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No redactions required

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 96

Court of Appeal Record Nos 2019/141 & 147

Whelan J.

Faherty J

Collins J.

BETWEEN

EUGENE McCORMACK

Plaintiff/Appellant

AND

MARCUS TIMLIN, MATER PRIVATE HOSPITAL

and MATER PRIVATE HEALTHCARE

Defendants/Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 26 March 2020

INTRODUCTION

1. The Plaintiff ("*Mr McCormack*"), appeals from the Judgment and Order of the High Court (Cross J) dismissing his action for medical negligence against the First Defendant "(*Mr Timlin*"). The Judgment of the High Court was given on 18 January 2019, followed by an Order dated 15 February 2019.

2. Mr McCormack's claim relates to his post-operative care following spinal surgery he underwent on 11 March 2010. That surgery was carried out in the Mater Private Hospital by Mr Timlin, who is a consultant orthopaedic and spinal surgeon. Mr McCormack was a patient in the Mater Private until his subsequent discharge on 26 March 2010, following further surgery, also carried out by Mr Timlin, on 19 March 2010. No complaint is now made by Mr McCormack as to how either surgery was performed by Mr Timlin (though that was not always the case). Rather, his complaint is that, following the first surgery on 11 March 2010 he began to develop Cauda Equina Syndrome which was not diagnosed and treated as quickly as it ought to have been and which, he says, has caused him significant and permanent injury and incapacity.

3. The *cauda equina* is a bundle of nerve roots at the lower end of the spine. [1]These nerve roots control important motor and sensory functions including bladder and bowel function, sexual function and lower limb motor movement. Cauda Equina Syndrome (CES) occurs when these nerve roots are compressed. It can lead to incontinence and permanent paralysis. Even where it does not develop completely, it may cause significant injury and incapacity. It is a very serious condition which, if diagnosed or suspected, warrants urgent surgical intervention in order to relieve the cause of compression.

4. It was not suggested by Mr McCormack that he developed full-blown CES. His case was that, following his surgery on 11 March 2010 he began to develop CES and suffered significant injury as a result of delay in diagnosis on the part of Mr Timlin. Mr Timlin re-operated on Mr McCormack on 19 March and, while that relieved the caudal compression that had been developing, it is Mr McCormack's case that this intervention should have taken place sooner.

[1] So-called because of their perceived resemblance to a horse's tail. The usage dates back to the late 16th/early 17th century.

5. As the title of these proceedings indicates, Mr McCormack sued the Mater Private Hospital Mater Private Healthcare in addition to Mr Timlin. It is apparent from the Personal Injuries Summons that these entities were sued on the basis that one or other of them was owner, occupier and operator of the Mater Private and employer of the medical and nursing staff at the hospital and vicariously liable for their negligent acts and omissions. However, on the opening day of the trial in the High Court, the Court was informed that Mr McCormack's action against the Mater Hospital Defendants had been settled and it was struck out with costs to Mr McCormack. As a result, the action proceeded against Mr Timlin only and the Judgement and Order of the High Court was concerned only with the claim against him.

6. The Judge found that, in the aftermath of the 11 March surgery, Mr McCormack was suffering from a "*developing CES"*.[2] In his view, that developing CES was "*there to be interpreted on the films*" of an MRI of Mr McCormack's spine taken on 16 March 2010. [3] The Judge also found that had the revision surgery carried out on 19 March been undertaken on 16 or 17 March, or possibly even on 18 March, that developing CES

[2] Judgment, at paragraph 56

[3] Judgment, at paragraph 60.

would have been dealt with at an earlier stage "*and without, at least, a considerable amount of the resulting symptoms*". [4] Had the intervention occurred earlier, Mr McCormack would not have developed post-operative CES and other symptoms and sequelae he complained of.[5] All of these findings are disputed by Mr Timlin and are the subject of a cross-appeal by him. However, notwithstanding those findings in favour of Mr McCormack, the Judge went on to dismiss his claim. He did so on the basis of his view that Mr Timlin could not be faulted for his interpretation of the MRI scan and the course of action he took following from that interpretation. On the basis of the information actually available to him (and, as I will explain, the Judge was of the view that there was other information which, if known to Mr Timlin, would have prompted him to act sooner) the Judge considered that Mr Timlin could not be faulted for continuing with conservative management until 19 March 2010. Applying the principles set out by the Supreme Court in *Dunne v National Maternity Hospital* [1989] IR 91, the Judge concluded that he had not been negligent in his treatment of Mr McCormack.

[4] Judgment, at paragraph 58

[5] Paragraph 59.

7. For the reasons set out in this judgment, I would set aside the Judgment and Order of the High Court and direct a retrial of Mr McCormack's claim.

BACKGROUND

8. Mr McCormack had a significant history of back problems. A CT scan in May 2006 disclosed a large disc bulge which led to a discectomy being carried out in April 2007, followed by a revision in May 2007. In October 2008, he underwent a left sided L5/S1 decompression and micro discectomy. Unfortunately for him, these procedures (none carried out by Mr Timlin) did not provide any lasting relief. In April 2009 he was referred to Mr Timlin complaining of chronic lower back pain and in May 2009 Mr Timlin carried out a revision, decompression at L5/S1 and posterior fusion. While Mr McCormack's condition improved in the immediate aftermath of that procedure, later in 2009 his pain returned and he became depressed. He was reviewed by Mr Timlin in February 2010 and a further revision was advised to address what appeared to be loose screws at L4/S1.

9. On 11 March 2010 a revision, decompression and posterior lumbar interbody fusion of the L4/L5 was carried out by Mr Timlin, involving the insertion of a posterior lumbar interbody fusion (PLIF) cage at L4/L5. It is clear from the evidence before the High Court that Mr McCormack experienced significant pain and distress post-operatively. That was not

in dispute though there was significant dispute as to the factors underlying his symptoms. In any event, by 16 March 2010 Mr Timlin had sufficient concern about his condition, and in particular about certain neurological signs he was exhibiting, including right leg weakness and numbness of the buttock, to direct an urgent MRI scan.

10. There was very significant dispute in the High Court as to what was disclosed by the MRI scan. A number of Mr McCormack's expert witnesses (in particular Professor Marks and Dr Annesley-Williams) contended that, properly read, the MRI scan revealed a developing CES that should have prompted immediate surgical intervention. That was not, however, how Mr Timlin read the MRI scan (and the evidence established that he had discussed the scan in detail with the radiologist, Professor Eustace and with a spinal surgeon colleague, Mr Poynton) and he opted to treat Mr McCormack conservatively. In his Judgment, the Judge explicitly states that Professor Marks' "*factual interpretation"* of the MRI scan was correct. However, he also states that the developing CES and its signs on the scan "*was a marginal thing*" that was and continued to be "*open to significant expert debate*" and that Mr Timlin was not to

be faulted for his interpretation of the scan.[6] He had followed "*the Gold standard*" in discussing the scan with Professor Eustace and Mr Poynton. All of these findings are challenged on appeal/cross-appeal before this Court.

11. On 19 March 2010, following an apparent deterioration in Mr McCormack's neurological signs, Mr Timlin performed further surgery. Again, there was significant dispute in the High Court as to what that surgery revealed. While, in his operation notes, Mr Timlin recorded *"an organised haematoma[7] and fluid haematoma[8] .. deep in the thoracolumbar fascia*" which was "*under pressure and .. the most likely cause of [the Plaintiff's] urinary dysfunction and right leg weakness",* when he came to give evidence, he sought to distance himself from his recorded observations.[9] However, the Judge took the view that as an analysis made at the time, when there was no question of litigation, Mr

[6] Judgment, at paragraph 68.

[7] A solid blood clot

[8] A mixture of blood and cerebral spinal fluid (CSF).

[9] In his evidence Mr Timlin said that the reference to the material being "*under pressure"* did not, in fact, indicate that it was exerting any form of compressive force. He also suggested that Mr McCormack's urinary dysfunction and right leg weakness were in fact attributable to other factors (which evidence was supported by the evidence of Professor Bolger, a consultant neurosurgeon who was one of the expert witnesses who gave evidence for Mr Timlin).

Timlin's opinion was to be given weight and it was the "*main reason*" for his conclusion that Mr McCormack had been suffering from a developing CES, resulting in pressure on his nerves, after the surgery on 11 March 2010.[10]

12. To complete the time-line, Mr McCormack was discharged from the Mater Private on 26 March 2010. He was reviewed by Mr Timlin on 12 May 2010, presenting with significant pain in his right leg. An MRI indicated that the PLIF cage had become dislodged and on 20 May 2010 Mr McCormack had further surgery involving a revision/decompression of L4/5, the removal of the PLIF cage and the placement of local bone graft. That was his seventh spinal surgery and the fourth undertaken by Mr Timlin.

13. Whatever the cause (as to which, as noted, there is strenuous dispute between the parties), it is apparent from the evidence heard by the High Court – including the evidence of Mr McCormack himself and that given by his wife - that he has suffered, and continues to suffer, from a constellation of significant physical and psychological/psychiatric

[10] Judgement, para 56.

difficulties following the operation of 11 March 2010. Mr McCormack is now in his early 60s. He continues to have significant weakness in his right leg, with a right-sided foot drop, which significantly affects his mobility, requiring the use of an ankle splint and walking stick. He continues to experience urinary dysfunction and says that he has suffered from sexual dysfunction since the index operation. He gave evidence of significant depression, including two suicide attempts. Mr McCormack also suffers from what is referred to as "*mechanical*" back pain but it is accepted that this relates to his underlying back problems and is not attributable to any act or omission on the part of Mr Timlin.

14. It will be evident this was an immensely significant claim from the Plaintiff's perspective. It was also, of course, one of great significance to Mr Timlin. Apart from the stress of being sued, his professional reputation was at issue. In *Mangan v Dockeray* [2020] IESC 67, speaking of the rule that a claim in professional negligence should be made only where there was a reasonable basis for it, McKechnie J observed:

> *"The reasons for there being this rule in respect of professional malpractice, are readily understandable, particularly but evidently not solely, in the case of doctors, other individually related persons*

> *and entities similarly involved. Reputation is a crucial component of one's right to earn a livelihood at a personal level, as it is for public confidence in the profession of which that person is a member, at an institutional level." (para 90)*

Accordingly, there was (and is) a great deal at stake on both sides of this litigation.

