

**THE HIGH COURT**

[2022] IEHC 75

**RECORD NO. 2019/8909P**

**BETWEEN:**

**ELIZABETH O'CONNOR**

**PLAINTIFF**

**AND**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**JUDGMENT OF MS. JUSTICE SIOBHÁN PHELAN DELIVERED ON THE 10th DAY OF FEBRUARY, 2022.**

**INTRODUCTION**

1. This matter comes before the Court on an application to strike out the proceedings on the grounds of (a) abuse of process and (b) delay.
2. The basis advanced for contending that the claim is an abuse of process is that these are the second set of proceedings instituted in respect of injuries sustained accidentally in a surgical procedure carried out in August, 2013. The plaintiff had previously issued and subsequently maintained a claim in respect of injuries sustained in the said surgical procedure in proceedings titled *Elizabeth O'Connor v Health Service Executive* (High Court Record No. 2015/9826P) [hereinafter "O'Connor No. 1"]. The summons in the within proceedings [hereinafter "O'Connor No. 2"] was only served on the defendant five days after a decision of this Court (Barr J.) setting aside an earlier order renewing the summons in O'Connor No. 1 bringing those proceedings to a close consequent upon a failure to serve them within time.
3. It is contended that the plaintiff's claim in O'Connor No. 2 is an effort to circumvent the court's decision in respect of her failure to prosecute her previous claim in a proper and timely manner and represents a collateral attack on the decision of the High Court (*O'Connor v HSE* [2020] IEHC 551) in the previous proceedings. The defendant objects that the plaintiff is seeking to litigate an issue in O'Connor No. 2 that should have been brought forward, pleaded, and advanced as part of the plaintiff's case in her previous proceedings.
4. The delay complaint is advanced on the basis that the plaintiff has delayed inordinately and inexcusably in bringing this claim, resulting in prejudice to the defendant in defending itself.

**FACTUAL BACKGROUND**

5. The plaintiff in these proceedings advances her claim against the defendant arising from the alleged negligent treatment of her by the defendant, its servants or agents, at the defendant Hospital at St. Luke's Hospital, Kilkenny during the course of an emergency caesarean section on the 15th August 2013. In the months and year following the section, the plaintiff developed problems with the functioning of her kidney and required a series of operative interventions. Although the plaintiff claims that she was informed by her doctor in December 2014 that her kidney had suffered accidental damage in the course of the caesarean section which "ought not to have occurred " (and this is the

bare plea advanced on the summons in the earlier proceedings), it is her case that it was only on receipt of a report from an expert Consultant Obstetrician, Mr. Roger Clements, in December 2018 that she ascertained that the immediate injury in the procedure was to the ureter, that this occurred as a result of negligent surgical procedure and in turn caused damage to her kidney. Her position is that in the absence of satisfactory medical evidence up to that point, it was only on receipt of the report from Mr. Clements in December 2018 that the plaintiff was equipped to properly pursue proceedings against the defendant by identifying particulars of negligence and damage.

#### **PROCEDURAL BACKGROUND**

6. Although the report from Mr. Clements was only received in December 2018, the plaintiff had issued proceedings on the 25th November 2015 against the defendant in High Court Record No. 2015/9826P (O'Connor No. 1) alleging an accidental injury to her kidney, but with little further detail. It is clear from the face of these proceedings that they were initiated as a protective measure to prevent the operation of the Statute of Limitations against the plaintiff but were commenced without the benefit of any expert report. The writ was endorsed as follows at para. 13:

“As of the date of issue of the personal injuries summons herein the Plaintiff is unable to include full and detailed particulars of the acts of the Defendant, its servants or agents, constituting the wrong, particulars of negligence, breach of duty and/or breach of statutory duty, particulars of injury and particulars of special damage in circumstances where the Plaintiff issues this Personal Injuries Summons in order to protect her position under the Statute of Limitations Act 1957 (as amended) and prior to having received full and complete medical records from the Defendant and expert reports from the medical practitioners in the relevant field. The Plaintiff therefore reserves the right to adduce all of the details required by Order 1A of the Rules of the Superior Court including details of the circumstances of the wrong, the particulars of negligence, breach of duty and particulars of personal injuries, loss and damage upon receipt of any and all medical records and expert reports in this regard.”

7. In the absence of a medical report, proceedings issued on 25th November 2015 but were not served at that time pending receipt of a medical report. Thereafter, the evidence before the court is that time was consumed in trying to obtain the full records from the defendant's hospital and subsequently obtaining an expert report from a Professor Lees. There were delays in both obtaining the records and the report and the court is told that due to inadvertence in the plaintiff's solicitors' office, the summons was not served before the expiry of twelve months from the date of issue of the summons.
8. Subsequently an order extending the time for service was granted by the Master of the High Court on 22nd November 2016. This application was grounded on an affidavit sworn by the plaintiff's solicitor on the 16th November 2016 in which he stated that the summons had not been served as a report was awaited from the expert in respect of liability issues. The plaintiff's solicitor deposed to the fact that:

“expert medical report in relation to liability was still awaited”

and

“expert has now been engaged and is in the process of preparing a report in relation to liability.... following receipt of this report the proceedings can be issued without delay.”

9. The order of the Master was endorsed on its face with the statement that the summons was:

“renewed as of this date for the period of six months from the date of such renewal inclusive”.

10. This meant that the renewed summons in O’Connor No. 1 proceedings would expire on the 22nd May 2017 unless served in advance of that date.

11. The six-month time limit specified in the Master’s order was not adhered to and due service was not effected in the time allowed. The plaintiff’s solicitor has explained this failure on the basis that he was of the mistaken belief that the Master’s order extended the summons for a period of twelve months and he was awaiting a medical report from Dr. Lees. The plaintiff’s solicitor finally received the report from Dr. Lees on the 7th November 2017 and the summons was served on the 13th November 2017 but by then the time permitted for service of the summons had passed.

