[2020] IEHC 46

THE HIGH COURT

2011 No. 1097 P.

BETWEEN

PETER AHEARNE

PLAINTIFF

AND

TADHG O'SULLIVAN
ALEC MEDICAL LIMITED
PEI SURGICAL DEPUY (IRELAND)
DEPUY INTERNATIONAL LTD
HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 6 February 2020

INTRODUCTION

1. This judgment is delivered in respect of an application to dismiss the within proceedings on the grounds of inordinate and inexcusable delay. The proceedings are in the form of personal injuries proceedings. The plaintiff (hereinafter "*the injured party*") seeks damages arising out of a hip replacement operation performed on 17 August 1995. The operation involved the implantation of a device said to have been manufactured by Depuy ("*the hip device*"). The injured party pleads that the hip device was defective, and that this deficiency led to a series of further operations having to be performed on his right hip.

2. It will be necessary to consider the precise claims being made against the respective defendants in more detail presently. For introductory purposes, it should be noted that claims have been brought against the orthopaedic surgeon who performed the initial and subsequent operations, and against the manufacturers and suppliers of the hip device. The case pleaded against the former involves an allegation that the surgeon had knowledge of the defective nature of the hip device, but chose not to disclose that knowledge or information to the injured party. The case against the manufacturers and suppliers includes *inter alia* an allegation that the hip device was defective within the meaning of the Liability for Defective Products Act 1991.

3. The significance of these pleas is that—assuming the proceedings were to go to trial—the trial judge would have to make findings of fact in respect of events which occurred almost twenty-five years ago. In particular, it would be necessary to consider the information provided to the injured party prior to the operation. In assessing the claim against the manufacturers of the hip device under the Liability for Defective Products Act 1991, it would be necessary to make findings as to the state of scientific and technical knowledge at the time when the product was put into circulation.

4. One of the principal matters to be considered in the context of the present application to dismiss the proceedings is whether a fair trial and just result is possible at this remove.

5. It will also be necessary to consider whether there has been culpable delay on the part of the defendants (or any of them) such as to tip the balance of justice in favour of allowing the proceedings to go to trial.

HISTORY OF PROCEEDINGS

6. The principal event giving rise to these proceedings occurred on 17 August 1995, that is, almost twenty-five years ago. It is pleaded that on that date the injured party underwent a surgical procedure, namely a hip replacement operation. The operation is said to have been performed by the first named defendant ("*the orthopaedic surgeon*"). The operation involved the implantation of a device said to have been manufactured/supplied by the second, third, fourth and fifth named defendants ("*the manufacturers and suppliers").* The sixth named defendant is the Health Service Executive ("*the HSE*").

7. It is pleaded that the hip replacement was not a success, and that, as a consequence, it was necessary for the injured party to undergo four further surgical procedures between 2001 and 2006. These surgical procedures had been performed by the same orthopaedic surgeon as had carried out the initial hip replacement operation.

8. The injured party has averred on affidavit that he had requested his medical records on 12 November 2008. It is further averred that, upon review of these medical records, he discovered a letter dated 19 September 2001 which he characterises as involving an "acknowledgement" of the defective nature of the prosthetic hip which he had received. The injured party subsequently issued a letter of claim on 9 July 2010, and an application on his behalf was made to the Personal Injuries Assessment Board ("*PIAB*") on 10 November 2010. An authorisation to issue proceedings was issued by PIAB on 22 November 2010. The within proceedings issued on 4 February 2011.