15. Turning to the claim made by Mr McCormack, the Personal Injuries Summons (issued on 5 March 2012) claimed that a nerve or vessel was severed and/or that there was a bleed or leakage in the course of the revision on 11 March 2010. The Summons pleaded that the operations on 11 and 19 March 2010 were *"sub-standard*." As I have mentioned, no such claim was ultimately pursued at trial. However, the Summons does complain about Mr McCormack's post-operative care following the surgery on 11 March 2010 and that was the focus of the Updated Particulars of Negligence and Breach of Duty delivered on the Plaintiff's behalf on 15 February 2016 in which (*inter alia*) specific complaint is made that the Defendants had failed to carry out an MRI scan until 16 March (2010) "*even though the Plaintiff was having post-operative neurological difficulties*". A further complaint is made to the effect that

the repair of the second dural tear had not been carried out until 19 March "*even though the MRI scan on 16 March had demonstrated a compressive fluid collection that mandated immediate surgery."* As Ms Barrington (for Mr Timlin) noted in the course of her submissions, there is no reference to CES in the Summons or in the subsequent particulars delivered by Mr McCormack.

16. A full Defence was delivered on Mr Timlin's behalf.

17. In due course, the parties delivered schedules and updated schedules of witnesses/expert witnesses and lengthy schedules of expert reports. These include a number of reports from Professor Marks, the consultant neurosurgeon who gave evidence for Mr McCormack. It appears that the first time Professor Marks specifically referred to CES was in his report of 6 January 2018, a point emphasised by Ms Barrington in her submissions to this Court. However, as Mr McCullough (for the Plaintiff) observed in response, in his first report (dated 19 January 2016) Professor Marks clearly criticised the Mr McCormack's management post-operatively and asserted (*inter alia*) that the presence of "*a CSF hygroma and post-operative haematoma"* in the soft tissues of his back was responsible for the neurological deficit he had suffered. He also expressly

complained of the delay between the MRI on 16 March 2010 and the Plaintiff's further surgery on 19 March 2010.

18. There were also a number of reports from Ronald Miller, a consultant urological surgeon who was a witness for Mr McCormack as well as a report from Dr Deborah Annesley-Williams, consultant neuroradiologist, who was produced as a witness for Mr McCormack very late in the day.

19. Mr Timlin produced reports from Professor Ciaran Bolger, consultant neurosurgeon, Professor Stephen Eustace, consultant radiologist and Dr Hugh Flood, consultant urologist, all of whom gave evidence at trial. Mr Timlin, and his colleague Ashley Poynton (another orthopaedic spinal surgeon operating in the Mater Private) were listed in the First Defendant's schedule as witnesses of fact and, in consequence, no expert reports were furnished from them. [11]

[11] Where – as here – a defendant is a doctor or other professional sued for professional negligence, and where it is intended to call that defendant to give evidence to the effect that they acted with appropriate care, it seems rather anomalous that they should be treated as a witness of fact rather than an expert witness for the purposes of SI 391 of 1998, with the consequence that the plaintiff and the court will not have any prior notice of the substance of their intended evidence. Here, if Mr Timlin had been required to provide a report or statement pre-trial, the fact that he had not reviewed the physiotherapy notes might have become evident and any issue arising from that could have been identified and addressed. Difficulty can also arise where a "*witness of fact*" is an expert (as was the case here with Mr Poynton). In such circumstances, the distinction between expert evidence and evidence as to fact can be difficult to maintain (as was illustrated in the course of Mr Poynton's

20. Ms Barrington complained that the claim ultimately advanced in the High Court was radically different to the claim originally pleaded. That complaint is entirely valid. No claim was made at trial of any negligence in the performance of the surgeries on 11 and 19 March 2010. Instead, the claim ultimately advanced by the Plaintiff rested entirely on the alleged delay of Mr Timlin in diagnosing and treating developing CES. That being so, it is entirely unsatisfactory that no such claim was made in the pleadings. Even if the claim being advanced by Mr McCormack was clear from his expert reports, that would not have relieved him of the obligation to plead his case properly: *Morgan v ESB* [2021] IECA 29. In fact, however, the Plaintiff's expert reports were far from clear. With the exception of Dr Annesley- Williams, each provided multiple reports in which a great many complaints were canvassed, many of which, though never formally withdrawn, were not ultimately pursued. Again, this was wholly unsatisfactory and made the Judge's task more difficult than it needed to be.

evidence in chief). In any event, it would appear important that, however such witnesses are categorised, there should be a requirement that the parties and the court be given prior notice of the substance of their intended evidence. This would appear to be an issue that warrants consideration in the context of any reform of the case management procedures applicable to clinical management claims.

21. These proceedings provide concrete proof of the urgent need for reform of the management of clinical negligence claims as recommended in the *Expert Group Report to Review the Law of Torts and the Current Systems for the Management of Clinical Negligence Claims* (January 2020). Of particular significance are the recommendations in the Report regarding the need for identification of the issues well in advance of trial and for meetings of experts in advance of trial so that the areas of conflict can be defined. Here, the issues were never properly defined before trial and there appears to have been no engagement between the expert witnesses. Even in the absence of formal case management procedures applicable to clinical negligence claims – for which, it is clear, there is a pressing need - it was open to the parties to engage, and if necessary to seek the assistance of the High Court, for the purpose of agreeing a sensible pre-trial case management regime. Notwithstanding the absence of detailed rules, the High Court has ample power to manage litigation before it, in the interest of the parties and in the public interest in the effective administration of justice. Here it was in the interest of the parties, as well in the wider public interest, that the issues actually in dispute should be identified as clearly as possible so that the evidence (and in particular the

expert evidence) could be focussed on those issues. An agreed list of issues would also have been of assistance to the Judge.

THE HEARING IN THE HIGH COURT

22. Although, as just observed, the claim ultimately advanced in the High Court by Mr McCormack differed significantly from the claim initially pleaded in his Personal Injuries Summons, I did not understand Ms Barrington to suggest that the Judge ought not to have permitted Mr McCormack to make the case at trial that his injuries were caused by CES resulting from the negligence of Mr Timlin.

23. The hearing in the High Court took place over 12 hearing days. In addition to witnesses of fact (which, as explained, included Mr Timlin and Mr Poynton as well as Mr McCormack and his wife), the Court heard from the expert witnesses identified above (whose evidence went to negligence/liability) and a number of other expert witnesses for each side (whose evidence went to quantum).

24. As will be all too evident from the brief summary above, there was intense dispute about almost every aspect of the claim. There was a very complex clinical background. While there was no dispute as to the applicable legal framework (it being accepted before the High Court, as it was accepted before this Court on appeal, that the relevant principles

were those set out in *Dunne v National Maternity Hospital*), this was, as the Judge noted, a "*complex case both in terms of liability and causation"* with the Court being faced "*with two radically different interpretations of the events by the plaintiff's and defendant's expert witnesses."*[12] The difficulty of the Judge's task is perhaps illustrated by the fact that, on appeal, virtually every one of his significant findings is impugned by one or other party. There was bitter disagreement as to the nature and cause of Mr McCormack's condition, Mr Timlin's contribution (if any) to the development of that condition and whether (as Mr McCormack maintained) Mr Timlin had been negligent to a significant extent or whether (as was submitted on his behalf) Mr Timlin had followed the "*gold standard*" approach. There was also significant dispute – which did not feature before this Court – as to the proper quantum of the Plaintiff's claim, assuming success on liability.

25. Faced with these controversies, the task of the Judge was to consider the conflicting evidence, engage with the key elements of the case being made by each of the parties, and come to a reasoned conclusion as to what occurred and whether it amounted to a breach of duty on the part of Mr

[12] Judgment, at paragraph 2.

Timlin. In my judgment in *McDonald v Conroy* [2020] IECA 239 (with which Kennedy and Ni Raifeartaigh JJ agreed), I discussed in some detail the jurisprudence on the nature and extent of the obligations on a trial judge to make appropriate findings of fact and explain the basis for such findings, including the decisions of the Supreme Court in *Hay v O' Grady* [1992] 1 IR 210 and *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505 and (in the context of expert evidence) *Donegal Investment Group plc v Danbywiske* [2017] IESC 14, [2017] 2 ILRM 1. It will be necessary to refer to this jurisprudence further below.

THE CHALLENGES TO THE JUDGE'S FINDINGS

26. I have already identified a number of the key findings made by the Judge. I will identify any further relevant findings in the context of setting out the specific grounds of challenge advanced by way of appeal and cross-appeal.

Mr McCormack's Appeal

The failure to carry out an MRI prior to 16 March 2010

27. At paragraph 62 of his Judgment, the Judge records that Mr McCormack's "*first complaint*" was that the MRI scan was not carried out until 16 March and ought to have been carried out a number of days previously. He then states that Mr McCormack's experts did not give evidence to that effect and observes that *"in reality this argument was not pressed by the plaintiff and should be rejected."*

28. Mr McCullough says that this point was in fact advanced by his experts, was pressed by way of submission and ought therefore to have been addressed by the Judge. However, he accepted that an earlier MRI would not, of itself, have led to a different outcome because it would not have disclosed more information of developing CES than the MRI scan actually carried out on 16 March. Accordingly, he accepted that, unless Mr McCormack could show that the Judge was incorrect in his analysis of the other issues, an earlier MRI would have made no difference. That being so, this ground of appeal was not pressed and nothing more is said about it here.

The failure to notice the signs of developing CES in the MRI of 16 March, in view of the plaintiff's neurological complaints

The Defendant's knowledge [of the Plaintiff's condition]

29. This is how the Plaintiff's remaining grounds of appeal are expressed in his written submissions. In his oral submissions, Mr McCullough articulated them somewhat differently.

