

**THE HIGH COURT**

**[RECORD NO. 2017 5298 P]**

**BETWEEN**

**SIOBHÁN FREENEY**

**PLAINTIFF**

**AND**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**EX TEMPORE JUDGMENT of Ms. Justice Hyland of 3 March 2020**

1. This is an application by the Plaintiff to exclude certain portions of the evidence of Dr Coffey who is asserted to have acted negligently in the review of the Plaintiff's mammography slides in June 2015. It started out as an application to exclude portions of all five witnesses who viewed the Plaintiff's mammography slides. However, it has now narrowed down to the evidence of Dr Coffey although undoubtedly any ruling excluding same would have implications for the evidence of other witnesses, particularly that of Dr Pender.
2. It is a very specific application whereby the Plaintiff only objects to Dr Coffey interpreting the mammographic images and not to the giving of any other evidence by her. For that reason, in this ruling I will not address the other aspect of the case, i.e. the alleged failure to refer the Plaintiff for further assessment including ultrasound examination, having regard to her clinical presentation or symptoms on 17 June 2015.
3. I must start this analysis by identifying the test I will ultimately be asked to apply when determining these proceedings, being that identified by the Supreme Court as applicable in cases of medical negligence in *Dunne v. National Maternity Hospital* [1989] I.R. 91 i.e. whether the medical practitioner 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.
4. In respect of the alleged failure to identify suspicious features on the mammogram, that will necessitate me deciding whether those medical practitioners who read the mammograms, in this case the two radiologists, Dr Coffey and Dr Pender, were guilty of such failure as no medical practitioner of equal specialist skill would be guilty of if acting with ordinary care. The fact that only the HSE is being sued, and not Dr Coffey or Dr Pender, does not alter the position in this respect.
5. In any medical negligence cases, it is common to hear from both witnesses of fact and expert witnesses. The Defendant has proffered both in respect of the reading of the mammograms in June 2015 – Dr Rosalind Given-Wilson as an expert witness, and Dr Coffey and Dr Pender as factual witnesses. Other factual witnesses are put forward in respect of the review in December 2015. I approach the matter on the basis that such evidence will be potentially relevant to my decision. Similarly, I have already had factual and expert evidence on behalf of the Plaintiff in respect of the reading of the mammogram in June 2015 and again I anticipate that evidence will be relevant to my decision.

6. Where it is alleged that there has been a negligent act or omission, it is important a court understands as fully as possible the entire circumstances surrounding that act or omission. That will usually involve evidence from the persons against whom the allegations of negligence are made. Of course, a party is not obliged to put forward any particular witness. However, a decision not to do so may make it more difficult for the court to adjudicate upon the matters it is called upon to decide.
7. That was the situation in *Morrissey v. HSE & ors.* [2019] IEHC 268 where the court was called upon to consider, *inter alia*, whether the reading of slides obtained when screening for cervical cancer was negligent. Cross J. noted at paragraph 92 of his judgment, in considering the 2009 smear test, and asking whether a reasonably competent screener could have treated the slide as negative, that the second defendant chose not to call as evidence the original two screeners of the slide in 2009. He said that in the absence of the screeners, he was "left in a vacuum as to what they did or did not see or how they did or did not appraise the slide". He further noted that second defendant did not call to give evidence the person who conducted the internal audit of the slide and he was left without evidence as to the basis he concluded that the slide contained AGUS/AGC cells and this was "not satisfactory".
8. In respect of the 2012 test, at paragraph 98, Cross J. noted that the third defendant did not call either of the screeners of the slide to give evidence as to what they found or the person who conducted the internal or external audit of the slide to give evidence as to why they found the slide to be abnormal. He noted it was entirely a matter for the third defendant but from the court's point of view described the position, variously, as "unsatisfactory" and "highly unsatisfactory".
9. Those comments confirm my view of the desirability of a court hearing all relevant evidence where same is available.
10. Separately, I am conscious of the entitlement of the persons accused of negligence to be heard in their defence if they so wish. That entitlement extends to all matters relevant to the allegation of negligence. In this case, the allegation of negligence undoubtedly extends to the manner in which Dr Coffey read the slides. Therefore, on a prima facie basis, Dr Coffey should be entitled to give evidence of her reading and characterisation of the slides, given that it is alleged she did so negligently.
11. Therefore, I commence my consideration of the Plaintiff's application on the basis that it is desirable I should hear from both factual and expert witnesses in respect of the events the subject matter of the proceedings unless I am persuaded there is a good reason to prevent those witnesses giving evidence either generally or in respect of particular topics.
12. The reasons put up by the Plaintiff for such restriction are essentially twofold:
  - That Dr Coffey, when interpreting mammographic images, will essentially be acting as an expert witness, and

