

Judgment 59/2004

**Mourant v. Ferguson – Royal Court (Civil
Action File 746) – 6 December, 2004**

Law Reform (Tort) (Guernsey) Law, 1979 – medical negligence claim – cause of action time barred under section 5 – application for leave to proceed notwithstanding – the relevant legal principles – affidavit evidence considered – reason for delay – balancing exercise – leave granted to proceed.

IN THE ROYAL COURT OF GUERNSEY

The 6th day of December, 2004, before Sir de Vic Carey, Bailiff; sitting alone.

In the matter of

JACQUELINE MARY MOURANT

Plaintiff

-v-

JOHN FERGUSON

Defendant

WHEREAS on the 20th October, 2004, the Bailiff considered an application by the Plaintiff pursuant to Section 8 of The Law Reform (Tort) (Guernsey) Law, 1979, requesting that the Court exercise its discretion to allow the Plaintiff's cause of action to continue notwithstanding that it is time barred pursuant to Section 5 of the said Law and heard thereon Advocates C.A. Tee and R.J. Collas, Counsel for the Plaintiff and Defendant respectively;

THE BAILIFF this day gave judgment in the terms attached hereto and:

- 1) GRANTED the Plaintiff's application and gave leave for the action to proceed;
- 2) RESERVED the question of costs.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Text

**IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION**

Between:

JACQUELINE MARY MOURANT

Plaintiff

and

JOHN FERGUSON

Defendant

**JUDGMENT OF THE BAILIFF ON THE PLAINTIFF'S APPLICATION PURSUANT TO
SECTION 8 OF THE LAW REFORM (TORT) (GUERNSEY) LAW, 1979**

Date of Hearing: 20th October, 2004

Date judgment handed down: 6th December, 2004

Advocate for the Plaintiff: C. A. Tee

Advocate for the Defendant: R. J. Collas

Introduction

1. In 1999 the Plaintiff who was born in 1964 was complaining of abdominal pains and was referred by her primary care doctor to the Defendant who is a general surgeon with the Medical Specialists Group. Gallstones were diagnosed and on the 26th May that year an open cholecystectomy was performed by the Defendant to remove the gallstones. Within a few days of the operation she had severe abdominal pain and she was readmitted to the hospital on the 31st May as an emergency. Unfortunately she was suffering from a biliary leak. The Defendant advised that a laparotomy be performed to repair the source of the leak. Her condition did not improve and she was readmitted to the Princess Elizabeth Hospital on the 18th June with severe pain. A cholangiogram was performed on the 21st June and it was found that the T-tube, which had been inserted by the Defendant on the 31st May, had migrated down the common bile duct. She was transferred to Bristol Royal Infirmary for further treatment and an ERCP was performed.
2. The Plaintiff has not enjoyed a satisfactory recovery from the original operation and the efforts of the Defendant on the 31st May to correct the situation and repair the leak. After taking expert advice from two consultants in England, Miss Tee has issued on behalf of the Plaintiff proceedings for damages for negligence on the part of the Defendant in the way that

the operation and the procedures on the 26th and 31st May were carried out. As we shall see Miss Tee who is the second advocate to have advised the Plaintiff only issued proceedings against the Defendant on the 30th April, 2003, returnable on the 2nd May and this date is just under four years after the accepted date of knowledge of the Defendant's failing namely the 31st May, 1999. Being out of time therefore Miss Tee has had to bring this application under section 8 of the Law Reform (Tort) (Guernsey) Law, 1979 requesting that the Court exercise its discretion to allow the Plaintiff's cause of action to continue notwithstanding that it is time barred pursuant to section 5 of the Law of 1979.

A summary of the legal principles involved

3. In 1979 the States enacted legislation similar to that contained in the Limitation Act of 1975 of England enabling the Court to override time limits in certain personal injuries actions where those actions were otherwise statute barred. The relevant section of the 1979 Law is section 8, which reads as follows:-

8.(1) If it appears to the court that it would be equitable to allow action to proceed having regard to the degree to which –

- (a) the provisions of section five or six of this Law prejudice the plaintiff or any person whom he represents, and
- (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that those provisions shall not apply to any specified cause of action to which the action relates.

(2) The court shall not under this section dis-apply subsection (2) of section six of this Law except where the reason why the person injured could no longer maintain an action was because of the time limit in section five of this Law.

