

**THE HIGH COURT**

**[2023] IEHC 515**

**RECORD NO. 2015/10180P**

**BETWEEN**

**AINE O NEILL**

**PLAINTIFF**

**AND**

**LORCAN BIRTHISLE**

**DEFENDANT**

**Ex tempore judgment of Mr. Justice Mark Heslin delivered on 28 July 2023**

**1.** On 17 December 2021, the Defendant issued a motion seeking an Order dismissing the Plaintiff's claim for want of prosecution, pursuant to O. 122 r. 11 of the Rules of the Superior Courts ("RSC"); for inordinate and inexcusable delay; and seeking such further or other Orders as the court deem appropriate; as well as an Order for costs.

**2.** I took the time in advance of sitting today to consider with care the evidence before the court which comprises of the following:-

- (i) the averments made in an affidavit sworn by Ms. Sarah Kelly, solicitor for the Defendant, on the 15 December 2021 (together with the documentation exhibited at SK1 - SK3 thereto);
- (ii) the averments made in a replying affidavit, sworn by Mr. Stephen McGrath, solicitor for the Plaintiff, on 26 April 2022;
- (iii) the averments in Ms. Kelly's further affidavit, sworn on 24 January of 2023 (and exhibit SK4 thereto); and,
- (iv) the averments made by Ms, Jennifer O'Sullivan, solicitor for the Plaintiff, in her affidavit sworn on 1 February 2023, (together with exhibits B1-B3 thereto).

**3.** Later in this ruling I will refer to certain averments and correspondence.

**4.** In the manner touched on at the outset of the hearing, there was a further affidavit which I agreed to accept, notwithstanding the fact that it was delivered very late in the day and post the callover. That was an affidavit sworn by Mr. McGrath on 26 July – so an 'eleventh hour' affidavit – and I will refer to its contents presently.

## **Legal principles**

**5.** Before proceeding to look at the evidence and the facts which emerge from it, it is appropriate to make reference to the legal principles governing the proper approach by the courts to delay applications. Given the nature of the proceedings I will also, during the course of this ruling, make reference to obligations which any Plaintiff seeking to bring professional negligence proceedings is obliged to meet.

**6.** The leading judgments in respect of applications to dismiss on delay grounds are those of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 ("*Primor*"), as well as a somewhat earlier decision by the Supreme Court in *O'Domhnaill v. Merrick* [1984] IR 151 ("*O'Domhnaill*").

**7.** The authorities make clear that *Primor* remains the 'touchstone', or the primary approach. The observations by then Chief Justice Hamilton setting out the position (at pp. 475/76 of the reported judgment) are well known and it does not seem to me to be necessary to quote those verbatim.

**8.** It is fair to say that *Primor* and the authorities derived from it require this Court today to ask three questions in sequence:-

(1) Is the delay inordinate?

(2) If so, is it inexcusable?

(3) If the delay is both, is the balance of justice in favour of, or against, allowing the case to proceed?

**9.** There is a separate but overlapping jurisdiction to dismiss proceedings which arises where there is a real and serious risk of an unfair trial and/or an unjust result. This is clear from the Supreme Court's decision in *O'Domhnaill* and the authorities derived from same.

**10.** There are distinctions between the *Primor* and *O'Domhnaill* tests. Those distinctions were made clear in *Cassidy v. The Provincialate* [2015] IECA 74 (at paras. 33 to 38).

**11.** First, whilst inordinate and inexcusable delay are essential elements under the *Primor* test, if the matter is approached through the lens of the *O'Domhnaill* test, it is not necessary for a Defendant to meet the burden of proof of establishing culpable delay on the Plaintiff's part.

**12.** Second, under the *Primor* test, if inordinate and inexcusable delay have been established, then a case may, depending on the particular circumstances, be dismissed where "moderate" prejudice has been established, and, obviously, the court must respond to the particular facts and circumstances in the unique case before it. In other words - and this seems to me to speak to a submission made by counsel for the Plaintiff - it is not necessary, per the *Primor* approach that so-called "fair trial" prejudice be established. By contrast, under the *O'Domhnaill* test, nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or an unjust result will be sufficient to justify dismissal.

**13.** Therefore, the *Primor* approach focuses squarely on the Plaintiff's action (or more usually the inaction on a Plaintiff's part) before - if that inaction is established and not excused - moving to a consideration of the balance of justice. By contrast, *O'Domhnaill* is focused squarely on whether a fair trial is possible, regardless of how blameworthy, or otherwise, a Plaintiff may be.

**14.** The *Primor* test is the primary approach for the court to take in the present case.

**15.** In a much more recent decision handed down by the Court of Appeal on 20 October 2022, in *Cave Projects Limited v. Gilhooly & Ors.* [2022] IECA 245, Mr. Justice Collins set out a comprehensive analysis of the jurisprudence in the area, in particular at para. 36 (between pages 27 and 37, inclusive) of the Court of Appeal's judgment and it is those principles which this Court applies in this decision today.

**16.** Having set out the landscape in terms of legal principle, it is now appropriate to look at the landscape in terms of the evidence and the facts emerging from it.

#### **The Personal Injuries Summons (issued on 7 December 2015)**

**17.** The Personal Injuries Summons (as issued on 7 December 2015) named a Ms Michelle Rabbette. Paras. 1 to 5 inclusive of the personal injuries summons state the following:-

*"1. The Plaintiff who resides at [Address] was born on [date in 1984]. Her PPS number is [XXXX]. She suffers from spina bifida and because of this medical condition she is unemployed.*

*2. The Defendant is the Clinical Claims Manager of the State Claims Agency and she is the individual nominated by the State Claims Agency to represent St. James Hospital in these proceedings".*

**18.** As I will presently come to, the evidence allows for a finding of fact that she is *not* the individual nominated by the State Claims Agency. The indorsement of claim then continues by pleading the following particulars of wrongs alleged:-

*"3. Negligence and/or breach of duty on the part of the Defendant, her servants and agents as hereinafter appears.*

#### **Particulars of the acts of the Defendants constituting the wrong.**

*4. The Plaintiff underwent surgery for the realignment of her right lower limb during childhood. This involved the insertion of an internal fixation device in the distal tibia. From approximately November 2011, the Plaintiff has suffered from symptoms of swelling in the right lower limb. This has led to repeated episodes of recurrent infection and hospitalisation in the Defendant hospital.*

*5. On the 3<sup>rd</sup> November 2013 the Plaintiff underwent surgical removal of a staple from the right distal tibia with wound washout at the Defendant hospital under the care of Mr. Peter*

*McKenna. This resulted in the alleviation of her condition in the right lower limb and she has not suffered from infection of the subject area since that time. The persistent infections and related symptoms that she suffered in the period from November 2011 until the date of the surgery under Mr. McKenna as aforesaid are attributable to the failure to the Defendant, its servants/agents, to identify the staple as the source of the Plaintiff's symptoms and/or to remove the staple at an earlier date".*

**19.** The first observation to make is that this Plaintiff is alleging that certain unidentified medical professionals performed a procedure at some point in time which she does not identify either. The Plaintiff does no more than say that the procedure took place "*during childhood*".

**20.** Pleas are then made under the heading of "Particulars of negligence and breach of duty" and it seems to me that they can fairly be described as having been made in the most general of terms. For example (A) refers to failing to take any adequate care for the Plaintiff; (B) refers to exposing the Plaintiff to a risk of injury or harm; (C) refers to failing to identify or appreciate that the presence of the staple was the cause or a contributor to the Plaintiff's condition and to arrange for removal; (D) refers to failing to accurately or expeditiously diagnose the cause of the Plaintiff's condition; and (E) refers to failing to conduct and/or to adequately review such investigations and/or procedures as would have enabled the correct identification and source of the cause of the Plaintiff's symptoms.

**21.** As I say, these are the most general of pleas. There is certainly nothing like a particularisation of *how* the wrong is said to have occurred, *what* the Plaintiff contends should have been done, or *when*, or by *whom*. What is equally clear is that these are professional negligence proceedings in relation to medical treatment carried out, it is said, at a certain hospital, and the court is entitled to infer, therefore, that it is a claim against medical professionals, albeit not as yet named.

**22.** In light of the plea that she suffered from pain and swelling "*From approximately November 2011*", it follows that the medical treatment of which she complains was allegedly carried out at some point prior to this. By way of an observation, and it is a very obvious one, as of November 2011, the Plaintiff, who pleads that she was born in late 1984, would have been in her late twenties, in other words, an adult at that stage.

**23.** The personal injuries summons goes on to make certain pleas, namely: shock; distress; pain, swelling and irritation; and reference is made to periods of inpatient treatment, the earliest date being 25 November 2011, and the latest being 14 November 2013.

**24.** On an objective reading of the personal injuries summons, it does not seem to me that the Plaintiff is pleading that she was caused injury *during* any of those hospital admissions between 2011 and 2013. Rather, she appears to be attributing a significant portion of these hospital admissions to what she describes as "*the presence of the staple and the consequent symptoms suffered by the Plaintiff*".

