**THE HIGH COURT**

**[2008 No. 4863 P.]**

**BETWEEN**

**ANDREW MANGAN (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND, LORRAINE MANGAN**

**PLAINTIFF**

**AND**

**JULIAN DOCKERAY AND (BY ORDER) BRIAN DENHAM AND THE CONGREGATION OF THE SISTERS OF THE LITTLE COMPANY OF MARY, TRADING AS MOUNT CARMEL HOSPITAL**

**DEFENDANTS**

**JUDGMENT of Mr Justice Binchy delivered on the 12th day of April, 2018**

1. There are two motions brought before the court in substantially similar terms. The first in time is that of the second defendant and is dated 2nd March, 2017. It is grounded upon the affidavit of Mr Ciarán O'Rorke, solicitor of Hayes Solicitors dated 1st March, 2017.

2. The second in time is the motion of the third named defendant which is dated 12th September, 2017, and is grounded upon the affidavit of Mr John Gleeson, solicitor, of Mason Hayes and Curran Solicitors dated 11th day of September, 2017.

3. The first motion seeks the following reliefs:-

> "(a) An order pursuant to the Rules of the Superior Courts or in the alternative pursuant to the inherent jurisdiction of this Honourable Court striking out the plaintiff's claim against the second named defendant on the grounds that it is an abuse of process;
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> (b) An order pursuant to the Rules of the Superior Courts or in the alternative pursuant to the inherent jurisdiction of this Honourable Court striking out the plaintiff's claim against the second defendant on the grounds of inordinate and inexcusable delay;
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> (c) An order pursuant to O. 25 and/or O. 34 and/or O. 35 of the Rules of the Superior Courts or in the alternative pursuant to the inherent jurisdiction of this Honourable Court, directing the trial of a preliminary issue of law and/or fact, namely the questions:
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> (i) whether the plaintiff's claim against the second named defendant is an abuse of process, and
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> (ii) whether the plaintiff's claim should be struck out as an abuse of process;
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> (iii) whether the plaintiff's claim against the second defendant is barred pursuant to the provisions of the Statute of Limitations Act 1957 (as amended);
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> (d) An order pursuant to O. 19, r. 28 of the Rules of the Superior Courts or in the alternative pursuant to the inherent jurisdiction of this Honourable Court striking out the plaintiff's claim against the first defendant on the grounds that it is unsustainable or in the alternative bound to fail in circumstances where proceedings issued outside the time limit laid down by the Statute of Limitations Act 1957 (as amended). " The reference in this paragraph to the first defendant is clearly an error and should refer to the second defendant.

4. As I have said above, the second motion is in substantially similar terms to the first motion. However, there are some differences:-

> (i) In relying on O. 19, r. 28, the second defendant does so on the grounds that the proceedings against him are unsustainable or in the alternative bound to fail because the proceedings issued outside the time prescribed by the Statute of Limitations Act 1957. In relying on the same rule however, the third named defendant moves its motion not on the grounds that the claim against it is statute barred, but on the grounds that the claim discloses no reasonable cause of action and/or is frivolous or vexatious.
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> (ii) The third named defendant also seeks an order pursuant to the European Convention on Human Rights Act 2003, dismissing the plaintiff's claim as contrary to the third defendant's right to a trial within a reasonable time pursuant to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"). Although not referred to expressly by the second defendant in the first motion, counsel on his behalf did rely upon the ECHR in their submissions.

5. In opposing each of the first and second motions, Ms Agatha Taylor, solicitor the plaintiff in the firm of Ballagh Solicitors, swore affidavits dated 4th April, 2017 and 25th October, 2017. She also swore a short supplemental affidavit during the course of the hearing of these motions, dated 29th November, 2017.

**Background**

6. The plaintiff was born on 11th January, 1995 at Mount Carmel Hospital, which was then under the management of the third defendant. In his affidavit, Mr Gleeson avers that the third defendant sold its interest in the hospital in April 2006 and that the hospital subsequently closed entirely in early February, 2014.

7. The first defendant is the consultant obstetrician and gynaecologist who, it is alleged, at all material times provided ante-natal care to the plaintiff's mother Lorraine Mangan. The second defendant is the consultant paediatrician who provided neo-natal care to the plaintiff's mother, and the third named defendant was, at the time that the plaintiff was born, the proprietor of Mount Carmel Hospital with responsibility for the operation and management of the hospital during the period leading up to the plaintiff's birth and during his neo-natal care thereafter.

