Neutral Citation Number: 2012 IEHC 351

THE HIGH COURT

[2001 No. 12398 P.]

BETWEEN

DAVID AHERNE

PLAINTIFF

AND

MOTOR INSURERS BUREAU OF IRELAND

DEFENDANT

JUDGMENT of Mr. Justice Herbert delivered the 10th day of August 2012

The plaintiff/applicant seeks an order, pursuant to the provisions of O. 8, r. 1 of the Rules of the Superior Courts, extending the time for leave to renew a plenary summons, 2001/12398P, issued on the 2nd August, 2001, but not served. The relevant part of the rule is as follows:-

> "No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons. After the expiration of twelve months, an application to extend time for leave to renew the summons shall be made to the Court. The Court or the Master, as the case may be, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons…and a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby a time for the commencement of the action shall be limited and for all other purposes from the date of the issuing of the original summons."

The defendant/respondent opposes the application on the grounds that the applicant has not shown good reason why the relief sought should be granted and, should the court determine otherwise, it is not in the interests of justice between the parties that the time be extended because of the hardship that this would impose on the respondent, *(Chambers v. Kenefick* [2007] 3 I.R. 526 at 530 per. Finlay Geoghegan J.). The hardship identified by the respondent is firstly, that it would be deprived of a defence under the Statute of Limitations 1957 (as amended) and secondly, it would be substantially prejudiced in defending this claim by the delay of almost thirteen and a half years since the date of the alleged road traffic accident on the 25th February, 1999.

The facts are set out in the principal affidavit, sworn on the 18th October, 2011, and, supplemental affidavit, sworn on the 5th July, 2012, of Siobhan P. Fahy, solicitor and principal of the firm of Fahy Law, solicitors for the applicant and, in the replying affidavit of Thomas J. O'Halloran, solicitor for the respondent sworn on the 18th June, 2012.

25th February, 1999 The applicant claims that he was riding his Suzuki G.S. 850 motorcycle on the public roadway at or near Griffin's Cross, Limerick, when a vehicle collided with the rear of the motorcycle driving him into a field as a consequence of which he sustained very serious injuries.

30th August, 2000 The applicant's previous solicitors notified the respondent by registered post of a, "hit and run" accident and asked to be provided with a questionnaire.

20th April, 2001 The applicant's previous solicitors sent a reminder to the respondent.

25th April, 2001 The requested questionnaire was received from the respondent.

20th July, 2001 The questionnaire was completed and returned to the respondent. A reply in the negative was given to the question, - "did gardaí investigate". It was stated that Henry Street Gardaí attended at the scene. No Garda report had been obtained, no witness statements were available and no prosecution was pending under the Road Traffic Acts.

25th July, 2001 The respondent acknowledged receipt of the completed questionnaire and advised the applicant's previous solicitors that they were investigating the insurance and other aspects of the matter and would be in touch.

30th July, 2001 The applicant's previous solicitors wrote to the respondent asking them to nominate an Insurance Company to handle the claim.

2nd August, 2001 The applicant's previous solicitors issued, - but did not serve, - a plenary summons, 2001 No. 12398 P, claiming compensation pursuant to the provisions of the agreement between the respondent and the Minister for the Environment made on the 31st December, 1988, for personal injuries, loss, damage and expense occasioned to the applicant by reason of the negligence, breach of duty and breach of statutory duty of an untraced motorist.

30th August, 2001 By letter of this date the respondent asserted that the applicant could not prosecute such a claim against the respondent.

2nd October, 2001 By a letter of this date, marked "without prejudice", (this was waived at the hearing of this application) the applicant's previous solicitors indicated that they did not accept this opinion of the respondent and asked the respondent to nominate solicitors to accept service of the proceedings. This letter also advised the respondent of the following matters:-

> (i) Members of the Garda Síochána did not carry out any investigation of the accident despite the seriousness of the injuries suffered by the applicant.

