THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 156

Record No. 2017/385

Peart J.
Edwards J.
Costello J.

BETWEEN/

PAUL GALLAGHER

PLAINTIFF/APPELLANT

-AND–

LETTERKENNY GENERAL HOSPITAL, HEALTH SERVICE EXECUTIVE NORTH WEST AREA, THE MINISTER FOR HEALTH AND ALISTAIR MC FARLANE

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 5th day of June, 2019

1. This is an appeal against the judgment and order of the High Court (Baker J.) dismissing the proceedings against the second named defendant pursuant to the inherent jurisdiction of the court for want of prosecution on the grounds of inordinate and inexcusable delay. Baker J. delivered her written judgment on the 30th March, 2017 ([2017] IEHC 212) and adjourned the motion for a period of three months to allow the plaintiff to assemble expert evidence and reports and to furnish full and detailed particulars of the nature of the plaintiff's injury, of the alleged negligence and of particulars of loss. On the 5th July, 2017 she was not satisfied that the plaintiff had progressed the proceedings in the manner she required and accordingly she dismissed the proceedings against the second named defendant for want of prosecution and ordered the plaintiff to pay the second named defendant the costs of the proceedings.

Background

2. This is a very tragic case. The plaintiff was born on the 12th December, 1986 when he suffered a catastrophic injury immediately before, or at or shortly thereafter his birth as a result of which, he is profoundly physically disabled and he suffers from cerebral palsy. He is wholly dependent upon his parents, he cannot speak or walk and he has great difficulty in communicating. Indeed, counsel for the plaintiff indicated even though the proceedings have been brought in his own name, he is only in a position to give general instructions and the detailed instructions are in fact given by his mother.

3. It appears that as a far back as 1998, during the minority of the plaintiff, his parents contacted Sean Boner & Co. solicitors to advise on his behalf. It appears that Mr. Boner made enquiries in relation to a possible claim and took preliminary advice from a consultant based in England, Mr. Roger Clements, in 2001. Proceedings were not issued at that time. The personal injury summons was issued on the 29th March, 2007, one day before the limitation period for bringing the proceedings was due to expire. No real reason was advanced to explain why proceedings were issued in 2007 rather than 2001 or shortly thereafter.

4. It should be noted that the plaintiff and his parents are of extremely limited means and are not in a position to fund the litigation. The solicitor acting on his behalf since 1998 is a sole practitioner and he has stated on affidavit that he also was not in a position to fund the litigation.

5. Having issued the proceedings on the 29th March, 2007 the plaintiff's solicitors served the personal injury summons directly on Letterkenny General Hospital on the 25th March, 2008 shortly before the plaintiff would have been required to renew the summons under Order 8 of the Rules of the Superior Courts. In 1986, Letterkenny General Hospital formed part of the North Western Health Board and by 2008 both those entities were now covered by the HSE. On that basis, Irish Public Bodies Mutual Insurances Limited nominated solicitors to act on behalf of the first and second named defendants.

6. On the 13th February, 2009 solicitors for the first, second and third named defendants inquired when the personal injury summons was served on the first and second named defendants. No reply was received to that letter so they wrote on the 28th May, 2009 noting this and presuming that the plaintiff was not proceeding with the case. They wrote again on the 3rd June, 2009 asking whether, if it was not the plaintiff's intention to proceed with the matter, could they arrange to file a notice of discontinuance. A reply was received on the 27th August, 2009 from the plaintiff's solicitors confirming that the personal injury summons was served on Letterkenny General Hospital on the 25th March, 2008 and upon the second named defendant on the 27th March, 2008. Solicitors for the first and second named defendants requested affidavits of service in respect of service of the personal injury summons on the first and second named defendants in order to satisfy themselves that the summons had been served within a year of issue. On the 17th September, 2009 the plaintiff's solicitor promised to furnish those affidavits in due course. It is to be inferred that they did so as an appearance was entered on behalf of the first and second named defendants on the 26th November, 2009, some twenty months after the issue of the summons.

