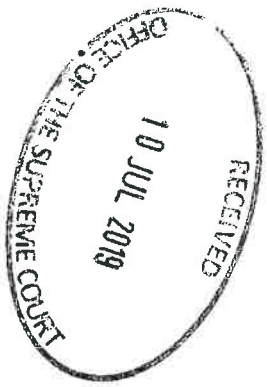
No. 2

O. 58, r. 18(1)



SUPREME COURT

Record No: 2019/121

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:

RUTH MORRISSEY AND PAUL MORRISSEY

PLAINTIFFS

-v-

HEALTH SERVICE EXECUTIVE AND

QUEST DIAGNOSTICS INCORPORATED AND

MEDLAB PATHOLOGY LIMITED

DEFENDANTS

2. Name of Respondents:

Ruth Morrissey and Paul Morrissey

3. Application to extend time: **Yes** [ ] **No** [x]

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.

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. The judgment involves the application of well-established principles and accepted screening standards to the facts of these proceedings.

2. The judgment does not modify the test in *Dunne v National Maternity Hospital and another [1989] IR 91*. The Trial Judge adopted the decision of the Court of Appeal in *Penney Palmer and Cannon v East Kent Health Authority [2000] Lloyd's Rep Med 41* and this decision set the standard that has applied to cervical screening for the past twenty years in the United Kingdom. The Applicant accepted that this decision was applicable in determining the standard of care in the screening of cervical smear samples.

3. The judgment does not affect the standards that are required of those providing screening services other than to articulate what are already the accepted standards. The standards required and recognised by the Court are already specified in the Bethesda System and in the detailed Quality Assurance Standards contractually imposed on the Second and Third Named Defendants by the First Named Defendant.

4. It is correct that the judgment will likely be relied on in litigation involving the interpretation of imaging, scans and radiology as has been recognised in the United Kingdom in relation to the *Penney* decision. This has not led to a flood of litigation or adversely impacted on such services in that jurisdiction.

5. There is no confusion in the judgment in relation to what is meant by the 'absolute confidence' test applied by the Court in accordance with the principles set out in *Penney*. There is no basis for the Applicant's inference that any miniscule doubt would prohibit a screener determining a slide to be negative. This is evident from the Court's decision in relation to the 2012 slide where the failure to identify the abnormalities on that slide by the Third Named Defendant was not found to amount to negligence. The standard applied is that set in *Penney* with no adverse consequence for the cervical screening programme in the United Kingdom.

6. The judgment does not depart in any way from the principles set out in *Dunne* but actually underlines its principal applicability. The question of whether the cytoscreeners were following a general and approved practice does not arise.

7. The decision does not impact in any way on the ability of cytoscreeners to exercise judgment in the interpretation of smear samples. The judgment merely articulates the standard already accepted as applicable to the review of cervical smear samples.

Word count - 410

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. The Court did not modify or depart from the *Dunne* test and it specifically confirmed that that the *Dunne* test applied in the interpretation of cervical smear samples.

2. The fact that the proceedings are of significant private importance to the Second Named Defendant is not relevant in determining whether the constitutional threshold for an appeal to the Supreme Court has been reached.

Word count - 64

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.

2. Appeals have also been brought by the First and Third Named Defendants in respect of a number of aspects of the judgment. The within application for leave to appeal raises numerous issues. Even if there was to be a further appeal to this Court the issues justifying any such appeal are likely to be refined in a hearing before the Court of Appeal.

3. There is no lack of clarity in relation to the absolute confidence standard which has a bearing upon this case or others.

4. The issues raised in this appeal are not novel and the judgment articulates the standards already accepted as applicable in the review of cervical smear samples.

Word count - 130

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.

n/a Word count: 1

Appendix

Grounds of Opposition (and Cross Appeal)

1. Title of the Proceedings:

RUTH MORRISSEY AND PAUL MORRISSEY

PLAINTIFFS

-v-

HEALTH SERVICE EXECUTIVE AND

QUEST DIAGNOSTICS INCORPORATED AND

MEDLAB PATHOLOGY LIMITED

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.

