THE SUPREME COURT

[Appeal Nos: 2019/120, 2019/121 and 2019/122]

Clarke C.J.
O'Donnell J.
McKechnie J.
Dunne J.
O'Malley J.

Between/

Ruth Morrissey and Paul Morrissey

Plaintiffs/Respondents

and

Health Service Executive, Quest Diagnostics Incorporated and Medlab Pathology Limited

Defendants/Appellants

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 19th of March, 2020.

1. Introduction

1.1 The tragic circumstances underlying this appeal must be acknowledged. The first named plaintiff/respondent ("Ms. Morrissey") is terminally ill from cancer. She had undergone screening in accordance with the National Cervical Screening Programme ("CervicalCheck") in August 2009 and again in August 2012. In both instances, her smear test was reported as negative for abnormalities and she was provided with a clear result. However, in May 2014, Ms. Morrissey attended at her G.P. following symptomatic bleeding and was referred for further testing. A biopsy and an MRI scan subsequently disclosed the existence of cervical cancer.

1.2 Following this diagnosis, the 2009 and 2012 smears provided by Ms. Morrissey were audited and it was reported that the original results provided in respect of both tests were incorrect. By 2015, the results of the audits had been communicated to CervicalCheck. However, their results were not disclosed to Ms. Morrissey until mid-2018, when Ms. Morrissey herself made inquiries as to whether there had been an error in her case.

1.3 Ms. Morrissey and the second named plaintiff/respondent, her husband, ("Mr. Morrissey", and collectively, "the Morrisseys") commenced these proceedings thereafter. The first named defendant/appellant ("the HSE") is, of course, the body charged with the provision of health services in Ireland and, in the particular context of these proceedings, with the promotion of the CervicalCheck scheme. It will be necessary to go into the precise role of the HSE in due course, for its legal obligations in respect of CervicalCheck are one of the issues which will need to be addressed.

1.4 From 2008, the HSE contracted out the testing of samples to various multinational firms. The second named defendant/respondent, Quest Diagnostic

Incorporated ("Quest"), carried out an examination of the sample taken from Ms. Morrissey in August 2009, in one of its laboratories located in Grand Rapids, Michigan in the United States. The third named defendant/respondent, Medlab Pathology Limited ("Medlab"), tested the sample provided in August 2012 in one of its laboratories situated in Co. Dublin.

1.5 The High Court (Cross J.), in a judgment delivered on 3 May 2019 (*Morrissey & anor v. Health Service Executive & ors* [2019] IEHC 268), gave judgment in favour of the Morrisseys in the sum of €2,152,508 against all three defendants and an additional sum of €10,000 in nominal damages as against the HSE in respect of its failure to notify Ms. Morrissey of the results of the audits of her earlier smear tests.

1.6 Each of the defendants/appellants sought leave to appeal directly to this Court. An oral hearing ensued. For the reasons set out in a judgment of this Court (*Morrissey & anor v. Health Service Executive & ors* [2019] IESC 60), leave to appeal was granted although the issues became somewhat more confined in circumstances described in that judgment.

1.7 It is, therefore, appropriate to set out the basis on which leave to appeal was granted, for that defines the parameters of this appeal. Before this Court, it was outlined that there were a number of other cases pending before the High Court which have arisen in a similar factual context to that of these proceedings. It was also stressed that the work of the CervicalCheck Tribunal, as established by law in July 2019, will involve the assessment of legal liability and will therefore require the application of the same legal test as that determined in the courts. Thus, it was clear that the Tribunal would be significantly constrained in progressing its work if there remained doubt about the proper test to be applied in determining legal liability.

While it is usually appropriate that an appeal is heard in the Court of Appeal, where narrowing and clarification of the issues of importance can take place, here this Court held that the question of the standard of care to be applied in screening cases met the constitutional threshold for leave to appeal generally and, having regard to the urgency which attends its clarification, also met the additional criteria necessary to grant leapfrog leave.

1.8 In respect of whether the other grounds of appeal urged by the defendants justified a grant of leapfrog leave, it was held that the interests of justice required granting that wider leave. It should be noted that both Quest and Medlab had agreed at the oral hearing to drop certain grounds of appeal as advanced in their applications for leave. At para. 4.7, the Court held:-

> "Considering the standard of care grounds in the abstract, while issues concerning some of the findings of the High Court remained alive before the Court of Appeal, would be highly unsatisfactory. I am also satisfied that it would be unfair to the defendants/appellants to require them to abandon all of the other grounds as the price for obtaining leapfrog leave. Most of those grounds are sufficiently closely connected with the standard of care grounds in any event such that this Court is likely to need to at least get into the facts relevant to those grounds to some extent. Insofar as the causation and, in the case of Medlab, quantum grounds are raised, it seems to me that these issues can most conveniently be dealt with in the same appeal."

2. <u>The Broad Issues</u>

2.1 Before setting out the broad categories of issue which arise on this appeal, it may be useful to make one general observation. At a superficial level, it might be thought that a case such as this ought to be relatively straightforward. If a person gets the all-clear as a result of a screening process and subsequently develops the disease

which the screening process was intended to detect, then it might be felt that it must be fairly obvious that someone was at fault. However, that does not necessarily follow.

2.2 I would emphasise that not all of the matters which I am about to note will necessarily arise in each case and all of them do not arise in this case. However, there are a range of reasons why it might, at least in theory, be the case that a person who obtained a clear result on a screening process might subsequently be diagnosed with the relevant disease in the absence of any negligence by any party.

2.3 First, there will almost always be some period of time between the test which led to a clear result and the diagnosis of the disease in question. Depending on the length of that time and the likely progress of the relevant disease, there may, in some cases, be a possibility that whatever the relevant indicators for the disease in question are, they may not have been present at the time of the screening process but have only developed at a later stage. Next, in the context of a screening process such as that with which this Court is involved on this appeal, it is always possible that a sample taken may not contain any of the type of suspicious material which ought to have given rise to a result suggesting that the test was not clear. In other words, suspicious material might not actually have been captured during the taking of the sample, or at least captured in a sufficient quantity that it would show up during the screening process. Third, it should be noted, for reasons which will be addressed in this judgment, that even screening processes which operate at the very highest standards can give rise to different results by competent screeners. In addition, a retrospective review of the screening process after someone has been diagnosed may well give different results, possibly influenced by the difficulties encountered with hindsight. It

is thus possible, as the trial judge in this case found, that a competent screener exercising ordinary care might give a clear result, even in circumstances where it might transpire with the benefit of hindsight that there could have been suspicious material on the slide. For these and doubtless other reasons, it is not simply a case of inferring from the fact that someone obtained a clear result but subsequently was diagnosed with the relevant disease that there was necessarily negligence on someone's part. It follows that the assessment of whether there was negligence in any particular case will involve findings of fact by the trial judge based on evidence. That process may well be both difficult and complex and each case will, necessarily, depend to a significant extent on its own facts.

2.4 Against that background, I should start by noting that, at the oral hearing, counsel on all sides were asked to agree that five sets of issues arose between the parties. I did not understand there to be any disagreement about that proposition, although there are undoubtedly sub-issues potentially arising in some, if not all, of the categories.

2.5 The first issue concerned the proper approach to negligence in a case involving medical screening such as this. As will become apparent, the trial judge, relying on the case law of the United Kingdom, had applied what he said was an "absolute confidence" test, although it is important to understand that the trial judge was quite specific about the precise aspects of the case to which that test was to be applied. The potential question which arose was as to whether the trial judge could be said to have applied a test differing from the established case law of the courts in this jurisdiction as regards the legal standard of care in medical negligence cases, which finds its clearest example in *Dunne (an infant) v. National Maternity Hospital* [1989]

I.R. 91. However, in the course of the oral hearing, it became clear that there was no significant dispute between the parties on this question. However, I am mindful of the fact that a significant amount of public comment, some of it unfortunately misinformed, followed from the judgment of the High Court and I do, therefore, propose setting out the position in the hope of bringing some clarity to a potentially controversial issue.

2.6 Second, Quest raised certain points concerning the findings of the trial judge which led to a conclusion that it was negligent in the way in which it carried out its functions. In fairness to counsel for Quest, it was not argued that there was no evidence from which the trial judge might have reached the conclusions which he ultimately did in this case. However, it was said that there was a significant failure of the trial judge to properly engage with certain aspects of the defence case, such that the finding in negligence against Quest should be set aside.

2.7 Third, there were similar issues raised by Medlab concerning the finding of negligence against it. In that context, it is of some relevance to note at this stage that the finding against Quest related to the reading of the slides concerned. It was said that had such reading been properly carried out, a negative result should not have ensued. A like claim was made against Medlab, although it is of some importance to note that the trial judge rejected that aspect of the claim against that party. However, it is clear that there may be circumstances in which it is inappropriate to give a result in respect of a particular screening where the cell count of the relevant sample is inadequate to allow for its proper assessment. The finding of negligence against Medlab related to what was said to be negligence in assessing the smear in question as being adequate for such assessment. However, points are put forward on behalf of

Medlab to suggest that, as in the finding of negligence against Quest, there was a failure to properly engage with certain aspects of the case which it put forward in that regard.

2.8 Fourth, there were issues raised by the HSE concerning the finding of the trial judge that the HSE was liable in negligence arising from the manner in which both Quest and Medlab carried out their tests. The trial judge found that the HSE was primarily liable in respect of the way in which the tests were carried out but also held that the HSE was vicariously liable for the negligence found against the two laboratories. The HSE appealed against both of those findings.

2.9 Fifth, and finally, Medlab raised some questions concerning particular elements of the damages awarded by the trial judge. Neither of the other defendants has raised questions as to damages in their appeals.

2.10 However, in order to properly understand both the approach of the trial judge and, more specifically, many of the issues which arise before this Court, it is appropriate to set out in a little detail the history of CervicalCheck and, in particular, the way in which it works in practice.

3. CervicalCheck

3.1 In 2008, the National Cancer Screening Service ("the NCSS") was responsible for the establishment of the CervicalCheck programme, which provides free smear tests for women between the ages of 25 and 60 in order to regularly screen for early signs of the development of cervical cancer. In 2010, the Board of the NCSS was dissolved and its functions were assumed by the HSE, as part of its National Cancer Control Programme.

3.2 From 2008, the testing of the samples was contracted out by CervicalCheck to various multinational firms, including Quest and Medlab, which provided a faster service than that of Irish labs. These contracts provide that the tests are to be carried out in accordance with the NCSS Guidelines for Quality Assurance in Cervical Screening, which require the use of the Bethesda System for Reporting Cervical Cytology ("the Bethesda System").

3.3 As part of the programme, audits are conducted in respect of the screening histories of those patients who receive a diagnosis of cervical cancer. Laboratories conduct a review of previous smears and their results where cancer is subsequently detected. The purpose of these audits is educational, for the screeners and the laboratory to look into the quality of the testing and to make any improvements necessary.

3.4 Smear tests are not diagnostic tests, but rather are screening tests to determine whether the cells examined are healthy or whether they may have been contaminated by the HPV virus. Where high-risk HPV is carried in the body for some two to three years, a pre-cancer will develop. This pre-cancer may be high grade or low grade. If a significant number of high grade lesions are not detected and treated, this will progress and develop into an invasive cancer. The invasive cancers are typically either squamous cell tumours or glandular cell tumours. It was accepted in evidence by the High Court that such pre-cancer will usually progress to invasive cancer over an eight to twelve-year period of time.

3.5 Samples of cells are taken from the cervix by a patient's GP, using a system known as Liquid Based Cytology, which are then reviewed by a laboratory. In the lab, a slide is made from the sample using the ThinPrep Imaging System. The slide is

then examined by a qualified cytoscreener, who must first assess the sample for the adequacy of its cell count. For a sample to be considered adequate, as required by the Bethesda System, there must be a minimum number of 5,000 well-visualised squamous cells. Most samples will clearly be seen to be adequate on a quick overview, but in the event of any doubt, the slide must be assessed for adequacy using the ThinPrep method prescribed by the Bethesda system.

3.6 The screener then examines the cells for abnormalities at various magnifications. If any abnormal cells are detected, irrespective of the adequacy of the sample, the slide must be classified as abnormal. The terms of the contracts agreed between CervicalCheck and both Quest and Medlab provided that laboratories were to screen samples using one of the following processes; a full manual primary and secondary screening; a full manual primary screening and rapid review rescreening; a full manual primary and rapid preview screening; or one of the above options with automated-assisted screening in place of manual screening.

3.7 The apparently uncontested evidence before the High Court suggested that the practice of the laboratories operated by Quest at the relevant time in respect of those slides which were reviewed under its contract with CervicalCheck was that two full manual screenings of each slide took place. All parties agreed that the reports of the Scoping Inquiry into the CervicalCheck Screening Programme, as conducted by Dr. Gabriel Scally ("the Scally Reports"), could also be considered by the Court. The Scoping Inquiry was established by the Government in 2018 in order to examine and establish the facts surrounding the issues which had recently come to light in respect of the operation of CervicalCheck. I do note that a somewhat different description of these procedures appears in the final Scally Report, published in September 2018. I

should emphasise that a court can only consider facts based on the evidence presented to it. It may well be the case that, for the purposes of these proceedings, nothing turns on the difference between this aspect of the evidence presented to the High Court and the relevant description contained in the Scally Report.

3.8 However, it is again important to emphasise that, where a difference on the facts is potentially relevant to the outcome of the case, it is important that sworn evidence is presented in respect of the competing positions and that any relevant party is given the opportunity to test the competing evidence before the judge. It is also of particular importance to emphasise that the function of a trial judge is not the same as the function of a person preparing a report. The trial judge is only required to make findings of fact in relation to questions which are relevant to determining legal liability. Trial judges sometimes specify additional facts by way of background or to provide context, but the precise accuracy of such facts is only important where the facts in question have at least the potential to influence the outcome of the case. In that context, I would draw attention to the observations of this Court on the question of whether it is necessary to correct factual errors which are not material (see, in that regard, the judgment of this Court in *Walsh v. Minister for Justice and Equality* [2019] IESC 54).

3.9 Be that as it may, it was found by the trial judge that it is the practice of Medlab that a primary manual screen is first conducted by a cytoscreener. If this first screen highlighted any areas of suspicion, then a full manual rescreening is conducted. However, if no areas of suspicion are detected by the first screener then there is no manual rescreening, but rather an automated analysis of the sample is conducted by a machine using the ThinPrep Imaging System. If there are any areas of suspicion,

these are highlighted on the slide using a marker, and the slide is sent to a pathologist in the laboratory.

3.10 The results of the tests can be graded by a screener using either the Bethesda System of classification or the British Society for Clinical Cytology CIN terminology, both of which result in the same consequences for the patient. The system used by the laboratories contracted to CervicalCheck is the Bethesda System. The grades to which a test should be marked, according to the Bethesda terminology are; unsatisfactory/inadequate sample, negative/NAD (no abnormality detected), ASC-US (atypical squamous cells of undetermined significance), LSIL (low grade squamous intraepithelial lesion), HSIL (high grade squamous intraepithelial lesion), squamous cell carcinoma, AGC/AGUS (atypical glandular cells/of undetermined significance), glandular neoplasia or broken/damaged/expired slides. The categories of ASC-US or AGC/AGUS denote borderline abnormalities in squamous and glandular cells, respectively. These do not of themselves denote either cancer or pre-cancer but do represent a non-negative finding and require at least that a patient is rescreened within a short number of months.

3.11 The laboratories are obliged, under the terms of their contracts with the HSE, to record the appropriate treatment alongside the results of the screening. If the test finds that the cells are healthy, then the patient is referred for routine repeat examination, which is usually every three years. Where the laboratory finds the cells to be abnormal, then depending upon the result, the patient is either sent for early repeat screening or else directly to the patient's doctor for colposcopy and, if necessary, other treatment. In the High Court, it was held that the evidence of all

relevant experts was that in the event of any ambiguity, the lab ought to report the cells as abnormal.

3.12 It is clear that the screening is not infallible. For example, actual abnormal cells in the patient's body may not have been located in the sample. In addition, as noted by the High Court, there is also "room in the analysis for genuine and non-negligent divergence as to whether particular cells are negative or potentially alarming". One study accepted in evidence before the High Court, which reviewed the audits of over 6,000 English patients of the NHS Cervical Screening Programme who had been diagnosed with cervical cancer, indicated that at least 44% (or 55%, depending on whether samples labelled as 'inadequate' are counted) of their previous samples were incorrectly marked as normal at first screening. It bears noting that this statistic does not indicate that there is anything close to a 50% chance of the results of a screening test being wrong. The lives of many women have been saved as a consequence of the detection of abnormalities in the course of such screening programmes. It should be emphasised that this study refers to an audit of the prior tests of the small proportion of patients who had subsequently received a diagnosis of cervical cancer. In order to ascertain whether there has been any negligence or breach of duty in any case, each screening test would have to be assessed individually.

3.13 Against that background, it is appropriate to turn to the history of the Morrisseys' engagement with CervicalCheck.

4. The Facts of this Case

4.1 Mr. and Ms. Morrissey are married with one young daughter. In August 2009, Ms. Morrissey underwent a smear test which was processed by Quest, as part of its contract with the HSE, in its laboratory in Grand Rapids, Michigan. The sample was

reported to be adequate and the result was negative for any abnormality. Ms. Morrissey was advised to return for a routine repeat examination in three years' time.

4.2 Ms. Morrissey's next smear test was taken in August 2012, and processed by Medlab, in its laboratory in Co. Dublin. It was reported that the sample was adequate for assessment and that there was no evidence of the presence of new abnormal growth tissues. Ms. Morrissey was again recommended for routine recall in three years' time.

4.3 Following an investigation as a result of symptomatic bleeding in May 2014, Ms. Morrissey received a diagnosis of invasive squamous carcinoma of the cervix. A further smear test was carried out in 2014 following the diagnosis, which also returned a negative result. There is no suggestion that this interpretation was negligent. Surgery was required and the cancer appeared to have been treated successfully. In 2018, there was a serious recurrence of the cancer and, tragically, Ms. Morrissey has since received a terminal prognosis.

4.4 As a result of Ms. Morrissey's 2014 diagnosis, audits were conducted of the 2009 and 2012 smears. In September 2014, the 2009 slide was reviewed by the senior staff pathologist of Quest, who reported that the original test was incorrect and found the slide to contain borderline nuclear abnormalities, marking it AGC/AGUS. Under the heading in the report of 'Factors likely to lead to false negative results', nothing was inserted.

4.5 The 2012 slide was reviewed internally by the medical director of Medlab in October 2014, and this review also found that the original result was incorrect. Under the heading of "Factors likely to lead to false negative results", the laboratory listed the fact that the sample was "scanty", a term used to indicate an inadequate number of

cells on the slide. The 2012 slide was also externally audited by an independent reviewer in 2015, who reached the same conclusion that the slide had been inaccurately read and also classed the sample as "scanty".

4.6 The results of the internal audit of the 2009 slide and the internal and external audits of the 2012 slide were communicated to CervicalCheck by 2015. CervicalCheck advised Ms. Morrissey's treating doctor of the audit results in June 2016. These were not discussed with Ms. Morrissey. When national publicity in relation to another patient arose in mid-2018, Ms. Morrissey herself made inquiries as to whether there had been errors in her case. At this juncture, she was advised of the results of the audit by her doctor, who apologised to the Morrisseys and indicated that he simply "forgot" to tell them.

4.7 It is Ms. Morrissey's case, as put before the High Court and again before this Court, that had the 2009 and 2012 smears been accurately reported at first, then, as a matter of probability, subsequent medical investigations would have disclosed a precancerous condition, which would have been treated successfully, and Ms. Morrissey would not be facing the same terminal prognosis which she has now received. Each of the defendants deny liability and loss. Before the High Court, the HSE admitted breach of duty limited to its failure to advise Ms. Morrissey of the results of the audit, but denied loss on this basis.

4.8 It is appropriate next to turn to the judgment of the High Court.

5. The High Court Judgment

5.1 As a preliminary point, it is appropriate to draw attention to the timescale within which these proceedings operated. Clearly, having regard both to Ms.

Morrissey's medical situation and the fact that there are a large number of other similar cases pending before the courts, it was considered highly desirable that judgment should be given as quickly as possible.

5.2 Addressing the proper approach to be applied in a case involving medical screening such as this one, the trial judge considered that the legal standard of care and the factual standards and criteria to which the screener must adhere are different, although interrelated, issues. The trial judge held that the classic statement of the applicable legal standard of care in the context of medical negligence cases is set out by Finlay C.J. in *Dunne v. National Maternity Hospital*, at p. 109:-

> "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...."

5.3 The trial judge placed particular reliance on the decision of the English Court of Appeal in *Penney, Palmer & Canon v. East Kent Health Authority* [2000] Lloyds Rep Med 41 ("*Penney Palmer*"), a case which also considered the allegedly negligent misreading of smear tests by cytology screeners. It is apparent that the trial judge considered the approach of Lord Woolf M.R. in those proceedings to be entirely correct, and thus it is appropriate to briefly set out the relevant aspects of that decision.

