

THE HIGH COURT

[2022] IEHC 126

[Record No. 2013/3244P]

BETWEEN

JULIE WALSH

PLAINTIFF

AND

**MATER MISERICORDIAE UNIVERSITY HOSPITAL AND
ASHLEY POYNTON**

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 8th day of March, 2022.

Introduction.

1. The plaintiff is a security guard. She is 63 years of age having been born on 17th April, 1958. The first named defendant is a public hospital in Dublin. The second named defendant is a consultant orthopaedic surgeon.
2. This is an application by the second defendant for an order dismissing the plaintiff's action against him on grounds of inordinate and inexcusable delay on the part of the plaintiff in pursuing her action against him.
3. The events the subject matter of the proceedings occurred in April and May 2011. It is the plaintiff's case that during that period, the defendants and each of them, failed to carry out all necessary investigations into her complaint of left leg pain. In particular, it is pleaded that they failed to carry out any vascular investigation as a possible cause for her pain, and as a result whereof, they failed to diagnose that she had a vascular disease, and as a result of that, it is pleaded that she suffered severe pain and injury to her leg, leading ultimately to the loss of her left leg below the knee.
4. The second defendant submits that as the proceedings against him issued on 28th March, 2013, but were only served on him on 27th January, 2015 and did not contain any concrete allegations of negligence, as the writ had been issued on a protective basis; and that as full particulars of negligence were only served on him on 12th April, 2021, meaning that the action will probably not come on for hearing until sometime in 2024 or 2025, the plaintiff has been guilty of inordinate and inexcusable delay, as a result whereof the second defendant has been prejudiced in his defence of the action and in such circumstances the court should strike out the proceedings against him.
5. On behalf of the plaintiff it was submitted that there were a number of matters which occurred during the intervening years which made the delay that had occurred, excusable. It was further submitted that even if the delay was held to be both inordinate and inexcusable, the balance of justice lay in favour of allowing the action to proceed, as there was no real prejudice to the defendant in defending the action, as liability would effectively turn on expert evidence given in relation to the steps that had been taken by the treating doctors, based on their medical notes and records, all of which remained available to the second defendant.
6. That is a very brief summary of the issues that arise for determination on this application.

The events giving rise to the proceedings.

7. In her personal injury summons, the plaintiff has pleaded that on 1st April, 2011 she attended with the second defendant at his private rooms. She states that at that consultation she made specific complaints about severe pain, numbness and loss of power in her left leg. An MRI scan of her lower back was arranged and was carried out on 26th April, 2011.
8. On 19th May, 2011, the plaintiff attended at the accident and emergency department of the first defendant's hospital. Although not specifically pleaded, it is presumed that this was in relation to a complaint of left leg pain. She states that she was discharged home later that day.
9. The plaintiff has pleaded that she was referred urgently by her GP back to the second defendant, whom she saw on 23rd May, 2011. She states that she once again explained to him that her left leg was in severe pain. She has pleaded that the second defendant examined her feet and arranged for an MRI scan to be carried out on the following day.
10. The plaintiff states that over the following days, her condition deteriorated. She became extremely sick. On 26th May, 2011, she was taken to the accident and emergency department of the first defendant hospital by ambulance. She states that investigations on that occasion revealed that there was a large plaque in the lower end of her aorta, which had caused thrombosis of her iliac system and ultimately, thrombosis of all the vessels in her left leg. Emergency surgery was carried out on 26th May, 2011, when a vascular surgeon managed to thrombectomise and angioplasty her aorta, as well as angioplasty of her iliac vessels. He carried out multiple embolectomies of the vessels in her lower limb.
11. The plaintiff states that while the surgery managed to restore circulation to below her knee, her foot was irreversibly ischaemic. On 1st June, 2011, a below knee left leg amputation was carried out.
12. It is against that background, that the present medical negligence proceedings were instituted. The essence of the plaintiff's claim against the defendants is that they treated her leg pain on the basis that it was referable to an injury, or problem in her back, which, given her presenting symptoms and relatively benign MRI scans, it is pleaded that the defendants and each of them should have considered the possibility that she was suffering from a vascular disease and should have directed that vascular investigations be carried out, and had they done so, the vascular disease would have been discovered and she would not have suffered the injuries that she ultimately did.
13. At present, the court is unaware as to the stance on liability that will be taken by each of the defendants, as appearances have only been entered by the defendants to the personal injury summons issued by the plaintiff.

Chronology of the proceedings to date.

