Neutral Citation: [2014] IEHC 477

THE HIGH COURT

[2008 No. 4863 P]

BETWEEN

ANDREW MANGAN (A PERSON OF UNSOUND MIND NOT SO FOUND) SUING BY HIS MOTHER AND NEXT FRIEND, LORRAINE MANGAN

PLAINTIFF

AND

JULIAN DOCKERY

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered the 23rd day of October 2014

1. This is an application brought by the defendant pursuant to O. 8, r. 2 of the Rules of the Superior Courts to set aside an order of the High Court of the 15th July, 2013, permitting the renewal of the personal injuries summons herein of the 17th June, 2008. Order 8 provides as follows:-

> *"1. 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 may be limited and for all other purposes from the date of the issuing of the original summons.*
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> *2. In any case where a summons has been renewed on an ex parte application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order. "*

2. The plaintiff was born on the 11th January, 1995, at Mount Carmel Hospital, Dublin 14. In the personal injuries summons it is alleged that he suffered severe personal injuries as a consequence of severe respiratory distress in the post natal period. It is alleged that the injuries were caused by the negligence or breach of duty of the defendant who acted as consultant obstetrician and gynaecologist to the plaintiff's mother during the period of her pregnancy.

3. It is pleaded that the plaintiff is severely and permanently incapacitated both mentally and physically. His injuries involve severe cerebral palsy, cortical blindness, he is quadriplegic and he requires constant care and attention and is dependent upon every aspect of ordinary life. He sues as a person of unsound mind not so found through his mother and next friend, Lorraine Mangan.

4. A personal injury summons was issued on the 17th June, 2008, alleging professional negligence against the defendant. No attempt was made to serve this summons on the defendant. The plaintiffs solicitor, Ms. Agatha Taylor, swore an affidavit on the 8th July, 2013, for the purposes of grounding an application to renew the personal injuries summons and she stated as follows:-

> *"The circumstances necessitating the renewal of the summons are summarised as follows. The personal injuries summons was issued on the 17th June, 2008.*
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> *I say and believe that it was drafted by junior counsel on the basis of an expert obstetric opinion confirming the existence of negligence on the part of the defendant in the circumstances of the plaintiff's birth. Additional issues identified by junior counsel were raised by this deponent with the obstetric expert instructed on the plaintiff's behalf*
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> *Subsequent to the institution of the proceedings but prior to their service, senior counsel was instructed to advise on liability on the plaintiff's behalf Senior counsel advised that the opinion of a consultant paediatric neurologist should be obtained. This deponent had great difficulty in engaging the services of the consultant paediatric neurologist who is willing to report on the plaintiff's behalf and in this respect I wrote to eleven such experts throughout Ireland, the United Kingdom and Canada requesting assistance in the case. Unfortunately none of these specialists were in a position to provide a report on the case. "*

5. The defendant brought a motion pursuant to O. 8, r. 2 seeking to set aside the order renewing the summons. Ms. Taylor swore an affidavit in reply to the motion on the 28th February, 2014. She set out in very great detail the very considerable efforts which she took to obtain the necessary and appropriate medical reports prior to proceeding with the plaintiff's case. It is clear that the lapse in time between the 17th June 2008, when the summons issued, and the 15th July, 2013, when it was renewed, was attributable to the efforts taken by Ms. Taylor in complying with the careful and necessary directions of counsel (initially junior counsel and thereafter senior counsel) as to the issues that needed to be fully addressed before the summons could be properly be served upon the defendant (though it was accepted that there was a delay attributable to her maternity leave during this period). She stated that junior counsel was prepared to sign the summons on the basis that certain matters were attended to and in particular that the summons was settled by senior counsel. The steps taken by Ms. Taylor on the advice of counsel and in conjunction with medical advices are set out in paras. 8 to 35 of her affidavit and are appended to this judgement in tabular form. Ultimately a signed report of Dr. Blathnaid McCoy, Consultant Paediatric Neurologist, dealing with timing and causation of the injuries suffered by the plaintiff was received by the plaintiff's solicitors on the 1st June, 2013. Senior counsel was furnished with a copy of the report on the 4th June, 2013 and he replied on the 12th June, 2013, confirming that the plaintiffs claim should proceed. Thereafter junior counsel was instructed to draft the necessary papers to make the application to renew the summons.

