No. 2

O. 58, r. 18(1)

SUPREME COURT

Record No: 2019/000122

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent'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. **Title of the Proceedings:** *[As in the Court of first instance]*

RUTH MORRISSEY AND PAUL MORRISSEY

PLAINTIFFS

-v-

HEALTH SERVICE EXECUTIVE AND

QUEST DIAGNOSTICS INCORPORATED AND

MEDLAB PATHOLOGY LIMITED

DEFENDANTS

2. **Name of Respondent:**

Ruth Morrissey and Paul Morrissey

3. **Application to extend time:** Yes ☐ No ☒

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

N/a

4. Do you oppose the applicant's application to extend time:

Yes ☐ **No** ☐

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

n/a

5. Do you oppose the applicant's application for leave to appeal:

Yes [x] **No** ☐

6. Matter of general public importance:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

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

1. It is not a matter of public importance whether the Trial Judge correctly applied the standards set in *Dunne v National Maternity Hospital and*

another[1989] IR 91 and *Penney Palmer and Cannon v East Kent Health Authority [2000] Lloyd's Rep Med 41* to the assessment of whether there was an adequate number of cells on the 2012 slide, the subject of these proceedings, to allow for its assessment. Whether or not there was an adequate number of cells on the slide is a matter peculiar to the facts of these proceedings.

The expert pathologist called on behalf of the Third Named Defendant confirmed that the absolute confidence test, as set out in *Penney* applied to both the assessment of adequacy and to the interpretation of the cells on the slide.

2. The Trial Judge correctly applied the *Dunne* test to the question of adequacy. While the Court accepted that it was possible for a reasonably competent screener to determine that the slide was adequate, the Court was entitled to find that on the balance of probabilities a reasonably competent screener would not find the 2012 slide to contain an adequate number of squamous cells.

3. The Court was correct to find that the Second Named Plaintiff was entitled to recover damages for future dependency costs and loss of the First Named Plaintiff's earnings under the heading loss of consortium. The Court was also correct to state that such future losses were also recoverable under the heading "lost years". Neither the First nor the Second Named Defendant has sought leave to appeal on this ground.

Word count - 265

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

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

1. Clinical judgment is required in the assessment of the adequacy of slides and, therefore, the application of a test for negligence is required.

2. There is no basis to assert that the application of the *Penney* test to the assessment of adequacy will result in a significant increase in the number of tests deemed inadequate or that it will have far reaching consequences for screening services. Screeners are required under the specified methodology for the ThinPrep system to apply the *Bethesda* rules in the assessment of adequacy solely in accordance with that specified methodology. It is not a simple question of fact whether there are 5000 cells on the slide by any methodology as differing methodologies would require different minimum cell counts based on the resulting statistical likelihood that an abnormality would be detectable in different circumstances. Cells that are grouped around the margins of a slide are not spread out evenly and therefore not amenable to the detection of abnormalities that may be present even though the nuclei of those cells may be calculable under a different methodology such as the one used by the appellant.

3. The Plaintiffs are entitled to recover future pecuniary losses as loss of consortium or as "lost years". This is not an issue raised by either the First or Second Named Defendant in their application for leave to appeal to this Court.

4. The level of general damages awarded to the First Named Plaintiff is dependent on the particular facts of this case. The level of the cap on general damages has been set at €500,000 since 2009, although it was reduced to €450,000 in that year due to the economic recession. Those economic circumstances have since changed and, it is uncontroversial to have the cap restored to its former level.

Word count – 299

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

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 these proceedings do not warrant an appeal directly to the Supreme Court. The issues raised in this appeal are not novel and the judgment articulates the standards already accepted as applicable in the screening of cervical smear samples.
2. The findings of negligence against the Third Named Defendant in relation to the adequacy of the slide are specific to the facts of these proceedings and do not have implications for screening services in the State.
3. The First and Second Named Defendants have brought applications for leave to appeal in relation to a number of aspects of the judgment. It is preferable that these issues are refined in a hearing before the Court of Appeal even if there is to be a further appeal to the Supreme Court.

Word count – 132

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal.

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also 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 500 words and the word count should appear at the end of the text.

n/a

Word count -

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing: Yes [x] No [ ]

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

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

In the event that leave to Appeal is granted the Respondents also seek priority given the precarious health of the First Named Plaintiff.

