THE HIGH COURT

JUDICIAL REVIEW

[2026] IEHC 536

Record No. 2020/685P

BETWEEN

ROBERTA MOORE

PLAINTIFF

-and-

HEALTH SERVICE EXECUTIVE

DEFENDANT

RULING of Ms. Justice Siobhán Phelan, delivered on the 28th day of July, 2026

INTRODUCTION

1. This is my ruling on the Defendant's application to set aside an *ex parte* order made on the 3rd of March 2025 renewing a Personal Injuries Summons originally issued on the

28th of January, 2020 in a clinical negligence action arising from a hysteroscopy, D&C and polypectomy performed at Cavan General Hospital on the 30th of January, 2018.

2. The summons was issued on a protective basis shortly before expiry of the limitation period and was never served. It lapsed on the 27th of January, 2021. Following an *ex parte* application, the High Court renewed the summons on the 3rd of March, 2025, identifying as the relevant special circumstances the receipt of new information, the plaintiff's instruction of new solicitors and obtaining a new expert report.

3. The present issue is whether those matters constitute "*special circumstances*" within the meaning of Order 8 Rule 1(4) RSC sufficient to justify renewal of a summons more than four years after it had expired.

BACKGROUND

4. The Plaintiff suffered a miscarriage in October, 2017 and underwent a D&C procedure. In the months that followed, she experienced persistent gynaecological symptoms and pain. On the 12th of January, 2018 she attended a Consultant Obstetrician and Gynaecologist at Cavan General Hospital. A scan suggested either retained material, a blood clot or a uterine polyp and she was scheduled for a hysteroscopy, dilation and curettage (D&C), and polypectomy on the 30th of January 2018. At that stage, the Plaintiff was a 32-year-old mother of three young children.

5. On the 30th of January, 2018, the Plaintiff attended Cavan General Hospital for the planned surgery. It appears that during the procedure a uterine perforation occurred. In addition, the sigmoid colon was perforated, resulting in serious bowel injury. The operation became significantly more complex than originally intended and emergency surgical intervention was required. A laparotomy was carried out, a section of bowel was removed and a colostomy was created. The uterine perforation was also repaired. It appears, the uterine polyp which had been the original target of the surgery had not been removed.

6. The Plaintiff remained in hospital until the 10th of February, 2018. She was re-admitted to hospital shortly thereafter, underwent further treatment and was discharged again on

the 12th of February, 2018. The Plaintiff lived with a stoma and colostomy bag for approximately five months. According to the pleadings, the colostomy was not ultimately reversed until June, 2018 at the Mater Hospital. Even after reversal she claims to be experiencing ongoing difficulties affecting every aspect of her life. She describes trying to care for her young family while coping with pain, major abdominal surgery, a stoma, repeated hospital attendances and a long recovery.

7. The Plaintiff believed that what had happened to her during surgery was wrong. Indeed the surgeon who performed the procedure is claimed to have admitted to her that he had used too much force in the procedure. Through solicitors, the Plaintiff investigated the possibility of a medical negligence claim. The State Claims Agency was notified in January, 2020, of her intention to pursue proceedings arising from the injuries sustained during the January 2018 procedure, and the HSE nominated Mason Hayes & Curran to accept service of any proceedings.

8. A Personal Injuries Summons was issued on the 28th of January, 2020, on a protective basis. The summons expressly stated that proceedings were being initiated in the absence of an expert report and that further particulars would follow once expert evidence became available.

9. Following the issue of proceedings, the Plaintiff's then solicitors obtained expert opinion from a consultant gynaecologist and obstetrician. The advice she received was unfavourable. She says she was advised that the complication she had suffered was a recognised complication of the procedure and that no breach of the standard of care could be identified.

10. According to the Plaintiff, she accepted this medical advice. Believing that she did not have a viable negligence claim, she decided not to pursue the proceedings further. The summons expired in January, 2021, without being served. From her perspective, the litigation effectively came to an end because an independent medical expert had advised that no negligence could be established.

11. Although the legal claim was not pursued, the Plaintiff continued to live with the consequences of the events of January, 2018. In her affidavit she describes ongoing pain and difficulties with continuing symptoms. She also refers to significant psychological

consequences. She says she struggled not only with the physical consequences of surgery and injury but also with the impact these events had on family life as she tried to raise her children while coping with chronic symptoms. She also suffered the loss of her mother, whom she describes as an important source of support during this difficult period.

12. On the 18th of January, 2024 the Plaintiff attended a consultation with a gynaecologist at the Mater Hospital where she attended for follow up treatment. During that consultation she explained that a medical negligence claim had not proceeded because she had been advised she had no case. According to her evidence, the consultant informed her that what had happened was "*not right*" and was "*preventable*". In a later affidavit she identified this consultant by name.

13. The Plaintiff attaches great significance to the view offered by the consultant she met in the Mater Hospital as it appeared to validate her original belief that what had occurred to her should not have happened. Immediately after that consultation she contacted a different firm of solicitors and instructed them to investigate whether the earlier advice she had received had been correct.

