

THE HIGH COURT

[2022] IEHC 73
[2018 No. 9909 P]

BETWEEN

GG

PLAINTIFF

AND

**HEALTH SERVICE EXECUTIVE, MEDLAB PATHOLOGY LIMITED, CLINIC PATHOLOGY
LABORATORIES INC, SONIC HEALTHCARE (IRELAND) LIMITED, SONIC HEALTHCARE
LIMITED, SONIC HEALTHCARE USA INC, BK, AE AND BS HEALTH SYSTEM COMPANY
LIMITED BY GUARANTEE**

DEFENDANTS

Judgment of Mr. Justice Cian Ferriter delivered this 27th day of January, 2022

Introduction

1. This judgment addresses the application of the eighth named defendant, AE, for an order dismissing the plaintiff's claims against her on the grounds that such claims are statute barred pursuant to s. 9(2)(b) of the Civil Liability Act, 1961 ("s.9(2)(b)"). In the alternative, she seeks an order setting down for hearing by way of preliminary issue of the issue of whether the plaintiff's claims as against her are statute barred pursuant to s. 9(2)(b). AE is the widow and personal representative of the estate of the late Dr. I. Dr. I was a consultant histopathologist attached to a Cork Hospital (the Hospital) who is alleged to have acted negligently in the testing and reporting of a histology sample carried out on the plaintiff in January 2014.
2. A materially identical application is brought by the same defendant, AE, in respect of proceedings issued by the plaintiff's husband, OG, against the same defendants in which he advances separate claims for damages arising out of the same allegedly negligent events. (Those proceedings bear record number 2018/9909P). It was agreed by the parties at the outset of the hearing that the decision arrived at by me in respect of the dismissal application in GG's case would necessarily have to be the same in respect of the dismissal application in OG's case. Accordingly, I will deal in this judgment primarily with the application brought in respect of GG's case by the eighth named defendant.

Background

3. The plaintiff, GG, is a legal secretary who was diagnosed with cervical cancer in October, 2016. Unfortunately, she required a radical hysterectomy which was performed in November, 2016. She developed significant post-operative complications which required further surgery in February, 2017. In these proceedings, she claims damages for negligence and breach of duty in circumstances where she underwent smear testing as part of the HSE's Cervical Check programme in, *inter alia*, 2013 which she says was misreported leading to her developing cervical cancer when it could have been avoided. She alleges negligence and breach of duty arising out of these failings as against the first named defendant (the HSE) and the second named defendant (Medlab Pathology Limited) who was involved in the provision of laboratory testing facilities in the context of the HSE Cervical Check programme. The plaintiff's case against the eight-named defendant (in AE's capacity as the personal representative of the estate of the late Dr. I) and the ninth-named defendant arises from alleged negligence in the testing and reporting of a

histology sample carried out by the late Dr. I at the ninth-named defendant's hospital, Cork in January 2014.

4. The proceedings were instituted on 14th November 2018 on a precautionary basis to protect the plaintiff's position as regards statutory limitation periods whilst expert reports were commissioned to investigate her care.
5. In December 2018, one of the plaintiff's experts advised that a histology sample taken during a procedure performed on 10th January 2014 should be obtained and provided to the experts for examination. This was duly done and the relevant slides were provided to the appropriate expert in January 2019. The plaintiff's solicitor says that an expert report establishing breach of duty was received on 17th September 2019. This report highlighted a breach of duty in relation to the interpretation of an August 2013 cytology sample (which sample is alleged to have been processed by the first and/or second named defendants) and also a breach in relation to the interpretation of the January 2014 histology sample which had been tested in a private capacity and reported at the ninth named defendant's hospital by the late Dr. I.
6. The plaintiff ultimately obtained orders joining AE, as personal representative of the estate of the late Dr I, and the Hospital (the ninth-named defendant) as defendants to the action. However the order joining AE (made on 29th July 2020) was made more than 2 years after the date of death of Dr I (who died in late 2017), thus rendering the claims against AE statute barred on the face of it by virtue of the provisions of s.9(2)(b).
7. Section 8 of the Civil Liability Act, 1961 ("the 1961 Act") provides in s. 8(1) that "*On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate*".
8. Section 9 of the 1961 Act then provides as follows:
 - "(1) *In this section "the relevant period" means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.*
 - (2) *No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either—*
 - (a) *proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or*
 - (b) *proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires."*
9. It is common case 16th December 2019 was the last day in which the plaintiff could have issued proceedings which would not have been statute barred under s.9(2)(b). This is so because the two-year period stipulated under s. 9(2)(b) commenced on 15th December 2017 and expired either on 15th December 2019, which was a Sunday (or the day before,

Saturday 14th December 2019). Pursuant to the provisions of O. 122, r. 2 RSC the period could be extended into Monday 16th December 2019 as the relevant expiry occurred on a Sunday (or Saturday).