8. The plaintiff suffers from severe cerebral palsy, cortical blindness and quadriplegia. According to the affidavit of Ms Taylor of 4th April, 2017, the plaintiff is entirely dependent in respect of all aspects of his everyday living. Accordingly, the plaintiff's solicitor takes instructions from his next friend, his mother.

9. The personal injury summons was issued on 17th June, 2008 alleging professional negligence against the first defendant. This summons was not served, and no attempt was made to serve the summons on the first defendant. Accordingly, it was necessary for the plaintiff to bring forward an application to renew the personal injury summons, which application was made on 15th July, 2013. That application was granted by Peart J. on 15th July, 2013. Following upon that, the first defendant brought an application to set aside the order of Peart J., which application was heard but refused by Costello J. in a judgment handed down on 23rd October, 2014. The first defendant then appealed that decision, unsuccessfully, to the Court of Appeal, which handed down its decision on 13th May, 2015.

10. On 2nd November, 2016, the first defendant issued a motion to join the second and third defendants as third parties to the proceedings. This motion was grounded upon the affidavit of the solicitor for the first defendant, Ms Fiona Brassil. In this affidavit, M. Brassil averred, *inter alia*:-

> "The defendant has received expert advice to the effect that the ventilation provided to the plaintiff and his management was not appropriate and [that] the plaintiff was inappropriately hypocarbic as a result leading to brain injury. The defendant has also been advised by his experts that it was inappropriate to provide or attempt to provide the kind of paediatric or neonatal care actually afforded to the plaintiff in the setting of Mount Carmel Hospital without specialised and resident paediatric expertise. Further, there was an inadequate setting to ensure appropriate availability of blood gas testing and monitoring at Mount Carmel Hospital. The defendant will allege as against the third parties that it was not acceptable for the plaintiff to have remained in Mount Carmel, as opposed to being transferred elsewhere for appropriate neonatal care and that the care actually afforded to the plaintiff by Mount Carmel staff (whether under the direction of Dr. Denham or in applying hospital policy or protocols) was negligent. The negligence on the part of the proposed third parties, it will be alleged, has caused the plaintiff to suffer the injuries he now suffers from."

11. The application to join the second and third defendants as third parties came on for hearing before Barr J. on 21st November, 2016. On that occasion, the plaintiff took the decision to apply to have the intended third parties joined as co-defendants to the proceedings. The Court acceded to that application.

12. In her affidavit of 4th April, 2017, Ms Taylor explains the reason why the plaintiff decided to make application to have the intended third parties joined as co-defendants. It is clear that this was a well-considered decision. But it is equally clear that the decision not to join the second and third defendants to the proceedings in the first place was also a well-considered decision, and before proceeding further, that decision should be explained.

13. In her decision handed down on 23rd October, 2014, Costello J. helpfully sets out, in an appendix to her decision, the steps taken by Ms Taylor, on the advice of counsel and in conjunction with medical advices, to obtain the necessary and appropriate medical reports prior to proceeding with the plaintiff's case. Costello J. found that it was "clear that the lapse in time between 17th June, 2008, when the summons issued, and the 15th July, 2013, when it was renewed, was attributable to the efforts taken by Ms Taylor in complying with the careful and necessary directions of counsel (initially junior counsel and thereafter senior counsel) as to the issues that needed to be fully addressed before the summons could properly be served upon the defendant."

14. The personal injury summons that issued on 17th June, 2008 was drafted on the basis of an expert liability report prepared by a Mr Roger Clements, consultant obstetrician and gynaecologist. It appears that Mr Clements had identified additional enquiries to be addressed by experts in other specialist fields. These included obtaining a report on liability from a consultant in neonatal medicine. The solicitors for the plaintiff wrote to such consultant, a Dr Anoo Jain, consultant in neonatal medicine in St. Michael's Hospital, Bristol, on 4th March, 2008, but it was not until 17th July, 2009 that they received a report from Dr Jain. On receiving that report, the solicitors for the plaintiff sought further advices from senior counsel, and amongst the advices received was that the opinion of a paediatric neurologist should be obtained. There was some difficulty in identifying the appropriate person to furnish this report, and eventually it was obtained from a Dr Blathnaid McCoy, of Our Lady's Hospital for Sick Children, Crumlin. Dr McCoy provided two reports, one dated 22nd March, 2013 and the second dated 1st June, 2013. It was following upon these reports that the application to renew the summons was made on behalf of the plaintiff.