Ground 1 – The Trial Judge did not err in his understanding and application of Penney v East Kent Health Authority

1. The Trial Judge correctly adopted and applied the test formulated by the English Court of Appeal in *Penney Palmer and Cannon v East Kent Health Authority [2000] Lloyd's Rep Med 41* in determining whether a slide has been negligently reported. The Court of Appeal in that case accepted that the equivalent test in that jurisdiction to *Dunne v National Maternity Hospital and another [1989] IR 91* was applicable but held that it had no application to the findings of fact that the judge was required to make. The Plaintiffs and the Second and Third Named Defendants accepted that the *Penney* decision set the applicable standard for cytology.

2. The Trial Judge correctly determined that the legal standard to be applied in determining the issue of liability of the Defendants is the test in *Dunne* and he correctly applied that test. He correctly set out the approach that should be followed in determining questions of fact as follows:

a. What was to be seen in the slides?
b. At the relevant time could a screener exercising reasonable care have failed to see what was on the slide?
c. Could a reasonably competent screener, aware of what a screener exercising reasonable care will observe on the slide, treat the slide as negative?

He correctly held that questions (ii) and (iii) and any issues in relation to adequacy are to be decided in light of the 'absolute confidence' test and that thereafter the test for negligence is as stated in *Dunne*. The Trial Judge was entitled to come to that conclusion based on expert evidence and relying on the decision in Penney that no reasonable screener could report a slide as negative unless he or she had absolute confidence that that was the case.

3. In its written submissions to the Trial Judge the Second Named Defendant accepted that *Penney* contains the applicable standard of care in requiring a cytoscreener to refer a slide to a pathologist if they have a doubt that the slide is negative. It submitted, however, the expression 'absolute confidence' was a short-hand that did not convey the full extent of the *Penney* standard. While not rejecting the concept of absolute confidence, it submitted that it was more accurate to speak in terms of 'no doubt' rather than 'absolute confidence'. The expert witness called by the Second Named Defendant, Dr Austin, confirmed that his understanding of the *Penney* test was that absolute confidence was required although he expressed difficulty in expressing what the difference was between confidence and absolute confidence. Its expert cytologist, Mr Feit, confirmed that where there was any doubt that a slide was normal it should not be reported as normal. He expressed concern as a scientist at the term 'absolute confidence' and appeared to interpret it as meaning 'absolute certainty' where, for example, he stated that a physicist wouldn't have absolute confidence in the laws of gravity.

   The Trial Judge clarified at paragraph 72 of the judgment the level of confidence that was required, namely that if there was any room for doubt that the slide was normal and the screener ascribes a normal result to that slide then the screener is in breach of the *Dunne* principles. This was the level of confidence that the experts called on behalf of the Second Named Defendant were comfortable to abide by and the standard that was suggested in its submissions. There is no confusion, therefore, in the judgment as to the meaning or application of the 'absolute confidence' test.

4. That the Trial Judge did not impose a standard tantamount to certainty is evident from his decision in relation to the 2012 slide ,reported on by the Third Named Defendant. The Plaintiffs' experts gave evidence that there was a breach of duty in failing to identify the abnormalities on this slide which abnormalities were identified in the post diagnosis audit of the slide which confirmed a false negative. The Trial Judge accepted that these abnormalities were there to be seen on the slide. However, he determined

that a screener exercising reasonable care could not be faulted for failing to see them in the particular instance of that slide.

5. The Trial Judge was correct in holding that 'absolute confidence' is the screeners' practical duty in assessing a slide.

6. In articulating how the 'absolute confidence' test is to be applied the Trial Judge did not depart from the judgment in *Penney*.

7. The Trial Judge correctly applied the test in *Penney* and *Dunne* to the interpretation of the 2009 slide. He was correct to determine that the slide should not have been reported as negative given the particular and evident abnormalities on that slide.

Ground 2 – the Trial Judge did not adopt a standard of care that is incompatible with Cervical Cancer Screening.

8. The Trial Judge correctly applied the standard set in the *Penney* decision which has applied to the screening of cervical smear samples for approximately twenty years in the United Kingdom. This standard was accepted by the Second Named Defendant and the Third Named Defendant.

9. The judgment recognises the clinical role of cytocreeners in cervical screening programmes. It does not interfere with the ability of a cytoscreener to exercise clinical judgment in determining whether a slide is negative or abnormal.

Ground 3 – the Trial Judge did not misapply or depart from the principles in Dunne v National Maternity Hospital and another

10. The Trial Judge correctly applied the *Dunne* standard and the standard set in *Penney* in determining the 2009 slide to have been negligently reported. The Trial Judge adequately considered and assessed the evidence of all experts including Professor Austin and Mr Feit.