**25.** The Plaintiff pleads a marked loss of amenity; that she has been unable to live a normal life at home, independent from the hospital; and that further adverse sequelae shall be furnished, when to hand.

**26.** The only 'particulars of special damage' refer to travelling expenses and miscellaneous expenses of €150 each.

**27.** These proceedings very obviously comprise a professional negligence claim, of the medical negligence type. In short, the Plaintiff alleges professional negligence in relation to medical treatment afforded to her in St James' Hospital, at a time entirely unknown but prior to November 2011, by "servants and agents" - and that it is how it is put - of the Defendant i.e., medical professionals, but they are not identified.

**28.** With a particular focus on the reference to a staple, it is nowhere explained *how* the presence of the staple constitutes any breach of duty, or *what* should have, on the Plaintiff's case, taken place in respect of the staple. In other words, it is not at all clear what claim is being made, other than it is under the rubric of professional negligence in the medical sphere.

**29.** It is, however, perfectly clear that witness testimony will be essential for any determination by a future trial judge of matters in dispute. That is very clear from the plea at para. (f) of particulars of negligence and breach of duty, wherein the Plaintiff pleads:

*"(f)The Plaintiff will further rely in proof of the negligence alleged upon such facts as may appear in the evidence of the Defendants and their witnesses but not the Plaintiff's witnesses and as may appear in their evidence given at the trial of this action".*

**30.** I pause here to observe that, regardless of whether and, if so, what medical records may exist - and this is a tentative suggestion given that it is entirely unclear from the writ when the wrong is alleged to have occurred - it is inconceivable, particularly in light of that explicit plea, that a future trial court would not be asked to determine matters of fact without reference to oral testimony of witnesses who would need to rely to a material extent on their memories. I say this because it is simply inconceivable that every interaction between the Plaintiff and each and all of the servants or agents, albeit as yet unnamed of the Defendant was in writing only. It is inconceivable that those whom the Plaintiff alleges to have provided medical treatment to her did not speak to her, and one can well understand in proceedings where professional negligence is alleged, that matters of fact regularly fall for determination, such as, for instance, the question of consent, and within that, the subset of informed consent. In that context, and taking consent as just one issue, matters of fact may well be essential to a fair determination such as who said what, to whom, and when.

**31.** Moving on, and whilst emphasising that this is an application to dismiss on delay grounds, the court cannot be blind to the provisions of the Civil Liability and Courts Act 2004, which I will refer to as "the 2004 Act".

**32.** Section 10 (2) of the 2004 Act details what a personal injuries summons must specify and this includes inter alia, *"full particulars of the acts of the Defendant constituting the said wrong and the circumstances relating to the commission of the said wrong"* as well as *"full particulars of each instance of negligence by the Defendant "*.

**33.** Section 10 (3) goes on to provide that, where a Plaintiff fails to comply with the requirements in the section, the court may, inter alia, dismiss the Plaintiff's action where it considers that the interests of justice so require.

**34.** In a number of judgments, including a recent decision by Simons J. in *Rooney v. HSE*, [2022] IEHC 132 reference is made to the 2004 Act; to the enhanced level of detail required in pleadings; and to the importance of compliance with procedural requirements (see from para. 37 onwards). At paras. 41 and 42, Simons J. stated the following, in *Rooney*, with respect to claims where professional negligence, in particular medical negligence, are made:-

*"[41] ... the courts have said that it is irresponsible, and, potentially, an abuse of the process of the court to commence professional negligence proceedings without first ascertaining that there are reasonable grounds for so doing (Cooke v. Cronin [1999] IESC 54). An independent expert report will be required in the vast majority of medical negligence claims, but there will be certain circumstances where such is not an essential precondition (Mangan v. Dockery [2020] IESC 67).*

*[42] This has resulted in a convention whereby proceedings alleging professional negligence will not normally be issued without the intended Plaintiff's lawyers having first had sight of an independent expert report. This convention is not absolute, and proceedings are sometimes issued notwithstanding the absence of the requisite report. This is done to protect the intended Plaintiff's position in respect of the two-year limitation period. This practice is sometimes referred to as issuing a "protective writ" or issuing proceedings on a "protective basis". It is imperative, however, that the requisite report be obtained thereafter with reasonable expedition (Murphy v. Health Service Executive [2021] IECA 3 at paragraph 93). Depending on the views expressed by the independent expert, it may become necessary to discontinue the proceedings."*

**35.** By way of observation, *Rooney* makes a link between the requirements to secure an independent expert's medical report, before launching proceedings of this type, and the question of delay i.e. if a report, for whatever reason, is not available in circumstances where proceedings have to be issued on a protective basis, it is imperative that the report be obtained with reasonable expedition thereafter. The phrase *"reasonable expedition"* very obviously speaks to the passage of time, and although no 'line in the sand' is drawn in terms of weeks or months, it seems entirely uncontroversial to suggest that the reasonable expedition obligation, with respect to obtaining the necessary independent medical experts report, could not by any means be met if, absent clear and compelling reasons to excuse it, the time taken was measured in *years*, as opposed to weeks or months.

**36.** At this juncture it is appropriate that I make a number of observations, as follows.

- i. The Plaintiff has failed to provide *full particulars of the acts of the Defendant constituting the wrong* of which she complains;
- ii. The Plaintiff has failed to provide full particulars of *the circumstances relating to the commission of the said wrong*;
- iii. She has not provided *full particulars of each instance of negligence by the Defendant* ;
- iv. She has not even made clear *when* the wrong is said to have occurred or those she claims were involved;
- v. No medical expert's report was obtained in advance of these proceedings being issued;
- vi. These were medical professional-negligence proceedings which were commenced without the Plaintiff first ascertaining whether there were reasonable grounds for so doing;
- vii. The Personal Injuries Summons does not indicate that the absence of the requisite expert's report was due to an urgent need to protect the Plaintiff's position in respect of the Statute of Limitations – no reference to the Statute is made;
- viii. This Court is entitled to take the view that time was not a factor, in relation to any rush to issue the proceedings which, in the manner explained, were issued without any medical expert's report. The court is entitled to take that view, it seems to me, given that (a) the date of the alleged wrong is not specified at all; (b) the solicitor then acting for the Plaintiff did not say that there was any urgency related to the Statute of Limitations or any deadline pursuant to that; (c) between the date of the last pleaded hospital admission (14 November 2013) and the date the Personal Injuries Summons was issued (7 December 2015) is a period of over two years, which, in the absence of any evidence to the contrary - and none is before the court - would appear to provide ample opportunity to obtain a report; and (d) in the manner presently touched on, almost a year elapsed between the writ being issued and the writ being served (providing a further opportunity to comply with the 2004 Act prior to any decision on the part of the Plaintiff to proceed by way of serving the issued proceedings).

**37.** By letter dated 15 November 2016, the proceedings were served on the State Claims Agency (See para. 3 of Ms Kelly's 1<sup>st</sup> affidavit).

**38.** The said letter dated 15 November 2016 quoted the title and record number and simply stated the following: "*Dear Sir/Madam, I herewith enclose copy personal injuries summons and I would be grateful if you could nominate solicitors to accept service of proceedings at your earliest convenience.*" As noted earlier, there is no reference in that letter (or in the personal injury summons) to the Statute of Limitations. Neither was there any reference to a Plaintiff's requirements having regard to the 2004 Act not having been met, nor any suggestion that there was any difficulty

with compliance. There is not, for example, a request for forbearance so that the necessary obligations resting on the Plaintiff can be discharged.

**39.** At the risk of repetition, this very short letter enclosing the proceedings was, of course, one which came in excess of 11 months *after* the proceedings were issued. Later in this decision I will come to the question of a 'late start' or pre - commencement delay which I am entirely satisfied has occurred in the present case, but this 11 months without, it appears, any effort whatsoever to obtain the requisite independent medical expert's report is an element of, in my view, post - commencement delay.

**40.** By letter dated 9 December 2016, BLM solicitors for the Defendant wrote to the Plaintiff's solicitors expressing surprise that no letter of claim had preceded the issuing of proceedings; pointing out that the Plaintiff had inappropriately named an individual solicitor who works in the State Claims Agency, who was not the Defendant's nominee; indicating that, had prior contact been made, the name of the correct nominee would have been given; and calling on the Plaintiff's solicitor to amend the title of the proceedings to reflect the nominee of the Defendant, Lorcan Birthisle.

**41.** That letter was sent on 9 December 2016. In the manner presently explained, it was not until April 2018 that the Plaintiff 'mended her hand' with respect to the correct name of the Defendant as nominee. This delay is another significant element of post-commencement delay.

**42.** The letter of 9 December 2016 comprises part of Exhibit SK1 to Ms Kelly's first affidavit. It made clear that, before any appearance could be entered by the Defendant, the Plaintiff would have to bring an *ex parte* application to amend the title of the proceedings to reflect the correct name, and it was confirmed that the Defendant's letter could be used for the purposes of consent.