10. As we shall see, the plaintiff's solicitors did not become aware until 20th December 2019, of the identity of the late Dr. I's personal representative and the date of death of Dr I. The plaintiff subsequently brought an application to join the eighth named defendant as a co-defendant, which was opened on 19th March 2020 but adjourned in light of COVID-19 restrictions and ultimately determined on 29th July 2020 when an order was made by the High Court joining the eighth named defendant as a co-defendant. The Personal Injuries Summons which had originally issued on 14th November 2018 was amended on 13th August 2020 to include the plaintiff's claims against the eighth named defendant.

Pleaded claims against AE

11. In her amended personal injuries summons of 13th August, 2020, the plaintiff included as part of her negligence claim the testing and reporting by the late Dr. I, while with the Hospital, of a histology sample taken from the plaintiff on 10th January, 2014.
12. In her Defence, the eighth named defendant pleaded, by way of preliminary objection, that the proceedings were statute barred by reason of s.9(2)(b). She pleaded a detailed basis for the Statute defence at paragraph 14 of her Defence pleading essentially that the proceedings were statute barred as against the eighth named defendant as the proceedings commenced more than two years after the death of Dr. I. The Defence was delivered on 16th November, 2020.
13. The plaintiff in her "*Further Particulars of Breach of Duty*" delivered 1st February, 2021 stated as follows:

"The eight named defendant and her agents including the Medical Protection Society [the MPS] had an obligation to be candid, on a timely basis, about the core information requested by the plaintiff, including but not limited to Dr. I's date of death, place of death, personal representative, address(es), particulars of his insurance and death."

14. In the plaintiff's Reply to Defence delivered by the eighth named defendant (also delivered on 1st February, 2021), the plaintiff pleaded as follows (at paragraph 3):

"By way of reply to the preliminary objection set out in the Defence, the plaintiff pleads that the eighth named defendant is debarred from invoking a statutory limitation defence due to the unconscionable behaviour of her agent in failing, refusing, or neglecting, to provide the plaintiff with the information necessary to institute proceedings within the statutory period prescribed at section 9(2)(b) of the Civil Liability Act, 1961."

The parties' positions on the application

15. In summary, while the plaintiff accepts that she issued her proceedings against the eighth named defendant outside the two year period in s.9(2)(b), she says that the conduct of

the eighth named defendant (including the MPS on the eighth named defendant's behalf) in failing to provide her with information on a timely basis which would have allowed her issue proceedings against the eighth named defendant within the statute period gives rise to an estoppel within the jurisprudence or unconscionable behaviour such as to debar the eighth named defendant from relying on the limitation period in s.9(2)(b). The eighth named defendant, for her part, submits that there is not even a stateable case in any form of unconscionable conduct or conduct that could amount to an estoppel within the authorities, and that it is very clear that she must succeed on the statute defence arising from s.9(2)(b).

The evidence as to the circumstances of joinder of the eight-named defendant

16. The material facts as regards the actions of the plaintiff and the MPS relevant to this application are not in dispute. I will return later to the potential issue of the actions and knowledge of AE as regards the Statute and her joinder to the proceedings.
17. The plaintiff's solicitor avers that on receipt of the expert report on 17th September 2019 relating to Dr. I's alleged misreporting of the January 2014 histology sample she made telephone enquiries with the Medical Council and the Hospital seeking personal details in relation to Dr. I, as it was apparent that he was an appropriate and necessary party to be joined to the action as a co-defendant. The only information she was able to obtain was that Dr. I had previously worked in the relevant Cork Hospital. She contacted the Hospital who confirmed that Dr. I was deceased for a number of years. She also contacted the Medical Council. Neither the Medical Council nor the Hospital would provide Dr. I's address or date of death. The solicitor then carried out a probate search but discovered that no grant had been extracted as far as she could ascertain. She made various general internet searches (such as on rip.ie) to see if she could obtain any further information about Dr. I but could find no relevant information.
18. The plaintiff's solicitors wrote to the MPS by letter of 24th October, 2019 on the presumption that Dr. I was a member of same. Given the centrality of the contents of that letter to the issues on this application, I propose to set it out in full:

Dear Sirs,

We act on behalf of the Plaintiff GG in this matter.