(ii) A Mr. John Colbert would state that he was "flagged down" by the driver of a pick-up truck at the scene of the accident.

(iii) This pick-up truck was facing towards the field and the driver appeared very agitated. Mr. Colbert considered that this man was involved in the accident.

(iv) Mr. O'Sullivan, consulting engineer, (Report and photographs from John G. O'Sullivan, consulting engineers were enclosed with this letter), considered that the damage to the applicant's motorcycle was consistent with its being struck in the rear by a vehicle with "bull-bars" or the like on the front of the vehicle.

(v) Mr. John Colbert stated that the pick-up truck at the scene of the accident was equipped with "bull-bars" on the front.

14th January, 2002 The applicant's previous solicitors wrote to the respondent advising it that they had ascertained that Mr. Desmond O'Neill, Mr. Michael McMahon and Mr. David O'Connor may have been responsible for the accident and the respondent would also be liable.

21st January, 2002 By a letter of this date the respondent wrote to the applicant's previous solicitors stating that "they were filing their papers", in "Aherne v. Untraced Motorist".

24th January, 2002 The previous solicitors for the applicant requested a reply to their letter of the 14th January, 2002.

4th February, 2002 The previous solicitors for the applicant issued a plenary summons, 2002 No. 1531 P, claiming damages against Desmond O'Neill, Michael McMahon, David O'Connor and the respondent.

17th June, 2002 The respondent wrote again to the applicant's previous solicitors stating that they were filing their papers in the case of Aherne v. Untraced Motorist.

10th January, 2003 Plenary summons, 2002 No. 1531 P, was served by registered post on the respondent.

20th February, 2003 Service of plenary summons 2002 No. 1531 P, was acknowledged by the respondent.

11th March, 2003 The respondent, by a letter of this date, advised the previous solicitors for the applicant that they were passing the papers to Eagle Star Insurance Company (Ireland) Limited, to handle the claim.

27th March, 2003 The applicant's previous solicitors wrote to Eagle Star Insurance Company (Ireland) Limited asking them to enter an appearance to plenary summons, 2002 No. 1531 P.

15th April, 2003 An Appearance to plenary summons, 2002 No. 1531 P, was entered by Thomas J. O'Halloran, solicitor.

22nd April, 2003 By a letter of this date to the previous solicitors for the applicant Eagle Star Insurance Company (Ireland) Limited confirmed that they were handling the claim and, noted that the claim originally made had been on the basis of an "untraced motorist" but was now being made against three named defendants and the respondent.

--------- Between the 5th August, 2003, and the 15th December, 2009, inclusive, the following correspondence passed between Thomas J. O'Halloran, solicitor, and the previous solicitors for the applicant: 5th August, 2003, 24th August, 2003, 15th March, 2005, 11th April, 2005, 5th October, 2005, 2nd November, 2009, 7th December, 2009 and 15th December, 2009. In the letters to the applicant's previous solicitors dated the 24th August, 2003, 5th October, 2005, and 7th December, 2009, Thomas J. O'Halloran, solicitor, threatened to issue a motion seeking to dismiss the applicant's proceedings by reason of the failure to deliver a statement of claim.

20th May, 2010 Siobhan P. Fahy, Solicitor of Fahy Law, Solicitors came on record as solicitor for the applicant.

1st June, 2011 A statement of claim was delivered on behalf of the applicant in which it is pleaded, *inter alia*, as follows:-

> "4. The said vehicle was a vehicle that remained unidentified and which was untraced.
>
> 5. Further or in the alternative to which, without prejudice to all or any of the foregoing, the said vehicle was owned and driven at all material times by the first named defendant."
>
> It was accepted at the hearing of this application that the applicant no longer makes any claim against the second defendant or against the third defendant

14th June, 2011 On this date and on the 28th July, 2011, updated particulars of personal injuries were furnished by Siobhan P. Fahy, solicitor to Thomas J. O'Halloran, solicitor together with copies of the following reports:-

Dr. Eimear Smith, Consultant in rehabilitation medicine, 19th January, 2011.

