Neutral Citation Number: [2006] IEHC 186

THE HIGH COURT

[2004 No 6652 P]

BETWEEN

OLIVIA KEARNEY

PLAINTIFF

AND

ETHNA MCQUILLAN AND NORTH EASTERN HEALTH BOARD

DEFENDANTS

Judgment of Ms. Justice Dunne delivered on the 31st May 2006

1. The first named defendant herein seeks an order directing the trial of a preliminary issue namely whether the plaintiff is estopped from proceeding further with her claim herein by reason of the inordinate and inexcusable delay on the part of the plaintiff in instituting proceedings herein against the first named defendant as a consequence whereof it is alleged that the first named defendant has been severely prejudiced in the presentation of its defence to the claim herein.

2. By the same notice of motion, the first named defendant raised an issue as to whether the plaintiff's claim herein against the first named defendant was statute barred. However that application was not pursued before me and it was accepted for the purpose of the application before me, that the claim was not statute barred.

3. It should be noted that the first named defendant is sued as the nominee of the Medical Missionaries of Mary which was the owner/occupier of Our Lady of Lourdes Hospital, Drogheda, Co. Louth, at the relevant time.

4. Judgment in default of defence has been obtained against the second named defendant.

5. It is common case that the plaintiff entered Our Lady of Lourdes Hospital (the Hospital) on 16th October, 1969, and on 19th October, 1969, Dr. Gerard Connolly performed an emergency caesarean section upon the plaintiff and thereafter carried out a further procedure on her known as a symphysiotomy. These proceedings are concerned with the circumstances surrounding the latter procedure, whether it was done with the consent or knowledge of the plaintiff and whether it was necessary or appropriate to carry out such a procedure on the plaintiff. It is alleged that as result of that procedure, she suffered personal injuries which, it is alleged still have to this date an adverse effect on the plaintiff.

6. It would be useful to note at this point the history of the proceedings to date. I gratefully adopt the history of the proceedings to date set out in the legal submissions of the first named defendant herein.

> "On 4th February, 2004, the plaintiff's solicitors wrote to the Hospital indicating that legal action would be commenced on behalf of the plaintiff. (The plaintiff had first written to the Hospital seeking copies of her medical records in May, 2002.) A plenary summons duly issued on 11th May, 2004 and the statement of claim was delivered on 14th May, 2004, thirty four and a half years after the carrying out of the procedure which is the subject matter of the complaint. Particulars were raised on behalf of the first defendant on 19th May, 2004, to which replies were received on 12th July, 2004. A full defence was delivered on 13th December, 2004. The motion presently before the court which the first defendant has limited to seeking to have the plaintiff's claim dismissed by reason of the lapse of time since the events complained of and the probable date of trial, was filed on 23rd June, 2005."

7. A number of affidavits have been exchanged by the parties to this motion. I will refer to those insofar as may be necessary for the purpose of this application. An affidavit was sworn by Aisling Gannon on 22nd June, 2005, on behalf of the first named defendant. She deposed to the fact that Dr. Gerard Connolly had worked as an obstetrician/gynaecologist in the Hospital in 1969. He retired from practice in 1982 and died in the year 2000. She pointed out that there had been prejudice due to inordinate and inexcusable delay by virtue of the death of Dr. Connolly and due to the fact that the hospital records are incomplete and there are difficulties in establishing thirty five years later who made the relevant entries in the extant records and the whereabouts of those who made the relevant entries.

8. In reply the plaintiff swore an affidavit on 12th January, 2006. She described therein the nature of a symphysiotomy, namely the cutting through cartilage that binds the two pubic bones, thus permanently enlarging the pelvis. She had attended Dr. Gerard Connolly. After her child was delivered by caesarean section a symphysiotomy was performed upon her. She averred that that was an unnecessary procedure performed on her without her consent. She added that she had never been told by Dr. Connolly that he had performed such a procedure on her. She outlined the consequences of that procedure having been performed - while it is not necessary to set these out in detail, it would be no exaggeration to say that she has been left with a legacy of problems including pain, which could not but have had a significant adverse affect on many aspects of her life. She emphasised that neither Dr. Connolly nor any other GP or doctor that she had attended informed her that such a procedure had been carried out upon her.