15. In her affidavit of 4th April, 2017, Ms Taylor explains that while Dr Jain, in his report, is critical of the plaintiff's treatment in respect of his over ventilation and hypocarbic condition, he does not consider that the plaintiff's condition is attributable to injuries sustained in the neonatal period; rather he considers it attributable to injuries sustained as a consequence of premature delivery. Accordingly, it is apparent that the advice to the plaintiff is that it was the negligence of the first defendant that caused the plaintiff's injuries, and not the actions of the second or third defendants. While the report of Dr Jain was not exhibited, Ms Taylor quotes from the report in para. 12 of her affidavit of 4th April, 2017 as follows:-

> "… Andrew was over ventilated and hypocarbic from at least 17:00h 11.1.1995 … until approximately 08:00h 13.1.1995. Dr. Denham weaned the ventilation settings in response to this but the notes [do] not reflect in considering faster weaning or extubation for Andrew. Thus Andrew remained ventilated and hypocarbic for a significant period of time – both of these factors can lead to abnormal cerebral blood flow and periventricular leucomalacia …
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> In the absence of any serial cranial ultrasound scans, comments on his brain parenchyma or a neurological examination before discharge that might facilitate timing any post-natal acquired risk, I consider that Andrew Mangan's neonatal and subsequent care under Dr Denham was satisfactory.
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> In light of the above my professional opinion is that there are no obvious post-natal factors that might have resulted in Andrew Mangan's developmental delay.
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> My professional opinion is that Andrew Mangan's developmental delay is an unfortunate result of his premature delivery. An expert in obstetrics would need to determine if there was sufficient clinical evidence at the time to perform the operation on Lorraine Mangan that resulted in the delivery of Andrew Mangan at 30 weeks and 3 days gestation."

16. In the light of this opinion of Dr Jain (which was set out in his report of 17th July, 2009) it is not difficult to see why the decision was taken not to pursue the second and third defendants. Presumably the plaintiff had sufficient expert opinion to justify the proceedings as against the first defendant.

17. It was the application of the first defendant to join the second defendant and third defendant as third parties to the proceedings that caused the plaintiff to reconsider the joinder of the second defendant as a co-defendant to the proceedings. It is not clear if any consideration had previously been given by the plaintiff to the joinder of the third defendant, as a defendant to the proceedings.

18. I have already set out at para. 10 above the basis upon which the first defendant decided to bring forward the third party application. This was summarised in the affidavit of Ms Brassil, although the expert report relied upon by the first defendant and referred to by Ms Brassil was not exhibited. However, the application to join the second and third defendants as third parties, and the averments of Ms Brassil in support of that application caused the plaintiff's advisors some considerable concern. At para. 8 of her affidavit of 4th April, 2017, Ms Taylor avers:-

> "6. In light of the aforesaid and in consultation with counsel (both junior counsel and senior counsel) it was determined that, in the event of the expert evidence as averred to by Ms. Brassil being accepted at trial, then the proposed third parties would have a liability in respect of the catastrophic injuries sustained by the plaintiff and that this necessitated the joinder of the proposed third parties as co-defendants to the proceedings.
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> 7. When the matter came before Mr. Justice Barr on 21st November, 2016, counsel on the plaintiff's behalf requested that the proposed third parties be joined as co-defendants. Counsel for the plaintiff specifically and clearly stated to Mr. Justice Barr that the plaintiff did not possess expert evidence that justified the joinder of the proposed third parties as co-defendants but that nevertheless, in light of the unambiguous averments in Ms. Brassil's affidavit as to the expert evidence obtained by the existing defendant, the plaintiff's legal advice was that it was appropriate that the said parties be joined as co-defendants. Mr. Justice Barr noted the position and joined the proposed third parties as co-defendants accordingly."

19. Ms Taylor goes on to aver that her office wrote to the solicitors for the first defendant requesting a copy of their expert's report, but this request was declined. She also avers that her office is in the process of taking advices on the plaintiff's behalf in respect of the expert evidence opinion as set out in Ms Brassil's affidavit. However, no such further evidence was put before the Court for the purpose of these motions.