Mr. John Drumm, Urologist, 12th October, 2010.

Dr. Mary McInerney, Consultant Psychiatrist, 5th October, 2010.

Mr. Desmond White, Vocational Rehabilitation Consultant, 27th July, 2010.

Dr. Stephen Roche, General Medical Practitioner, 12th November, 2009.

Ms. Margot Barnes, 11th March, 2011.

Ms. Noreen Roche, Nursing etc. Consultant, 24th November, 2010.

Mr. Simon Hoe, Architect, July, 2011.

Mr. Sean Nolan, Quantity Surveyor, 29th July, 2011.

> In the report of Ms. Noreen Roche, (p. 2 of 12), with reference to the plaintiff and the alleged road traffic accident on the 25th February, 1999, the author states that, "the prior and subsequent events he does not remember".

14th September, 2011A defence was delivered on behalf of the respondent which pleaded, *inter alia,* that it was not open to the applicant to pursue an, "untraced motorist" claim in the proceedings, - 2002 No. 1531 P, against Desmond O'Neill and the respondent.

This was accepted by counsel for the applicant at the hearing of this application. The applicant had been advised, counsel stated, that even if he failed in his action against Desmond O'Neill as being the owner or driver of a motor vehicle which collided with the rear of his motorcycle on the public roadway on the 25th February, 1999, he might still succeed in a claim against the respondent on the basis that the road traffic accident had been caused by an untraced motorist. It was for this reason that the applicant now wished to renew the first plenary summons, - 2001 No. 12398 P.

Exhibited in the affidavit of Thomas J. O'Halloran, solicitor, sworn on the 18th June, 2012, is a letter dated the 6th August, 2010, from Det. Sgt. Brian Sugrue, Detective Branch, Garda Síochána, Henry Street. Limerick, to Siobhan P. Fahy, solicitor, present solicitor for the applicant. This letter states as follows:-

"RE: YOUR CLIENT DAVID AHERNE,

MOTORCYCLE ACCIDENT 25TH FEBRUARY, 1999,

With reference to above, I can confirm that an extensive search at Henry Street, has failed to discover a copy of the file and abstract in this case.

I note that the Correspondence Register in the Superintendent's Office, records this matter as having the reference No. LN 27.59/01 with the title 'Traffic Accident on the 26/2/99 near Griffin's Cross involving David Aherne, 22 Clarina Avenue, Ballinacurra Weston, Limerick driving Motorcycle No. 82 L 250'.

This register records correspondence received from McMahon O'Brien, solicitors on 20th February, 2001, seeking the names of witnesses. Another entry indicates that a copy of the file was 'put away' on 16th August, 2002, and that the file and abstract were forwarded on 25th February, 2003.

I have attached a copy of my notebook entry of that date. Unfortunately the sketch is a rough one and I note that a separate sketch was prepared, which as outlined above is not available.

The attached sketch indicates that the accident occurred 250 foot from Griffins Cross, and the road was 26 foot wide at the scene. There was a tyre mark visible at the scene which started two foot from the grass verge, and which went through the grass margin up to the ditch. This tyre track was visible for a 156 foot and was not a skid mark. The motorbike was found 40 foot inside the boundary ditch of the field.

I recall a person at the scene stating that their attention was drawn to the scene by the light from the motorcycle headlamp and that they found your client when they entered the field to investigate. No one at the scene actually witnesses the accident. I have the name of Des O'Neill, 13 O'Donoghue Avenue, Janesboro, Limerick recorded as being at the scene.

My recollection of this incident is that it appeared that your client was not involved in a collision with another vehicle, but that he drove at a shallow angle from the road, along the grass verge, and collided with the ditch.

I have recorded in my notebook that a copy of the file was sent to Ardnacrusha in April 1999. I will make an enquiry with the members at that Garda Station to establish if there is a copy of the file available and will revert to you once I have a reply."