14. The chronology of the proceedings to date can be set out in the following way:

22/3/2013	A pre-litigation letter is sent to the second defendant.
28/3/2013	A personal injury summons is issued on behalf of the plaintiff on a protective basis.
29/4/2013	Messrs Hayes Solicitors write to the plaintiff's solicitors advising that they have authority to accept service of the proceedings on behalf of the second defendant. The letter also seeks copies of the plaintiff's relevant medical records.
2/5/2013	The plaintiff's solicitor sends a holding letter in response, advising that they are not in a position to release the plaintiff's medical records.
7/5/2013	The plaintiff's solicitor sends a letter to a medical consultant, Mr. Getty, based in Sheffield asking if he could act in the case.
5/6/2013	Mr. Getty is advised by email of the identity of the defendants.
13/6/2013	Mr. Getty agrees to act in the case and outlines his fees.
27/3/2014	Personal injury summons expires.
28/7/2014	Ex parte application is made to renew summons under O.8, r.1 of RSC.
27/1/2015	The plaintiff serves the renewed summons on the second defendant personally. This was on the last day before it expired.
2/2/2015	The second defendant's solicitor writes to the plaintiff asking for copies of the papers which grounded the application to renew the summons.
3/3/2015	The plaintiff's solicitor sends Mr. Getty the plaintiff's medical records and requests an expert opinion from him.
5/3/2015	Mr. Getty advises the plaintiff's solicitor by letter that he is unable to act in the matter, as he is a friend and colleague of the second defendant.
November 2015	Mr. Pearse in the UK is engaged to provide an expert medical opinion.
5/2/2016	A report is received from Mr. Pearse.
14/2/2020	The plaintiff's solicitor serves a notice of intention to proceed.
17/2/2020	The plaintiff's solicitor writes to Mr. Stephen Brearley, Consultant Vascular Surgeon, requesting him to prepare an expert report.
21/2/2020	The plaintiff's solicitor writes to St. James's Hospital requesting the plaintiff's medical records and in particular, the plaintiff's blood analysis

	results from 2011.
16/3/2020	Professor O'Donoghue is contacted by the plaintiff's solicitor for the purpose of preparing a medical report. The report is provided by him on 10th May, 2020.
27/5/2020	The plaintiff's solicitor sends medical records to Dr. Mary Kennedy of Minerva Medical Legal to prepare a typed transcript of the plaintiff's medical records and/or provide a summary of treatment received by her from November 2004 until March 2020.
15/7/2020	The plaintiff's solicitor instructs Mr. Brearley to complete a medical report on behalf of the plaintiff.
5/8/2020	The plaintiff's solicitor arranges for a notice of updated particulars of negligence to be drafted.
18/11/2020	An appearance is entered on behalf of the second defendant.
7/1/2021	The present motion is issued by the second defendant.
12/4/2021	Further particulars of negligence are served on the defendants.
8/7/2021	A motion is issued by the plaintiff seeking judgment in default of appearance against the first defendant.
22/11/2021	Order of the High Court extending time for entry of an appearance by the first defendant, and an appearance was subsequently entered on behalf of the first defendant

Submissions on behalf of the second defendant.

15. It was not contested by the plaintiff that the delay in the prosecution of her action herein was other than inordinate. Mr. O'Flaherty BL, on behalf of the second defendant, submitted that the delay was also inexcusable. It was submitted that the plaintiff's solicitor had delayed at almost every stage of the proceedings since their inception.
16. Counsel pointed out that while the plaintiff's personal injury summons had issued on 28th March, 2013, it had expired, necessitating an application to renew the summons, which was made on 28th July, 2014. The summons was only served personally on the second defendant on the last day of the renewal period on 27th January, 2015. However, the content of the summons was very general in nature, as it was made clear in the summons that it was only being issued on a protective basis and without the benefit of full information.
17. Counsel submitted that at the time of the application to renew the summons, the excuse proffered for the failure to serve the personal injury summons that had issued in March 2013, was that the plaintiff's solicitor had been unable to obtain a report from a suitably

qualified expert in the UK, due to the fact that she was having difficulty in obtaining a complete set of medical records in relation to the plaintiff and in particular, she was having difficulty obtaining the report from the paramedic, who had attended to the plaintiff in the ambulance which took her to the first defendant hospital on 26th May, 2011. However, it appeared that a decision had been made by Dublin Fire Brigade to partially grant the plaintiff's request for documentation. That decision was made on 25th July, 2013. Yet it was not until 3rd March, 2015, almost two years later, that the medical records were sent to Mr. Getty for the purpose of obtaining a report from him. It was submitted that the plaintiff's solicitor had not adequately explained this inordinate period of delay.

