

THE HIGH COURT

[1989 No. 13263 P]

BETWEEN

BERNADETTE FARRELLY

PLAINTIFF

AND

THE BOARD OF BEAUMONT HOSPITAL AND PETER McLEAN

DEFENDANTS

Judgment of Mr. Justice Gilligan delivered on the 1st day of February, 2006.

1. These proceedings were commenced by way of a plenary summons as dated the 3rd November, 1989. The solicitors for the first named defendants brought a motion on the 3rd December, 1993, to dismiss the plaintiff's claim for want of prosecution, alternatively for an order that the plaintiff should deliver a statement of claim within such time as the court found reasonable following a series of letters calling upon the plaintiff's solicitors to deliver a statement of claim. Arising from the motion as brought by the first named defendant a statement of claim was delivered on the 27th January, 1994. The first named defendants delivered a defence in July, 1994 and the second named defendants a defence in December, 1994. A notice of trial was served in February, 1995 and it appears on the balance of probabilities that a second notice of trial was also served, presumably each notice of trial being served on the respective solicitors for the defendants resulting in the case having two list numbers.

2. Subsequently, the matter appeared in a positive call over list on the 18th December, 1996, and as there was no appearance on behalf of any party it appears as a matter of probability that the plaintiff's first notice of trial was struck out. It then appears that the matter appeared in a positive call over list in May, 1998 and the second notice of trial appears to have been struck out.

3. There is a certain amount of confusion as to precisely what occurred on the 18th December, 1996, and again in May, 1998 when the case was listed pursuant to the two notices of trial in the positive call over list. There is a possibility that the actual proceedings herein were struck out but the more probable result appears to have been that it was the respective notices of trial that were struck out. Mr. Maguire on the plaintiff's behalf accepts that the initial affidavit as delivered on the plaintiff's behalf and as sworn by Marian Chambers Solicitor does give rise to a certain amount of confusion as she deposes that the proceedings were struck out but a subsequent correcting affidavit as sworn by Brendan Flanagan confirms that this statement was made in error and that what occurred was that the respective notices of trial were struck out. Margaret Muldowney in her affidavit as delivered on the second named defendant's behalf refers to the notice of trial having been struck out and the first named defendant in its affidavit as sworn on its behalf by Aisling Gannon refers to the proceedings having been struck out but appears to rely on a print out from the Central Office which Mr. Fox on the first named defendant's behalf accepts is inconclusive, and the original affidavit of Marian Chambers. Ms. Gannon does not depose that she has any independent evidence available of her own personal knowledge that she is aware that the proceedings were struck out as opposed to the notices of trial.

4. I take the view on the balance of probabilities that it was the respective notices of trial that were struck out and accordingly the plaintiff's motion to reinstate the proceedings is in these circumstances moot and irrelevant because if the defendant's fail in their motion the appropriate procedure will be for the plaintiff to serve a notice of intention to proceed to be followed by a fresh notice of trial to be served on the respective defendant's solicitors, if necessary, with leave of this Court.

5. The plaintiff's claim is for damages in respect of the professional negligence of the respective defendants arising out of the medical care afforded to the plaintiff while a patient at Jervis Street Hospital following her admission thereto on the 2nd November, 1986, following a diagnosis of a stone at the lower end of the right urethra.

6. The plaintiff complains that it took some two-three years to recover from the treatment as afforded to her and that as of January 1994 she was still suffering from serious discomfort and constant pain in the right hand side of her abdomen with paraesthesia in her right thigh as a result of her treatment by the defendants.

7. The defendants have delivered full defences to the plaintiff's claim.

8. The defendants by motions dated respectively the 9th December, 2005, and the 15th March, 2005, seek an order striking out the plaintiff's claim for excessive and inordinate delay in prosecuting the claim.

9. As the second named defendant's motion is first in time I shall deal with the matter in the defendants reverse order.

10. On the 7th October, 1996, the second named defendant's solicitors were writing to the plaintiff's solicitors indicating that this was a case which should be specially fixed and requesting details as to when the plaintiff would be in a position to proceed with the action.