The MRI scan of 16 March 2010

30. Mr McCullough's first point related to the MRI scan. He reminded the Court that, at paragraph 60 of his Judgment, the Judge had found "*the developing CES was there to be interpreted on the films*" taken on 16 March 2011. He also noted that, at paragraph 65, the Judge had explained that he would approach his conclusions as to liability in relation to the MRI scan on the basis of that conclusion and that *"therefore, the factual interpretations of the MRI scans given by Professor [Marks] on behalf of the plaintiff were correct".* He also referred to paragraph 67 of the Judgment where the Judge, having referred to his finding that the Plaintiff had developed CES and that it was "*developing as of 16 March*", stated that *"accordingly, as stated by the plaintiff's experts, the signs in the MRI pointed to that fact*". According to Mr McCullough, these statements meant that the Judge was approaching the issue of liability on the basis "*that Professor Marks was correct as to what was to be seen on the scans*."

31. Notwithstanding this, the Judge had concluded that Mr Timlin had not been negligent in failing to interpret the MRI scan as disclosing developing CES. According to Mr McCullough, this conclusion was

based on two reasons. One was the fact that Mr Timlin had examined the MRI with his colleagues Professor Eustace and Mr Poynton (paragraph 67). The other was that the interpretation of "*signs and shadows on films is a difficult science*" and that the MRI scan was open to "*different interpretations"* (paragraph 67) and that the signs of CES on it were "*a marginal thing"* (paragraph 68). As to the former, Mr McCullough accepted that there was evidence of a discussion (though, he suggested, the evidence did not go so far as to suggest a "*consultation*") resulting in a decision to treat the Plaintiff conservatively. The focus of his submissions was, however, on the second reason given by the Judge. It was, he said, difficult to reconcile that reason with the Judge's conclusion that Professor Marks was correct in his interpretation of the MRI scans. Professor Marks' evidence was, he said, to the effect that the import of the MRI scan was clear, that it showed a postoperative haematoma which represented an "*obvious explanation*" for the Plaintiff's added neurological deficit and, when the scan was done, it was "*absurd*" to maintain the idea that the Plaintiff's condition resulted from neuropraxia.[13]

[13] Neuropraxia is a type of peripheral nerve injury. When Mr Timlin directed the MRI on 16 March 2011, he identified neuropraxia as a possible cause of Mr McCormack's neurological signs, along with *"caudal compression*". According to Mr Timlin, neuropraxia arose in circumstances where the Plaintiff had had had

32. That evidence is summarised in paragraph 39 of the Judgment, where the Judge recorded the Plaintiff's contention "*that the MRI scan if properly read showed a compressive lesion attributable to a collection of CSF and blood which resulted in the dura containing the nerve roots to be squashed to one side creating a 'rugby ball' type shape as opposed to the circle which would be usual and that correlation between the plaintiff's symptoms and the finding of the MRI mandated immediate surgery."* This was, it was suggested, the "*factual interpretations of the MRI scan"* given by Professor Marks that the Judge had expressly found to be "*correct*".

33. Mr McCullough submitted that, the Judge having accepted the conclusions of Professor Marks as to what was to be seen on the MRI, his conclusions in paragraph 68 (and the statements to the same effect in paragraph 67) were in conflict with that position. While it might be that this apparent conflict was capable of explanation, the Judgment contained no such explanation. The Judge had, it was said, failed to follow through on the consequences of his own factual finding (that Professor Marks' interpretation of the MRI scan was correct) when he assessed the other

multiple back/spinal surgeries that caused scarring and where his operation on 11 March would have given rise to nerve irritation and inflammation: see paragraph 54 of the Judgment.

evidence. There was, Mr McCullough said, a contradiction between the finding in paragraph 65 (repeated in paragraph 67) that Professor Marks had correctly interpreted the MRI scan and that in paragraph 68 (and 67) to the effect that the MRI scan was open to interpretation, uncertain and so on.

34. In response to questioning from the Court, Mr McCullough accepted *arguendo* the possibility that the Judge had accepted Professor Marks' evidence that the MRI scan indicated CES but had not accepted that the position was as clear as Professor Marks had suggested in his evidence. But if that were so (so Mr McCullough said) the Judge had failed to address that issue: Professor Marks had said that "*this is as clear as a bell*" and the Judge had failed to address that issue or explain why he had rejected that evidence. There was, he complained, no analysis in the Judgment of the respective views of obviousness on the part of the Plaintiff's experts and difficulty of interpretation on the part of the Defendant's experts; there was simply a conclusion that the MRI scan was open to different interpretations. Mr McCullough cited *McDonald v Conroy* in support of his submission that the Judge's analysis was unsatisfactory and ought to be set aside.

35. In response, Ms Barrington took the Court though the chronology in her written submissions. As at 16 March, the "*big question*" was whether the MRI would show a haematoma. If it did, a "*washout*" (surgical intervention to wash out the area) was indicated; if not, conservative management of Mr McCormack was indicated.[14] On examining the MRI scan, and after discussions with Professor Eustace and Mr Poynton, Mr Timlin concluded that it showed only a CSF (cerebral spinal fluid) collection and no haematoma.[15]Addressing specifically the suggestion that there was an inconsistency or contradiction in the Judge's findings regarding the MRI scan, Ms Barrington suggested that Mr McCullough was exaggerating the significance of the finding made by the Judge at paragraph 65. It did not mean that the Judge considered that everything said about the scan by Professor Marks was correct; he had merely considered that "*there was some evidence*" of developing CES in the scan and clearly also thought (having regard to his ultimate conclusions) that it had not been negligent not to see that evidence. While the Judge believed the signs were there, it was "*perfectly reasonable*" for Mr Timlin

[14] See Mr Timlin's entry in the medical notes to that effect.

[15] Mr Timlin explained in his evidence that CSF was not of major concern because it was not expansile and therefore did not cause compression. Professor Marks disagreed sharply with that view in his evidence. Their disagreement was not resolved by the Judge.

not to consider that was so and to believe that in fact there was no compression of the caudal root nerves. These were, Ms Barrington emphasised, *"fine, fine clinical and expert judgment calls"* and the call made by Mr Timlin had been made after careful consideration and discussion with Professor Eustace and subsequently Mr Poynton, who had all brought to bear "s*ignificant expertise*" – unlike Professor Marks, who (so it was said) did not have equivalent expertise or experience. Mr Timlin had been alive to the possibility of developing CES and had considered it carefully. Of course, none of this was said, at least expressly, by the Judge.

The Clinical Information known to Mr Timlin as of 16 March 2010

36. The second argument urged on the Court by Mr McCullough took as its starting point a different aspect of paragraph 65 of the Judgment, where the Judge states as follows:

> *"The plaintiff contends that I should examine the evidence in relation to the MRI in conjunction with the plaintiff's developing symptoms. <u>This I do.</u>"* (my emphasis)

37. Mr McCullough says that the Judge failed to undertake this analysis, even though it was a fundamental part of Mr McCormack's case at trial that the MRI had to be looked at with the background knowledge as to his developing neurological symptoms. Mr McCullough brought the Court to aspects of the evidence in the High Court. Mr Timlin was or ought to have been aware that Dr Obinwa had identified an issue as to bladder dysfunction/urine retention on 14 March 2010 (when it was noted that the Plaintiff was retaining 10 times the normal volume of urine after voiding which the Judge accepted was *"an abnormally large volume of urine retained*" and was a matter "*of concern"*[16]). That was, according to the Plaintiff's experts, *"a 'red flag' sign for impending CES*".[17] Mr Timlin was also aware (so it was said) of other neurological signs that Mr McCormack was suffering as of 16 March, including right foot weakness and numbness in the buttock and perianal area. These (according to Mr McCormack's experts) pointed directly to developing CES. Though he had (correctly) indicated that he would look at the MRI in conjunction with the Plaintiff's symptoms, the Judge had failed to do so and had instead focused solely on the MRI. Again, it is suggested that, in this

[16] Judgement, at paragraph 34.

[17] Judgment, at paragraph 35

respect, the Judge failed to comply with the principles set out in *McDonald v Conroy* and the authorities referred to in it.

38. Ms Barrington, in response, accused Mr McCullough of a "*reductionist reading*" of the Judgment. The evidence, she said, was that the clinical issues had been considered but there was disagreement as to the significance of those issues. Ms Barrington brought the Court to paragraph 74 of the Judgment where the Judge refers to Mr Timlin's examinations of Mr McCormack on 11 and 13 March (on each occasion finding him well). Noting that Mr Timlin ordered films in relation to Mr McCormack's urinary retention on 13 March, the Judge observed that the experts differed as to whether the retention problems were "*red flags*" or likely complications of surgery (differences that, Ms Barrington accepted, the Judge did not resolve) but it was clear that Mr Timlin had kept those problems in mind as by 16 March he ordered an MRI scan.

39. Mr McCullough said in response that this paragraph related to the period *before* the MRI scan was done and did not address the point he was making as to the need to have regard to the clinical information when interpreting the scan. Mr McCormack's experts had contended in detail and by reference to particular clinical signs that, taken together with the

results of the MRI, they indicated a developing CES. Mr Timlin's experts had given contrary evidence. That conflict could not be resolved without any analysis of the respective merits of that evidence but though the Judge had said he would do this, he had failed to do so.

40. At one level, at least, that does not appear to have been in dispute. In the course of addressing the next point (relating to the physiotherapy notes) Ms Barrington submitted that the Judge's finding that there was evidence of caudal compression from the MRI was the extent of his findings in relation to the existence of CES and he had not done the exercise of determining who was right about whether or not "*individual components*" such as urinary retention, numbness and so on were or might be signals of developing CES.

The Clinical Information not known to Mr Timlin – the physiotherapy notes

41. This was the third and final point made by Mr McCullough. It requires a little explanation.

42. Following his operation on 11 March, the Plaintiff received physiotherapy care within the Mater Private. The physiotherapist's notes were disclosed pre-trial and were referred to by the Plaintiff's expert witnesses in their pre-trial reports as part of their narrative[18] and in their evidence at trial.[19] On 12 March, the physiotherapist noted that the Plaintiff was experiencing numbness in both buttocks. On 15 March, the physiotherapist noted that the Plaintiff was "*still numb in buttocks*", needed a urinary catheter and an enema and noted "*query caudal compression*". Numbness in both buttocks was again noted on 16 March.