20. Later in her affidavit, Ms Taylor avers:-

> "The plaintiff's advisors (both this deponent and counsel) believe that a situation where the claim could potentially "fall between the stools" of the differing professional opinions on causation cannot be countenanced: it is in those circumstances that the decision was made to join the proposed third parties as co-defendants."

21. This clearly explains why the plaintiff made an application to have the second and third defendants joined as co-defendants. Notwithstanding that their own expert evidence is to the effect (1) that the plaintiff's injuries were caused by the negligence of the first defendant and (2) that the plaintiff's injuries were not caused owing to any negligence on the part of the second defendant, the case being made by the first defendant against the second and third defendants is a source of obvious concern to the plaintiff that is neatly summed up by the concern referred to above that the claim could "fall between the stools" of differing professional opinions.

22. The order of Barr J. of 21st November, 2016 whereby the second and third defendants were joined as co-defendants to the proceedings required the plaintiff to serve an amended personal injury summons within eight weeks from the date of perfection of the order. This period was extended by a further order of Humphreys J. dated 6th February, 2017, whereby he extended the period for service of personal injury summons by two weeks. While it is not clear as to precisely when the amended personal injury summons was served, a copy of the amended summons was produced to the Court. Paragraph 9 deals with the particulars of negligence and breach of duty as against the second and/or third named defendants and states:-

> "As of the date of issuing of the present amended personal injury summons, the plaintiff does not possess any expert medical evidence that would support allegations of actionable and causal negligence and/or breach of duty as against the second and/or third named defendants their servants or agents. The second and third named defendants are joined to these proceedings in reliance upon the expert medical opinion of the first named defendant's instructed experts: the allegations of wrongdoing on the part of the second and/or third named defendants have been summarised on behalf of the first named defendant in the following terms:"

There is then a verbatim extract from the affidavit of Ms Brassil, sworn on behalf of the first defendant on 2nd November, 2016, in support of that defendant's application to serve a third party notice upon the second and third defendants. I have already cited the passage concerned at para. 10 above.

23. Para. 10 of the amended personal injury summons states:-

> "The aforesaid constitutes the best particulars available to the plaintiff pending acquisition of further medical opinion which will in turn be predicated upon information as to the operation and management of Mount Carmel Hospital and its appropriateness as a venue for the plaintiff's neonatal care that shall only become available to the plaintiff in the course of a process of discovery and kindred procedures in these proceedings. The plaintiff shall furnish further and better particulars of negligence and breach of duty as against the second and/or third named defendants their servants or agents at that stage."

24. On 3rd October, 2017, a defence was filed on behalf of the first defendant. At para. 5(b) thereof, the first defendant pleads that he was not responsible for paediatric and/or neonatal care afforded to the plaintiff and further that any personal injuries suffered on the part of the plaintiff were caused, wholly or, in the alternative materially contributed to by the negligent acts or omissions of the second and/or third named defendant. No particulars of negligence against those defendants are given.

25. On 3rd October, 2017, the first defendant served a notice claiming indemnity and/or contribution on the second and third defendants. In this notice, the first defendant puts the other defendants on notice that he will seek indemnity from them on the grounds that if the plaintiff did sustain the personal injury, loss and damage as alleged, it was as a result of the negligence and breach of duty and breach of contract on the part of the second and third defendants in failing to take any reasonable care for the plaintiff while under their care, causing the plaintiff, inter alia, to be over ventilated, hypocarbic and thereby suffering brain injury as a result. That is the extent of the pleading as against the second and third defendants.

26. It is apparent from the above that the plaintiff makes no allegations of any kind as against those defendants. It is for this reason that the second and third defendants are applying to have these proceedings struck out as against them on the grounds that they

disclose no reasonable cause of action against those defendants and are therefore frivolous, vexatious and an abuse of process. I will deal with this element of the motions first. In applying to have the proceedings struck out against them for this reason, the second and third defendants rely upon the inherent jurisdiction of this court to strike out proceedings that are frivolous and vexatious, and/or bound to fail , and also upon O. 19, r. 28 of the Rules of the Superior Courts which provides:-

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

27. It is well established and not in dispute that the power conferred by O. 19, r. 28 to dismiss proceedings is one that must be exercised sparingly and only in very clear cases. In this case it is submitted on behalf of the second and third defendants that it is clear from the plaintiff's own pleadings that he has no evidence to support his claim as against the second and third defendants and that, in the absence of any expert evidence and without any particulars of negligence alleged against the second and third defendants, the plaintiff has not identified any reasonable cause of action or any cause of action at all as against those defendants, and the claim as against those defendants is therefore frivolous and vexatious.