5.4 In that case, the Court of Appeal expressly approved the legal test for the standard of care in screening cases, as had been stated in *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582. This, together with *Bolitho v. City and Hackney Health Authority* [1988] A.C. 232, was considered by Cross J. to be the English equivalent of the *Dunne* test. Lord Woolf M.R. then stated the following in relation to the questions to be addressed in the context of determining the negligence of a medical screener, at para. 27:-

"...the *Bolam* test has no application where what the judge is required to do is make findings of fact. This is so even where those findings of fact are the subject of conflicting expert evidence. Thus, in this case there were three questions which the judge had to answer:-

(i) What was to be seen in the slides?

(ii) At the relevant time could a screener exercising reasonable care have failed to see what was on the slide?

(iii) Could a reasonably competent screener aware of what a screener exercising reasonable care will observe on the slide treat the slide as negative?"

5.5 Further, Lord Woolf M.R. agreed with the finding of the trial judge in those proceedings, to the effect that the experts in that case endorsed a requirement of "absolute confidence", being that, if there was any doubt in the mind of a screener as to whether the slide was normal, the screener should not classify it as negative. Thus, it was held by the Court of Appeal that a slide should not be classified as negative unless the screeners had "absolute confidence" that it was so.

5.6 The trial judge in these proceedings adopted a modified version of the three-stage approach set out by Lord Woolf M.R. and held that, before applying the *Dunne* principles, the court must consider what is on the slides, a question of fact which must be determined on the balance of probabilities. Following such a determination, he held that the court must then consider the *Dunne* principles, in reference to the screener's practical obligation of "absolute confidence", in the analysis of their slides. This was elaborated on further at paras. 71 and 72 of the judgment of Cross J., as follows:-

"71. I hold that "absolute confidence" is the screeners practical duty in relation to their analysis of what is on the slide and indeed the adequacy of the sample, and the legal issue is whether or not they have carried out that duty in accordance with the *Dunne* principles. These extra tests set out in *Penney Palmer* are combinations of factual and legal matters, but I accept that a screening programme especially one such as in Ireland which does not have annual retesting, is inherently deficient if screeners ascribe as normal, results in which they are in any doubt. Accordingly,

to ascribe as normal, a slide which the screener has any doubt of that fact even if he legitimately believes it to be normal on the balance of probabilities, is to fall below the *Dunne* standards required of that screener. Whether the screeners were right not to have any doubt is a matter to be assessed at law in accordance with the *Dunne* principles.

72. In other words, if there is any room for doubt that the slide was normal and the screener ascribes a normal result to the slide then the screener is in breach of the *Dunne* principles as he has been guilty of such failure that no professional scanner of equally specialist or general status and skill would have been guilty of if acting with ordinary care. A screening programme cannot operate safely if screeners are left to judge the slides and whether they are safe merely on the balance of probabilities…"

5.7 The overall approach which the trial judge considered was appropriate in the assessment of negligence in the context of medical screening was then set out at para. 74:-

"[T]he legal standard to be applied on the issue of the liability of the defendants is the *Dunne* test. Questions of fact, however, are for my decision on the balance of probabilities. The questions of fact include what was to be seen on the individual slides. Accordingly, as in *Penney Palmer*, the correct approach is to determine:-

(i) what was to be seen on each slide;

(ii) whether a reasonably competent screener at the relevant time could have failed to see what was on the slide; and

(iii) whether a reasonably competent screener in the light of what he or she should have observed, could have treated the slide as negative.

Questions (ii) and (iii) above and any issues as to adequacy are to be decided in the light of the 'absolute confidence' test and thereafter, the test for negligence is as stated in *Dunne*."

5.8 Before turning to consider the allegedly negligent analysis of the slides, the trial judge noted the potential issue of hindsight bias in respect of any retrospective review of the smear tests. It was held that a court should be wary of the potential for retrospective bias in the course of an audit or an expert's review and thus treat their results with caution. While noting that there are certain merits to conducting a blind review in order to reproduce the original screening conditions, the trial judge held that such a review is not compulsory and that the court should assess the professional opinion of any expert, whether conducting a blind review or otherwise, and come to a judgment.

5.9 Employing the three-part test as set out above, the trial judge then turned to consider the negligence of Quest in relation to the 2009 smear test. Answering question (i), it was held that certain abnormal features of cells were visible on the slide, and thus the trial judge had "no doubt" that the cells on the slide were AGC/AGUS. In this regard, he accepted the evidence of the Morrisseys' expert witnesses, Ms. Tan and Dr. McKenna, and the conclusions of those who conducted the audit.

5.10 In respect of question (ii), the trial judge held that a reasonably competent screener at the relevant time should not have failed to see what was on the slide, where there were clear indicators of cell abnormality. In this regard, the evidence of Dr. McKenna was also accepted. The trial judge held that the evidence challenging this conclusion, which was given by American expert witnesses appearing on behalf of Quest, should be treated with caution, in light of the influence of the Guidelines for the Review of GYN Cytology Samples in the Context of Litigation or Potential Litigation, which were issued by the American Society of Cytopathology (hereafter,

"the Guidelines"). The trial judge found that the Guidelines were prepared in an attempt to limit litigation and to provide a robust defence for cytoscreeners accused of negligence in the American courts.

5.11 In particular, the trial judge disagreed with the provisions of the Guidelines which seek to impose an obligation in all cases to carry out a blind review and which suggest that, in the absence of a blind review, it is wrong to impute any screener with negligence. Cross J. also disagreed with those provisions of the Guidelines which deal with findings of ASC-US and AGUS cells. In respect of such findings, the Guidelines state that such cases "do not represent consistently identifiable abnormalities and a reasonable basis for allegations of practice below a reasonable prudent practitioner standard of care". Insofar as this provision proposes that it is not negligent to report a finding of ASC-US or AGUS cells as a normal or clear result, it was roundly rejected and criticised by Cross J. It is apparent that the trial judge considered that this attitude towards the categorisation of ASC-US and AGUS cells was prevalent amongst Quest's American expert witnesses. One of Quest's expert witnesses, Prof. Austin, was involved in the drafting of the Guidelines, while another expert witness, Mr. Feit, referred to the high degree of inter-observer variability in respect of ASC-US and AGUS categories and stated that the categories are not used at all in the U.S. for proficiency audits or examinations of cytoscreeners. Mr. Feit's evidence that, in his view, the slide was normal, was dismissed as having been arrived at on the balance of probabilities, utilising his professional skill and judgement. On the basis that the Guidelines had affected, even subconsciously, the evidence of the American expert witnesses, which could give rise to the belief that ASC-US or AGUS cells need not be examined with the same scrutiny nor be subject to the requirement

of "absolute confidence", the trial judge held that such evidence should be treated with caution.

5.12 Quest chose not to call the two screeners who reviewed the slide in 2009 or the individual who conducted the 2014 audit of the slide to give evidence. Considering question (iii), it was held that in the absence of any such evidence, the trial judge had no knowledge as to what they did or did not see or how they did or did not appraise the slide. Cross J. held that it was his belief that the Quest screeners were utilising their professional skill and judgment and recording what they believed, as a matter of probability, was the case. However, applying the requirement of "absolute confidence", and on the basis of the abnormalities as identified on the slide by Dr. McKenna, it was concluded that the slide ought not to have been categorised as negative, and that Quest was negligent and in breach of duty in relation to the reading of the 2009 smear test.

5.13 As previously mentioned, Medlab was held not to be negligent in its reading of the slide which had been sent to it. While concluding that abnormalities were visible on the slide which suggested a categorisation of AGUS/AGC cells, the trial judge held that these cells were not easily distinguishable from other normal cells and thus that a screener exercising reasonable care could have failed to identify the same. The High Court therefore held that the categorisation of the slide as negative for abnormalities was not negligent nor a breach of duty. This finding is not in issue on this appeal.

5.14 The trial judge then considered the issue of the adequacy of the 2012 slide. As previously mentioned, under the Bethesda System a minimum of 5,000 well-visualised cells must be counted on a slide for it to be considered adequate. The

adequacy of most slides can be determined by a brief visual examination. If this visual inspection is insufficient, the Bethesda System prescribes that the ThinPrep method is used to formally test for adequacy. This requires viewing the slide under a microscope on a vertical or horizontal axis and magnifying random points on that axis in order to count the number of cells present. From this, the number of cells are multiplied appropriately in order to ascertain whether the minimum number of required cells are present on the slide. If the screener finds less than that amount, then the patient should be referred for a repeat smear test in one to three months.

5.15 Both the internal and external audits of the 2012 slide which were carried out considered that the reason for the false negative result provided was that the slide was "very scanty". The evidence of the Morrisseys' expert witnesses, Ms. Tan and Dr. McKenna, and Medlab's expert witness, Prof. Pitman, also indicated that the slide contained an inadequate number of cells. Dr. McKenna and Prof. Pitman both reached this conclusion having carried out a formal test for adequacy as prescribed under the Bethesda System. Ms. Stowe, another expert witness who appeared on behalf of Medlab, gave evidence that she found a sufficient number of cells on the slide following a formal test for adequacy.

5.16 The trial judge dismissed the evidence provided regarding a study carried out in St. Vincent's Hospital, Dublin, and a second study carried out by Prof. Pitman, both of which purposively looked for cells, and counted and multiplied the number of cells located in order to achieve a purported total. It was held that this was not a valid approach, given that neither study sampled on a random basis in order to calculate an average number of cells, as required by the Bethesda System.

5.17 The trial judge also dismissed the evidence of Dr. Madrigal, a pathologist who conducted a computer analysis of the slide on behalf of Prof. Pitman and determined that there were, in fact, over 35,500 cells on the slide. This alternative system of counting cells was held to be irrelevant, in circumstances where there has been no study conducted, subject to peer review or otherwise, to demonstrate that such a computer analysis is suitable or indeed to determine what number of cells must be found on the slide by the computer in order to establish adequacy. Further, the trial judge placed reliance on the fact that Medlab was required, under the terms of its agreement with CervicalCheck, to utilise the Thin Prep method, as prescribed under the Bethesda System.

5.18 Turning to consider the 2012 slide, the trial judge held that, on a visual examination, it was significantly different from all the other slides he had witnessed and that it appeared to have significantly fewer cells on it. It was held that the "absolute confidence" test is also applicable in the context of the slide's adequacy, meaning that in the event of any doubt on the part of a competent screener, the slide ought to have been formally tested for adequacy. In light of the evidence put before the High Court, and the trial judge's observations of the 2012 slide, it was held that the failure to test the slide for adequacy in accordance with the ThinPrep method was negligent and in breach of duty. In accordance with the *Dunne* principles, it was held that no screener of equal specialist or general status would have, if acting with ordinary care, failed to subject the slide to an appropriate test as to adequacy.

5.19 While acknowledging that the nature of the formal adequacy test carried out by Ms. Stowe was unclear and was not referred to in any report, the trial judge accepted that she conducted her test in accordance with the Bethesda System.

However, he held that it was unlikely that any such random review would have found the slide to be adequate. As Medlab chose not to call the two individuals that initially reviewed the 2012 slide, there was no evidence provided as to whether an adequacy test was carried out. The trial judge held that it must be presumed no such test was conducted. On the balance of probabilities, Cross J. held that, had a test been carried out by the cytoscreeners, in accordance with the ThinPrep method and the Bethesda System, it would have resulted in a finding that the slide was inadequate. Thus, Medlab was found to be negligent and in breach of duty in its failure to properly conduct an adequacy review.

5.20 In light of the foregoing findings of negligence on the part of Quest and Medlab, the trial judge turned to consider the consequences of the negligent misreading of the slides. On his analysis of the evidence as to causation and having regard to the fact that Ms. Morrissey was diagnosed with cancer in 2014, the trial judge held, on the balance of probabilities, that the HPV infection was present for at least ten years before that diagnosis.

5.21 The trial judge went on to hold that had the 2009 slide been reported by Quest as abnormal, that is, with a categorisation of AGUS/AGC cells, Ms. Morrissey would have been referred for a colposcopy or, at least, been advised to attend for a repeat smear in six months' time. It was accepted by the High Court that, on the balance of probabilities, such a follow-up screening or colposcopy would have returned abnormal results. It was further accepted that the detection of such pre-cancer would have resulted in the performance of a large loop excision of the Transformation Zone (LLETZ) procedure. This would have led to a complete excision of the cancerous cells, with only a 5% chance of the recurrence of precancerous cells, and less than a

1% chance of invasive cancer developing. On the balance of probabilities, the trial judge therefore determined that the serious prognosis which Ms. Morrissey now faces would not have arisen.

5.22 In relation to the 2012 smear, the trial judge reached the same conclusion. He held that, had the sample been tested in accordance with the ThinPrep method, as prescribed by the Bethesda System, it would have been deemed as inadequate and Ms. Morrissey would have been required to undergo a repeat smear within one to three months. On the balance of probabilities, it was held that the repeat smear would have resulted in a referral for a colposcopy and that the cancer, which in 2012 was certainly developing, would have been identified and Ms. Morrissey would have undergone the same procedure which could have taken place in 2009, with the same benign results. Accordingly, the negligent misreading of both the 2009 and 2012 slides were found to have caused the entirety of the Morrisseys' claims for injuries and loss.

5.23 The trial judge dismissed the defendants' submission that cervical cancer develops more rapidly in younger women than in older women. On the basis of such a suggestion, it had been argued that Ms. Morrissey's cancer was not present in pre-cancerous form in 2009 or 2012. The trial judge held that there was no evidence to support the proposition that Ms. Morrissey's cancer had developed more rapidly than average. The High Court judge further rejected the argument of the defendants that, as Ms. Morrissey developed squamous cancer and the abnormalities identified on the reviewed slides were glandular in nature (being categorised as AGUS), the development of the two were unrelated. In this regard, the trial judge accepted the evidence of Prof. Wells to the effect that it is highly likely that where one sees

glandular pre-cancer there is an associated squamous pre-cancer, as the same carcinogenic stimulus is affecting the stem cells of the cervix.

5.24 The trial judge held that, along with Quest and Medlab, the HSE was liable to the Morrisseys, in light of its organisational role in the CervicalCheck programme. Given that it determines the standards to be applied in relation to screening and to which laboratories must conform and provides for the manner in which screening is conducted and how it is reported, the HSE was held to have responsibility for "all aspects" of the screening programme. Further, the trial judge emphasised that the HSE chose to contract out the screening of smear tests to Quest and Medlab and, citing *Byrne v. Ryan* [2007] IEHC 207, [2009] 4 I.R. 542, he held that a party cannot evade its liability merely by engaging competent professional persons to perform tasks which they themselves are obliged to do.

5.25 Thus, the High Court held that the HSE has a primary liability towards the Morrisseys. The trial judge dismissed the HSE's submission that primary liability is based on agency and stated that he accepted the principles of *Woodland v. Essex County Council* [2013] UKSC 66, [2014] A.C. 537 and the five-part test there outlined by Lord Sumption. The trial judge held that the HSE was also vicariously liable for the activities of Quest and Medlab, by virtue of the control which it holds over the laboratories and their performance, as a result of their contractual arrangements.

5.26 The High Court held that it was impossible to differentiate between the losses resulting from the failure to properly assess the 2009 and 2012 slides and therefore, the three defendants were deemed to be 'concurrent wrongdoers' under the Civil Liability Act 1961, each being responsible for the same damage or for damage that

cannot be distinguished. However, as a result of the terms of the contracts between the HSE and the other defendants, the HSE was found to be entitled to an indemnity against the laboratories for all matters other than its liability in relation to the non-disclosure of the audits.

5.27 Assessing the quantum of damages to be awarded, the trial judge held that Ms. Morrissey was entitled to both general damages and special damages. Noting that the cap on general damages was most recently fixed at €450,000 by Quirke J. in *Yun v. Motor Insurers Bureau of Ireland* [2009] IEHC 318, during the time of an economic recession, the trial judge considered it appropriate to raise the cap on general damages to €500,000. Ms. Morrissey was awarded special damages in respect of, amongst other things, the cost of her future care and the loss of her earnings for the remainder of her life. The High Court held that the admitted breach of the HSE in its failure to advise Ms. Morrissey of the results of the audits did not result in any further personal injury being suffered by Ms. Morrissey and therefore that only a finding of nominal damages should be made against the HSE in this respect.

5.28 The trial judge held that the Ms. Morrissey was entitled, as against all defendants, to: general damages of €500,000; miscellaneous special damages (agreed) of €12,508; cost of home adaption (agreed) of €70,000; occupational therapy costs (agreed) of €55,000; loss of earnings in the sum of €50,000; care costs of €60,000; giving rise to a total to Ms. Morrissey of €747,508; together with €10,000 in nominal damages against the HSE in respect of its negligence in relation to the audit. The total amount of damages awarded to Ms. Morrissey was in the sum of €757,508.

5.29 The trial judge held that Mr. Morrissey was entitled to general damages for loss of consortium and to special damages arising from that loss, specifically in

respect of the future care that he and his daughter will require after Ms. Morrissey's death and the loss of Ms. Morrissey's future earnings throughout her career. The defendants submitted that, on the basis of comments made by Geoghegan J. in *Coppinger v. Waterford County Council* [1998] 4 I.R. 243, a spouse is only entitled to damages for loss of consortium in respect of his losses while Ms. Morrissey is alive. This was dismissed by the trial judge, who held that a spouse is entitled to damages for future pecuniary losses under the heading of loss of consortium and that it was irrelevant that such damages are, in certain circumstances, available in an action taken under Part IV of the Civil Liability Act 1961, in relation to fatal injuries.

5.30 The trial judge then referred to the decision of Lavan J. in *Mahon v. Burke & anor* [1991] 2 I.R. 495, which held that, where a deceased person has brought an action in negligence and was awarded damages, a statutory dependent was not entitled to maintain an action under Part IV of the 1961 Act, as to hold otherwise would be to subject a defendant to more than one case arising from the same cause of action. It was then pointed out that this authority can operate to exclude the dependants of an injured party from making claims for future financial losses because the injured party had vindicated her rights during her lifetime in a personal action claiming damages for personal injury. A situation where an injured party was confronted with a choice to either vindicate her own rights in a personal action claiming damages for personal injury, therefore depriving her dependants of any separate claim in the future, or alternatively forego her personal claim so that her dependants could achieve compensation for their losses, was described by the trial judge as "grossly unfair".

5.31 To remedy this situation, the trial judge suggested that the principle of "lost years" could be employed to compensate a plaintiff whose working life expectancy

has been cut short for the loss of her future earnings and the loss of her ability to care for her children. If Mr. Morrissey is not, in fact, entitled to damages for future losses under the heading of loss of consortium, then the trial judge held that he would have found that the same damages would be recoverable by Ms. Morrissey under the heading of "lost years". The trial judge also highlighted the potential application of the "lost years" principle in circumstances where a claimant does not have a spouse that can recover such damages for loss of consortium but does have child dependants who would be deprived of any future statutory claim.

5.32 The trial judge held that Mr. Morrissey was entitled, as against all defendants, to: general damages for loss of consortium in the sum of €60,000; damages for loss of Ms. Morrissey's income of €600,000; loss of pensions, company car and share options in the sum of €150,000; costs of care for their child of €500,000; costs of domestic assistance of €75,000; retrospective care costs of €13,432 and bereavement counselling costs of €6,532; thus giving a total to Mr. Morrissey of €1,405,000. The overall sum of damages awarded to Mr. and Ms. Morrissey was, therefore, €2,162,508. The trial judge assessed that sum as being fair and reasonable in all the circumstances.

5.33 As will have been seen, most of the five issues identified earlier as arising on this appeal involve quite distinct questions. The only exception are the two issues raised by, respectively, Quest and Medlab, which suggest that the trial judge failed to adequately or appropriately engage with their case on the question of negligence. While the precise manner in which those defendants analysed the purported failure of the trial judge in that regard involves different considerations, there is clearly a great deal of common ground between those two issues.

5.34 I will, therefore, deal with those two issues together. However, it seems to me to be appropriate to deal separately with each of the other issues and to set out the arguments of the parties in respect of those different issues as part of the discussion under each heading. I propose, therefore, to turn first to the question of the legal standard of care in clinical negligence cases and its application in the context of screening.

6. The Proper Approach

6.1 As noted earlier, developments at the oral hearing suggested that there was ultimately little difference between the parties as to the proper approach to be adopted by a screener in a case such as this. However, as this matter has generated significant controversy and was, indeed, one of the reasons why this Court considered it appropriate to allow a leapfrog appeal directly to the Court, it is important that the position is set out in some detail.

6.2 I have already cited the so-called *Dunne* principles. All parties ultimately agreed that those principles continue to represent the law in this jurisdiction. It is also clear that there are significant similarities between the *Dunne* principles and the legal test for the standard of care identified in the United Kingdom in *Bolam* and *Bolitho*.

6.3 Before addressing the precise principles to be applied, it is appropriate to briefly make a number of preliminary observations. The first is that care needs to be taken in the use of the term "standard of care". As the trial judge pointed out, that term has a precise legal meaning and represents, at the level of principle, the legal duty which applies in any particular circumstance. However, given that, in clinical negligence cases, a court is dealing with "care" in a medical sense, the phrase "standard of care" might at least colloquially be used to define the appropriate

standard by reference to which the approach of a relevant professional to a particular problem should be assessed. To avoid any possible confusion between the term "standard of care" in its precise legal meaning and what might colloquially be called a standard of care in a clinic setting, I will use the term "standard of approach" to mean the standard which, in practice, has been shown to be required of a particular professional in particular circumstances.