18. Counsel pointed out that in the period 2013 to 2016, the second defendant's solicitor had sent no less than sixteen letters seeking various records and information from the plaintiff. With the exception of one holding letter, all the other correspondence had gone on unanswered. In her replying affidavit, the plaintiff's solicitor had stated that the original letter indicating that the second defendant's solicitor had authority to accept service had been "misfiled". She stated that the other correspondence was not brought to her attention, due to the fact that they were experiencing severe staffing difficulties in her office at that time. However, counsel pointed out that in her affidavit she had stated that she was working approximately fourteen hours per day and doing all the administration work due to the difficulty in obtaining and retaining suitable staff during that period. Thus it was difficult to see how the correspondence had escaped her attention.
19. When Mr. Getty indicated that he was conflicted in the matter and could not provide a report, an alternative expert was retained from Mr. Pearse. He provided a report in February 2016, yet the second defendant was only served with further particulars of negligence, which outlined the negligence against both the defendants in concrete terms for the first time, in April 2021. There had been no explanation for this period of delay.
20. It was submitted that while the plaintiff's solicitor had indicated that she had certain health difficulties in the years 2013-2016, which required her to attend with various consultants, she did not elaborate on the nature of the treatment that was afforded to her during this period, nor as to the affect that the medical condition and treatment had had on her ability to work. It was pointed out that she had pleaded that she had had to work excessive hours during that period, due to the unavailability of suitable staff.
21. Counsel accepted that the plaintiff's solicitor had contracted Covid-19 in January 2021, which had been very severe, necessitating her treatment in ICU in Sligo University Hospital for nine days. It was accepted that she had been unfit to return to work until April 2021. Nevertheless, it was submitted that the overall position was that proceedings had been issued in March 2013 and the only concrete step that had been taken to progress the proceedings since that time was the service of a notice of intention to proceed in 2020 and the service of further particulars of negligence in April 2021. At the present time, the proceedings were still in their infancy, with appearances having been recently filed on behalf of each of the defendants. It was submitted that the plaintiff's

solicitor had accepted that all the blame for the delay lay at her door. She did not blame her client, nor did she assert that either of the defendants were responsible for any of the delay. It was submitted that in all the circumstances of the case, the delay had been totally inexcusable.

22. Counsel submitted that in relation to the issue of the balance of justice, the court was entitled to have regard to the fact that the second defendant had not contributed to the delay; the action was not likely to come on for hearing until 2024 or 2025, by which time the second defendant would be required to deal with events that had occurred some thirteen/fourteen years earlier. It was submitted that this clearly demonstrated that there was prejudice to him in being asked to deal with the matter at that remove.
23. It was submitted that the court could also have regard to the fact that if the proceedings were struck out against the second defendant, the plaintiff still had her cause of action against the first defendant and, having regard to the frank admissions made by the plaintiff's solicitor in her affidavits, the plaintiff would have an alternative remedy against her solicitor in respect of the loss of her chose in action against the second defendant. In these circumstances it was submitted that the balance of justice was in favour of the court granting the relief sought by the second defendant in his notice of motion.

Submissions on behalf of the plaintiff.

24. Mr. Richard N. Kean SC, on behalf of the plaintiff, submitted that while the delay had been inordinate in length, it had in all the circumstances of the case been excusable. In this regard he referred to the various matters set out in the affidavits sworn by the plaintiff's solicitor. In particular, he drew attention to the fact that she had encountered difficulty in obtaining a full set of medical records in relation to the plaintiff's treatment. In this regard, the plaintiff's solicitor had encountered particular difficulty in obtaining relevant records from the ambulance personnel, who had transferred the plaintiff to hospital on 26th May, 2011. The plaintiff was of the view that the evidence of the paramedic as contained in his triage report would be of particular relevance. He had noted that the plaintiff's leg was swollen, was blue in colour and he had remarked that there was no pulse in it. It was submitted that the plaintiff's solicitor had been entirely correct to pursue the production of the ambulance records.
25. It was submitted that when the records were sent to Mr. Getty in 2015, it was only then that he indicated that he had a conflict of interest and could not act in the matter, notwithstanding the fact that he had been advised by email on 5th June, 2013 as to the identity of the defendants. This caused a period of delay while an alternative doctor was retained. That was not due to any fault on the part of the plaintiff, or her solicitor.
26. Counsel referred to the fact that the plaintiff's solicitor had indicated that she had had health issues between 2013 and 2016. More importantly, she had encountered extreme difficulty in obtaining and retaining suitable staff to work in her office. This had been set out clearly in her affidavit, wherein she had given details of four members of staff who had been employed at the office, but had left for one reason or another. There was also one other long term member of staff, who left at or about that time.

