NEUTRAL CITATION NUMBER [2012] IEHC 274

THE HIGH COURT

[2008 No. 7434 P]

BETWEEN

MICHAEL O'RIORDAN

PLAINTIFF

AND

MICHAEL MAHER, THE MATER PRIVATE HOSPITAL, DERMOT LANIGAN, BRIAN WHOOLEY, AND BON SECOURS HOSPITAL

DEFENDANTS

Judgment of Mr. Justice Birmingham delivered the 10th day of July 2012

The parties

1. The plaintiff is a married man and company director who was born in 1953. The first named defendant is a radiation oncologist practising at the second named defendant hospital. In the pleadings he is described as the director of radiotherapy with the second named defendant hospital. The third named defendant is a consultant urological surgeon, practising at the fifth named defendant hospital, while the fourth named defendant is a consultant general surgeon also practising at the fifth named defendant hospital.

2. Before the Court are applications on behalf of the third and fourth named defendants, who might be described as the principal moving parties, to set-aside the order of the High Court made on 14th June 2010, which renewed the personal injuries summons that was issued in the present proceedings for a further period of six months as well as for an order dismissing the case by reason of inordinate and inexcusable delay; a similar application on behalf of the first named defendant to set aside the renewal of the summons and dismiss for want of prosecution; an application on behalf of the second named defendant to dismiss for want of prosecution by reason of delay and a similar application on behalf of the fifth named defendant to set aside the renewal of the summons and to dismiss for want of prosecution.

Background facts

3. The plaintiff attended the third named defendant in July 2004, having been referred because of right testicular discomfort. Biopsies carried out on the 27th October 2004, indicated the presence of what has been described as low grade prostate cancer. On the 10th November 2004, the third named defendant wrote to the first named defendant seeking his views on the available treatment options.

4. Thereafter, the plaintiff underwent a course of treatment known as brachytherapy under the care of the first named defendant at the second named defendant hospital. The fourth named defendant became involved in the care of the plaintiff on the 21st April 2006.

5. The treatment has been unfortunately most unsuccessful and the plaintiff has experienced severe pain and distress. By reference to the particulars of personal injuries referred to in the personal injuries summons, this has involved sexual dysfunction, urinary dysfunction, he has had to undergo protracted treatment associated with the treatment of his prostate condition and with the treatment of the complications arising which has culminated in prostate-rectal fistula, which, as I understand it, is an abnormal passageway. According to the summons, the plaintiff's life expectancy has been reduced, he has had to undergo repeated surgical procedures and the amenities of life have been completely destroyed. That the plaintiff has suffered and continues to suffer greatly is not in dispute.

6. A personal injury summons was issued dated the 10th September 2008. The particulars of negligence are couched in rather general terms and individual particulars of negligence and breach of duty are not attributed to individual defendants. Instead the case is put on the basis that the defendants and each of them or alternatively one or other of them was negligent. The thrust of the case made raises issues in relation to informed consent and the kernel of the complaint is that the plaintiff was inadequately advised in relation to the risks relating to brachytherapy and that the advantages of an alternative course of treatment, radical prostatectomy, were not explained. In addition an issue in relation to the carrying out of rectal biopsies which it is suggested was contraindicated is raised on the pleadings, but again this complaint is not directed to a particular defendant. Brachytherapy, as I understand it, involves placing radioactive seeds in or near the cancerous tumour, giving a high radiation dose to the tumour, while seeking to reduce radiation exposure in the surrounding healthy tissues. Radical prostatectomy, on the other hand, is the more traditional operation designed to remove the prostate gland and some of the tissues around it.

7. On the 9th November 2007, the plaintiff first consulted a solicitor and then on 10th September 2008, a personal injuries summons issued. That summons was not served within the twelve month period prescribed for that purpose and in those circumstances an application was made *ex parte* to Peart J. to renew the summons, which he did on the 14th June 2010, extending the summons for a period of six months.

8. Order 8 of the Rules of the Superior Courts envisages that a summons may be renewed in two circumstances: where reasonable efforts to serve within time have been made but were unsuccessful or where there is other good reason for the renewal. In this case, no attempts were made to serve within time, so the issue between the plaintiff and those defendants who have raised an issue in relation to the renewal of the plenary summons is whether there is other good reason for its renewal.