7. On the 8th December, 2009 the plaintiff filed a notice of discontinuance in respect of the first and third named defendants. On the 5th October, 2010, ten months after entering an appearance, the second named defendant served a notice for particulars on the plaintiff. On the 2nd November, 2010 it served a twenty-one day warning letter in relation to the particulars and on the 23rd November, 2010 it served a further fourteen day warning letter in relation to the particulars. On the 4th February, 2011 the plaintiff's solicitors telephoned the solicitors for the second named defendant stating that they had mislaid the notice for particulars and it was agreed that a further copy would be furnished and a further twenty-eight days to reply would be allowed

8. Thereafter, matters lay dormant for two years until the 20th May, 2013 when a motion to compel replies to particulars issued. By consent on the 1st July, 2013 an order was made directing that the plaintiff furnish the particulars within six weeks. The plaintiff failed to furnish the particulars and solicitors for the second named defendant sent a twenty-one day warning letter in relation to this default. The particulars were not furnished.

9. On the 16th July, 2014 the second named defendant issued a motion to strike out the proceedings on various grounds including inordinate and inexcusable delay, which motion was returnable for the 13th October 2014. Replies to the notice for particulars dated the 5th October, 2010 were delivered by the plaintiff on the 10th October, 2014.

10. The motion to dismiss the proceedings was adjourned on consent to the 13th April, 2015 to explore the possibility of mediation. On the 25th September, 2015 the mediation was adjourned to enable the plaintiff to obtain a further report from Mr. Roger Clements. The mediation was adjourned to the 11th October, 2015 and then to the 22nd October, 2015 and then to the 12th November, 2015 to facilitate receipt of the report from Mr. Clements. On the 12th November, 2015 the plaintiff's solicitor advised that Mr. Clements' report would not be available until the new year and on the 16th December, 2015 it was agreed that the mediation would reconvene on the 21st January, 2016. The day before, on the 20th January, 2016 the plaintiff's solicitors contacted the solicitors for the second named defendant seeking a further adjournment of the mediation. At this point the second named defendants decided to discontinue the mediation process.

11. The motion to dismiss the proceedings on the grounds *inter alia* of inordinate and inexcusable delay had been adjourned from the 13th October, 2014 to the 13th April, 2015 to the 12th October, 2015 and then it was transferred into the list of fixed dates. On the 21st October, 2015 it was listed for hearing on the 1st February, 2016. The court directed that if the plaintiff wished to file a replying affidavit it must be filed within four weeks of that date. On the 1st February, 2016 the second named defendant agreed to adjourn the motion on the basis that the plaintiff's solicitor stated that he was due to meet with a new obstetric expert in the following weeks. The motion was adjourned for mention to the 22nd February, 2016. On the 22nd February, 2016 there was no appearance by the plaintiff's solicitors so the motion was adjourned to the 14th March, 2016. On that date there was no appearance on behalf of the plaintiff and the matter was listed for hearing on the 11th October, 2016. Ten days earlier, the plaintiff's solicitors furnished the second named defendant's solicitors a report of Mr. Clements on a "without prejudice" basis. On the 6th October, 2016 the plaintiff's solicitor applied to adjourn the motion listed for hearing on the 11th October, 2016 on the basis that he wished to obtain a report regarding post-natal resuscitation from Mr. Peter Fleming, a UK Consultant Paediatrician. The Deputy Master adjourned the motion to the 26th January, 2017, peremptorily as against the plaintiff.

The evidence before the High Court

12. The solicitor for the second named defendant swore an affidavit updating the court on the developments since her affidavit grounding the application. She set out a detailed timeline of events commencing prior to the issuing of the summons. She averred that the delays in the case were extraordinary and:-

> *"are such that there is no realistic prospect of the Defendants dealing with any factual issue that may arise by reference to human recollection…the only consultants that appear to have attended the Plaintiff's mother during her labour were Mr. Leo McAuley and Mr. Brian Davidson. Mr. Leo McAuley has passed away and Mr. Brian Davidson retired approximately twelve years ago. Staff midwives, Bridget McCool and Sophia Kelly are two midwives that attended the Plaintiff's mother during her labour. They retired approximately eighteen years ago. Another midwife that attended was Staff Midwife Geraldine Drumm. She retired approximately seven years ago. It is now thirty-one years since the Plaintiff was born and I believe that it is unrealistic, unreasonable, unfair and unjust to expect these witnesses that are still alive, some of whom are of an advanced age, to have any meaningful recollection of the events surrounding the Plaintiff's birth or to expect the defendants to deal with any issues of fact based on such recollections.*
>
> *The Defendant is further disadvantaged in defending a claim based on events over thirty years ago by the fact that medical record keeping practices by medical and nursing staff have, over the past thirty years become more rigorous, and medical records regarding cases in the recent past are now much more comprehensive than they were thirty years ago. In this case because of the delays that have occurred, the Defendants, having been deprived of the benefit of human recollection, will be left relying on medical records that are less comprehensive than records that are kept by the standards of today."*

She concluded by stating that in her opinion a fair trial of the action was no longer possible.

