THE HIGH COURT

[Record No. 2013/12794 P.]

BETWEEN

GINA CONWAY

PLAINTIFF

AND

THE BON SECOURS HOSPITAL (GALWAY), THE BON SECOURS IRELAND LIMITED, THE BON SECOURS HEALTH SYSTEM LIMITED, THE BON SECOURS FOUNDATION, THE BON SECOURS TRUSTEES, SISTERS OF THE BON SECOURS AND PADRAIG REGAN

DEFENDANTS

JUDGMENT of Mr Justice Binchy delivered on the 20th day of February, 2018

1. In these proceedings the plaintiff seeks compensation for personal injuries from the defendants, arising out of a procedure performed in May, 2009 while the plaintiff was a patient under the care of the defendants. The seventh named defendant was the consultant plastic surgeon who carried out the procedure, and the first to sixth named defendants operate and provide the hospital at which the procedure was carried out by the seventh named defendant. For the purpose of the proceedings, the first to sixth named defendants (the "hospital defendants") are represented by one firm of solicitors and the seventh named defendant (the "consultant") is represented by another. The motions issued on behalf of the hospital defendants and the consultant are to the same effect, although not expressed in identical terms. The first in time is that issued on behalf of the consultant, and although undated it appears to have been filed on 27th January, 2017. This seeks the following reliefs:-

> "(a) An order pursuant to Order 19, Rule. 28 of the Rules of the Superior Court or in the alternative pursuant to the inherent jurisdiction of the Honourable Court striking out the Plaintiff's claim against the First Defendant on the grounds that it is unsustainable or in the alternative bound to fail, in circumstances where proceedings issued outside the time laid down by the Statute of Limitations Act 1957 (as amended);
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> (b) An order pursuant to Order 25 and/or Order 34 and/or order 35 of the Rules of the Superior Court or in the alternative pursuant to the inherent jurisdiction of this Honourable Court, directing the trial of a preliminary issue of law and/or fact, namely the question of whether the Plaintiff's claim is statute barred pursuant to the provisions of the Statute of Limitations Act 1957 (as amended)."

2. The reference in para. (a) of the motion to the first defendant is an error and was clearly intended to refer to the seventh named defendant, on whose behalf the motion was issued.

3. The second motion in time is that of the hospital defendants and seeks the following reliefs:-

> "1. An Order striking out/dismissing the Plaintiff's action as against the First, Second, Third, Fourth, Fifth and Sixth Named Defendants ("the defendants") on the grounds that the action is clearly barred by the provisions of the Statute of Limitations 1957, as amended, and is bound to fail.
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> 2. In the alternative, an Order pursuant to O. 25 and/or O. 35 and/or O. 36 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court directing that the question as to whether the Plaintiff's action as against the defendants is barred by the provisions of the Statute of Limitations 1957, as amended, be tried as a preliminary issue."

Background

4. On 15th May, 2009, the plaintiff underwent surgery at the hospital operated by the hospital defendants. This surgery was performed by the consultant. The procedure in question is known as an abdominoplasty. Almost immediately thereafter the plaintiff appears to have developed a post-operative infection.

5. In his affidavit grounding his application, the consultant avers that the plaintiff remained in hospital for 15th-17th May, because of this infection, and was again seen on 18th May at an out-of-hours G.P. service for the same reason. She was seen and assessed by the consultant on 6th June, 3rd September and 18th September, 2009. On this last date the consultant performed a liposuction procedure on the plaintiff. The consultant says that on 17th December, 2009 the plaintiff contacted the office of the National Treatment Purchase Fund expressing dissatisfaction with the scarring on her abdomen. By reason of this complaint, she was given an appointment with the consultant for 14th January, 2010. This appointment was cancelled and the plaintiff instead attended with the consultant on 11th February, 2010. The consultant's clinical notes state that the plaintiff on this date "… expressly stated to me (and I recorded in my clinical notes) that she was unhappy with the outcome of the surgery on 15th May, 2009. I noted that the plaintiff's scar had evidence of delayed healing given that it was a little bit stretched. I advised the plaintiff that her scar could be improved with (sic) and would require further adjustment." On the following day, the consultant wrote to the plaintiff's G.P. a letter which he avers was, to the best of his recollection, "… dictated in the presence of the plaintiff in accordance with my invariable practice" stating:-

