THE SUPREME COURT

Supreme Court Record No. 104/2019 & 106/2019

Court of Appeal Record No. 210/2018 & 211/2018

High Court No. 2008/4863P

Clarke C.J.

McKechnie J.

MacMenamin J.

Dunne J.

Baker J.

BETWEEN

ANDREW MANGAN (A PERSON OF UNSOUND MIND OR NOT SO FOUND)

SUING BY HIS MOTHER AND NEXT FRIEND, LORRAINE MANGAN

Plaintiff/Appellant

AND

JULIAN DOCKERAY

First Defendant

AND (BY ORDER)

BRIAN DENHAM

Second Defendant/Second Respondent

AND

THE CONGREGATION OF THE LITTLE COMPANY OF MARY TRADING AS MOUNT CARMEL HOSPITAL

Third Defendant/Third Respondent

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 4th day of November, 2020

Introduction

1. Andrew Mangan, the plaintiff and now appellant, was born in Mount Carmel Hospital in January, 1995. He suffers from cerebral palsy, cortical blindness and quadriplegia and is entirely dependent on others in every aspect for his day-to-day living. In very general terms, the plaintiff in these proceedings, seeks damages against the defendants for the catastrophic injuries which he suffered in and around the time of his birth and its immediate aftermath. To understand the factual and procedural background which has led to this appeal, it is desirable to provide a brief explanation of the role which each party has played in these events.

2. The first defendant, Dr. Julian Dockeray, was a consultant obstetrician and gynaecologist who performed a caesarean section on the appellant's mother as well as attending on her at the time of birth. He is now retired and has taken no active role in these proceedings. The second defendant/respondent to this appeal, Dr. Brian Denham, is a consultant paediatrician who provided the appellant with neonatal care at Mount Carmel Hospital, Dublin 14, and the third defendant/respondent, being a religious order which, at the time was responsible for the operation and management of that hospital. In April, 2006, it disposed of its interest in the hospital which eventually closed in 2014.

3. Dr. Dockeray was the only defendant named in the original personal injuries summons but after obtaining expert evidence as to his position, he applied to join the second and third defendants as third parties; this in turn prompted the plaintiff to seek to have them joined as co-defendants. Barr J. acceded to this application on the 21st November, 2016 after which, each of them issued similar motions seeking to have the plaintiff's claim against them dismissed. These motions were heard by Binchy J., then of the High Court, who having found in favour of the second and third defendants struck out the claim for failing to disclose a reasonable cause of action pursuant to O. 19 r. 28 of the Rules of the Superior Courts ("RSC"). This decision was appealed unsuccessfully by the plaintiff, to the Court of Appeal, who agreed with the trial judge's assessment. The plaintiff then made his application for leave to appeal to this Court on the 4th June, 2019. The procedural history will be explained in fuller detail below. For ease of understanding and continuity, I will hereinafter refer to Mr. Mangan as the plaintiff and to the remaining parties as the first, second and third defendants.

4. In a determination dated the 4th October, 2019 ([2019] IESCDET 210), leave to appeal from the judgment and order of the Court of Appeal was granted, on two specific issues, which were later added to during the currency of case management on the 31st October, 2019: the precise wording of the permitted grounds appears at para. 30 below.

Factual Background

5. Ms. Mangan was admitted to Mount Carmel Hospital, on the 28th December, 1994, due to pre-term rupture of the membranes. She had been in and out of hospital several times in the weeks immediately preceding due to abnormal bleeding. Though her estimated delivery date was the 19th March, 1995, her son was born at just over 30 weeks gestation on the 11th January, 1995, at 00:39 hours, after she underwent an emergency caesarean section, which

was considered necessary by Dr. Dockeray and which was duly performed by him. Immediately after birth the new-born received suction and was then transferred to the Special Care Baby Unit at the hospital under the management of Dr. Denham, the second named defendant, where he received ventilation between the 11th and 13th of January. He stayed there until he was discharged home on the 20th January, 1995.

6. Following his discharge, Andrew remained under Dr. Denham's care who on assessment at age six months, expressed concern about his vision; any other developmental delay was thought to be as a result of his premature birth. However, at nine-months, following a referral by Dr. Denham, the plaintiff was seen by a Dr. Monaghan and was diagnosed with cerebral palsy and shortly after this, at ten-months old, he began suffering seizures and was diagnosed with epilepsy. Andrew received physiotherapy with Enable Ireland in Sandymount, Dublin 4, where he has attended school for most of his life. Over the years, his epileptic seizures have responded with varying degrees of success to different medicines prescribed for him. His medical history includes frequent respiratory infections, secretions, copious coughing and numerous other issues. He underwent spinal surgery in February, 2012 for severe scoliosis and has also received Botox injections in both upper limbs to help with spasticity. His visual impairment is significant and his ability to speak is confined to the use of single words and phrases, though his non-verbal communication is described as good by his family. This brief overview of the plaintiff's medical history serves to illustrate the severity of his condition, which is considered to be lifelong without any prospect of recovery or even improvement. He has 24-hour nursing needs which are provided by his family.

7. On the basis of a report prepared by Dr. Roger Clements, consultant obstetrician and gynaecologist, a personal injuries summons was issued by the plaintiff's solicitor, Ms. Agatha Taylor of Ballagh Solicitors on the 17th June, 2008, alleging professional negligence against Dr. Dockeray, then the only defendant. Service did not take place within the required time,

indeed not for several years. Accordingly, it became necessary to bring an application to have the summons renewed: this was acceded to by Peart J. on the 15th July, 2013. An application to have that order set aside was refused by Costello J. in a judgment delivered on the 23rd October, 2014 ([2014] IEHC 477). As might be expected the grounds for moving that application were essentially based on delay, with the first defendant submitting that no explanation whatsoever had been given for the failure to renew the summons earlier or for the absence even of a warning letter. He did however acknowledge that to progress a claim involving hypoxic injury, advices from a paediatric neurologist were absolutely essential, a requirement highlighted by Dr. Clements in his report.

8. The learned judge found that the lapse of time between 17th June, 2008, when the summons issued, and the 15th July, 2013, when it was renewed, was attributable to the considerable efforts made by Ms. Taylor, and outlined in her affidavit of the 28th February, 2014, to comply with counsel's instructions as to the issues which needed to be addressed before service should be effected. In particular, counsel had directed that the opinion of a consultant paediatric neurologist was necessary: unfortunately, Ms. Taylor had great difficulty in identifying any such person who was willing to act; this despite having written to eleven doctors with that speciality. Costello J. found that the importance of the claim coupled with the advanced stage of preparation which the proceedings had then reached, meant that setting aside the order made by Peart J. would be to risk grave injustice to the plaintiff and his family. She also found on the flip-side, that the risk of injustice to Dr. Dockeray should she refuse his application, was considerably less. On those bases, the learned judge was satisfied that there was good reason to renew the summons and that the relief sought ought to be refused.

9. The first defendant's appeal against that decision was dismissed on the 13th May, 2015 by the Court of Appeal. Dr. Dockeray thereafter, sought and was provided with further and better particulars on the 15th February, 2016. Two motions seeking judgment in default of defence then issued: in the first, heard on the 20th June, 2016, Dr. Dockeray was given six weeks within which to deliver a defence; this he failed to do. Before the second was heard on the 21st November, 2016, a motion was issued on his behalf seeking to have the 'now' second and third named defendants joined as third parties. This application was grounded on the affidavit of his solicitor, Ms. Fiona Brassil of the firm Daniel Spring & Co., sworn on the 2nd day of November, 2016. The contention made by her was, in so many words, that the plaintiff's injuries were as a result of the negligent care provided by Dr. Denham in the postnatal period and/or also due to the lack of specialist services available in Mount Carmel Hospital during that time. These assertions were said to be based on expert advice which the first defendant had then received (para. 16 below). The motion was heard by Barr J., on the 21st November, 2016; on that same occasion the plaintiff made an application to have the intended third parties joined as co-defendants, an application to which the Court acceded to. During the hearing, counsel for the plaintiff made it clear that they themselves were not in possession of an expert opinion, such as would justify that application: rather, in light of Ms. Brassil's averments in her affidavit, the plaintiff's advice had been to join the proposed third parties as co-defendants. The learned judge noted this position and allowed an 8-week period within which an amended summons should be served.

10. In an affidavit sworn on the 4th April, 2017, Ms. Taylor makes it clear that both herself and counsel were concerned about the possibility that the claim could "fall between the stools" of the differing medical opinions as to the cause of Mr. Mangan's injuries (paras. 14-16 below). In a separate affidavit, dated 3rd February, 2017, which was sworn to support of a motion for a short extension of time in respect of the eight week period, she outlines the fact

that she wrote to Dr. Dockeray's solicitors seeking their agreement to share the expert evidence which had been sworn to by Ms. Brassil. She did so because counsel considered it necessary so as to gain an insight into the allegations made about the personnel and facilities which were or were not available at Mount Carmel at the time of the plaintiff's birth. On the 29th November, 2016, Ms. Brassil denied this request.

11. Following such refusal and on further advice from counsel, it was decided that the only route by which the Mount Carmel information could be obtained was *via* the discovery process. Until that information was at hand there was little point in seeking expert advice as to what specific allegations of negligence could be pleaded against Dr. Denham and the hospital. For these reasons, it followed that for the time being the amended personal injuries summons could only be drafted in general terms. On application, the court by order dated the 6th February, 2017, granted an extension of time within which to serve the amended summons.

12. There are two further details which are worth noting at this juncture: the first is that on the 9th November, 2017, Dr. Dockeray's solicitors replied to a letter received by them from Hayes Solicitors, on behalf of the Medical Protection Society ("MPS") which is looking after Dr. Denham's interests. The MPS had wished to make direct contact with the person(s) in the State Claims Agency who had responsibility for Dr. Dockeray and who are represented by Daniel Spring & Co. It also requested copies of all expert reports which had been referred to by Ms. Brassil: in fact, it made the point that the same should have been exhibited with a grounding affidavit in the first instance. This request was refused, 'at this time', on the basis that disclosure would take place in the normal course as part of an exchange pursuant to S.I. 391/1998 RSC (No. 6) (Disclosure of Reports and Statements) 1998. Whilst it was acknowledged that the evidence referred to in Ms. Brassil's affidavit was the basis upon

which Dr. Denham had been brought into the case, it did not follow that the MPS had any right to see the expert evidence at that stage of the proceedings.

13. The second point is that in the grounding affidavit sworn on behalf of the hospital on the 11th September, 2017, Mr. John Gleeson, Solicitor, states that his clients have not had any "insurance indemnity" for claims of this nature since they disposed of their interests in the hospital in 2006. In a replying affidavit the plaintiff's solicitor expressed concern as to what exactly this meant and sought clarification in this regard, in particular as to whether Mount Carmel had any kind of indemnity cover which would be available to the plaintiff if the hospital was found liable for the alleged negligence. The requested clarification however was not forthcoming.

The Expert Opinions Obtained by the parties

14. Having outlined the procedural background to this appeal, it now seems appropriate to set out the substance of the expert medical evidence which has been referred to in this case. Firstly, and as previously stated, the plaintiff had obtained an opinion from Dr. Roger Clements, on foot of which the original personal injuries summons was drafted. In that opinion however, Dr. Clements advised, *inter alia*, that additional reports were required from experts in other specialities, including in the area of neo-natal medicine. Accordingly, Dr. Anoo Jain, a consultant in this field was asked for a report on the 4th March, 2008: such report was not furnished until the 17th July, 2009.

15. In this report, Dr. Jain was critical of the fact that Dr. Denham had not adjusted Mr. Mangan's ventilation settings in response to him being over-ventilated and hypocarbic, and stated that both of these factors can lead to abnormal cerebral blood flow and periventricular leukomalacia: nonetheless in his professional opinion the plaintiff's injuries were as a result of his prematurity at delivery, and not of any post-natal treatment whilst under the care of Dr.

Denham. He did however recommend that a further opinion should be obtained from a consultant obstetrician in order to determine whether delivery at aged thirty weeks was clinically justified. When Dr. Jain's report was furnished to counsel, his advice (para. 8 above), was that the retention of a consultant paediatric neurologist was also necessary. After much difficulty, the opinion of such a specialist, namely Dr. Bláthnaid McCoy, was obtained, in the form of two reports: the first was dated the 22nd March, 2013 and it related to the plaintiff's condition at that time and his prognosis for the future; the second was dated the 30th April, 2013 and it dealt with the timing and causation of his injuries. Whilst both reports were important, it is quite evident that the second one was critical on the issues of negligence and causation.

16. The expert engaged by Dr. Dockeray is not in fact named anywhere in the exhibits or judgments. However, the affidavit of Ms. Brassil (2nd November, 2016) is accepted as summarising the opinion given: this particular passage has been quoted in both the High Court and the Court of Appeal's judgments, however, I do not hesitate in re-quoting it, due to its importance in the factual matrix:

"The Plaintiff was born at 00:39 hours on 11th January 1995. The Plaintiff received suction and was transferred to the Special Care Baby Unit at Mount Carmel wherein the Plaintiff received ventilation between the 11th and 15th January 1995. The Defendant has received expert advice to the effect that the ventilation provided to the Plaintiff and his management was not appropriate and the Plaintiff was inappropriately hypocarbic as a result leading to brain injury. The Defendant has also been advised by his experts that it was inappropriate to provide or attempt to provide the kind of paediatric or neo-natal care actually afforded to the Plaintiff in the setting of Mount Carmel hospital without specialised and resident paediatric expertise. Further, there was an inadequate setting to ensure appropriate availability of blood gas testing and monitoring at Mount Carmel hospital. The Defendant will allege as against

the Third Party that it was not acceptable for the Plaintiff to have remained in Mount Carmel, as opposed to being transferred elsewhere for appropriate neonatal care and that the care actually afforded to the Plaintiff by Mount Carmel staff (whether under the direction of Dr. Denham or in applying hospital policy or protocols) was negligent. The negligence on the part of the proposed Third Parties, it will be alleged, has caused the Plaintiff to suffer the injuries he now suffers from. It may well be the case that one of the proposed Third Parties is willing to indemnify the other against some or all of the particular issues arising inter se the Third Parties but from the Defendant's perspective both the actual care afforded to the Plaintiff and the adequacy of the setting in which it was delivered are at issue."