9. In these circumstances it is necessary to trace the history of the proceedings in greater detail. This exercise also has a relevance to the question of whether there has been inordinate and inexcusable delay such that the proceedings should be dismissed for that reason.

Procedural history

- 27th July 2004, the plaintiff was referred by his general practitioner to the third named defendant.

• 10th November 2004, the plaintiff was referred by the third named defendant to the first named defendant at the second named defendant hospital in relation to the treatment options available, including the treatment known as brachytherapy.

• February 2005, the plaintiff underwent radioactive seed implantation (brachytherapy) at the second named defendant hospital.

• April and May 2006, the plaintiff underwent examination, diagnosis, advice and treatment involving all defendants and in particular the fourth named defendant.

• 25th May 2006, the plaintiff was informed by the fourth named defendant that his proctitis or inflammation of the rectum was radiation induced damage consequent on the brachytherapy.

• 9th November 2007, the plaintiff first consulted a solicitor.

• 13th December 2007, letter received by the third named defendant from the plaintiffs solicitor requesting medical records. There was no specific mention of an intention to issue proceedings or that such a course of action was under contemplation.

• 10th September 2008, personal injuries summons issued.

• 9th September 2009, the personal injuries summons expired

• 14th June 2010, an order was obtained from Peart J. renewing the summons for a period of six months.

• 15th October 2010, a letter indicating an intention to issue proceedings was sent to the third and fourth named defendant. A letter was sent on the same day to the first named defendant giving him notice of the plaintiffs claim. A letter of claim was also issued to the second named defendant.

• 7th December 2010, service of the personal injuries summons is effected on the third and fourth named defendants and also on the first named defendant.

• 13th December 2010, the second named defendant was served with the renewed personal injuries summons. This was a day before it would have expired for the second time.

• 17th December 2010, the second named defendant entered an appearance.

• 21st December 2010, conditional appearance was entered on behalf of the third and fourth named defendants. On the same day the second named defendant raised a notice for particulars.

• 3rd October 2011, the plaintiff furnished replies to the second named defendant's notice for particulars dated the 21st December 2010.

The approach to renewal of summonses and dismissal of proceedings for want of prosecution

10. It appears appropriate to refer briefly to the principles that a court will seek to apply. So far as a renewal of summons is concerned a helpful and concise treatment of the approach to be taken is to be found in the judgment of Finlay Geoghegan J. in *Chambers v. Kenific* [2007] 3 I.R. 526. In the course of her judgment she commented:-

> "...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 interests of justice between the parties to make an order for the 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".

11. The classic statement of the approach to be taken to applications to dismiss on the grounds of want of prosecution is to be found in the case of *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459. Hamilton C.J. set out the principles applicable as follows:-

> "(a) The courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) It must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof, that the delay was inordinate and inexcusable;
>
> (c) Even where the delay has been both inordinate and inexcusable the court must exercise a judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceedings in the case."

12. In considering this latter obligation i.e. determining where the balance of justice lies the court, according to Hamilton C.J., was entitled to take into consideration and have regard to:

> (1) The implied constitutional principles of basic fairness of procedures;
>
> (2) 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;

(3) Any delay on the part of the defendant- because litigation is a two party operation, the conduct of both parties should be looked at;

(4) Whether any delay or conduct of the defendant amounts to acquiescence on the part of the defendant of the plaintiffs delay;

(5) 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;

(6) 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;

(7) The fact that the prejudice to the defendant referred to in (6) may arise in many ways and be other than that merely caused by delay, including damage to a defendant's reputation and business.

13. The central significance of the *Primor* case has been reiterated in the recent Supreme Court case of *Desmond v. M.G.N.* [2008] IESC 56 by Geoghegan and Macken J.J. It is significant that that case is subsequent to decisions such as *Gilroy v. Flynn* [2005] 1 ILRM 290 and *Stephens v. Paul Flynn Limited* (Unreported, High Court, Clarke J., April 28th 2005); these cases had indicated that a certain recalibration was underway and certainly it is the case that the courts have become more conscious of the potential unfairness and the possibility of injustice in allowing an action depending on witness testimony to proceed. However, *Desmond v. M.G.N.* indicates that the traditional balancing approach remains in place and has not been ousted by the jurisprudence surrounding the European Convention on Human Rights. Renewing the plenary summons