9. The plaintiff takes issue with the complaint made by Ms. Gannon that records are "incomplete since the entries in the extant records were made over thirty five years ago." She pointed out that her solicitors made enquiries from the Hospital solicitors as to the records that they had and as to the records that are said to be missing. No reply was received. She disagreed with the suggestion that records made thirty five years ago are necessarily less reliable than records made in more recent times.

10. An affidavit was also sworn on behalf of the first named defendant by

11. Roisin Maguire, the General Manager of the Hospital, on 14th February, 2006. She dealt with a number of matters she alleged were to the prejudice of the Hospital, namely, the death of Dr. Connolly on 17th March, 2000, the death of the senior house officer at the relevant time, Dr. Maureen McDermott, on 25th August, 1992, the death of the consultant anaesthetist who attended the Plaintiff, who died on 19th April, 1999, and the death of the consultant radiologist who reviewed the plaintiff's x-rays around the relevant time. On that basis she averred that the hospital is deprived of the oral evidence of these medical specialists who would be essential to the hospital's defence. She pointed out that part of the plaintiff's case was that the symphysiotomy was an unnecessary procedure carried out without her consent, that she was never informed that it had been carried out and that she was not informed of the likelihood that such a procedure would be carried out. Roisin Maguire emphasised the importance of the evidence that could have been given by Dr. Connolly as to the discussions he would or could have had with the plaintiff which evidence is not now available. No other oral or documentary evidence can overcome this prejudice.

12. In addition to the medical staff who are deceased, she also pointed out that a number of the nursing staff who were involved in the plaintiff's care are also deceased. A number are out of the jurisdiction and the whereabouts of others are unknown despite efforts to trace them.

13. She pointed out that certain medical records are missing and those which are available are wholly insufficient to overcome the prejudice suffered by the absence of the medical staff referred to above. The birth registers, theatre registers and blood books have been destroyed and discharge records appear to be incomplete. The plaintiff's chart lacks detail and given the passage of time and the death of many of the personnel involved in the care of the plaintiff there is likely to be difficulty in interpreting and explaining all of the entries on the plaintiff's chart.

14. She added that as the first named defendant denies that the injuries allegedly suffered by the plaintiff were caused by the symphysiotomy it would be necessary for its medical experts to examine all of the plaintiff's medical records from October 1969 to date.

15. Having referred to these matters, she averred that the prejudice which will be suffered by the first named defendant in the presentation of its defence by reason of those matters has arisen because of the inordinate delay on the part of the plaintiff in instituting her claim for which no adequate explanation has been offered. She pointed out that the plaintiff has not specified when she became aware of the information to the effect that a symphysiotomy had been carried out. On that basis she argued that as the first named defendant has been severely prejudiced the balance of justice requires that the claim be dismissed.

16. A supplemental affidavit was sworn herein by Roisin Maguire dated 9th March, 2006. In that affidavit Roisin Maguire sets out detailed information in relation to the efforts made to trace members of the medical and nursing staff who were named on the delivery chart in relation to the plaintiff and others believed to have been involved in the plaintiff's care. As a result of inquiries by the Hospital in relation to the 19 people who have been identified as having been involved in the care of the plaintiff at the relevant time, 7 are deceased, the whereabouts of 7 remains unknown, 2 are in Africa and 3 have been located in this country. On that basis she repeated the view that the first named defendant is seriously prejudiced in seeking to defend the action by virtue of the lapse of time. Finally she added that because of the death of Dr. Gerard Connolly the first named defendant is not in a position to explain the clinical determinations made by him in respect of his treatment of the plaintiff.