We have supportive reports alleging negligence on the part of the Dr. I, Consultant Histopathologist (deceased) and unfortunately we have no option but to add him as a co-defendant to these proceedings.

We are aware that Dr I passed away a number of years ago. We do not wish to distress the family of Dr I by writing to them directly in this matter and therefore we are requesting your assistance please.

We wonder if you could nominate a party to represent his estate and to accept service of proceedings please.

We look forward to hearing from you.

Yours faithfully,

O K

C. Solicitors"

19. The parties hotly dispute the correct characterisation of this letter.
20. The plaintiff submits that it was clear from the letter of 24th October, 2019 to the MPS that her solicitors were requesting details as to the estate of the late Dr. I for the purposes of nominating a party to represent his estate and to issue proceedings against them.
21. The plaintiff's solicitor, O K, swore an affidavit on 24 September 2021 in response to the eight-named defendant's application. At paragraph 8 of that affidavit she averred that

"However, I was not in a position to issue proceedings at that stage as I had no information about the Deceased save his name and the fact that he had worked in the X Hospital. I was unaware of his date of death, place of death, address, next of kin, whether he had died testate or intestate, whether he had estate in this jurisdiction or any other jurisdiction. I say that having discussed the matter with Counsel we agreed that it was impossible to issue proceedings without the identity of a party to represent the estate of the Deceased."
22. The eighth named defendant, for her part, submits that the letter was not, and could not, reasonably have been interpreted as a request for details as to the date of death, place of death, address, next-of-kin or any details as to the appropriate representative of the Deceased's estate. The eighth named defendant/MPS submits that the contents of the letter were such that, objectively viewed, the plaintiff's solicitor was likely to be in possession of information relating to Dr. I's next-of-kin (given that the letter references the fact that *"we do not wish to distress the family of Dr. I by writing to them directly"*) and that the reference to a request to *"accept service of proceedings"* suggests that proceedings had already been issued. They say that it was very clear that they were not being asked to supply a date of death or that there was any other Statute of Limitations sensitive issue animating the letter.
23. NI, a solicitor and claims manager with the MPS based in Leeds, England, has sworn an affidavit in the context of the application in which she takes strong issue with the suggestion that she acted unconscionably or otherwise unfairly or inappropriately or that she withheld any information from the plaintiff as alleged in the plaintiff's pleadings. NI says that the letter of 24th October, 2019 made no enquiry as to the date of death of the deceased and that there was nothing in the letter indicating that proceedings had not issued noting that *"the enquiry was directed solely at identifying the party who would accept "service" of proceedings"*. She says, in particular, that none of the information set out paragraph 8 of the affidavit of O K (set out above) was communicated to the MPS.

24. NI avers that:

"I say that following the receipt of the letter dated 24 October 2019 the MPS made all necessary internal checks to ascertain if the membership department of MPS knew the deceased had died and had any contact information for his Personal Representatives (both of which enquiries were negative). Thereafter, my colleague M O'R sent a letter dated 8 November 2019 addressed to "The estate of Dr G I" asking them to contact us about the deceased's potential involvement in a claim. For data protection reasons, no details were given in those letters about the claim. For the avoidance of doubt, I set out here in full the exchanges had between the MPS and the eighth Defendant after receipt of the letter of 24 October 2019. It will be noted that the initial steps were taken prior to the sending of any reminder by solicitors for the Plaintiff on 11 November (although it is restated that no such letter was ever received by me or by MPS):