14. After taking instructions, the new solicitors sought to obtain the Plaintiff's file from her former solicitors and to gather additional medical records, including records from the Mater Hospital. They encountered delays obtaining records and difficulties locating a suitable expert willing to undertake a medico-legal review. Various consultants were approached before an expert was secured.

15. Ultimately Mr Matthew Izett-Kay, Consultant Gynaecologist and Subspecialist Urogynaecologist at Oxford University Hospitals, agreed to review the case. He examined the medical records and produced a report dated the 18th of November 2024. His conclusions were materially different from those seemingly contained in the earlier opinion. He concluded that while the original decision to perform hysteroscopy and D&C was reasonable and the consent process was adequate, the surgical technique employed on the 30th of January 2018 was substandard. He found that the failure to recognise uterine perforation amounted to substandard care and the bowel injury, bowel resection and colostomy flowed from that substandard surgery.

16. Armed with the new expert report, the Plaintiff changed solicitors formally and applied to the High Court for leave to renew the expired summons in December, 2024, without further delay. In grounding her application to renew her summons she stated that she had relied on the earlier negative expert advice, that she had subsequently been informed by a treating consultant that her injuries were preventable and that a fresh expert review now supported her claim.

17. On the 3rd of March, 2025, O'Donnell J. granted an order renewing the summons. The order identified the special circumstances as:

> *"the receipt of new information that led the Plaintiff to instruct new Solicitors and obtaining a new expert report."*

18. The HSE subsequently brought this motion seeking to set aside the renewal.

19. The following chronology appears from the papers.

Date	**Event**
30 Jan 2018	Surgery performed at Cavan General Hospital
17 Jan 2020	Letter before action sent to State Claims Agency
23 Jan 2020	Mason Hayes & Curran nominated to accept service
28 Jan 2020	Personal Injuries Summons issued
Mar 2020	Plaintiff receives expert opinion not supportive of negligence claim

Date	Event
27 Jan 2021	Summons expires without service
18 Jan 2024	Consultation with treating doctor in Mater Hospital; plaintiff told what occurred was "not right" and "preventable".
Feb-Nov 2024	New solicitors attempt to obtain fresh expert evidence
18 Nov 2024	Supportive report obtained from Mr Matthew Izett-Kay
Dec 2024	Application for renewal brought
3 Mar 2025	Renewal order granted ex parte
10 Jun 2025	Defendant moves to set aside renewal

SUBMISSIONS

20. The Defendant contends that the Plaintiff consciously abandoned the litigation after obtaining an adverse expert opinion. The summons remained unserved and expired in January, 2021. The 2024 consultation and supportive report merely represent a later reassessment of merits and not special circumstances. The Defendant submits that a plaintiff cannot abandon litigation and later revive it simply because a more favourable expert opinion is eventually obtained.

21. The Defendant relies heavily on recent Supreme Court and Court of Appeal authorities which emphasise that the amended rule establishes a higher threshold than the former "*good reason*" test. It submits that plaintiffs who issue protective proceedings are under a continuing obligation to act with expedition, particularly where limitation periods

have already expired. The failure to pursue expert evidence promptly or to serve proceedings cannot ordinarily justify renewal.

22. The Defendant did not press an argument made in written submissions that even after the Plaintiff consulted a new gynaecologist in January 2024, a further fourteen months passed before the renewal order was obtained because it was accepted that an affidavit subsequently sworn by the Plaintiff's new solicitor after written submissions had been prepared, gave a detailed account of the steps taken from his retainer in January, 2024 had been set out such that there was no want of expedition during this period when significant difficulties identifying an expert willing and able to provide a report were encountered.

23. The Defendant also relies on authorities holding that deliberate non-service of a summons, changes of solicitor, confusion about legal advice or later discoveries about a case will not ordinarily constitute special circumstances. It submits that if previous professional advice was wrong, any resulting loss should not be transferred to the Defendant.

24. The Defendant contends that renewal would work a substantial injustice. The proceedings effectively seek to litigate events that occurred in January 2018, over seven years before the renewal order. While medical records exist, the Defendant argues that surgical negligence cases depend significantly on the recollection and evidence of witnesses, whose memories inevitably fade with time. Reliance is placed on the observation of Simons J. in *Rooney v HSE* [2022] IEHC 132 that courts may take judicial notice of the fact that memories fade over time. Although medical records will exist, the Defendant submits that clinical negligence cases, particularly cases concerning the performance of surgery, cannot be treated as purely documentary cases. The submission is that not everything that occurred during the operation will have been recorded contemporaneously, surgical procedures involve judgement calls made in real time, oral evidence from surgeons and other witnesses may be crucial and recollections of those involved inevitably deteriorate with the passage of many years.

25. Relying on authorities such as *Pisarski v Kepak Cork Unlimited Company* [2026] IEHC 94, the Defendant contends that a defendant should not have to defend litigation many years later where there has been no active prosecution of the claim. It is contended that

the prejudice arising from a seven-year-old surgical case, including the loss of the opportunity to plead the Statute of Limitations, outweighs any justification for renewal.