**43.** In fact, there was neither a response to that letter, nor was any application made of the type indicated as essential and consented to by the Defendant's solicitor.

**44.** It is entirely fair to say that the evidence discloses that it was the Defendant, not the Plaintiff 'making all the running', and this is crystal clear from the fact that it was the Defendant's solicitor who sent reminder letters on 10 January and 20 January 2017. The response by the Plaintiff's solicitor by letter of 20 January 2017 indicated: "*I will be in touch with you further regarding your request that we amend the title of the proceedings by way of ex parte application*". Despite this, there was further inaction on the part of the Plaintiff.

**45.** In light of that ongoing inaction, the Defendant's solicitors wrote, once more, by letter of 6 April 2017 requesting that the necessary amendment with respect to the title of the Defendant be made, and that it be done without further delay. That letter also put the Plaintiff squarely on notice of the necessity for an independent medical expert's opinion and afforded the Plaintiff the opportunity to 'mend her hand' in this respect. No other interpretation is available from paras. 3 and 4 of the 6 April letter, which states the following:



*"We notice that the Plaintiff's personal injuries summons does not comply with the requisite requirements of the 2004 Act. For example, the Plaintiff's date of birth and PPS number and occupation or status are not pleaded. **It would appear that the Plaintiff's claim has not been pleaded with reference to a report from an appropriately qualified clinician of like skill and expertise to the person or persons whose management is being criticised in the claim. Please clarify. You will be aware that if you have issued the proceedings without such a report, perhaps in view of the Statute of Limitations, you are under an obligation to mend your hand and obtain such a report in early course.** We await hearing from you."* (emphasis added)

**46.** What emerges from that letter is that the Defendant's solicitors were entirely 'in the dark' as to whether the requisite expert's report had been obtained, or not, but put the Plaintiff's side very much on notice that it was needed and called for this to be done, and the words used were "*mend your hand*", and also "*in early course*". In my view, the evidence allows for a finding of fact that the opportunity to obtain the independent medical expert's report was, at least, from the 6 April 2017, leaving aside the obligation to do so sooner. In the manner more fully explained in this ruling, despite the call made, in April 2017, for a medical expert's report, we find ourselves in late July 2023, *without* any such report ever having been obtained by the Plaintiff. That, of course, represents a span of time in excess of six years.

**47.** Furthermore, it is acknowledged on the Plaintiff's side that such a report *is* essential. Among the averments made in the affidavit evidence before the court, are averments with respect to seeking an adjournment to try and facilitate obtaining such a report. In my view, given the facts which emerge from a consideration of the evidence, as well as the obligations which at all times rested on the Plaintiff intent on maintaining professional negligence proceedings, it would have been utterly unjust to prolong matters by adjourning the present motion. The Plaintiff has already had ample time, measured in years, to obtain the expert's report which, at material times was required.

**48.** As the end of 2017 approached, the Plaintiff still had not made any application to amend the title in the necessary manner, despite having been put squarely on notice of that, necessity in the manner I have explained. Therefore, and again illustrating that it was the Defendant making every effort to progress matters, in circumstances there was silence and inaction on the part of the Plaintiff, the Defendant's solicitors wrote again, by letter dated 15 November 2017, to the Plaintiff's solicitors. I will presently refer to the contents of that letter during the course of this ruling, but ultimately, on 31 January 2018, that the Plaintiff issued an application to substitute Mr Lorcan Birthisle as Defendant, and that was grounded on an affidavit sworn on 19 January 2018 by Mr. Brian McMahon, solicitor for the Plaintiff.

**49.** At para. 4 of the said grounding affidavit, Mr. McMahon made averments to the effect that, prior to issuing the proceedings, a Ms. Peggy Hughes of his firm contacted the State Claims Agency, by phone, on 27 November 2015 and that an individual whose name Ms. Hughes recorded as "Mary" -

without any surname - indicated that Michelle Rabbette, Clinical Claims Manager, should be named as Defendant .

**50.** He averred at para. 5 that, on 15 November 2017, Messrs BLM solicitors wrote to his firm indicating that Mr Birthisle was the nominee to represent the hospital. He exhibits the 15 November 2017 letter. It will, of course, be noted that the question of the Plaintiff having named the wrong individual is not a question which was raised for the *first* time by Messrs. BLM in that 15 November 2017 letter. Rather, in the manner already examined, it was approaching a full year earlier – i.e. by letter of 6 December 2017 - that that was made known to the Plaintiff.

**51.** It is appropriate for the purposes of this ruling to note what was stated in the letter from the Defendant’s solicitors of the 15 of November 2017, and I now quote its contents verbatim:-

*“Dear Sirs,*

*We refer to our telephone conversation with Peggy on the 3<sup>rd</sup> of November 2017.*

*We have been attempting to speak with your Mr. McMahon since February of this year without success. When we spoke with your receptionist on the 26<sup>th</sup> of April, we explained the issues in the proceedings and the need for the title of the Defendant in the order to be changed and for some action to be taken and we were advised that Mr. McMahon would be informed of this and would deal with the matter. We have heard nothing further from you.*

*We again telephoned your office on the 3<sup>rd</sup> of November 2017, and we were once again unable to speak with Mr. McMahon as he is out of the office. The position in this case is very unsatisfactory.*

*1. You have issued proceedings against a solicitor who was at the time a member of staff within the State Claims Agency and is clearly not an appropriate person to be named as the Defendant, by way of nominee for St. James Hospital. Moreover, that solicitor, Ms. Michelle Rabbette, has since left the State Claims Agency and is not currently in practice. She remains very concerned that her name appears on the title of these proceedings as the Defendant.*

*2. In December 2016, we wrote to you asking you to simply apply to amend the title of the Defendant in these proceedings to Lorcan Birthisle who is the agreed nominee for any claim against St. James Hospital. Lorcan Birthisle is the CEO of the hospital and it is the practice that the proceeding CEO is the named Defendant in any proceedings involving St. James Hospital.*

*3. We indicated on 9 December 2016 that once the proceedings were duly amended; we would enter an appearance on behalf of the correctly named Defendant and proceed to deal with the claim in the ordinary way. Your delay in dealing with this simple request has prevented any progress in the proceedings. It has also resulted in a member of staff’s good*

*name erroneously continuing to appear on the title of proceedings concerning clinical negligence.*

*4. Your inactivity in dealing with our request cannot be allowed to continue. We would ask you to confirm that you will apply within 14 days for the appropriate order, failing which we shall consider options available to ensure that Michelle Rabbette's name is removed from these proceedings.*

*You will appreciate that we have been more than patient. It is now also more than a year since we initially made this request..."*

**52.** It is a statement of the obvious to say that references in the foregoing letter to the Plaintiff's delay are entirely accurate. References to that delay having prevented any progress are equally accurate. References to inactivity are also correct. It is also entirely correct that, as well as 'making all the running', it was the Defendant who exhibited no little patience.

**53.** An order ultimately was made by the Master of the High Court on 12 April 2018, amending the title by substituting the Defendant, which order was perfected on 20 April 2018. This was over 1 year and 4 months after the Plaintiff was informed of the need to make the amendment application.

**54.** In addition to 11 months of post-commencement delay (regarding service) it seems to me that 1 year and 4 months of further post-commencement delay can fairly be 'laid at the door' of the Plaintiff, bringing the 'running total', so far, to 2 years and 3 months delay. By contrast to the Plaintiff's delay, an appearance was entered speedily for the Defendant, dated 14 May 2018.

**55.** I now return to a topic I flagged earlier, namely, the question of a 'late start'. For the purposes of determining that question it seems to me that the following is relevant. The alleged wrongs are said to have occurred at some unidentified time *prior* to November 2011. Despite this, the proceedings were not issued until December 2015. Furthermore, they were not served until November 2017. That seems to me to allow for a finding of pre-commencement delay. In other words, these are proceedings in which the Plaintiff made a 'late start'. I am fortified in that view by the reality that, when issued (and they were issued without any 'letter before action' or initiating 'letter of claim') the title to the proceedings was incorrect and, furthermore, despite the Defendant making this clear to the Plaintiff and putting the Plaintiff squarely on notice that an amendment application would need to be made before an Appearance could be entered, it took the Plaintiff a further 16 months to do so. All the while, as we now know - though the Defendant did not know it at that juncture - there had been no compliance with the requirements of the 2004 Act. Furthermore, if the Plaintiff did not for some reason understand the obligation to obtain a report from a medical expert prior to the proceedings being issued, the Plaintiff's solicitor was (i) put on notice of this and (ii) called upon to obtain such a report by means of the 17 April 2017 letter from the Defendant's solicitors.

**56.** Given the foregoing, it seems to me that these were proceedings in which a late start was made, and I am fortified in this view by information which emerged *after* the present motion was issued, namely, the information conveyed in an affidavit sworn by the solicitor currently on record for the Plaintiff, who understands that the alleged wrong is said to have occurred some 22 or, by now, 23 years ago.