17. An affidavit was also sworn by Brigid Flanagan on behalf of the plaintiff. She was the plaintiff's General Practitioner in 1969. After the birth of her child on 19th October, 1969, she was referred back to her GP by Dr. Connolly. In the referral back, no disclosure was made to her GP that the plaintiff had undergone a symphysiotomy following the birth. Dr. Flanagan did not become aware of that fact until informed that it had taken place following the receipt of medical records from Our Lady of Lourdes Hospital on 27th May, 2002. Dr. Flanagan deposed to the fact that she believed that the plaintiff was not aware that she had undergone a symphysiotomy until she received the medical notes.

18. Finally a further affidavit was sworn by the plaintiff herein on 13th March, 2006. In that affidavit she explained that she requested her hospital notes as a result of hearing a radio programme in which the procedure known as symphysiotomy was discussed. It was only on receipt of the hospital notes and on reading same that she had an indication for the first time that a symphysiotomy had been carried out on her. She confirmed that on 15th November, 2004, she attended Mr. Roger Clements in his consulting rooms for the purpose of examination and medical and legal report. That report was exhibited in the said affidavit.

19. A reference to the report of Mr. Clements may be of assistance. In his summary on page 17 of his report he concluded:

> "At the caesarean section, the consultant Dr. Connolly performed a gratuitous, improper operation without Mrs. Kearney's consent. Neither Dr. Connolly nor anyone else ever explained to Mrs. Kearney that this second operation had been done. As a result of it, Mrs. Kearney has suffered 35 years of pain, discomfort, loss of sexual amenity and loss of opportunity for further children.

20. The operation was wholly improper and unjustifiable. That it was done without consent or explanation, in clear contravention of the hospital's own ethical guidelines, adds to Mrs. Kearney's grief and anger."

21. At p. 5 of his report Mr. Clements noted as follows:

> "The only form of consent signed by Mrs. Kearney was for anaesthesia. She was told that she was to have a caesarean section and signed the foot of the labour chart. The foot of the page is again obscured by careless photocopying but in as far as I can read it, it has 'permission for anaesthetic
>
> I hereby consent and give permission for a general anaesthetic...'"

22. In fact it transpired that Mr. Clements comments about careless photocopying are more than apposite in that it transpired that the entire of the relevant consent was not in fact photocopied. The full consent in fact read as follows:

> "Permission for anaesthetic
>
> I hereby consent and give permission for a general anaesthetic and any operation the surgeon considers advisable."

23. That consent was signed by the plaintiff on 16th October, 1969. To that extent therefore, the report of Mr. Clements proceeds on a misapprehension. Having said that, Mr. Clements in the course of his report goes on to discuss the medical literature in relation to symphysiotomy and its use. He concludes at p. 15 of his report as follows:

> "I can find no justification in the literature of the time for the operation performed by Dr. Connolly on Mrs. Kearney. There is no support in the literature for symphysiotomy as an elective procedure. There is outright condemnation of symphysiotomy in a patient who has already had a caesarean section. In the circumstances of Mrs. Kearney's delivery it would not therefore be possible to justify the operation of symphysiotomy, in any event."

24. In his submissions Mr. Meenan SC on behalf of the Hospital made the point that the statement of the plaintiff to Mr. Clements is central to his report. However he pointed out that there is not and cannot ever be a statement from the doctor. Mr. Clements in his report had referred to a statement from the plaintiff to the effect that she was told that she was going to have a caesarean section and that she was not told that any other procedure was contemplated. Mr. Meenan said that he is simply not in a position to deal with that allegation. He cannot refute it with any evidence from any party who was present. He pointed out that if there is no

support in the literature for a symphysiotomy as contended by Mr. Clements then it would be necessary for Dr. Connolly to give evidence as to the course he took. Clearly in the absence of Dr. Connolly the Hospital is at a significant disadvantage. He referred to the principles applicable to allegations of medical negligence as summarised in the case of *Dunne (an infant) v. National Maternity Hospital* [1989] I.R. 91. He noted that one of the criticisms made by Mr. Clements was based on his view that to perform a symphysiotomy was a departure from the general and approved routine practice and having referred to that, Mr. Meenan highlighted paras. 1 and 2 of the principles applicable to medical negligence actions summarised in the *Dunne* case referred to above at p. 109, namely:

> "1. The true test for establishing negligence in diagnosis or treatment on the part of a medical practitioner is whether he has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.
>
> 2. If the allegation of negligence against a medical practitioner is based on proof that he deviated from a general and approved practice, that will not establish negligence unless it is also proved that the course he did take was one which no medical practitioner of like specialisation and skill would have followed had he been taking the ordinary care required from a person of his qualifications."

25. In the light of those principles, Mr. Meenan argued that the evidence of the doctor who performed the operation is crucial. If as contended for by Mr. Clements there is no support in the literature for symphysiotomy to be performed in the circumstances herein, Dr. Connolly is the only one in a position to give evidence as to the course he took. Mr. Meenan referred to the paragraph I have quoted above

26. from the summary of Mr. Clements report, and stated that in the face of such criticism that Dr. Connolly performed a gratuitous improper operation without explaining to Mrs. Kearney that the operation had been done that it would be entirely wrong to allow the action to proceed in the absence of the relevant witness.

27. Mr. Meenan then referred to a number of authorities dealing with the issue of prejudice by reason of delay. He referred firstly to the judgment of the Supreme Court in the case of *Toal v. Duignan and Ors.* (No. 1) [1991] I.L.R.M. 135 at p. 138 of the judgment where it was stated by Finlay C.J.:

> "I am prepared to deal with this appeal on an assumption that the plaintiff has not got a personal responsibility for any delay in the prosecution of these proceedings since they were instituted in October, 1984."

28. Mr. Meenan conceded that in this case the plaintiff does not have a personal responsibility for the delay and he also made the point that it was clear that the first named defendant had not contributed to the delay. However notwithstanding the fact that neither the plaintiff nor the first named defendant could be said to have contributed to the delay that of itself does not overcome the prejudice occasioned to the first named defendant by the delay.

29. Finlay C.J. in *Toal v. Duignan and Ors.* (No. 1) went on to say having set out about the background to that particular case as follows:

> "It is wholly impossible, the death having occurred of both the gynaecologist and paediatrician concerned either for the hospital or for the widow sued as a personal representative of the paediatrician to defend themselves in any way against the allegations which are being made against them.
>
> Even though, therefore, the plaintiff may be blameless in regard to the date at which these proceedings have been instituted and with regard to the period of twenty five to twenty six years since the events out which they arose, as far as these defendants are concerned there would be an absolute and obvious injustice in permitting the case to continue against them. One cannot but be moved with sympathy for the plaintiff who obviously feels deeply the medical condition which he is advised he presently suffers from, but that sympathy could not be permitted to justify what would be unjust proceedings against these defendants. In the High Court it was held by Keane J. that the case was governed by the decision of this court in *O'Domhnaill v. Merrick* [1984] I.R. 151. I am in agreement with that view of the law. It is unnecessary for me to repeat here the principles laid down by this court in that case, that they may be summarised in their application to the present appeal as being that where there is a clear and patent unfairness in asking a defendant to defend a case after a very long lapse of time between the acts complained of and the trial, then if that defendant has not himself contributed to the delay, irrespective of whether the plaintiff has contributed to it or not, the court may as a matter of justice have to dismiss the action."