26. Accordingly, the Defendant submits that the Plaintiff has not demonstrated special circumstances justifying renewal, that the interests of justice favour the Defendant, and that the order renewing the summons should be set aside.

27. The Plaintiff in response contends that she acted responsibly by not pursuing allegations unsupported by expert evidence. From her perspective, the January 2024 advice represented a fundamentally new and contradictory professional opinion. It is contended that the change in expert understanding of the case is an unusual circumstance amounting to special circumstances. She also relies on the extensive efforts made throughout 2024 to secure records and obtain a suitable expert. She points out that the Defendant had notice of the claim since January, 2020 and has produced no evidence of concrete prejudice. In argument on her behalf, it was urged that the balance of justice strongly favours allowing an apparently meritorious claim to proceed.

28. The Plaintiff opposes the Defendant's application to set aside the order renewing the Personal Injuries Summons and contends that the renewal was properly granted because there were special circumstances within the meaning of Order 8 Rule 1(4) and because the interests of justice favour allowing the proceedings to continue.

29. The Plaintiff submits that the case is unusual because, after issuing protective proceedings in January, 2020, she obtained expert gynaecological advice which did not support a negligence claim. Acting on that professional advice, she did not pursue the proceedings further.

30. The position changed fundamentally in January, 2024 when she attended an independent consultant gynaecologist who expressed the view that what had happened to her was "*not right*" and "*preventable*". This was the first occasion on which she received advice materially inconsistent with the earlier expert opinion. She then instructed new solicitors who undertook a fresh investigation and eventually obtained a supportive expert report in November, 2024.

31. The Plaintiff argues that this sequence of events are the special circumstances relied upon. The Plaintiff submits that the authorities make clear that the Court must undertake a broad interests-of-justice assessment rather than applying a rigid or mechanistic test. Relying on *Power v CJSC Indigo Tajikistan* [2025] IESC 55, *Murphy v HSE* [2021] IECA 3, *Nolan v Board of Management of St Mary's Diocesan School* [2022] IECA 10 and *Kearns v Evenson* [2023] IECA 297, the Plaintiff argues that the court must consider all circumstances together and prejudice and hardship are part of the overall assessment. It is submitted that there is no inflexible definition of what may constitute special circumstances and each case depends on its particular facts.

32. The Plaintiff argues that she was placed in a highly unusual position. She commenced proceedings within time. She then received expert advice that there was no negligence. She responsibly refrained from advancing allegations which could not be supported. Several years later she received materially different specialist advice indicating that her injuries may have resulted from negligence. A fresh expert subsequently confirmed a supportive view on breach of duty and causation. The Plaintiff says this is fundamentally different from solicitor oversight, inadvertence, neglect, tactical delay, or deliberately "*parking*" proceedings.

33. Instead, she says she acted reasonably by accepting professional advice and should not now be penalised because a later specialist review reached a different conclusion.

34. The Plaintiff distinguishes the authorities relied upon by the Defendant. In particular, she argues that *Maguire v PSW Sales & Logistics* [2026] IEHC 81 is not analogous because that case concerned the acts and omissions of a solicitor acting as the plaintiff's agent. Here, the earlier opinion came from an independent medical expert whose role was to provide professional medical judgment. She contends that she should not be forced into a speculative claim against a medical expert when she now possesses expert evidence supporting the underlying negligence action.

35. The Plaintiff also relies on *Galvin v Sharif* [2025] IEHC 680*,* where Ferriter J. acknowledged that unusual and extraordinary combinations of events may amount to special circumstances. She argues that the emergence of materially different expert medical opinion years after proceedings were issued is similarly unusual.

36. A major plank of the Plaintiff's submissions is that the Defendant has not demonstrated actual prejudice. The Plaintiff points out that the HSE received notice of the proposed claim in January, 2020 and nominated solicitors to accept service. It is stressed that the Defendant has been aware of the substance of the allegations from the outset. It is submitted that no evidence has been produced that records are missing, witnesses cannot be located, or the defence has otherwise been impaired. Accordingly, the Plaintiff argues that any alleged prejudice is speculative rather than proven.

37. The Plaintiff submits that the balance of justice overwhelmingly favours her. If the renewal is set aside a claim now supported by expert evidence will effectively be extinguished and she will lose the opportunity to have serious allegations determined on their merits resulting in very substantial hardship. By contrast, the Defendant has known of the proposed claim since January, 2020, has had ample opportunity to preserve records and investigate matters and has shown no specific prejudice in defending the proceedings.

38. In essence, the Plaintiff maintains that she acted responsibly in ceasing to pursue the claim when an expert advised that no negligence could be established; she revived the claim only when new specialist advice indicated that the earlier opinion may have been wrong and a fresh expert report supported the allegations. Those unusual circumstances constitute "*special circumstances*" under Order 8 Rule 1(4) of the Rules of the Superior Courts (RSC), the Defendant has not demonstrated actual prejudice, and the interests of justice favour allowing the proceedings to proceed to a determination on their merits.