**57.** For these reasons, it does not seem to me that it could be gainsaid that this was a claim in which a late start was made, and why is that relevant? It is relevant because where a Plaintiff makes a 'late start' to proceedings, they bear an extra burden to prosecute their claim in a timely manner. That proposition reflects the approval by our Superior Courts of an oft-quoted statement by Lord Diplock in *Birkett v. James* [1977] 2 All ER 801:

*"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."*

**58.** On the topic of a 'late start', it seems to me that there is not a shred of evidence put before the court which would provide an explanation for, still less an excuse for, the late start. Insofar as there is a reference in the indorsement of claim to the Plaintiff suffering from spina bifida and because of this medical condition she is unemployed, that is a world away from explaining either on affidavit, or in correspondence, or in the proceedings themselves, *why* the Plaintiff was in a position to cause legal proceedings to be issued on her behalf in December 2015, but *why*, if it be so contended, it was not possible for this to be done a year or two, or a decade before. Furthermore, *why* no proceedings were issued when the Plaintiff achieved her majority is something entirely unknown.

**59.** What *is* known is that once issued, the proceedings were *not* progressed with all due speed. They were not progressed with anything like even reasonable expedition.

**60.** As I have explained earlier eleven months after they were issued, they were served, in November 2016, whereupon, in December 2016, the Defendant immediately and promptly called for the necessary amendment of the title so that an appearance could be filed. This request does not appear to have resulted in any action on the Plaintiff side, and, as examined, it was the Defendant's side attempting repeatedly to make progress until, ultimately, the order amending the proceedings was perfected in April and an appearance filed in May. By this stage, six and a half years had elapsed since November 2011 which is the point prior to which the alleged wrong occurred. By the stage of April / May 2018, some three and a half years had elapsed since the proceedings were issued and that, it seems to me, can all fairly be called post-commencement delay for which the Plaintiff is exclusively responsible.

**61.** The Defendant, again in stark contrast to the inaction on the part of the Plaintiff, delivered promptly a combined request for further information and a notice for further and better particulars and this was done on 30 July 2018.

**62.** The request for further information was expressly made in accordance with s.11 of the Civil Liability and Courts Act 2004 which I have referred to, and that sought inter alia details of any prior personal injuries actions and awards and details of any previous or subsequent PIAB applications.

**63.** The notice for particulars which sought replies within 28 days, can fairly be said to be one which sought the specifics and specificity which was singularly and entirely lacking in the personal injuries summons. To see examples of the particulars which the Defendant was forced to seek, the following few examples will suffice:-

- (i) please provide the date on which the surgery for realignment was carried out;
- (ii) please confirm that the first date on which negligence is alleged is the unspecified date in November 2011 and please provide the actual date of same;
- (iii) if negligence is alleged earlier than this, please set out and provide particulars on the date(s) on which it is alleged the Defendant was negligent;
- (iv) further, please set out clearly what acts or omissions are being alleged to constitute negligence and provide the dates of those acts or omissions that are being relied on;
- (v) for the avoidance of doubt, if your case is either that a staple was wrongly inserted or that the Defendant failed to diagnose the staple as a cause of the Plaintiff's complaints, please say when the staple was inserted;
- (vi) with regard to the period between November 2011 and 3<sup>rd</sup> November 2013, can you please provide particulars of any medical practitioner the Plaintiff attended on other than at the Defendant hospital and in so doing, please provide the name and the date of attendance and the reason for attendance.

Although there are a number of further particulars sought, that certainly gives a flavour of what was, as I say, entirely absent from the personal injuries summons as served.

**64.** It seems to me that taking what might be called a 'view from the bridge' as of the end of July 2018, and bearing in mind the period of time which had elapsed on the Plaintiff's side up to this point, it was entirely reasonable to anticipate that the Plaintiff would thereafter progress her claim with all due expedition, namely, with all due speed and a determination not to allow further delay occur. The evidence discloses that this is not at all what happened.

**65.** The Plaintiff did not provide replies to particulars within 28 days or throughout the remainder of 2018.

**66.** Nor did the Plaintiff take any step to progress her claim throughout the entire of 2019.

**67.** Nothing was done on the Plaintiff's side throughout the entire of 2020.

**68.** By letter dated 30 March 2021, the Defendant's solicitors wrote to the Plaintiff's solicitors, and it is appropriate to quote from that letter which comprises Exhibit SK 2 to Ms. Kelly's first affidavit:-

*"Dear sir,  
We refer to the above matter.*

*The Plaintiff's proceedings were issued with the incorrect title of the Defendant. The proceedings were issued on 7<sup>th</sup> of December 2015 and a copy served on the State Claims Agency by letter dated 15<sup>th</sup> November 2016, a matter of weeks before the expiration of the personal injuries summons.*

*We entered into extensive correspondence with you, indicating that we could not enter an appearance on behalf of the named Defendant as she was a solicitor engaged in the State Claims Agency and not the appropriate nominee for the intended Defendant. Ultimately, an order amending the title of the Defendant was made on the 12<sup>th</sup> of April 2018. Subsequent to the said order we entered an appearance in May 2018 and raised a combined request for further information and particulars on the 30<sup>th</sup> of July 2018.*

*Given the absence of detail in the personal injuries summons, the combined request for particulars and further information was furnished for the purposes of identifying the claim against the Defendant and also to try to ascertain both the period of care about which the Plaintiff claims, and the allegations regarding that period of care to enable the Defendant to identify thereafter the relevant clinicians concerned with the allegations and obtain detailed instructions.*

*In the ensuing period, the Plaintiff has failed and/or neglected to furnish the appropriate replies to the combined request for further information and notice for better particulars with the result that the Defendant is now prejudiced in its investigation of these proceedings due to the passage of time.*

*It is our impression that the Plaintiff does not wish to proceed with these High Court proceedings and if so we would ask you to please let us have notice of discontinuance to conclude matters. We would confirm that if notice of discontinuance is served within the next **14 days**, our client will not proceed to seek costs against your client but will bear its own costs to date.*

*In the alternative, we shall issue a motion seeking to have the Plaintiff's claim dismissed for want of prosecution at the expiration of **14 days** from the date of this letter, and if successful, we shall seek an order for costs in the motion and in the proceedings.*  
*Yours faithfully".*

**69.** It could hardly have been said to be unreasonable for the Defendant to have adopted this approach. It also bears emphasis that, as and from the raising on 30 July 2018 of the notice for further and better particulars and requests for further information, the 'ball' was firmly in the Plaintiff's 'court'. In other words, this is not a situation where there was any acquiescence or culpable delay on the part of the Defendant. It was not for the Defendant to answer the replies it was seeking. That obligation rested on the Plaintiff, and it is an obligation they entirely failed to discharge. It does not seem to me that in those circumstances they can characterise any passivity on the part of the

Defendant as delay, still less culpable delay, and earlier in this ruling I referred to post-commencement delay i.e. (i) 11 months in respect of service before the writ went 'stale'; (ii) the 1 year and 4 months it took for the title to be amended, added to which is (iii) the period commencing as of 1 August 2018 which was the Defendant's delay unbroken by this letter of 30 March 2021, sent approaching 4 years later). I say it was unbroken because it is not as if the 'sleeping dog' of the proceedings issued by the Plaintiff awoke and became the prime mover. The facts paint an entirely different picture.

**70.** The court is entitled to take it that, by her actions, the Plaintiff had given a very clear indication of no intention to progress these proceedings at all, and it was entirely reasonable that, in the circumstances which pertained as of 30 March 2021, that the Defendant's solicitors would simply invite a notice of discontinuance. Even if measured up to that point alone, the Plaintiff's post-commencement delay is 6 years and more.

**71.** Despite this letter of 30 March 2021, there was no response by the Plaintiff's side and to say that this is surprising is a gross understatement given what had occurred up to that point.

**72.** Again, speaking to the reality that where any movement has happened it has been at the instigation of the Defendant, it was the Defendant's solicitors who had to write a further letter. This was sent on 22 June 2021, referring to a motion to dismiss on delay grounds. Shockingly, and I do not use that term lightly, there was no response to that letter. By this stage, we are of course six years after the writ has issued and no action whatsoever has been taken by the Plaintiff, other than to make, at a very late stage, a necessary application to amend its own proceedings which was done at the pressing of the Defendant.

**73.** A notice of intention to proceed was served on 26 July 2021. That plainly was not a step taken by the Plaintiff to progress its claim. Rather, it reflected the complete inaction on the part of the Plaintiff, in particular, the utter failure to reply to particulars despite the passage of years. It does not seem to me that the Plaintiff can place any reliance on the reality that it was the Defendant who was seeking any movement, *qua* notice of intention to proceed as a precursor to the motion which motion was plainly flagged in advance, as I say, in March of 2021.