As stated, it was on the basis of this advice that the first defendant applied to join Dr. Denham and Mount Carmel Hospital as third parties, and it was on the basis of this evidence that the plaintiff successfully applied to have them joined as co-defendants: he had no other evidence then or at any time later.

Amended Personal Injuries Summons and Motions of the Second and Third Defendants

17. The amended personal injuries summons is dated the 9th January, 2017. The most relevant sections begin at para. 9, wherein the particulars of the negligence and breach of duty alleged against the second and third defendants are detailed: -

"As of the date of issuing of the present amended personal injuries summons, the plaintiff does not possess any expert medical evidence that would support allegations of actionable and causal negligence and/or breach of duty as against the second and/or third named defendants their servants or agents. The second and third named defendants are joined to these proceedings in reliance upon the expert medical opinion of the first named defendant's instructed experts: the allegations of wrongdoing on the part of the second and/or third

named defendants have been summarised on behalf of the first named defendant in the following terms:"

Next quoted is the extract from Ms. Brassil's affidavit which has already been quoted in the paragraph immediately preceding. The amended summons then continues: -

"The aforesaid constitutes the best particulars available to the plaintiff pending acquisition of further medical opinion which will in turn be predicated upon information as to the operation and management of Mount Carmel Hospital and its appropriateness as a venue for the plaintiff's neonatal care which shall only become available to the plaintiff in the course of a process of discovery and kindred procedures in these proceedings. The plaintiff shall furnish further and better particulars of negligence and breach of duty as against the second and/or third named defendants their servants or agents at that stage."

18. The next pertinent events directly lead up to the central issues arising in this appeal: both the second and third defendants brought similar motions to have the proceedings struck out. The first motion, issued by the second defendant on the 2nd March, 2017 was grounded upon the affidavit of Mr. Ciarán O'Rorke of Hayes Solicitors, sworn on the previous day. The relief sought was an order pursuant to the inherent jurisdiction of the court or pursuant to the Rules of Superior Courts (or "RSC") striking out the plaintiff's claim against their client on the grounds of inexcusable delay, and/or that it was an abuse of process; and/or that it was unsustainable and bound to fail: in the latter respect the Statute of Limitations Act 1957, as amended, was also relied upon. In addition, further orders were also sought pursuant to, O. 25 (trial: on a point of law), to O. 34 (trial: by way of special case) and to O. 35 (trial: of issues of fact without pleadings), all of the RSC.

19. The second motion, that of the third defendant, was brought on the 12th September, 2017 and was grounded upon the affidavit of Mr. John Gleeson, of Mason, Hayes & Curran

Solicitors dated 11th September, 2017. The motion is drafted in very similar terms to that of the second defendant but with some modification: in seeking relief pursuant to O. 19 r. 28 RSC, Mount Carmel did not plead the statute, but rather relied on the grounds that the claim discloses no reasonable cause of action and/or is frivolous or vexatious. In addition however, it sought an order pursuant to the European Convention on Human Rights Act 2003, asserting that the timeframe of the plaintiff's claim was inconsistent with their client's right to have a trial within a reasonable time as guaranteed by Article 6 of the Convention.

20. On the 3rd October, 2017, a defence was filed on behalf of the first defendant in which it was pleaded that he was not responsible for the paediatric and/or neonatal care of the plaintiff and that the injuries suffered had been caused wholly or had been materially contributed to by the second and third named defendants; however no particulars of negligence or breach of duty were given. On the same date, Dr. Julian Dockeray also served a notice claiming indemnity and/or contribution on the other defendants. The reason given for this was, that if the plaintiff did sustain the personal injury, loss and damage as alleged, it was as a result of the negligence, breach of duty and breach of contract on the part of the second and third defendants in failing to take any reasonable care of the plaintiff and causing him *inter alia*, to be over-ventilated and to thereby suffer a brain injury.

Judgment of the High Court

21. Binchy J., (then of the High Court) delivered a lengthy judgment on the 12th April, 2018 in which he concluded that the plaintiff's claim could not succeed as it failed to disclose any reasonable cause of action against either of these defendants: he therefore made an order pursuant to O. 19 r. 28 RSC and dismissed the proceedings. Having decided the motions on this ground, the learned judge found it unnecessary to consider any of the other arguments advanced. Many of the submissions made before the High Court, particularly those discussing

relevant authorities, have been repeated both before the Court of Appeal and this Court; as these are dealt with later in the judgment, it is not necessary to further repeat them at this point.

22. In deciding the applications in the way in which he did, Binchy J.:-

i) cited *Cooke v. Cronin & Neary* [1999] IESC 54 (Unreported, Supreme Court, 14th July, 1999), in which Lynch J. made the observation that in all cases of alleged professional negligence there ought to be some credible evidence to support the plaintiff's case before the action is commenced,

ii) held that the plaintiff had not made any specific allegations against the relevant defendants, noting in the process the views of Dr. Jain (para. 15 above),

iii) rejected any reliance on *Hetherington v. Ultra Tyre Services Limited* [1993] 2 I.R. 535, stating that the service of notices of contribution and indemnity in that case were solely between the defendants and had no bearing on the plaintiff's case, and,

iv) dismissed the concern that the expert evidence of the first defendant could potentially exonerate him and assign all responsibility to the second and third defendants: in such circumstances, although acknowledging the existence of that risk, the learned judge felt that this made no difference to the plaintiff's claim.

23. In conclusion, the trial judge's view was that it would "fly in the face of logic" to allow the plaintiff to continue the case against the second and third defendants in the situation where he had made no allegations of negligence against them and instead had simply replied upon averments made in the affidavit of the solicitor for the first defendant. In those circumstances, he held that, as no reasonable cause of action had been disclosed, the plaintiff's claim was bound to fail. In consequence, he made the order as above mentioned.

Court of Appeal

24. On the 22nd February, 2019, the Court of Appeal (Whelan J., McGovern J. and Costello J.) delivered its judgment in the matter, upholding the decision made at first instance. McGovern J., speaking for the court, outlined the rationale in this jurisdiction for the view that an opinion from a qualified expert was necessary so as to maintain an action in professional negligence; the understanding being that, even if no such finding is ultimately made, allegations of this sort can have very serious consequences for a medical practitioner. a hospital, or for those otherwise involved. As a result the institution of such proceedings should only occur against the backdrop of sufficient credible evidence to support the allegations made. (*Reidy v. National Maternity Hospita*l [1997] IEHC 143 (Unreported, High Court, Barr J., 31st July, 1997), para. 45 ("*Reidy*"), *Greene v. Triangle Developments & Anor* [2008] IEHC 52, 27 I.L.T. 134 at para. 4.3 ("*Greene*"), *Gallagher v. Letterkenny General Hospital & Ors* [2017] IEHC 212 (Unreported, High Court, Baker J., 30th March, 2017) at para. 47, ("*Gallagher*")).

25. During the course of the hearing, discussion was had as to whether the law did require the existence of a written expert report before commencing proceedings, or whether on the correct interpretation of the authorities the existence of reasonable grounds would be sufficient. The observations of Kelly J. in *Connolly v. Casey* [1998] IEHC 90 (Unreported, High Court, 12th June, 1998 at p. 19) were cited by the plaintiff's counsel (see para. 92 below). While the Court of Appeal acknowledged that the jurisprudence could be looked at in this way, it was not accepted that reliance on the expert report of the first defendant, which the plaintiff's legal advisors had not even seen, could be sufficient: it was too "slender a thread upon which to hang such a claim" in particular having regard to the contrasting views taken by Dr. Jain.

26. Significant emphasis was placed by McGovern J. on the fact that the plaintiff had not yet instructed appropriate experts in order to strengthen the case being made against the second and third defendants, even having had "ample opportunity" to do so (para. 22 of the judgment).

The learned judge observed that from the point at which the plaintiff's advisors had seen the affidavit of Ms. Brassil, they would have had sufficient general knowledge with which to make enquiries of their own as to whether the postnatal care given to the plaintiff was appropriate. Furthermore, Dr. Jain was still being retained as their key expert witness: this did not fit easily with the situation at hand. Either his opinion or even he himself as a witness, would have to change if support to maintain the existing position, was to follow.

27. The Court strongly rejected the suggestion made at para. 10 of the amended personal injuries summons that further particulars of negligence against the second and third defendants would be available through the process of discovery. McGovern J. stated that this would be "putting the cart before the horse": the process of discovery is rooted in the pleadings and cannot be used as a device to determine whether the plaintiff has or has not a viable cause of action.

28. Having regard to the decisions of Baker J. in *Gallagher v. Letterkenny General Hospital & Anor* [2017] IEHC 212 and of Hogan J. in *Casserly v. O'Connell* [2013] IEHC 391 (Unreported, High Court, Hogan J., 9th May, 2013), the Court of Appeal considered whether it should allow further time to see if an expert report could be obtained for the purpose of maintaining a claim against the second and third defendants, despite the fact that no such application had been made on behalf of the plaintiff. It was noted that on the 1st February, 2017, a letter from the plaintiff's advisors, Ballagh Solicitors, had been sent to Hayes Solicitors, in which it was stated that they were in the process of taking advice about the expert evidence referred to in Ms. Brassil's affidavit; however, at the date of the appellate hearing, some two years later, no progress had been made in this regard. Coupled with the already protracted nature of this litigation, McGovern J. found that the prejudice to the second and third defendants outweighed any possible benefit which might be obtained by following such a course: he therefore refused to allow any further time in this respect.

29. Finally, the Court of Appeal were entirely satisfied that Binchy J. had been correct both in the principles of law applied by him and in the conclusion which he had ultimately reached. As such, the appeal was dismissed.

Application for Leave to Appeal

30. The application for leave to appeal to this Court was filed on the 4th June, 2019, and listed in it were seven grounds of appeal: in the determination which followed ([2019] IESC DET210) leave was granted on two specific issues, which are as follows:

(i) Where a plaintiff in a personal injuries action joins an additional defendant and pleads that while they do not have any evidence to establish negligence on the part of that defendant, they believe the original defendant intends to defend the claim on the basis of expert evidence supporting the proposition that the additional defendant's negligence caused the plaintiff's injuries, does the plaintiff's pleading fail to disclose a cause of action and is it therefore captured by the terms of O. 19 r. 28 of the Rules of Superior Courts? ("O. 19, r. 28 RSC") ("Question 1")

(ii) In the situation as just described, wherein the plaintiff does not have expert evidence of their own to support any claim of wrongdoing as against the defendant(s) they wish to join and the expert evidence of the plaintiff supports the contention that it was the negligence of the original defendant who caused the injuries, is it a just application of the Court's inherent jurisdiction to strike out a claim as an abuse of process or one which is bound to fail even though such could leave the plaintiff without a claim, if the original defendant is successful on defending the action in the manner described? ("Question 2")

On the 31st October 2019, this Court gave an additional direction, following an application of both the second and third defendants, that submissions could be made on the question of

whether the plaintiff had been guilty of inordinate and inexcusable delay in prosecuting his claim against them. Hence, a third question. ("Question 3")

Submissions

31. The nature of the issues arising in this appeal are such that the submissions of the parties do not require a lengthy recitation at this juncture. Their respective positions are to a large extent self-evident and therefore the essential submissions made to the Court will suffice. Further, many of the authorities relied upon are predicated on well-known and well-established principles and can therefore be discussed without much, in terms of introduction.

The Plaintiff

32. On the first question, the plaintiff says that in finding that he was making no allegations of any kind against the second and third defendants, Binchy J. misread the amended personal injuries summons. His position was and remains, that an express case of negligence is being made out against these defendants, explaining that the structure of its presentation is simply designed to convey the source of the expert evidence which will be relied upon in this regard. On any fair reading of the pleadings, particular allegations of negligence can readily be deduced therefrom (para. 17 *supra*). Accordingly, as the claim should not be characterised as one which is bound to fail, it is therefore not captured by O. 19, r. 28 RSC. In addition, the Court of Appeal engaged in an exercise which is not appropriate: O. 19, r. 28 RSC is confined to an assessment of the pleadings and not the evidence available to support the underlying pleas. Consequently, the Court, in exceeding these parameters, erred as a matter of law.

33. On the second question (para. 30 above) of whether it would be unjust to dismiss the proceedings at this stage in circumstances where if Dr. Dockeray is successful with his defence,

such could leave the plaintiff without any defendant and thus in effect, without any claim: it is said that such would be highly unjust particularly if the trial court should, in the process assign all or even any responsibility to the second and third named defendants (*O'Toole v. Heavey* [1993] 2 I.R. 544 at 547). In addition, it is submitted that on an application such as this, only limited reference should be made to the facts, citing *Keohane v. Hynes & anor* [2014] IESC 66 (Unreported, Supreme Court, 20th November, 2014), to that effect (see para. 86 below). The plaintiff says that all he must do is put forward a credible basis for suggesting that it may be possible at trial, to establish the facts which are asserted. It is then for the moving party to prove the contrary (*Salthill Properties* para. 3.15), which in his view they cannot do so: this because the existence of supportive evidence has already been averred to on behalf of the first defendant and therefore such evidence is clearly procurable before or at trial.

34. The plaintiff accepts that in the area of professional negligence a reasonable basis must exist so as to initiate a claim (*Reidy* at para. 45). The key phrase underpinning this rule is that "reasonable grounds" must exist: if they do, no issue of abuse arises. The procurement of an expert report may but also may not be necessary before issuing a summons: all depends on the circumstances. (*Deasy v Health Service Executive* (Court of Appeal, 8th May, 2017: Ryan P. and Irvine J.) (para. 93 *infra*). See also the decision of Hogan J. in *Flynn v. Bon Secours Health Systems* [2014] IEHC 87 (Unreported, High Court, Hogan J., 14th February, 2014). (para. 94-5 *infra*)

35. It is the plaintiff's belief that the second and third defendants have implicitly accepted that he does possess "reasonable grounds" for making a claim against them, due to the fact that they have not sought to portray Dr. Dockeray's application to join them as third parties as an abuse of process, or as one which is bound to fail. These allegations now against the plaintiff are predicated entirely on the fact that the expert report is not his and is not in his possession. There should be no such additional requirement at the time of the joinder of a party; once the

plaintiff has "reasonable grounds" for maintaining the proceedings, as in the present case, that is sufficient.

