252

No. 1

O. 58, r. 15

SUPREME COURT

Record No: ~~2019/4309P~~

Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Date of Filing: 17 June 2019

2. Title of the Proceedings:

RUTH MORRISSEY AND PAUL MORRISSEY, PLAINTIFFS

V

HEALTH SERVICE EXECUTIVE, QUEST DIAGNOSTICS INCORPORATED AND MEDLAB PATHOLOGY LIMITED, DEFENDANTS

3. Name of Applicant: Health Service Executive

What was the applicant's role in the original case: ***[Plaintiff, Defendant, Applicant, respondent etc]:*** First Named Defendant

4. Decision of Court of Appeal (where applicable):

Record No: n/a
Date of Order: n/a *Perfection Date:* n/a
Date of Judgment: n/a
Names of Judges: n/a

5. Decision of the High Court:

Record No: 2018/4309P
Date of Order: 10 May 2019 *Perfection Date:*29 May 2019
Date of Judgment: 3 May 2019
Names of Judge(s): Cross J
Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

	Yes	x	**No**	

6. Extension of Time:	**Yes**		**No**	X

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

7. Matter of general public importance:

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

This section should contain no more than 500 words and the word count should appear at the end of the text.

Standard of Care

1. The judgment modifies the test in *Dunne v National Maternity Hospital* [1989] IR 91 in concluding it is not a defence to prove that a similar interpretation of a slide would be reached by a reasonable body of similarly skilled and experienced persons acting reasonably (as would satisfy *Dunne*). The High Court has said that a slide cannot be viewed as "*negative*" unless the reader had *absolute confidence* that such a reading was correct. That is not a standard drawn from a reasonable body of similarly skilled and experienced persons, but a legal standard imposed by the Court. Further, by concluding that the High Court has a "clean-slate" jurisdiction to determine matters which are the product of interpretation and judgment (such as what was on a slide), the Court has held that an interpretation of a slide (or, by possible analogy, an x-ray or scan) will not necessarily be defensible on the basis that a reasonable body of interpreters (e.g. radiologists) would have come to that interpretation.

2. The operation of CervicalCheck (and all screening programmes e.g. BreastCheck, BowelScreen) is of general public importance. This judgment says how that screening must be carried out. It effects the standards the HSE must require of those providing services and that may necessarily effect what can be obtained.

3. This judgment is likely to be relied on in litigation concerning many areas of medical practice including where interpretation of imaging, scans, radiology etc arise. Whereas this case was determined in the context of non-diagnostic screening, there is necessarily a likelihood that further litigation will involve attempts to rely on this standard in other areas.

4. *Dunne* is also relied on to guide actual clinical practice. The judgment has a necessary effect on how medicine is practiced in Ireland which is a matter of general public importance.

Finding of vicarious liability and/or a non-delegable duty of care

5. Section 38 of the Health Act, 2004 permits the HSE to enter arrangements with organisations to provide services "on behalf of HSE". The HSE submitted that in 2017 the HSE provided public funding of c.€3.8bn to c.2,300 agencies for the delivery of a range of health and personal social services. Whether the HSE is vicariously liable for the reasons set out at para.252 may affect ability to deliver and/or cost of delivery.

6. Regarding the non-delegable duty, at para.253, the High Court briefly adopted tests set out by the UKSC in *Woodland v Essex County Council* [2013] UKSC 66; [2013] 3 WLR 1227. These are recognised as "new law" in the United Kingdom applying, effectively, the very form of strict liability that Hardiman J held in *O'Keeffe v Hickey* [2009] 2 IR 302 at 341 was for the legislature. The application of a non-delegable duty of care to apply such strict liability to the HSE is a matter of general public importance.

Word count - 497

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.
This section should contain no more than 300 words and the word count should appear at the end of the text.

1. *Dunne* is authority of the Supreme Court. Any modification of same should be by determination of this Court.

2. The Supreme Court is likely to provide a quicker resolution to these issues than an appeal to the Court of Appeal and possible further appeal to this Court. It is in the interests of justice that matters pertaining to CervicalCheck and the associated litigation related to same be dealt with quickly and definitively. Indeed, the First Named Plaintiff's prognosis is the subject matter of the judgment (at para.37) and the interests of justice warrant expeditious conclusion.

3. In terms of vicarious and/or the non-delegable duty, the interests of justice require a fuller treatise of such important issues. Whereas the *Woodland* authority was relied on same would indicate that the HSE is *not* vicariously liable. Whereas the consideration in the judgment is brief, the issue is complex with considerable lines of differing authority to be considered (e.g. as applied by the Court of Appeal in *Woodland*). Indeed, *Woodland,* in particular, concerned an adoption in that jurisdiction of prior obiter comments of Denning LJ and overturned the classic understanding relating to "out-sourcing" as had been applied by the Court of Appeal therein. It is also well established that vicarious liability and/or non-delegable duties attract serious legal policy concerns. Whether or not to adopt (and how to apply if adopted) *Woodland* for this jurisdiction is something that should be the subject of consideration by this Court. Further, this issue requires consideration of whether tests designed to determine if a person is an *employee* should be applied to affix vicarious or direct liability for parties who are clearly not employees of the HSE but on the basis that the HSE set standards to be attained.

Word count - 291

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The circumstances of the Plaintiff and the context of this case within the wider litigation regarding CervicalCheck are exceptional circumstances warranting this Court accepting this appeal. The grounds of appeal herein relate to fundamentally important issues effecting the day to day operation of screening services and, indeed, of the HSE and ultimately same are best determined through a ruling of the final appellate Court.