11. Unfortunately in 1996 the plaintiff's husband died and she suffered considerably as a result of his loss. There was then some further correspondence in particular in 1998 enquiring as to the availability of Mr. Patrick Smith, the plaintiff's medical consultant, and then the case appears to have remained dormant for approximately three and a half years with no contact between the plaintiff's solicitors and the second named defendant's solicitors. It is in my view of significance that on the 25th March, 2002, the plaintiff's solicitors wrote to the defendant's solicitors indicating that they were ready to proceed with the case as Mr. Smith was available in the months of June and July, 2002, but the second named defendant's solicitors replied that a suggested hearing date in June/July, 2002 was unrealistic as the plaintiff's solicitors would have to serve notice of change of solicitor, thereafter notice of intention to proceed and finally, a new notice of trial, the original notice of trial having been struck out in May, 1998 and the case would then presumably take its place at the bottom of the personal injuries list. In my view it is of importance that as of the 27th March, 2002, the second named defendant's solicitors were not raising any issue as regards delay, and were given three months to prepare for a hearing in June/July, 2002. Through counsel the explanation is offered that it would not have been possible to serve a notice of change of solicitor, thereafter notice of intention to proceed and finally, a new notice of trial so that the case could get a hearing within 3 months. In any event counsel submits that the case would then presumably take its place at the bottom of the list. It thus appears that the second named defendants were prepared as of March, 2002 for a delay of more than three months to enable notices to be served and that then the case would go in at the bottom of the personal injuries list which clearly was going to involve a

further significant delay in the matter coming on for hearing against a background where there was no reference to any problem with the undoubted delay that had already taken place, and a clear offer by the plaintiff for a hearing in June/July, 2002.

12. In November, 2002 the plaintiff had heart problems and had to undergo an angiogram and then in the earlier part of 2003 she had a hip replacement and the plaintiff's solicitors wrote to the second named defendant's solicitors in June, 2003 indicating that the plaintiff was now in a position to proceed and that they noted that they had to apply to the High Court to have the notice of trial reinstated.

13. The plaintiff's solicitors also asked that the second named defendants would consent to having the case reinstated and this letter was replied to by way of a letter of the 24th June, 2003, indicating that the solicitors would take their client's instructions and revert. Subsequently on the 18th July, 2003, the second named defendant's solicitors wrote noting that it was intended to serve a notice of intention to proceed and presumably before doing so that a notice of change of solicitor would be served with no reference being made as to whether or not consent was forthcoming to the notice of trial being reinstated. Subsequently on the 26th January, 2005, a notice to proceed was served and it was indicated that a motion was going to be brought to have the case reinstated.

14. In the affidavit as sworn on the second named defendant's behalf it is contended that it was almost 19 years since the events complained of, that there was inordinate and excessive delay, that in all the circumstances the plaintiff had evinced an intention not to proceed reasonably with the action and prayed for the relief as sought.

15. Marian Higgins on the plaintiff's behalf delivered a replying affidavit sworn on the 7th July, 2005, explaining the background to the plaintiff's history of heart disease and her problems with her left hip and also the fact that the plaintiff was deeply upset for many years and was grieving following the death of her husband in August, 1996.

16. Ms. Higgins deposes in the affidavit that she has had considerable difficulty with her medical witness Mr. Patrick Smith. Ms. Higgins deposes that Mr. Smith had previously advised that he would have been available in June/July, 1998 but by letter of the 7th May, 1998, the solicitors for the second named defendants said they were unable to proceed due to the unavailability of witnesses and they suggested a date in the Michaelmas term of 1998. Ms. Higgins deposes to the fact that the plaintiff remained in ill health and that in March, 2000 a notice of intention to proceed was filed but it does appear that this may not have been served on either defendant.

17. On the 25th March, 2002, she deposes to the fact that she was in a position to proceed with the plaintiff's action and advising on Mr. Smith's availability in June/July, 2002 and of the solicitors for the second named defendants not being in a position to proceed.

18. Ms. Higgins accepts that there has been a protracted delay in this case but there have been a number of difficulties over the years in bringing the matter to a conclusion due to the death of the plaintiff's husband and a prolonged bereavement process and due to the plaintiff's heart condition and the fact that she has had to undergo a hip replacement. She also refers to the fact of the difficulties with Mr. Patrick Smith attending from the United Kingdom but indicates that as of July, 2005 the plaintiff was anxious to proceed with the case and she submits that it would be unfair to the plaintiff not to allow the matter to proceed in view of the fact that she has evidenced her intentions over the years to proceed with the case.

19. Ms. Muldowney on the second named defendant's behalf in a replying affidavit refers to the fact that her client has lived with the pressure of this impending litigation and the allegations against his professional competence since the time of the treatment of the plaintiff. In addition she deposes that whilst the hospital records are available after a lapse of 18 years it is submitted that it would be difficult if not impossible for the second named defendant to recall his actions and the delay has therefore prejudiced the defence of the second named defendant.