27. In addition, a complaint had been made to the Law Society by the plaintiff against her solicitor and that matter was not resolved until August 2020, at which time the file was closed and the plaintiff elected to remain with her current solicitor. In addition, the plaintiff's solicitor had had a severe episode of ill-health due to Covid-19 in the period January to April 2021. It was submitted that taking all of these matters into account, the delay was excusable.
28. Counsel further submitted that even if the delay was held to be both inordinate and inexcusable, the court must then look at the balance of justice to see whether it lay in favour of allowing the action to proceed, or in having the action struck out against one or all of the defendants. In this regard, it was submitted that the court should have regard to the nature of the action, which in this case concerned very serious personal injuries. The court could also have regard to the fact that the plaintiff, if successful, would obtain a very substantial award of damages.
29. It was submitted that the court should also have regard to the fact that the plaintiff herself had been blameless in the matter. Her solicitor had very candidly accepted the blame for any culpable delay that there had been.
30. Counsel stated that the essential issue on the balance of justice, was whether there was any real prejudice to the defendant in being asked to defend the proceedings at this remove. In this regard, he stated that given the state of the proceedings and the fact that all medical records had in fact been made available to the defendants, there was no reason why the action could not be brought on for hearing towards the end of 2022, or early in 2023.
31. Of more significance, it was submitted that this was a medical negligence action. In such actions, it was accepted that treating doctors would not have any actual recollection of a particular patient. The doctors always relied on the content of their notes and other records relating to treatment of the plaintiff. In these circumstances, the case could be seen as being a "documents case", in which the memories of witnesses as to fact, would be of little or no relevance. Therefore, the passage of time was unlikely to provide any great prejudice to the defendant in conducting his defence of the action.
32. It was submitted that liability in this case would turn on expert evidence, which in turn would be based on the content of the notes that were made by the second defendant at the relevant time and on the plaintiff's medical records in the first defendant hospital. In these circumstances, it was submitted that there was no real prejudice to the second defendant by the delay that had occurred in this case. Counsel submitted that in the circumstances, the court should refuse the second defendant's application.

The law.

33. The principles of law applicable to applications to strike out proceedings on grounds of delay are very well known. Accordingly, the court proposes to only set out a brief summary of the relevant principles that are pertinent to the present case.

34. The classic statement of the relevant principles, was that given by Hamilton C.J. in *Primor v. Stokes Kennedy Crowley* [1996] 2 IR 459, where he stated as follows at p.475/476:

- "(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*
 - (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."*

35. In *Millerick v. Minister for Finance* [2016] IECA 206, Irvine J. (as she then was) gave the following summary of the test that has to be applied in such applications: -

"18. The Court is obliged to address its mind to three issues. The first is to decide whether, having regard to the nature of the proceedings and all of the relevant circumstances, the plaintiff's delay is to be considered inordinate. If it is not so satisfied the application must fail. If, on the other hand the Court considers the delay inordinate it must then decide whether that delay can be excused. If the delay can be excused, once again the application must fail. Should the Court conclude that the delay is both inordinate and inexcusable it must not dismiss the proceedings, unless it is also satisfied that the balance of justice would favour such an approach.

19. In considering where the balance of justice lies the Court is entitled to have regard to all of the relevant circumstances pertaining to the proceedings including matters such as delay or acquiescence on part of the defendant and the potential prejudice resulting from the delay."

36. In *Mangan v. Dockeray & Ors.* [2020] IESC 67, McKechnie J. stated as follows at para. 105: -

"To this day, the dicta of Hamilton C.J. in Primor Plc v Stokes Kennedy Crowley [1996] 2 I.R. 459 ("Primor") is without doubt the most generalised statement of the law on this topic. Whilst it has been joined by many other authoritative decisions, it remains, as described by McMahon and Binchy, the "locus classicus", in this area (Law of Torts, 4th ed., [46.115]. As the relevant passages from the judgment of the Chief Justice are well known, it will be sufficient to simply indicate the following:-

- The delay complained of must be both inordinate and inexcusable: it is for the moving party to so prove.*
- Even where such is established, the balance of justice test must be applied: does it favour the continuation or termination of the proceedings?*
- In considering the latter, there may be several diverse factors at play, but in essence all lead to an assessment of whether it is unfair to allow the action to proceed or is unjust to strike the action out.*
- The individual circumstances of every case and the conduct of each party feeds into this assessment. The earlier cases of Dowd v. Kerry County Council [1970] I.R. 27 and the authorities therein relied upon, as well as Rainsford v. Limerick Corporation [1995] 2 I.L.R.M. 561: (judgment date: 31st July, 1979), were highly influential in the formation of these principles."*

37. Where a defendant establishes that there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting the action, the onus of proof shifts to the plaintiff to establish that the balance of justice lies in favour of allowing the action to proceed: see *Gibbons v. N6 (Construction) Limited* [2021] IEHC 138 (para. 29).