13. On the 24th January, 2017 the plaintiff's solicitor swore a replying affidavit to the motion issued in July 2014. He confirmed that the plaintiff was unable at that time to specify in detail the special damages of the claim and *"will seek to have the issue of liability determined by the court as a preliminary issue"*. The defendant speculates as to what might have occurred in relation to the birth of the plaintiff. In relation to the argument that the second defendant was prejudiced because witnesses were dead or unable to recall what happened due to the passage of time, he responded by stating that he believed that the nurses should have made more entries in the notes and argued that the existence of the written notes *"more than compensates for the absence of oral staff evidence."* In para. 12 of his affidavit he says:-

> *"I think that the facts that are incontrovertible adequately compensate for the absence of oral staff evidence. The hospital by the admission of their own records had sufficient time to resuscitate the Plaintiff and failed for no good reason to do so."*

He confirmed that the potential witnesses who are now dead *"had nothing to do with the plaintiff."*

14. Secondly, he argued that the defendants had been guilty of delay in the conduct of the proceedings and that therefore an order ought not to be made dismissing the proceedings. He said that there was a delay in entering an appearance, serving a notice for particulars and pointed to the fact that a defence was never delivered on behalf of the second named defendant.

15. He averred to the fact that neither the plaintiff nor his parents were in a position to fund the litigation in any way. He said that as a sole practitioner, he was not in a position to fund the cost of medical reports which he estimated to be about €15,000. He stated that this placed his client at a very considerable disadvantage.

16. At para. 26 of the affidavit he confirmed that he "now" needed to get a report from Mr. Roger Clements. He confirmed that he had corresponded with Mr. Clements in the early years after the plaintiff's birth. He referred to the fact that the report previously furnished by Mr. Clements said that *"the resuscitation was incompetent"* and confirmed that Mr. Clements suggested that a report be prepared by a paediatrician on the specific question on resuscitation as this was outside Mr. Clements' sphere of expertise. He

confirmed that he had tried to get Mr. Peter Fleming of Bristol Hospital to provide such a report but without success and was going to approach another consultant.

17. The second named defendant's solicitors swore a replying affidavit on the 25th January, 2017 but she did not elaborate further on the issue of the difficulty the second named defendant would have in defending the case.

Decision of the High Court

18. The trial judge noted that by agreement of the parties the period of time during which the parties were engaged in and exploring mediation would not be taken into account in determining the period of delay. She therefore discounted the period between the 13th October, 2014 and the 20th January, 2016. Applying the test in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459, she held that the relevant period of delay was between the issue of the summons on the 29th March, 2007 and the date of the hearing of the motion. Thus the delay was eight years and seven months. She held that the individual delays of the plaintiff while they were of some note, were not at a level where they could not be excused by reason of the complexity of the litigation. She held that the second named defendant did not engage the process with expedition after service of the summons and did not move on foot of an inordinate delay in replying to particulars and therefore bore some blame for the slow pace of the proceedings. The motion, in error, was issued on behalf of the first and second named defendants. As a Notice of Discontinuance had been served on the first named defendant, I shall simply refer to the second named defendant in the judgment.

19. Her focus was on the state of the case as it appeared before her nearly ten years after the issuing of the personal injury summons and thirty-one years since the events of the subject of the proceedings. She noted that ten years after the personal injury summons had issued, the plaintiff did not have the medical evidence necessary to prosecute his claim and he had not yet engaged the expert necessary to address issues of liability and causation. Neither the plaintiff, his parents nor the solicitor had the funds with which to prosecute the claim and in particular to pay for the necessary medical and other reports. The plaintiff had not yet assembled any details of his claim for special damages and the pleadings had remained entirely generic. She held that the second named defendant did not know the case that it had to meet. She noted that the pleadings did not satisfy the requirements of s.10 (2) of the Civil Liability and Courts Act 2004 which requires that a personal injury summons shall specify :-

> *"(e) full particulars of all items of special damage in respect of which the plaintiff is making a claim,*
>
> *(f) full particulars of the acts of the defendant constituting the said wrong and the circumstances relating to the commission of the said wrong,*
>
> *(g) full particulars of each instance of negligence by the defendant."*

She said that the Act created a statutory imperative and that generic types of pleading were not appropriate in such claims.