6.4 One further observation may also be useful at this stage. There are, of course, similarities between the *Dunne* principles as applied by the courts in this jurisdiction and the *Bolam* and *Bolitho* principles applied in the United Kingdom. I have already cited a passage from the judgment of Lord Woolf M.R. in *Penney Palmer* in which he indicated that "the *Bolam* test has no application where what the judge is required to do is make findings of fact". It seems clear that, in the context in which Lord Woolf M.R. was commenting, the *Bolam* test is in reality a reference to the fourth point identified in the judgment of Finlay C.J. in *Dunne* (as already cited). Thus where, in a number of judgments, the U.K. jurisprudence suggests that the *Bolam* test has no application in particular circumstances, it does not seem to me that it follows that the *Dunne* principles may not apply, for the specific point decided in *Bolam* forms but one leg of the overall test identified in *Dunne*.

6.5 In any event, it is important to start by indicating that, while the principles identified by Finlay C.J. in *Dunne* are expressly related to negligence against medical practitioners, they mirror the test applied across the board in cases involving allegations of professional negligence. For example, a similar approach to legal advice allegedly negligently given was adopted by this Court in *Roche v. Peilow* [1985] I.R. 232.

6.6 Thus, the starting point in any professional negligence case requires the identification of the standard of approach which would have been applied by a professional of the appropriate standing or skill as the person against whom the allegation of negligence is made. Accepted practice is highly relevant, although departure from normal practice may be found not to give rise to negligence where an equivalent professional might reasonably have followed such a course of action while exercising reasonable skill. Likewise, following normal practice may not absolve the professional from a claim in negligence if it can be shown that there was an inherent defect in the practice which should have been obvious to professionals of the type in question. Finally, it is emphasised that the question will not come down to one of a judge deciding which of two or more possible courses of action might have been considered, often with the benefit of hindsight, to have been preferable, but rather whether the course of action actually adopted was consistent with the exercise of the ordinary care which could reasonably be expected of a professional of the type under consideration.

6.7 In my view, the various aspects of the *Dunne* test identified by Finlay C.J. can be reduced to one overarching principle with a number of subsidiary considerations which impact on the application of that overarching principle in particular circumstances. The overarching principle is to be found in point (1); the standard of approach of a medical professional is to apply a standard appropriate to a person of equal specialist or general status acting with ordinary care. A failure to act in that way will amount to negligence.

6.8 Each of the other points made by Finlay C.J. derive from that overall obligation. Thus, even if the medical practitioner concerned deviated from what

might have been established to be a general and approved practice, the practitioner concerned will not be found to be negligent unless it can also be shown that no practitioner of equal status exercising ordinary skill might not also have deviated in the same way. This represents point (2) of the matters identified by Finlay C.J. and can be seen to represent the application of the overarching principle to circumstances where the relevant practitioner has, in fact, deviated from an established practice.

6.9 A similar comment can be made in respect of point (3). Here, Finlay C.J. makes clear that following an accepted practice may not absolve a practitioner from negligence if it can be demonstrated that there were inherent defects in the practice which ought to have been obvious to a professional giving the matter due consideration. This, again, can be seen to derive from the overarching principle, for a professional cannot be said to have applied the required standard of approach, being to exercise the ordinary skill which would be appropriate to a person of the status in question, if it can also be shown that any such person ought to have realised that the relevant practice had an inherent defect.

6.10 In addition, a similar observation can be applied to points (4) and (5) as identified by Finlay C.J. in *Dunne*. Where there are two or more schools of thought as to what course of action should be adopted in particular circumstances, it is clearly the case that a professional exercising reasonable care may adopt one of them even though there may be others who would take a different course. These principles, in effect, represent what might be called the *Bolam* element of the *Dunne* test and can also be seen to derive from the overarching principle.

6.11 Finally, it is important to note that Finlay C.J. went on, at p. 109 of his judgment in *Dunne*, to note that the relevant principles "apply in identical fashion to

questions of diagnosis" as well as to questions of treatment. There was no argument put forward on this appeal that different principles would apply in the case of screening. There are some passages in judgments of the courts of the United Kingdom which do seek to make a distinction between treatment cases and diagnostic cases. It is, of course, the case that the application of general principles to particular circumstances may give rise to somewhat different approaches, which stem from the very fact that circumstances may be different. It may very well be the case that questions concerning deviation from accepted practice, following inherently defective practices or choice between two respectable professional opinions may be much more likely to arise in the context of decisions on treatment rather than decisions on diagnosis (or, indeed, it should be said, screening). But it is not, for example, impossible to envisage that there might be circumstances where there were two different approaches to diagnosis in a particular set of circumstances, both of which had their reasonable adherents. I cannot see that those aspects of the *Dunne* principles which deal with such questions would not have equal applicability to a case of alleged misdiagnosis in such circumstances. There seems to me, therefore, to be strong grounds for favouring the view adopted by Finlay C.J. in *Dunne* which does not seek to distinguish, at the level of principle, between different types of clinical tasks. However, it does need to be acknowledged that how those general principles apply may well be different in particular circumstances. If there are not two schools of thought about how to go about a particular diagnosis, then the question of the applicability of those aspects of the *Dunne* principles which address such questions (and are at the heart of what are described as the *Bolam* principles in the United Kingdom) simply has no application. That is so not because there is a difference in principle between the approach to treatment cases and other cases, but rather it simply

derives from the fact that, in practice, some of the *Dunne* principles may have no application in a particular type of case because they do not arise on the facts.

6.12 No issue arose in these proceedings concerning the adoption of a common practice which had inherent defects which ought to have been obvious. Likewise, there was no issue concerning there being two schools of respectable thought or of an acceptable deviation from common and established practice. The issue of the standard of approach in this case came down, therefore, to the same issue which almost inevitably arises in any professional negligence case. 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? The test to be applied in this case is, therefore, no different to the test which would properly be applied in any professional negligence case. Ultimately, in the particular circumstances of this case, the question came down to establishing what the approach of relevant professionals to screening should be and whether it had been demonstrated that the actions of any of the screeners in this case had fallen below the reasonable standard which professionals of that type could be expected to have applied, having regard to that approach.

6.13 Next, it must be emphasised that the question of the standard of approach which should be applied by an ordinarily competent professional is ultimately a matter of fact. It requires expert evidence as to how professionals of the type in question would generally go about their work and the way in which they would have dealt with the case in question. It follows that, at least in many cases, the court has no role in determining the standard to be applied other than to assess the evidence given by professionals as to the standard to which they themselves regard as being

appropriate to someone of the standing and skill of the defendant. There may be some scope for the court reaching a further assessment in those limited cases where it is said that a professional did comply with an accepted practice but where there were also said to be inherent defects in the practice concerned. As already noted, no such issues arise in this case.

6.14 It follows that, in a case such as this, a court has no role in imposing a standard of approach on a professional. Rather, it is the standards of the profession itself, as demonstrated by the evidence, which impose the standard required.

6.15 I have felt it important to emphasise these factors to ensure that there is no misunderstanding about the court's role in cases such as this. Some public commentary on the decision of the High Court in this case seems to have ignored the fact that the role of the court is as I have just described it.

6.16 It seems to me next to be appropriate to address the way in which evidence was given in the High Court for, as I have pointed out, it is that evidence, given by professionals themselves, which determines the standard to be applied by the Court to another expert against whom an allegation of negligence is made.

6.17 In that context, it is of some importance to emphasise that the analysis of the Court of Appeal for England and Wales in *Penney Palmer* was based on the evidence given by relevant professionals to that court in that case. Further, that analysis was also expressly put to many of the experts who gave evidence in this case, such that its terms actually form part of the evidence given, in the sense that witnesses gave their testimony, at least in part, by reference to the conclusions reached in *Penney Palmer*. It is in that context that the term "absolute confidence" came into play. It is of the

highest importance to understand the way in which that term was used by the courts of England and Wales, in the evidence in this case and, it follows, by the trial judge.

6.18 First, it should be said that it is clear that the term "absolute confidence" derived from what the trial judge in the *Penney Palmer* proceedings (see *Penney, Palmer and Cannon v. East Kent Health Authority* [1999] Lloyd's Rep Med 123) considered to be the agreed evidence of the experts before him. Reviewing the evidence of the experts, the trial judge held, at p. 127:-

> "All five [experts] agreed that if the screener was in any doubt about what he saw on the slide he should not classify the smear as negative. In their evidence before me each expressed the point differently but the conclusion was the same."

6.19 The requirement of "absolute confidence that the smear is within the normal range" before a screener ascribes to it a clear result was said to be the appropriate practice of a screener, as advanced by one such expert, a standard with which the trial judge stated that all the other experts were in agreement. Likewise, the adoption by the Court of Appeal for England and Wales of the same term followed on from the finding of the trial judge, based, as it was, on the evidence. At para. 40 of his judgment, Lord Woolf M.R. stated:-

> "The judge's reliance on the absolute confidence test is understandable. The phrase 'absolute confidence' was no more than shorthand for the approach which on examination of the transcripts it seems to us all the experts endorsed."

6.20 It follows that the adoption of the "absolute confidence" test in England and Wales stemmed from an assessment of evidence given by relevant professionals on both sides of the *Penney Palmer* case. It was not itself a court imposed obligation but

one which, on the evidence, the trial court assessed as being the agreed position of experts in the field.

6.21 Turning then to the evidence before the High Court in this case, it is important to note that the question of there being potentially a difference between the appropriate standard applied in the United Kingdom and that applied in the United States did form some part of the debate on the evidence. It was in that context that evidence was given of the fact that an "absolute confidence" test was applied in the United Kingdom (including Northern Ireland) and was also the subject of discussion with some of the United States witnesses called on behalf of the defendants.

6.22 Dr. McKenna, a consultant cellular pathologist based in Northern Ireland who gave evidence on behalf of the Morrisseys, was referred to the *Penney Palmer* authority during his examination in chief before the High Court on 30 January 2019:-

> "Q. Can I just ask you about something... it's English decision called *Penney, Palmer and Cannon v. East Kent Health Authority* and it's a decision of the English Court of Appeal of 16th December 1999. Are you familiar with that?
>
> A. I am very familiar with it, yes.
>
> Q. There's just one particular thing said in that judgment I just want to draw attention to at this stage and it was that the English Court of Appeal said that all the experts endorsed the 'absolute confidence' test, under which if there is any doubt in the mind of the cytoscreeners as to whether the slide was normal, he or she should not classify it as negative. Now, what exactly is the English Court of Appeal saying there? Like, what is the absolute confidence test, what does that mean?
>
> A. I think what it's saying is that unless you are absolutely – and that is 100% -- convinced that the slide is negative, do not call it negative.

...

Q. So, in other words, what I am getting at here is that when a cytoscreeners has a slide in front of him or her, is there any acceptable level of doubt – if you have any doubt, is any doubt actually acceptable?

A. No, you can only – you should only report something as negative when you're absolutely certain – in other words, no doubt."

6.23 When the "absolute confidence test" was put to Dr. McKenna once again the following day, under which "if there is any doubt in the mind of a cytoscreeners as to whether the slide was normal he or she should not classify it as negative", he stated the following:-

"A. And I fully agree with that statement, and in fact those are the very words that I always use to my staff; if you have any doubt, then pass it on. Do not call it negative."

6.24 Ms. Tan, a cytotechnologist based in New York who also gave evidence on behalf of the Morrisseys, stated that there is no tolerance for any doubt in the assessment of the normality of the cells. The evidence tendered by the experts appearing on behalf of Medlab also indicated their agreement with the "absolute confidence" standard. Prof. Pitman, the lead consultant cellular pathologist for Medlab, agreed that a cytotechnology must have absolute confidence that a smear is normal before reporting it as normal. Ms. Stowe, a cytotechnologist based in Wisconsin, also had the following exchange during cross examination:-

"Q. Now let's be clear about this. Do you agree with me that the test is that a cytotechnologist or a cytoscreeners must have absolute confidence that there is no abnormality on that slide to pass it?

A. I agree with that."

6.25 The experts who appeared on behalf of Quest, both based in the United States, expressed some reservation with the "absolute" nature of the standard, however. Prof. Austin, a consultant cellular pathologist based in Pennsylvania, expressed the following in an exchange with the trial judge:-

> "Q. MR. JUSTICE CROSS: Do you accept the suggestion that the cytoscreeners must have absolute certainty to pass cells as normal?
>
> A. That's my understanding of the decision in the UK.
>
> Q. MR. JUSTICE CROSS: Well, is it your view?
>
> A. The cytotechnologist should be confident if a slide is negative or if it is possibly abnormal to refer it to the pathologist.
>
> Q. MR. JUSTICE CROSS: And you accept that, do you?
>
> A. Yes, Sir."

6.26 While Prof. Austin was under cross-examination, the following exchange in relation to the *Penney Palmer* authority took place:-

> "Q. ...You see, that decision in the UK, the *Penney, Palmer and Cannon v. East Kent Authority*, did you know that experts from The United States gave evidence in that case?
>
> A. No, I didn't know that.
>
> Q. All right. Did you know that they all agree, all the experts actually agreed in that case that the test is "the absolute confidence" test? Did you know that?
>
> A. No. Do you know who the US experts were?
>
> Q. I don't, I am afraid, no.
>
> A. Very good.
>
> Q. So what I just want to be clear about is this, because we are dealing with a slide which is in a laboratory in Grand Rapids in Wyoming in August

2009; are you saying that the cytotechnologist who looked at that slide has a different test than the absolute confidence test?

A. That question would have to be answered by someone from Quest because I wasn't there, you know, instructing the cytotechnologist in the Quest facility.

Q. MR. JUSTICE CROSS: When you said that a competent screener when looking at this slide in 2009 might or could have reported it as normal...

A. Yes, Sir.

Q. MR. JUSTICE CROSS: ...were you saying that that could have been done by a competent screener assessing his or her professional view and coming to a decision on the balance of probabilities or were you saying that a competent screener could say with absolute confidence that it was normal?

A. I can certainly say with confidence. To be honest, this idea of absolute confidence, I am kind of struggling with, because it's not...

Q. MR. JUSTICE CROSS: It is not something you...

A. It is not something we routinely deal with. So I am not quite sure how to say the difference between 'confidence' and 'absolute confidence'."

6.27 After the trial judge's intervention, the cross-examination continued and Prof. Austin appeared to ultimately express agreement with the standard of "absolute confidence", notwithstanding his previous reservations:-

"Q. Now what I just want to be very clear about here, I want to be clear that the standard that applied in Grand Rapids in Wyoming in August 2009, all right, that's what we are dealing with here in this case, all right. Now are you suggesting that a cytoscreener, when he or she is looking at a slide, should be anything other than absolutely confident if they are going to pass that slide as being negative?

A. No, Sir.

Q. So we are in agreement then?

A. Yes, Sir."

6.28 Mr. Feit, a cytotechnologist based in Wisconsin, also expressed misgivings in relation to the "absolute" nature of the confidence required:-

"A. Well, this is something that -- so absolute confidence for me, as a scientist, absolute confidence is very hard to have because, I mean, generally in science, you generally say the evidence supports this or doesn't support that.

Q. MR. JUSTICE CROSS: And there can be levels of support, can't there?

A. Yes, yes, but I don't think -- I mean, you probably wouldn't even have -- I mean, a physicist probably wouldn't even say he has absolute confidence in the law of gravity because....

Q. MR. JUSTICE CROSS: It'd be pretty close.

A. Pretty close, probably, pretty close. But I mean, in science, it's just, you know, we are taught not to do that because science moves forward through new studies, new evidence, you know, and so absolute confidence is something I just, it's very difficult for me. I know it probably has a different meaning in law.

Q. MR. JUSTICE CROSS: Yes.

Q. MR. TREACY: Yes.

A. And I don't understand that, so."

6.29 From that review of the evidence, it is first clear that there was evidence that the actual standard applied by relevant professionals in the United Kingdom was one of "absolute confidence". Given some of the "doomsday" predictions which followed on from the judgment of the High Court in this case, I do feel it necessary to say that at least some of the more extreme comments are very hard to reconcile with the fact that there was clear evidence that such a standard is actually applied in the United

Kingdom generally and, to the particular knowledge of an important expert witness, in Northern Ireland specifically, without the screening systems in those countries becoming unworkable.

6.30 It is also absolutely clear that, while there may have been some quibbling on the part of witnesses called on behalf of the defendants with whether the term "absolute" was appropriate, all of the witnesses agreed that any doubt about whether what is seen on a slide is normal must not allow the case to be reported as a clear result. Again, it must be emphasised that imposing such a standard of approach does not derive from the Court but rather from an assessment of the evidence given on all sides concerning the standard actually applied by professionals in the area in question. It is those experts, not the Court, who identified the standard expected of a normally competent screener as being one which precludes giving a clear result in a case of doubt.

6.31 Next, it is perhaps of particular importance to note again that the trial judge in this case clearly accepted that it was possible for competent screeners, applying an appropriate standard of approach, to come to different views about whether there was even a doubt as to whether a clear result could be given. It would, indeed, have been difficult for the trial judge to have come to any different view having regard to the evidence given in respect of the United Kingdom's screening programme (which is accepted as being one of the very highest standard), where, notwithstanding those high standards, reviews suggest of a different view to that of the original screener being taken in a significant proportion of those cases where a diagnosis of cancer actually followed.

6.32 However, if any proof were needed of the practical acceptance by the trial judge of the fact that there could be genuine differences of opinion between competent screeners, even applying a no doubt test, this can be found in his very finding in respect of the claim for negligence against Medlab relating to the reading of the 2012 slide. It will be recalled that, while the trial judge found Medlab negligent in respect of the adequacy issue, the trial judge was not satisfied that it had been demonstrated that Medlab was negligent in respect of the manner in which the screener did not identify any suspicious material on the slide in question. The trial judge came to that view notwithstanding the fact that there was expert evidence, tendered on behalf of the Morrisseys, which suggested that a competent screener would have identified the slide as problematic. It follows that this case itself provides a very clear example of how, even applying what the trial judge considered to be an "absolute confidence" test, there was nonetheless room for a finding, contrary to at least some of the evidence, that this was the sort of case where competent screeners could come to different views and where there was, therefore, no negligence. The suggestion, therefore, that the trial judge was applying an "absolute confidence" test in a way which effectively meant that every error (even with the benefit of hindsight) must result in a finding of negligence is demonstrably wrong and would clearly be seen to be such to anyone who had taken the trouble to read the judgment. If the trial judge were applying the test in that way then it is impossible to see how he could have found against the Morrisseys in respect of the allegation that Medlab had negligently read the slide, as opposed to the finding which he actually made, which was to the effect that Medlab was only negligent in treating it as adequate.

6.33 Finally, it is necessary to touch on a question on the standard of approach issue in respect of which there was some debate at the hearing. That debate concerned the

use of the term "test" in relation to "absolute confidence". Counsel for the Morrisseys accepted that the *Dunne* test was the appropriate test and was anxious not to be heard to suggest that *Penney Palmer* provided a different legal test. In that view, I consider counsel to be correct. *Penney Palmer* does not establish any different legal test. Rather the term "absolute confidence", which derives from *Penney Palmer*, can be seen as no more than a synopsis of the evidence given in that case and not as representing any different or separate test. However, it is worth noting that, in the written submissions filed in the High Court, counsel on behalf of the Morrisseys did describe it as "the absolute confidence test". That may well explain why the trial judge also described it as a "test" in his judgment. However, it is clear that it does not represent a separate or different legal test. The only test for the standard of approach, at least so far as relevant in this case, is based on evidence as to the standard actually applied by competent professionals in the area. In describing that standard, based on the evidence, it is important not to get too hung up on the words used, for to do so can create an erroneous impression that the language used has a status amounting to a legal test.

6.34 Indeed, it may well be that the introduction of the term "absolute confidence" into the debate has created more confusion than clarity. Ultimately, the overall question which a court has to address in a case such as this is as to whether a reasonably competent screener could have given a clear result, both having regard to adequacy and the absence of suspicious material. On the evidence in this case, it seems clear that the standard of approach to be adopted by a screener in such circumstances is that a screener should not give a clear result if they have any doubt about either adequacy or the absence of suspicious material.

6.35 That is the only test to be applied. Therefore, the question for the court's assessment is whether, on the evidence in this case, it has been shown on the balance of probabilities that a competent screener could not have concluded that there was no doubt about it being appropriate to give a clear result.

6.36 It does not seem to me that there is any basis for suggesting that the trial judge approached this case in any other manner.

6.37 It may be useful, at this stage, to also comment on the role of expert evidence. For the reasons already addressed, it is clear that, in any case of dispute, it will be necessary to tender expert evidence as to what the appropriate standard of approach should be for a professional of the standing and skill of the one against whom an allegation of negligence is made. But expert evidence may play another role. It may assist the court in deciding on the facts of the individual case whether the relevant professional has lived up to whatever standard of approach has been established. Expert evidence of that type may play a role in many types of negligence actions.