38. Where a defendant establishes that there has been culpable delay on the part of the plaintiff, then moderate prejudice to the defendant will suffice to prevent the action being allowed to continue: see *McNamee v. Boyce* [2016] IECA 19 (para. 35); *Flynn v. Minister for Justice* [2017] IECA 178.
39. The conduct of both parties is relevant to the issue of the balance of justice. If a defendant has caused delay, or has acquiesced in the delay, that is a matter that can be considered by the court.
40. When considering the likely effect of delay on a defendant, the court must look at the period from the date of the events giving rise to the proceedings, up to the likely date for the hearing of the action.
41. In considering where the balance of justice lies, the court can have regard to the nature of the cause of action and also to the question of whether the plaintiff may have an alternative remedy, either against an existing defendant, or against some other party, such as his or her solicitor, in the event that the proceedings are struck out against one of the defendants.
42. In considering the balance of justice, the court can have regard to whether liability will turn exclusively, or to a large extent, on oral evidence. If it will turn on such evidence, then delay of itself is more relevant, because it is well established that people's memories fade and become less reliable as time passes. If the action will turn on documentary evidence and where the relevant documents are available for use at the trial of the action, the prejudicial effect of delay may be less: see *O'Reilly v National Document Management Group Ltd & Anor.* [2022] IEHC 37.
43. Similarly, if liability will turn on expert evidence, rather than on the evidence of witnesses as to fact, the prejudicial effect of delay will be lessened. The court is also entitled to have regard to the question of whether all relevant witnesses and documents remain available to give evidence or be used at the trial of the action.
44. Finally, the case law makes it clear that each case must be examined on its own particular circumstances; for that reason the authority of other cases where delay of a particular length may have been found not to have been overly prejudicial, will not be determinative of the issue in subsequent cases with similar periods of delay. Each case will turn on its own facts.

Conclusions.

45. It is accepted that the test set down in the *Primor* case, as restated by Irvine J. in *McNamee v. Boyce* and by the Supreme Court in the Mangan case, is the applicable legal test in this case. That being the case, the onus rests on the second defendant as the moving party to establish that there has been inordinate and inexcusable delay on the part of the plaintiff in the prosecution of her action. If the second defendant can establish these elements, the onus shifts to the plaintiff to persuade the court that the balance of justice is in favour of allowing the action to proceed.

46. It was conceded by the plaintiff that the delay was inordinate.
47. The plaintiff did not accept that the delay was inexcusable. Having considered all the evidence set out in the affidavits sworn on behalf of each of the parties, the court is satisfied that the delay in this case was inexcusable.
48. While the plaintiff's solicitor has put forward many excuses for why she did not progress the action in a timely fashion, the court is not satisfied that these excuses render the delay excusable in the legal sense; being that there was good and sufficient reason why the inordinate delay occurred.
49. The court is not persuaded by the excuses for the delay that have been put forward by the plaintiff's solicitor in her affidavits. While it may have been necessary to issue the writ in March 2013 on a protective basis, without a medical liability report being to hand, the court cannot understand how it took a further two years to furnish the records to Mr. Getty for the purpose of providing such a report. It appears from the affidavit sworn by the plaintiff's solicitor for the purpose of obtaining the renewal of the summons, that Dublin Fire Brigade had agreed to make certain records available to the plaintiff's solicitor as and from July 2013. There is no suggestion that there was any difficulty encountered by her in obtaining any of the plaintiff's other medical records. In these circumstances, the court cannot find that the delay in furnishing the full set of records to Mr. Getty in March 2015, was excusable.
50. While the court accepts that a setback was encountered when Mr. Getty indicated that he was conflicted in the matter and that this necessitated retaining the services of another expert, the court cannot understand the further delay that ensued after delivery of his report in February 2016 and the serving of further particulars of negligence on the second defendant in April 2021. There is no explanation given for this period of delay.
51. The court was unimpressed by the fact that of the sixteen letters that were sent by the second defendant's solicitor to the plaintiff's solicitor in the period 2013 to 2016, only one of those letters received a response. The excuse given by the plaintiff's solicitor that this correspondence was not brought to her attention due to the extreme staffing difficulties that they experienced in the office at that time, is inconsistent with her evidence that she was working a fourteen-hour day at that time, doing all the administration work, due to the fact that she could not get or retain suitable staff. If she was doing all the administration work in the office, she must have seen the correspondence that came in addressed to her. There is no credible excuse given for her failure to answer that correspondence.
52. While the plaintiff's solicitor made vague assertions that she suffered from palpitations during the period 2013 to 2016, for which she was under the care of a consultant, she did not provide any details as to whether the condition impeded her ability to work in the office. It did not appear that it did.