6. Both Ms. Taylor in her affidavit of the 28th February, 2014 and senior counsel in the application in court indicated that they were not in a position to set out the details of the medical issues that counsel required to be addressed or the responses to those issues provided by the experts who ultimately reported on behalf of the plaintiff. It is clear however, that when the summons issued in 2008, the plaintiff only had the benefit of the report dealing with the obstetric care relevant to the case. He did not have a report from a consultant paediatric neurologist. The defendant accepts in written submissions presented on his behalf that expert opinion in relation to timing and causation is part and parcel of hypoxic injury cases. It is stated that paediatric neurology is a sine qua non of such cases. It follows therefore that it is accepted that it would neither be possible nor proper for the plaintiff's case to proceed without the appropriate expert paediatric neurological evidence being available to justify the bringing of proceedings against the defendant herein.

Submissions of the defendant

7. The defendant relied primarily on the decision of Feeney J. in *Bingham v. Crowley* [2008] IEHC 453. At para. 15 of the judgment Feeney J. held:-

> *"A correct interpretation of O.8, r.2 requires the application affair procedures and that such procedures include the right of a defendant in an O.8, r. 2 application to make submissions, that even on the facts originally before the Court that the Court should not exercise its discretion to renew a summons. The Court is satisfied that the purpose of0.8, r. 2 is to allow and permit an inter partes application on notice as to the issue of whether a Court should exercise its discretion to permit a summons to be renewed prior to any appearance.*

8. The learned Judge adopted the approach of Finlay Geoghegan J. in *Chambers v. Kennefick* [2007] 3 I.R. 526 as follows:-

> *"... that the proper approach of this court to determining whether or not it should exercise its discretion under O. 8, r. 1, where the application is based upon what is referred to therein as 'other good reason ', is the following. Firstly, the court should consider is there a good reason to renew the summons. That good reason need not be referable to the service of the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made. "*

9. At para. 15 of his judgment, Feeney J. agreed that a correct interpretation of O. 8 r. 2, required the application of fair procedure and that:-

> *"The application affair procedures should ensure that all questions and issues including facts, question of prejudice, the balance of hardship and any legal argument be ventilated at an inter partes hearing as to why the Court should or should not renew the summons. "*

10. He continued at para. 17 of his judgment, referring to the decision in *Chambers v. Kennefick*:-

> *"That approach was applied and adapted by 0'Sullivan J in Allergan Pharmaceuticals (Ireland) Limited v. Noel Deane Roofing and Cladding Limited and Ors. (Unreported, High Court, O'Sullivan J delivered on the 6th July, 2006) where he identified that in considering whether there is good reason to renew a summons the Court must consider such matter by reference 'to the overall interests of justice as between the parties' (p. 10). That approach was identified as being consistent with the judgment of Finlay Geoghegan J where the Court in considering whether there is good reason to renew had stated that the reason 'need not be referable to the service of the summons '. Other reason has been identified as any reason 'which might move the Court, in the interests of doing justice between the parties, to grant the renewal'. (see Walsh J in Baulk v. Irish National Insurance Co. Ltd. [1969] 1 I.R. 66 (at p. 71).*
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> *This Court is satisfied that the approach identified by Finlay Geoghegan J and as applied by O'Sullivan J represents a correct approach. "*

11. The defendant places very considerable emphasis on paras. 30 and 31 of the judgment of Feeney J. I quote them in full:-

