No. 1

O. 58, r. 15

SUPREME COURT

Record No:

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:

18 June 2019

2. Title of the Proceedings:

Ruth Morrissey and Paul Morrissey v Health Service Executive, Quest Diagnostics Incorporated and Medlab Pathology Limited

3. Name of Applicant:

Medlab Pathology Limited

What was the applicant's role in the original case:

Third Defendant

4. Decision of Court of Appeal (where applicable): N/A

Record No:

Date of Order: *Perfection Date:*

Date of Judgment:

Names of Judges:

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): Mr. Justice Kevin Cross

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?

Medlab will file an appeal in the Court of Appeal also.

Yes ☐ **No** ☐

6. Extension of Time: **Yes** ☐ **No** ☒

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.

N/A

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.

1) The general public importance of the case arises from the erroneous application of the *Penney Palmer* '*absolute confidence*' test to the issue of whether the 2012 slide had adequate cellularity. Whether a slide has an adequate number of cells on it is an issue as to fact and not one which warrants the application of the ***Dunne (an infant) v National Maternity Hospital*** [1989] IR 91 (***Dunne***) principles to the methodology of assessing adequacy.

2) Without prejudice to the foregoing, the High Court Judge failed to properly apply *Dunne* as the evidence before the Court was that a reasonably competent screener, Medlab's expert cytoscreener, did find the slide to be adequate using the Bethesda Counting System.

3) At §186 to §194 the Judge addressed whether the Plaintiffs are entitled in principle to damages for the cost of care and loss of earnings in respect of the time after the prospective death of Mrs. Morrissey. The Court held that Mr. Morrissey could recover damages in this regard as part of his claim for loss of consortium, but also that (in future cases in which the plaintiff is not married) they could be recovered by the injured plaintiff herself. This is a controversial point. It is of public importance and in the interests of justice that the scope of the type of damages available under the heading of 'loss of consortium' be clarified. Further, while the statement was *obiter*, the Trial Judge also stated that if the damages are not available under 'loss of consortium' then they may be awarded under the '*lost years*' principle. While it is appreciated that this is not a binding determination, it is of general public importance that the question of whether a plaintiff can avail of the '*lost years*' principle in this manner be examined.

Word count – 300

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) It is in the interests of justice that there be resolution of the issue of whether it was wrong in principle to apply any test of negligence, whether it be the *Dunne* test or the '*absolute confidence*' test or any variation of those, to the simple factual question of whether the slide was adequate as a matter of fact.

2) The Judgment has far-reaching implications for the screening services provided by Medlab and for other screening services provided in the State. If the adequacy of slides has to be determined by employing the Bethesda System following a quick overview of the slide (§13 of the Judgment) and a screener has to be '*absolutely confident*' that the slide has over 5,000 cells, then this may result in a significant increase in the number of tests being deemed to be inadequate and the consequent recall of patients for further testing. It is in the interests of justice that this issue be resolved.

3) Further, it is in the interests of justice that there be clarity as to whether a

plaintiff can recover, under the heading of loss of consortium, loss of a spouse's income, pension, company car and share options, the cost of care for any children and the cost of domestic assistance. It is also in the interests of justice for the cap on general damages to be considered in terms of the level of the cap and whether the plaintiff in the circumstances of these proceedings should be awarded damages to the level of that cap.

Word Count – 257

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) It is in the interests of justice that the issues in the appeal be determined as quickly as possible. In light of the First Named Plaintiff's health there is an urgency in having the case determined. The proceedings were fast tracked before the High Court, being heard and determined less than a year from their commencement. The benefit of the efficient progress of the case will be lost if the Appellant is required to argue its appeal before the Court of Appeal, before the almost inevitable consequence of a further appeal before the Supreme Court.

2) The findings in and consequences of the Judgment, in so far as they are referable to Medlab, which relate to the test to be applied when determining negligence and breach of duty in screening, have implications for other screening services in the State.

3) The relevant facts, as found, are quite net. There is, therefore, no benefit as regards the potential refinement of factual and legal issues by the Court of Appeal to having a hearing before that Court.

4) The importance of the case, both to Medlab, on the one hand, and to the Respondents, on the other, is so great that it is inevitable that there would be a subsequent appeal to the Supreme Court from any Court of Appeal Judgment. Given the clearly defined legal issues, this case can properly be characterised as one which raises issues of law which warrant a direct appeal to the Supreme Court.

Word count – 248

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.

Medlab seeks priority due to the potential impact of the Judgment on screening services provided by Medlab. The applicability of the *Dunne* test to adequacy and the emphasis on the Bethesda System of testing adequacy may lead to an increase in the number of tests being deemed to be inadequate and the consequent recall of patients for further testing. The Court's finding that 'absolute confidence' applies to adequacy has created uncertainty as to the standard of care which applies to cytoscreeners when reviewing slides for adequacy. It is important that these issues be clarified as a matter of priority.

Word count – 99

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.

N/A

Appendix - Notice of Appeal

1. **Title of the Proceedings:** Ruth Morrissey and Paul Morrissey **-v-** Health Service Executive, Quest Diagnostics Incorporated and Medlab Pathology Limited

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 Court erred in law in determining the standard of care applicable to the determination of adequacy of the 2012 slide.