43. In his evidence, Mr Timlin said that it was not his practice to "*routinely*" read the physiotherapy notes in a patient's chart.[20]

44. The Judge accepted that Mr Timlin had not reviewed the physiotherapist's notes.[21] That finding was not challenged on appeal. Nonetheless, the Judge went on to express views about the significance

[18] See, for instance, Professor Marks' Report of 24 October 2018 at para 5.8 and Mr Miller's letter of 23 October 2018. The physiotherapy notes are also referred to in Professor Bolger's Report at page 15.

[19] Day 5, page 62-63 and again at 82 and 106 (Professor Marks).

[20] Day 8, page 82. Mr Timlin also gave evidence, in answer to a question from the Judge, that he did not "*routinely*" read the nursing notes (Day 8, page 81)

[21] Judgment, paragraph 36.

of these notes. At paragraph 32 of his Judgment, the Judge records that "*as early as the day after the operation the physiotherapy notes record problems in both buttocks*". That was, he said, "*suggestive of at least possible nerve compression."* At paragraph 35, he refers to the notes for 15 March as indicating that the Plaintiff was complaining of numbness in both buttocks, suggestive of "*saddle anaesthesia"* (which, it was common case, is a "*red flag*" for CES)[22] and at paragraph 36 he refers again to these notes as well as the notes for 16 March. He then went on to make findings that Mr McCullough placed particular reliance on:

> *"72. ..... I have little doubt that had Mr Timlin been made aware of the physiotherapist's report and the potentially alarming findings that his concerns that the plaintiff might be developing a CES would have been considerably heightened and he would have acted sooner."*

[22] The Judge also states in this paragraph that the Plaintiff had given evidence - which he accepted - that he had made similar complaints to the nurses (a point repeated at paragraph 72). The Judge noted that "*unfortunately*" those complaints had not been recorded in the nursing notes. Given the Judge's evident view as to the significance of this information, it was indeed "*unfortunate*" that (as the Judge found) *"the nursing notes were .. anodyne"* (paragraph 72) and that "*his complaints and concerns were not fully noted and … were not passed on to Mr Timlin*." (Judgement, at paragraph 81)

> *"80 Had there been a communication of the findings by the physiotherapist of neurological signs in both buttocks as early as 11th March and had he delayed surgery until 19th, then my determination would have been different."*

According to Mr McCullough, the "*determination*" referred to in paragraph 80 was the Judge's determination in the final sentence of paragraph 79 that Mr Timlin could not be faulted "*for his decisions",* including not deciding to operate until 18 March, with the operation being carried out as soon as possible thereafter on 19 March (see paragraph 77 of the Judgment). In other words, Mr McCullough said, if Mr Timlin *had* been aware of the physiotherapy notes and had nonetheless waited until 19 March to operate, the Judge would have found him to have been negligent.

45. Of course, the evidence of Mr Timlin (which was accepted by the Judge) was that he had not seen the physiotherapist's notes. But Mr McCullough argues that, in the circumstances here, Mr Timlin was under an obligation to consider the *"complete clinical picture*". Even if a consultant surgeon might not be expected to routinely read every nursing and physiotherapy note, in circumstances where, on 16 March 2010, Mr Timlin had

identified "*caudal compression*" as a differential diagnosis, it was incumbent on him to review "*the whole of the records*" including the physiotherapy notes.

46. An immediate difficulty with that argument is that it was not made in the High Court. Although the Court was brought to various high-level statements in the evidence as to the need to "*take everything into account"*, the fact is that Mr McCormack did not seek to make the case in the High Court that Mr Timlin was obliged to review the physiotherapy notes, whether generally or by reason of the particular circumstances presented here. While the closing submissions made on Mr McCormack's behalf (which, by agreement, were made in writing) placed considerable reliance on what was said in the physiotherapy notes, no argument to the effect that Mr Timlin was under a duty to review those notes appears to have been advanced (and, in the absence of any evidence to that effect, it is difficult to see how such an argument might properly have been made).

47. However, Mr McCullough submitted, this was not due to any failure or oversight on the part of the Plaintiff but rather arose from the fact that Mr McCormack only became aware that Mr Timlin had not reviewed those notes when he came to give his evidence. He complains that, even though

his experts – and in particular Professor Marks – placed reliance on the physiotherapy notes in their evidence, it was not put to them that, in fact, Mr Timlin had not seen them nor was it suggested that it was acceptable that they had not been reviewed by him. That was, he says, a breach of the rule in *Browne v Dunn* (1893) 6 IR 67 which was recently considered by the Supreme Court in *McDonagh v Sunday Newspapers* [2017] IESC 46; [2018] 2 IR 1. The default of Mr Timlin had rendered the outcome of the High Court trial unsatisfactory and required that there be a retrial.

48. In response to questioning from the Court, Mr McCullough properly acknowledged that when Mr Timlin gave evidence to the effect that he had not reviewed the physiotherapy notes, objection could have been taken on the basis that such evidence had not been flagged and had taken the Plaintiff by surprise. He accepted that the Plaintiff could (at least to some extent) have sought to explore in cross-examination of Mr Timlin and/or his expert witnesses, whether his failure to do so was appropriate practice and could, if necessary, have applied to recall his own experts to give evidence on that issue. That would have required leave from the Court but, if real unfairness could be demonstrated, the Court would surely have acceded to such an application. There were procedural steps that could have been taken that might have remedied the problem.

However, Mr McCullough submitted, it was not apparent at the time that the physiotherapy notes would have the significance ultimately attributed to them by the Judge. In any event, the fundamental point was that the situation that arose had been the fault of Mr Timlin and it would in the circumstances be unfair to Mr McCormack to deny him the opportunity to make the case that Mr Timlin ought to have reviewed the physiotherapy notes and ought to have been aware of the significant information recorded in them concerning the condition of Mr McCormack.

49. Ms Barrington responded to this aspect of the appeal by expressing scepticism as to the significance of the physiotherapy notes. She went on to suggest that the statements relied on by Mr McCullough had to be read narrowly and that the Judge was simply saying that, if Mr Timlin had been made aware of what was in the physiotherapy notes, it might have given rise to additional questions concerning a possible issue of caudal compression. The Judge was not to be understood as suggesting that those notes were "*sufficient to upend all the other clinical pictures."* Such a conclusion would not make sense having regard to the other conclusions the Judge had reached including those at paragraphs 67 -68.

50. While accepting that Mr McCormack's expert witnesses appeared to have proceeded on the footing that Mr Timlin had had access to the physiotherapy notes, Ms Barrington stressed the fact that, when Mr Timlin gave the evidence he did (to the effect that he did not routinely review such notes, that he relied on his examinations and expected that any significant issues would be brought to his attention), it was not challenged in any way. There was no argument made that, in not reviewing the physiotherapy notes, Mr Timlin had departed from the appropriate standard of care as explained in *Dunne v National Maternity Hospital*. There simply had not been any debate on that issue.

The First Defendant's Cross-appeal

51. While a significant number of grounds were canvassed in Mr Timlin's Respondent's Notice, the focus of Ms Barrington's submissions was on the Judge's finding that the Plaintiff had developed post-operative CES at all and that this was the cause of his current complaints. She argued that there was no credible evidence that the Plaintiff was suffering from a neuropathic bladder (a bladder that does not function properly due to a

neurological condition or spinal cord injury). All of the evidence (and in particular the urodynamics tests the Plaintiff had undergone in 2010 and 2014/2015 about which Mr Flood, the urologist who was a witness for Mr Timlin, gave extensive evidence) indicated that the Plaintiff had a normal bladder and, on the undisputed evidence, it is not possible to have normal bladder function if the caudal nerves have been compromised. The only evidence to the effect that the Plaintiff did not have a normal bladder was that of Professor Miller and, it was said, the stated basis for his evidence that the Plaintiff's bladder was neuropathic despite the normal urodynamics results had been demonstrated to be incorrect.[23]

52. While the Judge had referred to the urodynamic studies and noted Mr Timlin's submission that they demonstrated that Mr McCormack's urinary problems did not result from any nerve compression, Ms Barrington submitted that he had failed to address this point properly in

[23] Mr Miller had relied on the fact that at the time of the 2014/2015 tests, the Plaintiff was receiving spinal cord stimulation when in fact he was not. He also suggested that the medication being taken by the Plaintiff would have had the effect of masking his neuropathic bladder (thus leading to the apparently normal urodynamics results). Mr Miller placed particular reliance on the fact that at the relevant time Mr McCormack was taking Mirabegron/Betmiga for urinary frequency/incontinence, which he said was an anti-cholinergic (a drug that blocks or inhibits acetylcholine in the parasympathetic nervous system). Mr Flood gave evidence that Mirabegron/Betmiga was not, in fact, an anti-cholinergic and that neither it nor any of the other medication Mr McCormack was taking could produce a normal neurodynamic result in a patient with a neuropathic bladder.

his Judgment and had erred in the conclusions he reached regarding developing CES.

53. Mr Timlin also says that the Judge erred in his interpretation of the MRI scan. The only witness to give evidence to the effect that there was a haematoma present on the scan was Professor Marks. Professors Eustace and Bolger were "*categorical*" that no haematoma was present and neither was challenged on that evidence. It is said that the First Defendant's experts had greater expertise and/or experience than the Plaintiff's experts.

54. In response to the cross-appeal, it was Mr McCullough's turn to seek the protective shelter of *Hay v O' Grady*. Mr Miller had given evidence that Mr McCormack was indeed suffering from a neuropathic bladder. He never resiled from that opinion and his evidence was at all times that the effect that the medication being taken by Mr McCormack had affected the urodynamics tests. While Mr Miller had been in error in suggesting that Mr McCormack had been using a sacral cord stimulator, his evidence was that the same point arose from the use of the spinal cord stimulator by Mr McCormack. Ultimately, there was conflicting evidence which it was the job of the Judge to assess. While he did not demur from a

suggestion from the Court that the Judge had not in fact assessed the evidence Mr McCullough submitted that, even if that was so, the Court was not entitled to reject Mr Miller's evidence as it had been invited to do.