20. Ms. Aisling Gannon in an affidavit as sworn on the first named defendant's behalf deposes to the fact that for a period of five years after December, 1996 the plaintiff's solicitors failed to write to the first named defendant's solicitors about the plaintiff's claim. The next correspondence that was received was the letter of the 25th March, 2002, more than 12 years after the issuing of the plenary summons. This letter was replied to by the solicitors for the first named defendants indicating that the notice of trial which had been served almost eight years previously was subsequently struck out and that it was possible that the first named defendant's witnesses involved in the matter were either untraceable or deceased and that if that was the case the first named defendant would be severely prejudiced. As the file had been removed to off site storage it would be located and the first named defendant's solicitors would correspond further with the solicitors for the plaintiff.

21. It then appears there was a further letter from the plaintiff's solicitors to Gannon and Liddy Solicitors who were the former solicitors to the first named defendants as dated the 17th June, 2003, and the solicitors for the first named defendants in a reply reiterated what was set out in their letter of the 27th March, 2002, and indicated that they would vehemently resist any attempt to have the matter re-entered.

22. In a further affidavit as sworn on the 9th December, 2005, Ms. Gannon deposes that it has been 19 years since the plaintiff received treatment at the Richmond Hospital and Jervis Street Hospital which hospitals closed shortly thereafter and whose services and employees transferred to Beaumont Hospital. She says that it has been more than 16 years since the plaintiff initiated these proceedings and more than 10 years since the proceedings were struck out. She says the delay has been inordinate and excessive and that the first named defendants are prejudiced in that the defendant has not had contact from a nurse who would have been a vital witness on its behalf. The last known whereabouts of the nurse, Ms. Neeson, was in London in 1996 some 10 years previously. She further deposes that the plaintiff's delay has prejudiced the defence of the first named defendant in that with the passage of so many years the memories of any witnesses who can be located will be compromised by such inordinate and excessive delay.

23. In a further supplemental affidavit Brendan Flanagan solicitor deposes on the plaintiff's behalf to the fact that arrangements had been made for the plaintiff to be medically examined by Mr. Smith and a report had been received from him on the 16th May, 2001, and a number of attempts were made to agree a hearing date with the defendants but it transpires that the plaintiff has a number of serious health difficulties and was an in-patient for various dates in 2003 and 2004 as a result of her health. He deposes that the plaintiff has a stateable case against both defendants and he seeks leave for the plaintiff to be given the opportunity to litigate her case in full against both defendants.

24. It is self evident that the delay in this case has been inordinate. In my view it is also inexcusable that in fact since the respective notices of trial were struck out in 1996 and 1998 no actual action has been taken on the plaintiff's behalf to rectify the matter by an application to court or otherwise.

25. It does appear to follow however that, notwithstanding that I come to the conclusion that there has been inordinate and

inexcusable delay, following the decision of Finlay P. in *Rainsford v. Mayor Alderman and Burgesses of the City of Limerick* [1995] 2 ILRM 561, it is clear that the court must further proceed to exercise a discretion as to whether on the facts the balance of justice is in favour of or against the proceeding of the case. Delay on the part of a defendant seeking a dismissal of the action and to some extent on its part to exercise a right to apply at any given time for the dismissal of an action for want of prosecution may be an ingredient in the exercise by the court of its discretion.

26. It further appears that while a party acting through a solicitor must to an extent be vicariously liable for the activity or inactivity of the solicitor consideration of the extent of the litigants personal blameworthiness for delay is material to the exercise of the court's discretion.

27. The issue as to a missing witness could not be regarded as a serious matter of prejudice in the absence of proof as to the nature of the evidence which the witness would have given and the date on which the witness became unavailable.

28. The chance of a major injustice being done to the plaintiff should the action be dismissed has to be considered in proportion to the chance of a major injustice being done to the defendants should the action proceed.

29. There is no doubt that in an action claiming damages for professional negligence it is incumbent in my view on a plaintiff maintaining proceedings to bring them to a hearing with reasonable diligence and that has not occurred in this case. There was a delay in the service of the statement of claim and it was necessary for the first named defendants to bring a motion to strike out the plaintiff's claim for want of prosecution and this motion resulted in a statement of claim being delivered in 1994.