36. The final issue relates to the question of delay. The appropriate principles are those set out in well-established and well-respected case law. (*Primor plc v. Stokes Kennedy Crowley* [1996] 3 I.R. 459, *Anglo Irish Beef Processors Ltd v. Montgomery* [2002] IESC 60, [2002] 3 I.R. 510**,** *McNamee v. Boyce* [2017] IESC 24, [2017] 1 I.L.R.M. 168). In short, Mr. Mangan says that the court should balance all considerations which relate to the conduct and interests of the parties to this litigation. Crucially, the plaintiff contends that the onus lies with the second and third defendants to establish that he has been guilty of inordinate and inexcusable delay in prosecuting his claim and even then, that justice demands that the proceedings should be terminated at this point.

37. The plaintiff submits that the circumstances of the delay in this case are highly unusual in that the period between 2008-2013 was given extensive consideration by Costello J. in her rejection of Dr. Dockeray's motion to set aside the renewal of the personal injuries summons. While different considerations apply to the instant applications, nonetheless, Mr. Mangan maintains that the decision of Costello J. is still highly material (para. 8 above). The difficulty in obtaining the appropriate expert evidence meant that it was only in 2013, on receipt of Dr. McCoy's reports, that the plaintiff's legal team had sufficient medical evidence to justify the continuation of the proceedings against the first defendant. Upon investigating the issue of neonatal care in 2008/2009, the expert advice was that the care afforded had not caused the plaintiff's injuries: therefore it would have been highly inappropriate to join the second and/or third defendants at that point. The application of the first defendant and indeed the contents of same, justified their joining and therefore, it is submitted that in reality, delay has not occurred.

38. In addressing the risk of prejudice, which is said to arise from the alleged delay, the plaintiff rejects this argument. He points out, as was already referred to in Ms. Taylor's affidavit

of the 4th April, 2017, that comprehensive medical records exist in respect of his birth and antenatal care, and that such records will identify specific staff members who were involved in that care. He urges the Court to consider the implications of leaving him without a remedy in its assessment of what is fair and reasonable. Finally, he says that the relevant defendants have failed to establish any grounds which would justify the dismissal of his action, particularly at a stage when a hearing on the merits has not taken place.

The Second Defendant

39. As a general submission the second named defendant:-

(i) fully endorses the judgments of both the trial and appellate courts on the O. 19, r. 28 RSC point, but also maintains that the claim should likewise have been dismissed on the second ground, namely that it constitutes an abuse of process.

(ii) argues that the treatment by both courts of the relevant provision of the Rules of Court was perfectly appropriate having regard to its stand-alone jurisdiction, and;

(iii) points out that whilst it was understandable why the abuse of process ground was not dealt with, there is still an opportunity for this Court to do so.

40. It is accepted by this defendant that in adjudicating upon his application, the court should take the plaintiff's case at its highest: analogous to an application for a non-suit (*Murphy v. Callanan* [2013] IESC 30 (Unreported, Supreme Court, 19th June, 2013), para. 24). This however, it is suggested, is precisely what McGovern J. did when stating that even with such an approach, the inevitable conclusion was that the pleadings did not disclose a reasonable cause of action (para. 26 of his judgment).

41. Moving to Question No. 2 (para. 30 above), the second defendant submits that, despite the follow on consequences for the plaintiff, it would be just to dismiss the claim against him and the hospital even if Dr. Dockeray should succeed in offloading legal responsibility to either

or both of them. Both the High Court and the Court of Appeal, being aware of such consequences, were nonetheless correct in their approach to this issue.

42. The second defendant links *O'Toole v. Heavey* [1993] 2 I.R. 544, to the observations of Clarke J. (as he then was) in *Moorview Developments Ltd v. First Active plc* [2009] IEHC 214 (Unreported, High Court, Clarke J., 6th March, 2009), in relation to expert evidence where the learned judge said "…*Where expert evidence does not stand up, even on a prima facie basis, to scrutiny, then it follows that it would have been unsafe to allow a case dependent on such expert evidence to go to a jury and it equally follows that in a case being tried without a jury a non-suit should be allowed*". On this basis, it is submitted that evidence offered fails to stand up even to a *prima facie* level, in that the plaintiff is simply not in a position to submit any, and in addition the case sought to be made in reliance on Dr. Dockeray's evidence is entirely inconsistent with the report of Dr. Jain, which in fact exonerates both the second and third named defendants from all responsibility in this matter.

43. The second defendant firmly believes that a correct interpretation of cases such as *Reidy*, *Gallagher* and *Green*, was applied by both by the High Court and Court of Appeal. He states that McGovern J. clearly held that while an expert's written report was not necessarily required in order to commence such a claim, nonetheless some alternative basis of meeting the obligation was required, as per the example given by him at para. 11 of the judgment. Such however, is in stark contrast with what is being proffered on behalf of Mr. Mangan: thus making it clear that the Court of Appeal was entirely correct in holding that there were no reasonable grounds to institute a claim of professional negligence against him.

44. Finally, it is submitted that the delay in this case is stark, inordinate and inexcusable: the second defendant was not joined to these proceedings until 22 years after the allegedly wrongful events and it is said that this lapse in time carries with it a heavy onus on the plaintiff to further the proceedings with diligence, which has not occurred. The Court is directed to the

well-settled principles on the topic of delay: in particular, that if there has been inordinate and inexcusable delay in prosecuting the claim, the balance of justice lies in favour of dismissing the proceedings (*Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459, *O'Domhnaill v. Merrick* [1984] I.R. 151). In conclusion, Dr. Denham urges this Court to dismiss the appeal.

The Third Defendant

45. The hospital adopts the submissions of the second defendant as their overall position, though by no means identical, is similar. It highlights the fact that the birth in this case took place over 25 years ago, and that the only attributed negligence against it is based on an undisclosed and undated expert report which the first named defendant has received. As the plaintiff is not and may never have possession of or be in control of that report, it follows that he has no realistic prospect of ever disclosing a reasonable cause of action. For this Court to permit the proceedings to continue in such circumstances would of necessity mean that such a conclusion would fly in the fact of the court's own precedent in *Cooke v. Cronin & Neary* [1999] IESC 54.

46. On the O. 19, r. 28 RSC issue, the third defendant complains that the pleadings lack both clarity and precision, a requirement identified by MacMenamin J. in *Tracey v. Minister for Justice, Equality & Law Reform* [2018] IESC 45 (Unreported, Supreme Court, 31st July, 2018) at para. 4. A correct reading of the judgment of Binchy J. is that in the absence of his own expert evidence and without any details of negligence being made out, the plaintiff could not make any allegations of his own against the second and third defendants: therefore it must follow that no reasonable cause of action exists. The hospital further says that it would be unreasonable for a court to consider the pleadings before it in a complete vacuum.

47. On the second issue, the third defendant submits that if a claim in a personal injuries action does not disclose a reasonable cause of action in its pleadings, it is bound to fail and

therefore it is also an abuse of process: a dismissal pursuant to O. 19 r. 28 and a dismissal for abuse of process pursuant to the Court's inherent jurisdiction are intertwined. MacMenamin J. is again quoted, this time from *Tracey v. Ireland* [2019] IESC 70 (Unreported, Supreme Court, 31st July, 2019) at para. 24.

48. Moving to the requirement which exists for there to be a reasonable basis for bringing an action in professional negligence, the hospital submits that it is settled law that the most common "reasonable ground" is an expert report from a suitably qualified professional. While it is accepted that some limited exceptions to this may arise, it is stated that these may only be accepted when there is clear evidence available to support and particularise a claim: as this is not the situation at hand, this defendant says that the plaintiff cannot avail of any such exception.

49. Finally, on the question of whether the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting his claim, the third defendant submits that even in the event of this Court allowing the appeal on the linked issues of O. 19 r. 28 and abuse of process, the claim should still be dismissed on this basis. In a very real sense, the delay in this case has prejudiced the third defendant's ability to locate any witnesses who might give evidence about the postnatal care given to the plaintiff, and even if they should be located it is submitted that their memories would be compromised due to the passage of time. The third defendant sold its interest in the hospital in April, 2006. It is unclear if any insurer or state agency will provide indemnity to the third defendant. (These and other matters are set out in the affidavit of Mr. Gleeson (para. 13 above)).

50. *McBrearty v. North Western Health Board* [2010] IESC 27 (Unreported, Supreme Court, 10th May, 2010) is cited, in which Geoghegan J. made a special note of the effect of a lack of indemnity on the doctors in that case, before he dismissed the plaintiff's claim against them pursuant to the Court's inherent jurisdiction. There are a number of English authorities

submitted by the third defendant to support the contention that a delay-based prejudice to an institution's financial interests is enough to allow a court to dismiss the proceedings (*Antcliffe v. Gloucester Health Authority* [1992] 1 W.L.R. 1044, *Gascoine v. Haringey Health Authority* [1992] P.I.Q.R. 416)

51. By way of conclusion, the third defendant states that the appeal and the plaintiff's claim should be dismissed on the basis of O. 19 r. 28 or, in the alternative, pursuant to the Court's inherent jurisdiction as an abuse of process and that the normal rule as to costs should then follow.

Discussion/Decision

52. Before any substantive discussion takes place it should be said, that as is common with multi-party litigation and multi-party medical negligence actions in particular, the factual matrix of this case is complex and requires an individualistic application of the relevant legal principles. In fact, at the hearing of the appeal, the litigation was compared to a game of four-dimensional chess: a fitting description. Depending on the outcome of the appeal, there are numerous possible eventualities and potential injustices for each of the parties and several variables to consider. Many of the authorities which were opened to the Court in the course of written and oral submissions are well-established, as are the principles contained in them but the ultimate task of this Court in the context of the permitted questions is to determine how best to uphold the integrity of those legal principles while also delivering justice and fairness for all.

Question 1 (para. 30 above)

53. It seems to me that there are a number of key aspects to this question. In broad terms these can be described as follows:-

i) What is the correct approach to an application under O. 19, r. 28 RSC?

ii) Did the Court of Appeal adopt and apply such approach? If not;

iii) What conclusion should have been correctly reached on this issue? With perhaps the core question being;

iv) Is a claim formulated in the manner as described in this case, that is where the allegations are based on the expert evidence, not of the plaintiff's own advisors but rather, the advisors of a co-defendant, bound to fail so that it is captured by the provisions of this order?

Correct Approach:

54. Despite the various grounds upon which both the second and third defendants sought to have the plaintiff's claim dismissed, it is clear beyond question that the High Court determined the applications solely by reference to O. 19, r. 28 RSC: having so decided on that basis, the learned judge said the following:-

"I consider that the pleadings disclose no cause of action at all as regards the second and third defendants, and that the proceedings as against those defendants are bound to fail. It follows therefore that the plaintiff's claim against the second and third defendants should be dismissed pursuant to O. 19, r. 28 of the Rules of the Superior Court. (para. 46)

Having arrived at this conclusion, it is not necessary for me to consider the other arguments advanced on behalf of the second and third defendants in support of their application." (para. 47)

55. Likewise, in the Court of Appeal, with McGovern J. saying that:-

"*I am satisfied that the High Court judge correctly says the legal principles applicable in an application of this nature both so far as O. 19, r. 28 of the Rules of the Superior Courts were concerned and also having regard to the jurisprudence on the professional obligations on legal advisers before commencing professional negligence proceedings.*" (para. 30)

"*The High Court judge correctly applied the applicable case law to the facts of this case and reached the conclusion which cannot be criticised. In those circumstances I would dismiss the appeal*." (para. 31)

Accordingly, neither court offered any views across the range of other grounds outlined in the motions, or on the abuse of process doctrine or on the exercise of the court's inherent jurisdiction. That being the case, it seems appropriate to firstly concentrate on the jurisdiction so exercised: Fortunately however, as the applicable principles are very well-known and very well-established, it will be sufficient to highlight the more salient features of that approach which have a bearing on this appeal.

56. Before doing so however, O. 19, r. 27 and r. 28 of the RSC should be quoted:

"O. 19. r. 27. The court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client.

O. 19. r. 28. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

57. Rule 27 of O. 19 RSC is quite distinct from rule 28; the former is appropriate where part only of a pleading is sought to be excised on any of the grounds therein mentioned: the latter is directed to the entirety of the pleadings, in essence to the whole or complete action or defence as the case may be. (*Aer Rianta CPT v. Ryanair* [2004] 1 I.R. 506 at 509-510: "*Aer Rianta v. Ryanair*"). Therefore, rule 27 would have no application in the circumstances of this case.

58. The manner in which a motion issued under O. 19, r. 28 RSC will be resolved is quite particular. First and foremost, it must be determined solely by reference to the pleadings, meaning that, as described in O. 125, r. 1 RSC, it must be decided only by what is stated in the originating summons, statement of claim, defence, counter-claim, reply, petition or answer as the case may be. In *McCabe v. Harding Investments Ltd* [1984] I.L.R.M. 105, where it was claimed that the proceedings were frivolous and vexatious, O'Higgins C.J. pointed out that for the rule to apply, any potential vexation or frivolity would have to appear on the face of the pleadings (at p. 108). In *D.K. v. King* [1994] 1 I.R. 166, Costello J. stated that rule 28 is confined to a situation where it can be shown that the text of the plaintiff's summons or statement of claim discloses no reasonable cause of action or that the action is frivolous or vexatious (at p. 170). The same was reaffirmed by this Court in *Jeffrey v. Minister for Justice, Equality and Law Reform* ([2019] IESC 27 (Unreported, Supreme Court, 8th May, 2019) at para. 5.2). Accordingly, there is no doubt but that the rule is exclusively pleadings based.