55. On the challenge to the Judge's findings about the MRI, Mr McCullough drew the Court's attention to the evidence given by Dr Annesley-Williams[24] to the effect that the MRI showed a mixture of blood and CSF that was compressing the thecal sac and the filar roots (otherwise known as the cauda equina) and that this was the cause of the cauda equina here. Evidence to the same effect had been given by Professor Marks. The suggestion that only Professor Marks had identified a haematoma was a matter of language only, it was suggested. Everyone agreed that it was a collection and the Plaintiff's evidence was that it comprised blood and CSF. In any event, Mr Timlin himself had noted a haematoma when he operated on 19 March. As regards the argument that Mr Timlin's experts were better qualified, that was not accepted as a matter of fact and in any event did not provide any basis on which this Court could interfere with the Judge's findings.

[24] At Day 5, pages 10-17.

DISCUSSION

Preliminary

56. The Judge here heard evidence from a large number of witnesses, over 12 hearing days. The medical evidence was complex and, as I have already observed, there were many areas of significant dispute. In making the findings he did, the Judge had the advantage of seeing and hearing the witnesses and this Court's role in reviewing those findings is a limited one: *Hay v O' Grady* [1992] 1 IR 210, at 217.

57. However, as I noted in *McDonald v Conroy* (at para 17), the appellate self-restraint mandated by *O' Hay v O' Grady* has an important *quid pro quo*, namely the requirement for *"a clear statement .. by the trial judge of his findings of fact, the inferences to be drawn, and the conclusions to be drawn*." The decision of the Supreme Court in *Doyle v Banville* [2012] IESC 25, [2018] 1 IR 505 has developed this aspect of *Hay v O' Grady* significantly.

58. Of course, the exception must not be allowed to swallow up the general rule. Accordingly, appellate courts must be astute not to permit *Doyle v*

Banville- inspired complaints of *"non-engagement*" with the evidence to be used as a device to circumvent the principles in *Hay O' Grady*: *Leopardstown Club Limited v Templeville Developments Ltd* [2017] IESC 50; [2017] 3 IR 707, per McMenamin J at paragraphs 109-111. Only complaints that go *"to the very core, or essential validity, of [the trial judge's] findings*" will suffice (para 110).

59. What is required of a trial judge is that their judgment "*engages with the key elements of the case made by both sides and explains why one or other side is preferred*": *Doyle v Banville*, at paragraph 10. Where a case turns on "*very minute questions of fact*" as to how an accident or injury occurred – and this case is such a case *par excellence* – "*then clearly the judgement must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred*.": *ibid*. The obligation here is essentially functional: elaborate analysis is not necessarily required. What is required is that the parties know why the court concluded as it did or (as it was put by Irvine J in *O' Driscoll v Hurley* [2015] IECA 158, at para 19) "*why they won or lost."*

60. The Supreme Court's decision in *Donegal Investment Group plc v Danbywiske* [2017] IESC 1427, [2017] 2 ILRM 1 is also instructive here, as it addresses the application of the principles in *Hay v O' Grady* and *Doyle v Banville* to expert evidence and to findings made by a trial judge on the basis of such evidence. At the end of his judgment (with which the other members of a 7 judge court agreed), Clarke J made the following important observations:

> *"8.8. It is, in my view, important to emphasise that the exercise which an appellate court has to carry out when scrutinising the judgment of a trial judge is not one to be conducted in a mechanical way so as to encourage parties to attempt to find some element of the findings of the trial judge which is said to be insufficiently explained. It must be recalled that a judgment is arrived at the end of a very open and transparent trial process. The case will have been fully pleaded, the evidence fully heard and submissions made on both sides. In many cases, and in particular in the Commercial Court, there will be further procedures including the exchange of witness statements and expert reports. Against that backdrop it will often be possible readily to infer why a particular finding was made even if there is no express statement in the judgment. The parties*

will know how the case ran. An appellate court can read the record of the case. The judgment needs to be read in the light of the case as made and defended before the trial judge.

8.9. But there can be cases where it is just not possible to ascertain, with any reasonable degree of confidence, the reasons why a trial judge adopted a particular approach in relation to an important part of the facts. Where a finding of fact is of significant materiality to the overall conclusion of the case and where the reasons of the trial judge are neither set out in the judgment or can safely be inferred from the run of the case and the structure of the judgment itself, then an appellate court is unable properly to carry out its task of scrutinising the judgment to see whether the findings of fact are sustainable in the light of the principles set out in cases such as Hay v. O'Grady and Doyle v. Banville. In such circumstances an appellate court will have no option but to allow an appeal to the extent appropriate and take whatever further steps may be required in all the circumstances of the case in question."

61. It was common case that these are the principles to be applied by the Court in determining the appeal and cross-appeal here. There is, however, no agreement as to how they should apply or what the outcome of their application should be. The only common ground is that each party submits that, while the favourable findings made by the Judge were correctly made and cannot be interfered on appeal, the adverse findings made by him are unsustainable and ought be set aside.

62. What the authorities make abundantly clear, however, is that very significant weight is to be given to the Judge's findings and conclusions and, as McMenamin J emphasised in *Leopardstown Club Limited v Templeville Developments Ltd,* there is a "*high threshold*" for intervention on appeal.

The Principles in *Dunne v National Maternity Hospital*

63. The parties were able to agree that the relevant principles were those set out by Finlay CJ in *Dunne v National Maternity Hospital*, at pages 109-110, as follows:

"1. The true test for establishing negligence in diagnosis or treatment on the part of a medical practitioner is whether he has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.

2. If the allegation of negligence against a medical practitioner is based on proof that he deviated from a general and approved practice, that will not establish negligence unless it is also proved that the course he did take was one which no medical practitioner of like specialisation and skill would have followed had he been taking the ordinary care required from a person of his qualifications.

3. If a medical practitioner charged with negligence defends his conduct by establishing that he followed a practice which was general, and which was approved of by his colleagues of similar specialisation and skill, he cannot escape liability if in reply the plaintiff establishes that such practice has inherent defects which ought to be obvious to any person giving the matter due consideration.

4. An honest difference of opinion between doctors as to which is the better of two ways of treating a patient does not provide any ground for leaving a question to the jury as to whether a person who has followed one course rather than the other has been negligent.

5. It is not for a jury (or for a judge) to decide which of two alternative courses of treatment is in their (or his) opinion preferable, but their (or his) function is merely to decide whether the course of treatment followed, on the evidence, complied with the careful conduct of a medical practitioner of like specialisation and skill to that professed by the defendant."

64. These principles apply equally to diagnosis cases, though in practical terms they may apply somewhat differently in that context, as for instance where there are not two schools of thought about how to go about a particular diagnosis: per Clarke CJ (with whose judgment the other members of the Supreme Court agreed) in *Morrissey v Health Service Executive* [2020] IESC 43, at para 6.11. In that situation, and where there was no issue concerning the adoption of a common practice that was

inherently defective, the question was *"what would an ordinary competent professional of the type and skill of the individual concerned have done, and did the professional who is sued meet that standard.:* at para 6.12

Mr McCormack's Appeal

65. I will address Mr McCormack's appeal before looking at Mr Timlin's cross-appeal. I will deal firstly with the arguments made regarding the interpretation of the MRI scan of 16 March 2010 and the issue of the clinical information known to Mr Timlin at that time. I will then consider the issue of the physiotherapy notes.

The MRI scan

66. The Judge made a number of findings which are critical to the assessment of this aspect of the appeal:

- *That as of 16 March 2010. Mr McCormack was suffering from a developing CES resulting in pressure on his nerves* (Judgment, paragraph 56)

This is obviously a significant finding. Mr Timlin had forcefully contended that Mr McCormack did not at any point suffer from CES in any degree and that any apparent signs or symptoms of developing CES were in fact attributable to other causes such as neuropraxia or fibrosis (scarring arising from previous surgeries). The Judge clearly did not accept that contention. The "*main reason*" given by the Judge for his conclusion – the observations and opinion expressed by Mr Timlin at the time of the further surgery on 19 March 2010 – necessarily involved the rejection by the Judge of the evidence of Mr Timlin insofar as that it differed from his contemporaneous operative note. It also, as is clear from paragraph 56 itself, involved the rejection of an aspect of the evidence of Professor Bolger.

- As of 16 March 2010 "*the developing CES was there to be interpreted on the films"* (paragraph 60)

Again this is a finding of critical importance given the evidence of Mr Timlin and his expert witnesses to the contrary effect.

- *"the factual interpretations of the MRI scans given by Professor [Marks] … were correct"* (paragraph 65)
- *"As stated by the plaintiff's experts, the signs in the MRI pointed to [developing CES]"* (paragraph 67)

While very terse in their terms (an issue to which it will be necessary to return to), these are findings of critical significance for Mr McCormack's claim. Professor Marks had given his interpretation of the MRI scans in his various pretrial reports and in his oral evidence. [25] In broad terms, he interpreted the MRI scan as disclosing compression of the cauda equina indicative of developing CES and the Judge clearly concluded that this interpretation of the MRI was "*correct*." It follows, necessarily, that the

[25] In his report of 19 January 2016, Professor Marks said that the appearances on the MRI were "*those of a haematoma/CSF collection within the soft tissues that appear to be causing some distortion and compression of the roots of the cauda equina*". In a later report dated 6 January 2018, he stated that the MRI "*showed not only the presence of a CSF collection which was space occupying, but also a post-operative haematoma in the soft tissues of the back"* (para 4.20) and disclosed "*surgically remediable pathology which should have subject to emergency surgery to address it".* (para 4.29) In his oral evidence, he stated variously that the MRI showed a "*compressive lesion which we know subsequently is due to a mixture of blood and cerebrospinal fluid"* (day 5, page 70), *" a compressive region lesion"* and *"something ..compressing the roots of the cauda equina and that should be evacuated"* (Day 5, 76). There was, he said*, "no doubt in my mind that this was a compressive lesion causing pressure on the roots of the cauda equina"* (Day 5, page 77)

Judge considered that Mr Timlin and his expert witnesses had failed to interpret the MRI *correctly*. It does not follow, of course, that Mr Timlin's interpretation of the scan was negligent but it is clear that the Judge considered that his interpretation had not been "*correct*". It is also clear – again on the basis of necessary implication rather than any express language in the Judgment - that, in arriving at that conclusion, the Judge must have preferred the evidence of Professor Marks over the evidence of Mr Timlin, Professor Eustace and Professor Bolger.