2. Further, the exceptionality of the Plaintiffs' circumstances warrant an appeal to this Court.

3. *Dunne* is also authority of the Supreme Court. If it is to be applied in a new or modified way, then determination of that issue by this Court rather than an appeal in the Court of Appeal. This is particularly the case where *Dunne* is an authority that guides the day to day practice of medicine. This is a matter, of itself, that is so exceptionally important, it warrants the direct consideration by this Court without further interim appeals.

4. Whereas not determinative, exceptionally, the High Court Judge stated that the parties (in the event of an appeal) should petition this Court by reason of the nature of the issues and, in particular, the circumstances of the Plaintiffs and the rights of the Plaintiffs subject to the rights of the Defendants to seek an appeal.

Word Count: 215

10. Grounds of Appeal

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing: **Yes** [X] **No** [ ]

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.

This section should contain no more than 100 words and the word count should appear at the end of the text.

1. The decision effects the day to day operation of the HSE and the operation of public health services. The standard adopted must be assimilated by practitioners which will influence how health services are delivered. Similarly, the holdings on direct and vicarious liability have a day to day effect on how the HSE deals with those providing services to the Irish public.

2. Further, the Plaintiffs circumstances warrant expedition

Word count - 69

12. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.

None.

Appendix

Notice of Appeal

1. Title of the Proceedings: *[As in the Court of first instance]*

BETWEEN:-

RUTH MORRISSEY AND PAUL MORRISSEY,

PLAINTIFFS

AND

HEALTH SERVICE EXECUTIVE, QUEST DIAGNOSTICS INCORPORATED AND MEDLAB PATHOLOGY LIMITED,

DEFENDANTS

2. Grounds of Appeal:

Please set out in numbered paragraphs the Grounds of Appeal relied upon if leave to appeal were to be granted.

1. The High Court erred in holding that the test for establishing negligence in the screening of liquid based cytology included an "*absolute confidence*" standard and/or that a party carrying on such screening would only be excused from negligence if it could be shown that such a party could have had "*absolute confidence*" in reading a slide as negative.

2. The High Court erred in applying *Penny Palmer & Canon v East Kent Health Authority* [2000] LS Law Med 4; [2000] Lloyd's Rep Med 41 which did not establish "*absolute confidence*" as determinative of the standard of care. Without prejudice to this and alternatively, if *Penny Palmer* does so establish that standard, then it is incorrect as a matter of law.

3. The High Court was wrong to conclude that the Second Named Defendant accepted "*absolute confidence*" in its submissions or through its witnesses.

4. Insofar as the High Court is taken as determining that, in fact, a reasonable body of practitioners carrying out screening would not report a negative without *"absolute confidence"* there was no evidence to enable that conclusion and/or this was wrong in law.

5. Insofar as the High Court stated that screening carried out *without* an *"absolute confidence"* standard would be inherently defective, there was no evidence on which that could be based and/or this was wrong in law.

6. It was not correct to hold that the Court's conclusions are no different to *Dunne*. There is a manifest difference between adjudicating on provision of health care by examining whether a *"medical practitioner has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care"* and stipulating that all such medical practitioners would only make matters of judgment on an *"absolute confidence"* basis.

7. It is wrong in law to assume that matters of interpretation of medical evidence are necessarily matters capable of determination as a matters of fact on a "clean-slate" basis. Interpretation is, itself, a matter of medical judgment and skill which falls to be tested on the basis of *Dunne*. It was wrong, therefore, to approach the question of "what was on the slide" by an approach which discounts that that very question is informed by those interpreting same and such interpretations have to be examined on the *Dunne* standard.

8. The High Court was incorrect to hold the HSE vicariously liable for the second and/or third named Defendants. The findings at para.254 are not sufficient to sustain the conclusion. The contractual relationship between the HSE and the Second and/or Third Named Defendants does not establish sufficient "control" to attract vicarious liability and nor is "control" itself sufficient in law to establish vicarious liability. And further there was no basis in law or fact for the conclusion.

9. The High Court did not have sufficient regard to the absence of any compelling reason as to why vicarious liability was required to be imposed.

10. The analogy with *Byrne v Ryan* at para.252 is wrong. There it was held that a hospital was *directly liable* for the acts of an employee who was integrated into the hospital organisation and on the basis that the hospital had a direct duty of care to take reasonable care in the provision of the very hospital services it offered. There is no comparable duty here.

11. The High Court wrongly was of the view that "nothing would be lost" by the HSE conceding direct or vicarious liability because of the Court's conclusions on indemnity. This was an irrelevant consideration.

12. The High Court was wrong to hold the HSE under a non-delegable duty and thus primarily or directly liable for the second and/or third named Defendants.

13. The High Court wrongly adopted and then wrongly applied the tests in *Woodland* which appears to have been the sole basis for the conclusion on the non-delegable duty of care. Those principles ought not reflect the law in this jurisdiction. *Woodland* (as it was applied by the High Court) necessarily applies a form of strict liability on the HSE without any fault for the acts or omissions of other parties beyond the scope of vicarious liability. This is the form of liability that Hardiman J in *O'Keeffe v Hickey* [2009] 2 IR 302 at 341 held was for the legislature to create. Alternatively, if *Woodland* does represent the law, then it was wrongly applied in this case as the tests set out therein could not have been satisfied on the evidence.

3. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Appeal were to be successful.

1. An order setting aside the Orders of the High Court.

2. An order providing for the costs of this appeal.

3. Such other Order as the Court deems fit of its own accord or on submission to it including, if necessary, an Order remitting the matter to the High Court.