Word count:23

13. 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.

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

Appendix

Grounds of Opposition (and Cross Appeal)

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

RUTH MORRISSEY AND PAUL MORRISSEY

PLAINTIFFS

-v-

HEALTH SERVICE EXECUTIVE AND

QUEST DIAGNOSTICS INCORPORATED AND

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DEFENDANTS

2. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

1. The Court did not err in determining that the standard of care applicable to the adequacy of the 2012 slide

1. In reporting on a slide, the screener is required to determine whether the slide has an adequate number of squamous cells for assessment. If it does not, the sample is reported as unsatisfactory and the woman is called for further testing in three months.

2. Slides with a low number of cells under the Bethesda methodology are recognised as being high risk in the Guidelines for Quality Assurance In Cervical Screening which were contractually imposed on the Third Named Defendant in its reporting of slides as part of the national cervical cancer screening programme. In addition, the Bethesda System for Reporting Cervical Cytology references a study that determined that unsatisfactory specimens were more often from high-risk patients and a significant number of these were followed by a squamous intraepithelial lesion/cancer when compared to a cohort of satisfactory specimens. The Guidelines advise that considerable time and effort is required in assessing these slides.

3. The *Bethesda* system and the ThinPrep manufacturer's guidelines provide that an adequate liquid based preparation should have an estimated minimum of at least 5000 well-visualised/well-preserved squamous cells. It requires that where specimens have a borderline or low squamous cellularity an estimation of total cellularity can be obtained by performing representative field counts. A minimum of 10 microscopic fields, usually at 40X, should be assessed along a diameter that includes the centre of the preparation and an average number of cells per field estimated. When there are holes or empty areas on the preparation, the percentage of the hypocellular areas should be estimated and the fields counted should reflect this proportion.

4. It is, therefore, not a simple question of fact whether there are in fact 5000 cells on a slide as suggested by the Third Named Defendant in this appeal.

5. Where there is a concern in relation to the number of well-visualised and well-preserved squamous cells on a slide, the screener is required to deploy their professional expertise and judgment in assessing adequacy in accordance with the *Bethesda* system. There is no provision for the use of a computerised programme which, in this case, is alleged to have counted the squamous cells on the slide most of which were clustered around the circumference of the slide or were clumped. The person who used the computer programme, Dr Madrigal, was approached by the Defendant's expert pathologist, Dr Pitman, who the Court determined had adopted the role of advocate in her attempts to establish that the sample contained more than 5000 cells. Dr Pitman had determined the sample to be inadequate. The programme used has not been certified for this purpose nor does it form part of the *Bethesda* methodology..

6. In the course of the audit of the 2012 slide, both reviewers, one being the chief medical officer at Medlab Pathology Limited and both being pathologists, determined that the likely reason for the false negative report was very scanty cellularity. Neither of the Dublin based cytoscreeners, who initially reported on the sample, were called to give evidence. While the two pathologists who carried out a review of the sample, following the First Named Plaintiff's diagnosis, were initially identified as witnesses for the Third Named Defendant, neither was called to give evidence.

7. Dr Pitman also accepted that the absolute confidence test applied to the calculation of the number of cells in a slide.

8. The Court was entitled to find as a matter of probability that had a test been carried out by the original cytoscreeners in accordance with the ThinPrep and the *Bethesda* system, that it would have resulted in the slide being deemed to be inadequate. The Court accepted that it was possible that a random review carried out in accordance with the Bethesda system would

have found a sufficient number of cells but, on the balance of probabilities, believed that any such random review would be unlikely to have found the slide to be adequate.

9. The Trial Judge did not err in law, or in fact in in relation to the weight to be attached to the use of a blind review by witnesses called by the Third Named Defendant and did not err in law, or in fact, in the weight given to the evidence of the Plaintiffs' expert consultant cellular pathologist.

2. The Court did not err in law, or in fact, in finding that the decision of Medlab Pathology Limited that the 2012 slide was adequate for cellularity caused the injuries suffered by the First Named Plaintiff

10. The Court was correct to accept the evidence of the Plaintiffs' expert, Professor Wells, that the same carcinogenic stimulus can cause stem cells in the cervix to differentiate along either squamous or glandular lines and that it is highly likely that where one sees glandular pre-cancer, that there is an associated squamous pre-cancer.