**74.** It is an obvious observation to make, but, as of July 2021, we were approaching a decade after the Plaintiff claims to have suffered adverse symptoms in respect of an alleged wrong carried out some time prior to that. Again, shockingly to my mind, there was no action on the Plaintiff's side in response to the correspondence I have referred to, in 2021, as sent by the Defendant, nor was there any action by the Plaintiff in the wake of the notice of intention to proceed.

**75.** As the end of 2021 approached, and without the Plaintiff taking any steps to progress the claim, the Defendant issued the present motion and did so on 17 December 2021.

**76.** It is appropriate to note that there was a change of solicitor on 14 March 2022, wherein Messrs. Burns Nolan LLP confirmed that they had come on record for the Plaintiff. As will presently be touched on, they received the Plaintiff's file from her former solicitors in early February 2022.

**77.** By notice of change of solicitor, dated 9 January 2023, Messrs. Clyde & Company Ireland LLP solicitors came on record for the Defendant .

**78.** I now turn to what emerges as a result of the Defendant's motion. From paras. 3 to 6 inclusive of the affidavit sworn on 26 April 2022, the Plaintiff's solicitor, Mr. Stephen McGrath, makes the following averments:-

*"Approximately **22 years ago, the Plaintiff underwent a procedure** in Crumlin Hospital to align/correct a problem she was having with her foot. I am instructed that during the procedure a staple was inserted to help with the alignment. **In the following years I am instructed that the Plaintiff suffered from infections** to the bone which caused ulcers and considerable pain to the Plaintiff. I say that the Plaintiff's instructions are that she subsequently was in and out of hospital for bone infections as a result of which she had to constantly have recourse to courses of antibiotics to control the infections..."* (emphasis added)

**79.** I pause here to say that the use of the words "in the following years" after reference to undergoing a procedure approximately 22 years ago, on the face of it, would clearly seem to be a relating of the former to the latter. The averment at para. 4 was in the following terms:-

*"I am further instructed that that at one stage consideration had been given by a previous consultant to amputate the Plaintiff's foot as a result of the infections from which she was suffering and the pain she was experiencing..."*

**80.** I pause here to say that this is an averment which was not even hinted at in the personal injuries summons but it is, with respect, as vague as the pleas contained in the personal injuries summons and no other interpretation is possible when one considers the use of the words "at one stage consideration had been given by a previous consultant".

**81.** Moving ahead to paras. 5 + 6, the following averments are made:-

*"5. I am further instructed that in and around the 31<sup>st</sup> of October 2013 her current treating consultant advised the Plaintiff after conducting an MRI scan that there (sic) something showing on an MRI scan and that he was not sure what in fact it was, but that they would have to remove it as soon as possible. In addition, I am advised that the treating consultant advised the Plaintiff that whatever was in her foot may have been the entire cause of her bone infections. I say and believe that a staple was subsequently removed during the course of a major operation on the 2<sup>nd</sup> of November 2013.*

*6. I am instructed that since the removal of the staple the Plaintiff has not suffered from any bone infections..."*



**82.** I pause to say that the averment that a solicitor is advised that a treating consultant advised the Plaintiff that whatever was in her foot may have caused infection, seems to be the basis upon which these proceedings were issued. In other words, a possible link is made in a third-hand manner, between the presence of something in the Plaintiff's foot, and injury.

**83.** However, and without wishing to be disrespectful, it is uncontroversial to say that few lawyers will be unaware that the tort of negligence comprises three essential elements, which as all of us are taught in first year tort lectures, amount to (1) the existence of a duty of care being established, (2) breach of that duty of care, and (3) damage. Nothing averred as having been advised to the Plaintiff by a treating consultant speaks to that crucial second element of the tort of negligence. It speaks to the third, but nothing whatsoever speaks to breach of duty.

**84.** Mr. McGrath proceeds to make averments in relation to what might be called the procedural history or the administrative history and avers at para. 11 that the Plaintiff's file relating to the case was transferred to his firm on 8 February 2022. He avers at para. 12:-

*"I say that as appears from an inspection of the file certain attempts were made by the previous solicitors on record for the Plaintiff to obtain a report from a suitably qualified medical expert. I say however that no such report was ever obtained by these former solicitors".*

**85.** It does not seem at all unfair to say that those averments are made in the most general of terms. What is meant by "*certain attempts were made to obtain a report from a suitably qualified medical expert*" is utterly unknown.

**86.** Moving ahead, it is averred at para. 13 that:-

*"I say that I have explained to the Plaintiff the position relating to her legal proceedings and what has transpired since May 2015. I say that while the Plaintiff was made aware of the fact that a medical report had not been obtained, she was not aware of the precise process by which a medical report could be obtained from a suitably qualified expert and/or the consequences of the ongoing delay in obtaining such a report. I say that the Plaintiff was relying completely on the advice from her solicitors in order to advance the said proceedings".*

**87.** At the risk of repeating previous comments, these are averments which simply provide no detail which could conceivably relate the *delay*, on the one hand, to an explanation or *excuse* for the delay, on the other. They are entirely devoid of detail which would enable that 'dose/response' relationship between (i) any proffered explanation or excuse and (ii) the delay, to be established.

**88.** At para. 14 the following is averred: "*I say that at all times it has been and continues to be the Plaintiff's desire to prosecute her claim*". I pause here to observe that each and every Plaintiff who causes proceedings to be issued on their behalf bears the obligation to prosecute them with at least reasonable expedition. A heightened obligation arises in circumstances where a Plaintiff made a late

start as this Plaintiff undoubtedly did. Whilst the averment is made that the Plaintiff was at all times desirous of prosecuting her claim, there is no explanation whatsoever as to why this desire to prosecute the claim did not translate into the action necessary in terms of prosecuting it.

**89.** Para. 14 continues with the following averments:-

*"I further say that from an examination of the file, the Plaintiff paid to the offices of Messrs. Coonan Cawley solicitors a sum of £1,000 Sterling which she understood and believed was to be used for the discharge of a report from Mr. Ian People, MD, FRCSI in the UK. I say that it was only in August 2019 that the Plaintiff was formally requested to discharge the costs of a report then being sought. I further say that ultimately the Plaintiff contacted Mr. People directly to be informed that he had retired in 2020 and could not now provide such a report".*

**90.** Those averments disclose allegations of a serious nature and I want to stress in the clearest of terms that this Court is not asked to, and cannot, make any findings of fact in relation to such allegations. What can be said is that there is simply no detail in relation to, for example, when the Plaintiff caused a request to be made for the requisite medical report and that is in circumstances where the Plaintiff, at all material times, had legal advice available to her. That is self-evident from the point at which legal proceedings are issued and it is not unfair to infer that proceedings were not 'conjured up' on the moment they were issued, but a certain amount of taking instructions and liaising with legal professionals preceded that. Bearing in mind that whilst the Plaintiff is not a legal professional and relies on the expertise and work of legal professionals, it does not seem to me that the jurisprudence states that, in delay applications any and all 'dropping of the ball', to put it in crude terms, which a solicitor might have permitted to happen, will constitute an excuse for a Plaintiff who is intent on maintaining proceedings. I am giving due note to and taking full account of the fact that non-lawyers rely on lawyers, but it would be to my mind entirely contrary to public policy if the pace of legal proceedings was always set with reference to such actions of a solicitor, in other words, if inaction on the solicitor's part was always and ever an excuse for all delay irrespective of how long, and that seems to me to be particularly so given that this is a case which discloses significant pre-commencement delay.

**91.** What can also be said in relation to para. 14 is that there is no setting out of what steps from August 2019 (and I use that date because it is specifically said to be when the Plaintiff was called on to discharge costs for a medical report) were taken from that point to obtain the necessary medical report. One also has to bear in mind that the reference to August 2019 appears in an affidavit sworn in April 2022.

**92.** Moving ahead to para. 15, the following is averred:-

*"I say that at para. 11 of the affidavit of Sarah Kelly it is averred that there is an absence of detail in respect of the wrong alleged and the circumstances surrounding same as a result of which the Defendant has been unable to investigate the claim. I say that para. 5 of the Plaintiff's indorsement of claim states 'on the 3<sup>rd</sup> of November 2013 the Plaintiff underwent the surgical removal of a staple from the right distal tibia with wound washout at the*

*Defendant hospital. This resulted in the alleviation of her condition in the right lower limb, and she has not suffered from infection of the subject area since that time'."*

**93.** If that is intended to be a plea that a wrong occurred when the Plaintiff underwent a surgical procedure in the Defendant hospital in November 2013, it is grossly insufficient by way of indicating *what* the alleged wrong is. If it is said to relate to a procedure which the Plaintiff underwent years *before* it is equally inadequate. In short, it does not indicate the basis of negligence, it does not indicate what the wrong is said to be, and one must of course keep in mind the backdrop here, because, as was known on the Plaintiff's solicitor's side at all material times - and it does not seem to me that I can assume that it was not known to the Plaintiff, and I say this in circumstances where the Plaintiff has chosen not to swear any affidavit - one must keep in mind that there has never been and continues to be no expert medical opinion. Whereas it is averred at para. 16 by Mr. McGrath that the particulars of negligence and breach of duty do specify certain acts of negligence that are being alleged, the reality is that no expert has ever offered a view that any negligence has occurred.