> "I reviewed Gina in my rooms today. She is not completely happy with the outcome of her abdominoplasty despite the fact that she had 2kg of skin removed from her lower abdomen. One of the problems is that she has a scar, which is a little bit slow to heal. This may require further adjustment. Her BMI is over 30 at the moment and I had suggested that she loses some weight and I will review her in six months time. She is also complaining some protuberance of her upper abdomen and I am sure this is related to the fact that she has quiet (sic) a lot of skin and subcutaneous tissue here."

6. The consultant further avers that he sent a further letter to the National Treatment Purchase Fund on 12th October, 2010 referring to delayed healing and advising that the plaintiff would now benefit from scar revision. He avers that to the best of his recollection, this was dictated in the presence of the plaintiff.

7. Before that, in March 2010, the plaintiff had consulted a solicitor. The plaintiff refers to this in her affidavit sworn in reply to these applications. Paragraph 10 of this affidavit is of some importance and in it the plaintiff avers as follows:-

> "For the avoidance of doubt, I say that from May 2009 onwards I became increasingly concerned and dissatisfied with the results of the initial and second procedures. It is common case and known that I consulted with a solicitor (Mr. Christopher Lynch) on or about March 2010 precisely because of the concerns as to substandard care which I then had. I attended Mr. Lynch in order to obtain expert advices not just from a solicitor but from appropriate medical experts as to whether potentially adverse outcome of the procedures and treatments at issue arose from negligent care and treatment on the part of the Defendants. I say that it is clearly recorded in correspondence that upon meeting Mr. Lynch I authorised him to commence enquiries by seeking my medical records and clinical notes. Ultimately, it appears that Mr. Lynch did not progress the matter and/or issue proceedings and further mislaid my file which *inter alia* contained crucial information and contemporaneous photographs of my injuries at the time."

8. On 10th December, 2011, the plaintiff had a third surgical procedure which on this occasion was performed by a Dr Ishmael. In replies to particulars delivered on her behalf on 15th April, 2015, it is stated:-

> "The plaintiff was first advised that her injuries arose from or were contributed to by the treatment and care of the 7th named Defendant when she received a report on liability from Mr Chapman dated 14th April, 2014. Prior to this the plaintiff suspected her treatment by the seventh named Defendant may have amounted to substandard care when she left Mr Regan's care and came under the care of Dr Ishmael in or around 10th December 2011. At that time Dr Ishmael informed the Plaintiff that the scarring was particularly bad and only a slight improvement could be achieved by cosmetic surgery."

9. The solicitor whom the plaintiff instructed in March, 2010 failed to take any action on her behalf. The plaintiff eventually instructed the solicitors now on record in the proceedings and it was only then that she became aware that she had an obligation to issue proceedings within two years from the date upon which her cause of action accrued. Her new solicitors caused a personal injury summons to issue on 21st November, 2013. In the proceedings, the plaintiff claims that following the treatment and care received by the plaintiff on 23rd December, 2008, she suffered a severe infection at the site where the operative procedure was carried out. That the wound failed to heal and the plaintiff re-attended the A&E department on many occasions, but that the problem was not/could not be corrected. That ultimately the plaintiff underwent three surgical treatments the last one being in December 2011 and is now left with a significant and disfiguring scarring which is permanent and chronic in nature. She pleads that the adverse consequences of the surgery which she has suffered were caused owing to the breach of contract, negligence and breach of duty on the part of the defendants in failing to provide any adequate treatment, care and/or assistance to the plaintiff. She further pleads that the defendants failed to advise her adequately as to inherent risks associated with the procedure. The reference to the date of 23rd December, 2008 is clearly an error and it is clear from the plaintiff's affidavit sworn in response to this motion that she was at all times aware that the procedure was carried out in May 2009, and it was not contended otherwise on her behalf at the hearing of this motion.