59. An obvious but significant consequence of this approach is that an examination of the underlying evidence, said to exist in support of the allegations of negligence, is not conducted. This in contrast to a situation where the moving party intends to invoke the inherent jurisdiction of the court (*Barry v. Buckley* [1981] 1 I.R. 306 at 308). In *Salthill Properties*

Limited v. Royal Bank of Scotland Plc [2009] IEHC 207 (Unreported, High Court, Clarke J., 30th April, 2009) ("*Salthill Properties*"), Clarke J. (as he then was) said the following:

"It is true that, in an application to dismiss proceedings as disclosing no cause of action under the provisions of Order 19, the court must accept the facts as asserted in the plaintiff's claim, for if the facts so asserted are such that they would, if true, give rise to a cause of action then the proceedings do disclose a potentially valid claim. However, I would not go so far as to agree with counsel for Salthill and Mr. Cunningham, to the effect that the court cannot engage in some analysis of the facts in an application to dismiss on foot of the inherent jurisdiction of the court." (para. 3.12)

The learned judge went on to say that the whole point of the distinction between the 'bound to fail' jurisprudence and the 'inherent jurisdiction' jurisprudence is that in the latter, the court can "…*look to some extent at the factual basis of the plaintiff's claim*". That passage from *Salthill* was approved by this Court in *Lopes v. Minister for Justice, Equality and Law Reform* [2014] 2 I.R. 301 at 308-309 ("*Lopes*"), and in *Keohane v. Hynes & anor* [2014] IESC 66 (Unreported, Supreme Court, 20th November, 2014) at para. 6.1. Accordingly, it cannot I think be doubted but that when considering the applications of both the second and third defendants, moved as each was under O. 19, r. 28 RSC, the pleadings alone constitute the foundation for the necessary assessment.

60. On the general approach there are two further observations from the case law which neatly identify what is involved. At paras. 12 and 13 of *Aer Rianta v. Ryanair*, Denham J. said the following:-

"*12. The jurisdiction under O. 19, r. 28 to strike out pleadings is one a court is slow to exercise. A court will exercise caution in utilising this jurisdiction. However, if a court is convinced that a claim will fail such pleadings will be struck out.*

13. An application by way of a motion under O. 19, r. 28 is decided on the assumption that the statements in the statement of claim are true and will be proved at the trial. Thus the motion relates to and is grounded on the statement of claim of the plaintiff." (at p. 509)

In *Lopes*, Clarke J. (as he then was), being satisfied that the "necessary facts" had been pleaded by the plaintiff, described an application under O. 19, r. 28 like so:-

"*An application under the RSC is designed to deal with a case where, as pleaded, and assuming that the facts, however unlikely they might appear, are as asserted, the case is nonetheless vexatious*." (para. 2.3)

The same approach applies to the other grounds mentioned in the said rule.

61. A further helpful decision is *Wilkinson v. Ardbrook Homes Limited* [2016] IEHC 434 (Unreported, High Court, Baker J., 22nd July, 2016), where Baker J., (then of the High Court), having stated that if there is a possibility that the case could possibly succeed it ought not to be dismissed, then continued "*were the test to be more stringent, and were a plaintiff obliged to establish that he or she will arguably succeed, or were the court to require a credible basis for establishing facts, the court hearing the motion would fall into the error of assessing the credibility of the evidence and failing to recognise that at trial, or even in the course of pre-trial procedures such as discovery, the facts may take a particular course and the court hearing a motion would be depriving a plaintiff of an action that could possibly succeed*". (para. 18). Finally, and quite evidently, the jurisdiction is aptly exercised where the facts and matters pleaded fail to disclose a cause of action known to law (*Civil Procedure in the Superior Courts*, Delaney & McGrath, (4th ed. para. 16.07).

The Approach adopted by the Court of Appeal:

62. As the narrative discloses, the plaintiff was permitted by court order to issue an amended plenary summons which he did on 9th January, 2017. At para. 9, he deals with the particulars of negligence and breach of duty as against the second and/or third named defendants, and immediately thereafter repeats *verbatim* the extract which is cited at para. 16 of this judgment. These will be further referred to in a moment (para. 70 & 71 *infra*)

63. Whilst the particulars and the extract last mentioned have been quoted in the judgment of the High Court and certainly are referred to in the decision of the Court of Appeal, it is clear however from an overall reading of both judgments that the assessment conducted and the conclusion reached were very much influenced by the evidential material which was, or was not available to the plaintiff. On several occasions reference is made to the fact that Mr. Mangan has no expert evidence of his own (emphasis added) to support the allegations against the relevant defendants: and likewise to the fact that his only expert, Dr. Jain, whilst critical of the conduct of the second and third named defendants, exonerates both on causation grounds. Furthermore, it was queried, again in both courts, as to why even after Dr. Dockeray sought to join the other 'now' defendants as third parties, the plaintiff was not in a position, despite opportunity, to obtain an expert report of his own upon which to sustain the allegations now made against Dr. Denham and Mount Carmel Hospital. It is therefore quite apparent that the evidential deficit, as the learned trial judge saw it, was a material if not a decisive factor in the conclusion which he reached. Again, with the Court of Appeal: whilst referring to the pleadings, it is inescapably the situation that its judgment very much supported the approach and analysis conducted by Binchy J. (para. 54 & 55 above). It therefore seems to me that the restrictive approach which a court should adopt, when dealing with a motion under O. 19, r. 28 RSC was not adhered to, in that considerable reliance was

placed on matters other than the pleadings, namely the evidence. On that basis alone, I would consider that neither judgment could stand.

The Correct Conclusion:

64. The next question therefore is whether by reference to the pleadings only, could either court, as a matter of law, have correctly come to the conclusion which they did? This in turn can be refined by asking whether, taking the plaintiff's pleaded case at its highest and assuming that the stated position is true and could be established at trial, would the asserted cause of action still be one which was bound to fail?

65. Such situation is perhaps best illustrated by reference to examples, through case law. *Moffitt v. Bank of Ireland* (Unreported, Supreme Court, 19th February, 1999) is a case in point: the plaintiffs brought proceedings against Bank of Ireland and the bank's solicitor who had acted on its behalf in judgment mortgage proceedings which had led to an order for sale of certain property therein described. It appears that a bank official swore an affidavit in which it was stated that there was no "family home" on the particular Folio which was subject to the mortgage. This they said was incorrect and thus the affidavit was false. The sole allegation against the solicitor was that he was professionally advising the bank during these proceedings and perhaps, though this is by no means certain, he may also have drafted the affidavit or at least arranged for its filing in the Central Office. This was the only specific reference in the statement of claim to the solicitor's involvement. Keane J. (as he then was), took the view that there was simply no cause of action disclosed against this defendant who, even if the facts as asserted were proven to be true, had done nothing except to act on behalf of his client as instructed. Lynch J. was of a similar mind: Barron J. concurring (with both).

66. In *Flanagan v. Kelly* [1999] IEHC 116 (Unreported, High Court, Sullivan J., 26th February, 1999) O'Sullivan J., being satisfied, that the plaintiff could not, as a shareholder,

"sue in respect of alleged damage to his shareholding resulting from damage to the company" (p. 5), and further, that the asserted losses were those of the company and not those of the plaintiff personally, concluded that the claim did not disclose a reasonable cause of action and was therefore bound to fail. Accordingly, he made an order under O. 19, r. 28 RSC.

67. A final example of the use of this jurisdiction, is a decision of this Court in *O'Reilly McCabe v Minister for Justice, Equality and Law Reform & Ors* [2009] IESC 52 (Unreported, Supreme Court, 7th July, 2009) , wherein the Minister and another defendant, a firm of solicitors, brought a number of motions seeking to have the proceedings against them dismissed. The claims advanced by the plaintiff were entirely predicated on a misapprehension that her husband, for whom the second defendant had acted in a personal injury action, following an accident in which he suffered serious brain damage as a minor and before his marriage to the plaintiff, had been made a ward of court after his accident. Armed with this belief, she sought damages from the defendants by making a multitude of serious claims: thankfully for the purposes of this limited discussion it is not necessary to explore the complexity of reasoning behind these allegations.

68. It is sufficient to say, all of the plaintiff's claims were bound to fail and were struck out: some pursuant to O. 19, r. 28 and others pursuant the inherent jurisdiction of the court, a decision affirmed by this Court on appeal. The finding of fact made by the High Court was that her husband was not and never had been, a ward of court. Amongst the allegations, the plaintiff claimed that the defendants owed her a duty of care in that, *inter alia*, they should have informed her of her husband's legal status prior to their marriage, and thus, not having done so, both were guilty of negligence in that regard. This was held by the High Court as caught by O. 19, r. 28, as it disclosed no reasonable cause of action in law. Even if her husband had in fact been a ward of court, neither the Minister for Justice or the solicitors would have been obliged to inform the plaintiff of her soon-to be husband's legal status and

no actionable negligence would therefore have existed. See also *O'N (J.) v. McD(s) & Ors* [2013] IEHC 135 (Unreported, High Court, Birmingham J., 22nd March, 2013).

69. Reverting now to the amended personal injuries summons as it was filed by the plaintiff's solicitor: whilst the passage most frequently quoted therefrom is the *verbatim* extract from the affidavit of Ms. Brassil, there are however two paragraphs bookending this quote which are also critical to note, as Order 19, r. 28 is intended to apply to "any pleading" and not just a portion of a pleading (*Aer Rianta c.p.t. v. Ryanair Limited*). Thus, it is proper to consider the complete document as a whole.

70. Paragraph 9 of the summons, under the heading "Particulars of Negligence and Breach of Duty as against the Second and/or Third Defendants Their Servants or Agents", reads:

"9. As of the date of issuing of the present amended personal injury summons, the plaintiff does not possess any expert medical evidence that would support allegations of actionable and causal negligence and/or breach of duty as against the second and/or third named defendants their servants or agents. The second and third named defendants are joined to these proceedings in reliance upon the expert medical opinion of the first named defendant's instructed experts: the allegations of wrongdoing on the part of the second and/or third named defendants have been summarised on behalf of the first named defendant in the following terms:"

71. There then follows the extract from Ms. Brassil's affidavit of the 2nd November, 2016 which has already been quoted (para. 16 above). Paragraph 10 of the amended summons continues:

"10. The aforesaid constitutes the best particulars available to the plaintiff pending acquisition of further medical opinion which will in turn be predicated upon information as to the operation and management of Mount Carmel Hospital and its appropriateness as a venue for the plaintiff's neonatal care that shall only become available to the plaintiff in the course

of a process of discovery and kindred procedures in these proceedings. The plaintiff shall furnish further and better particulars of negligence and breach of duty as against the second and/or third named defendants their servants or agents at that stage."

72. Doubtless, the manner in which the amended summons was drafted, was the result of the very unusual situation which the plaintiff's advisors found themselves in, not only on the basis of Ms. Brassil's affidavit but also by reference to the first named defendant's defence in which he pleaded, *inter alia*, that the damage suffered by the plaintiff was as a result of the negligence and breach of duty on the part of the second and third named defendants. Normally if the case took the usual pre-issue procedural course, it would have resulted in Mr. Mangan himself obtaining a report favourable to his position. This however did not take place, a fact which has not been disputed by the plaintiff; on the contrary at all times he has frankly admitted that the source of his allegations is that of Dr. Dockeray's advisors. If his appeal is allowed, he sees as the next immediate step the making of a request to the first named defendant for detailed particulars of those allegations: on receipt of which he will update the situation with both Dr. Denham and Mount Carmel. However, this is somewhat of an aside, with the most pressing current issue being the proper application of the relevant principles, as previously outlined, to the pleadings as filed.

73. There is nothing to suggest that the manner in which the amended summons was drafted was other than a strategic choice by the plaintiff's advisors and that by quoting directly from the affidavit of Ms. Brassil, it was intended to give the most accurate account of the acts of negligence as was available to them. If the problems complained of in this regard by the second and third defendants, required rectification by making it clearer that the plaintiff was relying on these allegations as part of his own case as opposed to a pure recitation of what the first named defendant had said, or if the perceived problem was his failure to

repackage what Ms. Brassil had sworn to, I would instantly facilitate such a step in light of the manifest injustice which would follow if the proceedings were to be terminated on that basis. However, such is not required: a sensible reading of the summons in my view, leads to the conclusion that these allegations are in fact being made by him against the second and third defendants.

74. By relying on the affidavit passage above cited (para. 16), which reflected the expert advice which Dr. Dockeray's solicitor said her client had then received, the plaintiff in essence was pleading:-

i) That the ventilation given to the plaintiff and the management provided for him, were unsuitable with the result that he was inappropriately hypocarbic leading to brain injury,

ii) That it was inappropriate to provide in Mount Carmel Hospital the paediatric neo-natal care which the plaintiff actually received, without there being on site some specialised and resident paediatric expertise,

iii) That the particular hospital setting was inadequate to ensure the availability of appropriate blood gas testing and monitoring, and,

iv) That it was an unacceptable decision to have the plaintiff remain in Mount Carmel as distinct from being transferred to a hospital where appropriate neo-natal care would be available.

75. Given the parameters of the application, it must be assumed that these facts are true and could be proven at trial. Accordingly, in view of the uncontroverted jurisprudence, it could not be said that the action is bound to fail or that no reasonable cause of action has been disclosed. Nothing more falls for consideration in the context of an O. 19 r. 28 motion, as is evident from the above case-law. I fully accept that the situation is most unusual and to some

extent the nature of how these allegations come to be pleaded is unsatisfactory. However and notwithstanding, the pleadings do not fail to disclose a cause of action. What further steps may be required in order to progress the case to a point of a hearing is not a matter for this Court, but evidently there are a number of procedural avenues available to all sides in order for more particulars to emerge. I would therefore conclude that the motion could not succeed on this ground.

Is a Plea based on the evidence of another Party bound to fail under Order 19, rule 28?

76. Perhaps none of the matters previously discussed are at the centre of Question No. 1 which this Court permitted in its determination. It seems to me that the essence of this question is whether, as a matter of principle a cause of action (or a plea therein), directed towards defendants B and C, which is based on predicted evidence not available to the plaintiff, but to a co-defendant, defendant A, who within the same proceedings seeks an indemnity from defendants B and C on the same basis, is bound to fail under O. 19, r. 28? In other words, unless a plaintiff him or herself has available such evidence in his or her own right, is it the case that the action, (or a particular plea(s) therein) cannot succeed? In reality, I think that this is the core basis of the decision of both the High Court and the Court of Appeal (paras. 21 and 24 above) in this case.

77. If the analysis previously discussed on the approach to a motion under O. 19, r. 28 RSC is correct, as I believe it to be, this question is self-answering. Having regard to the 'plea basis' of this jurisprudence, it is difficult to see what further role the rule might have in the instant situation. That is unless perhaps it could be argued that it would be impossible for the asserting party to adduce any evidence in support of the allegation(s) made: even then that provision may not be available. That aside, I cannot identify any basis upon which the rule could be utilised, so as to have an action dismissed *in limine*, simply because of where the

underlying evidence may come from. Disregarding its cogency or reliability, but assuming relevance, evidence is evidence from wherever it might come. No authority, at least in any way persuasive, has been opened to the court which would contradict this view. I therefore cannot see any sustainability in the submissions of the second and third defendants to this end.

