Neutral Citation Number: [2007] IEHC 431

THE HIGH COURT

2001 17325 P

BETWEEN

CHRISTOPHER McBREARTY
(A PERSON OF UNSOUND MIND NOT SO FOUND BY INQUIRY)
SUING BY HIS MOTHER AND NEXT FRIEND, ANNA McBREARTY

PLAINTIFF

AND
THE NORTH WESTERN HEALTH BOARD,
ANDREW McFARLANE, JOHN GLYNN
AND JAFPAL SINGH

DEFENDANTS

Judgment of Mr. Justice John MacMenamin dated the 14th day of December, 2007.

Introduction

1. The first, third, and fourth named defendants seek a number of reliefs dismissing the plaintiff's claim by reason of alleged non-compliance with time limitations laid down by the Rules of the Superior Courts, and delay in initiating and prosecuting the proceedings herein, where the plaintiff claims damages in respect of alleged negligence and breach of duty on the part of these defendants arising from his birth at 1.40 a.m. in Letterkenny General Hospital early on New Year's Day, 1st January, 1981. He now suffers from severe cerebral palsy of the spastic quadriplegic type, has severe learning difficulties and a mental handicap. He is substantially disabled and requires an electronically-powered wheelchair. He is unable to live independently. He alleges that these medical conditions arise from the negligence and breach of duty of those defendants who are the moving parties.

2. The first named defendant is sued as the then owner and operator of Letterkenny General Hospital. Notice of discontinuance has been served against the second named defendant, Mr. Andrew McFarlane, a Consultant Obstetrician Gynaecologist in the hospital. He is no longer therefore, a party to these proceedings and no allegation of any form of negligence or breach of duty now remains against him. The third named defendant was a Senior House Officer, and the fourth named defendant was then a Locum consultant Obstetrician in the hospital who attended at the birth.

3. Each motion focuses on a number of issues, some of which overlap and others which do not. In order to minimise repetition, and to best illustrate the issues this judgment will deal sequentially with the course of the proceedings, common features between all the applications, and with the specific applications brought by the fourth, third and first named defendants.

The course of the proceedings

4. The plaintiff is now a person of unsound mind, though not yet so found. His mother claims that at the time of the birth, now twenty-six years ago, no one informed her that there was any question of negligence. She was simply told that what had occurred was "one of those things". She states that she and her husband are ordinary lay people with little formal education, and are not informed about medical or legal matters. It was only in 1999, soon after Christopher's eighteenth birthday, that she and her husband were advised by Dr. Diarmuid Hegarty, their G.P., that he felt "duty bound" to tell them in Christopher's presence, that they should investigate what happened to their son at or about the time of his birth.

5. Anna McBrearty states that she initially sought advice from a firm of solicitors in Donegal. She wrote to them on 11th July, 2000 seeking their advice. In turn, they wrote to the first named defendant (the Health Board) to obtain the medical records relating to the birth and received them on 19th December, 2001. Mrs. McBrearty and her husband were then advised that it was worthwhile obtaining opinion from an independent medico-legal advisor on the issue of liability. However, she was advised this work should be carried out by a firm of solicitors who had more experience in dealing with medical negligence matters.

6. The first contact with the plaintiff's present solicitors, Messrs. Tansey & Associates, took place on 21st November, 2001. On 27th November, 2001 proceedings were issued by plenary summons against the Health Board and Dr. Andrew McFarlane only.

7. On 6th December, 2001 a letter was sent from the Health Board's insurers to the Medical Defence Union (M.D.U.), thought to be indemnifiers of Dr. Singh and Dr. Glynn, advising them of the potential claim. On 24th October, 2002 a letter was sent from the M.D.U. to Irish Public Bodies (the indemnifiers of the first named defendant) confirming that they had identified Dr. Singh as a member of the MDU and that he had been located in Canada. Almost one year after the plenary summons was issued, on 8th November, 2002 service was effected on solicitors for Dr. McFarlane, Messrs. McCann Fitzgerald. That firm was acting for Dr. McFarlane, indemnified by M.D.U.. On 19th November, 2002 the solicitors for the Health Board, Messrs. Coffey & McMahon, were served with the proceedings. They entered an appearance on 22nd November, 2002. On 31st January, 2003, an appearance was entered on behalf of the second named defendant, Dr. McFarlane, by Messrs. McCann Fitzgerald. One and a half years after the issuing of the plenary summons, on 6th May, 2003, a statement of claim was delivered to Dr. McFarlane. On 26th July, 2003 a medical report of Professor Taylor for the plaintiff, (not exhibited but referred to in a report from Mr. Roger Clements, Consultant Obstetrician Gynaecologist) was obtained. One year and ten months after the issuing of the plenary summons, on 10th September 2003, a statement of claim was delivered to the Health Board which, five months later, on 7th March, 2004, raised a notice for particulars. On 23rd March, 2004, a defence was filed by Dr. Andrew McFarlane, and a notice for particulars was served by him on the plaintiff's solicitors. On 21st June, 2004 the High Court (Kearns J.) granted an order to the first named defendant permitting four weeks for the filing of a defence on foot of a notice of motion. On 30th January, 2005 the plaintiff obtained a further medical report from a Dr. Philip Anslow. On 7th March, 2005 the High Court (Gilligan J.) granted the first named defendant, the Health Board, one week to file a defence, this being the second notice of motion brought against them. On 7th March, 2005 a defence was filed by the Health Board.

8. On 11th March, 2005, a notice of motion was issued by the Health Board to join Dr. Singh and Dr. Glynn as third parties. On 25th April, 2005 the High Court (Johnson J., as he then was) granted an order on application by the plaintiff in that motion joining Dr. Singh and Dr. Glynn as co-defendants. On 23rd May, 2005 the plaintiff furnished replies to particulars to the first and second named defendants. On 26th May, 2005 the plaintiff received the medical report of Professor Alan Hill from Vancouver. On 10th November, 2005 a letter was sent by the plaintiff's solicitors to the "medical defendants", Dr. Singh and Dr. Glynn, asserting that the cerebral palsy of the plaintiff was caused *inter alia* by the negligence and breach of duty of those defendants and requesting them to confirm that they would compensate the plaintiff. This letter, in form an "O'Byrne" letter, was sent after Dr. Singh and Dr; Glynn had already been joined as co-defendants but prior to amending the plenary summons. On 28th November, 2005 the plaintiff's solicitor received a medical report from Dr. Roger Clements, referred to earlier. On 16th December, 2005 an order was made amending the plenary summons. On the same date, a concurrent summons was issued with respect to Dr. Singh, then residing in Canada. On 13th January, 2006 the Master of the High Court granted liberty to amend the title of the plenary summons to read "Christopher McBrearty (a

person of unsound mind not so found suing by his mother and next Friend Anna McBrearty)". On 22nd February, 2006 the Master of the High Court extended the time within which to comply with the order dated 13th January, 2006 by a period of two weeks. On 8th March, 2006 the summons in question was amended in accordance with the orders of 13th and 22nd January, 2006.

9. On 20th April, 2006 (incorrectly recorded as 20th April, 2005) a letter from the plaintiff's solicitors to Dr. Singh advised him that he had been joined as co-defendant pursuant to the order dated 25th April, 2005. On 12th May, 2006 an amended statement of claim was delivered to the first and second named defendants. On 28th May, 2006 the High Court (Peart J.) extended the time for applying for renewal of the amended plenary summons and concurrent summons to 29th May, 2006; renewed the summonses for a period of six months as against Dr. Glynn and Dr. Singh; granted liberty to serve notice of the said concurrent summons of Dr. Singh at his address in Canada; and granted Dr. Singh eight weeks from the date of service of the notice of summons within which to enter an appearance to that summons. On 12th July, 2006 an amended plenary summons and statement of claim, now alleging negligence against all four defendants, was delivered to the Health Board's solicitors. Over four and a half years after the date of the plenary summons, on 17th July, 2006 notice of the summons was served on Dr. Singh in Canada. On 25th July, 2006 an appearance was entered on behalf of Dr. Singh. On 27th July, 2006 the plaintiff's solicitors delivered an amended statement of claim to Dr. Singh's solicitors. On 9th August, 2006 a plenary summons was served on the third named defendant, Dr. Glynn.

10. On 23rd January, 2007 a motion for judgment in default of defence was brought against the fourth named defendant, Dr. Singh. On 14th February, 2007, the notice of motion herein was issued on behalf of Dr. Glynn. On 16th February, 2007 the notice of motion herein was issued on behalf of Dr. Singh. On 8th March, 2007 a notice of motion by the plaintiff seeking judgment in default of appearance against Dr. Glynn was issued. The first return date for the motions brought on behalf of Dr. Singh and Dr. Glynn was of 12th March, 2007. On 4th April, 2007 a limited appearance was entered on behalf of Dr. Glynn. The plaintiff's motion for judgment in default of appearance was made returnable for 23rd April, 2007.

11. On 10th May, 2007 a notice of indemnity and contribution, alleging specific negligence and breach of duty, was served by the first named defendant on Dr. Singh and Dr. Glynn. On 10th May, 2007 an amended defence was filed on behalf of the Health Board. On 24th May, 2007 the motions against Dr. Singh and Dr. Glynn and the plaintiff's motion against the fourth named defendant were adjourned so as to permit a similar motion to dismiss be brought by the Health Board. On 31st May, 2007 the notice of motion herein was issued on behalf of the Health Board returnable for 6th June, 2007. On 27th June, 2007 the aforesaid motions were listed for hearing, adjourned and were ultimately tried on 30th October, 2007 and two succeeding days.