53. There was also a vague assertion in her affidavit that in or about 2018, her email system had to be replaced. She stated that she had started to use a new email address. She stated that that "may have added to the delays". The court finds that excuse unconvincing.
54. The plaintiff's solicitor also referred to the fact that in the summer of 2019, the plaintiff made a formal complaint to the Law Society in relation to the delay on the part of her solicitor in prosecuting her action. It appears that a formal hearing of that matter took place remotely on 21st May, 2020. On 12th August, 2020 the Law Society closed its file. The plaintiff elected to remain with her current solicitor. It is somewhat ironic that a complaint about delay on the part of the solicitor, should be used by the solicitor as an excuse for yet further delay during that period. While that was obviously a difficult time for the plaintiff's solicitor, it does not excuse inactivity for a period of almost one year.
55. The court notes that it was not until 17th February, 2020, that the plaintiff's solicitor wrote to Mr. Brearley, the Consultant Vascular Surgeon based in the UK for the purposes of obtaining a report. That report was only formally commissioned from him on 15th July, 2020. There is no credible reason given as to why such a report was only sought some nine years after the events giving rise to the cause of action and seven years after the proceedings had been instituted. Similar comments can be made in relation to the obtaining of a report from Professor O'Donoghue, who was the vascular surgeon, who had treated the plaintiff back in May 2011. He was only asked to review the plaintiff on 5th May, 2020. He furnished a report on 10th May, 2020.
56. The court accepts that the plaintiff's solicitor had very serious health issues between January and April 2021. Her inability to take any steps in the action during this four-month period is excusable.
57. Looking at the periods of delay that have occurred since the institution of the proceedings herein, the court is not satisfied that the delay was excusable. The court finds that the delay in this case was inexcusable.
58. Turning to the central issue in this application, the court must now consider where the balance of justice lies. Very fairly, Mr. O'Flaherty BL conceded that the nature of the plaintiff's action, being a substantial personal injury action, and the fact that, if successful, the plaintiff would obtain a large sum in damages, were both factors that weighed in the balance in favour of the action proceeding. However, he submitted that there were a number of factors which more than outweighed those factors and which should persuade the court that the proper course was to strike out the plaintiff's action against the second defendant.
59. The first of these factors was the length of time that had elapsed between the events complained of by the plaintiff and the likely date of the hearing of the action. The court accepts that the appropriate time period which must be considered, is not the date when the application to strike out the proceedings is moved. The issue of prejudice must be established by reference to the likely date for the hearing of the action. In this regard, the

court notes that the present action is very much in its infancy. Appearances have been entered by both defendants. The plaintiff has made her medical records available to the second defendant. If the action is to proceed, those records, together with instructions from the second defendant, will have to be sent to an expert for the purpose of giving an opinion on liability to enable the second defendant and his insurers to consider what defence should be filed on his behalf. The expert retained will probably have to be located abroad. When that opinion has been obtained, and a decision has been made as to what line of defence should be taken, the papers will have to be sent to counsel to draft a defence. Similar steps will have to be taken by the first defendant.

60. When the pleadings in the action are closed, they will have to be considered by senior counsel for each of the parties for the purposes of providing an advice of proofs. The action will then be ready to be set down for hearing.
61. Doing the best that I can, I estimate that if the action were allowed to proceed as and from now, being March 2022, it would take approximately three to four months to get an opinion from an expert on the liability aspects of the case. It would take a further two to three months for the second defendant to get a defence drafted and settled by senior counsel. This would take until approximately October 2022. It would take a further three months from close of pleadings for all parties to obtain an advice of proofs from their respective senior counsel. The action would then be ready to be set down for hearing, following which an application could be made for a specially fixed hearing date. Such application could be made in or about January 2023. Given the delays that exist in the High Court personal injury list at the present time, a hearing date would probably not be issued until July or October 2023. Accordingly, the court finds that the relevant period of delay from the events giving rise to the action, to the trial of the action itself, is likely to be in the region of 12/12.5 years.
62. In looking at the balance of justice, the court is satisfied that there are a number of factors in favour of the second defendant's position: he was not responsible for any of the delay; he has suffered reputational damage in the years since commencement of the action; while the plaintiff was not personally responsible for the delay, she must bear responsibility for the delay caused by the inaction of her solicitor, as she is bound by the actions and inaction of her agent; if the application is allowed, the plaintiff will still have her action against the first defendant and having regard to the frank admissions made by the plaintiff's solicitor in her affidavits, she would probably have a cause of action against her solicitor for loss of her chose in action against the second defendant. All of these facts must be taken into consideration when considering the balance of justice.
63. The key issue in considering the balance of justice is whether there is sufficient prejudice to tilt the scales in favour of striking out the proceedings. In this regard, as the second defendant has established inordinate and inexcusable delay on the part of the plaintiff, it is only necessary for there to be moderate prejudice to him, for the court to strike out the proceedings. It is not necessary for the second defendant to establish that he cannot get a fair trial. That threshold only has to be met when there has not been inordinate or

inexcusable delay, but a delay of such length and consequence that a defendant can no longer get a fair trial. That threshold does not apply in this case.