12. Upon service of a summons, the defendant’s solicitor queried the failure to serve the summons within twelve months of issue. When not satisfied with the explanation they received, the defendant’s solicitor advised that they were seeking counsel’s opinion in the matter.

13. Accordingly, the defendant was on notice of the claim from November 2017 but engaged in seeking advice in relation to the failure to serve the summons in time. On the plaintiff’s side, it appears from the affidavit evidence that senior counsel’s advice was sought in respect of Dr. Lees’ report and the plaintiff’s solicitor subsequently averred in grounding an application for a further renewal that, although the report of Dr. Lees’ was adequate to maintain proceedings (hence the service some days later), it was not:

“sufficient to particularly progress matters”.

14. The plaintiff’s solicitor has averred that he was advised by a senior counsel that a report should be sought from Mr. Roger Clements, consultant obstetrician gynaecologist. There was then some further delay in retrieving papers from Dr. Lees and obtaining a report from Mr. Clements. Mr. Clements reviewed the plaintiff in November, 2018.

15. Following receipt of the Clements report, there was *inter partes* correspondence in which the plaintiff’s solicitor indicated an intention to make a second renewal application. On the 15th July 2019 an *ex parte* application was moved by counsel on behalf of the plaintiff

before McGrath J. seeking an order pursuant to O. 8 r. 1 of the Rules of the Superior Courts renewing the personal injury summons for a further period. In grounding the application, the plaintiff's solicitor relied on the delay in obtaining supportive medical reports which were necessary to properly advance proceedings in medical negligence. It was contended by the plaintiff's solicitor that there was no real prejudice to the defendant caused by delay but that there could be considerable prejudice to the plaintiff if her summons were not renewed as an issue under the Statute of Limitations could be raised were she to attempt to serve a further set of proceedings.

16. By order dated 15th July 2019, the High Court (McGrath J.) ordered that the summons be renewed for a further period of three months from that date. The order recited the "special circumstances" which justified the making of the order extending the time for leave to renew the summons as being:

"there were ongoing investigations and misunderstanding of a prior order".

17. The personal injury summons was formally served on the defendant on 26th July 2019. Thereafter, an issue having been raised but not finally determined with regard to the service of the first summons, a second summons was issued in November 2019. Instead of discontinuing the first proceedings and serving the newly issued summons, further particulars of negligence and further particulars of personal injury were pleaded on behalf of the plaintiff on the 20th December 2019. The second summons was pleaded with the benefit of the Clements report, as were the updated particulars in the first proceedings.
18. In January 2020, the defendant issued a notice of motion seeking to set aside the renewal of the summons that had been made by order of the High Court on the 15th July 2019 in the first proceedings. This motion was heard on the 15th October 2020. During the course of the hearing, the court was alerted to the fact that a second summons had issued but had not been served.
19. In a judgement delivered on the 30th October 2020, the Court (Barr J.) set aside the renewal of the summons. Several days later on the 4th November 2020, the summons in O'Connor No. 2 was served. Then, on the 10th November 2020, a notice of discontinuance in respect of O'Connor No. 1 was filed. On the 12th November 2020, the order of Barr J. setting aside the renewal order of McGrath J. was perfected.

#### **JUDGMENT IN O'CONNOR NO. 1, OCTOBER, 2020**

20. It is clear from the judgment on the set aside application of (Barr J., *O'Connor v HSE* [2020] IEHC 551) the Judge decided to set aside the renewal of the summons on two bases, namely:

- i. that following amendment to the Rules the Court could grant only one renewal. This finding turned on an interpretation of the language of the newly amended Order 8, rule 1 which was subsequently reversed in a different case ; and
- ii. that the "special circumstances" test provided for under the new Order 8 for renewing a summons was not met.

21. In applying the “special circumstances” test the Court considered the delay in serving the summons. Finding that the plaintiff had failed to establish “special circumstances” justifying the renewal of the summons, the Court had regard to the plaintiff’s delay in obtaining an expert’s report and the fact that having successfully renewed the summons once, the plaintiff then failed to serve within the second extended period which in turn necessitated the application for a second renewal application. The Court ruled (paragraphs 75-77 ):

“In the circumstances of this case, I am satisfied the fact that the plaintiff may be statute barred if the summons is not renewed, is more or less balanced out by the issue of prejudice to the defendant if the summons is renewed. A hardship will be worked on either party no matter which way the decision is made. If the summons is not renewed the plaintiff may lose her cause of action against this defendant. However, if the summons were to be renewed, while the action itself may turn largely on medical records, it is undoubtedly the case that there would be some viva voce evidence that could be very relevant, in particular in relation to the statement that was alleged to have been made to the plaintiff by the surgeon on 19th December 2014. Being faced with a stale claim many years after the date of operation, or the date of that alleged statement, puts the defendant at a considerable disadvantage. Accordingly, I am of the view that a hardship would be worked on either party no matter what order is made.

At the end of the day, the undeniable fact is that even if the plaintiff had made her application for a second renewal of the summons, immediately upon receipt of Prof. Lees’ report in November 2017, she would still have been out of time to seek a renewal summons, even under the more lenient terms of the old O.8, because she could only have sought such renewal during the currency of the previous period of renewal, which had expired six months earlier on 22nd May, 2017.