11. The Court was entitled to find as a matter of probability that, had the First Named Plaintiff undergone a repeat smear in three months she would have been referred for colposcopy.

12. Professor Wells rejected as fundamentally flawed the suggestion that the Court should conclude that because the cancer determined in 2014 was squamous and because the previous abnormalities were glandular, that there is no correlation between the abnormality and the cancer. He was of the view that the suggestion that the 2014 cancer was unrelated to either the 2009 or 2012 slides was disingenuous and preposterous.

13. As regards the negative smear result in 2014, Professor Shepherd, on behalf of the Plaintiffs, gave evidence that it was not uncommon for smears taken from a cancerous cervix to be negative. This is due to the presence of inflammatory cells, blood and pus. He gave evidence that if a more vigorous smear had been taken, essentially like a biopsy, malignant cells would have been scraped off and detected on a smear slide.

3. The Court did not err in refusing the Third Named Defendant's application to allow the slide be viewed through a microscope during the trial.

14. On day nineteen of the trial, the Second Named Defendant attempted to have its expert witness, Dr Austin, give evidence to the Court with the aid of a microscope. This was successfully objected to by Counsel for the Plaintiffs.

15. Dr Austin had included no images from the 2009 slide in his report. The contents of the microscopic images or fields intended to be used by Dr Austin had not been put to Dr McKenna, the Plaintiffs' expert, in cross-examination. Following submissions from Counsel for the Plaintiffs and Counsel for the Second Named Defendant, the Court ruled that as the images had not been put to Dr McKenna, in cross examination they were not capable of fairly being given in evidence.

16. The Third Named Defendant made no submissions to the Court prior to its determination on this issue. On day twenty-one of the hearing Counsel for the Third Named Defendant made what can be described a "for the record" application to the Court to allow its expert pathologist use a microscope during the course of her evidence. The Court determined that, in circumstances where the expert's report contained no images from the slide and where the contents of the images were not put to the Plaintiffs' expert, it would be unfair to allow the use of a microscope during her evidence.

4. The Court did not err in addressing and deciding inter-defendant apportionment

17. The trial judge found that the Plaintiffs' losses result from the failure to properly assess the 2009 and 2012 slides. He found that it was impossible to differentiate between the losses resulting from one or the other. He found that the First Named Defendant was primarily and vicariously responsible for the acts of the Second and Third Named Defendants. He was therefore correct to conclude that the Defendants were concurrent wrongdoers as defined in the Civil Liability Act, 1961, as amended.

5. Quantum

(a) The Court did not err in its findings in relation to the Second Named Plaintiff's entitlement to special damages.

18. The Third Named Defendant, uniquely amongst the Appellants, seeks to appeal the Court's decision to award damages to the Second Named Plaintiff in respect of the cost of the future care that he and his daughter will require after the death of his wife and other resulting losses, on the basis that these are only recoverable in a wrongful death action under Part IV of the Civil

Liability Act, 1961 being a claim which is precluded by the decision of the High Court in *Mahon v Burke [1991] 2 IR 495.*

19. The Civil Liability Act 1961 permits a claim by dependents where one would not otherwise exist. It does not prohibit the recovery of such losses where a claim is brought prior to a plaintiff's death. As the Court stated, it would be grossly unfair if such losses were not recoverable. The Court was correct to find that these future losses were recoverable under the heading of loss of consortium. The Court was also correct to state that such future losses were also recoverable under the heading "lost years".

(b) Cap on General Damages

20. The Plaintiffs do not dispute that this is a case in which the cap on general damages applies given the level of special damages awarded. The Third Named Defendant is incorrect, however, in stating in this appeal that the cap on general damages is €450,000. Given the prevailing economic and social circumstances the cap is no longer €450,000. The trial judge was correct is concluding that the cap is €500,000.

21. The trial judge was correct in the circumstances of this case in awarding the maximum capped general damages to the First Named Plaintiff. The trial judge noted that the injury suffered by Mrs Morrissey is at the most extreme level.

3. Additional grounds on which the decision should be affirmed:

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

4. Cross Appeal

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

5. Order(s) sought

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