10. The plaintiff's new solicitors obtained a report on liability from a Mr Chapman in April, 2014, which is the report referred to in the replies to particulars. In her affidavit the plaintiff cross-refers to the replies of particulars referred to above in which it was stated that she was first advised that her injuries arose from or where contributed to by the treatment and care of the seventh named defendant when she received a report and liability from Mr Chapman on 14th April, 2014.

11. In the meantime, the plaintiff, concerned about the possibility that these proceedings may be statute barred issued proceedings against her former solicitors. Those proceedings are described by the plaintiff in her affidavit as a "protective writ" and while her current solicitors have been in correspondence with the solicitors instructed by the insurers of her former solicitor, those proceedings have not been progressed pending the outcome of these proceedings, or at least this application. There is also some uncertainty as to whether or not the plaintiff's former solicitor will receive indemnity from his insurers.

12. The background facts as outlined above are not in dispute. What is in dispute, and what is determinative of this application, is when the plaintiff first had knowledge of the facts referred to in s. 2(1) of the Statute of Limitations (Amendment) Act, 1991 (the "Act of 1991"). That section provides:-

> "2.—(1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:
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> (a) that the person alleged to have been injured had been injured,
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> (b) that the injury in question was significant,
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> (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
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> (d) the identity of the defendant, and
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> (e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;
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> and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.
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> (2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
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> (a) from facts observable or ascertainable by him, or
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> (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.

(3) Notwithstanding subsection (2) of this section—

(a) a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and

(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury."

Submissions of the Parties

13. On behalf of the defendants, it is submitted that there could not be a clearer case of proceedings that are statute barred. It is submitted that even on her own evidence, the plaintiff had sufficient knowledge to issue the within proceedings at latest in March, 2010, when she consulted a solicitor. It is clear from her own affidavit that she consulted with this solicitor precisely because she was concerned that she had received substandard care from the defendants. By this time, it is submitted, the plaintiff, on her own admission, knew that she had suffered a significant injury, that the injury arose from the surgery and she knew the identities of the defendants responsible for the surgery. The only gap in her knowledge was not one of fact, but one of law: whether or not the acts or omissions of the defendants involved negligence. However, s. 2(1) of the Act of 1991 makes it clear that, for the purposes of that section, and for the purposes of the accrual of a cause of action, such knowledge is not relevant.

14. The plaintiff on the other hand contends that while she had concerns following the procedures carried out by the seventh named defendant, it was not until she obtained the report of Mr Chapman dated 14th April, 2014 that she was aware that her injuries arose from or were contributed by the actions of the seventh named defendant. It is submitted on behalf of the plaintiff that the facts relied upon by the defendants in moving this application are not sufficient for the purposes of s. 2(1) of the Act of 1991. Referring to the grounding affidavit of the seventh named defendant, counsel submits that all this discloses is that the plaintiff was "unhappy" with the outcome of the procedure and that on the same day she was advised that her scar could be improved. The notes of the seventh named defendant to which he refers say no more than that the scar is "a little bit slow to heal" and may "need further adjustment". It is submitted that none of this indicates that the plaintiff knew at that time (February 2010) that she had sustained a "significant" injury within the meaning of s. 2(1)(b) of the Act of 1991. It is further submitted that when the plaintiff attended with her solicitor the following month, she did so for the purpose of getting more information and to be advised as to whether or not she had a case. Since her solicitor failed to act on her behalf, and since his file is not available, there is not sufficient information available for the court to decide just how much knowledge the plaintiff had following upon that consultation; all of this requires to be teased out at trial.