APPLICABLE LEGAL PRINCIPLES

39. The amended Order 8 Rule 1 RSC distinguishes between renewal before expiry by the Master upon proof of "*reasonable efforts*" at service or "*other good reason*" and renewal after expiry by the Court only where "*special circumstances which justify an extension*" are established and stated in the order. Order 8 Rule 2 provides that in any case where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order.

40. As for the meaning of "*special circumstances*", it is acknowledged in the caselaw that the amended rule imposes a higher threshold than the former "*good reason*" test. In *Murphy v HSE* [2021] IECA 3, Haughton J stated the test is fact-sensitive and "*special*" means something beyond the ordinary or usual, but it need not be extraordinary. The court weighs the interests of justice and prejudice as part of the test in deciding whether special circumstances warranting the renewal of the summons have been demonstrated. It was found in *Murphy* that solicitor inadvertence will rarely amount to special circumstances.

41. Subsequently, in *Nolan v Board of Management of St Mary's Diocesan School* [2022] IECA 10, the Court of Appeal held that special circumstances must first be identified and prejudice is considered as part of deciding whether those circumstances justify renewal. The Court found that a deliberate decision not to serve proceedings will not ordinarily suffice. Similarly, in *Kearns v Evenson* [2023] IECA 297 Butler J reiterated that the plaintiff bears the burden of establishing special circumstances and that prejudice and hardship are evaluated as part of a single analysis focused on the interests of justice.

42. In *Power v CJSC Indigo Tajikistan* [2025] IESC 55, the Supreme Court approved the Court of Appeal authorities and held that the court performs one overall assessment, the question being whether special circumstances justify renewal. Prejudice and the interests of justice form part of that overall assessment and the existence of special circumstances (a gateway requirement) alone is insufficient if renewal would operate unjustly.

43. In the context of clinical negligence cases, it is recognised in the case-law that obtaining expert evidence may be difficult. Nonetheless, where a protective summons is issued, expert reports must thereafter be pursued with reasonable expedition and in *O'Neill v Birthistle* [2024] IECA 17 it was observed that maintaining proceedings for years without supportive expert evidence may amount to abuse of process. In *Murphy*, the Court stressed that a plaintiff cannot wait indefinitely for expert opinion and delay in obtaining expert evidence must itself be reasonable.

44. On the authority of the judgments in *Murphy* and *O'Neill*, active and expeditious efforts to obtain supportive medical evidence must be evidenced to demonstrate special circumstances sufficient to justify renewal of a summons on an application made more than twelve months after the summons issued.

45. A recurring theme in the authorities is that a plaintiff who issues proceedings must thereafter act promptly. The decisions of the Supreme Court in *Kirwan v Connors* [2025] IESC 21 and more recently in *Sweeney v. VHI* [2026] IESC 32 are good authority for the proposition that delay requires to be considered when a court decides on whether to exercise a discretion to renew a summons.

46. In *Kirwan*, the Chief Justice observed that previously the *Primor* test had not given sufficient weight to:

> "*the fact that lapse of time alone is harmful to the administration of justice, and should be a sufficient basis in itself for dismissal of proceedings*".

47. O'Donnell C.J. did not accept that much weight should be given to the idea that the jurisdiction at issue was an interference with the right of access to courts; that right was a right to litigate claims. Thus:

> *"[a] system of administration of justice with scarce resources must set rules for the conduct of claims which, if not unreasonably strict or difficult to comply with, are perfectly permissible."*

48. Later in his judgment, the Chief Justice referred to "*culpable plaintiff inactivity*" in stressing that the plaintiff has an interest in and responsibility for bringing the claim to trial.

49. As Hogan J. said in his separate judgment in *Kirwan* (cited with approval in *Sweeney*), not only does the plaintiff have an obligation to ensure that the administration of justice is carried out effectively and efficiently but (at para.171):

> *"the court system has a corresponding interest in ensuring that all cases are advanced efficiently, and that endless indulgence is inimical to the proper functioning of the court system."*

50. In *Sweeney & The Limerick Private Ltd v VHI* [2026] IESC 32 the Supreme Court (Donnelly J.) found that delay itself has acquired greater significance in discretionary applications generally. Relying heavily on *Kirwan v Connors* [2025] IESC 21, Donnelly J. emphasised that courts are no longer indifferent to long periods of unexplained delay. The passage of time is itself harmful to the administration of justice (paras. 53–63). The applicant for a discretionary remedy must act as soon as reasonably possible and unexplained delay beyond the time required to make the application may itself justify refusal (paras. 107–108). Furthermore, very substantial unexplained delay may justify refusal of relief even without proof of specific prejudice. The Court expressly held:

> *"Where the delay is significant... the court may view the balance of justice as having shifted in favour of refusing the application..." (para. 109(g))*

and

> *"there is no requirement to demonstrate prejudice either actual and proven or presumed and inferred"*

where the delay is sufficiently significant (para. 105).