30. Mr. Meenan then referred to *Toal and Duignan and Ors. (No. 2)* [1991] I.L.R.M. 140 at p. 145 in relation to a motion by the sixth and seventh named defendants seeking orders dismissing the plaintiffs proceedings on the grounds that such a length of time had elapsed between the events on which the proceedings were based at the present time that it would be unjust for the defendants to be called upon to defend themselves and in which it was stated by Finlay C.J. as follows:

> "Lynch J. reached a different conclusion and I am satisfied that he was right. The vital difference between the position of the Coombe Hospital who was sued as being responsible in particular for the actions of the gynaecologist and the paediatrician who attended the mother of the plaintiff at the time of his birth, as well as for other junior staff, either medical of nursing, who might have been involved at that time, is that in the case of the Coombe Hospital both the gynaecologist and the paediatrician involved were dead, the records which they might have maintained were wholly incomplete and wholly inadequate. In the case of the present defendant, however, the doctor involved is alive; has apparently personal records as well as some personal recollection; he has not made any affidavit indicating any particular difficulty or disadvantage in giving evidence although the affidavit filed on behalf of the hospital itself indicates the general disadvantage of a long lapse of time. There is no real evidence of a concrete kind with regard to the nature of the records which are available nor to any attempt by this hospital to ascertain the whereabouts or availability of other persons who were involved at the treatment of the plaintiff at the relevant time. A rather comprehensive note of his treatment written by Dr. Rees to the eight and fifth named defendants after his treatment in hospital is an immediate source capable of being used by him (Dr. Rees) to revive his memory. In all these circumstances I am satisfied that these defendants have not made out a case for probable injustice which would entitle them to be dismissed out of the action."

31. It is clear that one of the important features of that case was that the plaintiff in that case as the plaintiff in the present case did not have a personal responsibility for the delay. It is also clear that the defendant had not contributed to the delay in that case either. However the crucial issue was the extent to which there was prejudice as a result of the delay and in the *Toal* case so far as

a number of the defendants were concerned the court was satisfied that there was no prejudice given that a number of the relevant doctors were alive and there were comprehensive notes available to assist in dealing with the issues in that case. Comment was made on the fact that there had been no concrete evidence before the court to indicate what steps had been taken to ascertain the whereabouts or availability of others involved in the treatment of the plaintiff in that case at the relevant time. That case clearly contrasts with the facts of the present case in which full details have been put before the court as to the efforts made to trace witnesses who may be of assistance details have been given as to the lack of availability of relevant witnesses and difficulties in relation to the extent of the notes available.

32. Mr. Meenan also referred to the decision in the case of *Manning v. Benson and Hedges Limited* [2004] 3 I.R. 556 a decision of Finlay Geoghegan J. dealing with the issue of lapse of time. In the course of the judgment in that case Finlay Geoghegan J. considered a number of authorities commencing at p. 564 to 569 of her judgment and having done, so enumerated a list of factors to be considered when the court is asked to dismiss an action upon the inherent jurisdiction to do so either on the basis that a fair trial cannot be conducted by the court or that it would be in breach of a defendant's right to fair procedures to require him to defend the claim. The factors identified are as follows:

> "1. Has the defendant contributed to the lapse of time;
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> 2. The nature of the claims;
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> 3. The probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;
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> 4. The nature of the principal evidence; in particular whether there will be oral evidence;
>
> 5. The availability of relevant witnesses;
>
> 6. The length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and probable trial date."

33. She added:

> "Further, on the second question [whether it would be in breach of the defendant's right to fair procedures to require him to defend the claim] it will be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time."

34. Having considered the principles set out by Finlay Geoghegan J. in the case referred to above, Mr. Meenan pointed out that this is a case in which there would have to be oral testimony, there are factual issues, for example, the issue of consent, the issue as to whether or not the plaintiff was told that a symphysiotomy had been performed on her, thirdly the issue as to whether or not that procedure was an appropriate procedure and that there has been a lapse of time of thirty six and a half years to date.

35. Finally Mr. Meenan referred to a number of authorities in which the dismissal of a case has occurred by reason of lapse of time where the death of an

36. important witness has been considered to be a specific prejudice such as to warrant the dismissal of the case.

37. Turlough O'Donnell SC appeared on behalf the plaintiff herein. He agreed with the principles of law referred to by Mr. Meenan on behalf of the first named defendant herein. He also accepted that much of the factual matters set out were common case. He argued that insofar as the court is considering issues such as this that each case must be determined on its own facts.