- *8 November 2019: MPS wrote to the estate of the deceased, advising that we had been informed of a potential claim (no details given for data protection reasons) and asking them to contact us.*
- *15 November 2019: MPS sent a further letter to the Estate of the deceased, seeking a response.*
- *22 November 2019: MPS sent a further letter to the Estate of the deceased, seeking a response to the letter of 8 November.*
- *27 November 2019: the Eighth Named Defendant wrote to MPS advising she was the widow of Dr I. This was first date on which I or the MPS had unequivocal confirmation of the death of the deceased.*
- *28 November 2019: I emailed the Eighth Named Defendant and asked her to confirm that she wished the assistance of MPS with the claim. On the assumption that she did I asked her to:*
 - o complete and return a Statement of Cooperation;*
 - o provide formal confirmation of the full names of all the Estate's Personal Representatives;*
 - o provide up to date contact details for each of the Personal Representatives;*
 - o confirm which Personal Representative will be the point of contact for MPS (if more than one)*
 - o advise me of the date of death of Dr I and whether his estate had been wound up yet (and if so the date on which it was wound up).*

Accordingly, as at 28 November 2019, neither I nor the MPS knew the identity of the Personal Representative of the deceased.

- *15 December 2019: the Eighth Named Defendant emailed MPS to formally request assistance and to advise that she was the Personal Representative of the estate. She returned the completed cooperation statement and advised that her husband had died on X December 2017. (Please note that X December 2019 was a Sunday and so the email would not have been considered until Monday X December at the earliest).*
- *17 December 2019: MPS acknowledged receipt of the Eighth Named Defendant's email.*
- *18 December 2019: In accordance with MPS protocol I passed the Eighth Named Defendant's formal request for assistance to a Medico Legal Advisor of the MPS for determination. Assistance was granted by him on 18th December 2019."*

25. NI avers that the various dates on which the MPS learned of relevant information were as follows:

- "The MPS first became aware that the Deceased may have died following receipt of the letter from the Plaintiff's solicitor on 24 October 2019.*
- Your deponent, personally, became aware of this when I took over the file from my colleague M O'R on 20th November 2019.*
- The MPS and I first received confirmation of the fact of death from the eighth Defendant on 27 November 2019.*
- The MPS and I first became aware of the date of the death of the Deceased on the X December 2019. "*

26. She goes on to state that *"at no point on becoming aware of this information [i.e. the date of death of Dr I] was I aware (or could I have been aware) that the plaintiff lacked this information".*

27. The plaintiff's solicitors state that they sent a reminder letter of 11th November, 2019 to the MPS by way of follow up to the letter of 24th October, 2019. NI avers that this letter of 11th November 2019 was not received by the MPS and only came to light when it was exhibited to an affidavit on behalf of the plaintiff in the proceedings.

28. In addition to the plaintiff's solicitors' correspondence with the MPS, the plaintiff's solicitors wrote on 14th November, 2019 to the secretary of the relevant Hospital, the ninth named defendant, noting in that letter as follows:

"We are aware that sadly Dr I has passed away.

Please confirm if Dr. I was an employee of your Hospital and that the Hospital accepts vicarious liability for his action? If not, we will have to involve Dr. I's estate and we do not wish to cause unnecessary distress.

If you are not accepting vicarious liability in respect of Dr. I's actions then please indicate the status of Dr. I while working at X Hospital i.e. whether he was an employee or locum. Furthermore you might confirm if you are aware as to whether solicitors have been nominated to represent the estate of Dr. I, if so who, and whether you have any details of his insurance."

29. After an acknowledgement of 3rd December 2019 from the Hospital, the plaintiff's solicitors followed up with a letter of 18th December, 2019 to the Hospital. In that letter, it was stated as follows:

"We are calling upon you to confirm the name and identify the address of the pathologist. We understand that he is a Mr. I, but we do not have his address. We further understand that he may have died, but we are unsure of the date of death, nor do we have any information in relation to his estate. This is information that is within your knowledge."

30. On 20th December, 2019, NI says that she telephoned AM, the plaintiff's solicitor at C. Solicitors, and informed her that Hayes Solicitors were accepting service of proceedings on behalf of the eighth named defendant. She avers that during the course of that exchange, AM asked her if she knew the date of death of the deceased. NI said she checked the file and advised AM of what the date was. She avers *"it was only when she asked me the question that I realised that she did not know the date of death"*.
31. NI goes on to aver that she was unaware at the time of the significance of the date of death (NI is based in England and, while a Scots-qualified lawyer, is not an Irish lawyer) and that the MPS relies on Irish firms of solicitors for guidance on relevant aspects of Irish law in the case of members who are sued in the Irish courts.