9. The chronology of key events in the proceedings is as follows.

4 February 2011	Personal Injuries Summons issued
23 March 2011	Proceedings are served
5 May 2011	Notice for Particulars on behalf of second to fifth defendants
25 June 2012	Consent order requiring injured party to make discovery
15 August 2012	Affidavit of Discovery sworn by the injured party
4 September 2012	Replies to Notice for Particulars
12 August 2013	Defence delivered on behalf of second to fifth defendants
24 June 2015	Defence delivered by sixth defendant
27 February 2017	Notice for Particulars on behalf of sixth defendant

7 July 2017	Replies to Notice for Particulars
14 December 2018	Notice of Intention to Proceed served by injured party's solicitors
-	Injured Party seeks Defence from first defendant

10. The respective parties highlight different aspects of this chronology. The defendants point to the fact that no step was taken on behalf of the injured party between 4 September 2012 and 7 July 2017. The injured party, conversely, points to the fact that the last of the defences delivered, namely that of the sixth defendant, the HSE, was not delivered until 24 June 2015, and that the first defendant, the orthopaedic surgeon, has still not delivered his defence. No verifying affidavits have been filed.

11. The injured party also points to the fact that a motion seeking indemnity as against two of the other defendants had been issued on behalf of the HSE. This is addressed at paragraph 43 below.

(1). INORDINATE AND INEXCUSABLE DELAY

Legal principles governing application to dismiss

12. The principles governing an application to dismiss proceedings on the basis of inexcusable and inordinate delay are well established. The leading judgment remains that of the Supreme Court in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459 (at 475/76) ("*Primor*").

> "The principles of law relevant to the consideration of the issues raised in this appeal may be summarised as follows:—
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> (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 a 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
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> (i) the implied constitutional principles 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 defendant 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 upon 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 be other than that merely caused by the delay, including damage to a defendant's reputation and business."

13. As appears, a court must consider three issues in sequence: (i) has there been inordinate delay; (ii) has the delay been inexcusable; and (iii) if the answer to the first two questions is positive, it then becomes necessary to consider whether the balance of justice is in favour of or against allowing the case to proceed.

(i). Inordinate delay

14. Whereas the traditional view had been that delay had to be assessed by reference only to delay in the prosecution of the proceedings, i.e. by reference to delay subsequent to the institution of the proceedings, the more recent case law indicates that both pre- and post-commencement delay can be considered. See, for example, *Cassidy v. The Provincialate* [2015] IECA 74, [32].

15. The rationale for this approach is explained as follows in *Connolly's Red Mills v. Torc Grain and Feed Ltd* [2015] IECA 280, [29].

> *"29. The reason that the court must take into account pre-commencement delay in assessing whether or not post commencement delay is inordinate and inexcusable is that it cannot be disputed but that the longer the period that is allowed to elapse between the events the subject matter of the claim and the trial date, the greater the risk that justice will be put to the hazard. In these proceedings, the late start by the plaintiff in issuing its plenary summons and the delay in delivering the statement of claim meant that eight years were permitted to elapse between the date of the contract at issue and the date upon which the claim was fully particularised."*

16. For the reasons which follow, I am satisfied that the combination of the delay pre- and post-commencement of the proceedings in the present case is inordinate.

17. The principal event giving rise to these proceedings, namely the initial hip replacement operation, occurred on 17 August 1995. The proceedings were not instituted until 4 February 2011, that is some fifteen years later. Even allowing that—notwithstanding the defendants' pleas to the contrary—the proceedings *might* not be statute barred having regard to the injured party's asserted date of knowledge, a period of fifteen years is

nevertheless significant. The progress of the proceedings themselves has been dilatory. Nine years have elapsed since the proceedings were instituted, and even now same are not ready to be set down for trial. Prior to the events associated with the motion to dismiss the proceedings, the last substantive step taken on behalf of the injured party had been the delivery on 7 July 2017 of a reply to a notice for particulars raised by the HSE.

18. The current position, therefore, is that notwithstanding that a period of almost twenty-five years has now elapsed since the date of the initial hip replacement operation, the injured party has still not brought these proceedings to trial. Irrespective of whether one measures the delay by reference to the date of the index event, i.e. the hip replacement operation on 17 August 1995, or by reference to the date of the institution of the proceedings on 4 February 2011, the delay has been inordinate.

(ii). Inexcusable delay

19. The next matter to be considered is whether or not the delay is inexcusable. The injured party has addressed the delay in the proceedings since 2012 as follows in his affidavit of 14 January 2020.