6.38 For example, in the case of an industrial accident, expert evidence may be tendered to establish the appropriate standards which should be applied by employers in the industry concerned. But expert evidence might also be tendered to assist the court in deciding whether, as a fact, the accident occurred in a way which could be said to be attributable to a failure to apply those standards. For example, an engineer might be called to give evidence about whether it was likely that an accident could have happened in the way in which it was described by a witness. It might be said that the workings of whatever industrial process was involved would not make it possible for an accident to have occurred in a particular way. Similarly, medical evidence might be tendered as to whether injuries actually suffered were or were not

consistent with an accident having occurred in a way described by a witness. In those latter cases, the experts are not giving evidence as to the standards to be applied but rather are giving evidence which may assist the court in conducting its role of deciding the facts on the balance of probabilities.

6.39 It is worth emphasising that, where expert evidence is tendered in that latter respect, there is no place for the application of the *Bolam* test or, in the Irish context, the third item of the *Dunne* test. The experts may express different views about the likelihood or otherwise of something having happened in a particular way or the likelihood or otherwise of a competent professional having acted in a particular way. But when such views are expressed, they only represent evidence to assist the court in deciding on the facts. The court must choose between any such competing evidence and reach an overall assessment on the facts on the basis of all the evidence tendered. In such a case, the court is not involved in identifying that there are two respectable schools of thought about the proper course of action to be adopted, such that a professional will be absolved from liability if following either. Rather, in such a case the expert is simply tendering evidence which may be useful, to a greater or lesser extent, in assisting the judge to reach a conclusion on the facts. Such evidence may not even be absolutely necessary in every case. To take but a simple example, it might be established in the circumstances of a particular negligence claim that it was accepted practice that a doctor should have taken a particular course of action if a patient had a temperature above a certain level. Whether the patient actually had a temperature above that level when measured by the relevant doctor is a question of fact. There might be competing evidence. A doctor might give evidence of one reading, whereas a nurse who was present might suggest that the doctor's evidence was incorrect. In such a case, the court would have to make a finding of fact based on

that evidence in circumstances where expert evidence would be of no assistance. However, where the facts involve difficult questions on which expertise may bear, then it will, of course, often be useful for the court to have the benefit of such expert evidence in assessing the facts.

6.40 That being said, I would also accept that the practical approach adopted in *Penney Palmer* may well provide a useful guide to the way in which a court should approach its task in circumstances of this case. Ultimately, however, the question is as to whether a competent screener could have given a negative, or clear, result. The first question for this Court is, therefore, as to whether there was evidence to support the trial judge's conclusion that a screener must not give a clear result when in any doubt. On the evidence, it was undoubtedly accepted by all witnesses that a competent screener must not give such a result if they had any doubt as to the presence of suspicious material or as to the adequacy of the material on the slide. It follows that the second question, in respect of the slide tested by Quest, was as to whether there was evidence and analysis to support the finding that a competent screener could not have formed the view that there was no doubt but that the slide in question was clear. Likewise, the second question in respect of Medlab was as to whether there was evidence and analysis to support the finding that a competent screener could not have formed the view that the sample was adequate.

6.41 Those issues obviously involve considering the slides themselves, potentially with the benefit of expert evidence, and considering whether any element of those slides was such that it should not have left a competent screener without a doubt. Ultimately it does not seem to me that the approach of the trial judge in that regard was materially different to the approach which I have just outlined. On that basis, it

does not seem to me that the standard of care issue itself could provide any basis for allowing an appeal from the decision of the trial judge in this case. In those circumstances, it is next necessary to turn to the two connected issues, which concern whether the trial judge failed, as both Quest and Medlab argue, to properly engage with their case on the respective second issues just mentioned.

7. Did the Trial Judge fail to engage with the Defence Case?

7.1 While the specific issues raised by, respectively, Quest and Medlab were different and depended very much on the factual issues arising in the separate cases as against them, there is, nonetheless, a similar approach adopted by both of these defendants at the level of principle.

7.2 While it will be necessary, therefore, to turn to the specific issues which arise in the different case made against both of these defendants, it is appropriate to start with some general observations which are applicable to both sets of issues.

7.3 The legal position is clear. The classic statement of the correct approach to be taken by an appellate court in respect of findings of fact made at first instance is as set out by McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210 at pp. 217-218. In particular, it was held that an appellate court is bound by the findings of fact made by the trial judge when they are supported by credible evidence. Further, McCarthy J. emphasised the importance of a clear statement by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusion that follows.

7.4 This latter obligation on the trial judge underpins the case law which subsequently developed on the question of the appropriate engagement on the part of a trial judge with the competing arguments of the parties to litigation. Any party is

entitled to a judgment which states why the party concerned won or lost. In *Doyle v. Banville* [2012] IESC 25, [2018] 1 I.R. 505, this Court held that, to this end, it was important that the judgment of the trial court engages with the key elements of the case made by both sides and provides a reasoned conclusion as to why the case on the facts made by one or other side is preferred. In my judgment in that case, a distinction was drawn between circumstances in which there may have been a significant and material error in the way in which the trial judge reached a conclusion as to the facts, in respect of which an appellate court can and should intervene, and a case where the trial judge was simply called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case, it is not the function of the appellate court to revisit the trial judge's findings.

7.5 This obligation on the trial judge to engage with and adequately address the competing arguments of the parties on the facts was restated by this Court in *Wright v. AIB Finance & Leasing and ors* [2013] IESC 55 and *Ulster Bank v. Healy* [2015] IESC 106. Importantly, in *Leopardstown Club Ltd. v. Templeville Developments Ltd* [2017] IESC 50, [2017] 3 I.R. 707, MacMenamin J. set out in clear terms the approach to be taken by an appellate court when reviewing the engagement of the trial judge with the arguments of the parties to litigation, at paras. 109-111:-

> "109. Save where there is a clear non-engagement with essential parts of the evidence, therefore, an appeal court may not reverse the decision of a trial judge, by adverting to *other* evidence capable of being portrayed as inconsistent with the trial judge's primary findings of fact.
>
> 110. "Non-engagement" with evidence must mean that there was something truly glaring, which the trial judge simply did not deal with or advert to, *and* where what was omitted went to the very core, or the essential validity, of his findings. There is, therefore, a high threshold. In effect,

an appeal court must conclude that the judge's conclusion is so flawed, to the extent that it is not properly "reasoned" at all. This would arise only in circumstances where findings of primary fact could not "in all reason" be held to be supported by the evidence (see Henchy J. in *V.C. v. J.M. and G.M.* [1987] I.R. 510, at p. 523, quoting his earlier judgment in *Northern Bank Finance v. Charlton* [1979] I.R. 149). "Non-engagement" will not, therefore, be established by a process of identifying other parts of the evidence which might support a conclusion other than that of the trial judge, when there are primary facts, such as here. Each of the principles in *Hay v. O'Grady* [1992] 1 I.R. 210 is to be applied.

111. The task faced by the judges of our appeal courts is already too onerous. But the task would be made yet more onerous were appeals to be reduced to a piece-by-piece analysis of the evidence, in an effort to show, on appeal, that the trial judge might have laid more emphasis on, or attached more weight to, the evidence of one witness, or a number of witnesses, or one document, or a number of documents, rather than others on which he or she relied." (emphasis included in original)

7.6 In the context of that case law, it is, however, important to emphasise a number of features which are of some relevance to the issues which arise on this appeal.

7.7 First, it is clear that what is spoken of as a lack of engagement in those authorities relates not so much to the way in which a trial judge conducted the proceedings but rather to the way in which the trial judge determined the issues in the judgment. A failure to engage, in the context in which it is used in the relevant case law, clearly refers to the failure on the part of a trial judge to set out the reasons why central or important aspects of the case of one or other party on the facts were not accepted.

7.8 I did not understand counsel on any side of this case to be in the least way critical of the way in which the trial judge conducted these proceedings. Even a general reading of the transcript makes it clear that the trial judge was fully involved with the evidence and the issues and, in that sense, was clearly engaged with the case. However, that is not the sort of engagement to which the case law referred to earlier is directed. Rather, the criticism suggested both by Quest and by Medlab is directed to the question of whether the trial judge gave adequate reasons in his judgment for rejecting what are said to be central aspects of their respective cases on the facts.

7.9 Second, it is worth adding that it is clear from that case law that it is far from sufficient for a party seeking to appeal a decision of a trial court to search through the undergrowth of the pleadings and evidence so as to find some tangential or minor aspect of the case which is not expressly referred to in the judgment. The test, therefore, involves, as MacMenamin J. pointed out in *Leopardstown Club*, a high threshold which requires the court to address the question of whether, taking that party's case as a whole, can it be fairly said that the trial judge has significantly failed to adequately address the reasons for rejecting the appellants' case on the facts?

7.10 Finally, before going on to consider the specific issues raised by the respective defendants, it is also of importance to emphasise that it was accepted by both Quest and by Medlab that there was evidence on which the trial judge could have concluded that the facts were as alleged by the Morrisseys. In other words, there was evidence that a competent screener would, in the case of Quest, not have given a clear reading and, in the case of Medlab, not considered the slide adequate. This is not the sort of case, therefore, where the primary issue identified in *Hay v. O'Grady* arises. In most cases in which factual decisions are sought to be overturned, it is asserted that there

was no evidence on which the decider of fact could have reached a particular adverse conclusion. This is not such a case. Rather, this case is solely concerned with whether there was sufficient engagement in the judgment with the case on the facts made by the two laboratories so as to give a reasonable and broad explanation as to why what were said to be important elements of their respective defences on the merits did not find favour.

7.11 Against those general observations, it is necessary to turn separately to the issues raised by, respectively, Quest and Medlab.

8. The Quest Case

8.1 It was argued on behalf of Quest that there was a failure on the part of the trial judge to engage with its case in respect of the interpretation of the 2009 slide, which was to the effect that a reasonably competent cytoscreener could have reported the 2009 slide as clear or negative. Quest submits that the trial judge reached two erroneous conclusions in relation to its U.S. expert witnesses, resulting in a failure on the part of the High Court to engage with the cumulative effect of their evidence.

8.2 First, as previously referred to, the trial judge considered that the evidence tendered by American expert witnesses called by Quest should be treated with caution and as being "subconsciously affected" by the Guidelines issued by the American Society of Cytopathology and its view on the reading of ASC-US and AGUS cells. Quest submitted that this conclusion was not supported by evidence and that at no point in these proceedings was it submitted that the Guidelines should set the legal standard for negligence in cytoscreening. While Quest's expert cytotechnologist, Mr. Feit, and its expert pathologist, Prof. Austin, were members of the American Society of Cytopathology, it was submitted that their conclusions as to the presence of

abnormalities on the 2009 slide were derived from honestly held opinions rather than bias towards the categories denoting borderline abnormalities arising from the content of the Guidelines.

8.3 Second, Quest argued that the trial judge also erred in concluding that Mr. Feit and the Quest cytoscreeners reached their conclusions as to the 2009 slide on the balance of probabilities, in circumstances where, it was submitted, there was no evidence that they adopted this standard.

8.4 As a result of these errors, Quest submitted that the conclusions of the trial judge in respect of the interpretation of the 2009 slide contained no real engagement with the evidence of Prof. Austin and Mr. Feit and that there was no proper explanation as to why the evidence of the Morrisseys' expert witnesses was preferred over their own.

8.5 Furthermore, it was argued that there was a failure to engage with the evidence adduced by Quest of the blind review which Mr. Feit coordinated of the 2009 slide. This review was submitted to have reproduced the original screening conditions insofar as possible in order to assess how the reasonably competent cytoscreeners would interpret a slide. The 2009 slide was reviewed by eight cytoscreeners, alongside nine other slides, and the screeners did not know which slide was of interest, nor by whom they were instructed. Six out of eight screeners deemed the 2009 slide negative, and two made findings of abnormalities.

8.6 Quest submitted that the trial judge's approach to the blind review was flawed. While it was accepted that Cross J. had engaged at a high level with some of the "hazards" said to be associated with blind reviews in general, the trial judge was said not to have engaged at all with the methodology or results of the Quest blind review

and not to have explained how its results can be consistent with the finding of negligence which was arrived at. This occurred, Quest submitted, in circumstances where the expert witnesses on behalf of the Morrisseys also accepted the merits of blind review. In addition, it was submitted that the trial judge expressly refused to consider the evidence of Prof. Roese, thus failing to appreciate the need to mitigate hindsight bias in a cytology review.

8.7 Finally, Quest submitted that there was also a failure on the part of the trial judge to engage with their case in respect of causation. The cumulative effect of the evidence adduced by Quest in relation to causation was said to point to the probability that neither squamous abnormalities nor squamous pre-cancer was present in 2009.

8.8 In this regard, it was submitted first that the trial judge erred in his conclusion that a rescreening or colposcopy in 2009 would have revealed squamous pre-cancer cells which ultimately developed into the cancer with which Ms. Morrissey had been diagnosed in 2014. This conclusion was based on what Quest argued was an inaccurate and unsubstantiated assertion made by Prof. Wells that both glandular and squamous pre-cancer existed in 2009, whereas the evidence was said to indicate that only glandular abnormalities may be identified from the 2009 slide.

8.9 In addition to this error, counsel for Quest argued that the trial judge failed to engage with the aggregate evidence in relation to the 2009 and 2012 slides and the 2014 smear, all of which returned negative results, and the 2014 trachelectomy specimen. This specimen, acquired during the radical trachelectomy procedure performed on Ms. Morrissey in 2014, was said by Prof. Austin to have indicated limited evidence of CIN3 cells, and its result was not referred to in the judgment of the High Court. Prof. Austin gave evidence on behalf of Quest that the features of

Ms. Morrissey's case suggested that Ms. Morrissey's cancer had progressed more rapidly than usual. This was accompanied with evidence to the effect that cancer may develop more rapidly amongst some younger women. It is submitted that the trial judge failed to engage with the totality of this evidence when reaching his conclusion on causation.

8.10 In response to the submissions of Quest in relation to the evidence of its U.S. expert witnesses, counsel for the Morrisseys submitted that, on the basis of the evidence which had been adduced in respect of the influence of the Guidelines, the trial judge was entitled to form his assessment of the appropriate weight to be given to the evidence of Prof. Austin and Mr. Feit In particular, counsel referred to the affirmation to comply with the Guidelines which other U.S. expert witnesses, who were members of the American Society of Cytopathology, confirmed in evidence that they had given. Further, counsel relied on the evidence of Dr. McKenna to the effect that borderline categories of abnormal cells cannot be underestimated and can be indicative of high-grade abnormalities on further investigation.

8.11 Further, it was argued on behalf of the Morrisseys that the trial judge was entitled to assess the appropriate weight to be given to the expert evidence in relation to blind reviews and hindsight bias. Evidence was adduced on behalf of the Morrisseys in relation to the inadequacies of blind reviews generally and Dr. McKenna further stated in evidence that the blind review of the 2009 slide had been compromised as the slide had markings on it and therefore was not a true reproduction of what was before the original screener. Prof. Roese, it was submitted, had no experience in cytology screening and did not engage with the facts of this case in giving evidence, and counsel argued that the trial judge was entitled to determine that

he did not require the assistance of Prof. Roese in respect of the impact of hindsight bias.

8.12 Finally, in respect of the trial judge's analysis as to causation, counsel on behalf of the Morrisseys submitted that there was no error in his finding that squamous pre-cancer was likely to have been in existence by 2009 and that this would have been identified following a rescreening and would, as a matter of probability, have led to a referral for a colposcopy had the 2009 slide been correctly interpreted. This finding was based on the evidence of Prof. Shepherd that the lesion was likely to have developed over an eight to twelve-year period and his evidence to the effect that, where glandular abnormalities are found it is highly likely that squamous abnormalities will co-exist, as the same oncogenic stimulus is affecting the stem cells of the cervix, which differentiate along either squamous or glandular lines.

8.13 Further, counsel for the Morrisseys denied that there was a failure to engage with the totality of the evidence adduced by Quest. That borderline abnormalities were identified on the 2009 and 2012 slides, it was submitted, did not lead to the conclusion that there were no high grade abnormalities or precancerous lesions in existence at that time. Prof. Wells gave evidence that there was not always a close correlation between the cytology and the subsequent histopathology so that cytology screening might show minor abnormalities whereas histopathology may often show more serious disease. The negative result of the 2014 smear, which was taken following Ms. Morrissey's cancer diagnosis, was said by Prof. Shepherd to be readily explicable as it is said not to be uncommon that smears taken from a cancerous cervix are obscured by the presence of inflammatory cells, blood and pus. In addition, it was submitted that there was no inconsistency between the findings of the 2014

trachelectomy specimen and the abnormalities identified on the 2009 slide. Prof. Wells gave evidence that any glandular abnormality could have been overgrown by the squamous cancer.

8.14 Finally, it was argued on behalf of the Morrisseys that the trial judge was entitled to dismiss Quest's contention that Ms. Morrissey's cancer was one which rapidly developed, particularly in light of the evidence of both Prof. Wells and Prof. Shepherd to the effect that the trachelectomy specimen indicated that Ms. Morrissey's cancer was a moderately differentiated one and did not bear the characteristics of an aggressive or rapidly growing cancer. Both experts also rejected the proposition that cancer develops more rapidly amongst younger women.

8.15 Before leaving the question of causation, I should make one point which is applicable to the case against both Quest and against Medlab. It was accepted by counsel on all sides that this case proceeded before the High Court on the basis that the task of the trial judge was to determine causation as a matter of probability. In other words, was it more probable than not that, had any relevant negligence not occurred, a benign or improved outcome would have ensued. Counsel agreed that no case had been made which suggested that, following the jurisprudence identified in *Philip v. Ryan* [2004] IESC 105, [2004] 4 I.R. 241, it might, arguably, be appropriate to assess causation on the basis of the likelihood or otherwise of a benign or improved outcome and to measure damages accordingly. There certainly are some types of cases where the proper approach is not to decide what consequences would have resulted from the absence of negligence by determining that question on the balance of probabilities, such that full damages would be awarded if there was a slightly greater than 50% chance of a benign or improved outcome but no damages at all

would be awarded if there was a slightly less than 50% chance of such a result. Rather, the approach identified in *Philip v. Ryan* is that, in the types of cases to which it applies, it is appropriate to award damages which are broadly proportionate to the likelihood of a benign or improved outcome, so that the relevant damages would approximate to full damages if there is a very significant likelihood of a benign or improved outcome in the absence of negligence but that limited but proportionate damages would be awarded even if it there was a less than 50% probability of a benign or improved outcome, but some realistic possibility of such a consequence.

8.16 I would decline, therefore, to express any view as to whether cases of this type might fit in the jurisprudence identified in *Philip v. Ryan*. I feel it appropriate to make that comment lest, by not dealing with the issue, it might be later asserted that I had, by implication, agreed that the approach adopted in this case was necessarily the correct one. That is an issue which I would leave to any case in which the issue was fully fought.

9. The Medlab Case

9.1 The first issue raised by Medlab is in respect of the trial judge's determination of the factual question of what was to be seen on the 2012 slide. This, the trial judge held, in accordance with the guiding principles set out in *Penney Palmer*, was to be assessed prior to any consideration of the standard of care required under the *Dunne* test. On the evidence given by Dr. Madrigal, his computer-generated analysis of the 2012 slide identified over 35,500 squamous cells. It was Medlab's case that on this evidence there were more than 5,000 cells on the slide, as required under the Bethesda criteria, and therefore the slide was, as a matter of fact, adequate. Thus, in circumstances where Medlab's cytoscreeners arrived in 2012 at what is submitted to

be a correct conclusion as to the adequacy of the slide, it was argued that there could not have been a finding of negligence by reference to the particular method used to arrive at that result.

9.2 Medlab contended that, in his judgment, the trial judge had accepted as a fact that there were over 35,500 cells on the 2012 slide. While not strictly falling under the "failure to engage" jurisprudence, it was submitted that he erred in subsequently dismissing Dr. Madrigal's evidence as to the alternative method of counting cells as "irrelevant" and in failing to answer the question as to how many cells were on the slide. Medlab further argued that the trial judge erred in concluding that, in the event of any doubt as to adequacy, the slide must be examined using the ThinPrep method, because Medlab was held to be obliged under the terms of its contract with Cervical Check to do so. The terms of this contract, Medlab submitted, cannot be relied on in a negligence claim. It was also argued that the contract, in any event, obliged Medlab to test in accordance to the Bethesda System, which method was said not strictly to require a formal adequacy test to be carried out in any particular manner.

9.3 Medlab further submitted that there was a lack of engagement on the part of the trial judge with its case in respect of the proper approach to be applied by a reasonably competent cytoscreener when assessing the adequacy of a slide. In the first instance, it was submitted that the evidence adduced by Medlab demonstrated that the Bethesda System does not strictly require a formal adequacy test to be carried out and that, applying the *Dunne* principles, the reasonably competent screener could have found the 2012 slide to be adequate without conducting a formal assessment. Two expert cytoscreeners, Ms. Frasch and Ms. Drew, both gave evidence on behalf of Medlab that they had conducted a blind review of the 2012 slide and had assessed it

as adequate without considering it necessary to carry out a formal adequacy review. Ms. Tan, the Morrisseys' expert cytoscreener, also gave evidence that the 2012 slide could have been passed for adequacy without a formal assessment. Medlab argues that this evidence was not properly addressed by the trial judge when, at paras. 123 and 124 of his judgment, he concluded that no screener of equal status or skill acting with ordinary care would have failed to subject the slide to an appropriate test as to adequacy and made the assumption that the two screeners who originally reviewed the slide in 2012 did not perform a formal adequacy test.