20. At para. 61 she held :-

> *"[t]he circumstances point to a delay which taking all the facts into account is inexcusable, and where the balance of justice seems to favour the dismissal of the proceedings."*

21. She considered whether the personal circumstances of the litigant could be taken into account in an assessment of the balance of justice on an application of this nature. She noted the decision of the Court of Appeal in *Farrell v Arborlane Ltd. & Ors* [2015] IEHC 535 to the effect that a consideration of the balance of justice :-

> *"…is to be arrived at following consideration of all relevant factors including the length of the delay and the degree of actual prejudice shown to have been suffered by the parties. It is not to be confined to the weighing of personal circumstances, and prejudice suffered by one or other party is not to be considered as a standalone factor, but as one that informs the court in the exercise it engages."*

22. She concluded that the personal circumstances of the plaintiff were a factor that she could weigh in the balance. She followed the approach in the High Court in *Casserly v O'Connell* [2013] IEHC 391 where Hogan J. adjourned the motion to strike out the proceedings for two months to enable the plaintiff to put his preparations for trial in order. Baker J. adjourned the motion before her for a period of three months to allow the plaintiff to assemble expert evidence and reports, and to furnish full and detailed particulars of the nature of the injury, and of the alleged negligence and, unless the solicitors for the first and second named defendants formally agreed to a modular trial, the particulars of loss.

23. The matter was relisted before her on the 5th July, 2017. No further affidavit was sworn and so the trial judge had no evidence of any steps taken by the plaintiff's solicitors to assemble expert evidence and reports or to furnish full and detailed particulars of the nature of the injury, the alleged negligence and the particulars of loss. By a letter dated the 4th July, 2017 the plaintiff's solicitors wrote stating as follows:-

> *"1. The plaintiff has furnished medical reports on the plaintiff's condition setting out the nature of his injuries.*
>
> *2. The plaintiff alleges that the defendants and each of them were negligent in that they failed to electronically monitor the foetal heartbeat of the plaintiff prior to the plaintiff's birth notwithstanding that the plaintiff's mother had been administered the labour augmenting drug, Syntocinon. The plaintiff alleges that the defendants were negligent in that the they failed to monitor the foetal heartbeat of the plaintiff.*
>
> *3. The plaintiff alleges that the defendants and each of them were negligent in that they failed to intervene by caesarean section to avoid the plaintiff being injured.*
>
> *4. The plaintiff alleges that the defendants and each of them were negligent in the manner that they carried out attempts at resuscitation of the plaintiff after his birth and in particular in the manner that they attempted to intubate the plaintiff's lungs."*

24. On the 5th July, 2017 the plaintiff's senior counsel asked the trial judge to afford the plaintiff a further six weeks to make *"full disclosure"* [sic] in relation to both liability and quantum. The trial judge rejected this application. She indicated that she had contemplated the possibility of making *"an unless order"* but considered that it would not be appropriate. The transcript records that she stated:-

> *"I considered this matter in great detail. The circumstances and law suggested strongly to me that this was a case that should be struck out, but I exercised my discretion which I considered I had under the various legal principles which I explained, by allowing a further three months for the plaintiff to do a number of things and I outlined those in paragraph 66 of my judgment. They were that the plaintiff would assemble expert evidence and reports, furnish full and detailed particulars of the nature of the injury and the alleged negligence and the particulars of loss. From what I can see all that seems to have happened is that a form of particulars dated the 4th July was served on the solicitors for the defendants which are the class of general particulars which you would expect to find in a statement of claim before somebody had engaged fully with the facts. This is far too general and it is nothing like the type of what I described as detailed, full and detailed particulars of the alleged negligence. This is not a case of whether the defendant will be further prejudiced by any further delay. It is a case where I consider that the defendant has been prejudiced and I gave the plaintiff a window. It was a window in which a lot of things had to be done and if an amount of those had been done and there was some difficulty with regard to some of those factors I might have been indulgent. But the fact is, at best four very general particulars were furnished yesterday to the defendant and it seems there is an expert report but it wasn't furnished to the defendant and it is not before me."*

She therefore struck out the proceedings for want of prosecution.