Parties' submissions

32. It was contended on behalf of the eight-named defendant that this was a case of no one being to blame in respect of the fact that the plaintiff did not issue her proceedings against the eighth named defendant before the expiry of the Statute. It was certainly not the case, on the uncontested evidence from the MPS, that there was any stateable suggestion of concealment, nondisclosure of information or any other form of unconscionable behaviour on the part of the MPS such that might in equity debar the eighth named defendant from relying on s.9(2)(b). On the contrary, it was submitted that the MPS acted promptly and appropriately in light of the request made of it. It was submitted that to prevent the eighth named defendant from relying on the Statute would be to do violence both to the terms of s.9(2)(b) and to the relevant jurisprudence.
33. The Supreme Court upheld the constitutionality of s.9(2)(b) in *Moynihan v. Greensmyth* [1977] IR 55. The eight-named defendant lays emphasis on that part of the rationale of

the Supreme Court's decision in *Moynihan v. Greensmyth* which emphasised that the State had a duty to others "*in particular those who represent the estate of the deceased, and beneficiaries*" to impose some reasonable limitation on actions against estates (O'Higgins C.J. at p. 72).

34. The eighth named defendant noted that, despite the fact that the Oireachtas has sought to amend aspects of the Statute of Limitations as regards personal injuries actions, including in the Statute of Limitations (Amendment) Act, 1991, the Oireachtas has not seen fit to amend the provisions of s.9(2)(b), e.g. by allowing the application to it of those provisions of the Statute of Limitations, 1957 which permit the Statute to be disapplied in cases of fraud or concealment, or by introducing a test of discoverability or otherwise by seeking to ameliorate what may be the harsh operation of s.9(2)(b) in certain circumstances.
35. The eighth named defendant accepted that the relevant jurisprudence left it open to a court to rule that a defendant might not be entitled to rely on the two-year limitation period in s. 9(2)(b) in circumstances where it would be unconscionable of the defendant to do so, and, in particular, in circumstances where the defendants' conduct is such as to set up an estoppel against reliance on the defence.
36. The leading authority in that regard is the Supreme Court case of *Doran v. Thompson* [1978] IR 223, a personal injuries case where the plaintiff issued his proceedings after the relevant limitation period. On the facts, the defendant's insurers had the plaintiff examined on a date after the Statute had expired but before the proceedings were issued. Henchy J. held as follows (at p. 225):

"What representation did the defendants' insurers make as to the issue of liability? The answer is "None." Aside from the first letter written by the plaintiff's solicitor in October, 1973, in which a query was put as to what proposal the defendants had for compensating the plaintiff, and the insurers' neutral reply saying that the circumstances of the accident were being investigated, not a word was written or spoken during the three-year period of limitation on the question of liability. Other than those two opening letters, the only communications that passed were those between the solicitor and the insurers, and these consisted of five letters on each side and two telephone conversations. In none of them was any reference, direct or oblique, made to the question of liability."

37. Counsel for the eight-named defendant submits that the answer is equally "none" to the question here as to what representation the MPS or eighth named defendant made to the plaintiff as to non-reliance on the Statute in this case.
38. Counsel for the applicant noted that even taking the somewhat broader *dictum* of Kenny J. in *Doran v. Thompson* was of no assistance to the plaintiff. That *dictum* of Kenny J (at p.239) is as follows:

"The other argument was that it would be inequitable to allow the defendants to rely on the Statute of Limitations if the defendants had accepted liability and had entered into negotiations to arrive at an agreed sum and if the plaintiff's solicitors had refrained from bringing proceedings because they relied on the admission of liability or the negotiations being conducted, it would be inequitable to allow the defendants to rely on the time-bar. But they never accepted or admitted liability and never represented that they did, nor did they carry on any negotiations for the purpose of settling the case. They did nothing which could give the impression to the plaintiff's solicitors that they need not issue proceedings nor did they mislead them in any way. I cannot see how the conduct of the insurers was dishonourable in any respect and I do not think that anything they did makes it inequitable for them to plead and rely on the Statute of Limitations. If the plaintiff's solicitors thought that liability was being admitted, the defendants and the insurers did nothing to cause or contribute to that belief."