64. It was argued by the plaintiff that there was not even moderate prejudice to the second defendant due to the delay that had occurred in this case. It was submitted that he was very well armed to defend the action. Firstly, he had all his own notes. Secondly, as in nearly all medical negligence cases, it was accepted that a treating doctor would not recall treating an individual patient on a particular day. The doctor always relies on his or her notes. Once these are available, it was submitted that he or she is in the best possible position to defend themselves, notwithstanding that a significant period may have elapsed between the events complained of by the plaintiff and the trial of the action.
65. In addition, all other medical records, such as the hospital records, were available. All these records had been furnished to the second defendant for the purpose of obtaining an expert opinion and formulating his defence.
66. Thirdly, it was submitted that liability would turn almost exclusively on expert evidence as to the standard of care given to the plaintiff by the defendants at the relevant times. That would be established by the experts examining the records and giving an opinion as to whether the defendants, and in particular, whether the second defendant, had acted with reasonable care when reaching whatever diagnosis he had, or whether he had considered all relevant factors and had directed that all necessary investigations be carried out in order to enable him to reach a diagnosis.
67. It was submitted that the gravamen of the plaintiff's case was that given her complaints at the times that she was seen by the various defendants, their servants or agents, they had been negligent in assuming that her complaint of persistent left leg pain, was probably due to some back injury or complaint; and that they should have recognised the need to carry out a vascular investigation. It was submitted that that issue would be resolved by expert evidence based on the documented complaints and presentation of the plaintiff on examination, as recorded in the notes made by the second defendant and in the records of the first defendant.
68. The plaintiff further submitted that insofar as oral testimony may be relevant to the issue of liability, which they did not accept that it was, it was noteworthy that no relevant witnesses were stated by the defendant to have died, or to be otherwise unavailable, or to be incapable of giving evidence on behalf of the defendants at the trial of the action. In essence, it was submitted that this was solely a documents case and that as all documents remained available, there was no prejudice to the second defendant.
69. The court cannot agree that this is solely a documents case. While it is true that the second defendant will rely on his notes to a very large extent, that does not mean that the plaintiff will accept that his notes, or the hospital records, are accurate and complete in all respects. She may argue that when she told her treating doctors of her complaints, they were not properly recorded in their notes. To that extent, they would certainly be at a disadvantage dealing with such allegations some twelve years, or more, after the

events. That being said, the court is satisfied that liability in this case will to a very large extent turn on the medical notes made by the doctors and on the actions taken by the doctors thereon.

70. One could be tempted to strike out the proceedings because of the lack of any credible excuse for the delay on the part of the plaintiff's solicitor. However, it is not the function of this court on the hearing of this application, to punish errant solicitors. Once the court is satisfied that the delay is inexcusable, it must then look at the balance of justice. In doing that, the court has to focus on the fairness of allowing the action to proceed, as against the justice of striking out the plaintiff's action. That this is the essential question which the court must consider, was recognised by McKechnie J. in his judgment in the Mangan case, where he noted that in considering the balance of justice "there may be several diverse factors at play, but in essence all lead to an assessment of whether it is unfair to allow the action to proceed or is unjust to strike the action out".
71. What the court must do, is look at the particular circumstances of this medical negligence action and ask whether the second defendant has really suffered even moderate prejudice as a result of the delay that has occurred to date and will occur pending the hearing of the action.
72. This was always going to be a most complex action from a liability point of view, due to the separate involvement of two treating entities, being the second defendant and the staff of the A&E department of the first defendant hospital.
73. It seems to me that as far as the second defendant is concerned, liability will turn almost exclusively on the notes and records made contemporaneously by him. In those notes, he ought to have recorded the complaints made by the plaintiff on the occasions that he saw her; the findings on his examination of her on each occasion; his note of a possible diagnosis, and his note of what further investigations he directed. It will then be a matter for expert evidence as to whether the actions taken by the second defendant, on the basis of what he recorded in his notes, were compatible with the standard of care that could be expected from a consultant surgeon.
74. In my view, oral evidence will have a very minor role to play in this case. Insofar as any evidence of the plaintiff may contradict the contemporaneous notes of the treating doctor, in my experience it would take very convincing evidence to persuade the court that a doctor's note was inaccurate, or incomplete. This is due to the fact that doctors are trained to take accurate notes and are aware of the importance of so doing. That being the case, I am satisfied that, as far as the second defendant is concerned, liability will turn on the reasonableness of his diagnosis and the investigations he directed, given the history and presentation of the plaintiff on the occasions that he saw her, all of which will be based on his notes.
75. In essence, the case will boil down to whether, having regard to the matters pleaded in the further particulars of negligence, the second defendant ought to have considered an alternative possible cause for the plaintiff's leg pain and directed that a vascular

investigation be carried out by an appropriate expert. I am satisfied that resolution of that issue will turn on the expert evidence given in relation to the notes and records and the actions taken thereon by the treating doctors, including the second defendant.