(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to -

- (a) the length of, and the reasons for, the delay on the part of the plaintiff;
- (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section five or as the case may be six of this Law;

- (c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
 - (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
 - (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
 - (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.
4. The Law of 1979 was drawn in a way to mirror the provisions which had been enacted in England a few years previously and the English Court of Appeal has helpfully given guidance to judges as to how they are to interpret the powers to extend time and I remind myself of the initial cases dealing with the 1975 Act reported under the name Firman v. Ellis [1978] 3 WLR 1. Although there has been no guidance from our Court of Appeal there have been three cases where this Court has had to consider the proper approach. There are two earlier decisions of mine as Deputy Bailiff namely Camacho v. Stan Brouard Limited 5th December, 1994 18.GLJ.34 and Mann v. St. Pierre Park Hotel Limited and Others 28th January, 1999, and the decision of Lt. Bailiff Talbot in Butt v. Brannan of 31st March, 2004. I reiterate what Mr. Collas urged and which was acknowledged by Lt. Bailiff Talbot in Butt at paragraph 38 namely that all cases of this nature must turn on their own facts.

The evidence

5. The Plaintiff's application is supported by two affidavits of the Plaintiff and one from Advocate Tee. The Defendant's response is supported by an affidavit of Advocate Collas alone. Neither party has sought to challenge the affidavit evidence. In Camacho the Plaintiff, Mr. Rodney Brouard and Advocate Brelsford gave evidence before me. This helpfully amplified what was in the affidavits. No point was then taken concerning the propriety of oral evidence being heard by the Bailiff sitting alone and whilst in the normal way issues of fact are for the jurats this is a procedural matter where I am being asked to exercise a judicial discretion.

6. It seems to me, although I have not had argument directly on the point, that it must be appropriate for the Bailiff to have the benefit of affidavit evidence being tested before him in establishing the facts to enable him to reach an exercise of his discretion. I mention this because in this case there has been no request for the Plaintiff to amplify what she said in affidavit evidence and a number of points have been raised by Mr. Collas in argument which might have been clarified had he had the opportunity of cross examining the Plaintiff. Likewise there has been no challenge to what Mr Collas has deposed on behalf of the Defendant as to the availability of the endoscopy procedures, which were then available to him. There being no such oral evidence I must take what is said in the affidavits as being correct.
7. It is impossible for somebody preparing affidavits to cover each and every point where one has a long chronology, such as we have here, but that does not mean to say that I should not take account of the points that Mr. Collas makes where the history of the matter is not adequately explained and in particular where unexplained delays have taken place. This may be relevant when we come to consider the conduct of those who have advised the Plaintiff during the course of this litigation.

The chronology

8. I set out in this particular case the chronology of events during the original limitation period.

22 nd April, 1999	First consultation with Defendant – operation advised.
26 th May, 1999	First operation.
31 st May, 1999	Plaintiff aware that operation had gone wrong –re-admitted for repair.
June 1999 to February 2000	Further medical intervention in Guernsey and Bristol.
4 th May, 2000	First Advocates (Olsen Ferbrache Morgan "OFM") consulted.
17 th May, 2000	OFM wrote to Medical Specialist Group advising that they have been consulted by Plaintiff and asking for access to records.
25 th May, 2000	MDU appraised of situation on behalf of the Defendant – advise OFM to communicate with them in future.
20 th December, 2000	OFM receive expert medical report from Mr. H. Espiner, F.R.C.S.
29 th March, 2001	OFM receive Counsel's opinion which was not supportive of immediate issuance of proceedings. Advice given to get further opinion of Espiner.

20 th April, 2001	Further opinion of Espiner.
11 th April, 2002	Further advice from Counsel after studying Espiner's further opinion – no claim sustainable.
31 st May, 2002	Limitation period expires.
2 nd August, 2002	First written communication from OFM to Plaintiff since receipt of Counsel's further opinion and expiry of limitation period. Advice that no claim possible.
8 th August, 2002	Further advice from OFM to Plaintiff explaining issue of limitation but not advising that period had already expired.
5 th September, 2002	Plaintiff changes to Carey Langlois ("CL") (Miss Tee).
1 st October, 2002	Plaintiff through CL instructs new expert Mr. Royston, F.R.C.S.
14 th January, 2003	Royston reports. For the first time it is suggested without equivocation that an endoscopy (ERCP) should have been performed before operating on 31 st May 1999.
2 nd May, 2003	Cause tabled.