38. Mr. O'Donnell's principal argument in relation to this particular matter was that if the plaintiff was in a position to produce evidence from someone such as Mr. Clements then there is no inhibition on the part of the first named defendant in producing like expert evidence. He argued that experts could engage on the issues in the case and that in that way a just result could be obtained. Mr. Clements in his report considered the state of medical knowledge at the time of the procedure carried out on the plaintiff, in coming to conclusions as to whether it was appropriate to have such a procedure. He argued that the first named defendant could do likewise as to the state of knowledge at the relevant time.

39. Mr. O'Donnell pointed out that one of the issues in the case relates not just to the performance of a symphysiotomy on a general basis, but that there is a specific issue as to whether or not that it is appropriate to perform a symphysiotomy after a caesarean section and he quoted from the report of Mr. Clements to the effect that:

> "There is outright condemnation of this operation in a patient who has already had caesarean section."

40. Accordingly Mr. O'Donnell argued that that is a specific allegation that may be dealt with by way of expert evidence. He stated that it was open to the first named defendant to deny that strong assertion, an assertion that goes to the heart of the case, namely an allegation that no medical practitioner of that time would perform a symphysiotomy on a person who had already had a caesarean section. In this context Mr. O'Donnell referred at length to the report furnished by Mr. Clements.

41. Mr. O'Donnell then turned to the issue of consent. He submitted that having regard to the onus of proof in this case, the onus of proving every material fact rests on the plaintiff. If she fails to do so she fails in the case as a whole and he argued that that onus on the plaintiff was a sufficient protection for the defence. I cannot agree with that argument. Mr. O'Donnell correctly identifies where the burden of proof

42. lies but it is a burden easily discharged in the absence of any available evidence by way of rebuttal. Thus, I find it difficult to accept the contention that as the burden of proof lies on the plaintiff that is a sufficient protection for the defence.

43. One of the issues that had been raised on behalf of the first named defendant was the adequacy or otherwise of the medical records available to the first named defendant. Mr. O'Donnell made the point that in considering that issue one had to examine the context in which these proceedings are taking place. Even though there has been a long lapse of time unlike many cases, this is a case in which there had been a system of record keeping available and thus he argued one must bear that in mind in considering the question of prejudice. There may be some merit in the argument but the problem highlighted by the defence is that while there is reference in the medical records to a symphysiotomy having been carried out, there is no explanation given as to the circumstances

in which the procedure was carried out.

44. He argued that this case raises systemic and conceptual points namely whether a symphysiotomy should be carried out after a caesarean section in the light of medical knowledge. On that basis, he could not see any reason why a defendant could not embark on an investigation of this point in the same way as the plaintiff had it done. He emphasised that a significant part of the plaintiff's case related to the fact that the carrying out of the operation was concealed from her and that her GP was not informed either.

45. He referred to the decision in the case of *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 where it was stated by Hamilton C.J. at p. 494 as follows:

> "I am satisfied, from a consideration of all the authorities, that the prejudice caused to a defendant by inordinate and inexcusable delay on the part of the plaintiff is a fundamental ingredient which may and should be taken into account on an application to dismiss proceedings for want of prosecution and that if the prejudice is such that a fair trial between the parties cannot now be held, then the proceedings should be dismissed and the defendant should not be further prejudiced by the delay that would inevitably be caused by a long and difficult hearing of the action and the possibility of an appeal from the decision of the High Court therein."

46. He referred also to the decision of the High Court in *Kelly v. O'Leary* [2001] 2 I.R. 526 which was referred to by Finlay Geoghegan J. in her judgment in the case of *Manning v. Benson and Hedges Limited* referred to above. In commenting on the *Kelly v. O'Leary* case, Finlay Geoghegan J. at p. 568 stated as follows:

> "The decision of Kelly J. in *Kelly v. O'Leary* [2001] 2 I.R. 526 is also of assistance in attempting to analyse the principles according to which the court should exercise such inherent jurisdiction. That was an application to dismiss for want of prosecution. There was a very long delay between the accrual of the cause of action and commencement of the proceedings which Kelly J. found to be inordinate and inexcusable. He referred to the possibility of there being two different tests in a claim to dismiss for want of prosecution and a claim to dismiss in the interests of justice by reason of significant lapse of time but left that question open. He determined the application by applying the principles in *Primor Plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 in relation to dismiss for want of prosecution referred to above. However in considering the balance of justice question as proposed by the Supreme Court, he ultimately reached his conclusion by answering the same two fundamental questions which appear to be raised by the judgements of the Supreme Court in *Toal v. Duignan (No 1)* [1991] I.L.R.M. 135, *Toal v. Duignan (No 2)* [1991] I.L.R.M. 140 and *O'Domhnaill v. Merrick* [1984] I.R. 151. These are:
>
> 1. Is there, by reason of the lapse of time (or delay) a real and serious risk of an unfair trial;
>
> 2. Is there by reason of the lapse of time (or delay) a clear and patent unfairness in asking the defendant to defend the action.

47. Having referred to those authorities Mr. O'Donnell made the point that at the heart of the issue in this case is the fact that the defendant concealed the cause of action. Although it was contended for by Mr Meenan on behalf of the first named defendant that they did not cause or contribute to the delay in bringing proceedings the whole point of the delay was the failure on the part of the first named defendant to tell the plaintiff that she had had a symphysiotomy. That was what caused the delay in this case.

48. Insofar as the defendant has a difficulty in locating witnesses he argued that the first named defendant had failed to pursue certain avenues of enquiry open to it. They had failed to engage someone like Mr. Clements, or a similar expert for an opinion in relation to the procedure that had been carried out. He argued that a defendant seeking to stop a trial should first see if it can defend that trial. Could an expert give a view? Not doing so is, according to Mr. O'Donnell trying to have it both ways. He argued that those witnesses who are available could be asked for their evidence on specific aspects of the case. For example, one could ask one of the nurses who are available was a symphysiotomy ever performed in the Hospital and they could also be asked whether a symphysiotomy had ever been performed at the hospital after a caesarean section.

49. In conclusion Mr. O'Donnell argued that whilst there were difficulties from the point of view of the first named defendant in relation to certain aspects of the case there were avenues open to the first named defendant to deal with those difficulties.

50. Mr. Meenan in reply distinguished the cases of *Primor and Kelly v. O'Leary*. The *Primor* decision was concerned with an application to dismiss for want of prosecution. In the *Manning v. Benson and Hedges Limited* case, Finlay Geoghegan J. was dealing with two separate applications, namely an action to dismiss for want of prosecution and thereafter a consideration of the exercise of the courts inherent jurisdiction to dismiss for reason of delay even in the absence of any culpable delay by the plaintiff. Mr. Meenan also dealt with the argument that the first named defendant could deal with the points raised by engaging its own experts and he agreed that an expert could indeed give views as to what occurred but he argued that that was not sufficient. He referred to the second principle summarised in the case of *Dunne (an infant) v. National Maternity Hospital* set out above and argued that in the absence of a statement of evidence from Dr. Connolly as to what occurred it was not possible to say that what was done by him was inappropriate. In other words that is precisely the type of prejudice that the first named defendant will suffer in the absence of a critical witness. He made the point that this is an action based upon oral testimony and is not a matter of exchanging medical reports between the parties. He, Mr. Meenan, cannot put to Mr. Clements the reasons why the operation was required. That being so the purpose of a trial during which evidence is tested is completely negated. He also dealt with the point made by Mr. O'Donnell that the nurses who are available may be able to assist but he disagreed with that point of view. The information that they might be in a position to give does not answer the crucial question "was the operation justifiable in the circumstances."