78. *Hetherington v. Ultra Tyres Services Limited* [1993] 2 I.R. 535 ("*Hetherington*"), is frequently quoted in conjunction with *O'Toole v. Heavey* [1993] I.R. 544, ("*O'Toole v. Heavey*") as outlining what procedures should be followed when a defendant or defendants apply for a non-suit against the plaintiff at the conclusion of the evidence presented on his behalf. Whilst this line of authority has been opened to the court, I am not sure that it is fully in point, certainly on this aspect of the case. There is however one aspect of *Hetherington* which is worth noting: it arises in this way. Defendant 1 was the plaintiff's employer: defendant 2 was the owner of the truck on which the plaintiff was working at the time of his accident, with defendant 3 being the distributor of that truck. Each defendant had served notices of contribution/indemnity on the other two. The High Court held against defendant 1, allowed an application for a non-suit by defendant 2 and dismissed the plaintiff's case against defendant No. 3. It is the defendant's 1's appeal against a finding of negligence in favour of the plaintiff which is of interest. In dismissing the appeal, Finlay C. J. was satisfied that there was sufficient evidence upon which the trial judge could make the finding which he did. At p. 539 of the report the Chief Justice then continued:

"*He accepted the evidence of the engineer, Mr. Prenson, called by the third defendant and he was entitled to accept that evidence, and in my view that was a proper finding and the first defendant's appeal against the finding of negligence against it must be dismissed*."

It seems therefore that the finding was upheld, not apparently on any evidence tendered by the plaintiff himself but rather, on the evidence offered by the expert who was called on behalf of the third defendant. If correct in this regard, but the report of the judgment is not fully clear,

such would be entirely in keeping with my understanding of how evidence, relevant and admissible, can be utilised.

79. Accordingly, for the above reasons, I do not see how O. 19, r. 28 RSC can be utilised by reference to any of the questions formulated at para. 53 above.

Question 2 (para. 30 above)

80. Whilst Question No. 2 overlaps to a certain extent with Question No. 1, it has however some new dimensions to it, which must be considered. The lead in wording is framed on the state of affairs as presently known:-

- The plaintiff has no evidence of his own against Dr. Denham or Mount Carmel Hospital,
- The evidence which he has is against Dr. Dockeray,
- That defendant says he is not liable but that his co-defendants are negligently responsible for the injuries suffered,
- He has served a notice of contribution/indemnity on the other defendants,
- If he is right in this regard, the trial court may simply dismiss the case against him, without more, but in so deciding,
- It may very well have to offer a view on the allegations made against either or both of the co-defendants; either way,
- If he is successful but is the only defendant at trial, the plaintiff would be left without recourse to any party, even if the decision implicates the respondents to this appeal,

The essence of the question therefore is whether in these circumstances, it is just to now dismiss the proceedings against the second and third named defendants?

Order 19, rule 28 RSC vis-á-vis inherent jurisdiction:

81. It is commonplace for applications to be made, as they have been in the within appeal, in reliance both on O. 19 r. 28 (or r. 27) RSC and in the alternative on the inherent jurisdiction of the court. Though the overall end point of either application, if successful, is to have the proceedings struck out, it is clear that the two are not interchangeable and that both may not be appropriate for use in the same scenarios. *Barry v. Buckley* [1981] I.R. 306, is I think the first 'recent' authority on the inherent jurisdiction approach, but in confirming it as part of our law, Costello J. also gave a description of O. 19, r. 28 and the relationship between both. The learned judge, in a passage most frequently quoted said the following:-

"I think nonetheless that the Court can only make an order under this Rule [O. 19 r. 28] *when a pleading on its face discloses no reasonable cause of action. But apart from Order 19 the Court has an inherent jurisdiction to stay proceedings and on applications made to exercise it the Court is not limited to the parties pleadings but is free to hear evidence on affidavit relating to the issues in the case. (See: Wyllie, "The Supreme Court of Judicature (Ireland) Act, 1877" pages 34 to 37, and "The Supreme Court Practice, 1979" paragraph 18/19/10). The principles on which it exercises this jurisdiction are well established - basically its jurisdiction exists to ensure that an abuse of the process of the courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the Plaintiff's claim must fail (See, Buckley, J., Goodson .v. Grierson 1908 1 K.B. 761, 766). This jurisdiction should of course be exercised sparingly and only in clear cases. But it is one which enables the Court to avoid injustice particularly in cases whose outcome depends on the interpretation of a contract or agreed correspondence."* (p. 308)

82. In *Lopes,* Clarke J., speaking for the court, made another point which is important to reiterate. It is that the inherent power of the court should not be used as a substitute for or as a means of circumventing the relevant legitimate provisions of procedural law: in other words,

the former jurisdiction should only be exercised in those situations which are not covered by the latter and should not be utilised where the rules of court adequately cover the issue (p. 307-8 of the report). It follows from this and the other aspects of both approaches, that a court when called upon should be consciously mindful of when it is appropriate to apply one rather than the other.

83. One further reference from *Lopes* , is where the learned judge gave an example of the distinction between the statutory provision and the judge made rule, when he said:-

"If, even on the basis of the facts as pleaded, the case is bound to fail, then it must be vexatious and should be dismissed under the RSC. If, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits, then the inherent jurisdiction of the Court to prevent abuse can be invoked." (p. 309)

The first point made might be a reference to where no known cause of action is described, and thus O. 19, r. 28 is in play, whereas the second point is where the formal plea is well recognised but it is clear that the underlying basis has no evidential material to support it: in such event, the inherent jurisdiction will arrive at the same result as the rule based provision when that is appropriate.

84. At the level of generality there are two further matters which should be noted. Firstly, the following extract from the judgment of McCarthy J. in *Sun Fat Chan v. Osseous* [1992] 1 I.R. 425, should be kept in mind:

"Experience has shown that the trial of an action will identify a variety of circumstances perhaps not entirely contemplated at earlier stages in the proceedings: often times it may appear that the facts are clear and established but the trial itself will disclose a different picture". (at p. 428).

Further, the requirement identified by Keane J. (as he then was) in *Lac Minerals v. Chevron Corporation* (Unreported, High Court, Keane J., 6th August, 1993), is likewise pertinent

"It appears to me that, in these circumstances, it is not possible to say with a degree of confidence which the authorities suggests should be present in the mind of the Judge when deciding an application of this nature that, no matter what may emerge on discovery or at the trial of the action, the inconsistency will be resolved only in a manner which will be fatal to the Plaintiff's contentions". (pg. 34)

No doubt the learned judge could also have added what might arise from the exchange of particulars. Almost the same point was summarised neatly in *Ruby Property Company Limited v. Kilty* [1999] IEHC 50 (Unreported, High Court, McCracken J., 1st December, 1999) where at pg. 26 of the judgment it is said:-

"It is quite clear that the court can only exercise the inherent jurisdiction to strike out proceedings where there is no possibility of success."

All of these, and those mentioned in the preceding paragraphs, are factors which feed into this line of authority.

85. Perhaps the real and most crucial difference between the two jurisdictions is that the rule is plea based, whereas when the inherent provision is invoked, regard may be had to whether or not there is a credible factual basis for the asserted claims. If none should exist so that the claim is for example bound to fail, then it will be struck out as abusive. That said however, there are significant limitations on the extent to which the underlying basis may be explored and as part thereof what evidence may be considered. (*Salthill Properties Ltd. v. Royal Bank of Scotland* [2009] IEHC 207 (Unreported, High Court, Clarke J., 30th April, 2009)).

86. In *Keohane v. Hynes* [2014] IESC 66 (Unreported, Supreme Court, 20th November, 2014), Clarke J. expressed the view that if the case is one in which the legal rights and

obligations of the parties are governed by documents, then the court could certainly examine that material so as to determine whether, and if so to what extent, it supports the claim as made: it could also inquire if there was any other relevant evidence touching upon the rights of the parties. It is however perhaps, the final *caveat* identified by the learned judge which might prove to be the most prescient for the purpose of this appeal:

"Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred." (para. 6.9)

The observations just quoted from *Sun Fat Chan* are apt to recall in this context (para. 84 above)

87. With this in mind and as the approach taken to the first issue reveals, it is particularly useful to discern the essential question(s) which a judge must ask and be convinced of the answer, one way or another: in a motion under O. 19 r. 28 RSC, that question is whether the facts as pleaded and if assumed to be true, disclose a recognisable cause of action which, if successful will benefit the plaintiff. Where the inherent jurisdiction is relied upon, all of the factors above identified could be distilled into asking whether it was proper for the plaintiff to institute proceedings? Such was the view expressed by Barron J., who posed the question in the following terms: -

"It is not the function of the Court to determine whether the plaintiff will succeed in the action.

The function of the Court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such incontravertible evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. There is no room for considering what evidence should be accepted or how it should be interpreted. To do the latter is to enter on to some sort of hearing of the claim itself." (p. 333)

88. The passage quoted comes from *Jodifern v. Fitzgerald* [1999] IESC 88, [2000] 3 I.R. 321, a case where the plaintiff sought specific performance or damages in lieu, of two written agreements, the defence to which was that both were "subject to contract" and therefore unenforceable: accordingly, it was said that the proceedings were bound to fail and a motion to that end issued. Whilst the underlying material was based on written documentation, nonetheless the principles espoused are certainly capable of wider application, including that to the situation at hand. There were three judgments delivered with Hamilton C.J. and Murphy J., agreeing with all of them. The rule based jurisdiction did not seriously feature: the case was decided on the *Barry v. Buckley* line of authority. Having agreed with what McCarthy J. said in *Sun Fat Chan*, namely that the court should be slow to entertain an application of that kind, Murray J. said the following:-

"The reason for such caution is self-evident. The making of an order staying or dismissing the proceedings on the basis of such inherent jurisdiction deprives the plaintiff of access to the courts for a trial of his or her action.

The object of such an order is not to protect a defendant from hardship in proceedings to which he or she may have a good defence, but to prevent the injustice to a defendant which would result from an abuse of the process of the court by a plaintiff. Clearly, therefore, the hearing of an application by a defendant to the High Court to exercise its inherent

jurisdiction to stay or dismiss an action cannot be a form of summary disposal of the case either on issues of fact or substantial questions of law in substitute for the normal plenary proceedings… Moreover, and this is the aspect I wish to emphasise, where all the essential facts have been so identified, it must be manifest that on the basis of those facts the plaintiff's case has no foundation in law." (p. 334 of the report)

(See also *Burke v Anglo Irish Bank Corporation Public Ltd & Anglo Irish Bank Ltd* [2011] IEHC 478 (Unreported, High Court, Birmingham J., 15th December, 2011))

Is a Report a pre-requisite to the institution of proceedings?

89. The use of various phrases, such as "mere assertions", "credible basis" and "credible evidence" begs the question as to what these terms actually mean and what role they play on an application of the instant nature. In this particular case such are closely linked to another rule of practice which has created a distinct strand of case law in proceedings involving professional negligence. The Court of Appeal in this case felt quite strongly that the basis upon which the plaintiff sought to bring a claim against the second and third defendants was "too slender a thread" upon which to hang a professional negligence action (para. 18 of its judgment). This view was very much related to the existence of this discrete rule.

90. The reasons for there being this rule in respect of professional malpractice, are readily understandable, particularly but evidently not solely, in the case of doctors, other individually related persons and entities similarly involved. Reputation is a crucial component of one's right to earn a livelihood at a personal level, as it is for public confidence in the profession of which that person is a member, at an institutional level. As Finlay C.J. said *"…the development of medical science and the supreme importance of that development to humanity makes it particularly undesirable and inconsistent with the common good that doctors should be obliged to carry out their professional duties under frequent threat of unsustainable legal*

claims" (*Dunne (an Infant) v. National Maternity Hospital* [1989] I.R. 91 at 110; but see the surrounding passages for context). Therefore, by instituting practice related proceedings against such a person or body, is to put their reputational integrity in issue, at least to some extent, and thus should only be undertaken if there is justifiable reason for so doing. This sentiment has been acknowledged in countless decisions throughout the years with most every court being in agreement that it is improper to bring such an action without a reasonable basis for doing so. Though the basic idea is universal, the exact formulation of the test has been the subject of some debate and indeed is under discussion in this case, *vis-à-vis* the second and third defendants.

91. The first articulated expression of this particular point probably occurred in *Reidy v National Maternity Hospital* [1997] IEHC 143, where Barr J. stated that what was needed in order to institute professional negligence proceedings were "reasonable grounds" and that such proceedings "necessarily required appropriate expert advice to support it" (para. 45). This was affirmed 2 years later by Denham J. (as she then was) in a case where the plaintiff's only medical evidence was that of her solicitor's GP whom she had met for the first time a few days before the hearing and who had examined her on just one occasion some eight years after the events. As the case centred on whether an episiotomy had been correctly performed, it was held that the GP did not have the necessary expertise to satisfy the reasonable grounds test. Dr. Neary, the second named defendant, played no part whatsoever in the after-care of the plaintiff and thus should never have been joined (*Cooke v. Cronin & Neary* [1999] IESC 54 ("*Cooke*")). This general approach remains the prevailing trend, but the manner in which it has been described has varied in some of the case law.

92. Whilst quoting the pertinent passage from *Reidy*, what Kelly J. actually said was "*I have no difficulty in endorsing the views of Barr J., that the commencement of proceedings alleging professional negligence is irresponsible and an abuse of process of the court unless*

the persons advising such proceedings have reasonable grounds for so doing" (*Connolly v. Casey* [1998] IEHC 90, pg. 19 (para. 51)). When dealing with the appeal in *Connolly*, Denham J. said "*it is important in professional negligence cases to act reasonably. Proceedings must have an appropriate basis*" (p. 350). In *Cooke*, Lynch J. also delivered a judgment in which he said "*in all cases of alleged negligence on the part of a qualified professional person in carrying out his professional duties there should be some credible evidence to support the plaintiff's case before such an action is commenced*". (pg. 14/para. 15). As can therefore be seen, whilst the underlying requirement is not doubted, its formal expression has differed somewhat. This perhaps is not surprising as the rule, or more accurately the rule of practice, is required to fit a wide variety of circumstances.