14. Following the approach directed by Finlay Geoghegan J., the first test is to consider whether there is good reason to renew the summons. Arising from cases such as *Baulk v. Irish National Insurance Company* [1969] I.R. 66 and *McCooey v. Minister for Finance* [1971] I.R 159 there had been a view that if a claim would be statute barred in the event that a summons was not renewed that would of itself constitute good reason. However, a change of attitude is evident in cases such as *O'Brien v. Fahy*, judgment of the Supreme Court of 21st March 1997. That was a case where the plaintiff claimed to have sustained injuries, at the defendant's riding stables on the 24th July, 1988, issued a plenary summons on the 23rd July, 1991, then on the 5th June 1992, just as the summons was about to expire, the plaintiffs solicitor wrote to the defendant informing them of the proceedings. The summons was not served until the 29th July 1992, after it had expired. Barrington J. referred to the fact that if renewal was not granted the plaintiff's action would be statute-barred but he also placed emphasis on the fact that the defendant had not been informed of the proceedings until four years after the cause of action accrued and as a result was prejudiced in making its defence.

15. In seeking to establish that there are good grounds for renewing this summons it is said on behalf of the plaintiff that such delay as has occurred arises from the anxiety on the part of the plaintiff and his advisors to adhere to high standards before issuing proceedings which involve allegations of professional negligence. The easy thing to do would have been to go ahead and issue the proceedings. This was emphatically not a case, it is said, of inadvertence or indolence. It is argued that if lawyers conscientiously conclude that it would be premature to serve the proceedings, that a court should be slow to fault those lawyers and to hold their caution against a plaintiff. It is pointed out that the position of a plaintiff who believes that he has a cause of action against his doctors, but who continues to receive treatment from those same doctors is a very difficult one. The point is made that while the integrity of the individual defendants is not impugned in any way, it is entirely understandable that a seriously ill patient should be concerned about the possibility of damaging the doctor-patient relationship if he sues his treating doctors.

16. In my view there is real substance in the point that a patient who continues to be treated by his doctors will be very reluctant to initiate proceedings until the situation has been clarified to the extent that is possible. Recognising that accords with the approach of Finlay P., as he then was, in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561 where in the course of his judgment he commented:-

> "I would I think be departing from common sense if I were not aware of the sort of reluctance which an ordinary citizen living in the city of Limerick would be likely to show towards asserting with strength and militancy his rights against an ailing solicitor who has long been established in practice and who was manifestly in ill health."

17. I referred to the fact that counsel has submitted that this was not a case of indolence or inadvertence. It is entirely clear from the affidavit sworn by Mr. Diarmaid Falvey, solicitor for the plaintiff, that the whole question of issuing a summons and serving it was one that was being approached with the most anxious scrutiny, to borrow a phrase from another area of litigation. So, before the summons was issued there was extensive interaction between senior and junior counsel and solicitor. That anxiety did not come to an end with the issue of the summons. Papers were sent to three medical experts for their views. While, with the benefit of hindsight, the plaintiff would no doubt have wished that his lawyers would simply have got on with the case, their caution, some might describe it as punctiliousness or over-punctiliousness, becomes very understandable given the plaintiffs extremely complex medical situation. Such was the range of responses to the emerging medical situation and the number of individuals involved in treating the plaintiff that even if the stage was reached where the plaintiff and his advisors were satisfied that the evidence was there to establish that all was not as it should have been, it would remain the situation that identifying the individual or individuals with whom any fault lay was very far from straightforward.

18. The difficulties arising from the concern of the plaintiff's lawyers that unjustified proceedings should not be issued or served prematurely were compounded by a number of factors. While the plaintiffs advisors were anxious to probe more and more extensively through obtaining reports from specialists in different areas of medicine, the plaintiff was, understandably, very reluctant to incur additional expense unless it could be established for him that this was absolutely necessary and unavoidable. I commented that his concern in relation to expense was understandable, I make that comment in a situation where, although the plaintiff was a VHI subscriber, the situation was that such was the range of treatments he was undergoing and in particular the number of surgical interventions that he was experiencing that there were difficulties in obtaining reimbursement, to the extent that the third named defendant became involved in advocating to the VHI for a higher level of reimbursement to the plaintiff. A further unwelcome element was provided by the downturn in the fortunes of the plaintiff solicitor's practice against the backdrop of the downturn in the economy. This saw the situation alter from one where in 2008, the principal of the practice was supported by four solicitors, an apprentice solicitor, three legal executives and appropriate secretarial support, to a situation in 2010, where the support consisted of one part-time legal executive and two part-time secretaries. Inevitably, this must have given rise to difficulties in allocating the time and resources required for a case of such complexity. It goes without saying that the plaintiffs medical situation was such that there was no question of him being in a position to manage or still less drive the litigation on.