There is no reference in any of the affidavits filed in this application of any further communication having been received from Det. Sgt. Brian Sugrue.

In the instant case, as in *Baulk v. Irish National Insurance Company Limited* [1969] I.R. 66, Supreme Court, no effort at all had been made to serve the plenary summons, - 2001 No. 12398 P, within the period of twelve months from and including the 2nd August, 2001, as permitted by O. 8, r. 1 of the Rules of the Superior Courts. In that case, Walsh J. with whom O'Dalaigh C.J., agreed, (McLoughlin J. dissenting) pointed out at pp. 71 and 72 that the jurisdiction conferred on the Court by the rule to extend the time to renew a summons was not confined to circumstances or factors explaining why the summons had not been served within the period of twelve months. Walsh J. held that the jurisdiction extended to include, "any other reason which might move the Court in the interests of doing justice between the parties to grant the renewal". That case was decided by reference to the provisions of O. 8, r. 1 of the 1963 Rules of the Superior Courts which was different from the present O. 8, r. 1 of the 1968 Rules of the Superior Courts in that it required the application to renew the summons to be made, "before the expiration" of the period of twelve months. However, this difference is not material because under O. 108, r. 7 of the 1963 Rules the court had power to enlarge the time appointed by the Rules for doing any act or taking any proceeding and, Walsh J. (p 72), held that there was no reason for not granting such an enlargement of time if the court was satisfied that the summons ought to be renewed.

The *ratio decidendi* for the decision of the Supreme Court in *Baulk's* case (followed in *McCooey v. Minister for Finance* [1971] I.R. 159, O'Dalaigh C.J., with whom Budd J. concurred, - Fitzgerald J. dissenting) appears at first glance to have been identified by O'Dalaigh C.J., in the latter case as being, "that the fact that the Statute of Limitations would defeat any new proceedings, which might be necessitated by the failure to grant the renewal sought, constituted 'other good reason' and moved the court to grant renewal". However, in the same paragraph in the very next sentence O'Dalaigh C.J., also refers to the "only other element" mentioned by Walsh J. in the passage from his judgment in *Baulk's* case which O'Dalaigh C.J., cites as establishing the *ratio* of that decision; that is to say, the finding that the defendants were from the very beginning aware of the plaintiff's intention to sue them. The full exposition of the law by Walsh J., in *Baulk's* case (pp. 70 to 72) is as follows:-

"There is authority for the proposition that where the main reason for a renewal is to prevent the time running out under the Statute of Limitations that the court ought not to renew it. The most notable case is *Battersby v. Anglo-American Oil Co. Ltd.* [1945] 1 K.B.

23. That decision, however, appears to have proceeded on the assumption that the effect of failure to serve the summons within the time stipulated by the rules of court in some way made the summons a nullity. That approach was not applied in *Sheldon v. Brown Bayley's Steel Works Ltd. and Dawnays Ltd*. [1953] 2 Q.B. 393, where it was pointed out that the summons is not a nullity in those circumstances because it is something which can be renewed and, if renewed, it is something which is just as effective as it was before the period for service had expired. For example, if it had been served after that period and a non-conditional appearance had been entered, the appearance would have cured the defect in the service.

In my view it is erroneous to compare the position of proceedings which have been commenced by the issue of a plenary summons that has not been served within the necessary twelve months with the position where no proceedings have been issued at all. Section 11, sub-s. 2(b), of the Statute of Limitations, 1957, requires that the action in this case be brought before the expiration of three years from the date on which the cause of action accrued, but it does not require that the proceedings should be served within that time. If the proceedings, for one reason or another, cannot be served or are not served within that time, then a plaintiff may find himself in a position where he cannot pursue his action and the alternative course of issuing fresh proceedings may be useless to him if more than three years from the date of the cause of action has already elapsed.