93. There are two further cases of relevance to this point. In *Deasy v The Health Service Executive, Sandosh David, Carl Vaughan* (Unreported, Court of Appeal, 8th May, 2017) the plaintiff candidly acknowledged that he was not in a position to adduce any expert evidence: his intention was to call the defendant doctors as hostile witnesses, if necessary, and also some other witnesses as to fact. He further acknowledged that if such was the rule without exception, a view which he disputed, his claim should be dismissed. Ryan P., said that "*I merely say that my understanding is that it is not a requirement of a report as such although that will usually be the basis of the initiation of proceedings. It is not the report that is important. It is the reason of the necessary implication that there is a reasonable basis for bringing an action against the professional person. That is my understanding of it*". For Irvine J., it was not necessary to decide if the rule is absolute, but if it is absolute, it would require qualification in some circumstances where the absence of an expert report would not necessarily mean that the claim was bound to fail, or that it was an abuse of process. For example, if there was an MRI showing that the left leg needed to be amputated, but the hospital records showed that in fact it was the right leg which was removed, then the

proceedings could possibly succeed without expert evidence. In any event, Mr. Deasy's appeal was dismissed, as the learned judge felt that the overall lack of evidence was fatal to his claim.

94. In the course of her discussion, Irvine J. did refer to another case, one in which the salient features have some similarities to the within appeal. (*Flynn v Bons Secours Health Systems Ltd* [2014] IEHC 87). The plaintiff in that case maintained that in 1987 when pressing the back of his palate with his finger, he broke and moved his left pterygoid Hamulus bone, an injury which all agreed is exceedingly rare and most infrequently encountered. In the years which followed he had multiple investigations including a number of CT scans. Nothing was identified. Mr. Flynn was utterly dissatisfied. As part of an agreement to discontinue proceedings against the Mater Private, the hospital agreed to commission a report from Professor Nigel Hoggard, a specialist in this area at the University of Sheffield. This report and the accompanying letter was described as containing "an important vindication of Mr. Flynn's position", and that despite being told the contrary by several medical practitioners and consultants since 1994, there was now a recognised expert who "more or less admitted that Mr. Flynn's interpretation of the CT scan was probably correct and that the most explanation was that he had, in fact, suffered a fracture of his left Hamulus". In the end, such proceedings were not discontinued but were transferred to the Circuit Court, along with a number of other sets of proceedings. In July, 2013 that Court effectively dismissed all proceedings on the grounds that they were bound to fail.

95. The plaintiff readily admitted before Hogan J., who was hearing appeals from that decision and who made the observations last quoted, that being unemployed and self-representing, he was not in a position to lead the evidence from Professor Hoggard or indeed, any other expert. The learned judge however, felt that this did not mean that such evidence did not exist or that it was inappropriate to institute the proceedings. What Hogan J. did was

to adjourn the action for a period of twelve months so as to give Mr. Flynn a reasonable opportunity of procuring the necessary evidence if that could be achieved. If not, a further motion to dismiss could be moved once again before the Circuit Court.

96. There is no question but that the most fitting basis upon which to ground proceedings of this type is for a plaintiff to have an expert report from a person of the same speciality as the issue involves. No conceivable objection could be taken if such existed. The outcome of the case is an entirely different matter: experts differ and cases are lost. But is such a report essential?

97. It seems to me that the most appropriate way of expressing this requirement is to say that a reasonable basis must exist before any such proceedings are issued. Almost by definition therefore, there will be situations where it may not be necessary to insist upon the availability of an expert report before that takes place. There are several like examples to that given by Irvine J. in *Deasy*, in addition to which reference can be made to the issue of a holding writ to avoid the claim being statute barred (*Cunningham v. Neary* [2004] IESC 43, [2005] 2 I.L.R.M. 498 at para. 11). Such qualifications are necessary so as to be consistent with one's right to access the court system as well as being required to reflect the reality of professional litigation. Further, I see no danger that this formulation would undermine the rationale for the rule in the first instance. As the same must apply to all professionals, a degree of flexibility is required, so as to accommodate a variety of diverse circumstances. I therefore think that the rule should best be framed in the manner suggested. In the vast majority of medical cases that will require a report, but there will be circumstances where such is not an essential precondition in all situations.

A Summary of the inherent jurisdiction approach:

98. So, the key points on the exercise of this jurisdiction in the instant case are as follows:-

- Is there any credible basis to sustain the allegations made against the relevant defendants,
- Is there any credible evidence which is now or could become available to sustain those allegations,
- More particularly is there a prospect that the plaintiff by whatever means could get into evidence the basis upon which Ms. Brassil made the averments which she did,
- Or has the stage been reached that his case is bound to fail and that this Court is convinced of that being the only outcome?

These collectively are the essential movers on this aspect of the case.

99. This is not the typical situation outlined in the case law, save perhaps for some affinity with *Flynn*. Mr. Mangan does not have an appropriate report in his own right, and it is highly unlikely that he ever will. Instead, he relies entirely on being able to access by whatever means the evidence underlining the averment of Ms. Brassil in her affidavit. Thus, the question posed must be analysed in this context.

100. Let's suppose that Mr. Mangan was in possession of such evidence, could it be realistically said that a motion of this nature could succeed? I readily recognise that he is not, but having regard to what might emerge from the further exploration of procedural steps such as particulars and/or discovery, could it be said that his case is bound to fail? Is there any reason in principle why the evidence underpinning the averments of Ms. Brassil would not be available *via* discovery or disclosure, the very process by which she herself envisages the production of such documents (para. 12 above). This issue can also be tested in a slightly different way. Let's assume that Dr. Dockeray's application to join the second and third named defendants as third parties would have been granted if steps had not been taken to join them as co-defendants, in such circumstances would a subsequent motion to have the third party notices dismissed as being bound to fail have succeeded? I cannot think so.

101. There is however another fundamental reason why I think the conclusion reached is correct. This relates to how the plaintiff might navigate his case from this point onwards, against the backdrop of the evidence of Ms. Brassil and assuming that the averments in her affidavit are correct. It must also be reasonable to assume that Dr. Jain would not give evidence in any way sufficient to raise a *prima facie* case against either the second or third defendants: as we know the contrary is in fact the situation. It must also be highly unlikely, given what previously has occurred, but not impossible, that the plaintiff will be in a position to obtain a favourable report from an expert which implicates either of these defendants. Subject to *Hetherington* and *O'Toole v. Heavey* the plaintiff would be acutely aware that an application for a non-suit would most probably succeed. Facing such prospect, what options might be available to him? This in part will depend on whether or not Dr. Dockeray intended to pursue his notices of contribution or indemnity against the second and third named defendants. On the basis of commercial expediency, it is reasonable to assume that his insurers would intend to call the expert or experts who have given the advice previously sworn to by his solicitor. On that basis, it is difficult to see how by discovery or disclosure the plaintiff would not be in a position to obtain a copy of the relevant report(s), and so it is probable that he would be familiar with its contents. At least one obvious option would be to serve a subpoena on that expert and solicit from him or her the evidence contained in his or her report. Of course that might not be ideal but given the foremost obligation of any expert witness, which is to the court, Mr. Mangan would be entitled to expect that he could illicit the contents of the report in this manner. If that occurred, then the trial judge would be faced with quite a different situation on any application for a non-suit than that presently existing. How often have we as practitioners significantly strengthened our client's case or conversely have had it significantly weakened by, for example, cross examination. In my view, it matters not how evidence is adduced provided it is admissible and relevant. Running the case through

this prism, I have no doubt but that if given, such evidence could be relied upon by the plaintiff in support of his pleaded allegations against both the second and third named defendants, even where the retention of the expert(s) was originally that of Dr. Dockeray. In such circumstances by the application of the known principles, I could not conclude that this action is bound to fail. Finally, and it is to state the obvious, that the subject motion is not the same as an application for non-suit, where the questions facing the court will be different. In any event, these are not quite the essence of Question No. 2: which is whether or not it would be just to dismiss these proceedings potentially leaving the plaintiff without a party or remedy.

102. The situation at hand is reminiscent of what the court had in mind in *Hetherington*, and in *O'Toole v. Heavey* and is precisely the kind of injustice which Finlay C.J. sought to avoid when he felt compelled to express the view which he did, at the end of *Hetherington* (p. 542) and in *O'Toole v. Heavey* (p. 5), that when dealing with an application for non-suit in an action with multiple defendants, where notices of contribution and indemnity have been served, a judge should always enquire whether any of the other defendants intend to defend themselves by bringing evidence which implicates the party seeking the direction. If the remaining defendant escapes liability by successfully proving that the defendant, now no longer a party to the proceedings is liable, that plaintiff has no prospect of recovery: In short, in such circumstances the plaintiff's claim could so to speak, fall between two stools. Exactly the circumstance which prompted the plaintiff's advisors to join the second and third defendants to these proceedings. While of course the situation in the instant appeal is not identical, the similarities cannot be ignored: to dismiss the plaintiff's claim at this point would be to expose the very type of risk envisioned by the learned Chief Justice in *Hetherington* and *O'Toole*.

103. As I am not convinced that the claim against the relevant defendants is bound to fail, I therefore cannot agree that the action should be dismissed on the inherent jurisdiction basis.

Question 3 (para. 30 above)

104. The jurisprudence relating to delay, prejudice and the court's inherent jurisdiction to dismiss claims based thereon, is expansive and has been the subject of many well-known decisions; thus, it is necessary only to remind ourselves of the core principles which impact upon this case. For a more comprehensive and in depth analysis see the following:- *McBrearty v. North Western Heath Board and Others* [2010] IESC 27 (Unreported, Supreme Court, 10th May, 2010), (paras. 77-100) ("*McBrearty*"); *O'Carroll and Another v EBS Building Society and Another* [2013] IEHC 30 (Unreported, High Court, O'Malley J., 1st February, 2013), paras. 28- 34; *Lismore Builders Ltd (in Receivership) v Bank of Ireland Finance Ltd and Others* [2013] IESC 6 (Unreported, Supreme Court, 8th February, 2012), paras. 3-7.

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 authorative 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.

106. *O'Domhnaill v. Merrick* [1984] I.R. 151 ("*O'Domhnaill*"), was foundational, in a more specific way, in the development of the court's inherent jurisdiction when dealing with inordinate and inexcusable delay. In that case, the plaintiff took advantage of this Court's decision in *O'Brien v. Keogh* [1972] I.R. 144, which declared that s. 49(2)(a)(ii) of the Statute of Limitations Act 1957 was unconstitutional, with the result that the statute could not be successfully pleaded against her, as the proceedings were commenced within three years after reaching her majority, which was then age 21. However, given the lapse of time involved, it was held that it would be unjust on the defendant if the plaintiff was allowed to continue with her personal injury action, in respect of an accident which had occurred in 1961. Speaking for the majority, Henchy J. said *"In all [such] cases the problem of the court would seem to be to strike a balance between the plaintiff's need to carry on his or her delayed claim against a defendant and the defendant's basic right not to be subjected to a claim which he or she could not reasonably be expected to defend"*. (p. 157).

107. *Toal v. Duignan & Ors (No. 1)* [1991] I.L.R.M. 135 (judgment date: 27th November, 1987), and *(No.2)* [1991] ILRM 140 (judgment date: 26th July, 1990), differed from *O'Domhnaill* in that whilst there was inordinate and inexcusable delay in the latter, there was

no suggestion that such existed in the former. In *No. 1* the court's judgment proceeded on the basis that Mr. Toal was personally blameless and was not in any way responsible for the delay which had occurred. Nonetheless, following *O'Domhnaill* and having conducted the assessment suggested by Henchy J., the court prevented the action going ahead against the second, fourth and fifth named defendants on delay grounds: it dismissed the action against the first named defendant on non-related delay grounds and noted that since the third defendant had died and that the proceedings had never been reconstituted, the action could not proceed against his estate. For a variety of prejudice related reasons, including the death of the gynaecologist and paediatrician who had attended at or immediately after the plaintiff's birth, the fact that the physical location of the Coombe Hospital had changed in the mid-60s, with the result that the records available were wholly incomplete and wholly inadequate (*Toal No. 2*, p. 145), and the fact that none of the nursing staff present at the time were still in the employment of the hospital with their whereabouts being unknown, the court held that it would have been to inflict an obvious injustice on those defendants if the case was permitted to proceed.

108. *Toal No. 2* came about as a result of the remaining defendants in that action issuing similar motions to those which were the subject matter of *Toal No. 1*. In *No. 2*, the court reaffirmed the existence of this jurisdiction even where the proceedings were not statute barred, but noted in the process that such "should not be frequently or likely assumed" p. 143: see *Primor* at p. 487 of the report where this reservation was further endorsed. Accordingly, even where no blame attaches to a plaintiff for the delay involved, there is vested in the court this intrinsic jurisdiction so as to satisfy fair procedures and render justice to all. On the facts of the case, it is interesting to note that the court dismissed the proceedings against the eighth named defendant as she had no real recollection and no record of a conversation alleged to have taken place some sixteen years previously between the plaintiff's mother and herself:

such was the basis of the action against her. However, the action against the sixth and seventh defendants, a doctor, and Harcourt Street Hospital respectively, could proceed as the doctor was still alive and as there were records available to both him and the hospital. Finlay C.J. concluded "*in all these circumstances, I am satisfied that these defendants have not made out a case for probable injustice which would entitle them to be dismissed out of the action*" (p. 145). Accordingly, the case proceeded against them.