Her position was also perilous due to the fact that there had been inordinate delay in obtaining the further report from Dr. Clements and then making the application to the court in July 2019. As Clarke J. pointed in the Moloney case, parties seeking a renewal on the basis of the delay in obtaining expert support, have to establish that they moved with all reasonable expedition in obtaining that report. I am not satisfied that the plaintiff has discharged such burden in relation to obtaining the report from Dr. Clements. For these reasons, the court is not satisfied that the plaintiff had established special circumstances justifying the renewal of the summons at the time of the application was made before McGrath J. on 15th of July 2019.”

22. It is clear from the foregoing that insofar as the High Court considered the question of delay, it did so in the context of determining whether “special circumstances” were demonstrated to ground the renewal of a summons. In having regard to the fact that the plaintiff’s proceedings may be rendered statute barred by his decision, the court implicitly

acknowledges the possibility of a further set of proceedings but those proceedings could be burdened with an issue under the Statute of Limitations.

#### **APPLICATION TO STRIKE OUT**

23. By notice of motion dated 22nd February, 2021, the defendant brought an application to strike out the O'Connor No. 2 proceedings and it is this application which is the subject of this judgment. The application was grounded upon the affidavit of Mark McCabe, Solicitor, sworn on the 11th February 2021.
24. In grounding the application, the defendant's solicitor referred to the fact that these personal injury proceedings are the second proceedings arising from the same events. He stated that it is apparent from a comparison of the personal injuries summons in the O'Connor No. 1 proceedings and from the updated particulars of negligence and updated particulars of personal injuries in those proceedings, each dated 20th December 2019, that the plaintiff also alleged that she sustained an injury to her kidney and ureter during a caesarean section at St. Luke's Hospital in Kilkenny on 15 August 2013 in those earlier proceedings as later more fully particularised. He placed in evidence the pleadings and court orders made in O'Connor No. 1 and highlighted the similarities between the two claims, both arising from a caesarean section on the 15th August 2013.
25. It is argued on behalf of the defendant that the chronology of events in this case suggests that the plaintiff's solicitors, aware that the defendant had not entered an appearance and was examining the grounds for the renewal order, issued the O'Connor 2 summons as a precaution in anticipation of a challenge by the defendant to the renewal order in O'Connor 1. They complain that the O'Connor 2 summons was only served on the defendant on the 4th November 2020 (having issued on the 19th November 2019), five days after delivery of the Court's judgment setting aside the renewal order in O'Connor 1 and that accordingly not only was the same claim maintained in two separate set of proceedings, but the service of the summons after his decision amounted to a collateral attack on his judgment which it is contended is an abuse of process.
26. In grounding the application, the defendant's solicitor further highlighted the plaintiff's delays in obtaining medical reports and in proceeding with the second renewal application, having failed to serve during the currency of the first.
27. In a replying affidavit filed on behalf of the plaintiff, the plaintiff's solicitor referenced the equivocal nature of his initial instructions whereby the plaintiff reported that she had been informed by one of the treating doctors at the hospital that she had sustained an incidental injury to her kidney during the surgical procedure but that no serious harm had been done to her. He referred to the time it had taken to secure the medical records and then to obtain a medical report which when it was received was "inconclusive with regard to causation and liability". He confirmed seeking a further report on the advice of counsel and this report was only received in December 2018 and concluded that the plaintiff had sustained a severe injury due to the wrongful insertion of a suture or sutures into the ureter and that the injury was caused by substandard care and skill.

28. The plaintiff's solicitor highlighted that the original instructions he had received from the plaintiff based on what she had been told by her doctor had identified an injury to the kidney but it now transpired that it was in fact an injury to the ureter. He contended that such was the difference between the injury as described in the December 2018 expert report and the injury described in the indorsement to the first summons, that it was not correct to say that the claim advanced in the second proceedings arises from the same events and injuries as the first set of proceedings.
29. On the question of prejudice, the plaintiff's solicitor pointed to the existence of hospital records and said that no real or actual prejudice had been identified.

### **DECISION**

30. The court proposes to address the questions of abuse of process and delay as grounds for dismissal in turn.

#### **Abuse of Process**

31. The Courts have an inherent jurisdiction to regulate their own processes, to ensure the efficient use of court time, and to prevent abuse of process. The plaintiff's claim against the defendant as it has evolved with the assistance of further medical investigation and reports is that through negligence the defendant, its servants or agents caused a significant an unnecessary injury to the plaintiff's ureter during the course of the emergency caesarean section in August 2013.
32. I am satisfied from a comparison of the two sets of proceedings that the updated particulars of injury and negligence served in the first proceedings were drafted with the benefit of Mr. Clements' report and essentially mirror the particulars of negligence and of injury pleaded in the second summons. Further, it is clear that in both summons a claim in negligence causing personal injury arising from the same surgical procedure is advanced. In the circumstances, I do not accept that separate causes of action are advanced in the two proceedings.
33. The question which then arises is whether maintaining two sets of proceedings arising from the same cause of action in all the circumstances of this case is an abuse of court process which warrants striking out the proceedings so that the plaintiff's claim as against the defendant can never proceed to adjudication.
34. While it was acknowledged during the course of argument that this is not strictly speaking a *Henderson v. Henderson* type case because there has been no ruling on the claim advanced in the proceedings and the first summons had been struck out, the rule in *Henderson v. Henderson* was nonetheless relied upon as authority for the proposition that parties must normally advance the totality of their claim in the first set of proceedings, save in special circumstances and a failure to do so is an abuse of process. The court was further referred, amongst others to the decisions of Hardiman J. in *AA v. Medical Council* [2003] IR 302, Murray CJ in *In Re Vantive Holdings* [2010] 2 I.R. 118, Whelan J. in *Flanagan v. AIB Private Banking & Ors.* [2020] IECA 57 and Hardiman J. in *Minister for Justice, Equality and Law Reform v. Tobin* [2012] 4 I.R. 147.