> *"27. These Court proceedings have been advanced since 2012 to the extent that the all Defences (sic) bar the Defence of the First Named Defendant have been delivered, Notice for Particulars have been replied to and various Notices of Intention to Proceed have been filed. During that time period, thirteen (13) attendances have occurred with my Solicitors. In addition, Expert Reports on Liability/Causation have been obtained from two UK based Consultant Orthopaedic Surgeons where, due to the time period since the Hylamer Ogee cup issues, it has been more difficult to source expertise. As my capacity to work has been decimated by the consequences of the hip related difficulties that I have experienced, financial resources available to your Deponent are more limited than would otherwise be the situation as I am dependent upon payments from the Department of Social Protection. I have obtained Expert Reports in terms of the Quantum of my claim and indeed, in certain instances, updated Expert Reports in respect of the following losses:-Loss of Services Report, Nursing Care Report, Occupational Therapy Report associated with aids and appliances, Vocational Rehabilitation Consultant's Report in relation to career loss, Orthopaedic Opinion in relation to the extent of the injuries sustained and more particularly, your Deponent's condition and prognosis. I further say I am aware that considerable research has been undertaken in relation to the DePuy Hylamer Ogee cup implant and the issues that arose from the particular implant in the context of patients who suffered adverse impact arising out of its use. I say that this research indicates that in one particular Expert Journal where an article appeared it was stated that there was a failure rate of 67.6 % at 5 years where the Hylamer Ogee cup although it was thought to represent a significant advance, failed due to aseptic loosening with progressive osteolysis or radiolucencies. I say that like my own situation, many patients who received this implant suffered massive bone loss."*

20. Leading counsel on behalf of the injured party, Mr Martin Hayden, SC, submits that any delay is excusable. In particular, it is said, by reference to the injured party's affidavit (above), that the injured party has not been inactive since 2012. Steps have been taken to obtain expert reports on *liability and causation* from two UK-based consultant orthopaedic surgeons. Expert reports in terms of the *quantum* of the claim have also been obtained.

21. In response, counsel on behalf of the defendants, Mr Brian Murray, BL, submits that the injured party has failed to put forward an excuse which justifies or explains the delay. Counsel is critical of the level of detail provided in the affidavit. No details have been provided in respect of the precise steps said to have been taken in terms of obtaining expert reports.

22. Reliance is placed in this regard on the judgment of the Court of Appeal in *Sweeney v. Keating t/a Keating Transport and McDonnell Commercials (Monaghan) Ltd* [2019] IECA 43, [28] ("*Sweeney*").

> "28. In his affidavit sworn for the purposes of opposing the application brought to the Supreme Court to strike out Mr Sweeney's appeal, Mr Kennedy mentions the 'complexity of the proceedings', the difficulty of his researches, and his engagement with potential experts. However, these are no more than bald averments unsupported by any evidence or details concerning these difficulties. He talks of 'expending' a great amount of time on 'research and making enquiries of experts'. He furnishes no dates, copy correspondence, etc. to establish his engagement with any of these experts or indeed junior counsel. His only references is to advices from junior counsel of 4 July 2011, 13 months after he obtained the file from the Legal Aid Board. Furthermore, these averments are inconsistent with his assertions that he was merely 'looking at the file' on Mr Sweeney's behalf, (affidavit of 8 May 2014, para. 6)."

23. Counsel submits that the affidavit in the present case suffers from precisely the same type of shortcomings. The point is also made that no steps have been taken to update the particulars pleaded to reflect any new information supposedly obtained from the expert reports.

24. Counsel also observes that the injured party is in default in the timing of the delivery of his affidavit. The High Court (O'Connor J.) had directed that the affidavit be filed by 10 June 2019, but in the event it was filed merely days in advance of the hearing of the application to dismiss.