30. As previously indicated there is confusion as to what occurred in 1996 and 1998 when the respective notices of trial appear to have come before this Court by way of a positive call over and while clearly the greater onus lay on the plaintiff's solicitors to attend, it does appear that there was no attendance at either of the positive call overs by any representative of any of the parties to these proceedings. Having regard to the view which I have expressed as regard to the striking out of the notices of trial as opposed to the striking out of the proceedings the present proceedings were at all times "live" and in fact all that was necessary was for the service of a notice of intention to proceed and the bringing of an application to the court for leave to issue a fresh notice of trial or alternatively subject to clarification to issue a notice of intention to proceed and then serve a fresh notice of trial. It was equally open to either of the defendants to seek a dismissal of the action and neither chose to do so. I fully accept that the letter of the 25th March, 2002, from the plaintiff's solicitors to both solicitors acting on behalf of the defendants came out of the blue but, as appears from the deposition as contained in the supplemental affidavit of Brendan Flanagan, in fact the plaintiff had seen Mr. Smith in Bristol and a report had been received on the 16th May, 2001. The importance of the situation that arose in March, 2002 was that no application had been made by either defendant to dismiss the plaintiff's claim which was a live action on the basis of inordinate or excessive delay and each defendant was given the opportunity, with effectively three months clear notice, to have a trial of the action in June/July, 2002. More crucially however neither defendant at that particular point in time took exception to the indication from the plaintiff that she was now ready for a hearing. It is accepted that there was a further delay after the letter of the 17th June, 2003, from the plaintiff's solicitors wherein it was indicated that a notice of intention to proceed was going to be served and then a further delay to the 26th January, 2005, wherein it was indicated that it was proposed to bring the application to have the case reinstated by serving a notice of intention to proceed which led to the bringing of the motion by the second named defendant to have the proceedings dismissed for inordinate and inexcusable delay.

31. Against this background the first named defendant had not taken any action to have the plaintiff's proceedings dismissed but had indicated in a letter of the 27th March, 2002, that they may be prejudiced and that when they had located their file from off site storage they would correspond with the plaintiff's solicitors further. Subsequently in August, 2003 the solicitors for the first named defendant indicated that they would resist any attempt to have the matter re-entered and reinstated.

32. The first named defendant only brought the present motion to have the plaintiff's claim dismissed for excessive and inordinate delay in prosecuting her claim on the 9th December, 2005, clearly following the second named defendant's motion.

33. In my view there was delay on the part of both defendants in seeking a dismissal of the action and the importance in my view of the failure on the defendant's part to exercise their right to apply for the dismissal of the plaintiff's action is of significance as each defendant in the particular circumstances of this case was offered the opportunity of a trial in June/July, 2002 and neither took up this offer.

34. I am satisfied in the particular circumstances of this case that while the plaintiff personally may have had difficulties with the grieving process following the death of her husband in 1996 and with subsequent ill health in 2002 and 2003 in relation to her heart and her hip these matters as such should not have prevented the procedural steps which should have been taken to bring about the service of a fresh notice of trial on both defendants. There is no evidence before me that the plaintiff herself attracts any personal blameworthiness and in my view this is a material factor in the exercise of my discretion.

35. Insofar as the first named defendant makes out a case that there is now a missing witness, it is clear that Ms. Neeson has been unavailable since 1996 and the probability is that she would not have been available in any event for a trial of this action subsequent to 1996. In any event I do not regard the issue as to the missing witness to be a serious matter of prejudice as I have no indication as to the nature of the evidence she would give and its importance to the central issue of liability herein.

36. I note in this context that the hospital records are available and the issue of prejudice as advanced is a generalised one that 19 years after the event no witness should be asked to cast their mind back to the particular circumstances of what actually occurred. In this regard it is apparent from the manner in which the affidavit is sworn on behalf of the second named defendant that the second named defendant has not been actually consulted because the deponent avers that after a lapse of 18 years it will be difficult if not impossible for the second named defendant to recall his actions and the delay has therefore prejudiced the defence of the second named defendant. The second named defendant, the Senior Registrar who actually performed the procedure and the nursing staff of the first named defendant's hospital, will have the opportunity to consider the hospital records which are available and in my view while there may be an issue of general prejudice having regard to the undoubted inordinate delay that has occurred, no specific claim is made out of any actual prejudice that will be suffered by the defendants if these proceedings are brought to a hearing.

37. The principles of relevant law to be considered arising on the issue before me can be taken from the views as expressed by Hamilton J. in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, at p. 475, and can be summarised as follows; 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. In considering this obligation the court is entitled to take into consideration and have regard to-

- (i) the implied constitutional principle 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 and 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 damages to a defendant's reputation and business.

38. I note the views as expressed by O'Hanlon J. in *Celtic Ceramics Limited v. IDA* [1993] ILRM 248 wherein at pp. 258 – 259 he stated:

"It seems very unfair and unjust that persons whose professional standing and competence are under attack should be left with litigation hanging over their heads for years by reason of inordinate and inexcusable delay on the part of a plaintiff and I would respectfully echo the view expressed by Henchy J. in *Sheehan v. Amond* that it should be possible to invoke (implied constitutional principles of basic fairness of procedures) to bring about the termination of such proceedings."