35. This case-law warrants some further scrutiny to see if it properly develops principles which have any application in this case. The *Henderson v. Henderson* rule was first articulated by Wigram VC in a case of the same name (*Henderson v. Henderson* (1843) 3 Hare 100) as follows:

“[W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.” (p.114)

36. I do not accept that in issuing a second summons during the lifetime of the first summons but before there had been any determination of the cause of action in question that any issue of *res judicata* arises or that any of the principles laid down in *Henderson v. Henderson* are offended. In proceeding on foot of a second summons the plaintiff is not asking the Court to re-open an issue which had already been determined in the previous set of proceedings. In particular, no determination has been made on any issue concerning the liability or the quantum of the plaintiff’s claim, preliminary or otherwise.
37. I agree with the defendant that the principle in *Henderson v. Henderson* that there should be finality in litigation has wider application. A leading authority for the application of the rule in *Henderson v Henderson* in Irish Courts is that of Hardiman J in *AA v Medical Council* [2003] 4 I.R. 302. In *AA*, Hardiman J quotes extensively from the judgment of Lord Bingham in the English case of *Johnson v Gore Wood and Company* [2002] 2 AC 1, as follows:

“*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.” (p. 316)

38. Hardiman J. noted, however, that the rule or principle could not be applied in an automatic or unconsidered fashion. The raising of an issue previously ventilated is not necessarily abusive where, in all the circumstances the party concerned was not misusing the process of the court. It is recalled that in *A.A. v Medical Council* there was an attempt to re-litigate a full and final judicial review. Similarly, in *Tobin*, the second set of proceedings was deemed oppressive to the defendant because there had been a full and final determination of the very same extradition issue by the Supreme Court.



39. It was acknowledged by the defendant's counsel in argument that the statement of the rule in *Henderson v. Henderson* in its classical formulation does not have direct application in this case. The defendant's argument is more nuanced and is advanced by way of analogy with *Henderson v. Henderson* rather than on a direct application of the rule. At the heart of the defendant's argument is the contention that the Court in setting aside the renewal order in O'Connor No. 1 determined the proceedings. As there was no appeal against this decision, the Order setting aside the renewal of the summons had the effect of bringing proceedings to an end. The defendant contends that the issue and service of a second summons arising from the same claim in negligence is an affront to the administration of justice and offends the principle of finality in litigation because it seeks to circumvent the order made bringing the earlier proceedings to an end (see Biehler, Delaney and McGrath, *Delany and McGrath on Civil Procedure* (4th edn, Roundhall 2018) para. 16-113).
40. This case can be distinguished, however, from cases such as the *In Re Vantage Holdings* case relied on by the defendant in support of the application of *Henderson v. Henderson* "by analogy". In that case, Murray CJ. expressed the view that the bringing of a second petition was an abuse of process where crucial evidence had been deliberately withheld from the court in the course of proceedings determining the first petition but was presented during the course of a second petition. Nothing of that sort occurred in this case. The conduct complained of in this case is of an entirely different order. It is complained that the plaintiff issued a second summons arising from the same events without immediately discontinuing the earlier proceedings and without alerting the court or the parties to the fact that a second summons had issued. It is contended that the second proceedings when then served to circumvent the effects of the court order setting aside the renewal of the first summons. It is significant, of course, that the fact that a second summons had issued but had not been served was disclosed to the court before orders were made in the first proceedings. The court was not mis-led and the possibility of further proceedings was clearly within the mind of the court in making its decision to set aside the renewal order.
41. It is suggested on behalf of the defendant that there is some contrivance in the manner in which the plaintiff now argues that the second summons was issued because a separate cause of action exists and that this is something the court. The plaintiff seeks to stand over its position that the second summons can be seen as relating to a separate cause of action in reliance on the decision of Clarke J. in *Mangan & Sheehy v. Murphy & Ors.* (30th June 2006). It is said on behalf of the plaintiff that the particulars of negligence and injury pleaded on the second summons on foot of the expert report of Mr. Clements change the case so materially that the mere service of updated particulars in the earlier proceedings (which occurred in December 2019) would not have been adequate and it would have been necessary to apply to amend the statement of claim. It was argued that had such an application for an amendment been brought, an issue under the Statute of Limitations could have arisen. Referring to *Woori Bank & Anors v. KDB Ireland* [2006] IEHC 156, the point was made on behalf of the plaintiff that on an application to amend the court would have regard to whether the amendment would cause prejudice to the

party against whom the amendment is sought. In view of the fact that an amendment could defeat a plea under the Statute of Limitation because the new claim would be taken to have commenced when the proceedings issued, it was contended that an application to amend to include the added claim of injury to the ureter (as opposed to the kidney alone as pleaded in the first summons) could be refused by the court and the court could direct, as it did in *Mangan & Sheehy*, the issue of a separate set of proceedings in order to preserve the defendant's entitlement to rely on the Statute of Limitations in respect of the new claim.