> *"[30] Another ground claimed as a good reason to justify the renewal of the summons is the fact that the plaintiffs required further and additional expert medical opinion. The Court is not satisfied that the same could be a justification for the non-service of the plenary summons. The plenary summons was issued in December 2002 and by that month the plaintiffs had already carried out substantial preparatory work in relation to the prosecution of a potential civil claim. They had obtained the medical records by the end of 2001. By December 2001, a consultant neurologist had been retained and a report had been obtained from him, in May 2002. The plaintiff had also engaged health care consultants in the UK. to carry out an assessment. By October 2002, those consultants had furnished an interim report and thereafter the plaintiff's obtained a nursing care report. A further neurological report was available by December 2002. The information available as of December 2002 was the information relied upon by the plaintiffs when they made their complaint to the Medical Council in 2005. It is apparent from the document attached to the letter of complaint that the plaintiff were in possession of detailed expert medical opinion and advice by December, 2002. The fact that a further medical report was being sought from an expert in a different area of medical practice cannot amount to a justification for the non-service of the plenary summons.*
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> *[31] It was submitted by the plaintiffs' solicitor that since the opinion of a further medical expert was required to establish the claim that it was possible and legitimate to issue a plenary summons and to delay serving it on the proposed defendants while investigating the available medical evidence. Reliance was placed upon the statement from McGuinness J. in the case of Cunningham v. Neary [2004] 2 I.L.R.M 498 (at p. 502). McGuiness J. stated:-*
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> > *'It was submitted on behalf of the plaintiff in this court that it would be unwise for a solicitor to embark upon a medical negligence action without convincing or at least persuasive, independent medical evidence to establish the claim. Such a practice, it was argued, would have unnecessary and harmful effects on the medical profession. In general terms this is true but, as was pointed out by senior counsel for the defendant, in a case where there is a danger of the statute running against the plaintiff it is perfectly possible and legitimate to issue a plenary summons and to delay serving it on the proposed defendant while investigating the available medical evidence. '*

That quotation related to a case which was concerned with the statute of limitations and not the renewal of a summons. Such a suggested approach was being identified as a means of addressing the period of limitation provided for by statute. However, in this case what occurred was that a plenary summons was issued, just before the time limit provided for by the statute, and no attempt or effort was made to serve such summons. The significance of such failure is all the greater in this case where there was no warning letter. By November, 2005, none of the defendants were aware of any civil action. It would have been open to the plaintiffs in this case after they had issued the summons to have served it and at the same time indicated by letter that a further medical report was being obtained and that the statement of claim would be delivered on receipt of same. The fact that further inquiries were being made with an additional medical expert provides no basis for justifying the failure to serve a plenary summons. The requirement to serve a summons without delay is all the greater not only where there has been no warning letter but also where the period provided for in the statute of limitations has already expired. "

12. The defendant submits that having issued the summons in 2008, there is no explanation whatsoever in either of Ms. Taylor's affidavits as to why the summons was not renewed or why no warning letter was served. It was also submitted that the report obtained by Dr. McCoy would appear not to have been relevant to the issue of liability at all, but rather to the symptoms and prognosis of the plaintiff. It would appear in the light to the second affidavit of Ms. Taylor that this is incorrect and that in fact two reports were obtained from Dr. McCoy, one dealing with the current condition of the plaintiff and the other dealing with questions of liability. That being so, the criticism that the medical report was not relevant to the renewal of the summons is unfounded.

Application of the law to the facts in the case

13. The first question the court must address is whether there is a good reason to renew the summons or potentially a good reason to renew it. Both the plaintiff and the defendant are agreed that the plaintiff ought to be in possession of an appropriate expert paediatric neurological report before issuing proceedings or continuing them. The defendant in his written submissions described such a report as a *sine qua non*. Ms. Taylor made clear in her second affidavit that the outstanding report from Dr. McCoy related to issues pertaining to liability and that senior counsel only indicated on the 11 June, 2013, that Dr. McCoy's opinion had fully addressed the outstanding issues in the case and that the plaintiffs claim should proceed. It would thus appear that it was only in June 2013, that the plaintiff's legal team had sufficient relevant medical evidence to justify the continuation of the proceedings.

14. This is clearly different to the situation in *Bingham v. Crowley* where Feeney J. noted that while the plaintiff desired to obtain further expert medical opinion it was not averred that such expert opinion was required to enable the statement of claim to be completed, nor was it averred that such opinion impacted on the ability to serve the summons. In this case, senior counsel clearly was not prepared to give the proceedings his imprimatur until he was in possession of such medical evidence as, in his opinion, was required in the light of the plaintiff's legal team's existing state of knowledge. It seems to me that this was an entirely appropriate and indeed professional way to proceed, particularly in a case of such factual and legal complexity. I am thus of the view that *Bingham v. Crowley* should be distinguished and that there exists a good reason to renew the summons, or, in the alternative, there exists a potentially good reason to do so in this case.