As the second of these two findings makes clear, it was not solely the evidence of Professor Marks that the Judge appears to have preferred. The "*plaintiff's experts*" that gave evidence that the "*the signs in the MRI pointed to [developing CES]"* also included Dr Annesley-Williams. Her evidence was that the MRI clearly showed a CSF/blood collection causing significant compression of the filar roots/*cauda equina*.[26] In contrast, the evidence of Mr Timlin and his experts was that there was nothing in the MRI that pointed to developing CES. Mr Timlin explained that "*the thing [he] wanted to outrule in the scan was a query*

[26] See, inter alia, Day 5, at pages 12-13, 17-18, 19-20, 23, 28, 38.

compression of the caudal nerve root"[27] and his evidence was the scan had been "*very reassuring".*[28]

67. As already noted, the parties disagree as to the scope of the Judge's endorsement of the evidence given by Professor Marks. It is true, as Ms Barrington observed, that the Judge did not expressly endorse all aspects of his evidence but it is clear that the Judge considered that Professor Mark's interpretation of the MRI was the correct one and (it seems ineluctably to follow) that Mr Timlin (and Professor Eustace) had misread it in March 2010. Having accepted Professor Marks' evidence on that critical point, it is reasonable to expect that, if the Judge had rejected other aspects of his evidence, he would say so and explain why. There is no such indication in the Judgement and at no point does the Judge identify <u>any</u> issue where he preferred the evidence of Mr Timlin and/or his expert witnesses over the evidence of Professor Marks or Dr Annesley-Williams.

68. Having said all of that, the extremely terse nature of the Judge's findings on the critical and hugely controversial issue of what was disclosed by

[27] Day 8, page 100.

[2828] Day 8, page 99 (repeated at Day 9, page 12)

the 16 March MRI scan is rather surprising. That issue had been the subject of detailed and conflicting expert evidence. Doctor Annesley-Williams, Professor Marks, Mr Timlin, Professor Eustace and Professor Bolger had, successively, given their views as to *what* was shown on the MRI scan and *whether* what was shown was, or was not, a sign of developing CES. Each had explained in significant detail the basis for their views. On the basis of that evidence a number of issues arose. Without attempting to be exhaustive, these issues included the following:

- What was the nature of the fluid "*collection*" shown on the MRI? (That the MRI showed a significant collection was one of the few points that everyone agreed on) Was it solely CSF? Was it a mixture of CSF and blood? Was a haematoma visible on the MRI? This issue was the subject of a great deal of debate and dispute.

- What was the significance (if any) of the precise make-up of that collection? If the collection was a CSF collection, did it follow (as Mr Timlin contended) that it could not cause nerve root compression? There was a direct conflict on the evidence on this point.

- Did the MRI show *compression* (as opposed to *clumping* only) of the nerve roots? Again, this was the subject of sharp disagreement between the experts.

- What did the MRI show regarding the position and shape of the thecal sac and what was the significance of that? If the MRI showed compression of the thecal sac (and, as the Judgement recorded, Mr McCormack's experts said that the MRI showed that the thecal sac had been pushed to one side and squashed into a rugby ball shape as a result of pressure), did it follow that the nerve roots were also subject to compression? Again, this was an intensely controversial issue.

- Did the MRI scan show what was revealed operatively on 19 March (as Mr McCormack submitted)? This was another matter of significant dispute. Apart from the issue as to what was to be seen on 19 March (in respect of which the Judge found for the Plaintiff), there was an issue as whether one could properly work backwards from what was seen on 19 March and infer that the position on 16 March had been the same.

- More generally, did the MRI show signs of developing CES/caudal compression and, if so, what precisely were those signs?

None of these issues were directly addressed or resolved by the Judge. In my opinion, the failure to address these issues clearly is significant both for Mr McCormack's appeal and for Mr Timlin's cross-appeal.

69. In any event, it appears to me that, for the purposes of considering Mr McCormack's appeal, the findings made in his favour regarding the correct interpretation of the MRI must be given credit at their full face value and the critical issue at this point is whether, having regard to those findings, Mr McCormack has succeeded in identifying any error on the part of the Judge in proceeding to dismiss his claim as he did for the reasons set out in paragraphs 67 and 68 of his Judgment.

70. In those paragraphs, the Judge finds that Mr Timlin's misinterpretation of the MRI was not negligent. As a matter of principle, of course, such a finding was open to the Judge: professional *error* is not to be equated with professional *negligence*. However, in circumstances where the Judge had found error, it was important that any such finding should be

adequately explained. This was at the very core of Mr McCormack's claim. He had asserted that the MRI scan disclosed developing CES. Mr Timlin and an array of expert witnesses had given evidence that such was not the case. Having prevailed on that critical issue – which appears in reality to have been the principal battleground in the High Court Mr McCormack was entitled to a clear explanation of why, nonetheless, his claim failed. He was, as the authorities suggest, entitled to be told why, though he had apparently won the battle, he had nonetheless lost the war.

71. I do not consider that the Judge's statements at paragraph 67 and 68 provide an adequate explanation for that outcome. While the Judge refers to the interpretation of "*signs and shadows on film*" being a "*difficult science"* and the MRI being open to *"different interpretations*", it is notable that the Judge obviously felt in position, on the evidence he had heard, to reach an conclusion – expressed in unqualified terms - that Professor Marks' interpretation was correct (from which it followed that Mr Timlin's interpretation was not correct). He clearly considered that the issue was sufficiently clear-cut to warrant such a conclusion and that in itself might be thought to cut across any suggestion that the MRI was reasonably open to different interpretations or that it was a "*marginal thing*". In fact, none of the witnesses appears to have made any such

suggestion. All were adamant that their interpretation of the MRI was the correct one and that there was no proper basis for any contrary interpretation.

72. Significantly, neither Mr Timlin nor Professor Eustace appear to have suggested in their evidence that the interpretation of the MRI had involved any "*marginal*" call. While Mr Timlin did suggest at one point in his evidence that the MRI images were "*very difficult to interpret"*[29], he ultimately considered them to be "*very reassuring".*[30] Given that the entire purpose of the MRI scan was to "*outrule*" a differential diagnosis of caudal compression/CES, Mr Timlin was presumably looking for clarity. Unless he could be confident of his interpretation of the MRI scan, then presumably Mr Timlin would not have been "*very assured*" by it and would not have decided against immediate surgery as, in fact, he did.

73. Equally, no case appears to have been advanced by Mr Timlin that his interpretation of the MRI was reasonable even if erroneous. That case was not advanced by Mr Timlin or his expert witnesses in their evidence, it does not appear to have been put to Mr McCormack's witnesses and it

[29] Day 8, page 96

[30] Day 9, page 21.

does not appear to have been advanced in his closing written submissions either. As I have noted already, the major point of conflict throughout the High Court hearing appears to have been was whether Mr McCormack was suffering from developing CES as of 16 March 2010 and, if so, whether it was identifiable on the MRI scan, read in conjunction with the relevant clinical history.

74. Professor Marks also explained in his evidence that there can be difficulty in interpreting early post-operative scans and emphasised in that context that the exercise of reading such scans must be undertaken in conjunction with assessing the relevant clinical/neurological observations (and that is, of course, the focus of Mr McCullough's second point).[31] However, he went on immediately to state that "*in this particular case*, *[the deterioration in the Plaintiff's condition] .. is being caused by a space occupying lesion compressing the roots of the cauda equina."* (my emphasis) and the thrust of his evidence as a whole (and the evidence of Dr Annesley-Williams also) was to the effect that the picture disclosed by the MRI here was clear, with Professor Marks going so far as to suggest that, in light of the MRI, it was "*absurd*" to hold to the view that

[31] Day 4, page 100. Also page 96.

the Plaintiff's difficulties were due to neuropraxia.[32] On the Plaintiff's evidence, therefore, Mr Timlin had missed obvious, critically important signs in the MRI. *Prima facie,* that evidence was accepted by the Judge. Certainly, the Judge does not comment critically on that evidence or suggest that he was rejecting any of it. If that was the case, it was something that required to be addressed explicitly.

75. Ms Barrington invites the Court to infer from what the Judge says at paragraphs 67 and 68 that he must have rejected the contention that the interpretation of MRI was clear and that he had, implicitly but necessarily, found that Mr Timlin was entitled to reach the view that the MRI did not show caudal compression. However, that would not be an appropriate or legitimate exercise in my view. This was the very heart of the dispute before the High Court. Having accepted, without apparent qualification, the evidence of Mr McCormack's experts as to the correct interpretation of the MRI, it was incumbent on the Judge to explain, in clear terms, why Mr Timlin's failure to read the MRI correctly was not negligent and to identify the evidential basis for that conclusion. Such a crucial finding is not properly a matter for inference or implication. In

[32] Day 7, pages 55 and 56.

any event, I do not think it is possible to draw any such inference here. While, as Clarke J observed in *Donegal Investment Group plc v Danbywiske*, the parties of course know how the case ran (and the transcript of the hearing is available to this Court), given the conflicts in evidence here, and given the apparently unqualified preference for the Plaintiff's evidence on the issue of the interpretation of the MRI scan, there is no proper basis on which the parties or this Court could safely draw the inference Ms Barrington suggests. In my view, the Court cannot safely *"fill in the gaps"* in the Judgment, or reformulate the findings made by the Judge as to the interpretation of the MRI, in the circumstances here.

76. Aside from the point that the findings at paragraphs 67 and 68 cannot readily be reconciled with the Judge's stated acceptance of the Plaintiff's evidence on the issue of the interpretation of the MRI, the basis for those findings is not, in my opinion, sufficiently explained. It was, of course, the case that there was significant conflict between the witnesses as to the proper interpretation of the MRI. But it does not necessarily follow that both contending interpretations were *ipso facto* reasonable or that the correct interpretation was "*marginal*". Some further explanation is required. Equally, that the error which the Judge found Mr Timlin to have

made was in a sense a collective error, involving Professor Eustace and Mr Poynton also, does not, in itself, necessarily lead to the conclusion that the error was made without fault.[33] If the fact that Mr Timlin's interpretation of the MRI scan was arrived at following discussion/consultation with Professor Eustace and Mr Poynton was, in itself, a complete answer to Mr McCormack's negligence claim, it would seem to follow that the issue of what the MRI scan actually disclosed and how, objectively, it ought to have been interpreted, were matters with which the Court did not need to be concerned at all, a proposition wholly at odds with the way that the case actually ran in the High Court.