Elapses of time

12. The defendants point to the following elapses of time as being significant in the consideration of these motions.

1. 30th December, 1980/1st January, 1981 – 1st January, 1998/early 1999:

   A period of 17 to 18 years elapsed between the birth of the plaintiff and his parents seeking legal advice.

2. 1st January, 1998/early 1999 – 17th November, 2001:

   A period of between 1½ and 2½ years between the plaintiff's parents seeking legal advice and the issuing of proceedings against the first and second named defendants.

3. 27th November, 2001 – 25th April, 2005:

   Application to join Dr. Singh and Dr. Glynn as defendants made:

   (a) over 3 years and 5 months after the plenary summons herein was issued in which only the first two defendants were named;

   (b) over 6 years after the plaintiff's parents obtained legal advice in relation to the plaintiff's birth and 24 years after the plaintiff's birth and the alleged events the subject matter of the plaintiff's claim.

4. 25th April, 2005 to 16th December, 2005:

   An elapse of time of 6 months occurred after applying to join Dr. Singh as a defendant, and writing to him on 10th November, 2005 alleging that he had caused the plaintiff's injuries.

   A further period of seven months elapsed after applying to join Dr. Singh as a defendant and amending the plenary summons (on 16th December, 2005) in breach, it is contended, of O. 28, r. 7.

5. 16th December, 2005 to 20th April, 2006:

   Plaintiff delayed for a further period of over 4 months in notifying Dr. Singh that he had been joined as a co-defendant.

   Thus, having obtained an order on 25th April, 2005 joining Dr. Singh as a co-defendant the plaintiff did not inform him that he had been so joined until 20th April, 2006, almost a full year later.

6. 20th April, 2006 to 27th July, 2006:

   The plaintiff did not serve a plenary summons on Dr. Singh until 17th July, 2006, over 4½ years after the plenary summons was issued, over one year and three months after an order joining Dr. Singh was made, and over 25 years after the alleged events the subject of the plaintiff's claim.

   The statement of claim was not served until 27th July, 2006.

13. In making the order joining Dr. Singh and Dr. Glynn on 23rd April 2005, the High Court was clearly made aware that Dr. Singh was

then resident in Canada; the summons was marked "not for service outside the jurisdiction". All those involved clearly assumed that Messrs. McCann Fitzgerald, instructed by the M.D.U., who had acted for Dr. McFarlane, would also be instructed for Dr. Singh and Dr. Glynn. This impression was conveyed by letter from the Health Board's solicitors to Tansey & Associates in letters dated 4th May and 27th June, 2005. As matters transpired, for reasons later described, no such nomination was made either in the case of Dr. Singh or Dr. Glynn. The plaintiff's solicitors point out that they wrote to Dr. Singh personally on two occasions, on 10th November, 2005 and 20th April, 2006. There was no response to these letters. Furthermore, Messrs. McCann Fitzgerald, wrote on 14th November, 2005 stating that, contrary to previous belief, they would not be representing those defendants. It transpired that this was by reason of the crux which had arisen as a consequence of the decision of the M.D.U. to withdraw indemnity in relation to obstetrical claims within this State. Only then was it clear that Dr. Singh would have to be personally served in Canada, necessitating a further application to the High Court (Peart J.) on 26th May, 2006. Counsel on behalf of the plaintiff, Mr. Eoin McCullough S.C., emphasises that, after personal service had been effected on Dr. Singh on 17th July, 2006, an unconditional appearance was entered on his behalf only a very short period thereafter, on 25th July, that is within a period of eight days. A copy of the amended statement of claim was provided to Dr. Singh's solicitors, Messrs. O'Connors, on 27th July, 2006. It is suggested that it is remarkable that Dr. Singh, having previously not nominated a solicitor in Ireland to accept service, and having compelled the plaintiff's solicitors to "go through the hoops" in order to personally serve him in Canada, could nonetheless within an unusually short time, arrange for the filing of an appearance after personal service had been effected.

14. It is clear that these specific difficulties with regard to the service on Dr. Singh and Dr. Glynn the medical defendants, were in the first instance, attributable directly to the decision taken by the M.D.U. to withdraw indemnity for obstetrical cases in Ireland.

15. Counsel for the plaintiff has informed the court that the plaintiff's expert reports are now complete both as to liability and quantum, and that the case could be set down for trial rapidly once the defences of the two medical defendants are received. The plaintiff avers that much delay was caused either by the M.D.U. or Dr. Singh and Dr. Glynn themselves, who could have had sight of the pleadings from 2005 had they chosen simply to nominate a firm of solicitors. As a matter of fact Dr Glynn was at all times resident in the jurisdiction.

16. It is submitted that there has been an expenditure of significant costs and outlay in relation to obtaining reports from expert witnesses and that this outlay has been largely incurred since Dr. Singh and Dr. Glynn were joined as defendants. In March, 2006 the plaintiff's solicitors flew over, at their own expense, Professor Alan Hill, Professor of Neurology at British Columbia Children's Hospital. Reports were also received by Dr. Philip Anslow, Consultant Neuro-radiologist at the Radcliffe Infirmary, Oxford, Dr. Dewi Evans, Consultant Paediatrician, and Mr. Roger Clements, Consultant Obstetrician and Gynaecologist. Reports have also been obtained from an actuary, a vocational assessor, an occupational therapist, a nursing expert, assistive technology experts and an architect.

Dr. Singh's application
17. Dr. Singh's application raises first a procedural point pursuant to O. 28, r. 7 of the Rules of the Superior Courts, and second seeks to have this claim dismissed for want of prosecution by reason of inordinate and inexcusable delay.

The procedural issue
18. Order 28, rule 7 of the Rules of the Superior Courts provides:

> "If a party who had obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no such time is thereby limited, then within fourteen days of the date of the order such order to amend shall, on the expiration of such limited time as aforesaid become *ipso facto* void unless the time is extended by the court."

It is submitted any subsequent amendment outside that time is *ipso facto* void. Mr. Shane Murphy, S.C. and Mr. Douglas Clarke B.L. appeared for Dr. Singh. They submitted that this order placed an onus upon the plaintiff, having obtained an order to amend the summons, to effect such amendment within a period of fourteen days. The relevant dates which they point to are:

> Order joining the third and fourth named defendant 25th April, 2005.
>
> Summons in fact amended by adding the named of the third and fourth named defendants, 16th December, 2005.

Order renewing the summons made on 29th May, 2006. Thus they submit the amended summons, made outside the posited time limit, is void.

19. In order to consider this issue it is necessary first to consider the precise terms of the orders actually made. The order as described made on 25th April, 2005 was simply for the joinder of Dr. Glynn and Dr. Singh as third and fourth named defendants. However, no order was made at that stage to amend the plenary summons. The plaintiff submits that either in fact or in effect, the order made by Johnson J. was not an order for leave to amend pleadings within the meaning of O. 28, r. 7, but rather the order in question was made pursuant to O. 15, r. 13, which provides that the court may in order to effectively and completely to adjudicate upon and settle all questions involved in the cause or matter, at any stage in the proceedings, either upon or without an application of either party, and on such terms as may appear to the court to be just, order that the names of any parties not properly joined, whether it be plaintiffs or defendants, be either struck out or added. The consequence of such an order is addressed in O. 15, r. 15, where it is simply stated:

> "Where a defendant is added or substituted the plaintiff shall, unless otherwise ordered by the court, file an amended copy of and take out a summons and serve such new defendant with such summons or notice in view thereof in the same manner as the original defendants are served." No time limitation is prescribed.

20. The essential question here therefore is what is the true nature of the order made? Was it to amend a pleading, or to join a party? I consider it was the latter. As a matter of common practice a period of some time may elapse between the joinder of a party and service of amended proceedings upon him. Issues as between defendants may be defined by pleading not by mere joinder. I am unable to find how Order 28, r. 7 is applicable to this situation or that there would be any rationale for the application of this order and rule in this way. The order of 25th April, 2005 was not to amend the pleadings but to join Dr. Singh as a defendant. The question of amending the pleadings so as to make out the case against the new co-defendant(s) fell to be determined later, but not in circumstances where the failure to amend the plenary summons within fourteen days would render the joinder of an additional party, and any subsequent proceedings against him, void. This would be a most draconian consequence and would, if intended, surely have been the subject of a specific provision in the Rules. Order 28, r. 7 merely falls to be considered within the context of an application made by way of notice of motion to amend either a pleading or a defence. Such application would normally be moved on a grounding affidavit exhibiting the proposed amended proceeding. Thus, in such circumstances, a limited timescale would be appropriate, but not

otherwise where frequently the circumstances to be pleaded in a newly joined defendant require analysis and preparation. See generally chapter 6-24 to 6-37, Delaney and McGrath Civil Procedure in the Superior Courts 2nd edition and the authorities therein cited which illustrate the distinction between joinder of parties and subsequent amendment of pleadings of parties and issues are quite distinct aspects of a case.

21. I consider that the application which was made before Johnson J. was for an order simply pursuant to O. 13, r. 13 of the Rules of the Superior Courts and that the point made is misconceived. In such circumstances, it has not been suggested that any specific time limit exists such as provided for in O. 28, r. 7 and is therefore not out of time.

22. The order of Peart J. of 29th May, 2006 extended the time for the service of the amended plenary summons from the date thereof pursuant to O. 8, r. 1 of the Rules of the Superior Courts for a period of six months as against the third and fourth named defendants. Consequently, even if I am incorrect in my interpretation of the order of Johnson J., I consider that any such defect was cured by the (unappealed) order of Peart J. of 29th May, 2006.

23. Furthermore, even if either of these findings was incorrect, the court would be entitled pursuant to O. 122, r. 7 to enlarge or abridge the time appointed by the Rules or to affix by any order enlarging time for doing any act or taking any proceedings. Were it necessary, therefore, I would enlarge the time for the amendment of the summons, in the circumstances, and for reasons outlined later in this section of the judgment dealing with the issues of delay, discretion and the balance of justice appertaining to this applicant.