In my view Order 8, r. 1, of the Rules of the Superior Courts, 16 in speaking of 'no original summons shall be in force for more than twelve months from the day of the date thereof', does not mean that the summons becomes a nullity after that date but that it shall not be in force for the purpose of service after that date, unless renewed by leave of the court. In the circumstances of the type which I have envisaged above, it is in the court's hands to decide whether or not the plaintiff shall be able to pursue the action he has already commenced and the Statute of Limitations does not affect that action. Order 8, r. 1, goes on to provide 'and the Court, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original . . . summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons'.

In my view, on the facts of the present case, it could not be said that reasonable efforts had been made to serve the defendants because in fact no effort at all was made to serve the defendants within the period of twelve months. The question then remains whether there was any other good reason for which the Court ought to renew the summons. While the phrase 'other good reason' may refer to the circumstances or factors which throw light on the failure to serve the summons within the twelve months, in my view it is not exclusively referable to the question of service but refers also to any other reason which might move the Court, in the interests of doing justice between the parties, to grant the renewal. This matter was dealt with in the decision of this Court in *Armstrong v. Callaghan* in which in my own judgment in that case I indicated that, in my view, the fact that the Statute of Limitations would defeat any new proceedings, which might be necessitated by the failure to grant the renewal sought, could itself be a good cause to move the Court to grant the renewal.

In the present case it does not appear to me that any injustice would be done, in the wide sense of the term, to the defendants by the granting of the renewal in this case. They have been aware from the very beginning of the plaintiff's intention to sue them, as they were parties to the motion which resulted in leave being given to name them as defendants. If the plaintiff's injuries were caused by the negligence of the defendants' deceased driver, and if the present proceedings have been commenced within the statutory period (as was the case), it is no injustice to ask the defendants to pay the damages in the amount awarded. If, on the other hand, the plaintiff's action fails to establish any negligence against the deceased driver, the defendants will succeed in the action notwithstanding a renewal of the plenary summons. On the other hand, if the plaintiff can establish negligence against the deceased driver but does not have his summons renewed because the period of limitation for the institution of a new action has already expired, the plaintiff will suffer an injustice by a refusal to renew this summons through being deprived of such damages as he would be entitled to. In my view, in the circumstances of this case, it would be an injustice to the plaintiff to employ the rules of court for the purpose of preventing him from proceeding with the action which he commenced within time when there is no other course open to him which will enable him to have his claim against the defendants determined."

It was to this final paragraph that O'Dalaigh C.J., referred in *McCooey's* case. Any difficulty that may have arisen from these two decisions was resolved by the subsequent decisions of the Supreme Court in, *O'Brien v. Fahy* (Unreported, Supreme Court, 21st March, 1997*), Roche v. Clayton* [1998] 1 I.R. 596 and *Martin v. Moy Contractors Limited* (Unreported, Supreme Court, 11th February, 1999). In *Moloney v. Lacy Building and Civil Engineering Limited and Others* [2010] 4 I.R. 417 at 427 (para. 24), Clarke J., held as follows:-

"It seems clear from *Roche v. Clayton* [1998] 1 I.R. 596, that it is not a good reason to renew a summons simply to prevent the defendant availing of the statute of limitations. In that case, O'Flaherty J., speaking for the Supreme Court, and having made reference to *McCooey v. Minister for Finance* [1971] I.R. 159 and, in particular, *O'Brien v. Fahy* (Unreported, Supreme Court, Barrington J., 21st March, 1997) noted that the statute of limitations must be available on a reciprocal basis to both sides of any litigation. To the extent, therefore, that *Baulk v. Irish National Insurance Company Limited* [1969] I.R. 66, might give rise to a possible argument to the effect that the fact that the plaintiff might otherwise be statute barred can provide good reason on its own, it seems to me that subsequent Supreme Court authority makes it clear that that argument is not tenable. It follows that the 'good reason' must be more than a simple need to renew the summons so as to avoid the defendant being able to rely on the statute. It does seem that the history of events up to the time when the statute might have applied, and in particular, the extent to which the potential defendant knew of the existence of the claim and most especially, the fact that proceedings had been brought on foot of it, can constitute good reasons for the purposes of the rules."