Conclusions

51. This is a case in which a full defence has been delivered on behalf of the first named defendant. Although a full defence has been delivered denying that a symphysiotomy took place it is clear from the medical records and from the affidavit of Roisin Maguire sworn herein on 14th February, 2006, that such a procedure was carried out on the plaintiff. I have referred in passing to the effect that this procedure has had on the plaintiff as described in the pleadings herein. Her present condition is more fully described in the report of Mr. Clements at p. 8 and 9. I have already referred in general terms to the manner in which the plaintiff contends that she was affected as a result of the procedure carried out upon her. I am clearly not in a position to comment on whether all of the complaints contended for by the plaintiff can be attributed to the symphysiotomy but I can say that I have the utmost sympathy for the plight in which she now finds herself.

52. At the heart of this case is the issue of the courts inherent jurisdiction to dismiss an action because of the lapse of time. I am satisfied that this issue falls to be determined by the principles enumerated in the cases of *Toal v. Duignan* (No 1 and No. 2) which

are reported in [1991] I.L.R.M. at pps. 135 and 140 respectively as recently followed in the decision of the High Court in *Manning v. Benson and Hedges Limited* referred to above.

53. In this case there is undoubtedly a significant lapse of time such that it clearly raises a question as to the fairness of any trial. In the *Manning v. Benson and Hedges Limited* case it was held that in assessing the affect of the lapse of time on the fairness of a trial, the court should consider whether the defendant contributed to the delay, the nature of the claim, whether the issues were factual or legal, whether oral evidence would be required, the availability of witnesses and the length of time between the acts or omissions and the probable trial date. In considering the issues outlined above there is an obvious difficulty in ascertaining whether the defendant contributed to the delay. The plaintiff in this case stated on affidavit that she first considered the possibility that a symphysiotomy had been carried out on her after hearing a radio discussion in respect of such operations. Thereafter she sought her medical records and having received those discovered that such a procedure had been carried out. It is a part of her case that she was never told that such a procedure had been carried out. It is clearly the case that her GP was not informed that such a procedure had been carried out. However whether or not the plaintiff was so informed is an issue in the case and could only be determined by oral evidence and it is equally clear that such oral evidence is not available due to the death of Dr. Connolly. To that extent it seems to me to be impossible to conclude that the defendant contributed to the delay.

54. So far as the nature of the claim is concerned and whether the issues are factual or legal, it is clearly the case that there are a number of issues between the parties which are factual and could only be determined after the hearing of oral testimony. In relation to the question of whether or not the plaintiff consented to the procedure, one could only determine that issue having heard not just the plaintiff's evidence but also the evidence of those who were present at the time the plaintiff gave the written consent.

55. I have no doubt but that in an action such as this it would of necessity

56. follow that there would have to be expert evidence available on both sides to debate the appropriateness of the procedure carried out on the plaintiff. Such oral testimony could not and would not be carried out in a vacuum. It seems to me that such evidence could only be considered in the light of the actual testimony from the person who carried out the procedure explaining the circumstances and the necessity for such a procedure arising out of that individual patient's care. The discussion of the merits or otherwise of such procedures in academic terms would not in my view help to decide the principal issue in this case as to whether or not there had been negligence on the part of the first named defendant through its consultant in carrying out the procedure. In other words to refer to the principle in relation to medical negligence actions identified by Finlay C.J. in the case of *Dunne* and referred to above:

> "If the allegations of negligence against a medical practitioner is based on proof that he deviated from a general and approved practice, that will not establish negligence unless it is also proved that the course he did take was one which no medical practitioner of like specialisation and skill would have followed had he been taking the ordinary care required from a person of his qualifications."

57. This is a case in which all of the central participants on the side of the first named defendant are no longer available. They are dead. There are a number of nurses available who had some involvement in the care of the plaintiff but, in my view I cannot see how in practical terms they could assist the first named defendant to deal with the principal issues which must be considered in this case. I have no doubt whatsoever that the first named defendant is severely prejudiced by the delay in this case. There is a real and serious risk of an unfair trial. I have come to the conclusion that the length of delay is so great in the circumstances of this case that it would be unjust to require the first named defendant to defend these proceedings. Accordingly I feel I have no option but to grant the relief sought herein.