The application to dismiss for want of prosecution or for inordinate or inexcusable delay.
24. In *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, a decision of 31st July, 1979, Finlay P. identified general principles applicable in applications to dismiss for want of prosecution. He held that it should first be established that the delay complained of has been inordinate and inexcusable. The onus in this regard lies on the party seeking the dismissal of proceedings (see dicta of Fennelly J. in *Anglo Irish Beef Processors v. Montgomery* [2002] 3 I.R. 510, 518). Even where the delay has been inordinate and inexcusable the court is required to exercise its discretion to decide whether the balance of justice is in favour of the case proceeding. Finlay P. stated that delay on the part of the defendant in seeking a dismissal may be an ingredient in the exercise by the court of its discretion and that, while a party must to an extent be vicariously liable for the inactivity of his solicitor, a litigant's own personal blameworthiness is material to the exercise of the court's discretion. (See generally Delany and McGrath Civil Procedure in the Superior Courts, Thomson/ Round Hall 2005, Chapter 13).

25. In *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pp. 475 and 476, Hamilton C.J. summarised the principles to be applied (below slightly paraphrased) as follows:

> (a) the courts have an inherent jurisdiction to control their own procedure and to dismiss a claim when the interests of justice require them to do so;
>
> (b) it must, in the first instance, be established by the party seeking a dismissal of proceedings for want of prosecution on the ground of delay in the prosecution thereof that the delay was inordinate and inexcusable;
>
> (c) even where the delay has been both inordinate and inexcusable the court must exercise its judgment on whether, in its discretion, on the facts the balance of justice is in favour of or against the proceeding of the case;
>
> (d) in considering this latter obligation the court is entitled to take into consideration and have regard to:
>
> > (i) the implied constitutional principle of basic fairness of procedures,
> >
> > (ii) whether the delay and consequent prejudice in the special facts of the case are such as to make it unfair to the defendant to allow the action to proceed and to make it just to strike out the plaintiff's action,
> >
> > (iii) any delay on the part of the defendant. Because litigation is a two-party operation the conduct of both parties should be looked at,
> >
> > (iv) whether any delay or conduct of the defendants amounts to acquiescence on the part of the defendant in the plaintiff's delay,
> >
> > (v) the fact that conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order but is a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending on all the circumstances of the particular case,
> >
> > (vi) whether the delay gives rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or have caused serious prejudice to the defendant.
> >
> > (vii) the fact that the prejudice to the defendant referred to in (vi) may arise in many ways and other than that merely caused by the delay, including damage to a defendant's reputation and business.

Thus summarised it is now necessary to apply to these principles to the facts of this case.

Inordinate delay
26. It cannot be gainsaid that by any reckoning there has been an inordinate delay by the plaintiff in the prosecution of the proceedings. The delay in the instant case lies at the extreme parameter in the entire jurisprudence. A delay of over fifteen years from the issue of the plenary summons was described as undoubtedly inordinate in *Carroll Shipping v. Mathews Mulcahy & Sutherland*, the High Court, McGuinness J., 18th December, 1996. Much shorter periods have been found to be excessive.

Inexcusable delay
27. The periods of delay relied upon by this and other defendants have been outlined earlier in the course of this judgment.

In assessing these periods of delay for the second aspect of the test a further authority is relevant, that is *Stephens v. Flynn*, the High Court, 30th April, 2005, Clarke J., Unreported. In the course of that judgment Clarke J. observed:

"In Hogan v. Jones [1994] 1 I.L.R.M. 512, Murphy J. having referred to *Rainsford* further approved and applied a principle stated by Lord Diplock in *Birkett v. James* [1977] 2 All E.R. 801 at p. 808 to the following effect:

> 'It follows *a fortiori* from what I have already said in relation to the effects of Statutes of Limitation on the power of the court to dismiss actions for want of prosecution that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of the potential witnesses, their death or their untraceability. To justify dismissal of an action for want of prosecution the delay relied on must relate to the time which the plaintiff allowed to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued.'"
>
> (emphasis added)

28. Having regard to the above, it is clear that *here* and applying this test, inordinate and inexcusable delay in the *commencement* of proceedings is not, in itself, a factor, though it may colour what happens later. The events between 30th December, 1980 and 1st January, 1981 must be seen as the ingredients constituting the accrual of the cause of action. However, the elapse of time up to but prior to the issue of the writ are not factors to which the court should have regard in the ordinary application of *this* test. The first period therefore, for the court to consider is that between 27th November, 2001 and 25th April, 2005 when Dr. Singh was joined as a defendant, over three years and five months after the plenary summons was issued, in which only the first two defendants were named, in excess of six years after the plaintiff's parents obtained legal advice with regard to the plaintiff's birth and 24 years after the plaintiff's birth itself, during which time the events outlined in the chronology occurred.

Circumstances of respondent

29. There are a number of factors which are relevant which must be weighed by the court. As to the respondent, it is undisputed that the plaintiff and his family come from a background where they have no unfamiliarity with legal procedures. One must consider also the circumstances of the plaintiff in this case who was not only a minor up to the year 1999 but also, it would appear, a person subject to a significant and ongoing mental incapacity. The plaintiff himself, therefore, is not in the position of a large undertaking such as the defendant or an indemnifier in order to police and monitor the progress of his proceedings.

Imputed responsibility for acts or omissions of legal representatives

30. In *Brennan v. Western Health Board*, Macken J., the High Court, Unreported, 18th May, 1999, that judge took into account the extent to which delay caused by a servant or agent of the plaintiff could be considered for the purpose of deciding whether the latter's delay has been inordinate and inexcusable. She considered that in almost all cases involving infants there could be no control by a minor plaintiff over next friend or parents. The question for resolution however, is as to whether the minority or incapacity of the plaintiff falls to be considered as an issue in the category of excusable delay or balance of justice. This matter is dealt with later in this judgment.

Recent developments in jurisprudence

31. From the applicant's standpoint in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, 294, Hardiman J. commented that "In the light of European Convention on Human Rights Act, 2003 the assumption that even grave delay will not lead to a dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one". To similar effect, Clarke J. in *Rogers v. Michelin Tyre*, the High Court, 28th June, 2005, Unreported, commented that less weight should be attached now to the fact that the delay is accepted as being attributable to the plaintiff's solicitors as opposed to the plaintiff himself. These observations concern applications made with regard to delay after the commencement of proceedings of article 6 of the Convention, and Seymour Human Rights Practice, Chap. 6.158, Thomson Sweet and Maxwell, *McMullen v. Ireland*, European Court of Human Rights, 29th July, 2004.

32. It is an inescapable fact that by reason of the inordinate delay which occurred in this case, there devolved upon the plaintiff's solicitor a particular and specific duty to ensure that the proceedings moved with very great expedition. This must be seen in the context of the ability of a defendant to defend a claim after the elapse of time of what is now 26 years. Such considerations may necessitate the application of standards which would not otherwise be applicable, and the imposition of time scales to an order of rigour which would not otherwise be expected.

33. Because of that 26-year elapse of time in the instant case, I consider that even (as here) in the circumstances of an absence of culpability on the part of the plaintiff, culpability may nonetheless be imputed to the plaintiff by virtue of delay on the part of his solicitors in the determination as to whether or not the delay was inexcusable. Different considerations apply, however, in the third aspect of the test, that of "balance of justice". A number of issues have been identified which are relevant so far as Dr. Singh is concerned.

34. During the period 27th November, 2001 (date of summons) to the 25th April, 2005 date of joiner, the plaintiff joined two other defendants, that is to say the Health Board and Dr. McFarlane. The Health Board only filed its appearance on 22nd November, 2002. No motion for judgment in default of appearance was brought against it. Then there was an elapse of time of six months between that date and 6th May, 2003, at which point the original statement of claim was delivered to the Health Board. This would appear to have pre-dated the receipt by the plaintiff's solicitors of a medical report on 26th July, 2003. Thereafter, a significant delay, up to 10th September, 2003, occurred prior to the delivery of the statement of claim to Dr. McFarlane. A further elapse of time occurred between 10th September, 2003 and 7th March, 2004, at which point a notice for particulars was raised by the Health Board. On 23rd March, 2004 Dr. McFarlane's defence was filed and a notice for particulars was served from his solicitor. On 21st June, 2004 the first named defendant was given four weeks to deliver a defence. On 7th March, 2005 the Health Board was given a further week to deliver a defence. Thus, only on 7th March, 2005 was the defence of the first named defendant filed which raised allegations of negligence against Dr. Singh and Dr. Glynn. It appears the only information which would have been available to the plaintiffs prior to that date was upon the basis of the medical notes where Dr. Singh was briefly referred to as having been present, but his role not described. But this merely begs the question as to why further, and expedited steps were not brought against the Health Board. It is an insufficient explanation to say that it took two years for medical reports to become available without outlining where precise steps were taken between 2001 and 2003 to progress the case. True Dr. Singh's role was not fully clear at that point. It was certainly not made clear that he was acting in the role of locum consultant. It would appear that the plaintiff was not apprised of any specific or substantive role on the part of Dr. Singh until the filing of the defence by the first named defendant. But all this information could have been ascertained far earlier had steps been taken to expedite the proceedings as a whole and as against the first and second named defendants.