The respondent in the instant case has been aware from the very beginning that the applicant intended to sue them. The respondent was also aware that proceedings had actually been issued and, the respondent had been asked to nominate solicitors to accept service of those proceedings. The respondent was notified by registered post on the 30th August, 2000, that a claim was intended to be made against them arising out a "hit and run" accident. A questionnaire with details of this alleged accident was returned to the respondent on the 20th July 2001 and its receipt was acknowledged by them on the 25th July, 2001. By that acknowledgement, they informed the applicant's then solicitors that they were investigating (my emphasis), the insurance and other aspects of the matter. The letter dated the 30th August, 2001, demonstrates that the respondent was aware that the plenary summons had been issued in the "untraced motorist" claim and, in the letter of the 2nd October, 2001, the respondent was asked by the applicant's then solicitors to nominate solicitors to accept service of those proceedings. It was not until the 14th Januarys, 2002, that the applicant's previous solicitors advised the respondent that they had ascertained that Desmond O'Neill, Michael McMahon or David O'Connor may have been responsible for the accident. The limitation period expired on the 25th February, 2002. However, it was not until the 17th June, 2002, that the respondent notified the then solicitors for the applicant that they were "filing their papers" in the Aherne v. Untraced Motorist matter. The plenary summons in the second action, - 2002 No. 1531 P. – against Desmond O'Neill, Michael McMahon, David O'Connor and the respondents issued on the 4th February, 2002, and was served on the 10th January, 2003. At no stage however, did the applicant's former solicitors indicate that the other action was being abandoned. The respondent had therefore, up to that time, sixteen or seventeen months within which to investigate this "untraced motorist" claim. It was really only after the 22nd April,

2003, when Eagle Star Insurance Company (Ireland) Limited which had been appointed by the respondent to handle the claim, wrote to the applicant's previous solicitors advising them of their appointment, that such activity as there was, which until the delivery of the statement of claim on the 1st June, 2011, consisted only of inter parties correspondence mostly relating to the delivery of that pleading, and the obtaining of medical and other reports relative to damages by the former solicitors for the applicant, became concentrated in the second action. I am satisfied that the foregoing amounts to "other good reason" to extend the time and renew the plenary summons in this matter.

In the present case, despite the passing of thirteen years and four months since the date of the alleged road traffic accident, I am satisfied that no actual or specific prejudice would be suffered by the respondent if the plenary summons issued on the 2nd August, 2001, were to be renewed. This remains so even though additional time will be required to complete the pleadings in that action and, this may delay the hearing of the other action as the court was advised by counsel for the applicant that it was intended to make application, as soon as possible, to have both actions heard together.

There is nothing in the affidavits filed in support of or, in opposition to, this application which suggests that the applicant's case is other than that indicated in the letter dated the 2nd October, 2001, from his former solicitors to the respondent. I have already indicated that in the Report of Ms. Noreen Roche dated the 24th November, 2010, exhibited in the supplemental affidavit of Siobhan P. Fahy, solicitor for the applicant, it is stated that the applicant has himself no memory of events either prior or subsequent to the alleged accident. The evidence of Det. Sgt. Brian Sugrue is contained in his letter dated the 6th August, 2010, Exhibit "TOH-01" referred to in the replying affidavit of Thomas J. O'Halloran, solicitor for the respondent. In my judgment the respondent is not in any manner inhibited in presenting their defence by the fact that the more stylish version of the original sketch map in Det. Sgt. Sugrue's notebook is no longer available. One must ask why, having received the completed Questionnaire prior to the 25th July, 2001, which stated that Henry Street Gardaí attended at the scene of the alleged accident and, especially having received the letter of the 2nd October, 2001, the respondent did not take up a copy of the Garda Abstract.