28. The second named defendant places great emphasis on a number of decisions of this Court and of the Supreme Court in which it is made very clear that there is an obligation on any party intending to issue proceedings against another alleging professional negligence, to obtain evidence first (usually in the form of an expert opinion) to support the plaintiff's case. The second defendant referred me to the decision of Barr J. in *Reidy v. National Material Hospital* [1997] IEHC 143 in which he stated:-

> "It is irresponsible and an abuse of the process of the court to launch a professional negligence action against institutions such as hospitals and professional personnel without first ascertaining that there are reasonable grounds for so doing."

This case was cited with approval by the Supreme Court in the case of *Cooke v. Cronin & Neary* [1999] IESC 54 in which case Lynch J. observed:-

> "In all cases of alleged negligence on the part of a qualified professional person in carrying out his professional duties there should be some credible evidence to support the plaintiff's case before such an action is commenced."

29. It is submitted that in this case the plaintiff has no such evidence. As far as the second defendant is concerned it is submitted that, having investigated the possible liability of that defendant, the plaintiff could not identify any grounds upon which liability may be attributed to the second defendant.

30. It is submitted that it is wholly inappropriate and an abuse of process for the plaintiff to have joined the second and third defendants as co-defendants to the proceedings in circumstances where the plaintiff himself makes no case as against those defendants and has no evidence to ground his claim as against them. It is submitted that a plaintiff cannot be entitled to sue a defendant in professional negligence proceedings on the basis only of a contention made by another defendant (the original defendant), in an application to join the former as a third party to the proceedings, to the effect that the former has a liability to indemnify the original defendant, which indemnity is claimed by way of third party proceedings. It is submitted that it is not open to a plaintiff to "piggyback" a claim being made by a defendant against another party in a third party application. Moreover, apart from the fact that the plaintiff is not in a position to call any expert evidence as against the second and third defendants, as the plaintiff is required to do in professional negligence actions, those defendants do not know with any precision the nature of the case being brought against them by the plaintiff.

31. The second defendant also submits that the joinder of the second and third defendants as co-defendants at the hearing of the application for leave to issue and serve a third party notice potentially immunises from challenge a third party notice that would otherwise be amenable to challenge by reason of delay. It was submitted on behalf of the second defendant that the third party notice issued eight years after the commencement of proceedings, although this ignores the fact that the proceedings were not served until after the order of the Court of Appeal made on 13th May, 2015, and an appearance was entered on behalf of the first defendant on 12th June, 2015.

32. The second defendant also relies on the case of *Gallagher v. Letterkenny General Hospital* [2017] IEHC 212 in which Baker J. dismissed the proceedings noting that ten years after the issue of the plenary summons the plaintiff did not have a medical report to support his claim with the result that the defendants did not yet know the case being made out against them. While Baker J. adjourned the motion to strike out the proceedings for a period of three months to allow the plaintiff to assemble expert evidence and reports, when the plaintiff failed to do so, she struck the proceedings out. However, it would appear that she struck them out on the grounds of inordinate and inexcusable delay, as distinct from the ground that the proceedings are frivolous and vexatious and/or an abuse of process.

33. In response to this allegation, the plaintiff submits that the joinder of the second and third named defendants was necessary and proportionate in the light of the plea of the first named defendant regarding the liability of the second and third named defendants. It is submitted that to characterise the decision to join the second and third defendants to the proceedings as an abuse of process affords no consideration to the complex and difficult circumstances that arose from the averments made in the affidavit sworn on behalf of the first named defendant in support of the application for leave to issue and serve third party notices.