Subsequent Developments
25. On the 21st November, 2017 Baker J. heard a similar application on behalf of the fourth named defendant. Again, counsel for the plaintiff was seeking further time in which to prepare his case. He referred to the fact that the plaintiff had a report from Mr. Clements from 2016 in which he said that there was negligence on the part of the midwifery in terms of monitoring and maintenance of records. He confessed that the problem was causation. He informed the court that there had been a consultation with Mr. Clements and Dr. Luyt, a consultant neonatal paediatrician. He said that :-

> *"in order to determine when the insult which hit Paul occurred, it is necessary to get a MRI scan. No MRI scan has been conducted to date, at this remove. It is unusual because the boy was born in 1986. But we have* ***now*** *got the consent of the parents and the consent of the plaintiff to undergo an MRI. It will require sedation and it will hopefully be administered,* ***we hope it will be undertaken within the next month*** *or so, but then we have to get a report from a paediatric, I think, neuroradiologist, and they are 'rare birds' in this planet.* ***We are trying to get in touch*** *with Professor Hill in Vancouver who I think is regarded as a pre-eminent expert in this area. So, all I can say, Judge, is that I would ask for the same indulgence, if you could give me maybe three months,* ***maybe into the new year to see if we can get that MRI scan****, get it reported upon and to* ***see whether it assists us in determining when the insult*** *which Paul is labouring under* ***occurred****."(emphasis added)*

Baker J. struck out the proceedings against the fourth defendant on the grounds of inordinate and inexcusable delay and granted no further extension of time in view of the previous indulgence afforded the plaintiff on the 30th March, 2017.

The jurisdiction of the Court of Appeal
26. The question of this court's jurisdiction in relation to an appeal against an order of discretionary nature was comprehensively considered in *Collins v Minister for Justice Equality and Law Reform* [2015] IECA 27. As the authority has frequently been cited by this court, I will simply confine myself to citing the concluding paragraph,79, which states as follows:-

> *"For all these reasons, therefore, we consider that the true position is that set out MacMenamin J. in Lismore Homes [Sic] Lismore Builders Limited (in receivership) v Bank of Ireland Finance Ltd*. [2013] IESC 6. *namely that the Court of Appeal (or as the case may be the Supreme Court) will pay great respect to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a prori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."*

27. In *Lismore Builders Limited (in receivership) v Bank of Ireland Finance Ltd.* [2013] IESC 6, MacMenamin J. in the Supreme Court stated :-

> *"[a]lthough great deference will normally be granted to the views of the trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case."*

28. Thus it is for this court to exercise its discretion on the application, while showing great deference to the decision of the trial judge in the exercise of her discretion.

Submissions by the appellant
29. Counsel for the plaintiff/appellant accepted that it was very difficult to stand over the delays which had occurred in this case but nonetheless submitted that they were neither inordinate nor inexcusable. She argued that in assessing the period of delay from the institution of the proceedings, the court should effectively give the plaintiff credit for the amount of time which it might reasonably take to bring a case of this complexity to trial. Thus the period of delay identified by the trial judge of eight years seven months should be reduced by several years. Once this occurred, then the actual delay could not be considered to be inordinate.

30. It was submitted that in light of the very difficult circumstances of the plaintiff and his family and the very great prejudice to the plaintiff in having his proceedings dismissed that the appellant ought to be afforded a further time in which to prepare his case and gather the necessary reports in the interest of justice. Counsel for the plaintiff told the court that the plaintiff's solicitor had expended €20,000 to obtain reports to date and assured the court that he would fund the case to trial. She gave an undertaking on his behalf to adhere to any very tight timelines that might be imposed in order to bring the case to trial.

31. It was submitted that the defendants were not really prejudiced in the defence of the case as they had reports on liability available to them at the mediation in 2015. It was pointed out that the affidavits do not say that the defendant cannot defend the case on the basis of the documents or lack of recollection and it was further urged that the second named defendant had been responsible for some of the period of delay in relation to the entry of an appearance and raising particulars and subsequently pursuing the question of particulars. Counsel argued that there was no great difference which the second named defendant would necessarily have experienced had the proceedings progressed expeditiously from March 2007 compared with the current situation and that accordingly the actual prejudice asserted by the second named defendant could not be attributed to delay on the part of the plaintiff's post commencement of the proceedings.

32. Finally, it was argued that the court could have considered making an "unless order" on the 5th July, 2017 and it was urged that

this court ought to make such an order.

Counsel maintained that in late July 2017 a report relating to the care needs of the plaintiff was furnished and argued that if the court had made an unless order to a date in August 2017, it would have been possible for the plaintiff to serve particulars of special damage upon the second named defendant's solicitor.