42. This Court is not persuaded by the argument on behalf of the plaintiff that the second proceedings concern a separate cause of action. It seems to the court that both claims relate to injuries caused by the negligent conduct of the same medical procedure. In my view the position here is not properly analogous to that which arose in the *Mangan & Sheehy* case where an entirely new claim was advanced on an application to amend. Indeed, had the plaintiff really believed that the second summons was necessary because a separate cause of action had been identified in the Clements report, it serves to beg the question why the second summons was not served until after the court had determined the renewal application in the first set of proceedings.
43. Whilst I do not accept that separate causes of action are advanced in the two sets of proceedings or that an amendment to the first summons would have been necessitated to enable the more particularised claim to be advanced, I would not treat the argument advanced to this effect on behalf of the plaintiff as a contrivance which might be considered abusive. To so conclude would require a high degree of certainty as to the approach a differently constituted court might take as to whether an application to amend would be required. Indeed, it seems to me that it would require certainty at a level sufficient to conclude that the plaintiff knew full well that there was no risk of a court taking this position and was maintaining a position in argument which was spurious to the point of dishonesty rather than admit the true position before the court.
44. Whether the reason for the issue of the second summons was because the plaintiffs apprehended that they would be unsuccessful in standing over the renewal order as the defendant suspects or because they were concerned that a point would be taken that the updated particulars might be perceived as identifying a further cause of action not endorsed on the original writ and which would require an amendment of the proceedings as the plaintiff has argued, it is clear that the plaintiff's actions were not directed to relitigating an issue which had been finally decided. On either construction, the plaintiff was taking protective steps in a bid to ensure that she would be permitted to present the substance of her case to a court for determination.
45. Where the complaint made by the defendant is that the plaintiff maintained two writs for a number of days, it seems to me to be wrong to divorce these facts from the effect of the court order determining the first proceedings, the context of the litigation and the surrounding circumstances. In November 2020 when the second writ was served, the High Court had already decided that the first writ would be set aside, albeit the order had

not yet been perfected. The effect of a service of a notice of discontinuance in circumstances of this case were negligible. Whether struck out or discontinued, the first proceedings were at an end without an adjudication by the court on the question of medical negligence. While the defendant treats the service of the second summons as an attempt to circumvent the order of the court which had the effect of precluding further action on the first summons, there is no real suggestion that the plaintiff was seeking to do anything other than regularize the position through the service of the notice of discontinuance having regard to the issue and service of a second writ. At the time the notice of discontinuance was served the decision of the court had been pronounced but the order was not yet perfected and where there was only a short time remaining to serve the summons which had issued almost a full twelve months earlier.

46. Nor do I not accept the defendant's contention that by serving a second summons the plaintiff is circumventing the court's ruling in the first strike out application. The defendant relies on *Quinn v Irish Bank Resolution Corporation Ltd* [2016] IECA 21 where Irvine J. (as she then was) concluded that the High Court judge had correctly engaged with a consideration of the rule in *Henderson v Henderson* in considering that the application by the plaintiff to amend a statement of claim, if granted, would have undermined what the court had intended to achieve when it directed the trial of the preliminary issue and whether it would have had the effect of undermining the decision that had been made on that issue. Applying the approach of the Court of Appeal in *Quinn* in this case, it is again recalled that the court before proceeding to strike out the first summons had been made aware that a second summons had issued. In ruling on the application before it in O'Connor No. 1, the court was not adjudicating on an issue in the proceedings akin to a finding that the proceedings were statute barred. The court was merely finding that the circumstances which would warrant the renewal of the first summons by the court had not been demonstrated to the court's satisfaction.
47. While the court might well express dissatisfaction with the conduct of the proceedings and clearly had regard to the extent of the delay evident in the case in making this decision insofar as it was relevant to a consideration of "special circumstances" on a renewal application, this does not make the decision of the court of wider import than the question it was required to decide. It is, of course, acknowledged that in considering an application to set aside the renewal of the summons the Court considered the question of delay and the explanation for delay, just as this Court must do in addressing the application to dismiss grounded on delay in this application (addressed below), but the tests are nonetheless different. The application before the court in O'Connor No. 1 was to set aside a renewal of a summons under O. 8 r. 1 of the Rules of the Superior Courts by reason of a failure to comply with the procedural requirements of the rules. This was the only issue decided.
48. The defendant did not identify any authority which estops a plaintiff from issuing a separate set of proceedings in circumstances such as prevail here. Indeed, it seems to me that this case is more akin (albeit not on all fours) to that of *AIB Plc v. Darcy* [2016] IECA 214 than it is any of the abuse of process cases identified to the court by the

defendant . The parties availed of an opportunity afforded after the hearing had concluded to address the court on the potential relevance of this case. It was argued by both the plaintiff and the defendant that the case was supportive of their respective positions.

49. In *AIB Plc v. Darcy*, the Court of Appeal (Charleton J.) considered the issue of fresh proceedings by the Bank following a refusal by the Supreme Court to affirm an order of the High Court granting summary judgment and remitting the matter for plenary hearing in the High Court. Following from the failure of the bank to uphold the order granting judgment in the Supreme Court, the bank did not continue with those proceedings but instead instituted new proceedings. As apparent from the judgment, these proceedings commenced on 28th January 2014, while the notice of discontinuance of the proceedings which were remitted to plenary hearing by the Supreme Court was only served on 9th April 2014. The question considered first by the High Court and then by the Court of Appeal was whether it was an abuse of the process of the courts for the bank to issue a fresh set of proceedings which did not have the defect inherent in the first set and with an overlap between both sets of proceedings.
50. The High Court (Gilligan J.) was satisfied that the error which occurred was an error of form and not of any substance and that in the absence of evidence of prejudice and having regard to the interests of justice, the court would treat the second proceedings as valid. In answering the question as to whether the issue of the second set of proceedings whilst the first set were live was abusive in the negative (affirming the decision of the High Court) the Court of Appeal (Charleton J.) identified the purpose of the abuse of process jurisdiction (at para. 12):