The section 8 exercise

9. Before going through the points covered in section 8(3) of the Law of 1979 I need first of all to consider under section 8(1) the issue of the degree of prejudice to the parties if I exercise my discretion in favour one way or the other.

Prejudice to Plaintiff

10. The authorities indicate that a relevant factor is for the judge to consider the strength of the case put forward by the Plaintiff. The difficulty about over emphasising this particular consideration is that inevitably it involves the judge forming a view of what the ultimate decision of the Court is going to be without having heard all the evidence and all the argument. This much is however incontrovertible. Mrs. Mourant, the Plaintiff, went to Mr. Ferguson to have him treat the problem of her gallstones. She was operated on and the outturn was not what she was entitled to expect from a relatively straightforward operation. She has suffered considerably as a result of that unfortunate outturn. If the doctor was to blame for her misfortune then she is entitled to compensation. The problem for her is showing that she has not just been the victim of mischance. She has got to put together a cogent claim that the Defendant has fallen short of what could rightly be expected of him as a general surgeon charged with the Plaintiff's care.

11. One must not under emphasise the difficulty which Mrs. Mourant is in. Indeed part of the reason for the delay here is that her first team of advisers, Mr. Espiner, F.R.C.S. and Mr. Johnston of Counsel were unable to advise her that she had a case which she could properly pursue in the Courts. Her new medical adviser does not substantially disagree with the conclusions of the first team. He however introduces a new ground of complaint against the Defendant, namely that the Defendant should in the first instance have proceeded by way of an endoscopy. Had he done that he would have been apprised of the possible complications that subsequently arose. Mr. Royston's views are well summed up in his letter to the Plaintiff's new advocates dated the 22nd April, 2003. He concedes that if an ERCP could not be urgently performed in Guernsey because the facilities were not there then the complaint of failure to perform one might not be sustained. This is an important point in considering prejudice to the Defendant which I will address later. The Plaintiff would appear therefore to have a claim which she is entitled to have determined by the Court, albeit considerable hurdles face her even at this stage. We cannot anticipate what other expert evidence may be available to the Court of trial.

Prejudice to the Defendant

12. The prejudice to the Defendant is clearly set out in Advocate Collas's short affidavit. I must give what he says due weight. Mr. Collas concentrates on the claim with regard to the failure to perform an ERCP (endoscopic retrograde cholangiopancreatography) prior to the laparotomy on the 31st May, 1999. Mr. Collas deposed on 15th August 2003 that his instructions are that in Guernsey there is no attempt to provide a twenty-four hour ERCP service and there is only one specialist in Guernsey who is available to perform an ERCP, a gentleman called Mullen. Mr. Mullen was certainly not on duty that night, but at this stage it cannot be established whether or not he was on the island and would have been available to be called in. Mr. Collas also points out that at the time of swearing the affidavit (which was outside the limitation period) the plaintiff's advocates had still not particularised the allegations.
13. Going back in time, the MDU were merely alerted to the possibility of a claim by Mr. Morgan when he wrote seeking medical records in May 2000 and by no stretch of the imagination could the MDU have been alerted to the need to establish whether Mr. Mullen was or was not available on that particular evening. The experts seem to be agreed that however desirable an ERCP would have been there may have been limitations on the ability of the Guernsey health service to provide one and whilst it will be a matter for the Court a trial it does seem to me that the central issues will be whether it was negligent of Mr. Ferguson not to make inquiries into the availability of Mr. Mullen before operating and whether with the level of service available namely one practitioner capable of carrying out the procedure it was reasonable to

expect his colleagues to call him in whatever the hour of the day or night to attend on the patient.

14. Whilst it would have been helpful no doubt to the Defendant's case to be able to neatly respond to the criticism of the failure to perform an endoscopy by saying that Mr. Mullen was physically unavailable to do it I do not think that the Defendant's position turns wholly on that rather narrow issue of where Mr. Mullen was on the evening in question. Therefore the issue of prejudice to the Defendant is a narrow one but still one of some substance.