77. The essential complaint made by Mr McCormack here was that Mr Timlin failed to diagnose his condition accurately on 16 March as a result of misinterpreting the MRI (and, relatedly, by not having proper regard to Mr McCormack's clinical condition in that context). In my view, it was essential for the Judge to identify clearly what the MRI scan showed by

[33] The evidence in the Court was that, in this area of medicine, the consultant surgeon, rather than the radiologist, would ultimately make the call as to the interpretation of MRI scans, though they would have regard to the views of the radiologist: see for instance the evidence of Mr Poynton (Day 4, pages 16-17) and Professor Bolger (Day 12, Pages 72-74). Mr Timlin gave evidence to the same effect (Day 8, page 96). Thus, while discussion between consultant surgeon and radiologist appears to have been routine, the decision was one made by the surgeon.

way of signs of developing CES and then address how it was that Mr Timlin failed to identify those signs. In my opinion, it was only at that point, when the nature and extent of Mr Timlin's error had been properly identified, that an assessment could properly be made as to whether that failure involved fault or not. Any such assessment would also need to have regard to the context in which the MRI scan was taken (the need to outrule a differential diagnosis of developing CES). That was the whole purpose of having the MRI scan done. Any assessment of Mr Timlin's conduct would have to take into account the risks to Mr McCormack that any misinterpretation of the MRI might involve. Any misinterpretation of the MRI that led to the erroneous conclusion that Mr McCormack was not suffering from developing CES would have very serious implications for him However, none of that analysis was undertaken.. Only when that analysis was done could the Judge have meaningfully addressed the core question identified in *Morrissey*, namely whether Mr Timlin had met the standard of the competent consultant orthopaedic and spinal surgeon in interpreting the MRI as he did.

78. This leads to Mr McCullough's second point. He says that the MRI cannot be considered in isolation. In assessing Mr McCormack's condition on 16 March and reaching a decision on whether surgical

intervention was required at that point, the MRI was only part of the picture that had to be considered by Mr Timlin. He had also to consider the available information concerning Mr McCormack's condition (or, as Mr McCullough put it, "*his developing neurological symptoms"*) and the MRI had to be read in conjunction with the medical history. That appears to have been common case and the Judge indicates at paragraph 65 that he would adopt that approach in assessing what Mr Timlin had done.

79. According to the Plaintiff's experts, when the MRI was read in conjunction with the information actually known to Mr Timlin as of 16 March 2011, a diagnosis of developing CES was the only tenable one. A number of "*red flags*", including significant levels of urinary retention (which were noted in the medical records by Dr Obinawa) and significant right foot weakness and buttock/peri-anal numbness (noted by Mr Timlin himself in his examination of the Plaintiff on 16 March) were relied by them in their evidence. The significance of these *"red flags*" was disputed by Mr Timlin and his expert witnesses but the Judge did not address the issue in his Judgment.

80. The Judge made no clear finding as to the extent to which Mr Timlin had regard to these "*red flags*" when deciding that no surgical intervention

was warranted following the MRI scan on 16 March. Ms Barrington refers to paragraph 74 of the Judgment but, as Mr McCullough says, the discussion there appears to be directed to events prior to the MRI scan being undertaken on 16 March, not the diagnostic process that followed. But, in any event, all that is said in paragraph 74 is that the experts differed as to whether the urinary retention problems being experienced by Mr McCormack were properly regarded as "*red flags*" (of developing CES) or whether they were simply complications of surgery. The experts also differed on the relevance and significance of the other "*red flags*" relied on by the Plaintiffs but at no point does the Judge resolve those significant differences between the experts.

81. The significance of this issue is illustrated by the Judge's observations regarding the physiotherapy notes. As I read them, paragraphs 72 and 80 of the Judgment indicate that the Judge was of the view that, had Mr Timlin been aware of the contents of those notes, it would not have been acceptable for him to delay surgery until 19 March. The Plaintiff's case is that, even if one disregards what was in the physiotherapy notes, the clinical history known to Mr Timlin was such that, when considered along with the MRI scan, it compels the same conclusion – that surgery ought to have taken place earlier than 19 March and that Mr Timlin was

negligent in delaying surgery until then. That contention may or may not been well-founded but the Plaintiff was entitled to have it addressed. The Judge ought, in my view, to have addressed whether the "*red flags"* relied on by the Plaintiff, were, individually and/or cumulatively, signals of developing CES and (to the extent that he concluded that they were) he ought then to have considered whether Mr Timlin had adequate regard to those "*red flags*" in his interpretation of the MRI scan and his decision not to operate which he took in the aftermath of the MRI on 16 March.

82. In my view, the Judge's failure to address this point further undermines the conclusions reached by him at paragraphs 67 and 68 of his Judgment. Without resolving the "*red flags*" issue, the Judge could not appropriately determine whether Mr Timlin's decision not to operate in the immediate aftermath of the MRI scan on 16 March was negligent or not. Even if the signs of developing CES on the scan were properly characterised as "*a marginal thing*", had the Judge concluded that Mr Timlin had failed to identify clear "*red flags*" in Mr McCormack's medical history on and leading up to 16 March which a competent professional would have relied on (in conjunction with the MRI) to make a judgment that immediate surgical intervention was required, it would have been open to him to find negligence.

83. In the circumstances, the findings made by the Judge to the effect that Mr Timlin was not negligent must in my opinion be set aside. In reaching that conclusion, I am very mindful of the limitations on this Court's role as emphasised in the authorities to which I have referred. However, I am satisfied that the complaints made by Mr McCormack are valid and that they go "*to the very core, or essential validity, of the [Judge's] findings."* Having found that Mr McCormack was suffering from developing CES as of 16 March 2010 *and* that it was "*there to be interpreted"* on the MRI scan as Mr McCormack's experts had contended (thereby necessarily preferring their evidence over the evidence of Mr Timlin and his expert witnesses), the Judge failed to explain adequately why he had proceeded to find against Mr McCormack on the negligence issue and that failure was significantly compounded by his failure to address adequately the question of clinical "*red flags"*. These matters were, individually and cumulatively, critical to the appropriate resolution of Mr McCormack's claim.

84. Mr McCullough bravely suggested that, in light of the findings made by the Judge regarding the correct interpretation of the MRI scan, the Court should not merely to overturn the decision of the Judge but substitute for

it a decision in favour of Mr McCormack. That is clearly not so. This Court could only adopt such an approach if it considered that, in light of the findings made by him, the Judge was constrained to find that Mr Timlin was negligent. As I hope is clear from the discussion above, that is not my view. In any event, my conclusions on the cross-appeal exclude any possibility of adopting the approach suggested by Mr McCullough. Mr McCormack is entitled to a rehearing, not to judgment.

The Physiotherapy notes

85. This is quite a different point. While it is said that there was an unfairness in the trial such that the interests of justice requires that a retrial be directed, no criticism whatever was or could be made of the Judge. When Mr Timlin gave evidence that he had not reviewed the physiotherapy notes, he was not challenged on that evidence and no complaint was made to the Judge, either immediately or any later point in the trial, that the Plaintiff had been prejudiced by any failure to put Mr Timlin's position to Mr McCormack's witnesses. There was not even a suggestion that the Plaintiff was taken by surprise by Mr Timlin's evidence. No application was made to the Judge for permission to recall Professor Marks (or any other of the Plaintiff's witnesses) for the purposes of disputing the

appropriateness of Mr Timlin's approach. Despite this, it is now said that the High Court hearing miscarried to such an extent that the Judgment must be set aside.

86. It is, in fact, wholly unclear whether the Plaintiff was (or ever will be) in a position to advance a case that, in not reviewing the physiotherapy notes, and relying instead on his own examinations and what was brought to his attention by the nursing staff, Mr Timlin departed from the standards to be expected of a reasonable consultant orthopaedic and spinal surgeon. No evidence to that effect is before the Court and it has not even been said that the Plaintiff has any such evidence available to him. It appears to me to be quite remarkable that the Court should be asked to set aside the Judgment and Order of the High Court on the basis that the Plaintiff was wrongly denied an opportunity to make a case that, even now, is entirely theoretical. It is, on the basis of the material before the Court, no more than a case that *might* possibly be made by the Plaintiff. It has no more substance than that.

87. As for the so-called "*rule*" in *Brown v Dunn* (1893) 6 R 67, it is not clear to me that, strictly speaking, the circumstances here come within the four corners of the rule. No question of impeaching the credibility of Professor

Marks or any other of the Plaintiff's witnesses arose here. No-one was suggesting that Professor Marks' references to the physiotherapy notes were inaccurate. But is not necessary to express any final view on that issue. On any view, when Professor Marks gave the evidence he did (in which he placed material reliance on the physiotherapy notes) – if not, indeed, before that point [34] - it should have been made clear to the Plaintiff and to the Court that Mr Timlin's evidence would be that he had not reviewed those notes and that, on his case, the contents of those notes were not relevant to the Court's assessment of his clinical decisions and actions. The failure to do so was an error but it was not suggested that it was anything other than an innocent error.

88. *Brown v Dunn* was considered in detail in the judgments of McKechnie and Charleton JJ in *McDonagh v Sunday Newspapers Limited* [2017] IESC 46, [2018] 2 IR 1. Each of those judgments emphasises that the

[34] In fairness to Mr Timlin, if Mr McCormack's claim had been properly pleaded, the extent to which reliance was being placed on the contents of the physiotherapy notes should have been clear and issue could then have been joined as to the relevance of the notes and as to whether it was the duty of Mr Timlin to review them. That would avoided any surprise at trial. The Plaintiff's failure to plead his case properly was therefore a significant contributory factor in what occurred in the High Court.