Discussion
33. I shall first consider this case under the principles set out in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R.459. At p.475-476, Hamilton CJ. summarised the principles of law relevant to the considerations of issues raised in the appeal :-

> *"(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."*

34. The Chief Justice stressed the inherent jurisdiction of the court to dismiss a claim in the interest of justice

> *"where the length of time which has elapsed between the events out of which it arises and the time when it comes for hearing is in all the circumstances (my emphasis) so great that it would be unjust to call on a particular defendant to defend himself."*

This particular passage was cited with approval by Geoghegan J. in the Supreme Court in *McBrearty (a.p.u.m. not so found) v. North Western Health Board & Ors.* [2010] IESC 27.

35. Bearing these principles in mind, the court must first consider whether the delay in this case is inordinate. The proceedings commenced on the 29th March, 2007. By consent of the parties the period when mediation was being explored is to be excluded from the assessment of the period of delay, that is from the 13th October, 2014 to the 20th January, 2016. This reduces the period before the High Court of nine years and ten months to eight years and seven months. In my opinion, the fact that nearly all of the steps necessary to prepare the plaintiff's case for trial have yet to be taken, means that this period of delay must be regarded as inordinate. The time has not been utilised to progress the case to any meaningful degree. I specifically reject the argument that the court should deduct from its consideration the time which would normally take to bring a case of this kind to trial. That is clearly incorrect as appears from the second quote from Hamilton C.J. cited above.

36. The authorities have long established that where there has been delay in the commencement of proceedings, there is a greater onus on the plaintiff to progress his or her case expeditiously. In *McBrearty* at p.21 of the judgment Geoghegan J. said:-

> *"…as is clear from case law, it has been well established for a long time that even in cases where the court is only concerned with delay post the commencement of the proceedings, it will view the obligation of expedition after the commencement much more strictly when there has been a considerable lapse of time before the commencement."*

37. In this case the events arise out of the plaintiff's birth which occurred on the 12th December, 1986. The personal injury summons issued one day before the limitation period expired. It is clear that it was incumbent on the plaintiff and his solicitor to progress his case with great expedition and any delay in that regard is to be assessed *"much more strictly"*.

38. Furthermore, recent case law supports the view that the court does not completely ignore the period that elapsed prior to the commencement of the proceedings when assessing whether the delay has been inordinate. This has been held by Irvine J. in the Court of Appeal in *Gorman v Minister for Justice, Equality and Law Reform* [2015] IECA 41, *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27 and *William Connolly and Sons Limited v Torc Grain and Feed Limited* [2015] IECA 280. In the latter case Irvine J. stated in para. 21:-

> *"…that in considering whether or not delay should be classified as inordinate, the court may have regard to any*

significant delay prior to the issue of the proceedings…"

She made similar observation in *McNamee v Boyce* [2016] IECA 19.

39. This court therefore cannot ignore the period between the 12th December, 1986 and 29th March, 2007. This is particularly so given that the plaintiff's parents had consulted the solicitor who has acted for him at all times in 1998 to obtain his medical records and had obtained informal advices from Mr. Clements in 2001. It has not been explained why proceedings could not be commenced in 2001 but, in the absence of further steps, the plaintiff was in a position to institute the proceedings in 2007. Having instituted the proceedings in 2007 they have not been progressed with expedition and the period of delay can only be regarded as inordinate in all the circumstances.

40. The next matter for the court to consider under the *Primor* principles is whether the delay is inexcusable. The onus rests on the moving party to establish this, it is not up to the plaintiff to disprove this point. However, there is an important distinction between inordinate delay that is understandable and inordinate delay that is excusable. This distinction has been recognised since *Dowd v Kerry County Council* [1970] I.R. 27 and was referred to again to in *McBrearty*. In this case, the impecuniosity of the plaintiff and his family and the inability of the plaintiff's solicitor to fund the litigation make the delay which has occurred in this case since the commencement of the proceedings entirely understandable. However, that is not to say that it is excusable. The second named defendant was entitled to point to the fact that ipso facto delay of this duration is inexcusable, absent of a cogent excuse which may be recognised by the court. While the court may have every sympathy with the predicament in which the plaintiff and his parents found themselves, and this is not the same as saying that the difficulty amounts to an excuse within the meaning of the jurisprudence in motions of this kind.