35. After the order of the High Court of 25th April, 2005 joining Dr. Singh and Dr. Glynn, it was not until 16th December, 2005 that the plenary summons was amended in order to allege negligence against him. The concurrent summons was issued on that date. On 13th January, 2006 the Master of the High Court granted liberty to amend the title of the proceedings so far as the plaintiff and next friend were concerned. It then became necessary to extend the time within which to comply with this order for a further period of two weeks, again pursuant to a further order of the Master of 22nd February, 2006. The summons was only actually amended as per the orders of 13th and 22nd January, 2006 on 8th March, 2006. Only on 20th April, 2006 was there a letter from the plaintiff's solicitors to Dr. Singh advising him that he had been joined as a co-defendant pursuant to an order dated as long ago as 25th April, 2005, that is almost exactly one year. The amended statement of claim was not delivered to the first and second named defendant until 12th May, 2006. It was not until 29th May, 2006 that by order of the High Court, (Peart J.) the time was extended for the renewal of the amended plenary summons and concurrent summons to 29th May, 2006; renewing the summonses for a period of six months against Dr. Glynn and Dr. Singh; liberty granted to serve notice of the concurrent summons on that Dr. Singh in Canada, which service was effected only on 17th July, 2006, to be followed by the service of the amended statement of claim on 27th July, 2006. I am conscious that during that period the plaintiff's solicitors were informed in error by the first named defendant's solicitors that Messrs. McCann Fitzgerald would probably accept service in the case. It is clear that the original amended summons, including Dr. Singh, was marked "not for service out of the jurisdiction". It is clear that once it was established that there were no solicitors nominated who would accept service on behalf of Dr. Singh, the plaintiff's solicitors were constrained to return to court. It is hard to avoid the conclusion that they were being "put through the hoops". During this time, up to November, 2005, there was uncertainty. It was only at that time that Messrs. McCann Fitzgerald reverted to the plaintiff's solicitors to indicate that they were not acting in the matter. In November, 2005 the plaintiff's solicitors wrote to Dr. Glynn and Dr. Singh. Dr. Glynn did in fact respond to this correspondence (*per contra* the averment made in the affidavit sworn on behalf of the plaintiff). No response emanated from Dr. Singh. Similarly, there was no response to a further letter on 20th April, 2006. As referred to earlier, applications were made to amend the title of the proceedings and Anna McBrearty was added for the first time as next friend. In April, 2006 a letter was written directly to Dr. Singh and Dr. Glynn in which it was said once it became clear that Messrs. McCann Fitzgerald were not going to act for them. The application to renew the summons was only brought on 29th May, 2006.

36. In normal circumstances an elapse of time of this type with these explanations might not give rise to a finding of inexcusable delay. But this must be seen in the context of the fact that from 7th March, 2005 the first named defendant had filed its defence wherein the role of Dr. Singh was identified. Yet it was not until 17th July, 2006 that notice of the plenary summons was served upon him.

37. Having regard to the principles outlined in *Primor* and as applied in *Stephens*, I consider that the late start after inexcusable delay made it the more incumbent upon the plaintiff to proceed with all due speed. While in normal circumstances the pace of progress might have been excusable if the action against Dr. Singh had been started sooner, I consider that having regard to the circumstances, the actual joinder of Dr. Singh already occurred at a time when there had been already inexcusable delay after the original writ was issued. This is so even having regard to the fact that the full role of Dr. Singh only emerged after the defence of the Health Board had been filed following two motions for judgment. This finding is made too, even having regard to the ongoing disability of the plaintiff having attained his majority, the elapse of two years in identifying expert consultants and obtaining reports and, even bearing in mind, as regards "excusability", that the plaintiff's solicitor engaged in substantial expenditure in bringing witnesses into this jurisdiction and in obtaining expert reports both on the questions of liability and quantum. While undoubtedly these are factors to be weighed in the balance, the position of the plaintiff during this latter period could have been more effectively protected by bringing on, at an early date, an application to serve notice of the plenary summons, within a short time of the filing of the two earlier defences which themselves should have been filed far earlier even by dint of further motions for judgment in default. While in other circumstances an estoppel against the fourth named defendant might well lie by permitting such expenditure, if a clear definition could be made as to when expenditure was incurred, I do not consider such a finding can be made in this case where, once the issue was crystallised by the first named defendant, the primary onus was upon the plaintiff to ensure that all relevant parties were joined into the proceedings. It is not shown that a delay or other misconduct by this defendant caused or contributed to the expenditure. The *personal* position of the blameless plaintiff suffering from an incapacity is, however, a different question to be considered in the balance of justice.

38. As pointed out in *Gilroy v. Flynn* and *Rogers v. Michelin Tyre*, the part of a plaintiff's solicitor or professional adviser is now one which must be seen as one of increasing significance by the court, particularly so on the facts of the instant case. I find, therefore, there was inexcusable delay between 27th November, 2001 and 17th July, 2006, the date of service of notice of the plenary summons on this defendant, even despite the conduct of the defendant in rendering service of the proceedings difficult to achieve.

The balance of justice

39. Having found that these delays were both inordinate and inexcusable, the court must then exercise its discretion to decide whether on the facts of the particular case the balance of justice is in favour of dismissal or permitting the action to proceed. In doing so, the court should again apply the principles identified by Finlay P. in *Rainsford* and also Hamilton C.J. in *Primor*. The court must look to the conduct of the defendants since the commencement of the proceedings for the purpose of establishing whether any delay or conduct on the part of the defendant amounted to acquiescence in the plaintiff's delay and whether the defendant was guilty of any conduct which induced the plaintiff to incur further expense in pursuing the action. The court too must assess whether the delay is likely to cause, or has caused, serious prejudice to the defendants of a kind that would make the provision of a fair trial impossible; or which would make it unfair to the defendant to allow the action to proceed thereby rendering it just to strike out the action; and whether, having regard to the implied constitutional principles of basic fairness of procedures, the plaintiff's claim against this defendant should be allowed to proceed or should be dismissed.

The effect of 'specific prejudice'

40. Prior to a further consideration of the facts of the instant case it will be convenient here to consider the decisions of the Supreme Court in *Toal v. Duignan (No. 1)* [1991] I.L.R.M. 135 and *Toal v. Duignan (No. 2)* [1991] I.L.R.M. 140, and a number of other authorities which concern both delay pre-commencement and post-commencement of proceedings. In *Toal v. Duignan (No. 1)* it was held that, even though the plaintiff might have been blameless in regard to the date upon which the proceedings were instituted, there would be an absolute and obvious injustice in permitting the case to continue against the second and fourth defendants in that case. *The absence of detailed clinical notes and records and the death of both the gynaecologist and the paediatrician concerned made it wholly impossible for either of those defendants to defend themselves against the allegations of negligence*. Additionally, it was accepted that the notes and records of the case were incomplete, no-one was aware of the whereabouts of the nurses concerned, and two central witnesses, that is the gynaecologist and paediatrician, had both died.

41. In *Toal (No. 2)* some of the defendants met a different result. A general practitioner who was joined as a defendant ultimately obtained an order dismissing the proceedings for want of prosecution because she had no records, and had made a detailed search for such records and could not find any. By way of contrast, however, two other defendants did not obtain relief because the first, a doctor involved was alive, had personal records, and had not sworn an affidavit giving detail of his disadvantage in giving evidence.

Furthermore, it was held that another defendant, the hospital, had not made out a case for probable injustice which would entitle it to be dismissed out of the action as there was no real evidence of a concrete nature with regard to the availability, or unavailability, of records and witnesses.

42. In *Reidy v. The National Maternity Hospital* (The High Court, Barr J., 31st July, 1997, Unreported) a case concerning both pre and post-commencement delay, that judge considered that, even in a case where there was an absence of personal recollection by a doctor and where the records were significantly less than full, the case should be permitted to proceed. In the course of his judgment Barr J. observed that there were *"sufficient hospital records to establish the facts essential to a determination of the negligence issue between the parties, that is the hospital notes made soon after the birth of the plaintiff and in the days following to which I have referred and the accuracy of which is not in dispute, together with Dr. Lowry's letter of 15th June, 1976 when the Reidy family doctor establishes, inter alia, that there was a problem with the baby's left hip."* (emphasis added)

43. Similarly, in *Glynn v. the Governor and Guardians of the Hospital for the Relief of Poor Lying-in Women in Dublin*, (the High Court, O'Sullivan J., 6th April, 2000, Unreported) there were absent witnesses and no CTG record. Nonetheless, the action was not dismissed because there were notes available and the witnesses were alive.

44. The defendants have placed much reliance on the case of *Faughnan v. Maguire & Ors.,* O'Sullivan J., 2006 IEHC 282. The facts of this case are somewhat distinct from those earlier cited and fall into a different category because of very specific prejudice identified therein, that is the apparently pivotal issue of whether a particular remark had been made in relation to the plaintiff's pain threshold and, if so, who had made that remark. The Senior House Officer who was the applicant asserted that he had no recollection of making such a remark , an issue upon which the question of determination of liability against him could have turned. It was because the evidence identified this specific issue that O'Sullivan J. held that there was *specific prejudice*.

45. These principles in the authorities are now considered below.

Prejudice

46. For the purposes of this aspect of the application, the court will approach the issue of prejudice upon the basis that firstly, the onus of proof lies upon the defendant to demonstrate prejudice, and secondly, that for the purposes of this test prejudice must be specific in nature, that is to say identifiable, germane and material in the context of the facts and parameters of the case.

47. On behalf of Dr. Singh it has been contended

(a) there has been insufficient identification of the precise case being made against him in the pleadings;

(b) he had no recollection of the occurrence and was entirely dependent on the notes and records of the events at issue;

(c) the notes and medical records "while possibly adequate by the standards of 1980/1981, were inadequate to enable him to defend against the plaintiff's allegations at this stage";

(d) there were no notes available from the paediatrician

(f) the records did not contain detailed information in respect of each of the events relevant to the issues;

(g) it had been accepted even by the plaintiff's expert consultant, Dr. Clements, that the records in a number of areas were of "poor quality", sometimes untimed and failed to identify specifically the role played by each doctor;

(h) in areas of significance there had been a lack of identification as to whether certain procedures were carried out by a doctor or midwife, such as the application of a fetal scalp electrode to the plaintiff's head;

(i) There was an absence of names, dates or times of the CTG trace.