51. The Supreme Court found it relevant to weigh the public interest in efficient administration of justice in making discretionary orders recognising that delay wastes court resources and can itself justify a stricter judicial approach (paras. 60–63, 102–106). As Donnelly J. observed in *Sweeney* (para. 61) with reference to the judgments in *Kirwan*:

> *"these dicta amount to an explicit recognition that, apart from the interests of the defending party, there is a public interest in ensuring that the most efficient and effective use is made of limited court resources."*

52. In *Sweeney v. VHI*, the Supreme Court addressed the meaning of "*special circumstance*" in the different context of a security for costs application. The Supreme Court found that it is important to bear in mind that the role of the special circumstance or countervailing factor is to act as a counterbalance "*a matter of justice*" (citing *Hidden Ireland Heritage Holidays Ltd v Indigo Services Ltd* [2005] 2 IR 115, [2005] IESC 38 at para. 28).

53. In *Darjohn Developments v IBRC* [2016] IEHC 535 Noonan J. considered a deliberate decision not to serve a summons, finding that proceedings cannot be issued and then "*parked*". It was not considered permissible to allow litigation to be left dormant awaiting favourable developments. In *Nolan*, the Court of Appeal also rejected a solicitor's deliberate decision not to serve proceedings as a basis for special circumstances. A similar decision was reached in *Timmons v Wellcome Foundation Ltd* [2026] IEHC 304 where Nolan J. reiterated that a deliberate decision not to serve cannot itself justify renewal reaffirming that once issued, proceedings should ordinarily be served within the permitted time.

54. Examples of cases where an order renewing a summons have been set aside include *Pisarski v Kepak Cork Unlimited Company* [2026] IEHC 94 where Barr J set aside a renewal where the original solicitor decided not to serve proceedings and a later solicitor sought renewal years afterwards. He found that a deliberate decision on the part of the Plaintiff's solicitor not to serve the summons and any confusion on the plaintiff's part did not amount to special circumstances. He set aside the renewal of the summons in circumstances where prejudice to the defendant from very late litigation

was significant in the context of delays like those in this case (albeit not a clinical negligence claim). He observed that the defendant was "*not to blame*" for the fact that the summons was not served.

55. In *Galvin v Sharif* [2025] IEHC 680 Ferriter J. accepted that unusual and compelling circumstances can amount to special circumstances (in that case misrepresentation by former solicitors to the plaintiff that summons had issued and active misleading in relation to the progress of proceedings) even in cases of long delay, however, after discovery of the problem (having read of professional misconduct proceedings concerning her former solicitor in the newspaper and a complaint to the Law Society being required to secure the file), a renewal application must be made promptly. Where an informed decision is made not to apply to renew a summons in a timely manner, it having come to light that a former solicitor had falsely represented that the summons had been served, then Ferriter J. considered this fatal to any renewal application made over two and a half years later.

ANALYSIS AND DECISION

56. It is impossible not to have huge sympathy for the Plaintiff arising from the injuries she sustained in the 2018 procedure. She is a young mother of three children and there can be little doubt that the consequences for her of sustaining perforations of her uterine and colon walls during the procedure are significant and they weigh heavily with me in deciding on this application. Sympathy for the Plaintiff at a human level, however, cannot be the determining factor as hard cases make bad law.

57. The essential question on this application is whether the Plaintiff's receipt of a later, materially different expert medical opinion in November, 2024, after having earlier received advice that no claim existed and after allowing the summons to lapse in January 2021, constitutes "*special circumstances which justify an extension*" within Order 8 Rule 1(4) in an application brought in December, 2024, when weighed against the delay in progressing clinical negligence proceedings in this case and any resulting prejudice to the Defendant.

58. I am mindful of the general, well-established position at law that clinical negligence proceedings must be commenced within two years of the accrual of the cause of action. While Order 8 allows for renewal of a lapsed summons, it does so in a controlled manner. Thus, if an application to extend time is made before the expiry of the 12-month period of validity of the summons, it is necessary to satisfy the Master either that reasonable efforts have been made to serve the summons or that other "*good reason*" exists to justify a time limited extension of three months only.

59. The fact that an application made after the expiry of 12 months must be made to the court and the requirement to specify "*special circumstances*" justifying the extension on the order signifies the seriousness of the application and the intention informing the introduction of the rule that it should not be lightly granted.

60. It seems to me on the exercise of discretionary powers to the context of this application that importance attaches to the fact that the renewal can only be made for a period of three months. It is manifestly clear from the terms of Order 8, that time is of the essence when it comes to the validity of a summons. The requirement to serve a summons within a specified period following its issue is the foundation for the application of prescribed limitation periods and is central to the operation of a court process based on the rule of law in this jurisdiction.