109. In addition, it is worth repeating a few points which have consistently been made in the case law: -

i) The ultimate outcome of a delay/prejudice issue must invariably depend on the particular circumstances of any given situation: "Every case is different. Factual resemblances are only of limited value". (*McBrearty* at pg. 36)

ii) In cases where the court is essentially concerned with delay post the commencement of proceedings, it will view the obligation of expedition much more strictly where there has been a considerable delay pre-commencement. (*McBrearty* at pg. 25)

iii) Delay and certainly culpable delay on the part of a defendant may constitute countervailing circumstances which militates against a dismissal.

iv) The existence of significant and irremediable prejudice to a defendant would usually feature strongly, for example the unavailability of witnesses, the fallibility of memory recall and the like. The absence of medical records, notes and scans likewise, but where such are available, the converse may apply.

v) This latter point may be of very considerable significance, particularly in medical negligence cases as most treating doctors and certainly all consulted experts, will rely on such information for their evidence. (*McBrearty* at pg. 48)

110. Finally, the following passage in the judgment of Cross J., in *Calvart v. Stollznow* [1980] 2 N.S.W.L.R. 749, which was approved by Murphy in *Hogan v. Jones* [1994] 1 I.L.R.M. 512, should be noted:

> *"Considerations of justice transcend all other considerations in these matters. Of course justice is best done if an action is brought on whilst the memory of the witnesses is fresh. But surely imperfect justice is better than no justice."*

As in *McBrearty* (p.19), this may be relevant in that whilst the passage of time has been considerable, there is no dispute but that the relevant medical records, notes and files are available: Ms. Taylor has so averred on more than one occasion.

The Instant Case: The Periods of Delay:

111. At the outset it must be accepted that the timeframe in this case appears quite stark: at least at face value it could be so described: that picture however, may not be the entire story. In any event, the analysis required to be carried out involves an assessment of the various events which occurred during these periods, with the responsibility therefor and the consequence thereof also featuring heavily in such assessment. So as to conduct this exercise it is desirable to briefly recap the relevant dates and pertinent events, although, many of these have previously been outlined.

112. A few key dates to start with: the plaintiff was born in January, 1995: proceedings were commenced in June, 2008: the summons was renewed in July, 2013 and Dr. Denham and Mount Carmel Hospital were joined as co-defendants in November, 2016. Their motions to have the proceedings dismissed issued respectively in March and September, 2017. The judgment of Binchy J. and that of the Court of Appeal (McGovern J.) followed: as did the determination of this Court granting leave. Therefore, in board terms the periods involved might be broken up as follows:

January, 1995 –June, 2008:

June, 2008 –July, 2013:

July, 2013 – May, 2015

May, 2015 – November, 2016

November, 2016 – March, 2017

When looking a bit more closely at these periods, it is important to bear in mind the position of both the second and third named defendants on this aspect of the appeal.

113. Both the second and third defendants have submitted that due to the lapse in time since the birth of the plaintiff they will suffer prejudice if the action should proceed. The second defendant says that the delay must give rise to a presumed prejudice while the third defendant argues that any right to a speedy and fair trial will be denied as well as pointing to the fallibility of witness memory and other related matters. Although stating that they had been unable to identify any potential witnesses thus far, nonetheless, neither defendant has given any specific details as to the reasons why. Mount Carmel further claims that it will be materially prejudiced as a result of having disposed of its interest in the hospital in April, 2006, with their solicitor, Mr. Gleeson, indicating that since then, it has had no insurance or indemnity cover. Ms. Taylor, for the plaintiff, replying to this averment, swore an affidavit on the 25th October, 2017, in which she requested him to clarify the situation: however, none was forthcoming. The hospital has subsequently adjusted its position somewhat in its submissions to this Court, in stating that it was "unclear" whether any insurer or state agency would provide indemnity for this claim.

The Periods:

114. In very many cases grouping the periods involved in the manner above described conveys an accurate representation of events from which one can apply the appropriate

principles, such as whether the delay was inordinate, inexcusable, and then the follow on test based on the balance of justice. For some periods at least this would not portray a just picture of the actual events which occurred in this case. Accordingly, it will be necessary to be more specific in certain instances.

January 1995 – June 2008:

115. There is very little evidence available as to what occurred during this period of time. That is of course on the legal front. No doubt the parents of Mr. Mangan were in large measure and for a very considerable period, preoccupied with obtaining a definitive diagnosis of their son's condition, and when discovered in putting in place measures to try and cope with that situation before even contemplating any engagement with the legal process. Clearly, that did occur however as within this period the original personal injury summons was issued on the 17th June, 2008, naming Dr. Dockeray only: such was based on the advice of Mr. Clements, who evidently felt that further exploration of the neo-natal period was necessary. Therefore, he recommended the retention of a consultant in this area. In March, 2008 Dr. Jain agreed to receive instructions and to provide a report. Between that date and the receipt of his opinion in July, 2009, Ms. Taylor dealt with a number of queries raised by him and she also inquired on at least six occasions as to when his report might be available. On the whole therefore, although relevant, I do not consider this period of time, to be crucial in the overall assessment of the delay issue.

June 2008 – July 2013

116. On the advices received, a paediatric neurologist report was necessary so as to progress the claim: so said Dr. Clements and now Dr. Jain, and also, evidently based on their advices, so did senior counsel. Over the following period the plaintiff's solicitor asked a

number of such specialists to accept instructions: in all she contacted eleven in total from Ireland, both North and South, the United Kingdom and Canada: each declined expressly or by way of no response. In April, 2012, Dr. McCoy agreed to become involved. After a full set of records were sent to her and following a number of meetings, her reports were received in March and April, 2013. Thereafter, there was immediate correspondence with counsel who indicated on the 12th June, 2013, that the outstanding issues had now been addressed and that the claim should proceed: hence, the application to renew the summons on the 15th July, 2013. This period evidently featured in that application and is dealt with a little later in this judgment (paras. 122-125 below).

July 2013 – May 2015:

117. Such application was successfully made before Peart J. on the 15th July, 2013, with the amended plenary summons issuing on the 27th September of that year. A motion for judgment in default of appearance followed, but before being heard Dr. Dockeray sought to have the renewal order set aside: this he did by notice of motion dated the 12th February, 2014. That application was rejected by Costello J. in a written judgment delivered on the 23rd October, 2014, and an appeal therefrom was dismissed by the Court of Appeal on the 13th May, 2015. Whilst I intend to come back to these court decisions in a moment, it is difficult to see how anyone could describe this period as being one of delay.

May 2015 – November 2016:

118. The next distinct period is that which followed the Court of Appeal's decision in May, 2015. Shortly thereafter, in June, 2015, Dr. Dockeray requested additional information, sought further and better particulars and also requested voluntary discovery. On the 7th December, 2015, the High Court on a motion directed the plaintiff to comply, which duly occurred on the

15th February, 2016. There then followed two motions brought by the plaintiff for judgment in default of defence. The first was heard on the 20th June, 2016, when Dr. Dockeray was allowed 6 weeks to deliver his defence. The second was due to be heard on the 21st November 2016. However, as we know, he then brought an application on the 2nd November to join the 'now' defendants as third parties, thus setting in motion the chain of events under discussion in these proceedings.

119. As the evidence shows, during this period the plaintiff's advisors took clear steps to progress the claim, by providing the required particulars and by bringing motions for judgment in default of defence. To look at that time-period slightly differently, what other reasonable steps could have been taken by the plaintiff in order to expedite the action in the absence of any defence from Dr. Dockeray? True, the plaintiff could be criticised for taking a number of months to furnish the particulars, but at the overall level it would be harsh to characterise such delay as being inordinate but even if that were so, it should not in my view be described also as inexcusable.

November 2016 – March 2017:

120. Finally, on the hearing of the applications to join the second and third defendants to these proceedings, Barr J., on the 21st November, 2016, was satisfied that there was sufficient evidence before him, in the form of Ms. Brassil's affidavit, to justify making that order and on the same basis felt equally justified in joining them as co-defendants. The amended plenary summons was served on the relevant defendants in February, 2017 following a two-week extension of time within which to do so. In March, Dr. Denham issued the notice of motion which is the subject of this appeal with a similar motion on behalf of Mount Carmel issuing on the 12th September, 2017. These were then within the judicial domain and so remain to this day. Even though there was a six-month gap between the first and second motions, it is

clear that the critical time path for both was determined by the March motion. Evidently, the plaintiff could take no step regarding if and when Mount Carmel made its application. Although the relevant defendants were the moving parties in both motions, it has not been suggested that their resolution was in any way held up or delayed by the plaintiff.

121. Before outlining my conclusion on the delay/prejudice issue, it is necessary to again refer to what weight should be attached to the various judicial interventions, above referred to, which have taken place in this case since 2008.

The Renewal of the Summons:

122. The application to renew a summons is governed by O. 8 of the RSC; in this case in the version applying pre the amendment brought about by S.I. No. 482/2018 Rules of the Superior Courts (Renewal of Summons) 2018. Basically such can be granted if the court is satisfied, that reasonable efforts had been made to serve the defendant(s), or for other good reason; it was latter ground relied upon in this case. Based upon an affidavit of Ms. Taylor (dated 8th July, 2013) in which she set out in brief terms the events which occurred following the issuing of the summons, Peart J. granted the renewal on an *ex parte* application, as allowed for by the said Order. The question arises as to what weight should be given to that decision.

123. As it happens, Peart J., outlined in another case (*Moynihan v. Dairygold Co-operative Society Limited* [2006] IEHC 318 **(**Unreported, High Court, Peart J., 13th October, 2006), his general approach to such an application. When moved *ex parte*, he would consider that the "bar" is low and normally would take "a reasonably benign view of delay". When made on notice or when an application to set aside is moved, the situation is entirely different. The learned judge considered that the latter was a "*de novo*" hearing, which involved a much more detailed analysis than that appropriate on an *ex parte* application. Matters such as the length

of delay, the reasons therefor, and the general conduct of the proceedings should all be considered: this to see whether in the circumstances the "*prejudice to the defendant in having to defend the proceedings after the length of time involved is such as to outweigh the undoubted prejudice to the plaintiff in being in effect debarred from proceeding*…" (p. 8). Through phrased somewhat differently, one can see a similar approach in *Chambers v. Kenefick* [2005] IEHC 402, [2007] 3 I.R. 526, where a three stage sequence was suggested, namely is there a good reason to renew the summons, is it in the interests of justice between the parties to so do, and thirdly where does the balance of hardship lie. In any event, as we know this level of analysis did not take place as the learned judge was only asked to deal with the application on an *ex parte* basis: accordingly, whilst some sort of inquiry had to have been conducted by him, nonetheless in view of *Moynihan*, I would not want to overly rely on its intensity as a major factor in this case.

124. The judgment of Costello J., given on the 23rd October, 2014, however is an entirely different matter ([2014] IEHC 477). In her written decision she made a number of significant findings which cannot be overlooked:

- Firstly, that an appropriate report from a paediatric neurologist was absolutely essential for cases involving hypoxic injury, in particular for the timing of the insult and its causative effect. This much was also acknowledged by Dr. Dockeray in his submissions to her, when he said that such expert evidence is a *sine non qua* of such cases.
- Therefore, her unequivocal view was that the plaintiff's advisors simply could not progress their case until such report was available to them.
- Having noted the considerable efforts made by Ms. Taylor to procure the necessary evidence, the learned judge then looked at the overall justice of the situation.

- In so doing, she considered the relevant dates, the fact that no reference whatsoever to prejudice had been made by Dr. Dockeray and the considerable amount of work which the plaintiff's advisors had put into the case, which was now at "an advanced stage of preparation" (para. 17).
- She also noted the position of Dr. Dockeray, who intended to bring a motion for inordinate and inexcusable delay if his application before her was unsuccessful and of the plaintiff, as a person of unsound mind, who could issue a fresh personal injuries summons if the application was successful.
- She felt the importance of the action to the plaintiff could not be overstated given the catastrophic nature of his injuries.
- Overall, the grave risk of injustice to the plaintiff if the proceedings were to be struck out by her, was far less than the hardship potentially suffered by Dr. Dockeray, should the claim against him proceed.

On those bases, the application was unsuccessful.

125. From her judgment, it is clear that the antecedent history of the proceedings was closely considered by Costello J. and as part thereof, the reasons for the delay between June, 2008 and July, 2013. These views must have a material impact on the current issue as must the fact that Dr. Dockeray's appeal from her decision was dismissed by the Court of Appeal. Whilst I acknowledge that apart from the order, there is no evidence of the approach adopted by that Court, nonetheless its very conclusion must likewise carry not insignificant weight. Although neither Dr. Denham nor Mount Carmel Hospital were or could have been parties to this application, nonetheless given what the court considered and concluded, it may well be that the only area of differentiation remaining between Dr. Dockeray and these defendants, relates to what factors either may rely upon on this appeal as constituting prejudice particular to them.

The Joinder of Parties:

126. As the application of Dr. Dockeray to join the second and third defendants as third parties was essentially subsumed into the application of the plaintiff, I should briefly look at the rules which cover the joinder of parties to existing proceedings, though how instructive this turns out to be, is not clear. The position of new defendants is entirely governed by O. 15 r. 13 and r. 4 while the position of third parties is contained in O. 16 and s. 27(1) of the Civil Liability Act 1961, as amended. In *O'Connell v. Building & Allied Trades Union Association* [2012] IESC 36, [2012] 2 I.R. 371, MacMenamin J. felt that the operation of O. 15, r .4 was straightforward in that all persons may be joined as defendants against "*whom the right to any relief is alleged to have existed",* either jointly, severally or otherwise (para. 19). In his view, there was no necessity for a plaintiff to set out all of the facts and circumstances which he/she had for the joining of such proposed defendant(s). He further quoted O. 15, r. 13 which states that it is only necessary to show that the joinder is required to "*effectively and completely adjudicate upon and settle all issues involved in the matter*". Whilst these rules were intended to be flexible and not overtly restrictive, nonetheless the learned judge felt that a discretion to refuse to join additional defendants existed where there was an insufficient legal basis for so doing, or where the application was vexatious or an abuse of process.

127. As previously noted, Barr J., on the 21st November, 2016, made the order joining Dr. Denham and Mount Carmel as co-defendants in these proceedings: quite understandably no written judgment exists. It does appear however, that he did not consider any possible prejudice to either of them arising from the lapse of time since the birth of the plaintiff, save for noting that they could, if they so chose, bring an application to have the proceedings

dismissed on the basis of delay, an issue he specifically stated would have to be decided "on another day".

Assessment of Delay/Prejudice:

128. In order for this Court to be satisfied that a dismissal of the proceedings is warranted on delay/prejudice grounds, it must first be established that the delay is both inordinate and inexcusable. If it is not so established, that is an end to the matter. If however it is so satisfied, then it must embark on the balance of justice test. What that entails has been expressed in *Primor* (pp. 475 and 476). In addition, however, regard must be had to the parallel or perhaps more accurately the overlapping jurisprudence set out in *O'Domhnaill* and in later cases such as *Toal No.1* and *Toal No.2.* In this regard, the court must ask whether, in all the circumstances, even where the plaintiff is entirely exonerated from blame and even where the statute cannot be successfully pleaded, nonetheless it would still be patently unjust to require a defendant to defend such proceedings in light of the period of delay and the intervening circumstances so adjudged to have occurred.