The High Court Judge determined at §71 that '*absolute confidence*' is the screeners' practical duty in relation to their analysis of (*inter alia*) the adequacy of the sample, and the legal issue is whether or not they have carried out that duty in accordance with the *Dunne* principles (emphasis added).

The first question identified by the High Court Judge in § 74, '*what was to be seen on each slide?*', is a factual one. It must be answered by reference to what is actually on the slide, and not by reference to what would have been revealed by a particular test of adequacy. If there are in fact more than 5,000 cells on the slide, then the slide is adequate. '*Absolute confidence*' has nothing to do with the simple factual question of what is on the slide. It is a misapplication of the rules relating to the standard of care to use them to impose liability where the correct clinical decision is reached. On the basis of the foregoing, the Judge erred in concluding that the fact that an alternative system of measuring cells by computer, which subsequently discovered that there were over 35,000 cells on the slide, is irrelevant.

Further and without prejudice to the foregoing, even accepting that a formal adequacy test is required, Medlab does not fail per the *Dunne* principles. On the evidence that was accepted by the High Court Judge, a competent screener could have carried out such a test and determined that the slide was adequate, even if the requirement is that they should have had '*absolute confidence*' in that regard. The High Court Judge expressly accepted (§114, §123) that Medlab's expert cytoscreener carried out a test in accordance with the Bethesda System, and found that there were sufficient cells on the slide.

Notwithstanding the above, it is illogical to hold that it is unlikely that a finding of adequacy would have been made if the slide were subjected to the Bethesda System

adequacy test. Similar findings to Medlab's expert cytoscreener were reached by the two other screeners who reviewed the slide immediately after Medlab's expert cytoscreener. There is, therefore, a fundamental inconsistency in the Court's determination at §123 that Medlab was guilty of negligence.

The High Court Judge erred in law and in fact in failing to appreciate that the blind review of the 2012 slide by Medlab's expert cytoscreener and the two screeners was the best way to reproduce the original testing process and represented findings as to *inter alia* adequacy, unbiased by hindsight. The High Court Judge also erred in law and in fact in attributing too much weight to the evidence of the Plaintiffs' expert pathologist, who is not a cytoscreener.

2. The Court erred in law and in fact in finding that Medlab's finding that the 2012 slide was adequate for cellularity caused the injuries suffered by the First Named Plaintiff.

Medlab submits that there is a fundamental error in the reasoning at §140 of the Judgment. The undisputed fact is that the Plaintiff developed squamous not glandular cancer. It necessarily follows that the former type of abnormal cell was not present on the 2012 slide. Even assuming that there was a failure to detect abnormal glandular cells, that cannot have led to the development of squamous cell cancer. The Judgment fails to reconcile this issue.

Further, the High Court Judge erred in law and in fact in adopting the hypothesis that had the First Named Plaintiff undergone a repeat smear in 2012 it would have shown abnormal cells. This assumption does not withstand scrutiny in light of the fact that the 2014 smear result, performed when the First Named Plaintiff had been diagnosed with cancer, was found to be normal.

3. The Court erred in refusing the Appellant's application to allow the slide to be viewed through a microscope during the Trial.

The High Court Judge erred in prohibiting the experts for Medlab to give evidence by reference to a live view of the slide itself, magnified to make it visible to the Judge and the Court on a screen. This ruling was incorrect in the light of the Judge's determination that the first question for him was to analyse what precisely was to be seen on the slide. The High Court Judge erred in placing singular and undue reliance on photographs of the slide

when same did not constitute best evidence.

4. The Court erred in addressing and deciding inter defendant apportionment.

This matter was not an issue between the parties and the High Court Judge was not requested to address and decide same during the course of the Trial and/or in submissions.

5. Quantum.

(a) The High Court Judge erred in finding that the Second Named Plaintiff is entitled to damages in respect of the future care that he and his daughter will require after the death of the First Named Plaintiff, as well as compensation for his losses resulting from the loss of earnings of his wife throughout her career, her pension, company car and share options, the cost of care for any children and the cost of domestic assistance under the heading of loss of consortium (§188). The foregoing in effect permits Mrs. Morrissey and her husband to recover damages in respect of the First Named Plaintiff's own pain and suffering, and also in respect of the loss of earnings and cost of caring for the dependents after her death. The latter is recoverable only as part of a claim for wrongful death under the Civil Liability Act 1961.

It is respectfully submitted that the High Court Judge erred in then finding in the alternative that if the Second Named Plaintiff is not entitled to damages for these future losses under the heading of loss of consortium, then the same damages would be recoverable by the First Named Plaintiff under the heading of '*lost years*' (§194).

(b) Medlab appeals the award of €500,000 general damages both on the basis that (i) the maximum cap is in fact €450,000 and not €500,000 and (ii) the maximum should not be awarded in a case of injuries of this nature.

3. Order(s) sought

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

(1) The Judgment of the High Court and Order of 29 May 2019 are set aside in so far as it was found that the Third Defendant was negligent.

(2) The Judgment of the High Court and Order of 29 May 2019 are set aside in so far as it was found that the Third Defendant is required to indemnify the First Defendant (with the exception of €10,000) and is jointly and severally liable for the damages awarded to the Plaintiffs.

(3) The Appellant be awarded its costs of the appeal and of the proceedings

before the High Court.