41. Taking medical negligence cases of the complexity as that of the plaintiff's is a difficult and necessarily expensive undertaking. If a plaintiff cannot afford to fund the prosecution of his own case either from his own resources or from family resources, then he will be obliged to obtain the services of experts on a *pro bono* basis. This is not always possible and ought not to be assumed. If, unfortunately for the plaintiff, he is not in a position to progress his case due to lack of funds, then the case cannot continue indefinitely neither progressing nor concluding. The permitted continuance of a case which cannot be further progressed due to an inability to fund the essential steps required to bring the case to trial amounts, in my opinion, to an abuse of the processes of the court. The assurances given by counsel to this court as to the future funding of the case by the plaintiff's solicitor do not really assist in meeting this difficulty, given his previous testimony to the High Court.

42. 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.

43. In *Cassidy v. The Provicialate* [2015] IECA 74, Irvine J. at para.30 expressed the role of the court when considering the third leg of the *Primor* test as requiring:-

> *"…the court to carry out a balancing exercise in the course of which it will put the interests of each of the parties and their conduct into different sides of a scales for the purpose of deciding whether the balance of justice favours allowing the case to proceed to trial. In this regard it is to be noted that* ***one*** *(emphasis added) of the factors that may go into the scales is whether the delay relied upon gives rise to a real risk that it is not possible to have a fair trial…"*

44. In conducting this exercise in respect of the facts of this case, it is necessary to look back to the period of time which has elapsed between the events out of which the claim arises (December 1986) and forward to the time when the case will come on for hearing. In this case it is clear that one is looking at a further likely delay of a number of years before the case could be ready for trial and could obtain a trial date. Even now, the plaintiff is far from being in a position to present his full case. As the trial judge pointed out in 2017, the second named defendant did not yet know the case it had to answer. Therefore, even when it is in receipt of the plaintiff's fully particularised claim, it will need time to engage its own experts to consider the detailed case to be advanced by the plaintiff. It seems to me that realistically there could be no possibility of this case ever coming to trial less than thirty-five years after the events in question.

45. Secondly, Ms. McMahon on behalf of the second named defendant has set out facts which in my opinion establish that the second named defendant has already and will in the future suffer prejudice in its defence by reason of the delay in this case. The trial judge was quite emphatic in her conclusions on this point on the 5th July, 2017, quoted above. I agree with her. There is ample authority to support the proposition that the passage of time of this duration inevitably means that witnesses will not be able to give evidence based upon their recollection of events in any real sense.

46. This of course gives rise to the conclusion that it is not possible to conduct a trial which affords the second named defendant the basic fairness of procedures guaranteed by the Constitution. As has previously been stated, where trials take place so long after the event, justice is put to the hazard.

47. As against these points, counsel for the plaintiff referred to delays in the conduct of the proceedings attributable to the second named defendant's inactions. In my opinion the second named defendant was not guilty of culpable delay in entering an appearance. It was entirely appropriate to satisfy itself that the summons had in fact properly been served within the one year allowed under the Rules of the Superior Courts and that it was not necessary to renew the summons. This is particularly so given the fact that the summons had been issued one day before the limitation period had expired and more than twenty years after the events complained of.

48. Once the appearance had been entered, there was a delay of ten months before the second named defendant raised a notice of particulars. The second named defendant is to some extent culpable for this period of delay. The second named defendant's solicitors pursued the plaintiff for replies to particulars and afforded the plaintiff's solicitors the usual forbearance for a few months. Some small degree of blame may attach to the second named defendant by reason of its delay in bringing the motion to compel the delivery of the replies to particulars. However, it is worth recalling the observations of Irvine J. in *Millerick v. The Minister for Finance* [2016] IECA 206. At para.36 she held that:-

> *"A defendant does not have an obligation to bring the proceedings to hearing…and unless there is some behaviour on the*

part of the defendant that constitutes acquiescence in the delay, his silence or inactivity is not material."

She said that in assessing the balance of justice :-

> *"…[t]he question at that point is whether the defendant caused or contributed to the plaintiff's delay or in some manner gave the plaintiff to understand or led him to believe that the defendant was acquiescing in the delay. Mere silence or inactivity in itself is insufficient because that does not communicate acceptance to the plaintiff."*

At para 39 she concluded that :-

> *"For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."*

49. In this case the second named defendant's notice for particulars were served on the plaintiff on the 5th October, 2010. There were warning letters on the 2nd November, 2010, 23rd November, 2010 and on the 4th February 2011, a further copy of the notice for particulars was furnished. For more than two years the solicitors for the second named defendant took no steps in relation to the conduct of the action. However, on the 20th May 2013 they issued a motion to compel the plaintiff to deliver replies to particulars and an order by consent was made in the High Court on the 1st July, 2013. On the 3rd October, 2013 the solicitors for the second named defendants sent a twenty-one day warning letter to the solicitors for the plaintiff requiring the plaintiff to comply with the order of the 1st July, 2013. Thus between the 20th May, 2013 and the 3rd October, 2013, the second named defendant gave some reassurance that it intended defending the claim. To that extent there was acquiescence in the delay for a period of six months. The next action was to issue the motion, the subject of this appeal, on the 16th July, 2014.