"A functioning, impartial court system that is bound by the rule of law is central to the discharge of the responsibilities of a democratic nation. People end up in disputes, claiming entitlements from others or from the State to which they may or may not have a legal right. The proper forum to resolve such disputes is the courts system. Hence, under the Constitution of this State there is a right to assert and have vindicated a legal right; *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345. Actual experience of the exercise of this right - acting as a litigant either through the commencement of an action or being faced with the defence of one - teaches one that this may be a drawn out, stressful and expensive process. Litigation can be used abusively. The purpose of exercising the constitutional right to litigate is the vindication of legal entitlements which the parties in the cause seek to assert. Of course, any legal right may be claimed on a factually or legally incorrect basis. To sort out such situations is the everyday task of the courts. Where a cause of action is bound to fail, it is not always necessary for those facing a court hearing to await the outcome of all preliminary steps and to patiently sit through an oral hearing and await a judge's decision. In drastic cases, litigation can be cut off from the outset through the use of the 'bound to fail' jurisdiction, subsisting as it also does under the 'vexatious litigation' title: *Kenny v. Trinity College Dublin* [2008] 2 IR 40. The rationale for the entitlement of judges to resort

to orders of that kind is that the legal system exists for the benefit of those in the country and that its misuse undermines not only the entitlements of the people in general but the functioning of courts. Hence, the courts have inherent powers to protect their own jurisdiction as part of the principle that abuse of the legal system should be stopped.”

51. The Court then considered the circumstances in which it was appropriate to exercise that jurisdiction before turning to having particular regard to the circumstances of the case before the Court stating (paras. 17-18):

“The circumstances under which litigation may be terminated are as varied as the death of a plaintiff and the non-survival of a cause of action, that someone thinks the better of continuing to either prosecute or defend litigation, or that the proceedings suffer from a technical defect which necessitates their recommencement. Without judging the ultimate consequence of the discontinuance of these proceedings, it is clear that it was the latter consideration that motivated the bank. This is a very different situation to one where such discontinuance should be condemned.....the legal system in all its complexity is not always a model of limpidity. Complexity and uncertainty is bound to give rise to inadvertence and mistakes and it would not constitute the just disposal of a case for parties with a genuine claim to be blocked out simply because they had blundered into an incorrect procedure.”

52. Finally, the Court of Appeal (Charleton J.) concluded that the Rules of the Superior Courts provide for a just response regarding the payment of costs where an action is discontinued and the Court of Appeal affirmed the order of the High Court refusing to strike out the second proceedings as an abuse of process. I accept that the *AIB* case is distinguishable from the facts and circumstances of this case, not least having regard to factors such as the reason a second set of proceedings issued (the fact that an intervening change in the law meant that the defendants would have no defence to proceedings issued under the new law) and the effect of the orders being “circumvented” (in the *AIB* case it was an order remitting for plenary hearing. Nonetheless, the case clearly recognises the broad range of circumstances in which two sets of proceedings concerning the same claim may be maintained, sometimes in abuse of court process and other times not. It also asserts in very clear terms the primacy to be afforded to the right of access to a court to maintain a claim where it is alleged an actionable wrong has caused injury and the care which is required by a court invited to restrict that right.
53. It must also be accepted that while the court in *O’Connor No. 1* was addressing a different legal test, there is an overlap in relevant factors as between the application to set aside the renewal order and this application to strike out not least because of the relevance of delay to a proper consideration of both applications. In *Minister for Justice, Equality and Law Reform v Ciaran Tobin* [2012] 4 I.R. 147, Hardiman J, referring to his AA judgment and the assistance he derived from an article by Mr. Justice Handley of the Court of

Appeal in New South Wales, "A Closer Look at Henderson v Henderson" (2002) 118 LQR 397, where it is stated that:

"[T]he question of whether or not there has been an abuse of process in an individual case remains open as does the possibility of claiming relief on the ground of delay. In a suitable case delay or sheer lapse of time may be part of what goes to make up an abuse of process." (p.297)

54. Thus, the Court's ruling in O'Connor No. 1 is not irrelevant to this court's task as we are both obliged to consider the question of delay.
55. The Court in O'Connor No. 1 was properly critical of delays on the plaintiff's part in progressing her claim from 2014. The fact that this delay was of an order which led the court to conclude that the summons should not have been renewed in reliance on O.8, r.1 of the Rules of the Superior Courts, however, does not equate to a finding that the lapse of time was such that proceedings otherwise properly instituted should be struck out as an abuse of process. While the delay was excessive and raises a concern, considered below, as to whether it is such as to warrant the proceedings being struck out because of inordinate and inexcusable delay which renders the proceedings unfair or interferes with the balance of justice, I do not consider the lapse of time evident in this case to constitute an abuse of process.
56. In *Right to Know Clg v An Taoiseach* [2021] IEHC 233, Simons J. stated that, in applying the rule in *Henderson v Henderson*, a court must seek to balance (i) the constitutional right of access to the courts against (ii) the public interest and the common good in ensuring that there is finality to litigation and that an individual is not subject to repeated or duplicative litigation in respect of issues which have previously been determined (para. 35).
57. Taking Simons J.'s approach in this case, I am not satisfied that this Court should strike these proceedings out as an abuse of process. Central to my reasoning from the public interest in the finality of litigation and the administration of justice perspective is the fact that the decision of court in setting aside the renewal of the summons in O'Connor No. 1 should not properly be treated as an order that the proceedings had been conclusively and finally determined and that no further summons could be pursued. A different legal test and different considerations pertain on this application to those which were applied to the determination of the order renewing the first writ even if the underlying facts are the same. Indeed, in its reasoning in setting aside the renewal order and invalidating the writ in O'Connor No. 1, the court treats as a consideration the fact that a further summons may be confronted with issues under the Statute of Limitations, an implicit acknowledgement that further proceedings might be pursued.
58. The court is satisfied that the only determination which has occurred in respect of O'Connor No. 1 is a decision to set aside the renewal of a summons where it was not served in time and special circumstances warranting a renewal for the purpose of service were not demonstrated. True it is that the defendant is confronted with a second set of

proceedings, but it must be factored in that it has never been called to answer to the first set. While an issue under the Statute of Limitations may arise in connection with the second set of proceedings, the plaintiff relies on her date of knowledge which she ties to the receipt of Mr. Clements report. In this case. the course of the litigation has been imperfect, but I consider that it would be excessive, unfair and disproportionate to strike out the proceedings as an abuse of process in the circumstances of this case and having regard to the important value which is upheld in vindicating the plaintiff's constitutional right of access to the court. There is no bar to bringing more than one set of proceedings arising from the same matter. It may be an abuse of process to seek to bring to trial more than one such set of proceedings, but not in circumstances where, as here, the process did not get under way at all.