19. In all the circumstances I am of the view that indeed there are present other good reasons to justify the renewal of the summons. However, that is far from the end of the matter because as Finlay Geoghegan J. pointed out it remains necessary to consider whether because of the identified good reason it is in the interests of justice that the summons be renewed or whether the interests of justice requires the setting aside of the renewal of the summons. Finally, it is necessary to address the question of the balance of hardship, though this is really an aspect of the earlier limb of the test.

20. As the question of the interests of justice is also relevant to the dismissal for want of prosecution element of the present case, I will consider first whether there has been delay which is inordinate or inexcusable.

Inordinate or inexcusable delay

21. In order to address the question of whether the delay that has occurred has been inordinate and inexcusable it is necessary to look in more detail at what was happening and what was not happening at various stages. The plaintiff as we have seen first attended his solicitor in November 2007. At that stage the plaintiff was of course still receiving treatment and was indeed a very ill man. Having been consulted, the plaintiff's solicitors very understandably decided to seek access to the plaintiff's medical records. It is to the credit of the defendants that records, which were substantial and complex, were promptly furnished, being submitted between the 13th December 2007 and the 9th January 2008 - clearly to this point there was no delay.

22. Following consultation with counsel it was decided to seek expert reports from Mr. Robin Barnard, Consultant Urologist, Mr. John Scurr, Consultant Surgeon and Dr. Plowman, Consultant Oncologist, which were requested on the 31st July 2008. While one would not be unduly critical of the slippage to the 31st July 2008, it must be said that it was always going to be necessary to obtain expert reports and ideally that exercise could have been initiated sooner. In any event, reports were obtained during August and September 2008. The plaintiff's solicitor has observed that a view was forming at this stage that it was possible to mount a case against one or more of the defendants but that, from a reading of the reports, it was not clear where individual responsibility as between the potential defendants lay. There was some concern on the part of the plaintiff's advisors that the statute of limitations could become an issue so a decision was taken to issue a summons. In a situation where there was concern about the statute, the plaintiff and his advisors are not to be faulted in issuing a writ on a protective basis. The appropriateness of such an approach was commented on by McGuinness J. in the case *Cunningham v. Neary* [2004] 2 I.L.R.M. 498 when she observed "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."

23. In a situation where the summons had been issued before the full picture was available and where there was an expectation that further clarity could be achieved within the twelve month period that was available it was understandable, and indeed might be regarded as commendable, that efforts would be made to clarify the situation further and in particular to isolate the contribution of the individual defendants. On the 26th September 2008, Mr. Scurr advised that further specialist evidence was going to be required on specific aspects of the brachytherapy treatment. There followed correspondence, arising from which a consultant urologist with an interest in prostate cancer surgery and prostate brachytherapy was identified in early March 2009. Again, one does not wish to be unduly critical but there does seem to have been further slippage in identifying and contacting the urologist. The urologist consulted sought sight of scans taken of the plaintiff, Mr. O'Riordan's solicitor sought these and obtained them after about four weeks in mid-May 2009.

24. At that stage further time was lost and little seems to have happened until November 2009, when a complete set of documents and reports obtained to date was sent to each of the three experts who had been consulted for their comments. However, by this stage the period for serving the summons had already been allowed to expire. Some of these comments were still outstanding when on the 13th May 2010, the plaintiffs solicitor swore an affidavit to ground an application to renew the summons.

25. There are a number of comments that can be made. It is clear that, while during the period between issuing the summons in 2008 and eventual service in November and December 2010 significant lulls in activity were permitted to occur, there was, nonetheless quite an amount of contact with the experts that had been consulted. In particular it is clear that the issuing of the summons was seen as providing a window for further enquiries. A measure of the concern, to obtain a clear picture, is that when the period for serving the summons expired the reaction was not to apply immediately to the court to retrieve the situation but rather to engage further with the experts. So, September 2009, saw the plaintiffs records going to Mr. Scurr. October 2009 saw a response from Mr. Scurr and there followed a consultation in late October 2009 with counsel in order to consider the response. November 2009 saw all records, scans and medical legal reports being sent to all the experts that have been involved. Early November 2009, saw the receipt of oncology reports which was followed by a further consultations with counsel. At that consultation the view was taken that the clarity required was still not available. So, the latest oncology reports were sent to Mr. Barnard for his comments. When a response was obtained from him, counsel had further queries leading to further contact with Mr. Barnard.