"*rule*" is not to be applied rigidly or over-mechanically. The ultimate touchstone is fairness. In my view, no unfairness has been demonstrated here. If any unfairness was apprehended by the Plaintiff, his remedy, at least in the first instance, was to make an appropriate objection to the Judge. He could have looked for time (if necessary) to consult with his expert witnesses and, if considered appropriate, he could have applied for permission to recall some or all of those witnesses to give further evidence. If the Judge refused to permit him to do so, that refusal could have appealed to this Court. It would be wholly inappropriate for this Court to set aside the Judgment and Order of the High Court on the basis of a complaint that could have been made to the High Court but was not. The only explanation proffered for the failure to raise the issue with the High Court is the rather feint suggestion that the parties did not anticipate that the Judge would give the physiotherapy notes the significance that he did. But that explanation simply will not do. If the Plaintiff and his experts failed to appreciate the significance of the physiotherapy notes, they - not Mr Timlin and not the Judge – bear the responsibility for that. The trial proceeded as it did, without any objection from the Plaintiff, and he is not entitled to seek a rerun of it merely because the Judge subsequently appeared to take a different view as to the significance of the physiotherapy notes. That, in my view, is enough to dispose of this

point but, in any event, there is the further difficulty that the alleged unfairness here is entirely notional and lacking in any evidential foundation.

89. Accordingly, I would reject this ground of appeal. However, as a retrial is being directed in any event, Mr McCormack will have an opportunity to advance whatever case he considers it appropriate to make (in light of the advice of his experts) regarding the physiotherapy notes (subject to any necessary amendment of pleadings). It seems desirable that the issue be clarified, one way or the other. It would appear to be a legitimate matter of concern that, within the Mater Private Hospital, there was medical information concerning Mr McCormack that (as the Judge found) would have had (or at least ought to have had) a decisive impact on his diagnosis and treatment if only Mr Timlin had been aware of it. That is, in my view, the only reasonable reading of the Judge's statements at paragraphs 72 and 80 of his Judgment. It does not follow, of course, that any fault lay with Mr Timlin for this apparent failure.

The Cross-appeal

90. Mr Timlin's cross-appeal remains to be considered. If any of the grounds for that appeal are well-founded, it may follow that, rather than directing a rehearing of Mr McCormack's claim, this Court should instead affirm the High Court's order dismissing it.

The Judge's Finding of Developing CES

91. As already explained, Mr Timlin says that this finding was not open to the Judge. The evidence clearly established that Mr McCormack had normal bladder function and that, in itself, was "*fatal*" to his claim that he had suffered from developing CES.

92. This was, on any view, a substantial argument, supported as it was by the results of the urodynamics test results and the detailed evidence of Professor Flood. Significant emphasis was placed on it by Mr Timlin in evidence and submission. If it was established that the Plaintiff had a normal bladder, his claim failed. In the circumstances, the Judge had to engage with that argument. As Mr McCullough accepted in argument, he did not so. Given the centrality of this issue for the proper determination

of the proceedings, it follows, in my view, that the Judge finding of developing CES cannot be allowed to stand.

93. Insofar as Ms Barrington asks the Court to go further, and substitute for that finding the opposite finding that the Plaintiff did *not* suffer from developing CES and therefore his condition was not attributable to it, I do not consider that it would be appropriate for the Court to go that far. There was evidence before the Judge – that of Professor Miller - to the effect that, despite the indications from the urodynamic test results, Mr McCormack did *not* have normal bladder function. There is no doubt that Professor Miller's evidence was challenged very strongly on cross-examination and that he appeared to concede that he had made an error insofar as he had suggested that the apparently normal urodynamic test results could be explained by Mr McCormack's use of a sacral nerve stimulator. It is also the case that Professor Miller's evidence that Mr McCormack's medication explained the normal urodynamic test results was sharply contradicted by Professor Flood. Even so, it is apparent from the transcript that Professor Miller maintained his view that the Plaintiff was suffered from an abnormal bladder (even if atypical in its presentation) consistent with developing CES. This Court not had the benefit of seeing or hearing Professor Miller and Professor Flood and, in

my opinion, it would be inappropriate for this Court on appeal to seek to resolve that conflict of evidence. That will be a matter for the High Court on rehearing.

The Interpretation of the MRI Scan

94. Mr Timlin's oral submissions focussed largely on the ground just addressed. However, his Respondent's Notice and submissions also challenge the Judge's findings regarding the correct interpretation of the MRI scan of 16 March 2010. Again, it is suggested that there was no credible evidence to support those findings. In essence, Mr Timlin says that the Judge should not have regarded the evidence of the Plaintiff's experts, and in particular, the evidence of Professor Marks, as credible and the Judge should have preferred the evidence of Mr Timlin, Professor Eustace and Professor Bolger which, it is said, went unchallenged in a number of significant respects. They were, it is said, "*significantly better qualified than Professor Marks in the area of complex spinal surgery"* and Professor Marks and Annesley-Williams did not have the same level of relevant clinical experience as Mr Timlin and his experts.

95. In my view, this Court cannot and should not undertake any comparative analysis of the expertise and/or experience of the respective expert witnesses called by the parties. So far as the Court is aware, no objection was made to any of the Plaintiff's expert witnesses and it was not suggested that they lacked the necessary expertise and experience to give expert evidence on the issues they addressed. Insofar as it was said that there was any difference of expertise or experience between the respective experts, that went to the weight to be given to their evidence and was accordingly a matter for the Judge. Nothing advanced by Mr Timlin has demonstrated any error on the part of the Judge on this point.

96. As will be evident from the discussion earlier in this judgment, the Judge heard a substantial amount of evidence to the effect that the MRI scan of 16 March 2010 showed caudal compression/developing CES. There was also a substantial body of contrary evidence. It was for the Judge to assess that conflicting evidence and make appropriate findings on it and, as a matter of principle, it was open to him on the evidence to conclude that the Plaintiff's interpretation of the MRI scan was to be preferred. That is so notwithstanding what is urged about the relative expertise and experience of the respective expert witnesses.

97. In essence, Mr Timlin is asking this Court to conclude – without having heard any of the evidence - that the evidence on Mr Timlin's side was so much more compelling that the Judge was effectively obliged to accept it. In light of the significant conflict on the evidence, and having regard to the principles governing appellate review explained in *Hay v O' Grady* and re-iterated many times since, such a conclusion is simply not open to the Court.

98. However, this aspect of Mr Timlin's cross-appeal highlights a significant problem with the Judge's findings regarding the interpretation of the MRI scan. They are essentially unexplained and therefore effectively unreviewable. The very fact that there was such a conflict of evidence as to the proper interpretation of the MRI scan obliged the Judge to explain to why he had preferred the evidence of the Plaintiff's experts over the evidence of Mr Timlin and his experts. In paragraph 68 above, I have sought to identify the issues which, on my reading of the expert evidence (and I include the evidence of Mr Timlin in this category), arose in respect of the MRI scan. None of those issues are addressed in the Judgement and the Judge's reasons for preferring the Plaintiff's experts are nowhere set out in the Judgment and certainly cannot *"safely be inferred from the run of the case and the structure of the judgment"*. It follows inevitably,

in my view, that this aspect of Mr Timlin's cross-appeal should succeed to the extent that the Judge's findings must be set aside: *Donegal Investment Group plc v Danbywiske*, at para 8.9.

CONCLUSIONS AND ORDERS

99. There is – rightly – a "*high threshold"* for intervention on appeal. For the reasons set out above, I conclude that both Mr McCormack in his appeal and Mr Timlin in his cross-appeal have surmounted that threshold. This was a piece of litigation of huge significance to the parties. It was, as the Judge recognised, *"a complex case both in terms of liability and causation"* in which there were multiple and material conflicts of evidence. In the circumstances, its appropriate resolution required more detailed articulation of the Judge's findings of fact and the reasons for the conclusions he reached.

100. The claim here arises from events that occurred almost exactly 11 years ago. The parties have already gone through the ordeal (and expense) of a 12 day trial in the High Court. It is highly desirable, in their interests and the public interest, that this litigation should reach finality. I am very conscious of the significant additional burden that a retrial of the claim will inevitably impose on the parties. In my opinion, however, this court has no alternative but to set aside the Judgment and Order of the High Court and direct a retrial.

101. It would, in my opinion, be desirable that the remitted proceedings should be subject to case management in the High Court. The issues in dispute ought to be clearly defined in advance of any retrial. There should also be engagement between the expert witnesses with a view to identifying the areas of agreement and disagreement between them. Whether any issue is being pursued regarding the physiotherapy notes will also need to be clarified. Any other issues arising regarding the pleadings, further expert reports and so can also be addressed.

102. The Plaintiff has succeeded in his appeal. While Mr Timlin's cross-appeal has succeeded to an extent, he has not succeeded in having the dismissal of the claim affirmed on other grounds, which was the essential purpose of the cross-appeal. As the appeal and cross-appeal were dealt with together, it appears appropriate to make a single order for costs. In the circumstances, I would propose that the Plaintiff should recover 75% of his costs. However I would be minded to put a stay of execution on such order pending the determination of the remitted proceedings in the High Court. In light of the substantive order that has been made in this appeal, it appears to be appropriate to set aside the costs order made by the High Court (which gave Mr Timlin 50% of his costs). The costs order was the subject of a separate appeal by Mr Timlin which was, by

agreement, left over to await the determination of the substantive appeal and cross-appeal. That appeal is now moot and it seems appropriate that it should be struck out without any order as to costs.

103. As to the costs of the first hearing in High Court, it appears appropriate that such costs should be reserved to the judge who hears the retrial: see *McDonald v Conroy* [2020] IECA 336, at paras 31-36. I believe that it is appropriate to reserve those costs, rather than making them costs in the cause, for the same reasons as led me to make an order in those terms in *McDonald v Conroy*, at para 35.

104. If either party wishes to contend for a different costs order, they will have liberty to apply to the Court of Appeal Office within 28 days (which takes account of the upcoming Easter vacation) for a brief supplemental hearing on the issue of costs. If such hearing is requested by either party and results in an order in the terms I have provisionally indicated above, that party may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Whelan and Faherty JJ have authorised me to record their agreement with it.