39. I take the view that quite clearly there are strong arguments made out on behalf of both the plaintiff and the defendants. Clearly the defendants have the benefit of a finding in this case that the delay on the plaintiff's part has been inordinate and inexcusable and further, that this is an action involving professional negligence and the defendants have been left with the litigation hanging over their heads for 19 years by reason of the inordinate and inexcusable delay on the part of the plaintiff.

40. The plaintiff herself has the benefit of a finding that she personally is not blameworthy for the inordinate and inexcusable delay, that as such the defendants have not suffered any actual prejudice other than a general prejudice having regard to the length of the delay but against a background where the medical notes and records are available, the fact of there having been general confusion as to what occurred when the case was called over in a positive call over list and there was no attendance on any parties behalf on either occasion and the fact that in March, 2002 without there having being any indication from either defendant of an intention to apply to have the plaintiff's case dismissed for want of prosecution the plaintiff indicated through her solicitor that on three months notice she was ready and in a position to proceed to a hearing but neither defendant ran with the situation as outlined or tried in any way to advance the situation at that point in time that they would apply to strike out the plaintiff's claim on the basis of delay. Accepting that there was then a further delay it was not until 2005 when the plaintiff's solicitors indicated clearly that there was a move to try to rectify the situation and bring the case on for trial that the second named defendants brought this motion which was subsequently followed by the first named defendant's motion to have the proceedings dismissed for inordinate and inexcusable delay.

41. Mr. Fox on behalf of the first named defendants advances the case that the plaintiff's injuries are not all that serious and this is a factor to be taken into account. I have no significant information before me in this regard other than the statement of claim which I note Mr. Fox also relied on but in relying on the statement of claim it is clear that the plaintiff, as of the date of the delivery of the statement of claim, was complaining of ongoing constant pain in the right side of her abdomen with paraesthesiae in her right thigh as a result of her treatment by the defendants. It is a matter of degree as to the nature and extent of the injury as complained of by the plaintiff but it does appear reasonable to conclude that the plaintiff on the basis of the content of the statement of claim sustained moderate injuries which would entitle her if successful in her claim to significant compensation. Insofar as the aspect of personal injuries has been touched on, no evidence has been advanced on the defendants' behalf that they have any difficulty in dealing with the damages aspect of the plaintiff's claim.

42. I take the view, bearing in mind the principles as outlined by Hamilton C.J. in *Primor v. SKC*, that this Court in exercising its discretion has to balance the plaintiff's arguments as against those of the defendants to come to a result which allows for basic fair procedures and to either bring about the termination of the proceedings or allow the plaintiff to bring them to a conclusion.

43. I am satisfied in the particular circumstances of this case that if I were to accede to the defendant's request the plaintiff would clearly lose her right and entitlement to be compensated by way of damages for an injury which she alleges was caused to her by the defendants. I am satisfied that insofar as the liability aspect is concerned the crucial factor from the defendant's perspective is the nature and extent of the medical records available regarding the treatment as afforded to the plaintiff while a patient. In this particular case it is clear that the relevant medical records are available and no actual prejudice has been found by me other than a generalised prejudice arising from the delay. A significant feature in this case in my view was the offer in March, 2002 of a trial of the action with 3 months clear notice which offer, notwithstanding that it may have come out of the blue at the time, related to a 'live' personal injuries action, and neither defendant seized the opportunity to advance the situation. The defendants make no claim that they have not been able to satisfactorily investigate the plaintiff's claim or deal with the 'damages' aspect and finally it was not until the plaintiff, albeit extremely late in the day, evinced a clear indication to bring the matter to a hearing that the second named defendant brought this motion.

44. I do not consider that such prejudice as there may be in the circumstances of this case is such as to make it unfair to the defendants to allow the action to proceed or make it just to strike out the plaintiff's action. I consider taking all the circumstances into account that it is possible to have a fair trial. I do not believe that in the particular circumstances of this case there is a basic unfairness of procedures in coming to this conclusion. I take the view that now to dismiss the plaintiff's claim with no hearing would result in a much greater chance of a significant injustice being occasioned to the plaintiff than would be done to the defendants by allowing the action to proceed. On these findings I come to the conclusion that the balance of justice is in favour of permitting the action to proceed.

45. Clearly in the circumstances there can be no further delay on the part of the plaintiff and, subject to facilitating both defendants, the action should be brought on for hearing at the earliest possible opportunity as any further delay on the plaintiff's part would be wholly inexcusable and in the circumstances could lead to a further successful application to dismiss the claim for inordinate and inexcusable delay.

46. In the circumstances I dismiss the respective applications of each defendant and strike out the plaintiff's application.