**94.** As I say, the Plaintiff simply has not set out what the claim is, what she says was the wrong, and/or what she contends should have happened, but did not happen.

**95.** Moving ahead to para. 17, the following averment is made:-

*"I say and believe that subject to the determination by this Honourable Court, whereas the Plaintiff acknowledges no report from a suitable qualified expert has as yet been obtained the particulars furnished to the Defendant, although limited in nature, were sufficient to enable the Defendant to identify the negligence being alleged and the circumstances surrounding same..."*

I pause to say that this is simply not so. It is impossible, in my view, to divine what the wrong is said to be from the pleas in the personal injuries summons. It also is, as counsel for the Defendant submits, an averment made on behalf of a Plaintiff alleging negligence who knows that, not only is it not particularised, no medical expert has advised that *any* negligence has arisen. That that comment seems to me to be crucial to keep in mind when one looks at the following averments at the end of para. 17:-

*"I further say and believe that the medical records for all treatment received by the Plaintiff are still available for examination by the Defendant as a result of which the Defendant subject to the determination of this Honourable Court will not be unfairly prejudiced in the defence of the Plaintiff's proceedings".*

**96.** I ask the following rhetorical questions: What records? Records of what treatment? And I ask those questions because it is simply not known (i) who is said to have carried out the treatment; (ii) what is said to have gone wrong; and (iii) where; or (iv) when the wrong is said to have occurred. In short, what is supposed to be the wrongful treatment is utterly unclear and, therefore, it is simply impossible in that scenario - bearing in mind that no independent medical expert has said any negligence arises - to identify records of potential relevance. The basis for the averment that medical

records for all treatment received by the Plaintiff are still available is not understood. Nor will, in my view, any number of records compensate for the reality that as the personal injuries summons itself makes clear (and I am referring to para. (f) thereof) witness evidence will be essential in terms of determining matters of fact at any future trial.

**97.** To complete the analysis of the averments made on behalf of the Plaintiff in this 26 April 2022 affidavit, it is averred at para. 18 that, subject to this Court, it would not be just to have the Plaintiff's proceedings struck out in circumstances where she was unaware of the consequences which would result in not having a report available and/or the consequences of not pleading the specific nature of her claim and that particulars of negligence being alleged. That does not seem to me to be an averment which provides an explanation for the Plaintiff's delay or still less an excuse for it.

**98.** The last averment made comprises para. 19 and it reads as follows:-

*"I pray this Honourable Court that having regard to the circumstances of the Plaintiff, the date in which instructions were originally given to her original solicitors, the legal proceedings subsequently issued, her understanding that a report was being obtained, the nature of the case and the fact that the medical records are still available to the parties herein not to strike out the Plaintiff's claim. I further say that every step will be taken to expedite the within proceedings on behalf of the Plaintiff if allowed by this Honourable Court and obtained a relevant report from a suitably qualified expert".*

**99.** I want to make three comments at this stage. It is averred that there was an understanding on the part of the Plaintiff that a medical report was being obtained, but in circumstances where the Plaintiff has chosen for whatever reason not to swear any affidavit, there is no detail before the court about, for example, when she was first made aware of the fact that a medical report was required and being obtained. If one looks at the combination of the averments in para. 13 and the averments in para. 19, there is simply no indication of when the Plaintiff was made aware of the necessity for a report and that it was being obtained. There is simply no evidence before the court on which it can base a finding of fact that, for example, from a particular point in time, the Plaintiff understood that all was well from the perspective of adequate efforts being made to obtain the necessary report, still less does the court have any evidence against which it can benchmark the reasonableness, or otherwise, of any patience on the part of the Plaintiff, to put it that way. Again, these averments are simply devoid of the necessary detail which would provide an explanation or an excuse for what is delay of a very significant sort and, in my view, undoubtedly inordinate and accepted as so very fairly by counsel for the Plaintiff.

**100.** By way of a second comment, it is averred at para. 19 that *"every step will be taken to expedite the within proceedings on behalf of the Plaintiff if allowed by this Honourable Court and obtain a relevant report from a suitably qualified expert"*. That averment was made on 26 April 2022. It was made against the backdrop of the Plaintiff's file being made available in early February 2022 to the current firm on record. Yet, we find ourselves at the very end of July 2023 with no such medical expert's report available, and that of course (even measured from April) is 1 year and 3 or 4 months.

That cannot be, in my view, consistent with an averment that every step will be taken to expedite the proceedings specifically to obtain the relevant report, and it gives me no pleasure to say so, but it does evidence (i) further delay of a significant sort of the post-commencement type, heaped on top of (ii) the post-commencement delay which itself was (iii) in the wake of by a late start, namely, extensive pre-commencement delay (with the underlying events, insofar as one can glean, said to go back some 23 years by this stage).

**101.** At the risk of repetition, it is fair to say that this affidavit of 26 April 2022 does not at all explain what steps were in fact taken, if any, by the Plaintiff's former solicitors at any stage to obtain the requisite medical report. Very obviously, there can be no criticism of the Plaintiff's current solicitor for delay which occurred *prior* to them receiving instructions, obtaining the file and then coming on record in 2022. Self-evidently, that means nothing offered by them can conceivably explain the delay in respect of the period prior to them coming on record, and, again, although I am repeating myself, this is a Plaintiff who has decided not to swear up to the factual position herself.

**102.** Relating the contents of that replying affidavit to the delay, and relating it also to the nature of the proceedings, one cannot lose sight of that it was as long ago as July 2018 that Particulars were sought. That period of delay is inordinate on its own terms - and is compounded by the delay which preceded it - delay which continues.

**103.** The affidavit was sworn on 26 April 2022 without the Plaintiff bringing an end to her own delay by causing, with such assistance from solicitors and experts, replies to particulars to be delivered which, as I say, were then outstanding for approaching four years.

**104.** What emerges, it seems, is that the Plaintiff finds it impossible to reply to the particulars raised in July 2018 by reason of the fact that she does not have, and never had, a medical expert's report. That allows for a finding, albeit in the context of this application to dismiss on delay grounds that the Plaintiff does not know *if* she even has a claim. She never knew that. She cannot know whether there is any credible basis for her claim, never having had a report from a suitably qualified expert (and as we also know none was obtained during the interregnum between the 26 April 2022 affidavit sworn on behalf of the Defendant and the 26 July 2023 affidavit, which I will presently come to).

**105.** Ms. Kelly's affidavit of 24 January of this years can be summarised by reference to certain averments as follows. At para. 8 she avers that on 25 July 2022, the motion was further adjourned on consent.

*"The motion was adjourned with agreement that the Plaintiff provide updated particulars of negligence and/or breach of duty based on expert evidence prior to the adjourned date. I say that the motion was adjourned to 30 January 2023".*

**106.** At para. 10 it is averred:-

*"I say that the Defendant has yet to receive updated particulars of negligence and/or breach of duty based on an expert report from the Plaintiff. I say that the proceedings were issued*

*over six years ago, during which time the Plaintiff has had ample opportunity to obtain an expert report. I say that the Plaintiff's current solicitors came on record on the 21<sup>st</sup> of March 2022 and have had conduct of this matter for ten months, during which time they have not provided updated particulars of negligence and/or breach of duty. I say that the Defendant has agreed to two adjournments, the latter of which was on the basis that updated particulars would be provided in advance of the hearing date of the motion on 30<sup>th</sup> of January 2023. This has not occurred. The Plaintiff has had more than adequate time within which to obtain an expert report and provide updated particulars of negligence and/or breach of duty if the said expert's report was critical of the care afforded to the Plaintiff by the Defendant."*

**107.** At para. 11 it is averred:-

*"I say that it is an abuse of process to continue with the claim without the benefit of an expert report. I say that the Plaintiff continues to be guilty of unconscionable delay in prosecuting the matter. The Plaintiff's claim should be dismissed for want of prosecution and/or as representing an abuse of process".*

**108.** It is appropriate to tie those averments to certain averments made by the same Ms. Kelly in the affidavit grounding the motion as sworn in December 2021, wherein, at paras 11 and 12 she made the following averments:-

*"11. As is apparent from a perusal of the personal injuries summons, there is an absence of detail in respect of the wrong alleged and the circumstances surrounding same as well as the particulars of negligence being alleged and consequently the Defendant has been unable to investigate the claim and with the passage of over ten years since the alleged cause of action may at this juncture be prejudiced in its ability to meet the claim".*

*12. I say that it is incumbent upon the Plaintiff to give some justification or explanation for the unconscionable delay in prosecuting the matter and that in the event of the Plaintiff failing to do so, I respectfully submit the Plaintiff's claim should be dismissed for want of prosecution and/or as representing an abuse of process".*

**109.** What is disclosed in those averments is, to my mind, something which speaks directly to prejudice. There is an uncontroverted averment made that, as a result of the delay and in the context of the passage of time of over ten years since the alleged cause of action (and that of course was an averment made in circumstances where the Defendant did not at that stage know that the passage of time since the alleged cause of action dates back well over two decades) there was prejudice to the Defendant, in that it was unable to investigate the claim given the passage of time. In the manner that I will presently come to, this is prejudice of a real kind, and it arises for the reasons I have explained in the ruling, because it is as yet unknown, even to the Plaintiff, if there is a negligence claim. That being so, it is simply an impossibility for this Defendant, despite year turning into further year of delay, to conduct any investigations.

