

# THE HIGH COURT

[2024] IEHC 751

[Record No. 2022/1444P]

BETWEEN

IARLA THOMPSON (A MINOR) SUING BY HIS PARENTS AND NEXT FRIENDS

SINEAD THOMPSON AND STEPHEN THOMPSON

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

**EX TEMPORE JUDGMENT of Ms. Justice Reynolds delivered on the 20<sup>th</sup> of March,**

**2024**

1. This is an application seeking leave to amend the personal injury summons dated 11<sup>th</sup> April 2022 pursuant to Order 28, rules 1 and 6 of the Rules of the Superior Courts.
2. Medical negligence proceedings were issued on behalf of the plaintiff through his parents and next friends in April, 2022. In the personal injury summons, it is alleged that the plaintiff was caused to suffer severe personal injuries at birth, arising from the negligence and breach of duty on the part of the defendant, its servants or agents in his ante and post-natal care. Further, it is alleged that this resulted in the plaintiff suffering hypoxic ischaemic encephalopathy, which resulted in the plaintiff's development of, *inter alia*, developmental delay and autism spectrum disorder.

3. A full defence delivered on behalf of the defendant in January 2023, put the plaintiff on notice that the defendant's investigations were incomplete.

4. In December 2023, the defendant delivered an amended defence and pleaded, *inter alia*, that the CTG tracing on 18 February 2013:

*“Is a normal, reassuring CTG tracing”* and that there was *“no indication to expedite delivery of the plaintiff”*.

5. The parties, thereafter, exchanged expert reports in December 2023. The trial was specially fixed for hearing on 30 January 2024. A full chronology of the proceedings is very helpfully set out in the defendant's replying affidavit and, for that reason, I do not propose to rehearse it here.

6. However, suffice to say, a number of applications were made to adjourn the proceedings and were unsuccessful, save and except that Coffey J. postponed the hearing to 6 February 2024.

7. When the matter came before me on that date, a further application was made for an adjournment on the basis of the necessity to amend the plaintiff's claim in light of a new expert report received from Mr. Gerald Mason, consultant in Feto Maternal Medicine. I acceded to the application and granted directions in respect of bringing the within application returnable on 19 March 2024.

8. The basis for the application is set out in the grounding affidavit of Cian O'Carroll, solicitor, dated 20 February 2024. At para. 7, he avers the following consideration of the defendant's expert reports, he became concerned about the degree of divergence in opinion with the plaintiff's experts and states:-

*“It seemed to me that the defendant's expert Professor F Malone offered to the Court a strong opinion that the CTG did not indicate a need for expedited delivery of the*

*minor plaintiff until a time considerably later than that which Mr. Mohsen Iskander, the plaintiff's obstetric expert had opined."*

At para. 12, he states that he felt it was appropriate to engage a new obstetric expert to reconsider the issue of ante-natal care and, thereafter, sets out how he came to engage Mr. Mason. Mr. Mason initially furnished an opinion on the issue of a failure to detect the Transposition of the Greater Arteries (TGA) ante-nataly, and concluded that there was no breach of duty.

9. Thereafter, Mr. Mason was requested to provide a more general opinion on the obstetric care provided. After further consideration of all the relevant issues, and in particular an analysis of the CTG, Mr. Mason concluded that:-

*"...All evidence points to a failure to monitor the foetal heartrate in labour instead recording a maternal rate..."*

10. He opined that the failure to obtain an accurate reading was a "*breach of duty*" and was directly related to the plaintiff's poor condition at birth.

11. There is no dispute but that the case, as originally pleaded on behalf of the plaintiff, is manifestly different to the case now being made by Mr. Mason. The plaintiff's previous experts have relied on the CTG trace as a recording of the foetal heartrate, whereas Mr. Mason's view is that it is, in fact, a recording of the maternal heartrate, and upon which his criticisms and findings are now based.

12. A replying affidavit of Padraic Brennan, solicitor for the defendant, raises a number of issues, including the lateness of the application, the extent of the costs incurred to date to meet the case as pleaded and the inevitability of further costs being incurred in the event that the defendant has to essentially meet a whole new claim.

### **Amendment with Leave**

13. Order 28, rule 1 provides:-

*“The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”*

**14.** There is no dispute between the parties as to the legal principles to be applied in considering such applications. These principles were summarised by Birmingham J. in *Rossmore Properties Ltd v. Electricity Supply Board* [2014] IEHC 159 and, more recently, analysed by Collins J. in *Stafford v. Rice* [2022] IECA 47 at 23.

**15.** For the purpose of this application, it appears to me that the most relevant considerations are as follows:-

- (a) That the amendment is necessary for the purpose of determining the real issues in controversy between the parties, and
- (b) That the amendment can be made without prejudice to the defendant, or where any prejudice, logistical or otherwise, can be addressed by the imposition of appropriate terms (including costs).

**16.** As a starting point, it is clear that the rule *“is intended to be a liberal rule”* as per Geoghegan J. in *Croke v. Waterford Crystal Ltd* [2005] 2 IR 383, 401 [2005] 1 ILRM 321, 337.

**17.** In the within proceedings, it is clear that Mr. Gerald Mason’s report only came to light very late in the day. After careful consideration by the plaintiff’s legal advisors, it was deemed necessary to adjourn the proceedings and amend the plaintiff’s claim in circumstances where his opinion and findings markedly alter the plaintiff’s claim.

**18.** No real argument has been proffered by the defendant to suggest that the proposed amendment is not necessary for the purpose of adjudicating upon the matters at issue in these proceedings. Nor has it been suggested that there is any real prejudice to the defendants, save

what might be considered “*logistical*” prejudice as per Clarke J. in *Woori Bank v. KDB Ireland Ltd* [2006] IEHC 156, where the effect of acceding to the application would be to significantly disrupt and delay the determination of the proceedings.

**19.** Undoubtedly, the court has a wide discretion as to whether to make the order or not, but the primary consideration remains whether the amendment is necessary for the purposes of resolving the real issues in dispute between the parties.

**20.** The gravamen of the outcome of these proceedings for the plaintiff cannot be overstated. The plaintiff is a vulnerable eleven-year-old child who suffers from neurodevelopmental delay and autism, and has ongoing and complex care needs.

**21.** However, for the purpose of this application it is not the function of the court to embark on any analysis of the prospects of success of the proposed amendment; it is merely to establish whether the amendment sought is necessary for the purposes of determining the real questions in controversy between the parties.

**22.** I am satisfied that the amendment sought relates to the core issues in controversy between the parties in terms of the obstetric care afforded to the plaintiff’s mother at the time of his birth. Whilst the report of Mr. Mason undoubtedly raises entirely new issues in this case, they are issues that are germane to resolving matters between the parties. There is no dispute but that the plaintiff suffered a degree of hypoxia in the course of his birth, what is disputed is the extent of that hypoxia and whether it is caused by negligence on the part of the defendant and whether it is the cause of the plaintiff’s neurodevelopmental issues and autism. Mr. Mason’s expert obstetric opinion will, therefore, be necessary from the plaintiff’s point of view to the resolution of those issues.

**23.** In considering the issue of prejudice to the defendant, I am satisfied that the only prejudice that arises is that of a logistical nature which the court can address in dealing with the issue of costs.

**24.** In all the circumstances, I will accede to the application to amend in terms of the amended personal injury summons exhibited in the grounding affidavit. On balance, I am satisfied that the defendant is entitled to costs of the application, but, having regard to the nature of the infant plaintiff's claim and the fact that the proceedings are at an advanced stage, I propose to put a stay on the Order pending the final determination of all issues between the parties.