

120/2019

No. 2

O. 58, r. 18(1)



SUPREME COURT

Record No:

2019/ 120

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

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 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 First Named Defendant did not address the standard of care that should apply in the interpretation of cervical smear samples during the trial or in its written submissions when invited to do so by the Trial Judge nor did they raise any concern notwithstanding that it was alleged from the outset that it was primarily and/or vicariously liable for the acts of the Second and Third Named Defendants. Having not addressed the issue in the High Court, it should not be allowed to do so by way of appeal.
3. The judgment does not modify the test in *Dunne v National Maternity Hospital [1989] IR 91* and, in fact, endorses its application as the basis for determining liability in cases of this nature. The Trial Judge adopted the decision of the English Court of Appeal in *Penney Palmer and Cannon v East Kent Health Authority [2000] Lloyd's Rep Med 41*. The Second and Third Named Defendants accepted that *Penney* was applicable in determining the standard of care in cervical screening.
4. The judgment does not affect the standards that the First Named Defendant must require of those providing screening services other than to articulate what are already the accepted standards, namely, as specified in the Bethesda System and in the Quality Assurance Standards contractually imposed on the Second and Third Named Defendants.
5. It is correct that the judgment will likely be relied on in litigation involving the interpretation of imaging, scans and radiology etc. This did not lead to a flood of litigation or adversely impact such services in the United Kingdom following *Penney*.
6. Concerns similar to those made in submissions to the Court, and in the media, following the judgment, about its impact on the viability of screening services, were rejected by the Court in *Penney* and have been shown to have been without foundation in that jurisdiction.
7. As the judgment underlines the application of the *Dunne* in determining the standard of care in medical negligence litigation, it does not affect how medicine is practiced in this jurisdiction.
8. The provision of funding by the First Named Defendant to 2,300 providers under section 38 of the Health Act 2004 is not relevant to these proceedings. What is relevant in assessing whether there is vicarious liability is the degree of control exercised in relation to the provision of those services. Detailed quality assurance standards were imposed on the Second and Third Named Defendants in relation to how they provided screening services. It is not submitted by the First Named Defendant that these other service providers are the subject of such detailed requirements.

9. Detailed submissions were made to the Trial Judge in relation to the question of whether the First Named Defendant is primarily and/or vicariously responsible for the negligence of the laboratories including on the basis of the applicability of *Woodland*.

Word count - 496

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 the *Dunne* test and it specifically confirmed that that the *Dunne* test applied in the interpretation of cervical smear samples.
2. The issues raised by the Applicant can be dealt with efficiently and definitively by the Court of Appeal. Appeals have also been brought by the Second and Third Named Defendants in respect of a number of aspects of the judgment. Even if there was to be a further appeal to this Court, the issues justifying such appeal are likely to be refined in a hearing before the Court of Appeal.
3. The Trial Judge was correct in his application of *Woodland v Essex County Council* [2013] UKSC 65 and *Byrne v Ryan* [2009] IR 542 in determining that the HSE was both primarily and vicariously liable for the acts of the laboratories.

The principle issue in determining vicarious liability is the degree of control exercised by the First Named Defendant over those responsibilities delegated to the third party and not whether that third party can be deemed to be an employee of the First Named Defendant or otherwise.

4. The First Named Defendant did not address the standard of care that should apply in the interpretation of cervical smear samples during the trial or in its written submissions notwithstanding that it was alleged from the outset that it was primarily and/or vicariously liable for the acts of the Second and Third Named Defendants. Having not addressed the issue in the High Court, it should not be allowed to do so by way of appeal.

Word count - 261

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. The Plaintiffs and the Second and Third Named Defendants accept that the *Penney* decision is applicable in determining whether there has been negligence in the interpretation of cervical smear samples. The fact that there are pending appeals is therefore not relevant. Furthermore, the laboratories are typically named in addition to the First Named Defendant. The First Named Defendant has an indemnity under its contracts with the laboratories in respect of any losses it incurs as a result of the actions of the laboratories.
3. 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 and in the imposition of primary and vicarious responsibility.

4. The *Dunne* test has not been modified in any way and its primary application in medical negligence litigation has been underlined in this judgment.
5. As noted above appeals have also been brought by the Second and Third Named Defendants in respect of a number of aspects of the judgment. Even if there was to be a further appeal to this Court the issues justifying such appeal are likely to be refined in a hearing before the Court of Appeal.

Word count - 217

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

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:

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.

Standard of care

1. The First Named Defendant did not address the standard of care that should apply in the interpretation of cervical smear samples during the trial or in its written submissions when invited to do so by the Trial Judge nor did they raise any concern notwithstanding that it was alleged from the outset that it was primarily and/or vicariously liable for the acts of the Second and Third Named Defendants. Having not addressed the issue in the High Court, it should not be allowed to do so by way of appeal.
2. The Trial Judge correctly adopted and applied the test formulated by the 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 English Court of Appeal, in that case, accepted that the equivalent test in that jurisdiction, to the test in this jurisdiction of *Dunne v National Maternity Hospital and another* was applicable but held that it had no application to the findings of fact that the judge was required to make.

3. The Trial Judge correctly determined that the legal standard to be applied on the issue of liability of the Defendants is the *Dunne* test. He correctly followed the *Penney* decision in setting 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*.

