

58. On the facts of the present case, the Plaintiff has been on notice of the deficiencies in his pleadings and of the failure to join the proper defendants since 5 April 2017. Despite the lapse of almost five years since that date, and the issuance of two motions seeking to dismiss the proceedings, the Plaintiff has, even now, still not attended to these defects. Instead, the proceedings have remained becalmed. It would not be in the interests of justice to allow the claim to proceed at this late remove.
59. To summarise: the balance of justice requires the court to consider a range of matters. It is not simply an exercise in weighing (i) the potential loss to the Plaintiff of an opportunity to pursue a claim, against (ii) the ability of the Defendant to defend the proceedings notwithstanding the delay. Other factors including, relevantly, the conduct of the respective parties must be assessed as part of the *Primor* test. The acts or omissions of the parties' solicitors, as agent, will be imputed to the parties to the litigation. The parties have a right of action if their solicitors have been negligent.
60. Here, the Plaintiff has had a number of years to mend his hand. The point has now been reached where the balance of justice demands that the proceedings be dismissed. It would be inconsistent with the constitutional rights of the actual and putative defendants, and, more generally, with article 6 of the European Convention on Human Rights, to do otherwise.

ALTERNATIVE RELIEFS SOUGHT IN NOTICE OF MOTION

61. Thus far in this judgment, the analysis has been carried out by reference to the objection that there has been inordinate and inexcusable delay in the prosecution of the proceedings. As appears from the notice of motion of 19 March 2021,

however, the application to dismiss the proceedings has been advanced on a number of alternative grounds. For completeness, it is appropriate to say something in respect of these too.

62. The dismissal of the proceedings has been sought by reference to section 10(3) of the Civil Liability and Courts Act 2004. This section allows the court, where it considers that the interests of justice so require, to dismiss an action for failure to comply with the statutory requirement to particularise a personal injuries action. As discussed at paragraph 45 above, had such an application been brought at an earlier stage in the proceedings, the court is likely to have shown some indulgence to the Plaintiff. However, time has since moved on, and having regard to the continued failure to provide particulars, some six years after the institution of a claim for professional negligence, it is in the interests of justice to dismiss the action on this ground as well.
63. It has also been sought to dismiss the proceedings as an abuse of process in circumstances where there is no appropriate evidential basis, in the form of an independent expert medical report, for same. The convention in this regard has been discussed at paragraphs 41 and 42 above. Again, had a dismissal been sought on this basis at an earlier stage in the proceedings, the court is likely to have shown some indulgence to the Plaintiff. As illustrated by the recent judgment of the Court of Appeal in *Murphy v. Health Service Executive* [2021] IECA 3, it may sometimes be appropriate to issue proceedings on a protective basis pending receipt of an independent expert report. In such circumstances, however, a plaintiff must move with reasonable expedition thereafter to obtain the requisite report. The ongoing delay in the present case is

unreasonable, and the continued maintenance of the proceedings without such a report has now become an abuse of process.

64. Finally, the proceedings should also be dismissed on the separate ground that no reasonable cause of action is disclosed against the Health Service Executive: the Mater Hospital is neither owned nor operated by the Health Service Executive. The Mater Hospital, through its solicitors, had indicated as long ago as April 2017 that it would consent to an application to join it as a defendant in substitution for the Health Service Executive. This very reasonable offer was not taken up, and the point has now been reached where the Health Service Executive is entitled to an order dismissing the proceedings against it even in the absence of substitution.

CONCLUSION AND FORM OF ORDER

65. For the reasons set out herein, I am satisfied that the Plaintiff has been guilty of inordinate and inexcusable delay in the prosecution of these proceedings. The balance of justice lies against allowing the proceedings to go to full trial. Accordingly, an order will be made dismissing the proceedings.
66. The proceedings also fall to be dismissed by reference to the alternative grounds discussed under the previous heading above (at paragraphs 61 to 64).
67. As to costs, the default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been entirely successful in proceedings is entitled to recover its measured costs from the other side. If this default position were to obtain, then the Health Service Executive would be entitled to its costs. If either side wishes to contend for a different form of order, they should email written legal submissions to the registrar assigned to this case by 1 April 2022.

Such submissions should be filed in the Central Office of the High Court and also exchanged with the other side.

68. The case will be listed before me, remotely, on Monday 4 April 2022 at 10.45 am.

Appearances

Daniel Coyle for the Plaintiff instructed by A.K. McGrath Solicitors (Dundalk)
Brian Conroy for the Defendant instructed by Mason Hayes & Curran LLP (Dublin)

Approved
Sandra S. Mans