11. The articulation of the 'absolute confidence' test at paragraph 72 of the judgment corresponds with the submissions of the Second Named Defendant as to the applicable standard.

Ground 4 – the Trial Judge did not err in the weight he attached to evidence of audits of professional practice in the English Cervical cancer screening programme.

12. The Trial Judge gave appropriate weight to evidence regarding audits carried out in respect of the English cervical cancer screening programme. The absolute confidence standard as articulated by the Trial Judge has applied in

that jurisdiction for approximately twenty years and is not inconsistent with the audit findings.

Ground 5 **The judge did not err in relation to the weight given to the evidence as to retrospective or hindsight bias.**

13. The Trial Judge specifically addressed the issues of hindsight bias and the use of blind reviews at paragraphs 75, 76 and 77 of his judgment. He accepted, as did all witness asked about it, that retrospective bias was a matter that had to be kept in mind no matter what kind of review was carried out of a slide following diagnosis. He noted the reference to hindsight bias in the *Penney* decision and in an English publication entitled "Public Health Guidance on applying Duty of Candour and Disclosing Audit Results". He noted that there were potential hazards in any method of evaluation after the fact. He concluded, from the evidence heard, that any retrospective analysis of the slides must be treated with caution and that, while there may be merits to a blind review, such a review was by no means compulsory.

14. Dr Roese, an academic psychologist with expertise in judgment and decision making, was presented by the Second Named Defendant as the global expert on hindsight bias. He has no experience whatsoever in relation to cytology or in the reasoning process used by cytotechnicians in screening slides and did not engage with the facts of this case in giving his evidence.

15. An application was made by the Plaintiffs' Counsel to have the evidence of Dr Roese excluded, essentially on the basis that his evidence was introduced to usurp the Trial Judge's decision making function in circumstances where the Trial Judge had evidence from pathologists and cytotechnicians in relation to the impact of hindsight bias on the interpretation of slides and in relation to the use of blind reviews. Ironically, Dr Roese had the benefit of Professor Austin's report when he prepared his own report. While noting that it was not clear to him from Dr Roese's report what his evidence would bring to the case the Trial Judge refused the application and proceeded to hear evidence from Dr Roese.

16. Having heard his evidence, the Trial Judge was entitled to determine that he did not require the assistance of Dr Roese to advise him that retrospective bias was an issue. The Trial Judge had ample expert evidence to assist him in understanding the impact of hindsight bias in retrospective reviews and in determining what was to be seen on the slide.

Ground 6 – The Trial Judge did not err in the weight he attached to the evidence based on blinded review.

17. There has never been a requirement in clinical negligence cases involving misdiagnosis to conduct blind reviews. Blind reviews were not carried out in considering negligence in the *Penney* case nor was any concern expressed regarding the absence of such type of review notwithstanding the Court's recognition of the risk of hindsight bias. The requirement for a blind review was seized upon by the Second Named Defendant's experts based on requirements set out in guidelines issued by the College of American Pathologists (CAP) and the American Society of Cytopathology (ASC), organisations representing the interests of cytopathologists and cytotechnicians. According to an article co-authored by Professor Austin, the Guidelines were developed "*to curb the negative medicolegal tide devised for litigation engulfing cytology professionals*".

18. These Guidelines address how negligence is to be determined in litigation involving the interpretation of cervical smear tests. It is an ethical requirement for members of these organisations to adhere to the guidelines in giving expert evidence. The Guidelines state that in most cases where ASCUS (atypical squamous cells of undetermined significance) or AGC (atypical glandular cells) is found on review it is not appropriate to find negligence where the slide was previously reported as negative. Dr McKenna gave evidence on behalf of the Plaintiffs that it was important not to underestimate these categories as in his experience he has seen biopsies after a finding of ASCUS to be normal, CIN1, CIN 2, CIN3 and cancer.

19. Secondly, the Guidelines stipulate that a breach of duty can only be established if a blind review is carried out involving the contested slide as one of a number of normal and abnormal samples representing a variety of disease states. The Guidelines further provide that courts should evaluate whether the overall screening practices of the laboratory meet the standard of care and whether unbiased blinded rescreening consistently detects significant abnormalities not initially identified by the laboratory.