### **Delay**

59. The defendant invokes the court's inherent jurisdiction to dismiss a claim for inordinate and inexcusable delay, based on the Supreme Court decisions in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 and the earlier decision of Henchy J. in *O'Domhnaill v Merrick* [1984] I.R. 151.
60. The Plaintiff allowed 6½ years to elapse between the date her surgery – on 15th August, 2013 – and the issuing of her summons in O'Connor 2 on 20th November, 2019. This despite the fact that the Plaintiff herself pleaded that she was aware that the injury complained of "ought not to have occurred" since 19th December 2014 (see O'Connor 1 summons at para. 11 and Mr. Reidy's replying affidavit at para. 5). Receipt of the report from Mr. Clements in December 2018 is identified by the plaintiff as the date of knowledge for the purposes of s. 3 of the Statute of Limitations (Amendment) Act, 1991 and the date from which the clock ticks on the claim advanced in the second proceedings. While this court makes no determination in respect of the issue which may arise in this regard under the Statute of Limitations, the fact that proceedings are not statute barred does not mean that there is an answer to a delay application, as the case-law demonstrates.
61. By way of partial explanation for the delay in initiating proceedings, Mr. Reidy's affidavit on behalf of the plaintiff provides (at para. 6) that "the Plaintiff sought his advice concerning the injuries she had sustained and [that he] sought the full volume of the plaintiff's records from the hospital which took a long time to be furnished in complete form". However, it is striking that no detail is provided about when the plaintiff first contacted the solicitor or sought her hospital records. Mr. Reidy further alludes to the difficulties for issuing professional negligence proceedings in accordance with law and professional obligations. His averments on affidavit in this regard are crafted so as to seek to distinguish between what may be required to issue a protective writ, then to serve it and thereafter to progress proceedings.
62. The plaintiff sought two expert medical reports from: (i) Dr Lees, whose expert report was received on 7th November 2017 (more than four years after the caesarean delivery); and (ii) Mr. Clements, whose expert report was received on 12th December 2018 (more than five years after the delivery). Even after the delays in obtaining the second report,

there was additional delay in applying for a further renewal of the summons until July 2019.

63. Then, instead of discontinuing the first proceedings and commencing a second set to avoid further delay, the plaintiff continued in its endeavours to provide life support to the first summons, rather than proceed expeditiously with fresh proceedings which course of action would have avoided the subsequent delays consequent upon the hearing of a motion to set aside the renewal order, albeit that they may be stymied by an issue under the Statute of Limitations. This potential and foreseeable issue under the Statute of Limitations explains why the preference would have been to maintain the original proceedings but does not render the delay acceptable. The proceedings the subject of this strike out application commenced on the issuing of the second summons on the 20th November 2019. They were served on the 4th November 2020, almost a full twelve months later.
64. Since that time the defendant has entered an appearance and issued the within application to dismiss. No notice for particulars has been raised. No defence has been delivered. Any delay in the proceedings in respect of *post*-commencement delay arises from the issuing of the within motion. Accordingly, there has been no culpable delay on the part of the plaintiff post-service of the within proceedings, but this needs to be seen in the light of overall delays since the index event in 2013, a period exceeding 7 years when the proceedings were served. These delays are not ones which can be lightly condoned and require careful scrutiny.
65. The courts have traditionally treated pre and post commencement delay differently. The so-called "Primor principles" applicable to an application to strike out on grounds of post-commencement delay were distilled into a simplified form by Barrett J. in *McClellan v Sunday Newspapers Limited* [2014] IEHC 304, at para. 7 as follows:
  - i. is the delay inordinate?
  - ii. is the delay inexcusable?
  - iii. even if inordinate and inexcusable, is the balance of justice in favour of or against a case proceeding?
66. The difference between the *Primor* and *O'Domhnaill* (pre-commencement) delay principles was later addressed by Irvine J. (as she then was) in *Cassidy v The Provincialate* [2015] IECA 74. With regard to the *Primor* principles, Irvine J. noted that the third limb did not require the same burden of proof in terms of the degree of prejudice that must be established in order to have the claim dismissed as that which falls to be discharged by the defendant seeking to engage the *O'Domhnaill* test (i.e., that it faces a significant risk of an unfair trial). Thus, if a defendant established inordinate and inexcusable delay, it may then urge the court to dismiss proceedings having regard to a whole range of factors, including the relatively modest prejudice arising from that delay.