(g) the tocograph records recorded poorly and the cardiograph has a somewhat flat, featureless baseline.

(h) the absence of indemnity from the M.D.U.

Dr. Clements' description of the birth of the plaintiff as derived from the medical records

48. In view of its central importance to these applications it is necessary to summarise the lengthy report from Dr. Roger Clements, Consultant Obstetrician retained by the plaintiff. This is so because the report has been referred to extensively by counsel for all parties. It is necessary in order to determine the nature and parameter of the case. Clearly, no finding can be made at this stage in regard to the validity of the contents of the report but rather as an indicator of the nature of the range of issues which arise, and whether limited or general in scope.

49. Dr. Clements states that observations of this labour were indeed of poor quality, that there was ample evidence even from the limited observations that were made that the progress of labour was poor and the fetal condition was not reassuringly normal. At the time of artificial rupture of the membrane there was meconium in the liquor. When the fetal heart was monitored there were abnormalities on the CTG. At 17.30 p.m. on 31st December a doctor was called at four fingers dilatation because the fetal heart was abnormal. Dr. Clements states that the doctor who was called left no note and gave no advice for change. In spite of the abnormalities on the CTG the syntocinon infusion was continued. He observes that medical experts consider that it is mandatory in the presence of fetal distress that oxytocin is discontinued or its rate reduced.

50. In essence therefore, the contention to be advanced on behalf of the plaintiff is that –

(i) fetal distress was present;

(ii) Oxytocin should have been discontinued or reduced once that was apparent;

(iii) no advice for change was given;

(iv) appropriate augmentation procedures should have been adopted in order to achieve an increased rate of labour, but

in an acceptable manner;

(v) during such augmentation, inter-uterine pressure should have been monitored to ensure that adequate myometrial relaxation was occurring between contractions;

(vi) the resting uterine tone was increased to an undesirable level by oxytocin;

(vii) if the administration of oxytocin promoted contractions which were too frequent or prolonged, the complications of management would have outweighed the advantages of acceleration;

(viii) when the CTG ended at approximately 40 minutes past midnight on the morning of 1st January, the fetus was still in reasonable condition, although there were decelerations in CTG, there was very good recovery thereafter;

(ix) it was not clear what happened between 12.30 (half past midnight) and 1.40 on New Year's Day, when the plaintiff was delivered and particularly whether there had been monitoring of the fetal heart of any kind between that period and during which a dangerous and difficult vacuum extraction was performed.

With regard to this extraction, Dr. Clements alleges that –

(i) in 1980 it was occasionally permissible to apply a ventouse before full dilatation. It was also occasionally permissible to apply the ventouse to a head high in the pelvic cavity;

(ii) however, it was never permissible to apply the ventouse before full dilatation with the head high and fetal distress was already present on the CTG;

(iii) the attempted ventouse delivery was ill-advised;

(iv) there had been no significant progress in the labour for four hours. A rim of cervix was palpable at 20.30. A rim of cervix was still described at 00.30. Such arrest of labour, in spite of oxytocin, and particularly in the presence of fetal distress and with the head high in the pelvis, should have been managed by Caesarean section.

(v) There was a clear indication for Caesarean section at 20.30 and Christopher McBrearty should have been born by 21.30 on 31st December, 1980.

(vi) The attempted ventouse delivery was likely to end in damage to the fetus.

51. With regard to these, the plaintiff's case is that the records show while the plaintiff himself should have been born by 9.30 p.m. on 31st December, he was not in fact delivered until 1.40 a.m. on the following morning, a period of several hours later and during that last hour of labour his injuries occurred. It is further contended that there was no monitoring of the fetal heart between 45 minutes past midnight and 1.40 a.m., at which point a dangerous and difficult vacuum extraction was performed.

Nature of prejudice relied on

52. The points raised contain elements of specific and presumptive prejudice. Specifically it is contended *inter alia* that the case is pleaded too generally, that there was no paediatric report on the plaintiff after the birth and that there was absent any detailed information in relation to each of the events relevant to the matters at issue in these proceedings as evidenced by the expert reports adduced by the plaintiffs themselves, the records being as they are, unpaginated, sub optimal by today's standards and often untimed. This is to be seen in the context of an allegation of presumptive prejudice caused by the elapse of time and decay of memory.

53. The statement of claim embodying much of Dr. Clement's report, however, does not complete the description of the framework of the precise case made against Dr. Singh. In the preparation of its defence the Court was informed the Health Board obtained expert consultant medical advice from an eminent consultant obstetrician, Dr. Peter Lenihan. This report was not exhibited for the purposes of the application by the Health Board but its consequences are relevant.

54. Two points, here, are of particular importance to Dr. Singh's application. The first is that the Health Board *did not assert prejudice at all* until this issue was raised by the medical defendants. This is so despite the fact that it had received the original statement of claim on 6th May, 2003 and the amended statement of claim on 12th May, 2006. However, this motion was brought by the Health Board (the first named defendant) only on 31st May, 2007, some four years after it had received the original statement of claim and one year after it had received the amended statement of claim. At no time prior to that point had any issue been raised by the Health Board as to any such difficulty which it might have encountered in determining the facts material to this case.

55. Second, while Dr. Lenihan's report has not been exhibited. It is clear that on 10th May, 2007 the Health Board served a notice of indemnity and contribution on Dr. Singh (and Dr. Glynn, whose position is considered later). In that notice, twelve specific allegations of negligence, breach of duty and breach of contract are made. These include Dr. Singh's alleged failure to diagnose the difficulty which the plaintiff's mother was experiencing during the second stage of labour, failure to deliver the plaintiff as soon as possible; failure to carry out proper assessment of the plaintiff's mother during the course of her second stage of labour; failure to take cognisance of the fact that the plaintiff's mother had a narrow sub-pubic arch; failure to take cognisance of the fact that the combination of long labour and the presence of meconium would place the plaintiff at a high risk of asphyxia and catastrophic injury; the attempting a ventouse delivery for a second time when the first attempt was unsuccessful; failure to consider or carry out a Caesarean section or to manage the second stage of labour; and causing and permitting the plaintiff to be subject to hypoxic insult. It can only be inferred that these focused allegations derive from the report of Dr. Lenihan obtained by the Health Board. No other proposition has been advanced to the court.

56. It has not been suggested on behalf of Dr. Singh that there exists here any issue relating to his "normal procedure" or any alleged departure therefrom. It has not been submitted as being part of the plaintiff's case that there is here any specific "incident" or exchange of words or any portion of the evidence which might have a bearing on the issue of liability. It is asserted that the notes and records in relation to the delivery would not comply with today's standards. Of more fundamental importance, however, it has not been contended by Dr. Singh, or by any of the other defendants, that whatever their deficiencies or inadequacies, there were on any previous time notes or records which are now lost or missing.

57. A further problem which might have arisen would have been the resolution of any potential issue between the third and fourth

named defendants. At any time prior to the initiation of this motion a notice of indemnity and contribution might have been served between those parties. However, this course of action was not adopted. Therefore no specific issue between the third and fourth named defendants has been identified. It had been thought at an earlier stage that both medical defendants would be indemnified by the MDU. It was also considered probable that they would be represented by the same firm of solicitors. That latter position altered only subsequent to the withdrawal of the indemnity by Dr. Glynn and Dr. Singh by the MDU.

58. Thus any potential question of individual liability of the two doctors emerged as a feature only after the withdrawal of liability by the MDU. While it might have been thought that the service of the notice of indemnity and contribution on the first named defendant might have prompted a like procedure between the third and fourth named defendants, this has not occurred.

59. While there is no duty upon any defendant to serve a notice for particulars prior to the bringing of a motion of this type, equally the onus is upon the defendant as moving party to demonstrate prejudice. To do this it is necessary to go further than mere assertion that the defendant has no recollection of what occurred.

60. One of the acid tests applied in the exercise of this discretion is whether there is available sufficient documentation or whether the absence of such documentation constitutes a serious prejudice or a substantial risk that it was not possible to have a fair trial. I find that essentially this is a documents case, in that there is sufficient cotemporaneous documentation to permit a fair trial, where all other witnesses are available as described later, although the applicant states he has no recollection. This latter point itself is not determinative here or elsewhere. The moving party has not identified any other factor intervening between the events in issue and the hearing of this motion where recollection, records or events have materially altered, or been affected.

61. It was not submitted by this or the first named defendant who was the custodian of the records that any medical notes or records which previously existed are now missing.

62. It is in fact incorrect to say that there are no paediatric notes. In fact, there is a report from a paediatrician, Dr. Ryan, written to the plaintiff's general practitioner on 11th March, 1981. This deals with the general circumstances of the plaintiff's birth, but it has not been shown that the plaintiff or his next friend were apprised in any way at that time of any potential significance attaching to this report on the question of negligence.

63. A further unique feature distinguishes this case even despite the very substantial time elapse. Not only are Dr. Singh and Dr. Glynn both alive, but the nursing records include a narrative of events which, although not full, by the standards of today, contain the midwives' records in sequence over the period in question. There is a labour record as to the facts and circumstances of the plaintiff's birth. Most remarkably, it has not been suggested that even one of the persons involved in the events in question is not available or has died, despite the very long period of 26 years' time elapse. Indeed, all but one of the nursing staff involved in the case are actually still working in Letterkenny General Hospital. It has not been submitted that any one of the named nursing or midwifery staff is unavailable to give evidence. While the court has been informed by counsel on behalf of the first named defendant that interviews have been conducted with the nurses and midwives, no evidence has been adduced by the Health Board or any one of the moving parties in relation to any question of specific prejudice or lack or recollection by the other identified participants in the events apart from the two medical defendants.