26. However, despite all this toing and froing, the situation had not really moved on by the time the application to renew was made in June 2010, in any significant way from when the summons had issued in September 2008. The case had not been refined in any real way against any of the defendants, whether by further particularising the claim or by deciding that it was unnecessary to proceed against one or more particular defendant.

27. Within the overall period that elapsed it is possible to isolate periods of culpable delay. These include the period of approximately six to seven months after the plaintiff's solicitor obtained his medical reports before they were sent to the experts for their views. Of course, some time would have been taken in identifying the experts and getting them to agree to become involved but nonetheless some time would seem to have been lost at this stage. Again, there was a period of five months after the plaintiffs solicitor was advised by the consultant surgeon that more specific advices were required in relation to particular and specific aspects of the brachytherapy treatment before an expert was identified. Again that some period would be needed is understandable but nonetheless, there would appear to have been some slippage. A further delay occurred after scans were sought in April 2009 and received in May 2009, before they were submitted for review to the oncologist in November 2009. This was a very significant period because it was during this period that the time for service was allowed to expire.

28. The question arises whether the delay was inordinate in the sense of immoderate or excessive. That question cannot be divorced from the nature of the proceedings and what was required to be done. What would be inordinate in the case of a straightforward road traffic accident would not necessarily be so in the case of a particularly complex medical negligence action where extensive investigations were necessary. I also take into account that the procedure for personal injuries summonses as distinct from the traditional plenary summons increases, and certainly frontloads, the obligations on the plaintiffs advisors. However, while cognisant of these considerations it seems to me quite clear that there has been excessive delay, some of it at least avoidable or capable of being minimised and I accordingly conclude that the delay has been inordinate.

29. The question then arises whether the delay has been explained or excused. I take the view that an acceptable excuse has been

forthcoming. I believe that the combination of the inherent complexities of the matter in issue, the understandable reluctance on the part of the plaintiff to commit to suing his treating doctors, and the extreme anxiety of the plaintiffs advisors not to issue proceedings alleging negligence against medical professionals prematurely provides such an excuse.

30. It does seem to me that some context is offered to the delay on the plaintiffs part that has occurred if one has regard to the time that was taken for issuing the motions before the Court that have been brought by the various defendants. These periods range from ten months, in the case of the motion brought by the third and fourth named defendants, to fourteen months in the case of the second defendant. None of these periods could be regarded as amounting to acquiescence on the part of the defendants. However, the fact that parties who are well resourced, and it may be said, obviously better resourced then the plaintiff should need to take this time before moving is an indication of the complexity of the matters in issue and a further indication that the excuse offered by the plaintiff should not lightly be dismissed. Accordingly, on this aspect I take the view that while there has been inordinate delay that it cannot be said that the delay is both inordinate and inexcusable.

The interests of justice

31. I turn now to seeking to identify where lies the interest of justice, a task which has to be undertaken in the context of renewing the summons and the application to set aside that renewal, and also in the context of deciding whether to dismiss by reason of delay. My consideration of this issue in the context of the application to dismiss for want of prosecution comes in a situation where I have concluded that, while there has been inordinate delay, the delay has not been inexcusable. However, lest I be incorrect in that view I am considering the issue of the balance of justice in relation to that issue. In considering this issue, I think it right to say that while the approaches set out by Hamilton C.J. and Finlay Geoghegan J. in *Primor* and *Chambers v Kenific* are presented in sequential terms, the dividing line between each limb of the test is not always clear-cut, and it is sometimes really an issue of judgment or even of style whether a particular factor is considered in the context of whether there is good reason or whether it goes to the balance of justice. Equally, a factor may be considered as providing, or as capable of providing, a good reason why renewal should be considered, but may require further consideration or indeed reassessment in the context of determining where lies the interests of justice. An example relevant to this case is that a proper concern not to issue professional negligence proceedings precipitately has to be balanced against the undesirability of leaving professionals with allegations hanging over their head for an inordinate period.