34. As regards the concept of abuse of process generally, the plaintiff relies on a line of authorities that make it clear that a defendant seeking to have proceedings dismissed on the grounds that they are an abuse of process is faced with a heavy burden. It is submitted on behalf of the plaintiff that it has been made very clear from the outset that the decision to join the third parties as co-defendants was entirely predicated upon the expert medical evidence obtained by the first defendant, and the plaintiff accepts that if the contention of the second and third defendants is correct i.e. that the law requires that the plaintiff must himself be in possession of his own expert medical opinion that justifies proceeding against the second and third defendants, then the plaintiff's proofs are deficient. But of course the plaintiff does not accept that that is a correct statement of the law. It is submitted that none of the cases relied upon by the second and third defendants as regards the requirement to have an expert report justifying the issue of proceedings grounded on allegations of professional negligence, require that the expert opinion must be that of the plaintiff. It is submitted that the essential criteria identified in the authorities are that there must be "reasonable grounds" for the claim, and that in the present case those reasonable grounds arise from the expert medical opinion obtained by the first named defendant. It is further submitted that it is not insignificant that the allegations of negligence are made on behalf of one medical professional against another and against the institution where he conducted his work.

35. The plaintiff also relies on the decision of Ryan P. in the decision of *D.C. v. HSE and others* (unreported 8th May, 2017) in which he stated, *ex tempore* and *obiter dicta*:-

> "I merely say that my understanding is that it is not a requirement of a report as such, although that will usually be the basis of the initiation of proceedings. It is not the report that is important. It is the reason of the necessary implication that there is a reasonable basis for bringing an action against a professional person."

36. Mr Gleeson in his affidavit characterised the expert report of the first defendant as "hearsay evidence" because it was not exhibited by the first defendant in his application to join third parties or otherwise disclosed. Ms Taylor, in her affidavit on behalf of the plaintiff (in opposition to this application) does not accept the description of the expert report of the first defendant as being "hearsay evidence". She says she has no doubt that the first defendant has obtained such a report and that she has asked the solicitors for the first defendant to release the report, but they have declined.

37. It is submitted on behalf of the plaintiff that the defendants have failed to establish that it is clear beyond doubt that the plaintiff could not succeed in his claim as against the second and third named defendants. The plaintiff submits that the Court should consider what happens in the event that these applications are granted and the case proceeds to trial. Liability would be determined on the basis of the evidence advanced by the plaintiff's expert and the first defendant's expert. If the Court prefers the evidence of the first defendant's expert and holds that the plaintiff's injuries were sustained by reason of deficient treatment in the neonatal period, the plaintiff's claim will fail notwithstanding the existence of actionable negligence on the part of the first and second defendant.

38. Persuasive and all as are the arguments made on behalf of the plaintiff, there is no escaping the fact that the plaintiff is making no allegations of any kind as against the first and second defendants. More than that, as regards the first defendant, it is the view of the plaintiff's own expert, Dr Jain, that the care afforded by Dr Denham to the plaintiff was satisfactory.

39. Furthermore, since the first defendant brought forward the third party application, the plaintiff would undoubtedly have had the opportunity to consider what the first defendant has to say about the actions of the second and third defendants, and to obtain the views of his own experts in this regard. To be sure it would have been helpful in any such consideration of the issue to have available the expert report relied upon by the first defendant, but whatever about that, the plaintiff has had the opportunity to refer these issues to his own experts and to adopt these allegations as his own, if his experts thought it appropriate to do so. That has not occurred. Not only that, in the way that the amended personal injury summons has been phrased it is clear that the plaintiff is not adopting the particulars of negligence alleged by the first defendant against the other defendants, but simply says that those defendants are joined to the proceedings in reliance upon the expert medical opinion of the first named defendant. Nor, at the hearing of this application, did counsel for the plaintiff seek additional time to enable the plaintiff's experts to consider these issues further , or to have an opportunity to obtain an opinion from any other expert regarding the same.