It is not averred on affidavit that the Suzuki G.S. 850 motorcycle, registration No. 82 L 250 was not available to be inspected by the respondent or, that the scene of the alleged accident has been materially altered. Having regard to what is stated in the letter of the 2nd October, 2001, and, to the consulting engineer's photographs and report enclosed with that letter and, having regard to the fact that from the 4th February, 2002, onwards a claim was being pursued by the applicant against Desmond O'Neill, (and originally others) and the respondent, if the respondent is now having: "considerable difficulty in endeavouring to investigate matters at this stage", - and I find it significant that these difficulties are not identified, - this must be entirely or principally due to the fact, stated at para. 23 of the replying affidavit of Thomas J. O'Halloran, solicitor for the respondent, that the respondent did not, "engage the services of a consulting engineer and the services of a motorcycle expert until after the statement of claim was delivered in the applicant's claim against Desmond O'Neill and the respondent on the 1st June, 2011. It will be recalled that in a letter dated the 25th July, 2007, to the applicant's then solicitors the respondent stated that they were investigating the insurance and other aspects of the matter. If therefore the respondent is experiencing any such difficulties this is not due to delay on the part of the applicant in seeking leave to renew the "untraced motorist" summons.

It is not averred on affidavit in this application that some identified person whose evidence might be material in conducting the defence of the respondent, should the court renew the plenary summons, is no longer available to give evidence. The fact that Mr. Desmond O'Neill has refused to cooperate with respondent in the investigation of the applicant's claim against Mr. O'Neill and the respondent, as alleged at para. 20 of the replying affidavit of Thomas J. O'Halloran, solicitor for the respondent, is scarcely a reason for this Court to decline to renew the applicant's summons in the separate action based on the "untraced motorist" claim. Undoubtedly the recall by witnesses of the events of the 25th February, 1999, will not be as clear as it would have been had this "untraced motorist" action, and indeed the other action, been prosecuted with proper expedition. However, I am satisfied that sufficient documents exist by reference to which witnesses may refresh their memory. The issues of fact in both cases are essentially the same and no application was made, - though it was threatened, - by the respondent to strike out the applicant's proceedings in the second action.

In these circumstances I am satisfied that the balance of justice between the parties in this application is in favour of the Court extending the time and renewing the summons, - that is plenary summons 2001 No. 12398 P., even though the renewal is granted the respondent may still defend the claim on the merits. If however, the summons were not to be renewed the applicant would be barred on procedural grounds from making a case on the merits. In this respect I adopt what was held by Walsh J., in *Baulk's* case in the passage at p. 72 cited by O'Dalaigh C.J., in McCooey's case. The fact that the applicant, if this application were to be refused, might have a claim against his previous solicitors and their insurers is not in my judgment a relevant consideration in the circumstances of this application where the scales of justice between the parties are not so finely balanced. Further, as was pointed out by Ormrod L.J., in *Firman v. Ellis* [1978] 2 A.E.R. 851 at 865g, (disapproved in part on other grounds in *Chappel v. Cooper* [1980] 1 A.E.R. 463) –

"It is prejudicial to be forced to start another set of proceedings and against a party whom one does not particularly wish to sue and to be deprived of a good cause of action against the original tortfeasor. This may not amount to serious prejudice but it has to be balanced against no prejudice to the defendant at all."

I will therefore extend the time for the making of this application and I will renew the summons, - plenary summons 2001 no. 12398 P. for six months from the date of this renewal inclusive.

Other cases referred to in Judgment

Mulcahy v. Coras Iompair Eireann [2011] I.E.H.C. 292

Creevy v Barry-Kinsella & Others [2008] I.E.H.C. 100

Allergen Pharmaceuticals (Ireland) Limited v. Noel Deane Roofing & Cladding Limited & Others [2009] 1 I.R. 438