39. Counsel for the applicant makes the point, by way of analogy to the facts here, that there was absolutely nothing "dishonourable" in any respect in respect of the conduct of the MPS or the eighth named defendant. That there was no question of the eighth named defendant or the MPS ever giving the impression to the plaintiff's solicitors that the plaintiff's solicitors need not issue proceedings or of the plaintiff's solicitors being misled in any way or of relevant information in the possession of the eight-named defendant (such as the date of death of Dr I) being withheld despite request.
40. NI rejects in the strongest terms any allegation that she withheld information or that she acted unconscionably or otherwise inappropriately in her dealings with the plaintiff's solicitors in relation to this matter. The MPS, on behalf of the eighth named defendant, make the simple point that they were never asked in any correspondence to inform the plaintiff's solicitors of the date of death of Dr I. NI says at paragraph 27 of her affidavit:

"I say that it was at all times clear in the correspondence that the solicitors for the Plaintiff were aware of the death of the Deceased "a number of years" previously. I say that I was not asked in this correspondence, or in any correspondence, to inform the Plaintiff's solicitors of the date of death of the Deceased. It is simply incorrect to aver, as Mr C has done or as the Plaintiff has expressly pleaded, that such a request was ever made of the MPS or me. Indeed, a significant number of the requests the Plaintiff has pleaded as having been made were, as a matter of plain fact, never made:

- a. No request was ever made for the Deceased's date of death;*
- b. No request was ever made for the Deceased's place of death;*
- c. No request was made for any address or addresses (save insofar as that might be said to overlap with requests to identify a representative);*
- d. No request was ever made for particulars of the Deceased's insurance;*

e. *No request was ever made for any other particulars of his death."*

41. At the hearing of this application, counsel on behalf of the plaintiff very fairly accepted that her side was accepting the factual matters set out in NI's affidavit. It was pointed out on behalf of the plaintiff, that in fairness to the plaintiff, she was not in a position to establish the precise sequence of events until receipt of replies to interrogatories. The plaintiff had issued an application to direct the eighth named defendant to reply to interrogatories (aimed at eliciting evidence as to the knowledge of the MPS as to the date of death of Dr I and related information) and this application was not resolved until the morning of the hearing of that application (in late June 2021).
42. The plaintiff submitted that there was a form of representation sufficient to satisfy the *Doran v Thompson* estoppel test by the omission of the MPS/eighth named defendant to supply the plaintiff's solicitor with the date of death and personal representative of his estate before the expiry of the Statute on 16th December, 2019.
43. In the event that the court was not satisfied that there was an estoppel in the sense recognised by the authorities, the plaintiff submitted that this was an appropriately exceptional case in which the court should apply the wider concept of unconscionability to prevent the eighth named defendant's reliance on the Statute, in the sense signalled by Geoghegan J. in *Murphy v. Grealish* [2009] 3 IR 366. In *Murphy v. Grealish*, Geoghegan J. stated as follows (at 377):

"[32] I would leave open the question until it arises in some appropriate case as to whether a plea of statute bar can be defeated in some situations by unconscionable conduct but which could not be said to give rise to an estoppel. Quite apart from the judgments of O Dálaigh C.J. and Walsh J. referred to above, the High Court judgments of Costello J. and Kelly J., though reversed on the particular facts, might give some credence to a wider principle of unconscionability rather than the much narrower concept of estoppel with its stricter rules.

[33]. On the other hand, it is important to reiterate that there is nothing unjust about the Statute of Limitations. Far from it, it prevents stale claims, difficult to defend, from being pursued. In the absence of substantial unfairness a court will not allow a defence of statute bar properly raised to be defeated."

44. Counsel for the plaintiff submitted that on the unusual facts of this case, it would be an appropriate case in which to give credence to a "*wider principle of unconscionability*" (to deploy the formulation of Geoghegan J. as set out above), rather than the much narrower concept of estoppel which has stricter rules, on the basis that a "*substantial unfairness*" would otherwise result. The substantial unfairness is said to result from the fact that the plaintiff, through no fault of her own, would be left in the invidious position where, despite the best efforts of her highly experienced medical negligence solicitor, she would be left with the potentially serious adverse consequences for her proceedings of an order striking out her claim against the eighth named defendant (given that the second named defendant has pleaded reliance on s. 35(1)(i) of the 1961 Act in the event that the

plaintiff's claim against the eighth named defendant is held to be statute barred and in circumstances where it is inevitable that the ninth named defendant will dispute that it has any vicarious liability for the actions of the eighth named defendant).