64. It is also noteworthy that the notes and records have not inhibited the furnishing of reports to the plaintiff (which have been exhibited) by Dr. Philip Anslow, Consultant Neuro-radiologist, Professor Alan Hill, Professor of Neurology, Dr. Dewi Evans, Consultant Paediatrician or Dr. Roger Clements, Consultant Obstetrician and Gynaecologist. The absence of any application asserting prejudice on the grounds of the first named defendant until 31st May, 2007 has already been referred to. Finally, it is noteworthy that the only assertion of prejudice comes from Dr. Singh himself, not a professional expert retained by him.

65. A further factor relied on by the medical defendants is the absence of indemnity from the M.D.U.. I am not persuaded this is a factor which should be taken into account for the following reasons:-

(a) The court has been informed that an application is to be made to join the M.D.U. as third parties to their proceedings.

(b) This application is brought by Dr. Singh, and also in the future by Dr. Glynn, both on this occasion being represented by the Chief State Solicitor.

At best therefore I consider this issue constitutes a contingent prejudice not now proved and potentially remediable in the event of the successful bringing of these third party applications and a finding being made there in favour of the defendants.

66. Furthermore as pointed out by Clarke J. in *Rogers v. Michelin Tyres,* (Unreported, the High Court, 28th June, 2005) I am not at all persuaded that as the "deepness of the pockets" of a party should or can be a material consideration in an application of this type.

67. The court may, again in the balance of justice, take into account some expenditure of the plaintiff's solicitor in expert reports after Dr. Singh was joined, even if the evidence was insufficient to establish an estoppel from a time standpoint. Also in the balance must be the defendant's conduct with regard to the service of proceedings.

68. A final factor here is that the plaintiff suffering from an incapacity which is severe and ongoing and cannot, in the balance of justice, be held liable for delay by his solicitor any more than a minor. *cf. Kelly v. C.I.E.* [1973] I.R., Henchy J.

69. Weighing each of these factors as identified in *Primor* and with reference to the tests as to the balance of justice, I find the defendant has failed to discharge the onus of proof upon him of demonstrating injustice.

Inherent jurisdiction

70. In the absence of a sufficient degree of prejudice or detriment in the weighing of the balance of justice established in *Primor*, can the defendants rely on the inherent jurisdiction as identified in *O'Domhnaill v. Merrick*, recognised in *Primor* and applied most recently in a series of tobacco cases, particularly *Manning v. Benson & Hedges & Ors.* [2004] I.R. 556; *O'Connor v. John Player & Sons Ltd*. [2004] 2 I.L.R.M. 231 and *McCormack v. P.J. Carroll & Company*, the High Court, 24th April, 2007, Unreported, Gilligan J.

71. This inherent power to dismiss proceedings in the interests of justice, even if brought within time, is now statutorily recognised cf. s. 3 of the Statute of Limitations Amendment Act, 2000.

72. In *Byrne v. The Minister for Defence*, the High Court, Peart J., Unreported, 28th April, 2005, that judge observed that separate criteria are to be adopted in assessing pre and post-commencement delay. (See also *McH. v. M.*, Peart J., the High Court,

Unreported, 3rd March, 2004. Peart J. considered that the *Primor* principles were applicable in cases of post-commencement delay by a plaintiff, and where a defendant sought to dismiss a plaintiff's case for want of prosecution; the principles arising from the judgments in *O'Domhnaill v. Merrick* and *Toal v. Duignan* were more applicable to cases of pre-commencement delay. He stated:

> "I am of the view that there are two separate and distinct tests, one, the *Primor* test in respect of post-commencement delay, and the other, the *Toal v. Duignan* test, if I can so describe it, in respect of pre-commencement delay. First of all the distinction reflects the different and respective contexts in which the delay took place in each case. But beside that I am of the view that there are sound and logical reasons why the test in each instance ought to be different." (p. 7 of the judgment)

He then went on to outline in detail the rationale for the distinction. The pre-commencement delay test is best illustrated in the judgment of Finlay Geoghegan J. in *Manning*, cited above, a 'tobacco case'.

73. The tests which she identified are:

> 1. Is there, by reason of the lapse of time a real and serious risk of an unfair trial; and
>
> 2. Is there by reason of the lapse of time a clear and patent unfairness in asking the defendant to defend the action.

The relevant lapses of time are the periods between the wrongful acts alleged on which a court will be asked to make determinations and the probable trial dates.

74. In the course of her considerations in *Manning*, Finlay Geoghegan J. identified six significant issues as bearing on her consideration. These were in summary form:

> (1) None of the defendants could be considered to have contributed in any significant way to the relevant lapse of time;
>
> (2) the claims being made were extremely wide-ranging, both in the nature of the wrongful acts alleged and the time over which they were alleged to have occurred;
>
> (3) there would be significant factual issues to be determined by the court if the claims went to trial;
>
> (4) there would inevitably have to be much oral evidence;
>
> (5) a significant number of relevant witnesses to the fundamental claims made would no longer be available;
>
> (6) the lapse of time between many of the wrongful acts alleged, and hence factual issues the court would have to decide, and a probable trial date would be extremely long. In relation to certain issues in all cases it might be almost 100 years. For many others it would be at least 60 years and in other cases 40 years.

I have identified these criteria in detail because they illustrate the fundamental distinction which exists between the facts of the instant case and the tobacco cases. The claim here is not wide-ranging, either to the nature of the wrongful acts alleged or the time over which they are alleged to have occurred. In fact, they are, relatively narrow.

75. In the eyes of the consultants who have been retained, the descriptions of the factual issues are apparently sufficient to allow detailed assessments to have been made as to what is said to have occurred. No complaint has been made that the records are inadequate for this purpose by the experts consulted by the plaintiff or, apparently, any expert retained by the first named defendant. No expert consultants have been relied on by the medical defendants to make out their case. Apparently, all the relevant witnesses to the fundamental claims are available. Finally, as indicated, the temporal range of the case is very much more limited than that arising in the tobacco cases where some of the evidence and claims apparently stretch back over a century. In fact, by coincidence, the elapse of time in this case is very proximate to that which arose in the case of *Toal v. Duignan*.

76. The second authority relied on in relation to the inherent jurisdiction test is that of *O'Domhnaill v. Merrick* [1984] I.R. 151, Henchy J., speaking on behalf of the Supreme Court, held that in the exercise of its inherent jurisdiction the court would restrain a trial proceeding as a matter of natural justice because of the substantial time which had elapsed between the occurrence of the road traffic accident the subject matter of the proceedings in 1961 and the time of the application. There are, however, a number of noteworthy features in *O'Domhnaill* which require focus. The first of these is that, immediately after the accident which occurred in 1961, the plaintiff's father consulted a solicitor. There was, therefore, no question but that the plaintiff or the plaintiff's next friend was alive within a very short time as to the potential existence of a cause of action. Here, the plaintiffs have claimed that while the incident in question occurred in 1981, it was only in 1989 that the plaintiff's parents became aware even of the possibility of a cause of action.

77. The deductive approach of *O'Domhnaill v. Merrick* must be seen in the context of *Toal v. Duignan No. 1* and *No. 2*, where Finlay C.J., by induction, identified areas of prejudice which were the basis upon which the trial was restrained against some, but not all of the defendants. These issues have been discussed earlier.

78. Finally, and by way of contrast, in *O'Domhnaill* itself, Henchy J. identified minority, or incapacity on the part of a plaintiff as being factors which might cause the court to refrain from granting the relief sought. The incapacity of the plaintiff has not been disputed here.

79. There have undoubtedly been delays in prosecuting the instant case, but as observed earlier, while those delays were sufficient to make the failure to prosecute the claim expeditiously inexcusable, there were, nonetheless, other factors to be weighed in the balance of justice, that is the third aspect of the *Primor* test. The court in the exercise of its equitable inherent jurisdiction should look to the personal position of the plaintiff, the person suffering from incapacity, rather than the conduct of his legal representative whose conduct falls to be considered more appropriately in the realm of inexcusable delay. Thus, on the facts, this case is substantially different from *O'Domhnaill v Merrick*, delay with a plaintiff of full age at the time of the application.

80. Thus, having regard to these important distinctions which apply to each of the defendants, I do not consider that any of the moving parties have established that this is a case where the court should prevent a trial from proceeding in the exercise of its inherent jurisdiction. While the defendants undoubtedly will suffer a detriment by reason of the elapse of time and absence of memory, these in themselves do not outweigh the other factors, which indicate that, on balance, the trial should be permitted to

proceed. Absence of recollection *per se* cannot prevent a civil trial from proceeding, any more than a defendant who cannot recollect an accident, or even a defendant who is deceased. The balance of rights and framework of reference falls within Article 34 of the Constitution as opposed to a different weighting which would apply to a criminal trial pursuant to Article 38 of the Constitution. Even in the case of a criminal trial, it has been recently held that absence of recollection may not be a bar to a trial. cf. *Murphy v. D.P.P.*, O'Neill J., the High Court, Unreported, O'Neill J., 23rd October, 2007.

The application of the third named defendant

81. Order 8, rule 2 of the Rules of the Superior Courts provides:

> "In any case where a summons has been renewed on an ex parte application any defendant shall be at liberty before entering an appearance to serve a notice of motion to set aside such order."