32. Central to determining where the balance of justice lies is to determine whether and to what extent the ability of the defendants to defend the case has been impaired. In that regard it is of some note that formal letters of claim issued only on the 15th October 2010, more than two years after the summons had issued. It is true that there had been earlier contact in terms of seeking medical reports. However, the initial contact which resulted in records being produced promptly did not contain specific reference to intended proceedings or to the fact that possible negligence was being investigated. In that regard different comments are made in relation to the initial communication from the solicitor for the plaintiff. The third named defendant says that he got the letter dated the 13th December 2007 but did not draw from it that legal proceedings were being contemplated. The fourth named defendant has no recollection of receiving the letter while the first named defendant contacted the Medical Defence Union. For my part I find it surprising that a doctor on receipt of a letter from a solicitor requesting medical records would not have realised that there was at least a possibility of proceedings being issued. For what purpose other than litigation could a solicitor possibly be seeking records?

33. That observation must be put in the context of the fact that the outcome of the treatment afforded to the plaintiff has been very unfortunate indeed and largely unexpected. In these circumstances it would not be surprising if those responsible for the care of the plaintiff adverted to the possibility of litigation, even if they felt that any such proceedings would not be justified. A letter from Mr. Fergus Clancy, CEO of the second named defendant, dated 20th March 2007, leaves no doubt as to the extent of the concerns that were being felt even at that stage about what had occurred. That letter includes a statement that, "This inevitably caused us to investigate the extent, if any, to which these type of complications have arisen elsewhere."

34. It does seem to me that the letter from Mr. Clancy makes it abundantly clear that the outcome of the treatment and the factors that contributed to it have been fully and comprehensively investigated, certainly by the first and second named defendants. There is absolutely no reason to believe that investigations could have been any fuller or more effective if the summons had been served on 10th September 2008, the very day it issued.

35. The position in this regard of the third and fourth named defendants and their hospital, the fifth named defendant, is less clear cut in that there is no equivalent to the Clancy letter setting out the extent of concern, and the nature of the inquiries made and investigations undertaken. However, it must be said that the evidence of any prejudice is scant. The affidavit of the solicitor for the third and fourth named defendants refers to the fact that given the passage of time a fading memory is likely to prejudice their defence. This reference is little more than formulaic.

36. The affidavit does make the case that any medical examination at this stage would be of little if any value in assessing the injuries alleged to have been caused by brachytherapy in February 2005, and by further interventions in 2006, in circumstances where there have been further operative interventions. I find little substance in that point which ignores the fact that the plaintiff remains under the care of his treating doctors. No one knows more about the plaintiff's medical situation and his medical history than the defendants.

37. The point is made in the course of the affidavits sworn on behalf of the defendants that a key issue at trial will turn on what the plaintiff was told about the risks and downsides of the treatment for which he opted and what he was told about the advantages and disadvantages of the alternatives that were available. It is said that this is just the sort of issue which is prone to memory lapse by reason of the passage of time. There is undoubtedly a superficial attraction to that argument. If one were dealing with advice given in relation to a routine procedure, perhaps in a situation where there had been unexpected side effects, it would be a point of real substance. However, this is a situation where it soon became apparent that a terribly serious medical situation was developing. Having to defend the proceedings is obviously unwelcome from the point of the view of the defendants and will no doubt see them exposed to a degree of stress. However, I do not believe their difficulties have been compounded significantly whether by reason of the delay in relation to the service of the summons or subsequent delay or indeed by a combination of these factors. Certainly, it does not seem to me that whatever hardship the defendants will experience is at all of the same order as would befall the plaintiff if he is denied the right to litigate.

38. I am in no doubt that the defendants are and always were in a position to mount a defence to these proceedings. Their capacity to do so is not diminished. Neither, in the particular circumstances of the case, do I believe that the task of the Court in resolving disputed issues of facts has been rendered significantly more difficult. This is not a case where justice has been put to the hazard, to use the language of some of the old cases.

39. It seems to me that in a situation where the defendants' ability to defend has not been impaired that if one has regard to the very serious difficulties in which the plaintiff found himself that the interests of justice are served by allowing the parties to litigate

this dispute. Both sides have a case to make and both sides are in a position to do so. Having regard to the views that I have formed I do not regard it as appropriate to set aside the renewal of the summons or to dismiss the proceedings for want of prosecution. Accordingly in these circumstances I propose to refuse the defendants the reliefs that they are seeking at this stage.