25. For the reasons which follow, I am satisfied that the delay in the present case has been inexcusable. The proceedings relate to an event said to have occurred on 17 August 1995, but the proceedings were not instituted until 4 February 2011. It is well established that where there has been a late start to proceedings, a plaintiff is under an obligation to pursue the proceedings thereafter with expedition. (See, for example, *Millerick v. Minister for Finance* [2016] IECA 206, [21]). This has not been done in the

present case. Following an initial flurry of activity in the period 2011 to 2012, the injured party did not pursue his proceedings with diligence thereafter. Insofar as any steps were taken prior to the events associated with the application to dismiss the proceedings, same were reactive rather than proactive. The only substantive step taken prior to the issuing of a notice of intention to proceed on 14 December 2018 was to respond to a notice for particulars which had been served by the HSE. (I will return to address the nature of the obligation, if any, on a defendant to pursue proceedings under the next heading below). Such a reflexive approach does not indicate an intention to bring proceedings on for hearing expeditiously.

26. The principal excuse offered for the delay is that time was required to obtain expert reports. No attempt has been made, however, to provide details in respect of the steps said to have been taken in that regard. This is unsatisfactory for the reasons stated by the Court of Appeal in Sweeney in the passage cited at paragraph 21 above. It is also to be noted that the injured party has not updated the particulars in the pleadings in the light of the reports supposedly obtained.

27. The Court of Appeal has held that a delay in obtaining expert reports, even where the delay is attributable to financial difficulties on the part of a plaintiff, does not excuse delay in prosecuting a claim. See *Gallagher v. Letterkenny General Hospital* [2019] IECA 156, [42] as follows.

> "In this case it will be necessary for the plaintiff to obtain the expert advice and evidence of experts in many different fields of medical expertise as to causation and liability and as to condition and prognosis. He will need reports from occupational therapists in relation to future care needs and the reports of actuaries to quantify his claim. This is not by any means an exhaustive list of what would be required to bring this case to trial. Of necessity, this must involve inevitable expense. Therefore, while the plaintiff's financial difficulty amounts to a very genuine and significant explanation for the inability to progress his case, and one which is not contested by the second named defendant, it cannot amount to an excuse for the delay in prosecuting his claim. I therefore conclude that the second named defendant has established that the delay in this case was inexcusable as well as inordinate."

28. In summary, therefore, the submission that a period of several years was necessary to obtain expert reports in the present case, and that this excuses the delay in prosecuting the proceedings, is rejected.

(iii). Balance of justice

29. Given my finding that there has been inordinate and inexcusable delay in the prosecution of these proceedings, it is necessary to consider next whether the balance of justice is in favour of or against allowing the proceedings to go to full trial. The factors to be considered in this regard have been enumerated by the Supreme Court in the passage from Primor cited at paragraph 11 above.

30. One of the principal factors to be considered in the present case is whether the ability of the defendants to defend the proceedings has been prejudiced as a result of the delay. The nature of the consideration to be carried out is described as follows in *Primor*. The court must consider:

> "(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".

31. As it happens, it is necessary to carry out a similar exercise in the context of the application of the overlapping jurisdiction to dismiss proceedings which is discussed under the next heading below. As explained presently, the threshold to be met for the purposes of this overlapping jurisdiction is more demanding than that under the Primor test. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. Proof of moderate prejudice will not be enough.

32. For the reasons set out under the next heading, I have concluded that this *higher* threshold has been met on the facts of the present case. On the principle that the greater includes the lesser, it follows from this conclusion that the lower threshold under the *Primor* test must also have been met. To avoid unnecessary duplication, therefore, the analysis of the prejudicial effect of the delay set out under the next heading below should be read as applying *mutatis mutandis* to the application of the *Primor* test under the instant heading.

33. It remains then simply to determine whether any of the *other* considerations identified under the *Primor* test arise on the facts of the present case.

34. Counsel for the injured party has been critical of the delay on the part of the sixth defendant in not delivering its defence until 24 June 2015, and of the fact that the first defendant still has not delivered his defence. Complaint is also made that verifying affidavits have not been filed. Counsel acknowledges that the more recent case law emphasises that there is no obligation on a defendant to take positive steps to have the action against it progressed (or, as he more colourfully puts it, a defendant is not expected "to poke the bear"). Counsel goes on, however, to suggest that this case law is properly confined to circumstances where the defendant is not in culpable default itself. The failure to deliver a defence on time is cited as an example of a culpable default.