15. I now turn to the section 8(3) points:-

(a) The length of the reasons for the delay on the part of the Plaintiff

16. I need here to refer back to the chronology, which I have already set out in some detail. The Plaintiff continued to have the problems following the corrective operation of the 31st May, 1999, and she did not get to see an advocate until the 4th May, 2000, nearly a year after the first operation. Clearly the medical records had to be gathered, advice taken by OFM as to whom they should consult on behalf of the Plaintiff. It is therefore not surprising that an expert report from Mr. Espiner only emerged on the 20th December, 2000. Mr. Espiner did indeed address the issue of performing a ERCP but he makes clear that not all surgeons would follow this procedure and also suggests that it is a procedure which had developed between the date of the incident and the date of his report.

17. The real difference between the view of Mr. Espiner and that of Mr. Royston appears to be that Mr. Royston is saying that the failure to carry out an ERCP, provided of course it was a procedure available in emergency to Mr. Ferguson, amounted to negligence. Mr. Espiner could not go that far and Counsel in his careful analysis of the strengths of the case discounts the claim that it was negligent to re-operate in the circumstances that Mr. Ferguson found himself on the 31st May, 1999. Reverting to the chronology the original Espiner report was referred to Counsel who advised on the 29th March, 2001. He recommended going back to Mr. Espiner. This was done and he reported again on the 20th April, 2001. It does appear from the further report, which Mr. Espiner produced with commendable speed that the answers he gave did not overcome the problems identified in Counsel's opinion.

18. There is then an unexplained delay of nearly a year before Counsel comments on Mr. Espiner's further opinion and concludes that proceedings are not justifiable. I have looked again at the evidence of both Mrs. Mourant and Advocate Tee and there is no explanation whatever for why it took so long to go back to Counsel.. Miss Tee's evidence relates solely to what happened after she was instructed by Mrs. Mourant. The Plaintiff's first affidavit was

prepared to deal with the now redundant section 5 point and is silent as to how matters were progressed on her behalf by Advocate Whitmore. The Plaintiff did address these issues in her more recent second affidavit.

19. She made reference only to:-

- (1) Meeting Advocate Whitmore on 18th January, 2002, and the passing of the matter back to Counsel. (As I have said no explanation is given concerning delay since Espiner's second report had been received.)
- (2) Not recalling when she first saw Counsel's second opinion which she understood was forwarded in March 2002.
- (3) The advice of Advocate Whitmore of 2nd August and the move to Advocate Tee.

20. During the course of the hearing Advocate Tee helpfully produced copies of the letters that Advocate Whitmore had written to the Plaintiff. I am told by Advocate Tee that she has had access to the file and that there is no record of any communication between OFM and the Plaintiff following receipt of Counsel's second opinion in April 2002. The Plaintiff deposes that she does not remember when she first sought Counsel's opinion and OFM's letter of 2nd August throws little more light on the matter. It starts with the following statement

"As we have been unable to arrange a convenient time when you can attend these offices with Keith to discuss this matter, I thought it might be useful for me to outline in this letter the reasons why I feel, unfortunately, a clinical negligence claim is not viable."

21. There then follows a brief but unexceptionable analysis of the advice that has been received to date and the view is expressed that there are no reasonable prospects of succeeding in a claim. The letter then continues to deal with what may have been the immediate motivation for writing namely the fact that there were sizeable fees and more importantly disbursements outstanding and a fee note was enclosed.

22. A few days later a further letter (dated 8th August) is sent by Advocate Whitmore pointing out that in case the Plaintiff wished to seek a further opinion she should be aware of the issue of prescription. There then follows quite a brief but not inaccurate comment on the issue of prescription namely that time would run from the date of injury or the Plaintiff gaining knowledge that the damage suffered was significant and attributable to the (failures of) Mr. Ferguson and the period of three years is mentioned. Advocate Whitmore then goes on to say that arguably time will run from the date when it was first apparent that the operation had not gone as planned but she does not go on to point out that that three year period had by the time

that she was writing expired. One further interesting point is that in the letter of 2nd August Advocate Whitmore volunteers the fact that her time charges run up until the 29th January, 2002, which rather indicates that she did very little after that date to progress this claim.