20. Both Guidelines were the subject of significant criticism and were discredited in a decision of an American Circuit Appeals Court in 2014, *Adams v Laboratory Corp. of America 760 F.3d 1322 (2014)*. The Court observed:

> "*Both sets of [guidelines] focus not on how cytotechnologists should go about their duties in examining slides, but instead on how courts should go about their duty to adjudicate claims against cytotechnologists and similar professionals ... They are not objective, scientific findings; they are not guidelines followed by*

laboratories to screen for pre-cancerous or cancerous cells; they are policy proposals to limit how the courts can find the members of the organizations liable for professional negligence when they are sued." [emphasis added]

21. Commenting on the opinion in each set of guidelines, that without a blinded review it was not appropriate to establish deviation from standard practice ,the Court stated: "*That, of course, is a decision to be made by the courts, not by self-interested associations ...*".

22. The evidence of Professor Austin and Mr Feit is tainted through their adherence to these guidelines, the fact that neither disclosed the Adams case in their reports and the fact that Professor Austin was involved in the development of the CAP Guidelines.

23. The blind review of the 2009 slide, arranged by Mr Feit on behalf of the Second Named Defendant, did not adhere to the above Guidelines in that the 2009 slide was placed with slides all of which had been interpreted as negative and did not represent a range of disease states. The blind review that was carried out was, therefore, flawed.

24. Professor Austin gave his opinion in relation to whether the reporting of the slide was negligent without the benefit of a blind review.

25. The Trial Judge noted that there are potential hazards in any method of evaluation. He noted that blind reviews had merit but were not the only way to carry out a review of a slide. He heard evidence from Dr McKenna in relation to the inherent inadequacies of blind reviews generally and specifically in relation to that carried out in relation to the 2009 slide. He noted that blind reviews had their own potential hazards. There were merits to a blind review but they are by no means compulsory. He was entitled to come to these views based on the evidence.

26. Ms Tan's evidence in relation to the use of blind reviews was more nuanced than is suggested by the Second Named Defendant. Ms Tan was cross examined by Counsel for the Third Named Defendant who presented the Guidelines as authoritative of the position in the United States. She also gave evidence that to simply to review the individual slide was also a fair way to review the slide. It was a matter for the Trial Judge to review her evidence in light of the provenance of the Guidelines.

27. The fact that blind reviews are carried out by the UK College of Pathologists in assessing professional competence of its members is irrelevant to these

proceedings as the purpose of the blinding, in that instance, is to conceal the identity of the person whose performance is being assessed.

28. The Trial Judge was entitled to prefer the evidence of Dr McKenna and Ms Tan in relation to the interpretation of the 2009 slide.

Ground 7 - The Trial Judge did not err in the weight he attached to the evidence of either the pathologists or cytoscreeners called to give evidence

29. The Plaintiffs and each of the Second and Third Named Defendants called a pathologist and a cytoscreener to give evidence.

30. It is a matter for the Trial Judge, having heard all of the evidence presented by all of the parties over the course of a lengthy trial, as to which evidence he will prefer. He specifically accepted the evidence Ms Tan, a cytoscreener, and Dr McKenna, a pathologist in relation to the misinterpretation of the 2009 slide. He was entitled to have his stated reservations in relation to the reliability of the evidence given by Mr Feit.

Ground 8 - The Trial Judge did not err in his findings as to the reliability of the Second Named Defendant's US witnesses by reference to the ASC.

31. Please see the response to Ground 6 above in relation to the provenance, content and legal status of the ASC Guidelines in the United States. The Guidelines do not permit, save in exceptional circumstances, findings of negligence in relation to a failure to identify ASCUS or AGUS.

32. Professor Austin failed to disclose in his expert report the fact that the CAP and ASC guidelines upon which he relied had been discredited in the case of *Adams v Laboratory Corporation of America* referred to above. He also failed to disclose the fact that he was involved in the drafting of the ASC/CAP Guidelines in circumstances where the decision of the United States Court found that the purpose of the Guidelines was to curb litigation taken by plaintiffs in respect of cervical screening.

33. Evidence was given to the Court by Dr Pitman, on behalf of the Third Named Defendant, that it is an ethical requirement of the ASC that members of the organisation adhere to the Guidelines and that they are required to sign an affirmation to this effect. It is clear from Professor Austin's support of the methodology used by Mr Feit in carrying out the 'blind review', however,

that he was prepared to depart from the methodology required by the Guidelines in that instance.