4. The Trial Judge was correct in holding that the *Penney* decision required that a slide should not be classified as negative unless the screeners had absolute confidence or no doubt that it was negative.
5. There is no good reason why the standard applicable to the review of samples in the United Kingdom should differ to that applicable in this jurisdiction. In particular, given the potentially catastrophic consequences of failing to correctly report on a sample, it is respectfully submitted that the law in this jurisdiction should mandate no lesser standard than the absolute confidence test applicable in the United Kingdom and as articulated by the Trial Judge.
6. The Trial Judge was entitled to hold that a screening programme is inherently deficient if screeners are permitted to ascribe as normal slides in respect of which they have any doubt, and were a screener to do so, it would be a breach of the *Dunne* principles. The dangers of false positives and any distress that that may cause are far outweighed in the balance by the dangers of false negatives. As the English Court of Appeal stated in the *Penney* decision:

“We have no doubt on the evidence that the screening programme should aim by enhanced training of those who operate it to reduce so far as possible the number of false positives and false negatives. On the undisputed evidence before the judge however this cannot logically compromise the need for a primary screener to apply the absolute confidence test.”

7. In its written submissions to the Trial Judge the Second Named Defendant stated that it had no difficulty with the standard identified in *Penney* and that it supported the view 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. As to the weight to be applied to the use of the expression ‘absolute confidence’ it submitted that this 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, for example, where he stated that a physicist wouldn't have absolute confidence in the law of gravity.

8. 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.
9. In its written submissions to the Trial Judge, the Third Named Defendant stated that there was no discordance between the test for negligence in the *Penney* decision and that in *Dunne*. Its expert witnesses accepted the standard set in *Penney*. In particular its expert pathologist, Dr Pitman, stated that the absolute confidence test applied both in determining adequacy and in determining whether the slide was negative.
10. That the Trial Judge was not requiring a standard tantamount to certainty is evident from his decision in relation to the 2012 slide reported on by the Third Named Defendant. He determined that a screener exercising reasonable care could not be faulted for failing to see the abnormalities that had been identified on the slide.

Primary and Vicarious Liability of the First Named Defendant

11. The Trial Judge was correct in holding that the First Named Defendant owed both a non-delegable duty of care and that it was vicariously liable for the negligence and breach of duty of the Second and Third Named Defendants. His judgment is sufficient to support these conclusions.
12. The national cervical cancer screening programme, CervicalCheck, is a public service provided by the First Named Defendant free of charge to women in the State. The service is provided by the First Named Defendant pursuant to a positive statutory obligation to do so in the National Cancer Screening Service Board (Establishment Order) 2006 (SI 632/2006). This statutory obligation was outsourced under contracts to the Second and Third Named Defendants without any international precedent and pursuant to which, seven of the eight Irish laboratories, then providing this service, ceased doing so.

13. Detailed quality assurance standards in respect of every aspect of the laboratory service were imposed on the Defendants. Furthermore, the laboratories were subject to inspection by the Health and Information Quality Authority.
14. The National Cancer Screening Service Board acknowledged in its various programme reports that it was responsible for all aspects of the cervical screening programme.
15. The significant degree of control exercised by the First Named Defendant over the screening activities of the Second and Third Named Defendants is sufficient to establish vicarious liability.
16. The Trial Judge correctly adopted and applied *Byrne v Ryan* [2009] IR 542 (in which the decision of Denning LJ in *Cassidy v Ministry of Health* (1951) 2 KB 343 was approved). That decision is directly relevant to the circumstances of these proceedings in relation to the imposition of both a non-delegable duty of care and vicarious liability for the negligence of the Second and Third Named Defendants.
17. The Trial Judge was correct in both adopting and in how he applied the test for imposition of a non-delegable duty set out in *Woodland v Essex County Council* [2013] UKSC 65, a case described by the authors of Clerk and Lindsell on Torts (22nd Edition) as the leading case on non-delegable duties. The test was satisfied on the evidence presented to the Court.
18. In providing the CervicalCheck programme the First Named Defendant's relationship with the First Named Plaintiff has all of the characteristics set out in both *Byrne v Ryan* and *Woodland v Essex County Council*. Her samples were taken, screened and reported as part of a public service. From the inception of the screening programme the First Named Plaintiff was part of that cohort of women who were in the custody or care of the First Named Defendant for protection against developing cervical cancer. She had no say in how that care would be provided and had no say in where her samples would be reviewed. In common with all participants in the screening programme, the First Named Plaintiff was in a position of vulnerability as, in the event of a misreading of her samples, there was a risk of significant or lethal harm. She was therefore dependent on the First Named Defendant for protection against such risk. The First Named Defendant had an obligation to protect her and recognised this responsibility in directing adherence to quality assurance guidelines. The laboratories were negligent, not in some collateral aspect of the screening programme, but in the very performance of the functions imposed on the First Named Defendant under the statutory instrument, namely the screening and reporting of cervical smear samples. While the First Named Plaintiff was entitled to outsource the screening function, it could not legally delegate its responsibility for same.
19. The Trial Judge was correct in determining that the decision in *O'Keeffe v Hickey* [2009] 2 IR 302 is not relevant to these proceedings.

20. It is not irrelevant that the First Named Defendant was entitled to an indemnity from the Second and Third Named Defendants under their contracts.

21. The Applicant seeks to avoid the burden of defending claims for the negligent misreading of smear samples. Having outsourced its service to two multinational organisations with vast resources, it seeks to place the burden of pursuing these organisations on potential plaintiffs rather than engaging with the claims and, where negligence is established, compensating the victims and then pursuing these organisations itself. [delete]

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.