50. I would therefore agree with the trial judge that the second named defendant bears some responsibility for the delays which have occurred in this case, though not to the extent that, of themselves, they would disentitle the second named defendant to the relief sought. It is a factor, along with others, to be weighed in the balance and it is a matter of discretion how much weight is attributed to it.

51. Secondly, counsel for the plaintiff/appellant sought to rely upon developments since the 5th July, 2017 to argue that the justice of the case lay in permitting the proceedings to continue. No affidavit evidence was before the High Court setting out the steps that had been taken by the solicitors for the plaintiff between the date of the delivery of the written judgment and the 5th July, 2017. Furthermore, there had been no application for leave to put additional evidence before this court. Accordingly, counsel could merely assert but could not point to evidence of the steps taken by the plaintiff's solicitors. I have referred to the submissions of counsel for the plaintiff to Baker J. on the motion of the fourth named defendant to dismiss the proceedings which was heard on the 21st November, 2017. It is clear that whatever additional reports may have been obtained by the plaintiff in the weeks immediately after 5th July, 2017, in truth there was a very long road yet to be travelled before the plaintiff's case could be considered to be capable of being set down for trial.

52. It is worth observing at this point that reference was made to reports furnished during the course of the mediation. This court cannot consider such evidence as it is referred to in breach of the confidentiality that attaches to the mediation process. It is accepted by counsel for the plaintiff that Mr. Clements' expertise does not extend to the area of neonatal care and accordingly his opinions in relation to the postnatal care of the plaintiff cannot constitute expert opinion evidence.

53. It was also argued that the High Court and this court ought to have made an "unless order" and that this would meet the justice of the situation between the parties. I cannot accept that an unless order would have been appropriate in the circumstances of this case. It may be used where clearly identifiable action is required to be taken. For the trial judge to make an unless order on the 5th July, 2017 (or indeed this court) would have amounted to a direction of the proofs of the plaintiff, given the state of unreadiness of the case. The very fact that the expert engaged on the plaintiff's behalf, Dr. Luyt, indicated that she could not prepare her report without first obtaining an MRI scan and report thereon, simply indicates the impracticality of this suggestion. It remains equally impractical for this court to make such an order.

54. Balancing the arguments in favour and against the proceedings continuing, I conclude that the justice of the case requires that the proceedings be dismissed. The continuance of a case of this kind at this remove would undoubtedly put justice to the hazard. The second named defendant has satisfied me that it would not be possible to conduct a fair trial of this case affording it the basic requirements of fair procedures. As was stated by Irvine J. in *Gorman v The Minister for Justice, Equality and Law Reform* [2015] IECA 41 at para. 62 :-

> *"Regardless of the integrity of witnesses, it is an undeniable fact that the greater the lapse of time between the event in question and the hearing of the claim the more fragile and unreliable the evidence becomes."*

55. I am mindful of the distinction between the facts in this case and those in *Guerin v Guerin* [1992] 2 I.R. 287, where the plaintiff, by reason of his personal circumstances, had no real possibility of knowing that it was possible for him to sue for damages in respect of the injuries he sustained as a child. On the other hand, in this case, the plaintiff, through his parents, had the benefit of legal advice since 1998, more than twenty years ago, and of expert medical advice from 2001. Of course, it is accepted and acknowledged that he and they were never in a position to finance any claim he might have, but that does not necessarily mean that his claim could not have been brought. It is difficult to understand precisely what has changed in the interval between 2001 and 2007, when the summons was issued, and 2019, which could justify the inaction and delay.

56. Accordingly, in my view the justice of the case lies in favour of dismissing the proceedings pursuant to the inherent jurisdiction of the court on the ground of inordinate and inexcusable delay in prosecuting the proceedings. As I have reached this conclusion applying the principles in *Primor plc*, is not necessary to consider whether the case ought to be dismissed upon the principles in *O'Domhnaill v. Merrick* [1984] IR 151 and *Toal v Duignan (No.1)* [1991] ILRM 135.

57. For this reason, I refuse the appeal and affirm the order of the High Court.