34. The Trial Judge was entitled to accept that the evidence of Professor Austin and of Mr Feit were coloured by the guidelines and by the ASC view on ASCUS and AGUS cells.

Ground 9 - The Trial Judge did not mischaracterise and gave sufficient weight to the evidence of Mr Feit

35. Please see the responses to grounds 6 and 8 above in relation to the impact of the ASC Guidelines on the evidence given by Mr Feit. The Trial Judge was entitled to form the view that Mr Feit Had reached his conclusions on the balance of probabilities.

36. The Trial Judge found that Mr Feit's opinion was coloured by his view of the ASCUS/AGUS category as a "waste basket" and by the ASC Guidelines. He found that Dr McKenna's evidence was not so tainted by any such predetermined bias although, in his case, like the evidence of all reviewers, caution was required regarding hindsight bias.

37. The Trial Judge was correct in concluding that the Second Named Defendant's screeners ought not to have treated the slide as negative given the abnormalities as identified by Dr McKenna.

Ground 10 – Trial Judge did not err in refusing to admit evidence as to a blinded review by a pathologist

38. The Applicant made an application to the Trial Judge to admit a further expert report in relation to the interpretation of the 2009 slide. This review was carried out by an Associate Professor of Pathology who works in the same institution as Professor Austin, a Professor of Pathology. This new proposed witness was not aware of the party for whom she acted and was not aware of the First Named Plaintiff's subsequent diagnosis.

39. This new review was not a blinded review as contemplated by the Guidelines or as arranged by Mr Feit. It was not the type of blind review that the Plaintiffs' experts were criticised for failing to carry out. It was the same review as was carried out by Professor Austin and Mr Feit, save that there was no longer a green marking on the slide.

40. The basis for the application was that Dr McKenna had criticised the blind review that had been conducted for the Applicant and, in particular, had

criticised the review owing to the presence of a green marking on the slide. This 'blind review' was, however, a review of only the 2009 slide. The rationale put forward to the Trial Judge for the introduction of the report, namely, to answer Dr McKenna's criticism of the previous blind review, was inapplicable. In fact, Counsel for the Second Named Defendant agreed with the Trial Judge when he stated that the purpose of her evidence was not in relation to blind reviews, but rather to be an additional witness who would bolster the Second Named Defendant's view of the slide. He accepted that Mr Feit could address the criticism of including the slide, with the marking, in his blind review. The only difference between the reviews carried out by Professor Austin and the additional pathologist was that one pathologist looked at the slide with a green mark and the other without.

41. Counsel for the Plaintiffs submitted that this was not permissible under Order 36 Rule 58. The Applicant had already had the slide examined and reported on by a pathologist and a cytologist.

42. The Trial Judge, in his detailed ruling, was correct to refuse to allow further evidence from another pathologist in respect of the same slide.

Ground 11 - The Trial Judge gave appropriate weight to the reports of Dr McKenna and did not err in refusing to allow the use of a microscope in the Court

43. The Trial Judge accorded the correct weight to each of Dr McKenna's reports and in relation to his evidence to the Court. He was entitled to hold that that there was not any major difference between the two reports. His second report was based on a review of photographs taken by Ms Tan, a cytologist who gave evidence on behalf of the Plaintiffs. The photographs were used to demonstrate to the Court the abnormalities that were to be seen on the slide. Advance notice was given to the Defendants. His second report also, very helpfully, explained certain fundamental aspects of understanding what is involved in the screening of liquid based cytology samples.

44. On day nineteen of the trial, the Second Named Defendant attempted to have its expert witness, Professor Austin, give evidence to the Court with the aid of a microscope. This was successfully objected to by Counsel for the Plaintiffs. Professor 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 Professor Austin in his evidence to the Court had not been put to Dr McKenna in cross-examination. Following submissions from Counsel for the Plaintiffs and Counsel for the Second Named Defendant, the Trial Judge

was correct to rule that as the images had not been put to Dr McKenna in cross examination they were not capable of being given fairly in evidence.

Ground 12 - The Trial Judge was correct in finding that the Plaintiffs had established causation in respect of the 2009 slide.