15. The plaintiff relies on the authority of *Green v. Hardiman* [2017] IEHC 17. In that case, Cross J. found as a matter of fact that it was only when the plaintiff received his medical records that he could have known, for the first time, the cause of his injuries. Up until that point in time, the plaintiff had "general suspicions as to having suffered an injury and that that injury was caused by some actions of the defendants", but, he found, those suspicions were ill-founded. Accordingly, while the plaintiff was at all times aware of the symptoms of the injury, it was not until he received his medical records that he became aware of the negligent acts of the defendants that caused the injury i.e. in the words of s. 2(1)(c) of the Act of 1991, he was not aware that the injury was attributable to the negligence of the defendants, until he obtained his medical records. It seems implicit from the decision that had the plaintiff pursued an action for negligence against the defendants based on his original suspicions, the action would have failed. In the words of Brooke L.J. in the case of *Spargo v. North Essex District Health Authority* [1997] 8 Med. L.R. 125, a decision of the English Court of Appeal, the plaintiff would have been "… barking up the wrong tree… ".

Applicable Principles and Law

16. It is well established that the court has power to strike out proceedings that are frivolous, vexatious or bound to fail. It is a power expressly conferred by O. 19, r. 28 of the Rules of the Superior Courts but also forms part of the inherent jurisdiction of the court. This has been affirmed by Costello J. in *Barry v. Buckley* [1981] I.R. 306 and, more recently, by Clarke J. in *Hynes v. Western Health Board and Cronin* [2006] IEHC 55 and, more recently still, by Noonan J. in *Wallace v. Creevey and ors* [2016] IEHC 294. In the latter case, Noonan J. noted that it is a power that should "… be exercised sparingly and in clear cases only."

17. In an application such as this, crucial to the exercise of the power is the date on which it is established to the satisfaction of the Court that the plaintiff had knowledge of the facts set out in s. 2(1) of the Act of 1991. That section has been the subject of interpretation in a number of cases. In *Gough v. Neary* [2003] 3 I.R. 92, a decision of the Supreme Court, Geoghegan J. said (at p. 126):-

> "While it may not be necessary for the purposes of starting the statute to know enough detail to draft a statement of claim, a plaintiff in my opinion must know enough facts as would be able of at least upon further elaboration of establishing a cause of action even if the plaintiff has no idea that those facts of which he has knowledge do in fact constitute a cause of action as that particular knowledge is irrelevant under the Act."

In the case of *Naessens v. Jermym and Anor* [2010] IEHC 102, Dunne J. in this Court held that s. 2(1)(c) does not require a "triggering event" to start the limitation period running. Instead, the statute begins to run when a plaintiff has knowledge of the "connection between the injury and the matters alleged to have caused that injury."

18. In *Cunningham v. Neary & Ors* [2004] IESC 43, the plaintiff took proceedings against the defendant arising out of the removal of her ovary in 1991, of which she was aware at the time and in respect of the necessity of which "… she had received no explanation from the defendant." In December of 1998 the plaintiff wrote to the Medical Council making a number of allegations against the defendant arising out of the procedure. This followed upon the plaintiff becoming aware from reports in the media that a number of women had made serious complaints about the defendant. She consulted with a solicitor in May of 2000, and eleven months later obtained a report from an independent expert obstetrician who opined that the removal of the plaintiff's ovary had been unnecessary and that it represented incompetent medical practice. The plaintiff contended that that was the first time she became aware of that fact, and that the statutory period for the bringing of proceedings only commenced upon receipt of that report.

19. However, the Supreme Court held otherwise. Fennelly J. said:-

> "Thus, at the stage when the plaintiff wrote to the Medical Council, she had knowledge of the fact that the defendant had removed her ovary in 1991, that she had twice asked him why he had done so, that she had received no explanation at all and that other women had made serious complaints about the defendant. This knowledge was such that it was then "reasonable" for her to seek medical or other expert advice. When she went to her solicitor in May 2000, it took a further eleven months to obtain the report of Dr Porter. This can, no doubt, be explained by the time needed to obtain the plaintiff's medical records from the hospital. It shows, however, that if the plaintiff had gone to a solicitor in December

> 1998, she would have obtained the sort of advice which would have made out a case in negligence against the defendant. Therefore, the key fact that the removal of the ovary had been unnecessary was "ascertainable" and, for the purposes of the section, the plaintiff is deemed to have had knowledge of it as of that date."