In the instant case, the appearance entered on behalf of the third named defendant was a conditional one. In his focused submissions Mr. Gleeson S.C. relies on quotations from Delany & McGrath, para. 2-36, to the effect that an order granting relief to renew a summons should only be made where it is in the interests of justice to do so, that is where the injustice to the plaintiff in not being able to pursue his claim outweighs any injustice which would be caused to the defendant in renewing the summons. He relies on the general chronology outlined earlier and asserts that injustice to his client outweighs any other factor.

82. Counsel relied on two decisions, *Behan v. Bank of Ireland*, The High Court, Unreported, Morris J., 14th December, 1995, and *Chambers v. Kennefick*, (the High Court, Unreported, Finlay Geoghegan J., 11th November, 2005). For the purpose of this application, I accept an applicant is entitled to rely on *facts* not put before the court which significantly alter the nature of the plaintiff's application. However, it may also be open to a defendant, by submission, to seek to demonstrate to the court that even on the facts before the judge hearing the *ex parte* application upon a proper application of the relevant legal principles, an order for renewal of a summons should not be made. Such application must be made in a timely way and cannot be used as a mechanism for a 'late appeal'.

83. In considering the phrase "other good reason" the court should consider first whether there is a good reason to renew the summons. That good reason need not be referable to the service of the summons. Second, if the court is satisfied that there are facts and circumstances which actually or potentially constitute a good reason to renew then the court should move to what is sometimes referred to as the second limb of considering whether, because of that good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Third, in considering the question of whether it is in the interests of justice as between the parties to renew because of the identified good reason the court will consider the balance of justice for each of the parties if the order for renewal is or is not made. The issues identified are:-

> (a) The involvement of Dr. Glynn was evident from the medical notes themselves. His role as S.H.O. was identified on a number of occasions including a report to the plaintiff's G.P. in a discharge letter.
>
> (b) With that knowledge within their procurement, even if not so fully identified, the plaintiffs issued their proceedings from 27th November, 2001 and elected to proceed against the North Western Health Board and Dr. McFarlane only.
>
> (c) The grounding affidavit sworn by the solicitor for the plaintiff for the purposes of application to renew the summons on 12th May, 2006 before Peart J. failed to advert to the clinical notes made contemporaneously which referred to Dr. Glynn.
>
> (d) The reference made in the course of the grounding affidavit was simply to the notice of motion of the first named defendant seeking to join Dr. Singh and Dr. Glynn, did not advert to these clinical notes but instead apparently relied on information from the first named defendant's solicitors.
>
> (e) Dr. Glynn was always resident within the jurisdiction and available for service.
>
> (f) On 10th November, 2005 a letter was sent to, *inter alia*, Dr. Glynn and Dr. Singh in the nature of an "O'Byrne" letter, thereby adding to the delay.
>
> (g) It would be impossible to defend Dr. Glynn because of the specific nature of the allegations in the statement of claim of which he has no recollection.
>
> (h) *A fortiori* it will be impossible to defend the claim now brought on foot of the notice of indemnity by the first named defendant.
>
> (i) That any trial at this stage would be a "parody of justice".

In response, Mr. McCullough S.C. submits that:

> (a) The order joining Dr. Glynn was made on 25th April, 2005.
>
> (b) The solicitors for the first named defendant wrote to the plaintiff's solicitors both prior to and after the joinder of Dr. Glynn indicating that as far as they knew Messrs. McCann Fitzgerald were going to accept service. It was only on 14th November, 2005 that it was made clear this was not so.
>
> (c) It became clear it was necessary to amend the proceedings to add Mrs. McBrearty as next friend. That order was made on 13th January, 2006 and the amendment made on 8th March, 2006.
>
> (d) In the meantime the plaintiff's solicitors wrote directly to Dr. Glynn to which he responded outlining the position.
>
> (e) It was thought appropriate to deal with Dr. Glynn and Dr. Singh together in circumstances where it was necessary to revert to the High Court to obtain a further order in relation to Dr. Singh because his summons had been marked "not for service outside the jurisdiction".
>
> (f) Applying the balance of justice, the court should have regard to the detriment to the plaintiff in the event that an order renewing the summons was set aside because there must now be a serious risk if that is so that the Statute of Limitations would now come into play.
>
> (g) So far as Dr. Glynn's indemnifiers were concerned, they were aware that there was an intention to, at least sue Dr.

Singh as far back as 2002.

(h) The delay between the expiry of the summons in March, 2006 and the application to renew the summons on 29th May, 2006 is a short period.

Consideration

84. In considering the matter one must have regard too the decision of O'Neill J. in *O'Grady v. The Southern Health Board and Anor.* [2007] 2 I.L.R.M. 51. As pointed out by O'Neill J., it is not open to a court to treat this application, made in October, 2007, as a form of appeal made against the order of Johnson J. made in June, 2005, joining Dr. Glynn, or Peart J. of 29th May, 2006 extending the time for the service of the summons for a period of six months from that date.

85. It is accepted that the summons was not served until 9th August, 2006.

86. The essential question for determination here is as to whether there are other good reasons for renewing the summons. The phrase "other good reasons" is not confined to issues as to service, and may embrace a number of factors, for example, whether the refusal to renew the summons would (as here) render the plaintiff's claim statute barred. It is necessary for the defendant to demonstrate in the clearest terms that there is actual prejudice such that his defence to the claim has been substantially impaired. *Baulk v. Irish National Insurance Co.* [1969] I.R. 66.

87. In *O'Grady* O'Neill J. stated:

> "… All this tends to persuade me, as indicated earlier, that unless a defendant demonstrates on a rule 2 application the clearest case of actual substantial impairment of his defence, the court should at that stage relieve against the ultimate actual prejudice to a plaintiff namely the time-barring of his claim unless the summons is renewed."

88. Dr. Glynn is referred to on a number of occasions in the nursing notes. The first is on a midwife's note. An entry commencing at 8.30 p.m. refers to:

> "Catheterised. Vomiting coffee ground fluid. Dr. Glynn informed."

Then two lines below there is a reference to Dr. Glynn having been informed and an arrow followed by the words:

> "vacuum attempted. Dr. Singh called. Difficult vacuum extraction of live male …"

In the Labour Record, opposite the date 1st January, 1981 there is a reference which commences "thick mec" (presumably meconium) "s/h (fetal heart) down" "below 100. Dr. Glynn informed".

89. Mr. Gleeson S.C. submits that the tenor of the entries made by the midwives whose names appear on the note is that they were hoping that obstetrical assistance would not be required that, they were monitoring the progress of the birth, certainly in the first stage of labour, and that thereafter became apparent to them that this was a delivery which would require the assistance of the obstetrical staff. Immediately after the words "Dr. Glynn informed" and "vacuum attempted" there are the words "Mr. Singh called. Difficult vacuum extraction of live male". Thereafter there are the words "difficulty with shoulders" followed by the words "thick meconium". "Episiotomy sutured. Third stage complete." Continuing consideration of the Labour Record there is an entry at 1.40 under the heading "vacuum extraction". To the right of that there is a signature "J. Singh and J. Glynn". It records;

> "Delayed second stage. High head. Trial of vacuum. 5cm cup applied over brim. Live male infant delivered over five contractions. Difficulty with shoulders. Thick meconium. Flat baby. Slow to resuscitate. See head (paediatric note). Placenta and membranes complete. Episiotomy repaired with Dexon. Narrow sub-pubic arch. Blood pressure recorded."

A discharge record signed by Dr. Glynn reads:

> "Difficult vacuum extraction of male infant. Baby flat on delivery. Comments: Incubated. Apgar: 3 at 1, 6 at 10 minutes. Started to twitch. Put on phenobarbitone and Apo-cloxi. Baby under care of paediatrician. Episiotomy sutured with Dexon. Post-natal haemoglobin 12."

Counsel submits that Dr. Glynn's involvement in Christopher's birth was identifiable at the time of receipt of the discharge note. Therefore time should be counted from that point.

90. However, no evidence has been adduced, that Anna McBrearty, the plaintiff's mother, in any way apprehended that there was an issue of negligence until this matter was drawn to her attention by Dr. Hegarty, the plaintiff's G.P. in 1999.

91. With regard to the issue of prejudice, Mr. Gleeson S.C. submits, in common with the fourth named defendant, that his client has no recollection of events. He directed his submissions to the particulars of negligence and breach of duty set out in the statement of claim. He identifies in particular those which allege failure on the part of the defendants to take cognisance of the deceleration of the fetal heart rate, that the plaintiff sustained injuries through a long pull on his head combined with delay in releasing his shoulders; that there was a delay in extracting the plaintiff's shoulders; a failure to ensure a consultant of sufficient expertise was present during labour and delivery and a failure on the part of the doctors on duty, including the fourth named defendant, to see the plaintiff regularly enough or to consult with the second named defendant and another senior consultant; and that the plaintiff's mother was allowed to progress in labour for too long a period without considering or adopting other options. Counsel submits that it is unfair to Dr. Glynn to allow the trial to proceed in circumstances where he cannot now testify on the basis of recollection.

92. However, as in the case of Dr. Singh, the Health Board has also served notice of indemnity and contribution upon the third named defendant alleging negligence in that he:

> "(f) attempted a ventouse delivery without consulting with other members of staff and in particular the consultant on duty;
>
> (g) that he failed to discuss and/or seek the advice or expertise of the senior consultant in charge;

(h) attempted a vacuum delivery when it was not safe to do so;

(i) failed to consider a Caesarean section in all the circumstances.