45. The Trial Judge was correct to find that but for the misreading of the 2009 slide the First Named Plaintiff would not have developed cancer and would not have suffered the damage alleged. The Second Named Defendant suggests three bases for the contention that the Plaintiffs failed to establish causation.

(a) Progress of cancer in younger women

46. It is incorrect to say that the Trial Judge failed to give adequate weight to the hypothesis put forward on behalf of the Second Named Defendant that cancer behaves more aggressively in younger women. The evidence presented by the Plaintiffs clearly established that this is not the case save in respect of very rare small cell or anaplastic tumours. Professor Wells and Professor Shepherd gave evidence that the First Named Plaintiff did not have such a rapidly growing or aggressive cancer.

47. Professor Shepherd, on behalf of the Plaintiffs, gave evidence that the majority of cervical cancers are not fast growing. He said that anaplastic or small cell cancers of the cervix, which are very rare, are aggressive tumours. He said that, in the vast majority of cases, it takes between eight and twelve years for CIN to progress to cancer. He gave evidence that there is no difference of any significance in the speed of development or progress of invasive cancer in the young or in the old. Professor Wells agreed with that these timeframes were reasonable and that population based screening programmes were based around these intervals.

48. The evidence showed that the First Named Plaintiff probably had a precancerous lesion in 2009 and in 2012. Had she gone for a repeat smear in 2009 it would have shown either atypical glandular cells or high grade abnormal changes. Had she undergone colposcopy in 2009, a high grade abnormality would have been detected.

49. It is incorrect to say that the Plaintiffs did not engage with the literature on this issue. Professor Shepherd was cross examined with reference to literature and the literature was not put to Professor Wells or Dr McKenna on behalf of the Second Named Defendant.

(b) Co-existence of glandular and squamous abnormalities

50. The Second Named Defendant submits that even if there were atypical glandular cells in the 2009 slide, these are unrelated to the cancer that the First Named Plaintiff ultimately developed and that, therefore, the misreading of the 2009 slide was not causative of the injuries sustained by her. The evidence called by the Plaintiffs shows that this contention is incorrect. In particular, Professor Wells rejected, as fundamentally flawed, the suggestion that the Court should conclude that because the tumour identified in 2014 was squamous and because the previous abnormalities were glandular, that there is no correlation between the abnormality and the cancer. This was because the same oncogenic stimulus affected both the squamous and glandular cells. The same stem cells are differentiated along either glandular or squamous lines. He said that glandular and squamous cancer often go hand in hand. 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.

(c) Correlation between findings on cytology and findings following histopathology

51. The Trial Judge did not make a general finding that the mere existence of abnormal glandular cells necessarily meant that colposcopy would have detected cancer or pre-cancer. Based on the evidence of Professor Shepherd and Professor Wells, the Trial Judge was entitled to find that had the First Named Plaintiff been rescreened and referred for colposcopy, a precancerous lesion would have been detected. Professor Wells gave evidence that while cytology might show minor abnormality, histopathology often shows more serious disease. He said that it was likely that histopathology in 2009 would show evidence of both a glandular and squamous precancer. He gave evidence that where glandular pre cancer is found, it is highly likely that it will be associated with squamous precancer.[

(d) Subsequent negative smears and failure to identify glandular cancer or precancer in the trachelectomy specimen

52. The Trial Judge was correct to determine that had the First Named Plaintiff undergone repeat smear in 2009, abnormal cells would have been found, notwithstanding that smears taken in 2012 and 2014 were reported as

showing no abnormality and that the trachelectomy specimen did not show glandular cancer or precancer.

53. The Trial Judge found that the 2012 smear was inadequate for assessment and, therefore, no conclusions should be drawn from the fact that it was reported as negative. The Trial Judge acknowledged that the 2014 smear was correctly interpreted as negative notwithstanding the First Named Plaintiff's diagnosis. It is accepted by all parties that non-negligent false negatives occur. Furthermore, Professor Shepherd gave evidence that it was not uncommon or unusual 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.

54. In relation to the trachelectomy specimen the Trial Judge was correct to rely on the evidence of Professor Wells that the glandular abnormality could have been overgrown by the squamous cancer. Throughout his evidence Professor Wells reiterated that glandular abnormalities will often co-exist with squamous abnormalities.

Grounds 13 - The Court did not err in its findings on inter defendant liability

55. 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.

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.