61. Extending the ratio in *Sweeney* and the principled approach there advocated to the exercise of discretionary powers in the context of this application, I am satisfied that the purpose of the "*special circumstance*" requirement in Order 8 Rule 1(4) of the RSC is to ensure that real injustice is not caused by the overly rigid application of the rule that a summons remains in force for only 12 months from date of issue but that any departure from the consistent application of this rule should only occur where identified circumstances are advanced sufficient to justify the extension following due regard to the countervailing justice considerations which are served by the 12 month rule in the first place. This is a recognition that a failure to apply the requirement to serve the summons within time-limits fixed transparently in accordance with law can also result in an injustice to the defending party and to the administration of justice. It is now clearly established that the risk of injustice extends beyond the circumstances of the case to a risk to the administration of justice generally. As I read it, the significance of

Sweeney is that it transforms delay from merely a factor requiring proof of prejudice into a factor that can itself justify refusal of discretionary procedural relief.

62. As against that, I am cautious not to over-extend the *ratio* of the decision in *Sweeney*. Indeed, the Supreme Court in its judgment emphasised that each discretionary jurisdiction is fact-specific. Renewal remains governed by the established Order 8 jurisprudence which itself makes clear that a decision on whether special circumstances justifying renewal exist is a decision made in each case on the facts of that case. The decision in *Sweeney* does not alter the statutory or rules-based test for renewal, but in my view, it does reiterate and underscore the significance of delay as a factor which must be considered as increasing the requirement for good justification if renewing a summons, even in the absence of specific prejudice. The longer the delay, the more difficult it will be to justify granting an order and long delay on its own can, depending on the circumstances advanced which include the reason the summons lapsed and the explanation for delay, justify the refusal to renew the summons.

63. To establish special circumstances in this case, the Plaintiff relies on the opinion expressed at a medical review appointment as triggering a decision to see if her abandoned proceedings could be reactivated by consulting new solicitors who then sought an opinion which, when obtained, was different to the earlier opinion obtained and supportive of her claim, as "*special circumstances*". The second opinion was obtained some four years after her first opinion and five years after the issue of the summons she seeks to renew. In assessing whether this constitutes "*special circumstances*" capable of justifying an extension of time in this case, it is necessary to look beyond the fact that a different second opinion was obtained to consider why the Plaintiff belatedly decided to seek a second opinion with a view to reactivating consciously abandoned proceedings on foot of a lapsed summons and the content of the opinion obtained.

64. This not a case of solicitor oversight, inadvertence, neglect, administrative error or a deliberate tactical decision to defer service pending some perceived forensic advantage. Nor is it a case where the Plaintiff simply failed to obtain expert evidence. Rather, the Plaintiff obtained expert evidence, acted upon it, and ceased to pursue proceedings

because that evidence was not supportive of her claim. This was, plainly, a deliberate decision.

65. I accept that the consultation of 18th of January, 2024 was significant from the Plaintiff's perspective. It was the first occasion upon which an independent treating consultant expressed a view materially at variance with the expert opinion upon which the Plaintiff had previously relied. It is therefore understandable that the Plaintiff reconsidered her earlier decision not to pursue proceedings.

66. The question, however, is not whether the consultation was significant, but whether it constitutes special circumstances justifying renewal of a summons which had expired approximately three years earlier, on foot of a deliberate decision taken with the benefit of legal advice on foot of expert opinion.

67. In terms of the trigger for deciding to see if proceedings could be reactivated, it seems to me that the opinion expressed by the Plaintiff's consultant which the Plaintiff says caused her to revisit her earlier decision not to pursue proceedings, could not reasonably be considered "*new information*". The importance of the opinion offered by the Plaintiff's consultant in the Mater falls to be assessed in light of the fact that in this case the Plaintiff had instructed her solicitors that the consultant gynaecologist who performed the procedure specifically stated:

"I am very sorry for this, it was my fault, I went in with severe force."

68. The later consultation did not reveal a previously unknown fact. It did not identify a previously undisclosed complication. It did not result from the discovery of new records. It did not arise because relevant information had been concealed or was unavailable when the original expert opinion was obtained. What changed was not the factual substratum of the claim but the professional opinion being expressed about those facts.

69. If the obtaining of a later supportive opinion on the same factual material were, without more, sufficient to constitute special circumstances, the temporal limits imposed by

Order 8 could readily be undermined. A plaintiff who had consciously decided not to pursue proceedings following receipt of adverse expert advice could revisit that decision years later by obtaining a more favourable opinion on unchanged facts.

70. While I accept that hearing this opinion constituted circumstances which may have caused the Plaintiff to query whether the first expert opinion she had received was correct and to second guess the decision she made with the benefit of legal advice several years previously, it seems to me that this cannot be sufficient in all the circumstances of this case to constitute special circumstances capable of justifying renewal of the lapsed summons. While the view expressed at the consultation may have appeared to differ from the opinion contained in the expert report the Plaintiff had received (which is not in evidence), causing the Plaintiff to question the reliability of the earlier report received, the significance of this difference is moderated by the fact that the Plaintiff already had an opinion from the doctor who performed the procedure also indicating that the injury was avoidable. It is well known that doctors, like other experts, can differ.