45. Counsel for the plaintiff relied on the decision of Barrington J. in *Traynor v. Fegan* [1985] IR 586 in support of the proposition that an innocent administrative error on the part of the defendant may be sufficient to ground a claim of unconscionability against that defendant relying on the Statute of Limitations. Counsel on behalf of the eighth named defendant contended that the facts of that case were very far removed from the facts here in that in that case it was clear that the relevant innocent administrative error occurred against a backdrop of express representations of a kind that would ordinarily potentially ground an estoppel claim.
46. In *Traynor v. Fegan*, the defendant's insurers indicated to the plaintiff's solicitors (prior to the institution of proceedings) that they wished to discuss the case which related to a road traffic accident. The driver's insurers, on the defence side, indicated by letter that a firm of solicitors had been nominated within the jurisdiction to accept service of any proceedings (as the driver resided in Northern Ireland). The insurers then indicated that they wished to discuss the case further. The plaintiff's solicitor wrote several letters indicating his willingness to discuss the matter with the driver's insurers. The solicitor then learned that the driver had died and he wrote a further letter to the insurers drawing this fact to their attention and proposing settlement discussions. There was no reply from the insurance company. The plaintiff's solicitor and the driver's insurers agreed as to the nomination of an appropriate defendant subsequent to the driver's death. There was also an agreement that the insurers would honour any decree obtained in the proceedings.
47. The plaintiff's solicitor attempted to issue a plenary summons out of the Central Office a couple of weeks before the expiry of the Statute. The Central Office refused to issue the plenary summons on the basis that the plaintiff needed to obtain a court order authorising service out of the jurisdiction or produce a letter from a solicitor within the jurisdiction undertaking to accept service. The solicitors nominated by the driver's insurers refused to accept service of the proceedings because they had no instructions. The Statute expired on 24 October, 1980. On 4 December, 1980, the solicitors nominated by the driver's insurers, having taken instructions, undertook to accept service and the proceedings were then issued on 17 December, 1980 outside the limitation period. The defendant then raised the Statute in her defence.
48. Barrington J. held that the defendant was estopped from pleading the Statute in the circumstances. He relied, inter alia, on the representation contained in the insurers' letter to the effect that the insurers had nominated solicitors within the jurisdiction to accept service of the proceedings, and had encouraged the plaintiff's solicitor to defer taking steps to protect the plaintiff's interests. It was in those circumstances that Barrington J. held it would be unconscionable to allow the defendant rely on the Statute.

Barrington J. stated as follows:-

"The present case is an unusual one in the sense that there is no question of the Plaintiff having been led to believe that the Defendant was going to admit liability or the Plaintiff or her solicitor being deceived on this pointThe Plaintiff's case is a more complex one and rests in part on the representation contained in Mr. Moore's letter of 29th March, 1979 that his company had, in fact, nominated Messrs. G.D. Fottrell to accept service of proceedings. This representation, though made without ulterior motive, was false in fact and was never withdrawn. It was quite clear from subsequent negotiations and correspondence that Mr. MacGuill (the Plaintiff's solicitor) was acting on this representation. Had he known the true position, he could have taken steps to protect his client's interest".

49. As a further alternative, the plaintiff submitted that it would not be appropriate to determine the matter on this application and that it would be safer and more just to hear the oral evidence of the eighth named defendant herself at the trial of the action to allow the plaintiff interrogate whether there was a basis for the eight-named defendant's actions or inactions in the matter which might establish an estoppel or unconscionability in answer to the statute defence.