9.4 Further, and in the alternative, Medlab submitted that the trial judge's finding that, as a matter of probability, a formal test would have resulted in a finding of inadequacy, made at para. 125 of his judgment, cannot be reconciled with the evidence of Medlab's expert cytoscreener, Ms. Stowe, who conducted a formal adequacy review in accordance with the Bethesda system and found the slide to contain a sufficient number of cells.

9.5 Medlab also argued that the trial judge failed to engage with the evidence on causation which was tendered by expert witnesses on behalf of both Quest and Medlab. The trial judge concluded that, had Ms. Morrissey been referred for a repeat smear following a finding of inadequacy in respect of the 2012 slide, it would have resulted in colposcopy which would have revealed the existence of squamous pre-cancer cells. This finding, it was submitted, was reached in the absence of any evidence as to the existence of glandular pre-cancer cells in the 2012 slide or in the 2014 trachelectomy specimen, which would have indicated the likely coexistence of squamous pre-cancer. Further, this conclusion was said to have been reached without

addressing the evidence adduced by Quest which indicated that Ms. Morrissey's might have been a particularly rapidly-developing form of cancer.

9.6 In response to Medlab's arguments, counsel on behalf of the Morrisseys submitted that the findings of the trial judge in relation to the adequacy of the 2012 slide were supported by credible evidence. First, it was said that the factual question as to adequacy to be determined by the trial judge related to whether there was a sufficient number of well-visualised cells on the slide. In accordance to the method prescribed by the Bethesda system, the slide must contain 5,000 "well-visualised" cells and be "satisfactory for evaluation". These cells must be well-visualised for the cytoscreener operating in laboratory conditions, it was contended, rather than for a computer conducting an automated analysis. Both the terms of Medlab's contract with Cervical Check and the ThinPrep manufacturer's specifications require compliance with the Bethesda System. Further, the Morrisseys rely on the evidence of Dr. McKenna to the effect that an alternative method of testing adequacy, such as that employed by Dr. Madrigal, has yet to be clinically shown to be of the highest standard and proven to be as safe as the prescribed method that is being departed from.

9.7 In addition, counsel on behalf of the Morrisseys referred to the evidence given by a number of expert witnesses to the effect that the slide was not adequate for cellularity, including that of Prof. Pitman, who appeared on behalf of Medlab. Counsel for the Morrisseys also pointed out that Ms. Tan had given evidence that she reported the sample as adequate but only because she had identified abnormalities on the slide.

9.8 The submissions of the Morrisseys in respect of the trial judge's findings in relation to causation are as stated in full above. It is submitted that the trial judge's finding that a colposcopy carried out in 2012 would have been likely to identify squamous pre-cancer was based on credible evidence. In particular, counsel for the Morrisseys referred to the evidence of Prof. Shepherd to the effect that the cancerous cells were likely to have been developing over an eight to twelve-year period and that, on the balance of probabilities, they progressed to an invasive cancer in early-mid 2013. Prior to this, Prof. Shepherd stated, a high-grade lesion would have been in existence. Further, counsel for the Morrisseys relied on the evidence of Prof. Shepherd to the effect that where glandular abnormalities are found, it is highly likely that squamous abnormalities will co-exist, as the same oncogenic stimulus is affecting the stem cells of the cervix.

9.9 Having set out in some detail the precise contentions put forward both by Quest and by Medlab concerning what was said to be a failure of the trial judge to engage adequately in his judgment with certain aspects of their cases on the facts, it is necessary to address whether any of the points made are sufficient to warrant allowing the respective appeals of the laboratories.

10. Discussion on Engagement

10.1 The starting point has to be to reemphasise the fact that the threshold for successfully establishing that there has been a sufficient lack of engagement by a trial judge with the case made by a party who appeals against the first instance decision is a high one. As MacMenamin J. pointed out in *Leopardstown Club*, as referred to earlier in this judgment, an appellate court may only reverse the decision of a trial judge "where there is a clear non-engagement with essential parts of the evidence".

As MacMenamin J. also pointed out, the ultimate obligation on a trial judge is to give a reasoned judgment. If the analysis of the evidence and the basis on which certain evidence is preferred to a conflicting account fails to meet the requirement that the judgment is "truly reasoned" then an appellate court must set aside the judgment concerned. But it is clearly insufficient to that end to simply identify some piece of relevant evidence that is not mentioned in the judgment or to suggest that the basis for a trial judge preferring certain evidence over some other piece of evidence is not as fully set out as it might be. The threshold is much higher than that.

10.2 On the other hand, it is clear that an attack on the judgment of a trial judge on the basis of a "failure to engage" is different from a suggestion that there was no evidence on which the trial judge could have come to the conclusion which he/she reached, under what might be described as a "pure" *Hay v. O'Grady* point. Much of the argument put forward on behalf of the Morrisseys centred on identifying evidence which, it was said, the trial judge was entitled to accept and which, if accepted, led to the conclusions of fact set out in the judgment. However, I did not ultimately understand either counsel for Quest or counsel for Medlab to suggest that there was no evidence from which the trial judge could have reached the conclusions of fact which are to be found in the judgment. Therefore, pointing out that there was such evidence does not really advance the argument.

10.3 It seems to me that there really are three questions which need to be addressed under this heading. First, can it be said that the trial judge did fail to address any aspects of the respective cases made on the facts by Quest and Medlab? Second, and to the extent that it may be possible to say that there were aspects of those respective cases which were not fully addressed, were the issues in respect of which any such

failure might be established sufficiently central to the case as a whole to warrant holding that it was an "essential part" of the case on the evidence in the sense in which MacMenamin J. used that term in *Leopardstown Club*? Third, was the extent of any non-engagement sufficiently serious that it can properly be said that the trial judge has not really given reasons as to why one side succeeded and the other failed on an essential element of the case?

10.4 In addressing the issues which arise under this heading, it is important to start by emphasising the particular circumstances in which the trial of these proceedings was conducted in the High Court, insofar as those circumstances might be said to have had a reasonable impact on the way in which the judgment in this case was crafted by the trial judge.

10.5 First, it must be said that, commendably, all concerned were anxious that judgment be given as quickly as possible. There were obvious reasons why it was important that the Morrisseys should know the result of their case at the earliest possible time. There is also the fact that at least some of the issues which arise in these proceedings have the potential to also arise in other cases brought before the High Court claiming negligence arising out of CervicalCheck or where similar cases are brought before the CervicalCheck Tribunal.

10.6 In that context, the unusual step was taken of dispensing with oral closing submissions after the parties had filed written submissions subsequent to the evidence being completed. It should be emphasised that this is an unusual procedure. In straightforward cases, oral submissions will frequently take place immediately after the evidence completes. In more complex cases, it may be considered advantageous to give the parties an opportunity to file written submissions after the evidence has

finished. While it is true that, in many complex cases, written submissions may be filed in advance, such submissions are necessarily based on the evidence the parties consider is likely to be given. There will almost inevitably be some difference between the evidence as it has emerged at the trial (including questions over which evidence should be preferred in cases of conflict) compared with how either party might have assumed, in advance, that the evidence was likely to turn out. For that reason, written submissions which reflect the evidence as actually given, as opposed to the evidence which might have been anticipated, can be useful.

10.7 But in such cases, it almost inevitably follows that there is some oral debate after closing written submissions have been filed. The purpose of that debate is to tease out issues raised and allow the court to clarify, often not least in its own mind, the precise issues which need to be addressed in the judgment. However, all parties went along, for understandable reasons, with the truncated procedure adopted in this case.

10.8 While it is entirely commendable that all concerned sought to bring the proceedings to a close as quickly as possible, it must be acknowledged that truncating the process does carry with it the risk that not everything will be done quite as thoroughly as might otherwise have been the case. While proceedings should always be concluded as quickly as is reasonably possible, it must be emphasised that truncating proceedings may well have consequences. Where the parties go along with such a truncated process, then it equally follows that at least some of the consequences cannot be taken to give rise to any legitimate complaint. In saying that, it must, of course, be acknowledged that there is an irreducible minimum below which it is not permissible to go. In the context of the issues which arise under this

heading, a judgment might so lack in reasoning or demonstrable engagement with the issues that an appellate court could not allow it to stand notwithstanding the process adopted even with the agreement of the parties. But it does seem to me that it is appropriate for this Court to take into account the truncated process which was adopted in these proceedings in assessing whether the reasoning of the trial judge was adequate.

10.9 As already noted, the first point made under this heading by Quest concerned the approach of the trial judge to the evidence given by certain American expert witnesses. It may be that it would have been preferable if the trial judge had gone into greater detail concerning the actual evidence given by those experts and had given more detailed reasons, connected with their evidence and the competing evidence given by the corresponding experts called on behalf of the Morrisseys, for preferring the case made on behalf of the Morrisseys in that regard. But the trial judge did give some reasons for preferring the evidence tendered by the Morrisseys' experts. In that context, it does not seem to me that it can be said that there was a "clear non-engagement" by the trial judge such that the threshold identified by MacMenamin J. in *Leopardstown Club* has been met in respect of this aspect of the case.

10.10 The next aspect of Quest's case in respect of non-engagement concerned the trial judge's approach to blind reviews. There is no doubt that Cross J. did offer some general comments on the topic of blind reviews and did put forward reasons for his conclusion that a blind review was not necessary. It would undoubtedly have been preferable, however, if the trial judge had explained in more detail why he did not consider that the blind review evidence tendered in this case was preferable to the views expressed by the experts called on behalf of the Morrisseys. If the process

followed in this case had followed the normal course of events, then there might have been a basis for suggesting that the judgment in that regard was insufficiently reasoned. However, it does not seem to me that the judgment falls below the irreducible minimum of reasoning which would require this Court to set aside the judgment, whether or not the parties have gone along with a truncated process.

10.11 The third area concentrated on by counsel for Quest related to the trial judge's finding in respect of causation. I am of the view that it would have been appropriate for the trial judge to have set out in more detail the reasons for preferring the evidence of the Morrisseys' experts on the causation issue. However, certain reasons were given for the trial judge's conclusions on causation and they do not seem to me to fall below the irreducible minimum of reasoning which, for the reasons already set out, I consider to be the appropriate threshold having regard to the process adopted in the trial in the High Court.

10.12 Turning then to the issues relied on by Medlab, it should be recalled that the first such issue concerned the actual number of cells present on the relevant slide. Using a computer-based method, Medlab's expert witness concluded that there were 35,500 cells on the slide, which would be well above the threshold for adequacy of 5,000. It seems to me that the debate on this issue became overly-centred on the first question identified in *Penney Palmer*, which suggests that a court should initially decide what the factual situation actually was. It was certainly open to the trial judge to take the view that the question which must be addressed by a screener in determining whether a slide is adequate is as to whether there is a sufficient number of well visualised cells, in accordance with established practice. Whether or not the method adopted by Medlab's expert could be said to establish adequacy on that basis

may be debatable. It would, again, have been preferable if the trial judge had given more detailed reasons for not considering that evidence to be relevant. However, yet again, some reasons are given and they do not seem to me to fall below the irreducible minimum threshold.

10.13 The next issue raised on behalf of Medlab complains that there was what was said to be an inadequate engagement by the trial judge with the evidence given by two expert screeners called on its behalf, who gave evidence that they had subsequently looked at the slide in question and had passed it for adequacy. That evidence arose in the context of the question as to the proper process to be followed in reaching an adequacy assessment. All of the experts appeared to agree that it was open to a screener to reach a positive conclusion in respect of adequacy without doing a formal analysis. This was said to be the proper approach where adequacy was clear. A formal approach to the assessment of the number of cells was only required to be adopted where the initial assessment could not be said to have shown the sample to be clearly adequate. The two relevant witnesses had indicated that they did not consider, when reviewing the slide in question, that a formal analysis would have been required. However, as counsel for the Morrisseys pointed out, one of Medlab's own witnesses had considered that the slide was not adequate and another witness had only considered it to be adequate because of finding abnormalities. While, again, it might be said that more detailed reasons could have been given for preferring the evidence of some of the witnesses over others, the trial judge did give some reasons and, in my view, the irreducible minimum threshold was not, therefore, met.

10.14 Finally, Medlab also made complaint about the trial judge's engagement with the evidence on causation as set out earlier in this judgment. Here, again, there was

competing evidence as to what would have happened had Medlab assessed the relevant slide as being inadequate, thus leading to a further sample being required. There was undoubtedly a significant difference of medical opinion as to what might have occurred in those circumstances. The trial judge did address those issues in his judgment but did so in a way which might well have fallen short of the level of reasoning which might have been required had this case followed a normal process. However, again, it does not seem to me that the level of reasoning of the trial judge fell below the irreducible minimum threshold.

10.15 It will be seen, therefore, that I would consider that, in respect of some of the complaints made, it would ordinarily be justified to regard relevant aspects of the judgment as being insufficiently reasoned, even allowing for the high threshold which applies in reaching such a conclusion. However, I do not consider that any lack of reasoning falls below the irreducible minimum which would lead the Court to overturn the decision of the High Court, irrespective of the manner in which the trial was conducted. If the judgment of the trial judge had been delivered in circumstances of ordinary expedition and with the benefit of final oral submissions, it might well have been impossible to regard the judgment as sufficiently reasoned to withstand challenge. Of course, the very fact that there might have been oral submissions would, in those circumstances, cast some light on that very question. The focus of the debate during those oral submissions might give some guidance to the court as to the extent to which any particular issues truly remained as significant and material at the final close of the proceedings. Such an assessment is more difficult to reach in the absence of closing oral submissions directed towards teasing out the true issues which remain for debate between the parties and which, therefore, impact on the questions which need to be addressed in the judgment.

10.16 That being said, I consider that, in the particular circumstances of this case, and having regard specifically to the somewhat expedited and truncated procedure adopted, the reasoning of the trial judge is adequate to withstand challenge.

11. Liability of the HSE

11.1 As noted earlier, the HSE has appealed the findings of the trial judge in respect of its liability for the alleged negligence of Quest and Medlab. As mentioned, in this regard the trial judge held that the HSE was primarily liable in respect of the way in which the tests were carried out but also held that the HSE was vicariously liable for the negligence found against the two laboratories. The statutory functions of the National Cancer Screening Service Board, which was responsible for the establishment of the CervicalCheck programme in 2008, were set out in the National Cancer Screening Service Board (Establishment) Order 2006 (S.I. 632/2006) ("the 2006 Order"). Article 6(b) thereof provides that the Board was required to:-

> "[C]arry out or arrange to carry out a Programme for the early diagnosis of cervical cancer, and arrange for the primary treatment of cervical cancer in such classes of women as may be determined by the Minister from time to time."

11.2 On the dissolution of the National Cancer Screening Service Board in 2010 (under s. 28 of the Health (Miscellaneous Provisions) Act 2009), the HSE assumed the functions of the Board. In respect of the trial judge's finding that the HSE had a primary liability in respect of the acts of the laboratories, the HSE submitted that the extent of its duty under the statutory provision quoted above is to carry out, or to arrange to carry out, a competent cervical screening programme and that this duty had been complied with. The HSE, it was argued, had not sought to assume for itself a

duty to perform the relevant functions of the laboratories, being the screening and reporting of smear samples, rather it had only arranged for their performance. In support of its contention that its duty was solely an organisational one, the HSE submitted that the operation of the CervicalCheck programme was dependent on contracting out to third party service providers which could provide services with a turnaround time which the HSE was unable to match. It was further submitted that while the HSE had sought to impose obligations of quality assurance, this did not in any way alter the nature of its own duty.

11.3 The HSE disputed the finding that it held a non-delegable duty to take reasonable care in the interpretation or reporting of smears by individual cytologists employed by the contracted laboratories. It was accepted that a hospital could be said to owe a non-delegable duty to provide its patients with skilful treatment and therefore be liable in negligence for the acts of all of those who administer treatment in that hospital, whether they are employed by the hospital or engaged as independent contractors (see, to this end, the judgments of Lord Greene M.R. in *Gold v. Essex County Council* [1942] 2 K.B. 293 and Denning L.J. in *Cassidy v. Ministry of Health* [1951] 2 K.B. 343). However, the HSE argued that the service provided by the CervicalCheck programme is not akin to a hospital service and that the persons who take part in a screening programme are not comparable to patients in the care of a hospital. To this effect, the HSE relied on the decision of the Court of Appeal for England and Wales in *Farraj v. King's Healthcare NHS Trust*, [2009] EWCA Civ 348, [2010] 1 W.L.R. 2139, where it was held that the defendant hospital was not liable for the negligent acts of a third party laboratory which had been contracted to perform tasks relating to genetic screening. This finding was made on the basis that the claimants in the case had not been admitted to the hospital for treatment and what

was described as the "special duty" that exists between a patient and a hospital, where the hospital undertakes the care, supervision and control of persons those who are in special need of care, was therefore not found to be present.

11.4 The HSE also sought to distinguish these proceedings from the facts in *Byrne v. Ryan,* as was cited by the trial judge in support of his conclusion, which concerned the imposition of a primary liability on the defendant hospital for the negligence of a consultant in the course of his treatment of the plaintiff. This case, the HSE submitted, was in fact decided by Kelly J. on the basis of the existence of an employment relationship between the hospital and the consultant, who was a practitioner in the full time service of the hospital in question.

11.5 Further, the HSE took issue with the acceptance by the trial judge of the principles of *Woodland v. Essex County Council*, a decision of the U.K. Supreme Court which approved of the doctrine of the non-delegable duty, as identified in the "hospital cases", *Gold v. Essex County Council* and *Cassidy v. Ministry of Health*, cited above. The "essential element" giving rise to this duty, as described by Lord Sumption at para. 24 of his judgment, is the defendant's control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility. The criteria required to establish the existence of a non-delegable duty were set out in the preceding paragraph of his judgment as the following:-

> "(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which

places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another…

(3) The claimant has no control over how the defendant chooses how to perform those obligations, i.e. whether personally or through employees or through third parties.

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him."

11.6 The HSE argued first that none of the above criteria were fulfilled in respect of the role it performs in the provision of the CervicalCheck Programme, other than factor (3), as it was conceded that Ms. Morrissey did not have any control over the screening of her samples or her treatment. Furthermore, the HSE contested the trial judge's approval of the doctrine of non-delegable duty as a significant development in Irish law which, it submitted, has not been expressly adopted by the courts in this jurisdiction, and which represented a form of organisational or enterprise based liability which would be more appropriately adopted by way of legislative determination.

11.7 Finally, the HSE argued that any imposition of a non-delegable duty must be justified by a strong policy rationale. To this end it was submitted that, in fact, a

finding of primary liability would have negative consequences for the operation of a number of HSE programmes that involve the outsourcing of health services and that the associated increased burden of risk on the HSE would effectively lead to a reduction in the scope of the services which could be provided.

11.8 Counsel for the Morrisseys, in response, submitted that the non-delegable duty of care owed by the HSE, both under statute and at common law, arises from the nature of its relationship with the women participating in its cervical screening programme. It was argued that a statutory non-delegable duty arises from the wording of Article 6(b) of the 2006 Order, in which it is said to be implicit that the HSE has a duty both to take reasonable care in the provision of the programme and to ensure that those carrying out services on its behalf exercise reasonable care. It was submitted that this statutory duty cannot be evaded on the basis of the argument that the HSE's obligations were to be discharged by an independent contractor.

11.9 At common law, the Morrisseys submitted, a non-delegable duty of care arises under the criteria set out in *Woodland,* as quoted above, and further suggested that such a duty has been recognised in this jurisdiction in *Byrne v. Ryan.* Counsel for the Morrisseys disputed the HSE's interpretation of the decision in *Byrne* as one which was determined solely on the basis of an employment relationship. Particular reliance was placed on para. 126 of the judgment of Kelly J., where it was held that the hospital owed a primary duty to the plaintiff given the fact she was a public patient who was referred to the hospital and not to an individual consultant. In that regard, Kelly J. cited the following comments of Denning L.J. in *Cassidy v. Ministry of Health* with approval:-

> "I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services.
>
> ...
>
> ...[T]he hospital authorities accepted the plaintiff as a patient for treatment, and it was their duty to treat him with reasonable care. They selected, employed and paid all the surgeons and nurses who looked after him. He had no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill, then the hospital authorities must answer for it, for it means that they themselves did not perform their duty to him."

11.10 The Morrisseys argued that the five criteria as set out in *Woodland,* which are required to establish the existence of a non-delegable duty, had in fact been fulfilled in this case. First, it was submitted, Ms. Morrissey was one of a number of persons in the care of the CervicalCheck programme for the purpose of their protection from developing cervical cancer and she was in a position of vulnerability as a result, because a misreading of her samples would give rise to a risk of significant harm. Counsel suggested that the HSE had recognised this responsibility to protect Ms. Morrissey against such a risk by providing detailed and extensive quality assurance guidelines to the contracted laboratories.

11.11 Second, it was submitted that an antecedent relationship existed between Ms. Morrissey and the HSE, as the CervicalCheck programme was a public service which involved the provision of medical care. The programme, it was said, involved both the screening and, if required, treatment of the relevant population and independent laboratories had been contracted to screen smear samples as well as to direct the future treatment of those screened. Counsel sought to distinguish these facts from the

situation of the claimants in *Farraj*, as relied on by the HSE. In that case, the claimants resided outside the U.K. and sought to have a sample of foetal tissue tested for analysis. Their consultant in Jordan sent what was thought to be an adequate sample to the NHS, which did not have the capacity to clean and culture the sample and so this sample was sent on to an independent laboratory for that purpose. It was held that the NHS did not have a non-delegable duty towards the claimants, and counsel for the Morrisseys submitted that this was due to the absence of the central requirement of an antecedent relationship between the parties to the case.