**110.** Turning, then, to the last of the affidavits, and there are two, Ms. Jennifer O’Sullivan swore an affidavit on 1 February 2023. What emerges from that affidavit are the following facts. No expert appears to have been contacted until a letter of 17 October 2022 was sent to a Ms. Bach, consultant trauma and orthopaedic surgeon at St. Thomas Hospital, London. Even looked at with reference to the involvement of the Plaintiff’s current solicitors, in objective terms, this is some nine months since the examination of the file. A reminder was sent on 11 November 2022 and a reminder on 9 December 2022, and it is averred at para. 8 that no response was received from Ms. Bach. It is also averred that without a full expert medical report the Plaintiff is prejudiced in the application of her claim.

**111.** Several observations can fairly be made. There was, on any analysis, an extreme urgency and the need for every resource to be deployed in terms of securing an expert’s report and by that, I mean a medical report from some expert.

**112.** It does not seem to me that this urgent need is reflected in the efforts which the Plaintiff caused to have made. The court, it seems to me, is also entitled to take judicial notice of the fact that Ms. Bach is not the *only* clinician in these islands. In other words, it seems not at all unfair to suggest that, quite apart from the delay in even requesting a report from that expert, if there was any delay in that expert responding with respect to an examination time and the time when a report will be issued, it behoved the Plaintiff to make suitable alternative arrangements to see if *another* expert could produce a report quicker. As to the averment that without a full expert medical report the Plaintiff is prejudiced in her claim, it seems to me not at all unfair to say that this prejudice is entirely the result of choices made by either the Plaintiff or her legal advisors.

**113.** The final affidavit is one sworn by Mr. McGrath on 26 July 2023, and what emerges from that includes the following, which I quote verbatim from paras. 6, 7 and 8:-

*“6. I say that when contacting this office, [and “this office” is a reference to Ms. Bach’s office, the orthopaedic surgeon] I spoke to Ms. Julie Cregan by telephone on the 26<sup>th</sup> July 2023, requesting that they would confirm that the report is being prepared and the anticipated timeline for when the report would be finalised, and I was surprised to note that Ms. Cregan referred to an email being furnished to my office previously on the 27<sup>th</sup> of April 2023 which having conducted their review, unfortunately went into our spam email and went unseen. Ms. Cregan advised me over the phone that Ms. Bach would be in a position to prepare a report for the court but it would take three to four months.*

*7. I say that it is not unreasonable for a medical report of this nature to take quite a considerable time to be prepared as there is a large volume of medical records which have to be reviewed by Ms. Bach, orthopaedic surgeon, for the preparation of this report.*

*8. I say that in all the circumstances it is just that the Plaintiff be allowed to obtain the medical report and I believe it would be extremely prejudicial to the Plaintiff to strike out the proceedings in the circumstances set out herein”.*

**114.** It does not seem to me that the Plaintiff, through her solicitor, was demonstrating anything like the urgency required of a Plaintiff in her situation for a single call to be made on 26 July 2023 to try and expedite a report in respect of which a request had been made of a single clinician, with no alternative clinicians being contacted, given the ongoing delay. We have already seen the facts. The report, it is fair to say, was requested after a period of delay (it was not requested until October 2022, having regard to the file being examined in February and the former coming on record thereafter). It seems to me that things 'net down' to a single phone-call on the eve of this motion in the wake of just three written communications and this is in the context of the present motion having issued 18 months earlier.

**115.** We are still in a position where the Plaintiff has not obtained a medical report, and for the reasons given, cannot know whether this is even a claim which has a credible basis.

#### **Inordinate delay**

**116.** As I already mentioned - and it is very fairly accepted by counsel, who valiantly opposed this application with skill and provided the assistance to the court one would expect of someone acting to the highest standards of his profession - inordinate delay is, without doubt, established and is accepted.

#### **Inexcusable delay**

**117.** Turning to the question of inexcusable delay, in the Court of Appeal's decision in *Cave, Collins J.* at p. 28 made clear that: "*Where inordinate and inexcusable delay is demonstrated, there has to be a causal connection between that delay and the matters relied on for the purpose of establishing that the balance of justice warrants the dismissal of the claim.*" Earlier, the jurisprudence summarised by him emphasises that there also needs to be a causal connection also between (i) such excuses or explanations as are proffered on the one hand, and (ii) the delay they are said to excuse.

**118.** In the present case I can find no causal connection. I am entirely satisfied that this is delay which the facts do not present any excuse for.

**119.** I reach these findings very conscious of the submissions made by Counsel who contends that the Plaintiff is completely blameless in relation to delay. I do not doubt the sincerity with which that submission is made, but it seems to me that, with respect, it is a submission which is made in an evidential 'vacuum'. In other words, it may or may not be the case that the Plaintiff is entirely blameless, but there is simply inadequate evidence before this Court of what might be called the 'granular detail' from the Plaintiff, as to (i) what she did or did not do; (ii) what she did or did not instruct; (iii) what she did or did not know and; (iv) what she was or was not advised of.

**120.** It simply is not open to this Court to hold on the evidence before it that as a matter of fact the Plaintiff is completely blameless, and, therefore, the court is thrown back on the well-established and uncontroversial proposition that these were the Plaintiff's proceedings and she bore the



obligation to ensure that they were progressed with due expedition. That has not happened, and it seems to me that no causal connection between anything said to constitute an explanation, and the delay, has been made.

**121.** As to again the valiant efforts made by counsel for the Defendant to point to explanations, reference was made to the amendment of the proceedings on 12 April 2018 and to the notices of change of solicitors. It was also pointed out that the current solicitors came on record in March of this year. These, with respect, are not explanations for the delay which, at a minimum is 6 years of post-commencement delay (but to my mind, significantly more), piled on top of pre-commencement delay and a 'late start' to proceedings.

**122.** In submissions, it was said that there was a great deal of difficulty in obtaining a medical report, or that was the thrust of the submission, and there was an exchange at that point between myself and counsel. I made clear that I did not feel it was fair to counsel to be asked to be the conduit for evidence of fact, particularly in circumstances where, within a matter of a day or two ago, the position has been averred to by the solicitor currently on record for the Plaintiff. It therefore seems to me that there is no evidential underpinning for the submission that there were any significant difficulties in obtaining a medical report at any stage. Those difficulties, significant or otherwise, are simply not averred to. What is before the court is merely a relatively sparse chronology, but the startling facts are that (i) just as no medical report was obtained prior to the proceedings issuing; (ii) it was not obtained in the eleven months prior to the proceedings being served; (iii) nor was it obtained at any point thereafter; (iv) it is unknown entirely when it was first sought, other than; (v) the most recent request which came, it appears, some nine months after the current solicitors came on record and; (vi) to this day, the seeking – with, in my view, less than the requisite sense of urgency – has still not produced a report; (vii) nor is there any evidence that any alternative clinician has ever been asked for a report given the difficulties *if* any (because they are not expressed by the clinician herself) encountered.

**123.** For the sake of clarity, lest it not be already clear, I am entirely satisfied that this is both inordinate and inexcusable delay.