35. A related argument is made to the effect that a defendant who—having expressly raised a preliminary objection on the grounds of delay—does not promptly pursue an application to dismiss at an early stage may be refused an order dismissing the proceedings at a later stage, by reference to the balance of justice. Counsel relied in this regard on *Connolly's Red Mills v. Torc Grain and Feed Ltd* [2015] IECA 280 ("*Connolly's Red Mills*"). The defence delivered in that case had included the following preliminary objection.

> "1. The plaintiff has been guilty of inordinate and unconscionable delay in the commencement and prosecution of the within proceedings, such that the Defendant has suffered irreparable prejudice in defending the claim. On that account, the

defendant contends that the plaintiff's claim ought to be dismissed as an abuse of the process of the Court."

36. Irvine J. (delivering the unanimous judgment of the Court of Appeal) observed that the defendant had proceeded to act in a manner entirely inconsistent with the position it had adopted in its defence. Not only did the defendant not seek to call time on the litigation, as it ought to have done, following the delivery of its defence, the defendant, in fact, proactively engaged with the plaintiff insofar as an exchange of particulars was concerned. The defendant also engaged, without objection or reservation, in the discovery of documents. The Court of Appeal observed that—between the date of the delivery of the defence and the service of the notice of trial—not only did the defendant, by its conduct, lead the plaintiff to believe that it would meet the claim on its merits, it also caused the plaintiff to spend a great deal of time and money in engaging with litigation long past the point at which the application to dismiss ought to have been made.

37. Applying these principles to the facts of the present case, I accept, of course, that one of the factors to be considered in the balance of justice is the conduct of a defendant. It is also correct to say that one of the factors expressly relied upon in *Connolly's Red Mills*, as militating against the dismissal of the proceedings, was the delay on the part of the defendant in delivering its defence. This was, however, only one of six factors identified by the Court of Appeal. Many of these other factors involved acquiescence on the part of the defendant, and had resulted in the plaintiff incurring additional costs.

38. The circumstances of the present case are distinguishable from *Connolly's Red Mills*. Here, it cannot realistically be argued that the injured party incurred additional costs in the litigation in reliance on acquiescence on the part of the two of the six defendants who did not deliver defences on time. The injured party has not demonstrated that it had taken any substantive steps to progress the proceedings. The only evinced step which it took during the period 2012 to 2017 was to reply to a notice for particulars.

39. The case law draws a distinction between acquiescence and mere inaction on the part of a defendant. The distinction is explained as follows by the Court of Appeal in *Millerick v. Minister for Finance* [2016] IECA 206.

> "38. Why should a defendant who believes that there is some chance that the plaintiff, because of their tardy approach, may not further pursue litigation against them be blamed for failing to take positive steps to have the action progressed regardless of whether or not they consider the claim against them well founded? If they believe the claim is likely to be successful, should they be criticised for failing to stir the reluctant plaintiff into action in proceedings that may cause them personal, professional or financial ruin? Likewise, if they consider they have a good defence, why should they be damnified for failing to embrace the potential additional costs of ensuring that proceedings which might otherwise wither and die advance to a trial?
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> 39. For these reasons I am satisfied that in order for a defendant's conduct to be weighed against it when the court comes to consider where the balance of justice

lies, a plaintiff must be in a position to demonstrate that the defendant's conduct was culpable in causing part or all of the delay. In other words a simple failure on the part of the defendant to bring an application to strike out the proceedings will not suffice. Such inactivity must be accompanied by some conduct that might be considered to amount to positive acquiescence in the delay or be such as would give some reassurance to a plaintiff that they intend defending the claim, as might arise if, for example, they were to raise a notice for particulars or seek discovery during a lengthy period of delay."

40. Similar sentiments have been expressed in the more recent judgment of the Court of Appeal in *Sweeney v. Keating t/a Keating Transport and McDonnell Commercials (Monaghan) Ltd* [2019] IECA 43, [25].