15. Having reached that conclusion the court must then consider whether there is good reason to renew the summons in the context of the overall justice between the parties. In weighing the question of justice between the parties, the following matters are relevant to this case. If the case proceeds the defendant will have to face a claim in professional negligence in relation to events that occurred in January 1995, nearly twenty years ago. However, no reference whatsoever is made to prejudice in the affidavit of his solicitor, Nessa O'Roarty sworn on the 12th February, 2014 and further, when questioned by senior counsel appearing on his behalf, no such a case was advanced at this stage. Furthermore, the plaintiff is a person of unsound mind, not so found and accordingly the cause of action against the defendant is not and cannot be statute barred. Ms. Taylor has confirmed for the purposes of clarity, that in the event that the renewal of the personal injuries summons is set aside, a fresh personal injuries summons will be issued and served on the plaintiff's behalf. In addition, counsel for the defendant has indicated that, whether these proceedings continue on the basis that the renewal of the summons is not set aside or, whether fresh proceedings are brought by the plaintiff as Ms. Taylor indicates, it is the intention of the solicitors acting for the defendant to bring a motion to dismiss the proceedings on the basis of inordinate and inexcusable delay in due course.

16. Thus it would appear that whatever order is made by this Court there will not be the end of the matter and the defendant will not be relieved of the requirement to meet the plaintiff's claim.

17. On the other hand, the importance of the case to the plaintiff could hardly be overstated, given the gravity of his symptoms as pleaded. His lawyers and medical advisers have engaged in very considerable work to investigate and prepare his claim. It is now at an advanced state of preparation. Setting aside the renewal of the summons could result in a very grave injustice to the plaintiff if there subsequently proved to be a difficulty in issuing a new summons as indicated by Ms Taylor. It is the case that the plaintiff failed to send the defendant any warning letter such as would be usual before commencing an action and the absence of such a letter was a factor taken into account by Feeney J in *Bingham v. Crowley*. There has been no explanation for this omission. While this is may be unsatisfactory, it is not of such gravity in the circumstances of this case as to alter the balance of justice in the defendant's favour or to justify the setting aside of the renewal of the summons.

18. On balance, the hardship that the defendant may suffer by a refusal of the relief sought is less than the hardship that could be occasioned to the plaintiff by the granting of it. In particular, if the summons is not renewed and if there were a difficulty in the future in issuing a fresh summons, the plaintiff will definitely suffer the very great hardship of being denied the opportunity of bringing his case which, as is clear from the endorsement of the summons, alleges the most serious injuries.

19. I am satisfied that there is a good reason to renew the summons and that the relief sought in the notice of motion should be refused.

Mangan v. Dockery (Table) 17.10.14

Date	**Event**
11th January 1995	Birth of plaintiff
Unknown date prior to 17th June, 2008	Plaintiff obtained expert opinion of Roger Clements establishing negligence. Mr. Clements suggests opinion of consultant in Neonatal Medicine required.