11.12 The fulfilment of the third criterion, that of an absence of control on the part of Ms. Morrissey over the performance of the functions of CervicalCheck, was conceded by counsel for the HSE. Fourth, it was submitted by counsel for the Morrisseys that the HSE had delegated to the laboratories the task of screening and reporting of smears, which was said to be an integral part of the HSE's contended duty to take reasonable care in the provision of the programme. That the HSE had retained, in the terms of its contracts with the laboratories, full supervisory jurisdiction over the provision of these services, by means of systems of quality assurance, audits and site inspections, was suggested by counsel to be indicative of an assumption of responsibility on the part of the HSE over the performance of these functions. Further, it was contended that the fact that the HSE had delegated one of its functions to a third party because it did not have sufficient capacity to perform that function is immaterial. Finally, it was submitted that, if the preceding criteria have been fulfilled, it followed that any negligence established against Quest and Medlab arose in the performance of the function assumed by the HSE and delegated to the laboratories, that is, in the screening and interpretation of Ms. Morrissey's smear tests. I will turn to a discussion of the issues arising in respect of the possible primary liability of the

HSE in due course. However, I will first set out the position of the parties in respect of vicarious liability.

11.13 As noted earlier, the HSE also contested the trial judge's finding that it is vicariously liable for the activities of Quest and Medlab by reason of the control which the HSE exercised over the laboratories under the terms of their contractual arrangements. It was submitted that vicarious liability often arises in an employment relationship, or one analogous to the same, and that the default position under tort law is that a party is not generally liable for the acts of an independent contractor such as Quest or Medlab.

11.14 On the facts of this case, the HSE submitted that it possessed no direct control over the laboratories which would suggest that their relationship was analogous to that of an employment relationship, as was said to be required to establish vicarious liability in the judgment of Hardiman J. in *O'Keeffe v Hickey* [2008] IESC 72, [2009] 2 I.R. 302. In particular, the HSE contended that it had no real and exercisable power of control over the acts of the cytoscreeners. Further, the HSE disputed the contention that the provision of quality assurance guidelines in its contracts with the laboratories was indicative of vicarious liability. It was said that these provisions do not "guide the hand" of those carrying out the expert functions of the laboratory.

11.15 Moreover, it was argued that the concept of control is subsidiary to the ultimate question as to whether a relationship akin to an employment relationship exists. On that issue, the HSE submitted that, by the terms of their contracts, Quest and Medlab were in business on their own account and provided a service that the HSE could not provide in terms of turnaround speed. This was said to be indicative of the engagement of an independent contractor for its skills and expertise rather than

of the existence of a relationship analogous to employment. Furthermore, the HSE contended that the laboratories were neither "part of the organisation" nor "integrated" into the business of the HSE in a manner which could give rise to the imposition of vicarious liability. The HSE pointed to a number of features of the business relationship between itself and the laboratories which, it was said, indicated that the true nature of the relationship involved the engagement of an independent contractor. Amongst those relevant factors was said to be the fact that the laboratories provided their own equipment and had responsibility of the management of their affairs, together with the fact that the laboratories had assumed the financial risk of the enterprise and that the laboratories had the opportunity for profit through the arrangement of their affairs.

11.16 Finally, it was submitted on behalf of the HSE that the policy considerations which usually underpin a finding of vicarious liability, such as risk creation and enterprise liability, as referred to by Hardiman J. in his judgment in *O'Keeffe*, are absent in the present case. The HSE, in its arrangement of the CervicalCheck programme, is not operating for profit and is not "creating" any risk, in the commercial sense.

11.17 On behalf of the Morrisseys, it was submitted that, by virtue of what was said to be the extraordinary degree of its control over every aspect of the laboratories' screening of the slides, the HSE is vicariously liable for the negligence of Quest and Medlab. It was contended that the essence of vicarious liability is control, as held by Hardiman J. at para. 47 of his judgment in *O'Keeffe*, and that the question of vicarious liability is no longer resolved simply by the question of whether the tortfeasor is an independent contractor.

11.18 In dictating the methodology by which the slides would be reviewed by the labs, it was submitted, the HSE exercised a degree of control that would not ordinarily be exercised over a truly independent contractor. Counsel for the Morrisseys contested the HSE's reliance on the decision of the Supreme Court in *O'Keeffe*, where it was held that the State was not vicariously liable for the sexual assault of the claimant perpetrated by the claimant's national school teacher. That case, it was submitted, was based on an entirely different factual matrix, being that the sexual assault committed by the relevant teacher evidently fell outside the scope of his employment. In addition, the rules which the Minister for Education had laid down for national schools were general in nature and did not go to the governance of the detailed activities of any individual teacher. On the facts of this case, it was submitted, the acts of the cytoscreeners clearly fell within the scope of their employment and the HSE exercised a high level of control over the screening activities at the laboratory. Furthermore, counsel indicated that the application of the "close connection" test, as adopted by Fennelly J. in *O'Keeffe* and with whom the majority of the Supreme Court agreed, which considers the closeness of the connection between the work which the individual was engaged to carry out and the tortious act, would also lead to a finding of vicarious liability in this case.

11.19 Finally, on the level of policy, it was argued on behalf of the Morrisseys that the HSE ought not to be able to divest itself of any responsibility for failings in the delivery of public health services through the outsourcing of its services

11.20 In the light of those submissions, I propose to turn firstly to the question of whether the trial judge was correct to hold that the HSE was vicariously liable for the actions of the laboratories.

12. Vicarious Liability

12.1 Both sides sought to place reliance on the judgment of Hardiman J. in *O'Keeffe v. Hickey*. There was, however, something of a dispute between the parties as to whether the key component in the relevant test centred around the legal relationship between the parties or on the degree of control which one party exercised over the way in which the other carried out its task.

12.2 It may be said that where difficult or novel issues arise concerning the application of well-established concepts in common law to particular circumstances, it may be useful to identify what the fundamental principle or purpose behind the law concerned may be, for that may give valuable guidance as to how the practical rules regarding the application of the relevant aspect of the common law might be applied in such circumstances. However, there are areas where it may be difficult to discern any overarching but consistent fundamental principle. Rather, in some areas, the case law has grown up as part of an attempt to deal with a range of different circumstances. In some such cases it may well be that the proper approach to the evolution of the common law in such an area is to avoid over-radical developments, but to extend the parameters of the established case law to novel or evolving areas in a manner which is at least analogous to the way in which the existing case law has developed.

12.3 The former might be described as a "back to first principles" model. The latter might be described as an "evolution by analogy" approach. In my view, the former approach is preferable should it prove possible to discern, with any real degree of clarity, what the underlying principles are. However, the latter approach may be more appropriate where it is not really possible to identify a coherent underlying basis which informs all of the existing case law.

12.4 It will be necessary to return in due course to the most recent judgment of this Court on the issue of vicarious liability, being *Hickey v. McGowan and anor* [2017] IESC 6, [2017] 2 I.R. 196. However, in this context, it is appropriate to note that O'Donnell J. reached his conclusions on the proper principles to be applied in that case by adopting what he considered "to be the cautious and incremental approach outlined by Fennelly J. in *O'Keeffe*". O'Donnell J. indicated that he proposed adopting that approach, having considered what seemed to be the different approaches adopted by, respectively, Hardiman and Fennelly JJ.

12.5 In this same context, it may be appropriate to refer to *Robinson v. Chief Constable of West Yorkshire Polic*e [2018] UKSC 4, [2018] 2 W.L.R. 595. While the Supreme Court of the United Kingdom in that case was concerned with determining whether a duty of care existed in the particular circumstances of that case, it did make comments which seem to me to be appropriate regarding the broader issue of how one should approach the evolution of the common law. In *Robinson*, it was indicated that what is required in such circumstances is:-

> "[a]n approach based, in the manner characteristic of the common law on precedent, and on the development of the law incrementally and by analogy with established authorities".

I would only add the qualification that, where the existing case law can be seen to derive from some underlying principle or principles, it may be more appropriate to start by seeking to identify how those principles should direct the incremental evolution of the common law. However, that being said, it seems to me that *Robinson* provides cogent reasoning as to why the "evolution by analogy" approach may well be appropriate in many circumstances not confined to the narrow question of the

determination of the existence or otherwise of the duty of care which was at issue in that case.

12.6 There is, in my view, a strong argument for the view that the law of vicarious liability may be more properly dealt with under the "evolution by analogy" approach. That it may be appropriate to impose liability on one person for the negligence of another is, of course, well-established as a legal principle. It would be surprising indeed if, for example, a supermarket could avoid liability for an injury suffered as a result of negligence by simply asserting that the fault was all that of a specified employee. However, there is a strong basis for suggesting that the categories of case in which vicarious liability has been established do not easily give rise to being explicable by reference to some underlying principle or policy. In *Imperial Chemical Industries Ltd v. Shatwell* [1965] A.C. 656 at p. 685, Lord Pearce said that "the doctrine of vicarious liability has not grown from any clear, logical or legal principle". Likewise, Tipping J., in the New Zealand Court of Appeal case of *S. v. Attorney General* [2003] NZCA 149, [2003] 3 N.Z.L.R. 450, commented that the literature was "replete with comments concerning the lack of any coherent or agreed jurisprudential underpinning". I respectfully agree with those comments. It seems to me to follow that any evolution of the law of vicarious liability or the application of that law to new or evolving circumstances requires an approach much closer to the "evolution by analogy" method to which I have already referred. It is in those circumstances that it is appropriate to look at how the law on vicarious liability has developed both in this jurisdiction and in other relevant common law jurisdictions in relatively recent times.

12.7 It is probably correct to say that, in its original form, the concept of vicarious liability stemmed principally from the legal relationship between the actual wrongdoer and the party who was held to be legally responsible for the actions of the wrongdoer even though not personally at fault. Thus, the relationships of employer and employee, principal and agent or partner and the other members of a partnership have been all held to potentially give rise to the possibility of liability being placed on a person who was not themselves directly responsible for any relevant wrongdoing.

12.8 However, this Court, in *Moynihan v. Moynihan* [1975] I.R. 192, did extend the concept of vicarious liability to a situation where there was sufficient control by one family member over the actions of another family member, who committed the negligent act in relation to the pouring of tea, which led to an injury. It is clear, therefore, that, for at least the last 45 years, the Irish courts have recognised that informal relationships involving some degree of delegated function and control can give rise to vicarious liability.

12.9 Likewise, the courts in Canada (see *John Doe v. Bennett* [2004] 1 S.C.R. 436) and England (see for example *Various Claimants v. The Catholic Child Welfare Society & Ors* [2012] UKSC 56, [2013] 2 A.C. 1) have also accepted that vicarious liability can attach to relationships that are considered to be "akin to employment". It would seem that many of the Canadian and English cases stem from a desire to ensure, as Lord Phillips put it in *Catholic Child Welfare Society*, that, insofar as it was fair, just and reasonable, liability for tortious wrong was borne by a defendant with the means to compensate the victim. I have to say that I am not convinced that, laudable as that aim may be, such analysis adds very much to the difficult task of determining the boundaries of vicarious liability. In that context, I would very much

agree with the observation of O'Donnell J., which is set out at para. 43 of his judgment in *Hickey v. McGowan*, regarding the function of vicarious liability.

12.10 Some persons are injured through the fault of others who are neither insured nor have the means to compensate. Obviously the advisors of such persons will seek to extend liability, if it be possible, to anyone who might be a so-called "mark" for damages. But the real question concerns how far it is possible to extend the concept of vicarious liability. Stating that it will be done when it is "fair, just and reasonable" does not really contribute very much to the analysis, for it simply begs the question as to the kind of circumstances that can be regarded as coming within that criteria. The real issue is to identify the type of situation which may legitimately give rise to vicarious liability.

12.11 There were undoubtedly good reasons for departing from an overly-technical view which confined liability to cases coming within specific legal relationships. Persons may well not fit, strictly speaking, within the definition of, for example, employee or agent but nonetheless may be doing something very similar to that which would be done by an employee on behalf of an employer or by an agent on behalf of a principal. There are sound reasons why vicarious liability should not depend on whether, technically, a person might be regarded in law as an employee or as an agent.

12.12 For example, it is interesting to note that a number of the Canadian and English cases arose in the context of sexual abuse within religious organisations. Clearly, the concepts of employee or agent do not always fit neatly within the structures typically encountered within religious orders. Furthermore, such organisations are not normally run as businesses and do not give rise to the kind of

relationships with a commercial enterprise that would exist in, for example, a private company. But the substance of the relationship is similar. A member of a religious order who teaches in a school operated by that order may or may not, strictly speaking, have been considered to have been an employee, but their relationship with the school and those who manage or own it would be very similar to the relationship between a teacher employed in a privately owned school and the owners of that school.

12.13 Similarly confining the analysis to the question of control might also lead to unsatisfactory results. Obviously, employers not only identify the work which employees are to do but also exercise a significant degree of control over how it is to be done. However, the extent to which actual control, as opposed to a theoretical entitlement to control, may be exercised in practice may vary greatly from employment to employment. This will particularly be the case where an employee possesses a particular skill or expertise which may not be shared by those who manage the affairs of the employer. The very point of employing the expert professional may be to ensure that certain types of work will be carried out in a way which that professional deems appropriate in circumstances where the employer would not be able to have the work carried out with the requisite expertise in any other way. The reality of the employer exercising any real degree of control over how the work is to be carried out in such a case may be highly theoretical. Thus, just like an overly-technical reliance on the legal basis for the relationship between the parties may present an unduly narrow focus, so also a complete emphasis on control may not provide a satisfactory answer either.

12.14 In those circumstances, it is important to return to *Hickey v. McGowan*. In that case, the issue was as to the potential liability of a religious order for acts of sexual abuse committed by one of its members. In assessing the question of whether the order concerned might be vicariously liable in such circumstances, O'Donnell J. said the following at para. 38 of his reported judgment:-

> "At a crude level the question of whether a relationship between [the first defendant] and [the second defendant] in any particular case is sufficient to give rise to vicarious liability can be addressed by asking how closely the relationship approximates to the classic case of employer/employee. Some of the cases have taken this approach. There is however in my view something slightly absurd in seeking to draw comparisons between the case of religious orders and businesses. Furthermore, the tests and language applicable when considering the case of employment and analogous relationships, such as 'enterprise' and 'risk' are not easily applicable in the case of religious orders. Indeed, to apply tests drawn from the relatively modern world of commerce and industry to religious organisations which have existed for centuries is in my view, to miss the sheer scale and impact of religious institutions on peoples' daily lives, particularly in the Ireland of the first three-quarters of the 20th century. The relationship between members of an order and his or her fellow members and indeed the order itself was much more intense, constant and all pervasive than the relationship between an employer and an employee, or in the old language of the late Victorian cases, a master and his servant. Everything in the organisation of religious orders is directed towards emphasising the collective. The vow of obedience involves subjugation of individual will to that of the superior. The vow of poverty has the effect of making the member dependent upon the order's collective resources. The vow of celibacy emphasises the focus of the member on relationships with the order and with God. The objective of teaching young people is not merely incidental to the work of an order, it is indeed the manner in which the order seeks to achieve its object. For a member of the order, teaching was not merely a job it was a religious vocation. There can no doubt that Brother

> Cosgrove was in the classroom in Sligo between 1969 and 1972 because he was a member of the Marist Order. That was known, understood and accepted by pupils and parents, and when such individuals looked at the various brothers who staffed the school at any given time, they saw, and were intended to see not just a teacher, but a Marist."

12.15 O'Donnell J. went on to conclude that, at least at the level of principle, a religious order could be vicariously liable in such circumstances. The reasoning in that regard included the following at para. 37:-

> "Looked at in this way, it should be apparent that this is in fact not the most difficult issue in the case. There is evidence that the second defendant was a member of the Marist Order. It is accepted that the Order was a teaching order, and supplied teachers to the school. That was how the second defendant came to be in the school. Teaching was not simply an occupation, but an important and central part of the mission of the Order. The Order was established, and its members bound, not merely by rules, but solemn vows taken by them and considered sacred and binding. Those vows included chastity, obedience, poverty and celibacy. I think we are entitled to take cognisance of the fact that members of religious orders at that time normally wore habits of standard design, identifying them as members of orders, and indeed correspondingly reducing their individuality, while emphasising their part in a collective."

12.16 On that basis, it seems to me that the overall test must be one which considers whether the nature of the relationship, including the question of control, is such that it is similar in substance, if not in form, to the types of relationships which have traditionally been regarded as giving rise to vicarious liability.

12.17 The Morrisseys argued for greater attention to be paid to the degree of control exercised by the HSE which, it was said, was significant. The HSE emphasised the fact that the laboratories were independent contractors and that the screeners were employees of the laboratories and not of the HSE. There is, in any event, often quite a

close correlation between the legal relationship between two parties which arises where one carries out work on behalf of another and the degree of control exercised. Indeed, one of the criteria which courts consider in determining whether a relevant contractual relationship involves one of an independent contractor, sometimes described as a contract for services, or of employment, often described in this context as a contract of service, is the degree of control exercised. It was often said that a key distinction in that context lies between a case where, on the one hand, the employer determined what the other party was to do and, on the other hand, determined not only what the other party was to do but also how they were to do it. There can obviously be grey areas between circumstances where one party simply contracts that a task is to be carried in return for payment and leaves it entirely up to the other party to choose the method of delivery compared with a case where the contracted party is under some form of direct supervision. Skilled employees may very well be left to a large extent to their own devices. Many contracts which are very much at arm's length will contain clauses specifying the standards to be achieved.

12.18 In my view, the ultimate question which the Court must address is as to whether the level of engagement by one party with the way in which the other party is to carry out a task entrusted to it is sufficient to conclude that there is a real extent to which it can be said that the contracted party is closely integrated into the activities of the employer, not just in respect of the ends to be achieved but as to the manner in which those ends are to be pursued. It is, in my view, difficult to give any true red line, for the type of circumstances which will arise will be many and varied. The legal relationship will certainly be relevant. So, too, will the degree of control. But neither are necessarily decisive, particularly where the substance of the practical situation may not always correspond with legal form.

12.19 In that context, it is clear that there were undoubtedly significant provisions in the relevant contracts between the HSE and the laboratories which specified certain standards to be applied. But it does not seem to me that those requirements can properly be characterised as involving the HSE in the task of directing how the laboratories were to go about their work. In any complex situation it would be extremely surprising if parties entering into a contract of the type with which this case is concerned did not impose measures by reference to which the quality of the work to be done could be assessed. Such contracts, for example, frequently specify that work is to be carried out in accordance with a particular recognised standard, even if that standard is not legally binding. It can hardly be said that a clause of that type implies that one contracting party is taking control over how the other is to do their work. The manner in which the second party is to ensure compliance with the quality control terms of the contract is left up to themselves.

12.20 Taking a broad view of the relations between the HSE and the laboratories, it seems to me that both the relationship between those parties (which is clearly that of independent contractors) but also the level of control exercised by the HSE is such that it cannot give rise to vicarious liability. I would, therefore, hold that the HSE was not vicariously liable for any negligence established against the laboratories. However, that leaves the question of whether it can be said that the HSE was primarily liable for any such negligence. I, therefore, turn to that question.

13. Primary Liability

13.1 There are a number of ways in which a party who has an established relationship with someone such as a customer, client or a patient, but who ultimately arranges for relevant work to be done by a third party, may become primarily liable in

negligence if something goes wrong. Perhaps the most common such circumstance arises where it can be said that the party with the primary relationship with the customer knew or ought to have known that there was a real risk that the work which was passed on to a third party would not be carried out in an appropriate fashion. For example, a failure to contract with persons of proven ability in the area might well provide the basis for a claim in that regard. However, no such claim is advanced in the circumstances of this case.

13.2 However, there is a second, and it might be said potentially developing, area of primary liability which comes under the heading of a so-called "non-delegable duty". Under this heading, a party who has the primary responsibility with the customer, client or patient may be held, in certain circumstances, to have accepted a duty to ensure that any relevant arrangements will be carried out in a non-negligent way and may be held to have done so in circumstances where that duty remains in place irrespective of whether the contracting party chooses to carry out its side of the arrangement itself or to arrange for a third party to do so.

13.3 It seems to me that three questions arise under this heading in the particular circumstances of this case. The first is as to the extent to which the concept of "non-delegable duty" arises in Irish law. The second is as to the parameters of the applicability of such a duty, should it be held to exist in principle. The third is as to whether it can be said that the arrangements of the HSE in respect of CervicalCheck can be said to come within the scope of any such principle so as, in turn, to lead to the HSE being primarily liable for any negligence established in respect of laboratories whom it contracts to carry out work in the context of that scheme.