76. In these circumstances, the court finds that there is not sufficient prejudice to tip the balance in favour of striking out the action against the second defendant, notwithstanding that there has been inordinate delay in the prosecution of the proceedings thus far.
77. One has to consider that, given the extent of the injury in this case and the delay that would necessarily ensue in obtaining all relevant medical records and obtaining the necessary expert evidence thereon and the necessity to fully explore the issue of quantum, without there being any delay on the part of the plaintiff, the action could not realistically have been brought on for hearing earlier than four years from the date of the events giving rise to the complaint.
78. At that remove, the second defendant was going to be entirely reliant on his notes. The fact that the action will now probably come to trial a further eight years later, does not in fact prejudice the second defendant in the conduct of his defence. He will give the same notes to a suitably qualified expert, who will give an opinion on them, having regard to the standard of care that could be expected of a consultant surgeon in 2011. In reality, the court is satisfied that there is no prejudice to the second defendant in having to fight the action at this remove.
79. The court is supported in its view as to the importance of medical records in medical negligence actions, by the decision of the Supreme Court in the Mangan case. While the facts of that case were very unusual, indeed one might say that they were almost unique, nevertheless, the broad principle that where medical records are available for use at the trial of the action, the balance of justice may tilt in favour of allowing the action to proceed, is a principle that is of wider application.
80. In the Mangan case, the plaintiff was a person of unsound mind. His case concerned an allegation of negligence in relation to the treatment of him in both the pre-natal and post-natal phases. The plaintiff had been born in January 1995. He issued his proceedings against the first defendant, who was the consultant obstetrician and gynaecologist who had performed a cesarean section on the plaintiff's mother, as well as attending on her at the time of the birth. The personal injury summons was issued on 17th June, 2008. The summons was not served within the time prescribed by the rules. An order renewing the summons was made on 15th July, 2013.
81. Thereafter, the summons was served on the first defendant and he was provided with further and better particulars of negligence on 15th February, 2016. On 21st November, 2016 a motion was brought by the first defendant seeking to join the second defendant, who was the paediatrician who had provided post-natal care to the plaintiff immediately after his birth and the third defendant, which was the hospital where the birth and post-natal treatment had been carried out, as third parties to the action. On the hearing of the motion, an application was made on behalf of the plaintiff to have the proposed third

parties joined as co-defendants to the proceedings. That application was acceded to and the plaintiff was allowed a period of eight weeks within which to serve an amended personal injury summons on all three defendants.

82. There were multiple applications to various courts thereafter. It is not necessary to set these out in this judgment; suffice it to say that a number of issues ultimately came before the Supreme Court for determination; one of which was whether the case against the second and third defendants should be struck out on the basis of inordinate and inexcusable delay. In the course of a detailed judgment, McKechnie J. dealt with the issue of the balance of justice at paras. 136 *et seq.* In reaching the conclusion that the plaintiff's action should be allowed to proceed, notwithstanding the very long period of delay between the date of the events complained of in 1995 and the probable date of the hearing of the action, in excess of 25 years later, the court held that a number of factors were in favour of allowing the action to proceed including the following: the crucial importance for the plaintiff in continuing with the action; the fact that being of unsound mind not so found, the limitation period could not apply; the fact that the second defendant was insured and no specific prejudice had been advanced on his behalf; the inadequacy of the evidential material advanced on behalf of the hospital regarding insurance and, of particular relevance to the decision in the present case, the learned judge identified the following two factors:

"The availability of what appears to be full and complete records of the events at and surrounding the birth and thereafter during the plaintiff's stay in Mount Carmel Hospital.

The likelihood that irrespective of the passage of time, the evidence of both the second and third defendants and any experts called on their behalf, would be heavily if not almost entirely reliant on those medical records."

83. McKechnie J. gave his conclusion on the balance of justice issue at para. 146:

"In all of these circumstances, I do not believe that, on the evidence presently available, there is a serious risk of an injustice being done to either the second or third defendants in allowing this action to proceed, whereas the undoubted prejudice to the plaintiff would be enormous. In any event, there is a continuing obligation on a trial court to ensure that fair procedures and constitutional justice is always adhered to. Further, it should be noted that, even if these applications were successful, both the second and third named defendants would remain in the action pursuant to the notice of contribution and indemnity issued on behalf of Dr. Dockera. In these circumstances, I do not feel it is justified to terminate these proceedings without a hearing on the merits at this point in time."

84. Finally, the court should note that where an application is made by one of a number of defendants to be let out of the proceedings on grounds of inordinate and inexcusable delay, a factor which might have to be taken into account is that such defendant may have to remain in the proceedings as third party, or on foot of a notice of

indemnity/contribution served between the defendants. The ramifications of this scenario was considered by the Supreme Court at para. 147 of its judgment in the *Mangan* case and was also adverted to by Butler J. in *Gibbons v. N6 (Construction) Limited*. It is not clear whether similar issues would apply in this case, because the first defendant would probably bring a similar motion to be let out of the proceedings, in the event that the second defendant was successful in its application. However, as the second defendant has not been successful in his application, it is not necessary for the court to make any finding on this aspect of the case.

85. For these reasons, the court refuses the reliefs sought by the second defendant in his notice of motion.
86. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.