71. The Plaintiff had, long before the consultation in January, 2024, formed the view that something had gone wrong during the procedure. Indeed, she relies upon an alleged statement attributed to the operating surgeon which, if made, conveyed a substantially similar sentiment. Accordingly, while the opinion expressed by the consultant in January, 2024, undoubtedly carried weight because it came from an independent clinician, I do not consider that it amounted to new factual information in any meaningful sense.

72. I am not satisfied that the fact that another doctor expressed a similar view should be considered enough on its own to constitute special circumstances which would permit the Plaintiff to seek to reactivate her claim several years after the lapse of her summons. The question of a second opinion was one which warranted urgent attention in the context of imminent expiry of her summons and the exigencies of justifying a renewal of that summons. It may be inferred in the absence of evidence to the contrary, a deliberate decision was made not to take that course. It is significant that the basis for the supportive opinions obtained in 2024 did not result from new information, a new fact, a new revelation, a previously unavailable medical record. None of these types of

features are present in this case and the second opinion was provided on precisely the same information which had been available in 2020/2021 when the first opinion was obtained. In this regard, the point that the new records obtained from the Mater Hospital were not a factor in the supportive medical opinion and appear not to have even been furnished to the second opinion doctor, is well made.

73. The supportive expert opinion ultimately obtained in November, 2024, was not generated because of newly discovered facts. Rather, it represented a different professional assessment of substantially the same underlying events and records. If the obtaining of a more favourable expert opinion on unchanged facts were, without more, sufficient to constitute special circumstances justifying renewal, it would be difficult to reconcile such an approach with the temporal limits imposed by Order 8. A plaintiff who had consciously decided not to pursue proceedings following receipt of adverse expert advice could, years later, seek to revive the proceedings by obtaining a different opinion based on the same factual material.

74. While I accept that these circumstances provide an explanation for why the Plaintiff revisited her earlier decision not to pursue her claim, I am not satisfied that they constitute special circumstances of sufficient weight to justify the renewal sought in this case when weighed together with the very substantial period of delay that occurred between the expiry of the summons and the steps subsequently taken to reactivate the proceedings.

75. As identified in *Kirwan* and reiterated in *Sweeney*, the countervailing justice considerations in an application where there has been delay which may operate to disentitle a person to discretionary relief include the fact that a system of administration of justice with scarce resources must set rules for the conduct of claims which, if not unreasonably strict or difficult to comply with, are perfectly permissible. In the context of a renewal application, it seems to me to be important to carefully weigh the interconnection between the renewal of a lapsed summons and the proper application of the statutory limitation periods where, as a matter of law, time stops for the purpose of the application of limitation periods from the date of issue of the summons.

76. Limitation periods are fundamental to the administration of justice because they promote fairness, certainty, and the efficient resolution of disputes. Limitation periods duly prescribed by law reflect the principle that legal claims should be brought within a reasonable time after the events giving rise to them. Any exercise of court discretion to renew a lapsed summons in a manner which impacts on factors such as the reliability of evidence, fairness to defendants, legal certainty and finality, encouragement of diligence, efficient administration of justice and any other public interest considerations identified as guiding the Oireachtas in the calibration of applicable limitation periods, must ensure that there are sufficiently weighty countervailing considerations which justify a departure from the application of transparent and generally applicable rules.

77. I read *Sweeney* as authority for the proposition that courts should adopt a stricter approach to unexplained delay generally and that delay is not merely relevant insofar as it causes demonstrable prejudice because the administration of justice itself has an interest in avoiding stale proceedings and a party seeking a discretionary indulgence bears the burden of explaining delay. There is now a greater burden than ever before on applicants for discretionary relief who present following a period of delay to provide fuller evidence explaining when they became aware of the relevant facts, what steps they took and why action was not taken sooner.

78. The appropriate starting place on this application therefore, having first considered what is advanced as "*special circumstances*", is the length of the delay in question and what is offered to explain it. The length of effective abandonment of proceedings in this case spans a period of greater than three years from the 27th of January, 2021, when the summons expired (postdating by an unknown period the Plaintiff's receipt of her first expert medical report) and 18th of January, 2024 when she consulted with a new firm of solicitors and instructed them to seek a second expert opinion. There is little by way of explanation from the Plaintiff for this extended period of delay.

79. It is averred that the Plaintiff's mother died during the period, but no dates are given and there is no real elaboration of how her mother's death affected the Plaintiff's ability to seek a second medical opinion. While I am asked to take judicial notice of difficulties caused by Covid-19 and delays in obtaining medical reports, there is nothing on affidavit to suggest that either played a role in the delay between January, 2021, when

the summons lapsed and January, 2024, when the Plaintiff instructed new solicitors and sought a second opinion.

80. Indeed, the Plaintiff straightforwardly acknowledges that she accepted the advice she received from her first solicitors on foot of the expert report received and decided not to pursue her case. This was a decision she made with the benefit of legal advice. Such decisions are made routinely in all manner of litigation and I cannot lose sight of the fact that it was open to the Plaintiff upon receipt of a negative opinion in 2020/2021, to look for a second opinion then.