> "There is no obligation on a defendant to progress proceedings or to take steps to pressurise a plaintiff to pursue an action with diligence. Every step taken by a defendant is one which is financially costly and a defendant may never recover that expenditure even if the action is successfully defended."

41. Applying these principles to the facts of the present case, I am satisfied that the defendants have not been guilty of conduct which amounts to acquiescence. The failure of the two defendants to deliver a defence on time lies towards the "inaction" rather than the "acquiescence" end of the spectrum.

42. In assessing the balance of justice, it is also relevant to have regard to the reputational damage for a defendant. On the facts of the present case, the injured party has made very serious allegations against the orthopaedic consultant who carried out the various surgical procedures. Not only is it alleged that he was negligent, it is also said that he is guilty of deceit and the deliberate concealment of the (allegedly) defective nature of the product. The extent of the reputational damage is borne out and emphasised by the fact that, in the last number of months, the injured party has chosen to make a complaint against the orthopaedic surgeon to his professional body, namely the Medical Council. See letter dated 17 September 2019 from the injured party to the Medical Council. This letter has been exhibited as part of the injured party's affidavit of 14 January 2020.

43. A plaintiff who makes such serious allegations should prosecute his or her proceedings without delay. Having failed to do so, the balance of justice points towards dismissing the proceedings in order to vindicate the surgeon's right to a good name.

44. Finally, for the sake of completeness, it is necessary to address a further argument which had been advanced on behalf of the injured party. This argument appears to run to the effect that there may have been an admission as between certain of the defendants inter se that the hip device was defective. Reference is made in this regard to the content of an affidavit seemingly filed in the context of an application on the part of the HSE pursuant to Order 25 of the Rules of the Superior Courts for an order directing the trial of a preliminary issue in respect of whether the HSE was entitled to an indemnity from the fourth and/or fifth defendants.

45. The materials which have been put before me in this regard are incomplete. In particular, a full set of the motion papers have not been put before me. It would not be safe, therefore, to attempt to reach any determination on this issue. More generally, I do not think that it is appropriate, in the context of an application to dismiss proceedings on the grounds of inordinate and inexcusable delay, for the court to engage in a detailed consideration of the underlying merits of the case. The precise purpose of such an application is to determine whether the case should go to full trial. It would pre-empt this were the judge hearing the application to dismiss, in effect, to embark upon a consideration and determination of the merits of the case.

(3) REAL AND SERIOUS RISK OF AN UNFAIR TRIAL OR UNJUST RESULT

46. The delay on the part of the injured party has been analysed, under the previous heading, by reference to what are often described as the *Primor* principles. These principles are, however, complemented by a separate but overlapping jurisdiction to dismiss proceedings where there is a real and serious risk of an unfair trial and/or an unjust result. This complementary jurisdiction had first been considered in detail by the Supreme Court in *O'Domhnaill v. Merrick* [1984] I.R. 151.

47. As explained by the High Court (Finlay Geoghegan J.) in *Manning v. Benson and Hedges Ltd.* [2004] 3 I.R. 556, this jurisdiction gives effect to constitutional requirements.

> "32. The constitutional requirement that the courts administer justice requires that the courts be capable of conducting a fair trial. This, as was submitted, is required by Article 34 of the Constitution. Accordingly, if a defendant can on the facts establish that having regard to a lapse of time for which he is not to blame there is a real and serious risk of an unfair trial then he may be entitled to an order to dismiss.
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> 33. Also, if a defendant can establish that a lapse of time for which he is not to blame is such that there is a clear and patent unfairness in asking him now to defend the claim then he may also be entitled to an order to dismiss. This entitlement derives principally from the constitutional guarantee to fair procedures in Article 40.3 of the Constitution.
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> 34. Whilst in some of the cases the judgments have referred to matters under both these headings, they appear to be potentially separate grounds upon which the inherent jurisdiction to dismiss may be exercised.
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> 35. The factor to be considered by the court in relation to each question may overlap. It appears to me that these may include:-
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> 1. has the defendant contributed to the lapse of time;
> 2. the nature of the claims;
> 3. the probable issues to be determined by the court; in particular whether there will be factual issues to be determined or only legal issues;
> 4. the nature of the principal evidence; in particular whether there will be oral evidence;

5. the availability of relevant witnesses;
6. the length of lapse of time and in particular the length of time between the acts or omissions in relation to which the court will be asked to make factual determinations and the probable trial date.