Discussion

50. With considerable regret, I feel compelled by the relevant jurisprudence and the existing state of the law to conclude that the plaintiff's claim against the eighth named defendant is statute barred under s. 9(2)(b).
51. In my view, the case law makes clear that in the absence of a representation inducing the plaintiff not to issue proceedings within the statute period, it is necessary to find unconscionability in the behaviour of the relevant defendant before the court can be in a position to consider the disapplication of any statute defence pleaded by that defendant. I do not believe that it can be fairly said that MPS or the eighth named defendant acted in any way unconscionably in the circumstances here.
52. In my view, *Traynor v. Fegan* is readily distinguishable from the facts that occurred here and does not avail the plaintiff's case. As is clear from the facts of that case summarised above, Barrington J was of the view that there was a false (albeit innocent) representation made on behalf of the defendant (i.e. by the defendant's insurers saying that they would nominate solicitors to accept service of proceedings in the jurisdiction thus obviating the need for an order for service out of the jurisdiction) which was acted on by the plaintiff to his detriment. There is no comparable or analogous false representation or inequitable behaviour on the part of the MPS or AE here.
53. The plaintiff fairly and properly accepted that it was not taking issue with Ms. N I's account of factual matters from the perspective of the MPS as set out in her affidavit. The affidavit of NI bears out that at all times the MPS acted properly in relation to the matter. The MPS did not know the date of death of Dr I at the time of receipt of the plaintiff's solicitors letter of 24th October 2019. The MPS acted promptly and responsibly following receipt of the letter of 24th October 2019 in making contact with the eight-named defendant seeking details of the personal representative of the late Dr I's estate and in

following up on that correspondence. The MPS cannot be criticised for failing to more quickly provide the date of death of Dr. I to the plaintiff in circumstances where the MPS did not have that information until 16th December 2019 and where it thereafter provided that information to the plaintiff's solicitors within a matter of days.

54. Insofar as it was contended that it would be appropriate to allow the issue proceed to the trial so that the state of mind and knowledge of the eighth named defendant herself would be tested in oral evidence, I do not think there is any plausible basis upon which it can be maintained that the eighth named defendant (who is the widow of Dr. I, had no involvement in the underlying events the subject matter of the proceedings and is sued merely in a representative capacity) may have been aware of the provisions of s. 9(2)(b) and how they might potentially operate to bar the plaintiff's claim if proceedings were not instituted against the eighth named defendant before the expiry of the two-year limitation period on or about 15th December, 2019. No *prima facie* or tenable basis has been identified for permitting the matter to go to trial to allow the exploration in oral evidence of a contention that Dr. I's widow may have slowed down her response to the MPS to ensure that the statute period expired.
55. The plaintiff's solicitor cannot be faulted for the steps which she sought to take on the plaintiff's behalf in relation to this matter. The unfortunate reality is that the plaintiff, and her solicitor, were left in a most difficult position by the fact that they only became aware on 17th September, 2019 that there was a potential claim in negligence against the late Dr. I and where they did not know the identity of Dr. I next of kin or legal representative, or of the date of death of Dr. I. All appropriate steps were then taken to identify the next-of-kin of the eighth named defendant and his date of death including the step of the letter sent to the MPS on 24th October, 2019. It did not prove possible to get the relevant information before 16th December 2019.
56. Accordingly, this is an unfortunate situation from the plaintiff's perspective where neither side were to blame for the fact that the plaintiff was not in a position to make an application to join the eighth named defendant as a co-defendant to the proceedings before the expiry of the two-year period stipulated in s. 9(2)(b).
57. In truth, and quite understandably given the invidious position in which the plaintiff found herself, the plaintiff is seeking to invoke the equitable doctrine of unconscionability to the facts here as a way of overcoming the very real discoverability issue which she was faced with in the circumstances. I am afraid that any application by me of the unconscionability doctrine to prevent the eighth named defendant from relying on the provisions of s. 9(2)(b) on the facts of this case would involve the court, in effect, plugging a lacuna in the relevant legislation. I should say that this case does seem to highlight a lacuna in the existing law in failing to allow for, for example, a principle of discoverability to apply in respect of scenarios of the type disclosed by the facts of this case to which s.9(2)(b) can otherwise very harshly apply. However, I am bound to apply the law as it is.

Conclusion

58. In the circumstances I will dismiss the plaintiff's claims against the eight- named defendant in both this case and in the related case taken by the plaintiff's husband against the eight-named defendant.
59. In accordance with the practice in place in relation to judgements delivered electronically, the parties, if they cannot agree on the question of costs, are entitled to deliver brief written submissions. It may be helpful if I indicate that my provisional view is that in the very particular circumstances of these cases, no order as to costs would be appropriate on the applications. However, if any party wishes to contend for an alternative costs order I will of course consider their submissions with a fully open mind.