129. As can be seen from the discussion of Questions 1 and 2, this is a very unusual case: this uniqueness continues into Question No. 3. In the first instance this is not an application by Dr. Dockeray to have the proceedings dismissed on delay grounds, even though he has been a defendant since 2008. As both Dr. Denham and Mount Carmel became parties only in November, 2016, there is in some sense a good deal of unreality underlying the discussion on the question of delay prior to that time. The periods above mentioned and analysed, took place either before or during the currency of these proceedings where there was only one defendant. One might therefore have thought that only Dr. Dockeray could assert and rely upon such delay.

130. Secondly, the plaintiff has acknowledged on numerous occasions, even to this day, that he himself has no or no sufficient evidence to implicate either the second or third named defendants. Their joining came about solely as result of the application made by Dr. Dockeray in November, 2016. If such a step had not been taken, then evidently due to the lack of evidential material, the plaintiff could not have initiated such a move. Quite clearly he had no control over if and when Dr. Dockeray would make that third party application. It is therefore difficult to see how the period preceding that could be relied upon by either of the relevant defendants as constituting inordinate or inexcusable delay. If anything, such an argument should be addressed to the first named defendant and not the plaintiff. Indeed, it is striking that no attempt was made to implicate the first named defendant on delay grounds.

131. In any event as touched upon previously, I do not regard the period up to the issue of the personal injury summons in June, 2008 as being crucial in this assessment. The five years thereafter, admittedly in quite a limited way, was considered by Peart J. when renewing the summons. However, it was closely analysed by Costello J. in refusing to set that order aside with her views being endorsed by the Court of Appeal. Both expressly and by necessary implication, it follows that the trial and the appellate court did not regard the delay involved as justifying acceding to that application. Whilst the principles on that motion and on the Question No. 3 issue differ slightly, there is nonetheless a large amount of common ground between both.

132. I respectfully agree with the decision of both courts which dealt with that application. At that time the medical and legal advice was that a paediatric neurologist was required. Dr. Dockeray so agrees that such an expert is a critical witness in a hypoxic injury case. The affidavit of Ms. Taylor sets out in considerable detail the steps which she undertook so as procure the necessary witness. Undoubtedly at a micro level one can point to periods of time here and there when matters might have been progressed more quickly. But what steps were

actually taken must also weigh heavily. Writing to eleven specialists, over three countries, and awaiting their response necessarily involves time. Moreover, nothing could be done to progress the action until that type of evidence was procured, which ultimately became available with Dr. McCoy's report. Therefore, quite independently of Costello J. and the Court of Appeal, I do not believe that the preceding periods, *i.e.* from June, 2008 to May, 2015 can be described as constituting inordinate delay but even if they are, it is in my view excusable.

133. The fourth period has been dealt with at para. 118 above, and has been adequately addressed. The final period is from November, 2016 to March, 2017 when the third party application was being processed. There is no suggestion of any delay on the plaintiff's part during this period. Thereafter, as previously outlined, the subject motions issued and both have been dealt with by the High Court and the Court of Appeal and furthermore, following leave to apply, are presently before this Court. Consequently, whilst of course I acknowledge the considerable period which has elapsed since the plaintiff's birth and now, I do not believe that it necessarily constitutes the type of delay coupled with the responsibility therefor, which is required before the case should be dismissed on the grounds of delay. In an overall sense, I have the same feeling as that expressed by Geoghegan J. in *McBrearty*, when at pg. 30 he rejected the High Court's conclusion that there was inordinate and inexcusable delay, instead offering "*My overall impression of the litigation from the papers before this Court is not one of laxity of the part of the solicitors concerned*". I share a similar view about this case.

134. Finally I should say that obviously I acknowledge that the overall time period in this case, being some 25 years since the events complained of occurred, may seem stark on its face. However, as some of the most prominent authorities demonstrate, a lengthy frontline period in and of itself may not necessarily be fatal. A more detailed examination of the circumstances, such as excusability, prejudice and the like, including where justice falls, is

always essential. In *Toal (No. 2)*, the alleged negligence took place in 1971, this Court allowed the action to proceed, against some of the defendants, in 1991: 20 years later. In *Rainsford*, the time between the plaintiff's accident and the court's decision was 24 years and in *McBrearty* there was 29 years between the relevant event, being the birth of the plaintiff, and Geoghegan J.'s decision. In both cases the action was allowed to proceed. Finally in *Gallagher*; though the proceedings were eventually struck out by Baker J. due to the failure of the plaintiff, in the three month adjournment allowed, to adhere to the imposed requirements, regarding particulars, expert evidence and general expedition of the case, the learned judge did not, at first hearing dismiss the action even though over 30 years had passed since the causative event; rather, having carefully considered the personal circumstances of the plaintiff and the risk of actual prejudice to the first and second defendants, she adopted the course as described. Therefore it could not be said that the ultimate decision reached in this case is without precedent.

135. Strictly speaking such a conclusion would end the examination required by *Primor*. However, even if I am incorrect in concluding that the relevant defendants have not established inordinate and inexcusable delay, and assume that they have, it then becomes necessary to consider the balance of justice argument which I now propose to so do. I do so by broadly asking whether the interest of justice still requires a termination of these proceedings, or whether the action should be allowed to proceed. This exercise can conveniently include all residual matters arising from the *O'Domhnaill* and similar decisions.

<u>*Balance of Justice*</u>:

136. As above stated, neither defendant has submitted any prejudice which can truly be classified as specific, save for the insurance issue on the part of the third defendant which I will come to in a moment. Though both have stated that the passage of time will make it

difficult to identify witnesses and for those witnesses to remember the events which occurred in January, 1995, these general claims must surely be viewed in light of Ms. Taylor's averments (25th October, 2017) that the necessary medical records are available to all parties. Geoghegan J. in *McBrearty* opined that in his experience such records were more important in medical actions than in others, in that doctors and medical staff were more likely to rely on them, rather than on their own memories of events (pg. 48). This too has very much been my experience. Certainly the vast majority of expert reports are so based. I cannot therefore accept that the general prejudice complained of by both defendants is incapable of being remedied by an examination of the records, should the action be allowed to continue.

137. Then there is the insurance issue, an important factor and one which was determinative for two of the defendants in *McBrearty*. These two "personal defendants", so described by the learned judge, were doctors who were no longer indemnified and thus faced a potentially huge financial burden, should the action succeed against them. Geoghegan J. felt that the trial judge had overlooked the "*enormity of the worry and upset this would cause*" (pg. 46) and that this made their continuing involvement in the action fundamentally unfair. The final defendant was the Health Board, for which no similar prejudice existed, thus the plaintiff was permitted to continue against it.

138. Two English authorities on this point were opened to the Court, each of which was decided in close proximity to the other, and each of which dealt with the same change in the insurance and indemnity arrangements for English health authorities. Before the 1st January 1990, any award of damages in cases of medical negligence, was paid by the relevant doctor's defence organisation. The change however, meant that where the damages did not exceed £300,000, the award had to be funded by the health authority defendant itself, without recourse to the indemnity fund of the medical defence bodies. In *Gascoine v. Haringey Health Authority* [1992] P.I.Q.R. 416 the Court of Appeal affirmed the decision of the trial court in

dismissing the plaintiff's claim for want of prosecution. The facts are straightforward: in 1978, the plaintiff underwent external radiotherapy as part of treatment for cancer, in 1980, she was found to have suffered some injuries as a result of this therapy and in 1983 she issued a writ for damages, claiming negligence against the Health Authority and two doctors. Eight years then passed without any action being taken by the plaintiff to progress her claim. In 1991, a fresh writ was issued which was followed by motions to have the proceedings struck out for want of prosecution. The plaintiff conceded that the delay had been inordinate and inexcusable. The personal defendants argued that they were prejudiced due to memory loss and also because the allegations had been hanging over them for such a period of time. The Health Authority claimed that as a result of the change in policy above referred to, it now suffered extreme financial prejudice, in that it would be forced to fund any award of damages itself.

139. The trial judge held that this change in circumstance was indeed a relevant head of specific prejudice which the court was entitled to have regard to. The Court of Appeal agreed, though stipulated that such was not of itself determinative and didn't represent automatic prejudice to be applied to every case where the issue arose. However, in this specific situation, the fact was that the Health Authority would be forced to meet a claim which, in the absence of delay, it would not have had to meet. A careful *caveat* however appears from the judgment of Woolf L.J.:-

"Therefore the fact of the changed arrangements is a matter with which the court can have regard. However, in having regard to it, the court should not, in my judgment, regard it as a matter of such significance that it would in itself justify an action being struck out. The prejudice is something to be taken into account together with other prejudice, if it exists, as justifying the view that in all the circumstances the appropriate conclusion is that an action should be struck out." (pg. 423)

Combined with the other prejudicial factors at play, the Court of Appeal held that the correct decision had been made, to strike out the action in its entirety for want of prosecution.

140. In *Antcliffe v. Gloucester Health Authority* [1992] 1 W.L.R. 1044, the plaintiff brought an action in negligence against her district's health authority as a result of two operations she underwent, one in 1981 and the other in 1984. Having issued proceedings in 1986, the defendants served their defence and requested further and better particulars. These were not given by the plaintiff until September, 1987 and a further 4 years then elapsed, until February, 1991, before anything else was done by the plaintiff to progress her case. The same change post-January 1990 stood to impact the defendant Health Authority. Schiemann J., the trial judge, rejected the financial prejudice argument saying that the insurance issue was "wholly irrelevant" and said that the question to ask was not "has the defendant been prejudiced?", but rather "has the defendant's case been prejudiced?". The Court of Appeal (Scott L.J.), disagreed with his approach and found that the plaintiff's inordinate and inexcusable delay would result in severe financial prejudice for the Health Authority if the action was successful. A plaintiff who was guilty of such delay had an obligation to "take the defendant as he finds him", and in this case, the health authority faced a significant change in circumstance post-January, 1990. Primarily on this basis, the decision of the trial court was reversed and the action was struck out.

141. Although I have referred to these two English decisions, I do not think that they have added much to our own domestic jurisprudence, which is well capable of identifying specific prejudice and responding to it. In any event, the situation here is entirely different for the following reasons.

142. Dr. Denham is a member of the Medical Protection Society and his interests are being covered by that indemnifier. The evidence in relation to the insurance situation with Mount Carmel is somewhat conflicting and frankly is quite unsatisfactory. At its highest, it is

suggested that since 2006, it has no indemnity for one off cases. However apart from that being utterly surprising, if Mount Carmel wishes to maintain its stated position relative to any aspect of this action, the same should be affirmatively sworn to and supported by appropriate documentation; in the absence of both it is difficult to see how such could be accepted . Even however, if one proceeds on that basis, it would mean that the hospital is in no worse a situation today than it was at that time. No application to dismiss on the grounds of delay or prejudice could conceivably have succeeded in or about 2006. Accordingly, I do not accept this as a point sufficient to merit a dismissal of the action.

143. In addition, the actual evidence offered by Mount Carmel on this general issue is entirely inadequate and utterly too nebulous to come to any conclusion thereon. No evidence has been produced in respect of the consideration which the hospital received when disposing of this asset in 2006, no financial records have been exhibited as to what its situation was on that occasion, or indeed at any time since then. If this was a point being seriously pursued, it would have been evidentially supported if such existed. I therefore cannot consider this as an influential matter in its application against the plaintiff.

144. In addition, it should be said that the third defendant will need to clarify its position both as to insurance and as to assets, so that some certainty can be brought to bear on this important issue. It will be most unsatisfactory for the parties, not only for the plaintiff, but also for Dr. Denham if there remained any ambiguity in this respect; justice and fair practice for all dictate that Mount Carmel should finalise its position as part of the further preparatory steps necessary so as to render this action ready for trial.

145. Looking at the interest of justice situation in the round, the following points come to mind:-

- The crucial importance for the plaintiff in continuing with this action.
- The fact that being of unsound mind not so found, the limitation period cannot apply.

- The fact that Dr. Denham is insured and no specific prejudice has been advanced on his behalf.
- The inadequacy of the evidential material advanced on behalf of Mount Carmel regarding insurance.
- The availability of what appears to be full and complete records of the events at and surrounding 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 named defendants and any experts called on their behalf, would be heavily if not almost entirely reliant on those medical records.

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. Dockeray. 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.

Conclusion on Question 3:

147. Each of the judgments delivered thus far in this matter has acknowledged the peculiar position of the plaintiff following the application to join Dr. Denham and the hospital to the proceedings, which evidences how Dr. Dockeray proposes to defend the action, namely by seeking to pin the alleged negligence on either or both of those defendants. Further, we must assume that the trial of the action against Dr. Dockeray will continue, even if the plaintiff's

claim against the second and third defendants is dismissed at this point. In fact, it would seem a likely eventuality that upon such occurrence, the first defendant will immediately re-apply to join them as third parties to the proceedings, given that the entire thrust of his defence is to offload responsibility onto them: which means that they will not be fully released from the proceedings in any event. The plaintiff would then be left without a claim against those who may be found liable for the injuries complained of. A further weighty factor must be the severity of the injuries suffered by him: there can be no disputing but that they were catastrophic.

148. All of the above, coupled with the lack of overall specific prejudice identified by the second and third defendants, would appear to tip the balance in favour of allowing the proceedings to continue.

Conclusion

149. Accordingly, I would answer the questions upon which leave was given (para. 30 above) as follows:

i) Question 1. No: The pleadings do not fail to disclose a cause of action and therefore O. 19, r 28 RSC is not appropriate. (paras. 53-79)

ii) Question 2. No: It is not a just application of the court's inherent jurisdiction in the circumstances to strike out the plaintiff's claim. (paras. 80-103)

iii) Question 3. No: The delay in this case is not such as to justify terminating the proceedings without a hearing on its merits. (paras. 104-148)

It follows therefore that I would allow the plaintiff's appeal.

150. Finally, the plaintiff's case against the defendants and any issues *intra* defendants must be processed with all due diligence henceforth.