20. This decision makes it clear that it is not necessary for a plaintiff to have in her possession a report confirming the negligence of a defendant. Similarly, it is not necessary to await receipt of medical records. This is apparent from the case of *Farrell v. Ryan* [2016] IECA 281, a decision of the Court of Appeal in which Peart J. held:-

> "In my view the trial judge was incorrect to conclude that she needed to know more than that before time started to run under the statute, and in particular that she needed her medical records before she could be said to have enough knowledge to justify the commencement of proceedings. In my view that was the wrong test. She did not need to know at that point that she had a good case. It was sufficient if she had enough knowledge to connect her injuries to the procedure which she knew had been carried out on her in 1963, and as she admitted herself in her evidence, she knew on the 10th February 2010 that the symphysiotomy she underwent was unnecessary. I believe that the evidence is clear that she had that knowledge as of the 18th February 2010. Medical records would no doubt elaborate upon the knowledge that she had, but were not a prerequisite to time commencing to run."

21. In the case of *Connolly v. the Health Service Executive* [2013] IEHC 131, Gilligan J. found that the plaintiff's "… date of knowledge…" was almost immediately after a procedure which the plaintiff underwent on 18th May, 2006, and was "… certainly no later than July 2006 when the plaintiff, having made a complaint to the hospital, sought legal advice in relation to the matter." The evidence in that case established that the plaintiff endured what he himself described as horrendous pain following the procedure and that when he returned home from the hospital he could see that what had happened was not what was meant to have happened. Gilligan J. found that at that stage the plaintiff knew that he had sustained a significant injury and since the proceedings were not issued within a period of two years from that time, the plaintiff's cause of action was statute barred. He went on to note that:-

> "… as the plaintiff sought legal advice so soon after the incident, it was incumbent upon the plaintiff to ensure that proceedings were initiated within the time period prescribed by statute."

Conclusion

22. The undisputed facts are that the plaintiff underwent a procedure at a hospital owned and/or controlled by the first to sixth named defendants, and conducted by the seventh named defendant on 15th May, 2009. The plaintiff developed a post-operative infection which resulted in her detention in hospital for a few days after the procedure. However, following upon her discharge from hospital, she continued to experience complications. She was assessed by the seventh named defendant on 6th June, 2009 and 3rd September, 2009. On 18th September, 2009 the seventh named defendant carried out a second procedure on the plaintiff, in the form of liposuction.

In December, 2009, the plaintiff made a complaint to the National Treatment Purchase Fund which according to the seventh named defendant related to the scarring on her abdomen. The seventh named defendant records that he again saw the plaintiff on 11th February, 2010 and noted that she was "unhappy" with the outcome of the surgery of 15th May, 2009. The seventh named defendant advised the plaintiff that her scar could be improved and that this would involve another (a third) procedure. The following month the plaintiff attended with her solicitor.

23. It seems certain that the plaintiff had a concern at this point in time that she had an unnecessarily disfiguring scar and that this was caused by the seventh named defendant. On the uncontroverted evidence of Mr Regan, the plaintiff had, by 11th February, 2010, made two complaints to this effect. And on her own admission she took those concerns to her solicitor in March 2010 for the purpose of obtaining "… expert advices not just from a solicitor but from appropriate medical experts as to whether potentially adverse outcome of the procedures (sic) and treatment at issue arose from negligent care and treatment on the part of the defendants." It is clear that the plaintiff was attending her solicitor to see if she had a case against the seventh named defendant, i.e. in order to be advised as to whether or not he had been negligent in the conduct of the surgery.

24. While the plaintiff says that Dr Ishmael informed her on 10th December, 2011 that the scarring was particularly bad and only a slight improvement could be achieved by cosmetic surgery, the fact is that she had already had corrective surgery in September of 2009 with which she was not satisfied, and she made complaints to the National Treatment Purchase Fund and again to Mr Regan himself in December, 2009 and February, 2010 respectively. Almost certainly, assuming Dr Ishmael did, as she claimed, inform her that the scarring was particularly bad, this was something she already knew and about which she had already complained; indeed, the procedure performed by Dr Ishmael was performed precisely because the plaintiff remained dissatisfied with the outcome of the procedures conducted by Mr Regan and quite clearly considered that she had significant scarring requiring correction.