### **Balance of justice**

**124.** Counsel for the Defendant draws this Court's attention to a range of authorities, all of which I have considered. He relies in particular on the Court of Appeal's decision (Donnelly J.) in *Sullivan v. HSE* [2021] IECA 287, in particular para. 110, in which the learned judge stated the following:-

*"110. Although the Defendant relied on the O'Domhnaill principles, the Defendant also raised the issue of the lack of an explanation by the Plaintiff for the delay. As set out at para. 57 above, there is no suggestion that this particular Plaintiff could have been responsible for any of the pre-litigation delay...."*

I pause here to say that this Court is operating in a complete evidential 'vacuum' as to whether or not the Plaintiff in these proceedings has any excuse for the pre-litigation delay which undoubtedly occurred, and it does not seem to me that a reference to, and I mean no disrespect in this, spina

bifida and being unemployed, necessarily gives rise to an automatic excuse. Again, I want to stress that I mean no disrespect to a Plaintiff who suffers from this condition. My point is that there is no linking of this condition or the effect on the Plaintiff of this condition, with any inability to progress proceedings sooner, or to give instructions that they be commenced earlier. Continuing with para. 110, Donnelly J. in *Sullivan* stated:-

*"Unexplained delay is not to be equated automatically with inexcusable or culpable delay (although in an appropriate case an inference may be drawn that there is no reasonable explanation for the delay). **The relevant consideration at issue in the present case is whether the Defendant can have a constitutionally fair trial i.e. a trial which is not beyond the reach of fair litigation, despite the lapse of time** which has occurred."*  
(emphasis added)

**125.** It seems to me that those last observations by the learned judge in *O'Sullivan* were, with respect, to the approach *per* the *O'Domhnaill* principles and, as I said at the outset of this ruling, under the *O'Domhnaill* test, nothing less than fair trial prejudice needs to be established if dismissal is to be justified. In other words, the moving party (the Defendant in this case) must establish *per O'Domhnaill* that there is a real risk of an unfair trial or unjust result, and nothing less will be sufficient to justify dismissal. But that is not the 'lens' through which this Court must examine this matter according to the primary approach in *Primor*; and *per* the *Primor* principles where a Defendant has established both inordinate and inexcusable delay, as this Defendant *has*, the authorities make clear – as touched on earlier – that moderate prejudice is sufficient to 'tip the scales' in favour of dismissal. So, it does not seem to me that *O'Sullivan* offers any 'life raft' to the Plaintiff in the present case.

**126.** I have undertaken the balance of justice assessment very carefully and I have done so very conscious of the constitutionally-protected right of access to the courts to bring and, indeed, to defend litigation. I am conscious, therefore, that if these proceedings are dismissed, it will create a terminal prejudice for the Plaintiff. However, it is fair to say that this cannot be the determinative factor in an application such as this type. Why? Because terminal prejudice is always facing a Plaintiff who finds themselves a respondent in an application of this type. If terminal prejudice, regardless of the weight that this Court undoubtedly is giving it, were always an answer which 'tipped the scales' in favour of allowing the proceedings to continue, no proceedings would ever be dismissed on delay grounds.

**127.** In conducting the balance of justice assessment, it is also fair to say that it has to be done in the factual matrix, and this speaks to the principle articulated in Superior Court authorities that the court must give a bespoke response in every application of the present type. In other words, guidance in terms of what length of delay occurred in other cases, and what might be called the 'moving parts' in other balance of justice assessments are of very limited use.

**128.** This Court has to consider the particular facts and circumstances in the present case, and those particular facts involve a situation where the personal injuries summons did not make any reference

to O. 1A, r. 6 of the RSC. It was not on its face (nor was it according to any correspondence sent at the time by the then-solicitor for the Plaintiff) a 'protective writ' or one issued in that context. There is simply not a hint in the personal injuries summons that there is no medical expert's report. It could not conceivably have taken to be a protective writ.

**129.** As we now know, many years after it was issued, and in the absence of any progress and in the absence of any explanation for the lack of progress, we are in a situation where the entire basis for the proceedings being issued would appear to be what a solicitor understands that a treating doctor advised the Plaintiff, namely, that something in a foot may have caused her complaints. As examined earlier, that does not at all speak to the question of a breach of duty.

**130.** This is a motion which issued in December 2021 and it does seem to me to be relevant in the balance of justice assessment that, in real terms, the Plaintiff has had more than a year and a half to 'put her house in order' yet, even now, there is no medical expert's report. That seems to me to weigh heavily against these proceedings being permitted to proceed.

**131.** Earlier, I touched on the prejudice which, in the manner averred by Ms. Kelly arises, namely, a complete inability on the side of the Defendant even to investigate the claim. That arises because, like 'dominos', the claim is not articulated in a manner capable of being understood, and the 'domino' preceding that is what we now know to be (but only know as a result of the present motion) the complete absence, at any stage, of a medical expert saying that there is a credible basis for negligence proceedings. That is real prejudice, i.e. the inability to investigate an unarticulated claim. That weighs extremely heavily in favour of dismissal.

**132.** Adding further weight to dismissal, is the fact that this is a case which could not conceivably come on for years. In fact, it is not even possible to say *whether* and, if so, *when* there would be a trial. I say this because of the previous analogy. All roads lead back to an expert saying that there is a basis for negligence being asserted, yet no such report is even now available. For that reason, it is conceivable that, once available, the putative claim will evaporate. Even if it did not evaporate, and even if in that theoretical scenario it was ultimately particularised, we now know that such particulars, even if they were available as "*early*" as the end of 2023, would be with respect to wrongs said to have occurred in the year 2000, i.e. 23 years earlier, almost a quarter of a century ago. It would only be of course at that stage that meaningful investigations could be carried out and I do not believe it is a 'stretch' to infer that such person or persons as may be said by the Plaintiff to have carried out the treatment of which she complains, which it now appears was carried out in the year 2000, may well either have passed on or be unavailable or, and I will presently come to this, have little or no recollection of for example what was said a quarter of a century earlier. This brings me back to the topic of witness evidence which we know from para (f) of the personal injuries summons, is being relied on by the Plaintiff.

**133.** I am entitled to hold, safely, that the delay on the Plaintiff's part even (if one were to confine that delay to a period of six or seven years of post-commencement delay only) has in all likelihood

given rise to a degrading of memories, prejudicing to a material extent the ability of such witnesses as yet unidentified to give meaningful assistance at some future point as yet unknown to a trial judge. This is very real prejudice. This Court feels entirely safe to say that it at least constitutes the moderate prejudice which is of relevance in the *Primor* approach.

**134.** In my view, it is also prejudice which meets the *O'Domhnaill* test. It seems to me that this Court can hold on the evidence before it that there is a real risk of an unfair trial or unjust result and that, even if there was no culpable delay, and even if there was no inexcusable delay, I feel entirely satisfied that per the *O'Domhnaill* principles, this is a claim which must be dismissed.

**135.** There is a phrase used in the jurisprudence that it would 'put justice to the hazard'. I am entirely satisfied that it would put justice to the hazard were this Defendant to be required to meet this claim, and I use "claim" in the very loosest of senses because it is not at all clear what claim the Plaintiff has articulated or whether there is indeed the credible basis for any claim.

**136.** The reality that no other clinician, apart from Ms. Bach, is, it appears, on the point of providing any report (and that stems from choices made by the Plaintiff) is something which also weighs in favour of dismissal. It is true that in *Flynn v. Bon Secours* [2014] IEHC 87 the court allowed a further period of time within which a medical expert's report might be obtained by the Plaintiff in that case. The facts in this application are utterly different, and as I observed earlier, the Plaintiff has been squarely on notice (since correspondence sent over 6 years ago, in 2017) of the need to 'mend her hand' regarding an expert report. Delay with respect to obtaining an expert's medical report which, for at least for six years was known to be essential, is something which must come into the balance of justice assessment. It weighs in favour of dismissal and utterly rules out, to my mind, that justice requires a further period of time. This is because, in truth, every reasonable opportunity has already been afforded to the Plaintiff by a Defendant which has conducted itself with patience and professionalism, but notwithstanding that, still has no idea of the case it is expected to meet, nor does, in truth, the Plaintiff.

**137.** Insofar as there was a submission made that the Defendant has delayed, the facts utterly undermine this. There was absolutely no acquiescence on the part of the Defendant and I use that term because it is of course referred to in the jurisprudence flowing from the *Primor* test. At no point could it be said that the 'ball' was sitting inert in the Defendant's 'court', it was the Defendant who pressed at all material times, and it is not necessary to recap those steps taken by the Defendant .

**138.** At no point prior to the present motion being issued did the Plaintiff choose to inform the Defendant that, first, the wrongs complained of dated back over two decades and, second, that there was no expert's report underpinning the personal injuries summons. That also to my mind weighs very heavily in favour of dismissal.

**139.** The authorities examining the proper approach under the *Primor* principles emphasise that, to avoid dismissal in circumstances where inordinate and inexcusable delay has been established, it

behoves the Plaintiff to put forward a material consideration or considerations of a weighty type which would 'tip the balance' in favour of the proceedings being allowed to continue. That is not for a moment to suggest that the Defendant does not have the obligation to meet the burden of proof under all three limbs of *Primor*. They do and they have. My point is that, try as I might, I have been unable to find any consideration or factor, still less anything weighty to place in the scales in favour of the proceedings being permitted to continue.

### **Conclusion**

**140.** For the reasons given, I am entirely satisfied that the Defendant has met the burden of proof with respect to all three elements of the *Primor* test and the balance of justice, without doubt in my view, favours dismissal.

**141.** Without prejudice to that, I am also satisfied that the test per the *O'Domhnaill* principles has been met and it would be inimical to justice if this Court did not bring an end to these proceedings at this stage.

**142.** Finally, I want to express my thanks to both counsel. They articulated their respective clients' positions with great skill, clarity, and professionalism. However, submissions must yield to facts, and it is the facts which emerge from the evidence before this Court which have resulted in this decision.