93. The observations and findings which I have made in relation to the fourth named defendant on the issue of delay and general prejudice are applicable equally in relation to the third named defendant. To this I would add one further observation: it is that, in the course of two affidavits sworn for the purposes of bringing this motion, Dr. Glynn does not make any specific complaint in relation to the completeness of the records. Indeed, in his grounding affidavit he makes reference to the hospital records without any complaint as to their completeness or inadequacy although, quite properly, Mr. Gleeson S.C. adopted the submissions made on behalf of the fourth named defendant in this regard as being applicable to his client also.

94. The issues here, ultimately, are subject to the same observations as applied to the allegations of specific as opposed to generalised presumptive prejudice made as to the fourth defendant and I apply them here.

95. I accept the validity of the submissions made by counsel for the plaintiff as being the substantive reasons as to why service was not effected on Dr. Glynn.

96. What must now be weighed is the detriment to the plaintiff if this defendant's application were acceded to. There is one insurmountable obstacle for the applicant in the balance of justice. Against either specific or generalised prejudice, nuanced by reference to the notes and records, there must be weighed one unavoidable element of detriment to the plaintiff were this application to succeed, that is that the plaintiff's claim would now in all probability be rendered statute barred. I consider this factor outweighs any issue relied upon by the applicant.

97. I do not consider that substantive, specific prejudice has been established here from 1981 onwards. There is general presumptive prejudice as a result of the elapse of time an absence of memory. For the same reasons as identified with regard to Dr. Singh; I consider that what the third named defendant has established is ongoing *general prejudice* as opposed to *specific*, from the time of initiating proceedings on 27th November, 2001 to his joinder as a defendant (Johnson J.) April, 2005 to May, 2006 (Peart J.). However, the delays from the starting point have not been shown in any way to be an additional impairment of the defence of Dr. Glynn. He has not been deprived of any further benefit or been subject to any detriment in that time. The plaintiff, however, would suffer considerable detriment in the event that the summons was set aside and the Statute of Limitations would come into play. Insofar as this defendant relies on factors identified in the case of Dr. Singh I make similar findings as to their effect.

The application of the Health Board

98. By way of application dated the 31st day of May, 2007 the first named defendant seeks relief pursuant to the inherent jurisdiction of this Court dismissing the plaintiff's claim on the ground of inordinate and inexcusable delay in the commencement and prosecution of the proceedings which delay has prejudiced the defendants such that the balance of justice requires that the claims be dismissed and alternative relief to the effect that to permit the trial to proceed would be unfair, unjust and contrary to the principles of natural and constitutional justice and to the first named defendant's constitutional right as well as ancillary relief.

99. No other relief is sought by this defendant, represented by Mr. Richard T. Keane S.C. The chronology of events has already been outlined. It is unnecessary to reiterate the general course of proceedings or dates to which reference has already been made. There are a number of factors to which reference must specifically be made however. These include:

(a) that from September, 2003 to March, 2005 two motions for judgment were brought against the first named defendant;

(b) only in March, 2005 did the first named defendant file its defence;

(c) almost immediately thereafter the first named defendant issued a motion returnable for 23rd April, 2005 to join Dr. Singh and Dr. Glynn as third parties.

It is unnecessary to reiterate the detailed consideration which has been given in the chronology up to the present date, save insofar as any finding with regard to the third and fourth defendants up to July/August, 2006 when they were ultimately served. The court has concluded that this elapse of time constitutes inordinate and inexcusable delay on the part of the plaintiff's solicitor with regard to the third and fourth named defendants. It so finds here.

100. With regard to the balance of justice –

(a) The plaintiff's solicitors were informed by this applicants solicitors that Messrs. McCann Fitzgerald would probably accept service in this case, and that they as The Health Boards solicitors had been so advised.

(b) That the full identification of Dr. Singh as being an important actor in these proceedings took place only with the filing of the defendant's defence on 7th March, 2005. Thus, to that degree, this applicant contributed to the delay which occurred after the institution of proceedings.

(c) The notice of motion brought by the defendant is dated 31st May, 2007. It is not disputed that by that time the plaintiff had expended very considerable sums of money upon the preparation of the defence and of the obtaining of witness reports.

(d) The substantial delay of two years which occurred in the filing of a defence by this applicant is stated to be partly attributable to the difficulty in obtaining a witness, such as Dr. Lenihan, competent to testify in relation to the state of medical knowledge in 1981.

(e) Far more fundamental is that this defendant had received the statement of claim on 10th September, 2003. Almost three and three-quarter years elapsed prior to initiating this notice of motion.

(f) At no time prior to bringing the motions by the third and fourth named defendants was there any intimation on the part of this defendant that it was prejudiced the preparation of its defence.

(g) No expert evidence has been adduced by this defendant as to such prejudice, despite the fact that the defendant has available to it the services of the expert consultant obstetrician gynaecologist, Dr. Peter Lenihan.

(h) In fact, as referred to this defendant was in a position to furnish detailed notices of indemnity and contribution against the third and fourth named defendants on 10th May, 2007, presumably on the basis of the expert testimony available to it.

(g) While some criticism has been made of the fullness of the medical and nursing notes and records, it has not been suggested that there is any matter or part of the medical records, nursing records or traces which previously existed and are now missing.

(h) In the course of the affidavit sworn on behalf of the defendant it is stated that interviews have been carried out with the midwives who were involved in the birth of the plaintiff. No affidavit has been sworn by any of these midwives. No evidence has been adduced that there is any dimming of recollection on their part despite the very considerable elapse of time involved. As indicated earlier, all but one of the midwives are still employed by Letterkenny General Hospital. It has not been indicated that any witness is unavailable. In such circumstances this defendant faces a particular difficulty in that its allegation of generalised prejudice is not supported by the main actors in the events in question so far as they are concerned, that is to say, the midwives and nursing staff. It is not contended that notes, records or traces have been rendered unavailable by loss or destruction or that they are so incomplete as that medical experts retained by them are unable to express any view in relation to liability as to what occurred. It is however, strongly submitted that they contain gaps which may be unreliable or are uninformative as outlined earlier. The plaintiff's incapacity is a consideration as outlined earlier.

101. Again, it is a feature of the case relating to this applicant that none of the independent medical experts who have been retained for the plaintiff or by the Health Board have expressed the view that the notes and records, albeit in many ways imperfect, are such as to inhibit any view on liability being arrived at. No evidence has been adduced by this applicant on this point, although submissions were made as to deficiencies and gaps in the records as distinct from such material having been lost. In fact, as can be seen both from the reports and from the notice served by this defendant on the third and fourth named defendants, it would appear that the opposite is the case. The Health Board appears to assert no inhibition in preparing or pleading its case for indemnity.

Inordinate and inexcusable: the first defendant
102. In the course of this judgment reference has been made earlier to the authorities in the issue of dismissal for want of prosecution. It is unnecessary to reiterate these here. Suffice it to say that the court, in the consideration of this application, again concludes for the reasons outlined in relation to the fourth named defendant, that the delay here was inordinate and inexcusable.

Balance of justice: the first defendant
103. In the balance of justice, however, in the case of this defendant, there must be weighed additional features outlined earlier, including the four years delay on the part of this defendant in raising the issue of delay, the contribution, albeit *bona fide*, which this defendant added to in the misapprehensions on the part of the plaintiff's solicitor as to service, and the fact that this delay undoubtedly allowed and permitted substantial expenditure to be incurred by the plaintiff's legal advisers. In the balance of justice, the position of this defendant is, relatively speaking weaker than that of the third and fourth named defendants who at least were in a position to depose as to their absence of recollection that is general or presumptive prejudice. This was not the case in relation to the first named defendant which has had in its possession the medical and nursing records and traces. Additionally, this defendant has, according to evidence adduced and from submissions, interviewed the midwives. But no evidence from these midwives has been adduced. Instead, counsel on behalf of the first named defendant has sought largely to rely on the report of Mr. Roger Clements in order to demonstrate prejudice, and not any report of Dr. Lenihan, or affidavits from witnesses identified from the records.

104. The records are again referred to variously as being sparse, scanty and inadequate. They do not disclose what happened during a number of identified time intervals. But what is absent is any suggestion that the reports were in any way different in 1981 which would have raised specific prejudices.

105. The court therefore concludes that the delay in the case of this defendant has been shown to be inordinate and inexcusable, although, the latter, to a lesser degree, because of the conduct of this defendant as described. It is of particular relevance that in the instant case there has been delay or conduct on the part of this defendant which amounted to acquiescence in the plaintiff's delay. This took the following form, first, the delay of the applicant in raising this point, second, the permitting of incurring of substantial additional costs by the plaintiff in the pursuit of the action. I consider that on these facts an estoppel has been established.

106. A further factor to be borne in mind is the submission made by counsel for this defendant to the effect that, in the event of the third or fourth named defendants being dismissed out of the proceedings, the first named defendant would propose to rely on the provisions of s. 35 of the Civil Liability Act, and would therefore contend that in the absence of any finding of primary liability against the first named defendant, that defendant would seek to impute negligence on the part of the third and fourth named defendants to the plaintiff as being headings of contributory negligence in circumstances where the claim against the third and fourth named defendants might be found as time barred. This too, however, must be weighed in the balance.

107. As can be seen, a number of the factors outlined under the heading "balance of justice" bear also on the question as to whether the plaintiff's delay was inexcusable. While the evidence was sufficient to demonstrate the delay was inexcusable, though to a lesser degree than the other applicants, I am satisfied that the totality of issues now outlined are sufficient to show that this applicant has not discharged the onus of proof with regard to the balance of justice for the additional reasons outlined above, and in the earlier parts of this judgment which deal with this question in relation to the fourth, third and fist defendants.

108. The issue of dismissal on the basis of inherent jurisdiction also relied on by these applicants has been dealt with earlier in this judgment.

109. For these reasons, as outlined the court will therefore decline the reliefs sought in the notice of motion.