23. To be fair to Advocate Tee this point, which has only occurred to me on rereading the file, was not discussed at the hearing and again from Advocate Collas's point of view he had not actually seen that letter until during the hearing. It is also apparent that by August 2002 a substantial sum of money was owing because not only were there Advocate Whitmore's fees (which she had fairly reduced from her usual charge out rate) but there were also the disbursements of Mr. Espiner and Counsel which appeared still to be outstanding, although I accept that I have not actually seen the bill which was enclosed with letter of the 2nd August.
24. There is also no explanation as to why once Counsel's second opinion was received there was no proper appraisal of it and decisions reached with Mrs. Mourant prior to the expiry of the prescriptive period as to whether the matter was going to be pursued further or whether Mr. Johnston's advice was to be accepted. All we have are the two letters from Advocate Whitmore in August 2002 where she appears suddenly to wake up again to this client's affairs. The upshot of all this was that Mrs. Mourant, the Plaintiff, took herself off to a new advocate. Once Advocate Tee was instructed there is no real complaint of any further delay, but of course by that stage we are well without the normal limitation period.
- (b) The extent to which having regard to the delay the evidence adduced is likely to be less cogent, than if the action had been brought within time.
25. I have already dealt with this in my remarks on prejudice to the Defendant. All the available evidence in the form of medical records will be unaffected by the delay. The only evidence that will not be ascertainable according to Mr. Collas is the whereabouts of Dr. Mullen on the 31st May, 1999.
- (c) The conduct of the Defendant
26. All are agreed that is not relevant.
- (d) The extent to which the Plaintiff acted promptly and reasonably once she knew of the claim
27. It is accepted now that the Plaintiff knew that she had a claim on the 31st May, 1999. As I have already said she had to undergo a number of medical procedures and she did not get around to consulting Olsen Ferbrache Morgan until May 2000, nearly a year after the cause of action arose. I do not find this unreasonable. What does trouble me, however, is the apparent delay in taking the matter forward in the light of the discouraging reports from Mr. Espiner and more importantly the advice from Counsel. As Mr. Collas pointed out we have an

unexplained delay, from April 2001 until April 2002. I do not understand why in the light of Counsel's earlier advice that Mr. Espiner's further opinion should be obtained it was not promptly forwarded to Counsel in April 2001. It is true that there was a delay between December 2001 and April 2002 whilst Counsel perfected his advice, but that still does not explain the delay prior to his being re-instructed.

28. The next unexplained delay is the failure by OFM to take the matter forward after receiving the new advice, which was of course the effect that no claim was sustainable. Once that advice was received, it was particularly important that OFM explain the position to their client and get her clear instructions as to what they were to do prior to the limitation period expiring on the 31st May. The Plaintiff chooses to be somewhat vague about this. She does not know exactly when she received the further advice.
29. I ask myself the question as to whether the inaction between April 2001 and August 2002, save for the obtaining of Counsel's further opinion, is not evidence that perhaps Mrs. Mourant was not losing heart with this particular claim and therefore not taking it forward as she should. I accept that it is pure speculation on my part to suggest such a possibility. There is however the further point that as we have seen it appears that OFM had given substantial credit to the Plaintiff and with the poor prognosis given by both Mr. Espiner and Counsel in their earlier advice the Plaintiff was in the unenviable position that she had got nowhere close to the door of the Court but was finding herself out of pocket to the extent of several thousand pounds for the fees that had been incurred.
- (e) The steps, if any, taken by the Plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received
30. Miss Tee says that the Plaintiff was not unreasonable in delaying after receipt of the unfavourable advice from Counsel. It was also in her view reasonable for the Plaintiff to seek a second opinion through her practice. That however begs the question of the delay on the part of the Plaintiff and her first advisers to which I have alluded under the last heading. The Plaintiff had instructed advocates who had got on with getting medical and legal advice albeit that there was a hiatus at the critical time prior to the expiry of the three year limit.
31. However, in my view there was no excuse for failing to get on with the claim in April and May 2002, if not before. On the other hand it seems unlikely that there would have been any evidence that could have been uncovered as late as May 2002 on the vital issue of the availability of Dr. Mullen. This points to the prejudice to the Defendant by reason solely of the delay between May 2002 and May 2003 in tabling proceedings may not perhaps be significant.