13.4 The principle which gives rise to the existence of the non-delegable duty has been accepted by the courts of the United Kingdom, most notably in the decision of the U.K. Supreme Court in *Woodland v. Essex County Council*, as referred to above. In that case, the duty of a local education authority towards pupils in its care was held to be non-delegable in circumstances where a pupil suffered serious injury in the course of a school swimming lesson conducted by swimming instructors who were not employed by the education authority and whose services were provided to the authority by an independent contractor. Whilst that decision represents the most comprehensive analysis of the doctrine of non-delegable duties provided by the U.K. Supreme Court to date, a number of U.K. authorities had previously indicated that, in certain circumstances, the duty of a party can extend beyond taking reasonable care in the performance of their tasks, to ensuring that reasonable care is taken by anyone to whom those tasks are delegated.

13.5 As indicated by Lord Sumption in his judgment in *Woodland*, the characterisation of non-delegable duties has its origins in the law of nuisance and in the rule in *Rylands v. Fletcher* (1868) LR 3 HL 330, where strict liability may be imposed irrespective of fault on the defendant's part and where a defendant can be held responsible even when the acts complained of are committed by independent contractors. The category of non-delegable duties was subsequently extended to include situations involving a duty to take reasonable care, as in *Hughes v. Percival* (1883) 8 App Cas 443, where Lord Blackburn held in the House of Lords that the defendant had a duty to ensure that reasonable skill and care was used when carrying out work which involved a risk to the party wall which divided his house with that of the plaintiff's. It was held that this duty could not be discharged by delegating the performance of the work to a third party and thus the defendant was found liable for

the negligence of the builder whom he employed to do the work which had caused damaged to the plaintiff's house.

13.6 Subsequent to this, the principle of the non-delegable duty was further developed in the case law with reference to the character of the relationship between the plaintiff and the defendant and consideration of whether the defendant has assumed responsibility for the exercise of due care by a third party to whom the defendant may delegate the performance of his or her functions. This analysis first arose in the employment context, where it was held that an employer had a personal duty to provide a safe system of work and that, where he or she has appointed an agent to perform this duty, the employer remains responsible for the agent's negligent acts (see *Wilsons & Clyde Coal Ltd. v. English* [1938] A.C. 57). This principle was affirmed by the House of Lords in *McDermid v. Nash Dredging and Reclamation Co Ltd.* [1987] A.C. 906, where the defendant company, who had employed the plaintiff as a deckhand, was held to be liable for the negligence of an independent contractor, the captain of the ship on which the plaintiff worked, who had failed to operate a safe system of work.

13.7 In the "hospital cases" previously mentioned, a series of decisions of the Court of Appeal for England and Wales, it was suggested that a hospital holds a non-delegable duty to take reasonable care in the provision of care to its patients. In *Gold v. Essex County Council*, a local authority which operated a voluntary hospital was held liable for the negligence of a radiographer which it employed. While the majority of the Court of Appeal decided the case according to the principles of vicarious liability, in his minority judgment Lord Greene M.R. held that the hospital had assumed the obligation to treat the plaintiff patient, stating that this was the

"natural and reasonable inference" to be drawn from the authority's method of conducting their affairs and the nature of the radiographer's engagement, and that the authority was therefore liable if the persons employed by them to perform the obligation on their behalf act without reasonable care. At pp. 301-302, Lord Greene M.R. held that:-

> "... [T]he extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment). In the former case there is, of course, a remedy in contract, in the latter the only remedy is in tort; but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf; and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than an individual can; and it is no answer to say that the obligation is one which on the face of it they could never perform themselves. Nor can it make any difference that the obligation is assumed gratuitously by a person, body or corporation which does not act for profit: *Mersey Docks Trustees v Gibbs*...."

13.8 In another case involving the negligent acts of employed medical staff, *Cassidy v. Ministry of Health*, again the majority of the Court of Appeal reached its decision on the application of principles of vicarious liability. As quoted above at para. 11.9, Denning L.J. in his minority judgment considered that the critical factor was not the hospital's relationship with the doctor or surgeon, but its relationship with the patient, arising from its acceptance of the patient for treatment. This, he concluded, meant that the hospital authorities are liable for the negligence of a

hospital worker in the course of the treatment of a patient, regardless of whether the worker is employed under a contract of service or a contract for services. Denning L.J. restated this analysis in his minority judgment in *Roe v. Minister of Health* [1954] 2 Q.B. 66, at p. 82. While the principle of a hospital's non-delegable duty towards its patients was referred to with approval in an *obiter* comment of Lord Browne-Wilkinson in his *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633, at p. 740, the underlying principle identified by Lord Greene M.R. and Denning L.J. was first adopted by the U.K. Supreme Court in *Woodland.*

13.9 In *Woodland*, reflecting on the foregoing development of the law in this area, Lord Sumption considered that there are two broad categories of case in which a non-delegable duty has been held to arise. The first such category was described as a "large, varied and anomalous class of cases" in which a defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work. The second category of cases were held to involve circumstances where a protective relationship exists between the defendant and the plaintiff. Considering the latter category as that which was relevant to the facts of *Woodland*, Lord Sumption referred to three critical characteristics in identifying the existence of such a duty, at para. 7 of his judgment:-

> "First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the

defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own."

13.10 In an effort to articulate the exceptional circumstances in which a non-delegable duty of care may arise, Lord Sumption clarified that the question cannot depend simply on the degree of risk involved in the relevant activity. As previously referred to, five "defining features" of a non-delegable duty were set out at para. 24 of his judgment, which require to be restated here in full:-

"(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

(2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual custody, charge or care of the defendant, and (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(3) The claimant has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or through third parties.

(4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

(5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him."

13.11 Lord Sumption held that the fact of the defendant's control over the environment in which the injury was caused was not an essential element in this kind of case, and where a non-delegable duty arises, the defendant is liable despite the fact that he may have no control at all. In fact, the "essential element" of this type of case, he continued at para. 24 of his judgment, is "control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility". Furthermore, it was held that a non-delegable duty of care should be imputed to those providing critical services only in circumstances where it would be fair, just and reasonable to do so.

13.12 On the abovementioned criteria, Lord Sumption held that the imposition of a non-delegable duty was not an unreasonable burden on the education authority. In particular, as noted by both Lord Sumption and Lady Hale in her concurring judgment, the outsourcing of the educational and supervisory functions of schools was a recent phenomenon and these were traditionally performed by staff, for whom the authority would have been vicariously liable. If, on analysis, the duty of the authority was not to perform the relevant function but only to arrange for its performance, then it would not be liable for the negligence of independent contractors (see *Myton v. Woods* (1980) 79 LGR 28). On the facts of the case, however, it was concluded that the alleged negligence occurred in the course of the educational functions which the school assumed an obligation to perform and had delegated to its contractors, and that if negligence and resultant injury were found, the educational authority is in breach of duty.

13.13 Lord Sumption's judgment in *Woodland* has been subsequently considered by the U.K. Supreme Court in *Armes v. Nottinghamshire County Council* [2017] UKSC 60, [2018] 1 All E.R. 1, where it was held that the imposition of a non-delegable duty on a local authority to ensure that reasonable care was taken for the safety of children in care, while they were in the care and control of foster parents, was too broad and that the responsibility with which it would fix local authorities was too demanding. In light of policy considerations and the relevant statutory provisions, the Court concluded that the duty of the local authority was not to perform the function of the provision of daily care, in the course of which the plaintiff had been abused, but rather to arrange for, and then monitor, the performance of this function.

13.14 It does not appear that this Court has ever been asked to fully consider either the question of whether such a principle applies in Irish law and, if so, whether the criteria for determining that a non-delegable duty arises are the same as those identified in the United Kingdom case law.

13.15 While the United Kingdom case law sets out quite detailed criteria for assessing whether such a duty can be said to exist in particular circumstances, it does seem to me to be necessary to consider the appropriate approach to be adopted in determining whether the concept of a non-delegable duty should be extended to a category of case which has not yet been the subject of a specific ruling by the courts. In that context, it is appropriate to refer back to the overall analysis set out in the section of this judgment concerning vicarious liability which suggests that a court should be informed by any underlying principle, if there be one, but should also, to the extent that it is not possible to identify any underlying principle, adopt an incremental approach.

13.16 There are, it is clear, certain types of duty which are owed to a very wide number of persons under the long established neighbour principle. When we drive a car, we owe a duty of care to ensure that the car is safely driven and owe that duty to anyone who happens to be in the vicinity, be they the occupants of another vehicle, cyclists or pedestrians. It does not require any particular prior relationship to impose such a duty. The happenstance of an individual being a user of the same piece of roadway as the driver creates, in itself, a sufficient proximity for a duty of care to arise.

13.17 But there are other circumstances where some form of relationship is required between parties in order for a duty of care to arise in the first place. Professional persons owe a duty of care to their clients and patients precisely because they have undertaken the relationship concerned. That relationship, whether based on contract or otherwise, informs the parameters of the duty. In such circumstances, it is easy to see that there is a strong case for suggesting that someone who assumes that duty of care cannot absolve themselves from their obligations simply by arranging that a third party will carry out some of the activity which that duty requires to be accomplished. On that basis, it does seem to me that it is appropriate to recognise that a relationship may give rise to some form of non-delegable duty. To hold otherwise would be to say that a party who enters into a relationship giving rise to a duty of care could escape from that duty simply by inviting someone who was not an employee, or over whom they did not exercise a sufficient degree of control, to carry out some of the duty concerned.

13.18 As noted by Lord Sumption, the courts of the U.K. have identified a number of types of situation where a non-delegable duty of care may exist. It is not necessary

for the purposes of this judgment whether all such categories have a counterpart in Irish law. For present purposes, it is sufficient to note that, for the reasons analysed in the preceding paragraphs of this judgment, it is appropriate to consider that there is potentially at least one underlying principle behind the concept of the non-delegable duty, being that such a duty derives from a particular relationship between the parties. However, the identification of that underlying principle is not particularly helpful in defining the parameters of the type of relationship which will be held to give rise to a non-delegable duty. In that context, it seems to me that the incremental approach by analogy provides the best assistance to the Court in attempting to map out the parameters of the circumstances which give rise to such a duty.

13.19 It must be recalled that one of the matters identified by both Lord Sumption and Lady Hale in their respective judgments in *Woodland* as being relevant in assessing the extent of any such duty was the fact that certain functions had traditionally been performed by staff of the schools in question where the outsourcing of the functions in question was a relatively recent phenomenon. That analysis may assist in pointing to the appropriate direction of any incremental approach.

13.20 In the particular context of this case, it may also be appropriate to have regard to the fact that there have, since the adoption of widespread publicly funded health measures, been significant developments in the way in which the delivery of medical care is structured. It is, of course, necessary to acknowledge that there continue to be significant differences between the way in which health services are provided in Ireland in comparison with equivalent systems in the United Kingdom. Even where patients have medical services provided to them free of charge, those services are often provided in Ireland to a much greater extent by the private sector under

arrangements with the HSE. But notwithstanding those differences, it remains the case that a significant development in the provision of medical services since the Second World War has been a move from the historical position where most of those services were provided under some form of contract between the patient and the medical service provider (whether that be a hospital, a consultant or a doctor) to one where many such services are now provided under various publicly funded schemes. In the past, a patient who contracted for medical services would almost certainly have been entitled to rely on a term (whether express or implied) of their contract to the effect that the services in question would be provided in a non-negligent fashion. In present conditions, many such services are simply provided under publicly funded schemes without any contractual relationship.

13.21 Just as there was, in *Woodland*, a basis for considering that the outsourcing certain education supervisory functions which would traditionally have been carried out by staff might not absolve the institution from retaining a duty of care in respect of the manner in which those functions were carried out, there is a basis for suggesting that, by analogy, the mere fact that certain services are no longer provided by contract should not necessarily absolve a provider from the kind of obligations which would likely have arisen under contract in the first place. Such an approach would meet the "evolution by analogy" approach.

13.22 In that context, it seems to me to be important to note that there is no reason in principle why the HSE might not have chosen to have its own laboratory in which screening could take place. To the ordinary woman who availed of CervicalCheck, the question of the precise ownership of the laboratory which would do the screening would not, in my view, have appeared material. Rather, that woman would have

assumed that she was engaging in a HSE promoted programme which was under the control of the HSE, and whatever needed to be done might be done by the HSE itself or might be done by some other body of the choosing of the HSE. In the past, a body providing a service such as CervicalCheck, but within the private sector, would almost certainly have entered into a contract with any woman availing of that service which would have made, either by express or by implied term, the service provider liable for any negligence. That would be likely to be so even if the service provider decided that it would sub-contract some of the work to others. It would have been unlikely that a relevant contract would have been such that the obligations of the service provider would have been confined to identifying an appropriate person to carry out part of the task. It is far from the type of case where a general practitioner may refer a patient either to a medical facility or an individual consultant precisely because that general practitioner takes the view that a greater or different level of expertise in a particular area is required to meet the needs of the patient concerned. In such circumstances, a patient would not take it that the general practitioner was assuming responsibility for the consultant or the hospital. A general practitioner might, of course, be liable for referring a patient to a consultant who that doctor knew or ought to have known did not have the expertise to deal with the matter. But that would give rise to a different type of liability.

13.23 It does not seem to me that it is appropriate to characterise the role of the HSE as being simply one of facilitating a relationship between patients participating in CervicalCheck and laboratories. Rather, it is appropriate to characterise the HSE as the party who has undertaken responsibility for the scheme, irrespective of whether actual screening, or indeed other elements of the scheme, were to be performed by others.

13.24 On that basis, it seems to me that the HSE were, *prima facie*, primarily liable. It is also necessary to consider whether there is anything in the circumstances of the case which would lead to the view that the HSE had divested itself of responsibility for an element of the programme, being that element which involved the assessment of slides by screeners. It seems to me that it was considerations of this type that led to the conclusion of the U.K. Supreme Court in *Armes* that the relevant local authority in the United Kingdom was not responsible for the actions of foster parents with whom they had placed children, subject only to there being a possibility of liability if there was negligence in the way in which the foster parents were selected or monitored. Even in an era where all relationships were governed by contract, it would have been most unlikely that an agency which held itself out as facilitating the placement of children in foster care would have been taken to have entered into a contract to ensure that, in all circumstances, the foster parents would not engage in any inappropriate activity. However, the underlying placement service would have carried with it at least an implied contractual obligation to ensure that the persons with whom a relevant child was to be placed had been assessed for suitability and, most likely, would be subject of monitoring. It would be to push the parameters of incremental change or evolution by analogy much too far to suggest that non-delegable duties could arise in cases where it was clear that the obligation being undertaken was simply one of identifying appropriate third parties to carry out a relevant function.

13.25 Some of those involved with CervicalCheck may have been aware that slides were sent to laboratories, whether in Ireland or in the United States, which were independent of the HSE. Some may not. But knowledge does not seem to me to be the essential ingredient. Rather, the question is as to whether the arrangement viewed as a whole could be taken as one where the HSE was simply procuring that screening

would be carried out by others, so that the HSE was divesting itself of responsibility for that aspect of the programme by entering into contracts with third parties. In my view, there is no basis for sustaining such a suggestion.

13.26 In those circumstances, it seems to me that the HSE is primarily liable for any negligence which might be found against the laboratories. I propose that the Court should reach such a conclusion on a somewhat narrower basis than that adopted by the trial judge because, for the reasons already referred to, I would not hold the HSE to be vicariously liable for the acts of those laboratories. However, I would hold that the HSE, in the manner in which it adopted and promoted CervicalCheck, acted in a way which would lead an informed and reasonable person to assume that the HSE was undertaking responsibility for ensuring that the programme would be conducted in a non-negligent way and, further, I would hold that there was nothing in the circumstances of the operation of the programme which would lead a reasonable person to conclude that the HSE had absolved itself of any obligations in respect of the screening part of the programme.

14. Damages

14.1 As noted earlier, the only defendant who appealed on the question of damages was Medlab. I have already set out the various headings under which the trial judge awarded damages against all of the defendants, including Medlab. As also already noted, with the exception of a sum of €10,000 awarded against the HSE in respect of a failure to inform the Morrisseys, and in particular Ms. Morrissey, about certain audit results, all of the damages were awarded against each of the defendants.

14.2 Many of the headings of damages were not contested by Medlab. The appeal, therefore, relates only to two items of damages awarded. In simple terms, it is first

argued that the award of general damages, which as will have been seen were measured by the trial judge at €500,000, was said to have exceeded the established maximum award permissible in respect of such damages, which was said to be €450,000. Further, it is submitted that the sum awarded was not proportionate when assessed against the level of damages commonly awarded in other cases.

14.3 Second, it was said that the trial judge was in error in concluding that he could, in these proceedings, award damages to Mr. Morrissey in respect of the costs which would be incurred in attempting to replace the non-financial contribution which Ms. Morrissey, had she a normal life expectancy, would have been expected to make towards the family. In that context, it is important to emphasise that the case made was not concerned with the manner in which the trial judge proceeded to calculate the sums found to be due under that heading, but rather whether there was a legal basis for awarding damages under that heading at all. In the same context, it is also important to note that the trial judge did indicate that if there was no legal basis for awarding damages to Mr. Morrissey under that heading, he would instead have awarded the same sum under the so-called "lost years" doctrine when calculating the damages due to Ms. Morrissey.

14.4 While arguing that the trial judge was correct to adopt the approach which he did, it is hardly surprisingly that counsel for the Morrisseys also suggested that, as a fall-back position, the trial judge was also correct to indicate that the same amount of damages could have been awarded under the "lost years" doctrine. It follows that the real question for this Court is as to whether, as a matter of law, damages of that type are available, either as damages recoverable by a person in the position of Mr. Morrissey or under the "lost years" doctrine.

14.5 However, it is appropriate to turn first to the award of general damages.

14.6 The starting point has to be to set out a very brief account of the history of the adoption by this Court of a limit on the amount of damages which can be awarded for pain and suffering. However, before so doing, it is of some importance to be clear as to the terminology used. On one view, it is said that whatever the limit may be, it can properly be described as a "cap" on general damages so that it would, on that basis, operate as an artificial limitation reducing the damages which might otherwise properly be awarded to fully compensate an injured party. An alternative view is that the limit, which might in this context not be properly described as a "cap" at all, amounts to the current view of the appellate courts as to the damages which should be awarded in cases of the most serious injuries. On that view, it might be said that all other damages, ranging from the very minor to those which are relatively serious but not of the most serious category, would require to be broadly proportionate to the damages awarded in the most serious cases, having regard to the level of injury suffered. It will be necessary to return to this question when the brief history of the case law in this area has been reviewed.

14.7 A limit, or "cap", on the amount of general damages which can be awarded for pain and suffering was first introduced by this Court in *Sinnott v. Quinnsworth* [1984] I.L.R.M. 523. In that case, O'Higgins C.J. described general damages as those which are intended to represent fair and reasonable monetary compensation for the suffering and inconvenience with which a plaintiff is afflicted by reason of their injuries and he referred with approval to the following *dicta* of Griffin J. in *Reddy v. Bates* [1983] I.R. 141 at p. 148, in relation to the calculation of such damages:-

> "The fact that a plaintiff has been awarded what is considered to be sufficient damages to cover all her prospective losses, to provide for all her bodily needs, and to enable her to live in comparative comfort (having due regard to her disabilities), should be reflected in the amount of general damages to be awarded...
>
> In a case such as this, where damages are to be assessed under several headings, when the jury has added the various sums awarded and arrived at a total for damages, they should then consider this total sum (as should this Court on any appeal) for the purpose of ascertaining whether the total sum awarded is, in the circumstances of the case, fair compensation for the plaintiff for the injuries suffered, or whether it is out of all proportion to such circumstances. In my view, the income which that capital sum would generate with reasonably careful and prudent investment is a factor which the jury (and this Court on appeal) should take into consideration in arriving at a conclusion in this behalf."

14.8 In outlining the rationale for imposing a cap on such damages, O'Higgins C.J. described circumstances in which a sum awarded might be so high as to be construed as a punishment imposed on the defendant for the infliction of the injury rather than a reasonable attempt to compensate the injured and might, thus, impact on the operation of public policy. He then continued on to identify the factors which a court may refer to in its assessment of the level at which such a limit should be appropriately set:-

> "In my view a limit must exist, and should be sought and recognised, having regard to the facts of each case and the social conditions which obtain in our society. In a case such as this, regard must be had to the fact that every single penny of monetary loss or expense which the Plaintiff has been put to in the past or will be put to in the future has been provided for and will be paid to him in capital sums calculated on an actuarial basis. These sums will cover all his loss of earnings, past and future, all hospital and other expenses in relation to the past and the future and the cost of the special care which his dependence requires, and will require, for the rest of

> his life. What is to be provided for him in addition in the way of general damages is a sum, over and above these other sums, which is to be compensation, and only compensation. In assessing such a sum the objective must be to determine a figure which is fair and reasonable. To this end, it seems to me, that some regard should be had to the ordinary living standards in the country, to the general level of incomes, and to the things upon which the Plaintiff might reasonably be expected to spend money."

14.9 In that case, general damages were assessed by the jury at first instance at £800,000, a sum which was described by O'Higgins C.J. as bearing "no relation to ordinary living standards in the country". By reference to "contemporary standards and money values", a limit on the award of general damages was set at £150,000 and the sum awarded was substituted accordingly.