25. By the time the plaintiff attended with her solicitor in March, 2010 there can hardly be any doubt but that the plaintiff knew the following:-

> (1) That she had scarring following the procedure which was more extensive than she must have anticipated prior to the procedure, otherwise she would not have had concerns.
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> (2) The scarring was significant, because the plaintiff had complained about it to the National Treatment Purchase Fund, to the seventh named defendant directly and to her solicitor. She had had follow up treatment in the form of liposuction in connection with the same in September 2009.
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> (3) She knew that the scarring was caused by the seventh named defendant in the conduct of the procedure that she underwent in May 2009.

26. It is true that the plaintiff could not yet have known whether or not the treatment and care afforded to her by the defendants had been negligently provided, although she did say that she attended her then solicitor in March, 2010 because of concerns she had that the treatment and care she had received may have been substandard. But to know whether or not that treatment and care was provided negligently as a matter of law, she would need both legal advice and an opinion from an appropriate medical expert, as she avers.

27. However, it is clear from s. 2(1) of the Act of 1991 that "… knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant." All the plaintiff is required to know are the facts which are alleged to constitute negligence, not whether or not those facts as a matter of law constitute negligence on the part of the person against

whom it is alleged.

28. I agree with the submissions made on behalf of the defendants that the report of Mr Chapman could not have added anything to the plaintiff's knowledge for the purposes of s. 2 of the Act of 1991. While this report was not exhibited, it seems clear from what the plaintiff herself has said on affidavit and in replies to particulars that she was first advised that her injuries arose from or were contributed to by the care of the seventh named defendant when she received the report on liability from Mr Chapman on 14th April, 2014. However, she does not identify any matter of fact arising from this report of which she was not previously aware. It is clear that at latest from March, 2010, the plaintiff knew that she had suffered what she claims is an unnecessary disfigurement and that she had suffered that at the hands of the seventh named defendant in the hospital facilities provided by the other defendants. Moreover, she obviously also knew of the infection which she contracted immediately following the procedure, and about which she also complains in the proceedings, almost contemporaneous to the procedure itself. The only question then remaining to be answered was whether or not she could assemble sufficient evidence to prove that that disfigurement, and the infection she subsequently contracted, were caused as a result of the negligence of the defendants. This is very different to the scenario obtaining in *Green v Hardiman*, where the plaintiff was unaware that an internal tear was the source of his complaints until he obtained his hospital records.

29. It is also self-evident that the plaintiff did not need to await the report from Mr Chapman in order to issue proceedings, because proceedings were in fact issued on her behalf on 21st November, 2013, some five months before the report of Mr Chapman became available. While it is true that the case pleaded in the proceedings is in somewhat general terms, the fact is that the plaintiff had sufficient information at her disposal to issue proceedings alleging that she had been left with significant and disfiguring scarring of a permanent and chronic nature owing to the negligence and breach of duty of the defendants. This meets the test articulated by Geoghegan J. in *Gough v. Neary* referred to above, i.e. that the plaintiff knew enough facts and in sufficient detail so as to establish a cause of action and to justify the issue of proceedings, even if further elaboration of the same might be required in due course. In my opinion, the plaintiff had sufficient knowledge, no later than March, 2010 when she first consulted with a solicitor, to instruct her solicitor to issue and serve the proceedings that were eventually issued in November, 2013. While the exact date upon which she consulted with that solicitor has not been stated, it is not material; even it is assumed to be the 31st March, 2010, that would mean that the proceedings should have been issued no later than 30th March, 2012. Since they did not issue until 21st November, 2013, it is clear beyond any doubt that the proceedings were issued outside the statutory limitation period and the plaintiff's claim is therefore bound to fail. Accordingly, I will, in the case of each of the motions before me, make an order in the terms of para. 1 thereof striking out the plaintiff's claims against all defendants. In the circumstances, there is obviously no need to consider the second relief sought by the defendants i.e. the trial of a preliminary issue.