67. Most recently in *Claire Sullivan v Health Service Executive* [2021] IECA 287, Donnelly J. addressed the differences between the application of the *Primor* and *O'Domhnaill* principles, summarising the current law as follows:
- “a) Regardless of whether the delay is pre or post commencement of proceedings, where a defendant establishes inordinate and inexcusable delay on the part of a plaintiff, the defendant may rely upon the third leg of the *Primor* principles to ask the court to dismiss the proceedings where the balance of justice requires this (a lesser standard than whether there is a real and substantial risk of an unfair trial or unjust result).
- b) Where a defendant cannot establish culpable delay on the part of the plaintiff prior to the commencement of proceedings, the defendant may nonetheless succeed in an application to dismiss the claim where he or she can establish on the balance of probabilities that there is a real and substantial risk of an unfair trial or unjust result.” (para. 52).
68. I adopt the approach of the Supreme Court in *Mangan v. Dockeray & Ors.* [2020] IESC 67 (at para. 128) and the Court of Appeal in *Claire Sullivan v Health Service Executive* [2021] IECA 287 (above) in proceeding on the basis that 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, it is the end of the matter. If, however, it is so established the court must embark on a balance of justice test.
69. I agree with the defendant that the chronology of events in this case does not demonstrate reasonable expedition in obtaining either of the medical reports. Reliance is placed on behalf of the plaintiff both on the need to have expert advice to issue and maintain professional negligence proceedings and also to have adequate knowledge of the nature of the wrong done to progress proceedings (the plaintiff cited *O'Sullivan v. Ireland & Ors* [2019] IESC 33, [2020] 1 IR 413 in relation to date of knowledge in medical negligence cases). While it is not the case that no steps were being taken and the plaintiff's solicitor made attempts to secure necessary medical expertise from not one but two experts, I accept that the delays incurred in obtaining same were inordinate. In my view inadequate explanation has been provided to excuse the full extent of this delay. Even after receiving Mr Clements' expert report, the plaintiff delayed for almost one year before issuing the O'Connor No. 2 summons. Furthermore, having issued O'Connor No. 2 summons – which included specific particulars of negligence and breach of duty – the plaintiff then failed to serve the summons for another 11 months and only did so after the delivery of the court's judgment in O'Connor No. 1.
70. As I find the delays inordinate and inexcusable, this Court may properly proceed to strike out the claim where the balance of justice requires it. In cases of delay it is now well-established that the facts and circumstances of each case must be decided on their own merits so that ultimately the balance of justice can be achieved.

71. The plaintiff contends that there is no prejudice to the defendant arising from any delay because all matters are reasonably contained in the plaintiff's hospital records. The defendant asserts that it "*is materially prejudiced because of the delay*" (para 31 of the affidavit of Mark McCabe). Although the defendant has not identified any prejudice which might be classified as "specific", the court has been directed to the fact that this is a case which may involve oral evidence in determining whether the plaintiff's case is statute-barred, particularly given the contradiction between the plaintiff's pleas (i) at para. 11 of the O'Connor No. 1 summons and (ii) at para. 7 of the O'Connor No. 2 summons regarding the date on which she first became aware of her injury. Indeed, the Court (Barr J.) made a finding (at para. 75 of his judgment) that viva voce evidence regarding the events of 19 December, 2014 – when the plaintiff was informed of the damage to her kidney – "*could be very relevant*".
72. The question of prejudice to the defendant is one which requires to be weighed and balanced against the plaintiff's rights. I agree with Barr J. as to the potential prejudice arising from memory frailty with the passage of time. Nonetheless, this concern is one as the potential for prejudice for which no specific evidence exists. At this stage, it is unknown whether the doctor denies the account given by the plaintiff. It is even possible a record exists as to what was said to the plaintiff at that time. There is no suggestion that an important witness has died or is unwell. There is no question of missing records, or certainly none has been raised on the evidence before this Court. Indeed, it is clear that medical records and clinical notes recording in detail the index event giving rise to the cause of action exist and remain available to the defendant to consider.
73. In assessing the issue of prejudice, different considerations apply to cases which will largely involve documentary evidence than those requiring witness evidence. In *Carroll Shipping Ltd v Matthews Mulcahy and Sutherland Ltd* [1996] IEHC 46 at 11, McGuinness J. stated: "*where matters are at issue which are not, or are not fully, covered by documentary evidence, there is greater likelihood of prejudice resulting from delay*" (at para. 37). In a medical negligence case typically, medical records are of far greater importance than a witness' memory or recall of events (see Supreme Court in *Andrew Mangan (a person of unsound mind) v Dockeray and Others* [2020] IESC 67, paragraphs 104-109). Should this case proceed to hearing, there is likely to be significant reliance on the medical records and, as McKechnie J. observed in the *Mangan* case (para. 145), the likelihood is 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."
74. Whilst the delays identified in this case are inordinate and inexcusable, I do not consider that it has been demonstrated that, on the facts and circumstances of this case, the evidence supports a conclusion that the balance of justice is tipped against the case being permitted to proceed, still less that a real and substantial risk of an unfair trial or unjust result is demonstrated. Medical notes and records which are not time dependent remain available and it remains incumbent upon a judge hearing this action to intervene at any stage if he or she is of the view that an injustice presents itself due to evidential deficit

occasioned by the passage of time (see *Sullivan v. HSE* [2021] IECA 287, para. 106). Should the plaintiff's claim be dismissed at this juncture, she would suffer a significant prejudice and hardship in that she would be without a remedy for the alleged wrongs caused to her by the defendant giving rise to this claim. The balance of justice remains in favour of the case proceeding.

**ORDER**

75. Accordingly, for the reasons set out herein, the Court exercises its discretion to refuse the application made to strike out proceedings as an abuse of process . The Court further concludes that while there has been delay which has not been satisfactorily explained, the balance of justice is in favour of the case proceeding and accordingly, I refuse to strike out proceedings on grounds of delay.
76. Insofar as the issue of costs of the application is concerned, the default position under Part 11 of the Legal Services Regulation Act 2015 is that legal costs follow the event, i.e. the successful party is entitled to recover their legal costs as against the unsuccessful party. If the default position were to obtain, the plaintiff as the successful respondent to the application would be entitled to her costs as against the defendant. This is the order I propose to make. In the event that the defendant contends that a different form of order should be made, written submissions should be filed on or before the 25th February 2022 and any replying submission from the plaintiff should be filed by the 11th March 2022.