4th March 2008	Instructions sent to Consultant in Neonatal Medicine Mr. Anoo Jain.
2nd April 2008	Mr. Jain confirms receipt.
3rd June 2008	Mr. Jain is asked when his report will be ready
5th June 2008	Mr. Jain instructions his report will be ready in October 2008.
Unknown date prior to 17th June, 2008	Counsel drafts Personal Injuries Summons on basis of Mr Clements report but indicates that additional enquiries in additional fields were required. Counsel suggests that Senior counsel required to opine on liability (see para. 7 of affidavit).
17th June 2008	Personal Injuries Summons issued
25th November 2008	Mr. Jain asked when his report would be ready.
2nd December 2008	Mr. Jain raised query on medical records.
12th February 2009	Ms. Taylor (plaintiff's solicitor) says that query of 2nd December 2008 required her to review medical records enabling a reply to Mr. Jain only by this point.
20th April 2009	Mr. Jain asked when his report would be ready.
11th May 2009	Mr. Jain asked when his report would be ready.
13th May 2009	Mr. Jain asked when he report would be ready.
17th July 2009	Mr. Jain furnishes his report.
18th August 2009	Letter of instruction written by plaintiff's solicitor to Senior Counsel.
Early September 2009	Opinion of Senior Counsel received. This indicated that further "enquires were required before the proceedings could be advanced" (see para 11 of Ms. Taylor's affidavit). Enquiries were set out to be made of Mr. Clements and Mr. Jain.
12th November 2009	Plaintiff's solicitor consults over telephone with Mr. Clements.
18th November 2009	Mr. Clements provides ad vices to address Senior Counsel's queries.
January 2011	Contact made with Mr. Clements and Mr. Jain "in relation to the issues raised by Senior Counsel".
1st February 2011	Further advices from Mr. Clements and Mr. Jain received and/or furnished to Senior Counsel.
15th February 2011	Senior Counsel raises issues for Mr. Jain. Senior Counsel advises that "opinion of a paediatric neurologist" was required.
28th February 2011	Plaintiff's solicitor writes to Mr. Martin Smith.
4th March 2011	Mr. Martin declines instructions.
9th March 2011	Plaintiff's solicitor writes to Mr. Colin Ferrie.
15th March 2011	Mr. Colin Ferrie declines instructions.
16th March 2011	Plaintiff's solicitor writes to Dr. John Livingstone and Dr. Michael Clarke (no response ultimately received).
April 2011	Telephone consultation with Senior Counsel and Mr. Jain.
15th April 2011	Plaintiff's solicitors write to Senior Counsel with details of Mr. Jain's further comments.
3rd May 2011	Senior Counsel reverted, expressing view that opinion of a paediatric neurologist required.
3rd June 2011	Plaintiff's solicitors write to Dr. Sarah Aylett.
21st June 2011	Dr. Sarah Aylett declines instructions.
22nd June 2011	Plaintiff's solicitors wrote to Dr. Lucinda Carr.
13th July 2011	Plaintiff's solicitors wrote to Prof. Helen Cross.
18th July 2011	Dr. Lucinda Carr declines instructions.
28th July 2011	Prof. Helen Cross declines instructions.
5th August 2011	Plaintiff's solicitors wrote to Dr. Krishna Dass.
22nd August 2011	Dr. Krishna Dass declines instructions.

23rd August 2011	Plaintiffs solicitors wrote to Dr. Kathryn de Ville
21st September 2011	Plaintiffs solicitors wrote to Dr. Nigel Basheer
30th September 2011	Dr. Nigel Basheer replied saying that required further information before he could assist.
21st October 2011	Plaintiff's solicitors wrote to Prof. Mary King.
Unknown Date	Tony Bouldin informs plaintiff's solicitors that Professor was on sick leave.
15th November 2011	Plaintiff's solicitors wrote to Prof. Hill.
25th November 2011	Prof. Hill (again) declined instructions.
4th January 2012	Plaintiffs solicitors wrote to "Professor Fleming".
5th January 2012	Prof. Fleming replies to say he is not a paediatric neurologist.
29th February 2012	Plaintiffs solicitors wrote to Dr. Blathnaid McCoy
5th April 2012	Reminder sent to Dr. McCoy.
25th April 2012	Response from Dr. McCoy dated 17th in April 2012, received indicating willingness to accept instructions.
23rd July 2012	Dr. McCoy wrote to indicate she now had care of plaintiff enquiring if this caused difficulties. Plaintiff's solicitors wrote by email to say it did not.
8th August 2012	A full set of the plaintiffs records were sent to Dr. McCoy (see para 32).
14th November 2012	Meeting arranged with Dr. McCoy.
10th December 2012	Solicitor contacts Junior Counsel indicating anticipation of Dr. McCoy's report within weeks and requesting advices.
18th January 2013	Junior counsel provides requested advices.
1st June 2013	Dr. McCoy's reports are received one dated the 22nd arch 2013, on "condition and prognosis" and the other on the "timing and causation" of the injuries suffered by the plaintiff.
4th June 2013	Solicitors write to Senior Counsel who replied on 12th June 2013, indicating Dr. McCoy's reports addressed the outstanding issues and the claim should proceed.
20th June 2013	Junior Counsel asked to draft papers to renew the summons.
26th June 2013	Papers to ground motion ex parte to renew provided
15th July 2013	Application to renew made.