Further, on the second question it will be relevant to consider any actual prejudice to the defendant in attempting to defend the claim by reason of the lapse of time."

48. The difference between the legal tests governing these two complementary jurisdictions has been explained with admirable clarity by the Court of Appeal in *Cassidy v. The Provincialate* [2015] IECA 74, [33] to [38]. As appears from that judgment, the two principal distinctions are as follows. (For ease of exposition, I propose to adopt the same shorthand as employed by the Court of Appeal in *Cassidy*, and will describe the tests as "the *Primor* test" and "the *O'Domhnaill* test", respectively.)

49. First, whereas it is a necessary ingredient of the *Primor* test to establish that the delay is "inexcusable", the *O'Domhnaill* test does not require that there have been culpable delay on the part of a plaintiff. Secondly, whereas both tests require that some consideration be given to whether the delay has prejudiced the defendant in the defence of the proceedings, the degree of prejudice required differs between the two tests. Under the *O'Domhnaill* test, nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. The rationale for this distinction is described as follows in *Cassidy v. The Provincialate*.

"37. Clearly a defendant, such as the defendant in the present case, can seek to invoke both the *Primor* and the *O'Domhnaill jurisprudence*. If they fail the *Primor* test because the plaintiff can excuse their delay, they can nonetheless urge the court to dismiss the proceedings on the grounds that they are at a real risk of an unfair trial. However, in that event the standard of proof will be a higher one than that imposed by the third leg of the *Primor* test. Proof of moderate prejudice will not suffice. Nothing short of establishing prejudice likely to lead to a real risk of an unfair trial or unjust result will suffice. That this appears to be so seems only just and fair. Why should a plaintiff found guilty of inordinate and inexcusable delay be allowed to say that just because it is possible that the defendant may get a fair trial that the action should be allowed to proceed when the evidence establishes that they would have been in a much better position to defend the proceedings if the action had been brought within a reasonable time? Likewise, why should a plaintiff who has not been guilty of any culpable delay have their claim dismissed where the court is satisfied that the defendant is not at any significant risk of an unfair trial or unjust result but where, by reason of the passage of time it has become moderately more difficult to defend the claim?

38. Considering its jurisdiction having regard to the test in *O'Domhnaill*, a court should exercise significant caution before granting an application which has the effect of revoking that plaintiff's constitutional right of access to the court. It should only grant such relief after a fulsome investigation of all of the relevant circumstances

and if fully satisfied that the defendant has discharged the burden of proving that if the action were to proceed that it would be placed at risk of an unfair trial or an unjust result."

50. I turn now to apply these principles to the facts of the present case. For the reasons which follow, I have concluded that a fair trial is not possible at this remove. This is because two of the principal issues which would have to be resolved at trial are highly fact-specific. Those issues cannot be determined some twenty-five years later without there being a real and serious risk of an unfair trial and/or an unjust result.

51. The first issue which would have to be determined at trial is whether the hip device was defective. The case as pleaded expressly invokes the Liability for Defective Products Act 1991 and the European Directive (Directive 85/374/EEC) to which it gives effect. Both of these legal instruments provide that a producer shall not be liable if he proves *inter alia* that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered. By definition, the hip device the subject-matter of these proceedings had been put into circulation by, at the very latest, August 1995. The ability of the defendants to rely on this defence is undermined by the lapse of time. In effect, the defendants would have difficulty identifying witnesses or documentation which would establish what the state of scientific and technical knowledge would have been some twenty-five years ago. Moreover, it is to be noted that the actual device which had been implanted into the injured party is not available for inspection.