81. Instead of proceeding to seek a second opinion without delay, the Plaintiff made a deliberate decision that she would not pursue her litigation. Then, more than three years later, she changed her mind and decided to seek a second opinion supportive of her claim. Following the decisions in *Kirwan* and *Sweeney*, delay in and of itself carries weight and it seems to me that a delay of at least three years must carry significant weight in the context of a two-year limitation period and a discretionary power to renew a summons for a three-month period. In the face of this kind of delay, I do necessarily require proof of specific prejudice before refusing relief because the delay is both substantial and essentially unexplained.

82. While the Defendant does not claim actual prejudice in the form of missing witnesses or lost records in resisting this application, I am nonetheless urged to have regard to both presumed prejudice arising from the fact of extreme delay and specific prejudice arising from the nature of a surgical negligence case. On behalf of the Plaintiff, it is disputed that fading memory could be a factor in this case because so serious are the events in question that the surgeon could not forget them, particularly as a letter before action was written before the lapse of the summons such that the Defendant has long been on notice of the claim.

83. I cannot accept these arguments. The surgeon who performed the procedure is not the only potential witness. The fact that events are important does not mean that memory of those events does not diminish with time. As found in *Rooney v. HSE* [2022] IEHC 132, I can take judicial notice of the fact that memories fade as time passes. In *Rooney*, while acknowledging the role of documents in medical negligence cases, Simons J. found that direct evidence of witnesses of fact still have a bearing on the outcome of

such proceedings as not everything will have been recorded in the medical records. He observed that in a surgical context, the resolution of the claim may require an assessment of judgment calls made during the course of the procedure which may necessitate elaboration by oral evidence.

84. I am satisfied that the fact that the Defendant was on notice of the claim and had conducted its own incident review is no answer to a failure to issue and serve a summons. The passage of time would normally signal that a complaint is not being pursued and permit the Defendant to treat the matter as closed. I am not persuaded by the submission that the absence of evidence of lost records or unavailable witnesses is sufficient to negate prejudice in the circumstances of this case. The proceedings concern the performance of a surgical procedure undertaken in January 2018. While contemporaneous medical records undoubtedly exist and would be of considerable importance, a surgical negligence claim is not a purely documentary exercise. The resolution of such proceedings may require the Court to assess decisions taken in real time during the course of the procedure, the significance attached by clinicians to particular findings, the reasons for specific interventions, and the sequence of events as they unfolded. The reliability of such evidence inevitably deteriorates with the passage of time.

85. The prejudice arising from delay in a case of this nature is therefore not confined to situations where records have been lost or a witness can no longer be located. There is a forensic disadvantage inherent in requiring a defendant to meet allegations concerning events that occurred more than seven years previously, particularly where the proceedings were not served and could reasonably have been regarded as abandoned following the expiry of the summons. The fact that some notice of a potential claim was given in 2020 does not eliminate that prejudice. Notice of a potential claim is not equivalent to active litigation and cannot be expected to preserve indefinitely the quality of witness recollection or the ability effectively to investigate and defend a claim.

86. Furthermore, I am satisfied that the prejudice to be considered is not confined to the interests of the Defendant. As emphasised in *Kirwan* and *Sweeney*, the administration of justice itself has an interest in the timely progression of litigation. The longer proceedings remain dormant, the greater the risk that adjudication will occur on an

incomplete or diminished evidential picture. The public interest in the fair, efficient and timely determination of disputes is therefore itself engaged by the delay in this case.

87. Accordingly, while I accept that the Defendant has not demonstrated specific prejudice in the form of missing records, unavailable witnesses or irretrievably lost evidence, I am satisfied that some forensic prejudice is nonetheless inherent in requiring allegations arising from a surgical procedure performed in January, 2018, to be litigated after such an extended period, following the expiry of a summons that remained unserved for several years.

88. Even accepting that the Defendant has not demonstrated concrete evidential prejudice in the form of missing records or unavailable witnesses and that records are available to support proper recollection and minimise risks of memory fade, I must also have regard to the public interest in finality, expedition and the timely conduct of litigation.

89. Sympathetic as I am to the personal circumstances of the Plaintiff, I consider it would be wrong to see this as an access to justice or an effective remedy issue, as has been urged. The Plaintiff had a remedy available to her, but it was a remedy which was bound by rules governing access to it and time limits which are integral to the effective operation of any legal system. From the perspective of the administration of justice, she allowed the summons which had issued on a precautionary basis to expire without service. She did this on an informed, deliberate basis with the benefit of legal and expert advice and without seeking a second opinion at the time.

90. Were litigants permitted to revisit decisions not to pursue litigation years after the decision was made simply based on different advice or a second opinion which is not informed by new facts, then the consequences for the administration of justice would be far reaching. Not only would it be wholly unfair to the parties required to meet stale claims, but it would also be damaging to the functioning of the justice system itself.

CONCLUSION

91. For the reasons given above, I have decided to set aside the order made *ex parte* renewing the summons as I have concluded that special circumstances justifying the renewal of the summons at this remove have not been established. I will hear the parties in respect of the form of the order and any consequential matters.