Conclusion

32. This is not an easy case. The first problem is that there are from the medical reports real issues as to whether the unfortunate outcome of Mrs. Mourant's operation can be attributed to the neglect of Mr. Ferguson. Secondly, there is a gap in what I have been told about the way in which this matter was handled between April 2001 and the expiry of the limitation period in May 2002. Mrs. Mourant is not suggesting that her then advocates let her down. She was dissatisfied with the advice they obtained for her and that was why she changed to Advocate Tee. As I said at the outset she has suffered in an unexpected way as the result of the surgical intervention of the Defendant and I consider. I have great sympathy with the Plaintiff and in all such cases it is very tempting to say that it would be harsh to shut the door on her proceeding albeit that she is late and that her right to take this matter forward cannot be outweighed by the prejudice to the Defendant in his not being able to tie down where Dr. Mullen was on the night in question.
33. However it is when I come on to the provisions of section 8(3) of the Law of 1979 that the real balancing act upon which my discretion must be exercised is engaged. As a judge who regularly sits in matrimonial matters, I was interested to find the comparison of the subsection (3) exercise with the exercise under section 25 of the Matrimonial Causes Act 1973 contained in the judgment of Ormerod, L.J. in the first leading case to come before the English Court of Appeal on the interpretation of similar provisions in English Law in the case of Firman v. Ellis supra at page 17. The problem about this is, that attractive as such comparison, is in directing a judge to look objectively at the particular facts of a case and decide what is fair, unlike section 25 exercises where all the balancing exercise generally end up in providing £x for one spouse and £y for the other spouse, the judge here is in an all or nothing situation. If I figuratively attribute a weight to each factor, however finely the scales are balanced I come down on the side of the party in whose favours the scales have tipped and the other party either walks away, if the plaintiff, without any right to pursue a claim in compensation or, if the defendant, absolved from all liability whatever the strength of the claim.
34. Looked at this way the issue of strength of the claim does come into play. The Plaintiff's claim is based on a narrow premise namely that whatever Mr. Ferguson did or did not do on the 31st May, he should have addressed his mind to carrying out an endoscopy before taking the issue of immediate operation further. This ground of failure was really only highlighted when Mr Royston appeared on the scene after the prescription period had expired, although there is no reason to suppose that this advice could not have been identified at an earlier stage. Late identification of this alleged failing on the part of the Defendant does cause embarrassment to the Defendant because he says that no fair assessment of his actions can

take place without knowing whether or not Mr. Mullen was available to come in on the 31st May to carry out the procedure. I do not conclude that even with Mr. Royston's more robust advice the Plaintiff has anything like an overwhelming case that one sees often in some other cases of this kind. . Without prejudging the matter this is a case where I have to rate the Plaintiff's chances of success as only poor to moderate.

35. I go on to consider the question of the Plaintiff's conduct. As I have said I do not criticise her for not getting to the advocates until nearly a year after the incident, but I am concerned at the Plaintiff and/or her advisers for the lack of progress made after Mr. Espiner had given his further opinion. There is an unexplained period of inaction which led directly to this case becoming statute barred in May 2002 which has not been answered. There are clear indicators that OFM may have been somewhat lackadaisical in the way that they dealt with this matter. Surely they would have put something on record to Mrs. Mourant before the expiry of the limitation period.
36. However there may be reasons for this inactivity that cannot be attributed to any professional failing on the part of OFM. I know not. I also note that if there is a real possibility that legal action should be taken against OFM by this unfortunate Plaintiff, she may be forced to go to a third advocate as OFM have recently merged with CL. The difficulty about any such action is that from OFM's point of view the advice they had at the time that they failed to get on with action was clearly that an action was not sustainable. Mr. Royston's advice may have shown that such pessimism was not well placed.
37. The truth of the matter must wholly be within the knowledge of the Plaintiff and her then advocates and if they failed her in not getting a move on with this claim as it then appeared, with all its problems and weaknesses within three years of her acquiring knowledge of Mr. Ferguson's perceived failings then it could be argued that it is not for this Court to throw responsibility for dealing with this matter on the Defendant. Either he was to be brought before the Court within the time prescribed by Law or a claim was sustainable against the advocates who failed to get the matter into Court by that time.
38. I return to the final balancing exercise. Suppose that, what I have speculated is indeed the case, Mrs. Mourant had difficulty in funding OFM and they accordingly let matters ride. Is the Plaintiff to be thus shut out when the prejudice to the Defendant, apart from delay, is shown to be the narrow evidential point as to availability of the endoscopy? I think not. Reminding myself of the evidential burden resting with the Plaintiff. This case was as I understand it not legally aided and whilst it may be that legal aid was not available to the Plaintiff for some reason, it is inevitable that difficulties may be placed in a plaintiff's way and delays occur where a claim like this is self funded. Balancing an almost equally loaded

pair of scales I find for the Plaintiff, but the day must come when the scales in an almost similar case will balance in favour of the Defendant. Leave is accordingly given for this action to proceed.

39. Costs reserved.