40. It is clear from the amended personal injury summons and specifically para. 9 thereof, that the plaintiff is not himself making any allegations of negligence as against the second and third named defendants but is relying upon the expert medical opinion of the first named defendant. The plaintiff places some reliance on authorities, such as *Sun Fat Chan v. Osseous Ltd*. [1992] 1 I.R. 425 in which McCarthy J. stated that:-

> "Experience has shown that the trial of an action will identify a variety of circumstances, perhaps not entirely contemplated at earlier stages in the proceedings; often times it may appear that the facts are clear and established but the trial itself will disclose a different picture. "

That decision was also relied upon by Clarke J. in *Salthill Properties Ltd & Anor v. Royal Bank of Scotland & Ors* [2009] IEHC 207 in which he said:-

> "… I do not rule out the possibility that, in the words of McCarthy J. in *Sun Fat Chan*, something might "emerge". It is important to remember that the underlying factual basis for these proceedings, while partly governed by legally binding documentation, also involves factual matters which, while evidenced by documentation, may need to be assessed on the basis of what evidence might be available at trial."

41. But the difference between those cases and others to which counsel for the plaintiff referred me, and this case, is that in those other cases the plaintiffs were at least attempting to make a case against the defendant who brought forward the motion to dismiss. They may have had evidential difficulties at the time of the hearing of the motion to dismiss, but they were at least making allegations against that defendant. That is not so in this case, and as I have already observed on a number of occasions, the plaintiff's expert actually approves the standard of care afforded to the plaintiff by the second defendant.

42. In most cases where third parties are joined as co-defendants the plaintiff simply adopts the allegations of negligence made by the defendant against the third parties to justify the joinder of those parties as co-defendants. This is then reflected in the amended statement of claim. A plaintiff may or may not at that time take the opportunity to make allegations of his/her own as against the new parties to the proceedings, in addition to those identified by the defendant. But neither course has been adopted here.

43. While I fully understand why the plaintiff has taken the course that he has as regards the second and third defendants, it can hardly be gainsaid that where a plaintiff declines to make any allegations of his own against a defendant , the pleadings could not possibly disclose any reasonable cause of action for the purpose of Order 19. r.28 . Moreover the proceedings must be bound to fail as against the second and third defendants in circumstances where not only will plaintiff not lead any evidence against those defendants, but the plaintiff's own expert will actually give evidence in favour of the second defendant.

44. I have also considered the case of *Hetherington v Ultra Tyre Service Ltd.*, [1993] 2 IR 535, upon which the plaintiff also relies, as authority for the proposition that where there are several defendants, each of whom has served notices of contribution on the other (as, I was informed, is the case here), the Court should not determine an application to dismiss brought by one of those defendants until it has heard all the evidence. That case establishes that if, at the trial of the proceedings, a defendant brings an application to dismiss on the grounds that no case had been made out against him, the court should require him to be put on his election as to whether or not he intends to call evidence. However, I don't believe that case assists the plaintiff either. It seems to me that the serving of notices and contribution and indemnity as between defendants has no bearing at all upon the issue. Those notices raise issues as between defendants only, and are not concerned with the plaintiff's case. As to the point that a defendant would be put on his election if an application to dismiss were advanced at the trial, that may well be so, but this application is brought against the background where not only does the plaintiff not have any evidence against the second and third defendant, he makes no allegations against them either.

45. I have also given serious consideration to the plaintiff's concern that, at the trial of the action, there is the possibility that the Court may be persuaded by the first defendant's experts that responsibility for the plaintiff's injuries may lie with the second and third defendants, but not with the first defendant. But in all litigation of this kind there is always a risk that the court will be persuaded by the defendant's experts. The only factor that makes this case any different is that the first defendant is blaming the second and third defendants, whereas the plaintiff himself is not doing so. In that sense the first defendant's case against the others may be seen to be purely a third party issue. It doesn't change the plaintiffs case as originally framed in any way. If the plaintiff succeeds even to the degree of 1% as against the first defendant , that is sufficient for the plaintiff to succeed fully.

46. It seems to me that it would fly in the face of logic to allow a plaintiff to continue a case against a defendant or defendants in respect of whom the plaintiff himself has made no allegations of negligence, and instead simply relies on allegations which are made in an affidavit sworn by a solicitor grounding an application to join other parties as third parties to the proceedings, and which affidavit does not even exhibit the expert opinion relied upon for that application. I consider that the pleadings disclose no cause of action at all as regards the second and third defendants, and that the proceedings as against those defendants are bound to fail. It follows therefore that the plaintiff's claim against the second and third defendants should be dismissed pursuant to O. 19, r. 28 of the Rules of the Superior Courts.

47. Having arrived at this conclusion, it is not necessary for me to consider the other arguments advanced on behalf of the second and third defendants in support of their application.