52. It is also to be noted that the case as pleaded expressly raises issues in respect of the research and testing carried out by the defendants. See, for example, paragraph 25 of the Personal Injuries Summons as follows.

"(iii) The Second, Third, Fourth and Fifth Named Defendants are liable to the Plaintiff in respect of the defective hip product/device in that they:

a) Failed to use due care in the preparation, development and testing of the hip product/device.
b) Failed to use due care in the design, research, testing, manufacturing, monitoring, marketing, labelling, promotion, advertising and sale of its said hip product/device to prevent the risk of injury.
c) Failed to devise and conduct any or any adequate testing, monitoring and research to determine the safety, appropriateness, efficacy and integrity of the said hip product/device.
d) Failed to undertake and conduct any or any adequate post usage surveillance to determine the safety of the said hip product/device which would have alerted the Defendants to the dangers and the necessity for a prompt recall of the hip product/device from the market.
e) Failed to use due care in the manufacture, development, monitoring, inspection and promotion of the said hip product/device to prevent the risk of failure and injury to individuals who used said hip product/device.

f) Failed to desist from processing and marketing the said hip product/device which they knew or ought to have known involved a high risk of failure and injury.

g) Failed to provide any or any adequate or accurate information to treating Surgeons and Sales Representatives.

h) Failed to appraise themselves at all times of the best and most up-to-date scientific and medical opinion in relation to the risk of the hip product/device failure.

i) Failed to operate any or any adequate proper system of quality control.

j) Failed to heed warnings relating to the safety, efficacy and appropriateness of the said hip product/device.

k) Knowingly withheld from the Plaintiff information relating to the risk that the hip product/device was associated with a high failure or defective rate.

l) Failed to properly and fully disclose to the regulatory authorities within the State the knowledge of the said hip product/device in relation to the failure risks.

m) The above Particulars are the best Particulars which the Plaintiff can furnish until the making of Discovery and answering Interrogatories and thereafter the Plaintiff reserves the right to furnish further Particulars at any time before the trial of the action herein."

53. The second of the two principal issues to be determined at trial arises in connection with the case against the first defendant, the orthopaedic surgeon. The claim has been pleaded under various different headings as follows: (i) professional negligence; (ii) negligent misstatement; (iii) misrepresentation (including intentional and negligent misrepresentation); and (iv) deceit. The gist of the allegation against the orthopaedic surgeon is that the surgeon had become aware, at some point, that the hip device was defective, but had concealed this knowledge from the injured party. It is also pleaded that this (alleged) concealment meant that the injured party was not in a position to give full and informed consent to the surgical procedures subsequent to the initial hip replacement operation on 17 August 1995.

54. The determination of whether these allegations are well-founded would require the trial judge to make findings of fact as to events which occurred some twenty-five years ago. In particular, it will be necessary to determine the nature of the information given to the injured party, prior to the initial hip replacement, in respect of the nature of the risks involved in the surgery. It will also be necessary to determine the nature of the information supplied to the injured party at the time of each of the four subsequent surgical procedures which were carried out between 2001 and 2006.

55. The determination of these issues will turn largely on the oral testimony of the principals, namely the injured party and the orthopaedic surgeon. This court is entitled to take judicial notice that the passage of between fourteen and twenty-five years since these events occurred will impact on the accuracy and reliability of those individuals' memories.

56. In summary, the two principal issues arising in the proceedings cannot be determined some twenty-five years later without there being a real and serious risk of an unfair trial and/or an unjust result.

CONCLUSION AND FORM OF ORDER

57. For the reasons set out herein, I am satisfied that the injured party has been guilty of inordinate and inexcusable delay in both the commencement and prosecution of these proceedings. The balance of justice lies against allowing the proceedings to go to full trial.

58. I propose to make an order dismissing the proceedings.

Appearances

Martin Hayden, SC and Robert Fitzpatrick for the plaintiff instructed by Malcomson Law Solicitors

Brian Murray for the defendants instructed by McCann Fitzgerald Solicitors