-That Dr Coffey cannot offer factual evidence as to what she saw as she will not be able to recall how she proceeded due to the volume of images that she reads each year, being 20,000.

13. Insofar as Dr Coffey acting as an expert is concerned, the Plaintiff says that Dr Coffey may not act as an expert for the following reasons: she was not identified as such, did not provide an expert report, has a conflict of interest in so acting and the Defendant is not entitled to more than one expert in respect of any given area. I fully agree with all those propositions. Dr Coffey clearly cannot act as an expert witness. I must therefore rule on the submission that she is in substance an expert witness despite her description as a factual witness.
14. She is not put forward by the Defendants as an expert witness. The sole basis upon which it is asserted by the Plaintiff that Dr Coffey is in substance an expert witness appears to be that she is an expert in the field of radiology, i.e. she is a consultant radiologist with a particular expertise in reading mammograms. Mr. Treacy also noted in submissions that I was given her CV and given 15 to 20 minutes of evidence in respect of her expertise.
15. However, the fact that she has professional qualifications does not mean she is in substance an expert witness dressed up as a factual witness. In every medical negligence case where allegations are made against a medical practitioner, whether specialist or general, the practitioner will have professional qualifications. That does not prevent them from being a witness as to fact, although the court must ensure that their evidence does not at any point stray into opinion evidence such as an expert would give. They are there to give evidence of their clinical findings, observations and actions and the reasons for them in respect of the act or omission the subject matter of the proceedings.
16. Accordingly, I do not accept that Dr Coffey is an expert witness. She is a witness as to fact, facts that are at the heart of this limb of the case. If at any point she strays into opinion evidence, objection can be taken to that. However, she is entitled to give evidence about what she saw on the images, how she interpreted the images, why she categorised the images in a particular way and any other matter she considers relevant to the events in question.
17. Particular emphasis was placed by Mr. Treacy on the fact that counsel for the defence had put in evidence the qualifications of Dr Coffey and her CV and that this tended towards the conclusion that she was an expert witness or that the defendant was implicitly asking for her to be treated as such. The defendant is entitled to establish the professional qualifications of its professional witnesses, while bearing in mind that they are not there as expert witnesses. In this case there is a specific challenge to the skill, expertise and training of those providing the service as well as to the experience of same. I am treating that plea as part of the case unless it is withdrawn. Given its existence, the defendant is entitled to focus on the qualifications and experience of Dr Coffey. Even if that plea were not there, the defendant is still entitled to identify that the professional witness has the necessary qualifications and experience such as to carry out the task assigned to her. However, given that Dr Coffey, or any other professional witness, is not an expert

witness, what I might describe as a “deep dive” into those qualifications and experience is not necessary since the focus should be on qualifications and experience rather than expertise as such.

18. The second objection might possibly be characterised as a capacity objection – that Dr Coffey cannot give evidence because she is not in a position to remember the events in question due to the number of images she reviews weekly. That is a criticism that could be made of many witnesses in many different contexts. However, in this case, Dr Coffey has medical records to assist her memory. In any case, it is a matter for me to judge the weight to give Dr Coffey’s evidence after she has given it. Many factors may impact upon this, including her level of recall. The plaintiff is entitled to make any submissions she wishes at the end of the case in relation to the weight to be given to Dr Coffey’s evidence, either for reasons of recall or any other basis. It would be inappropriate to seek to prevent Dr. Coffey from giving evidence in advance on this basis.
19. For those reasons, I reject the application that Dr Coffey be limited in the evidence she is entitled to give qua factual witness, provided of course it meets the necessary requirements of relevance.