14.10 In light of the prevailing economic circumstances, this limit was subsequently revised upwards, to £250,000, by Morris J. in the High Court in *Kealy v. Minister for Health* [1999] 2 I.R. 456. The limit was also subject to analysis by O'Sullivan J. in the High Court in *McEneaney v. Monaghan County Council* [2001] IEHC 114, where, having regard to the expert evidence tendered as to inflation and living standards, it was considered that the contemporaneous equivalent figure to the "cap" on general damages imposed in *Sinnott* was approximately £300,000. In *M.N. v. S.M. (Damages)* [2005] IESC 17, [2005] 4 I.R. 461, Denham J. held that she was satisfied that, at that time, the equivalent figure to the £150,000 limit imposed in *Sinnott* was in excess of €300,000.

14.11 A detailed review of the limit on general damages was undertaken in *Yun v. Motor Insurers Bureau of Ireland & anor*, in which case Quirke J. considered expert evidence regarding the change in economic conditions in Ireland between 1984 (when

the "cap" in *Sinnott* was imposed) and 2009, together with the future social and economic outlook as of that time. Assessing the appropriate limit on the basis of the significant increases in earning levels and the improvements in living standards which took place in Ireland between 1984 and 2008, and allowing for inflation, Quirke J. found that the equivalent value of the 1984 "cap" in 2008 was €500,000. This figure was then subjected to a downward adjustment to reflect the reduction in wealth and living standards which had commenced in or around 2008, when Ireland had entered into a period of economic recession and which reduction was expected, on the basis of the evidence put before the High Court, to continue for a further period in excess of five years. Accordingly, Quirke J. reduced the value of the limit on the award of general damages to €450,000, a figure which was referred to with approval by this Court in *Kearney v. McQuillan & North Eastern Health Board (No 2)* [2012] IESC 43 and more recently by the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56, [2016] 1 I.R. 461.

14.12 This "cap" has been the subject of some recent discussion in the High Court (see, for instance, *Mullen v. Minister for Expenditure and Reform* [2016] IEHC 295, *Woods v. Tyrell* [2016] IEHC 355, [2016] 1 I.R. 349 and *B.D. v The Minister for Health and Children* [2019] IEHC 173), in light of what have been said to be considerable changes in the prevailing economic circumstances of the country in recent times.

14.13 In the same context, it is also important to note that a judge-led initiative suggested that a more equitable way of dealing with future care would be to provide for periodic payments rather than a lump sum, which can, of course, give rise to a

windfall gain or to monies running out, depending on whether life expectancy has been accurately assessed and whether the investment climate changes.

14.14 Regrettably it would appear that, for the reasons set out by Murphy J. in the High Court in *Hegarty & anor v. Health Service Executive* [2019] IEHC 788, despite the fact that it took a considerable period of time for the recommendations of the Working Group on Medical Negligence and Periodic Payments to be enacted into legislation, there are real reasons to fear that the periodic payment regime will not work in practice.

14.15 Those points are of some relevance to the question which this Court has to consider, for it must be accepted that any person who establishes a claim in negligence for serious injuries will be fully compensated for any financial loss which they suffer or any financial costs which they incur so that the award of general damages is designed to deal only with pain and suffering.

14.16 However, while there might at least be something approaching a broad consensus among the public generally as to the relative seriousness or otherwise of certain injuries, the precise translation of any particular set of injuries into a sum of compensation is necessarily somewhat subjective.

14.17 It is also potentially helpful to look at the position in other jurisdictions. In so doing, I am mindful of the fact that it would require more detailed analysis of the precise circumstances in which additional damages for financial loss or cost of case might be awarded in such jurisdictions to enable a true comparison to be made. However, and with that important caveat, it is of some relevance to note the highest level of damages provided for in the guidelines maintained in certain other jurisdictions.

14.18 In the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (5th Ed.), which were published in 2019 as a resource for courts and practitioners in the assessment of damages in personal injury cases, the highest level of damages specifically provided for is in respect of injuries resulting in quadriplegia, which attract awards between £475,000 and £700,000. In the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (14th Ed.), published in 2017, which are for the benefit of the judiciary in England and Wales, the highest awards of damages recommended are also in respect of injuries resulting in quadriplegia, which will generally attract an award of between £284,610 to £354,260.

14.19 While it does not appear that there are formal judicial guidelines on damages for injury in Germany, I am aware that awards in respect of severe cerebral palsy have been made in and around the sum of €700,000. It should, however, be noted that in the German system, the award may be adjusted to reflect the degree of culpability found against the defendant.

14.20 Allowing for the caveat mentioned earlier concerning comparability, it certainly does not seem that a limit, whether it be €450,000 or €500,000, in this jurisdiction is out of line with the highest level of damages awarded in other comparable systems. Indeed, there may be a basis for suggesting that, in relation to very serious injuries, damages in Ireland are arguably lower than those awarded in at least some comparable jurisdictions. However, given that no suggestion was made on this appeal to the effect that the award of €500,000 for general damages was too low, it is unnecessary to address those questions or to consider any issues of comparability

which might arise. It is sufficient to record that either of the limits being contended for in this jurisdiction is well within, if not below, international norms.

14.21 The first issue which arises for this Court is, therefore, as to whether it can, as Medlab argues, be said that the limit was €450,000 and that the trial judge was in error in awarding €500,000.

14.22 First, it must be said that the limit of €450,000 derives from the judgment of Quirke J. in *Yun*, as referred to above. However, it is also clear that the limit is not fixed forever but rather can be reviewed from time to time by reference to prevailing conditions. It is also clear that the limit of €450,000 was fixed at what was, on any view, a time of particular economic depression in this country and was expressly reduced by Quirke J. on that basis from what he would otherwise have regarded as an appropriate limit of €500,000.

14.23 Medlab accepted that it is possible for the limit to be adjusted in the light of prevailing circumstances but argued that, in order that a court might do so, there should be evidence of a change in prevailing circumstances so as to allow for a proper assessment to be made.

14.24 It is in that context that it seems to me to be important to note the difference between the proper approach to financial damages which are capable of reasonably precise assessment, on the one hand, and general damages for pain and suffering, on the other. The course of action adopted in *Russell (A Minor) v Health Service Executive* [2015] IECA 236, [2016] 3 I.R. 427 did involve detailed economic and other evidence which enabled that court to conclude that it was appropriate to calculate future pecuniary loss on the basis of an assumption that the real rate of return on monies invested would be 1.5% (with an exception in respect of the

calculation of the cost of future care, where the real rate of return was set at 1% to account for future wage inflation). But such an exercise was required precisely because such damages are capable of at least being approached on the basis of a calculation. As already noted, there is a significant subjective element to the calibration of compensation for pure pain and suffering. In those circumstances, it does not seem to me that a detailed evidence based approach to a change in circumstances is necessary or required when identifying the limit on general damages for pain and suffering. Rather, a court is entitled to take a broad approach based on its own experience, just as some of the courts which have set and varied the limit have done to date. In so saying, I do note the approach of O'Sullivan J. in *McEneaney* and of Quirke J. in *Yun* was somewhat different. In those circumstances, and having regard to the economic circumstances which prevailed at the time the limit of €450,000 was fixed, it does not seem to me to be unreasonable to place the current limit at €500,000.

14.25 I would also suggest that it is important that there be consistency in this area. In those circumstances, it does not seem to me that a first instance judge should alter the limit, even where that judge feels that circumstances have changed sufficiently to justify a departure from a previous limit set by appellate courts. Rather, as applies in a situation where a first instance judge is bound by precedent set by a higher court, it should be open to a first instance judge, while awarding damages at the limit previously fixed, to set out a reasoned basis for suggesting that a higher limit might be appropriate in the prevailing circumstances and, thus, to leave it up to an appellate court, most likely the Court of Appeal, to consider whether such an increased limit is appropriate. It is, of course, open to a party who wishes to seek to persuade the courts that a different limit should be applied, to lead whatever evidence they might consider

appropriate to that end. It would then be open to a trial judge, in giving reasons for suggesting a change in the limit, to set out whatever evidence was considered persuasive. Such an approach would pay appropriate respect to the experience of trial judges but also ensure consistency by ensuring that any changes are made in only one place, i.e. the Court of Appeal.

14.26 It is then necessary to turn to the second aspect of Medlab's appeal against general damages. Under that heading, Medlab argues that, whatever may have been the appropriate limit, the damages in Ms. Morrissey's case ought not have been set at that limit. In that context, it was submitted on behalf of Medlab that the award of general damages made by the trial judge was disproportionate, on the basis that Ms. Morrissey's injuries do not reach the end of the spectrum of personal injuries occupied by injuries such as a catastrophic brain injury occurring at birth.

14.27 It is, of course, the case that it may seem somewhat invidious to attempt to compare one type of very serious consequence with another. Some persons who suffer catastrophic injury due to negligence are likely to lead a long life suffering from very serious disability indeed, in circumstances where there are limits to the extent to which those disabilities can be ameliorated by the provision of supports which in turn can be financed by an award of damages. In some such cases, the person concerned may have full cognitive ability and may be all too well aware of their unfortunate circumstances. Others may suffer similar disability but with less realisation. Still others, such as Ms. Morrissey, will, tragically, not have a full or close to full life expectancy during which they will suffer from the consequences of negligence, but on the other hand will have the additional pain of knowing about the life which they will miss and the consequences for their loved ones. In my view,

there are different ways in which it is possible properly to characterise injuries suffered as a result of negligent action as being at or near the top of the compensation range so far as pain and suffering are concerned. I have no doubt that this is one such case.

14.28 I should say that I have come to that view while considering that the proper approach to the limit for damages for pain and suffering is the one which sees that limit as the appropriate sum to award for the most serious damages. This is therefore the sum by reference to which all less serious damages should be determined on a proportionate basis, having regard to a comparison between the injuries suffered and those which do, in fact, properly qualify for the maximum amount. The point which I have sought to make, however, is that the type of injuries which do properly qualify for the maximum amount may nonetheless come into different categories. While it is not possible to conduct a precise mathematical exercise in deciding whether particular injuries are, for example, half as serious as others, nonetheless it seems to me that respect for the proper calibration of damages for pain and suffering requires that there be an appropriate proportionality between what might be considered to be a generally regarded view of the relative seriousness of the injuries concerned and the amount of any award. But those very same considerations also recognise that it may be possible to regard injuries of very different types as being broadly comparable. That consideration applies equally to injuries of the most serious type and, thus, it is appropriate to consider the injuries suffered by Ms. Morrissey to be of that most serious type, even though they differ in character from other types of injuries which can also properly be characterised as being of the most serious type.

14.29 Given that I have, for the reasons already set out, come to the conclusion that the limit on general damages for pain and suffering as currently considered should be fixed at €500,000, it seems to me that such a sum amounts to an appropriate means of compensating Ms. Morrissey under that heading and I would not, therefore, interfere with the trial judge's award in that regard.

14.30 It is, therefore, necessary to turn to the second element of the appeal against damages which relates to the financial cost to Mr. Morrissey of providing for those "services" which Ms. Morrissey would, of course, willingly and happily have provided for her family had her life not been so tragically cut short.

15. Damages to Compensate for Loss of Free Services

15.1 While it may be somewhat difficult to describe the issues which arise under this heading in a way which does not appear disregarding of the real human issues which lie behind this question, nonetheless there is an important question of law which needs to be resolved. It will be necessary to turn shortly to the case law from which the existing legal position may be gleaned and from which any possible evolution of that position may find its staring point.

15.2 The essential difficulty stems from the long standing case law which suggests that a third party cannot sue in damages for loss arising out of a death caused by the wrongdoing of a defendant. There have been some exceptions identified and there have been alterations in the law brought about by the legislature. However, on Medlab's case, the fundamental position remains as indicated in that historic case law, subject only to those exceptions which have been recognised or where legislative change has been brought about.

15.3 The heading of claim with which we are concerned refers to damages to which the trial judge considered Mr. Morrissey was entitled, so as to compensate him for the cost of having to provide services for himself and his family which would, in the ordinary course, have been likely to have been supplied by Ms. Morrissey had she a normal life expectancy. The Morrisseys suggest that such a claim can come either within the existing case law or, potentially, a reasonable evolution of that jurisprudence. It is said that the anomalies which would arise from a finding that Mr. Morrissey was not entitled to such damages would justify, if it was required, such an evolution.

15.4 It follows that it is necessary to look at the case law and certain relevant legislation in a little detail. The historic position in tort was that no damages could be recovered for financial loss arising out of a death. In *Law of Torts* (4th edn.), McMahon & Binchy explain that the principle that death ended all actions in personal torts, *action personalis moritur cum persona*, arose from a feature of early English law, the felony merger doctrine, and meant that at common law the deceased person's estate had no right to sue in respect of his or her death. Further, the common law did not recognise the death of a person as giving a claim for damages. In a case which underpins much of the evolution of the law in this area, *Baker v. Bolton* (1808) 1 Camp 493, it was established that the dependants of a deceased person had no right to sue in respect of his or her death. There, the plaintiff, following an accident in which his wife was fatally injured, sought damages for the loss of her society and of her assistance in conducting his business. Lord Ellenborough held that the plaintiff was entitled to damages for the loss of his wife's society and for the distress which he had suffered only from the time of the accident until the time of her death a month later, and stated the following:-

> "In a civil Court, the death of a human being could not be complained of as an injury, and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence."

15.5 The rule in *Baker v. Bolton* was subsequently accepted in other common law jurisdictions (see, for instance, the decisions of the Supreme Court of Canada in *Monaghan v. Horn* (1884) 7 Can S.C.R. 409 and of the Supreme Court of the United States in *Insurance Co. v. Brame* (1878) 95 U.S. 754) and has also been previously referred to with apparent acceptance by this Court in *Byrne v. Houlihan* [1966] I.R. 274.

15.6 Exceptions to the historical position in tort law regarding recovery for financial loss arising out of a death have been fashioned both by courts and legislatures. In *Rose v. Ford* [1937] A.C. 826, the House of Lords held that the plaintiff had a claim of damages for loss of expectation of life as a result of the wrongful act of the defendant. The "lost years" doctrine has been subsequently adopted by the courts in order to allow those plaintiffs who have a decreased life expectancy as a result of the negligent acts of the defendant to recover for their lost years in a personal injury action brought before their death. In *Doherty v. Bowaters Irish Wallboard Mills Ltd* [1968] I.R. 277, it was Walsh J.'s view that the sum to be considered in this regard was the plaintiff's loss of earnings during the period by which his or her life expectancy has been reduced, less the living costs which would have been incurred during these years. The "lost years" doctrine has also been accepted in the United Kingdom, in the decision of the House of Lords in *Pickett v. British Rail Engineering Limited* [1980] A.C. 136, which appears to have similarly confined the monies to be recovered under this heading to the plaintiff's loss of earnings during his or her "lost years".

15.7 Further, the rule in *Baker v. Bolton* presented the obvious anomaly that a defendant could be found liable for negligence causing injury to a potential plaintiff, but that recovery was not allowed where the defendant's negligent acts caused the wrongful death of the same. Legislation was introduced in order to mitigate the harsh effects of this rule on the spouse and dependants of the deceased, who were until that point deprived of any cause of action for damages in respect of the individual's death. The Fatal Accidents Act 1846, commonly known as Lord Campbell's Act, was introduced to provide a statutory right to a cause of action to the dependants of the deceased in respect of their dependency (see the Fatal Accidents Act 1976 for these provisions as currently set out in English law) and such provisions were reflected in statutes introduced across a number of common law jurisdictions. In Ireland, the law on this matter has been consolidated in Part IV of the Civil Liability Act 1961. Section 48(1) of that Act is particularly relevant for the purposes of these proceedings and states as follows:-

> "48.— (1) Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased."

15.8 In a decision of the Queen's Bench Division of the High Court of England and Wales, *Thompson v. Arnold* [2007] EWHC 1875 (QB), Langstaff J. helpfully sets out the differences between a personal injuries claim taken by an individual who has suffered a shortened life expectancy as a result of negligence and a claim under the Fatal Accidents Act 1976 taken by the dependants of the deceased, at paras. 20-21:-

"[20] First, a claim for the life time damages of a claimant whose death is impending will, if made on a lump sum basis - the only basis available for claims at the time which this case concerns, which was before the introduction of periodical payment orders - be a claim for the loss of earnings up to the date of anticipated death, and thereafter may include a claim for the 'lost years'. Second, the claim can contain no element of care for any child, or husband, of the claimant after death, though the costs incurred in doing that which the claimant would have done to care for family members up until her death may be included. Third, an award for pain, suffering and loss of amenity may be made, but no claim for bereavement damages is payable to members of the family. Fourth, the claim is made by the claimant herself. Accordingly, any damages are paid to the claimant. If she dies any sum unspent out of the money she received will therefore be dealt with as part of her estate, and in accordance with her will if she has made one, subject only to any claims under the Inheritance (Family Provision) legislation.

[21] By contrast, a claim under the Fatal Accidents Act is one for dependency, which may be conveniently divided into two parts - dependency upon earnings ('earnings dependency') and dependency upon those services provided by the deceased to which a money value can be attributed ('services dependency') such as care of a spouse and children, insofar as either would have been provided for the benefit of the dependants, during the duration of their dependency. There is no lump sum claim, for pain, suffering and loss of amenity of the deceased - but instead the dependants may make a claim for bereavement which attracts a lump sum award, in a standard figure prescribed by legislation. Finally, a dependency claim is not one made by the claimant, but by her dependants and is therefore for their direct benefit, and not subject to the laws of intestacy, or to any will which she may have made."

15.9 The creation of a remedy for the dependants of the deceased by statute has in turn influenced the approach of courts in a number of common law jurisdictions towards the underlying rule in *Baker v. Bolton.* In *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. 38, the House of Lords refused an invitation to disturb the rule.

Lord Sumner considered that the provisions of Lord Campbell's Act, which remedied the disadvantageous position of widows and children, should be read as effectively providing statutory recognition to the rule at common law and held at p. 52 that the legislation "provided a new cause of action and did not merely regulate or enlarge an old one".

15.10 Similarly, in *Barclay v. Penberthy and Ors* [2012] HCA 40, the High Court of Australia declined to interfere with the rule in *Baker v. Bolton* at common law, where the plaintiff firm had sought to make a claim for damages for the wrongful deaths of two employees, in circumstances where such a remedy was not provided for by legislation. In doing so, the High Court surveyed the legislative provisions of all Australian jurisdictions regarding a cause of action on behalf of dependants, with the majority judgment of the Court holding that "the pattern of Australian legislation is a pointer towards the continued existence of the rule in *Baker v. Bolton* as a matter of common law" (para. 26) and that any further contraction in the scope of the rule is a matter for Australian legislatures.

15.11 As mentioned, in the United States, the rule in *Baker v. Bolton* was also accepted into case law and, in a similar manner to that described above, U.S. state legislatures subsequently intervened to provide a statutory remedy for the dependants of the deceased to maintain a cause of action. Deviation from the rule in *Baker v. Bolton* was considered permissible by the U.S. Supreme Court in circumstances where no legislative remedy had been already provided to mitigate the effects of the rule. In *Moragne v. States Marine Lines* (1970) 98 U.S. 375, the U.S. Supreme Court overruled *The Harrisburg* (1886) 119 U.S. 199, precedent founded on the rule in *Baker v. Bolton*, to the effect that maritime law did not afford a cause of action for

wrongful death, and held that the petitioner could maintain an action at maritime law for the wrongful death of her husband caused by a violation of maritime duties. This was in circumstances where a remedy for wrongful death in territorial waters did not otherwise exist in federal maritime statute. Having reviewed the other remedies provided at federal maritime law for dependants of maritime death victims in other circumstances, the Court concluded that the lacuna at issue was not reflective of a legislative intent to preclude the availability of a remedy for situations not covered under the legislation and to remedy the anomalies which such a lacuna caused, the Court created a uniform federal cause of action for maritime death.

15.12 The effects of the creation of a "true wrongful-death remedy" in *Moragne* were recognised in the later decision of the U.S. Supreme Court, *Sea-Land Services, Inc. v. Gaudet* (1974) 414 U.S. 573, where the Court allowed the bringing of a maritime wrongful-death action by the spouse of a deceased longshoreman who had previously recovered damages in his lifetime for his personal injuries. In that case, Brennan J. held on behalf of the majority of the Court that in *Moragne* a true wrongful death remedy had been created, which is founded on the death itself and is independent of any action the deceased may have taken in respect of his own cause of action. The dependant's claim was held to involve a different cause of action to that of the deceased and thus was not precluded by the principle of *res judicata*. While so called "wrongful death statutes" provide that a dependant's claim is barred if the deceased has recovered for their injuries during their lifetime, the judge-made wrongful death remedy at maritime law was held to operate with no such limitations and it was said that any potential for double liability could be eliminated by the application of principles of collateral estoppel.

15.13 The question which the U.S. Supreme Court faced in *Sea-Land Services Inc v. Gaudet* raises a final issue in relation to this aspect of proceedings, which is as to whether, under Part IV of the Civil Liability Act 1961, as amended, a claim could be brought subsequent to the death of the injured party by his or her dependants, where a claim has already been brought during the lifetime of the injured party. The position under U.K. law appears to be that if a deceased person brings an action for damages during his or her lifetime, and either proceeds to judgment or receives a settlement, a further claim cannot be brought after his or her death under the Fatal Accidents Act 1976, on the basis that the recovery by a dependant is conditioned in statute on the existence of an actionable cause in the deceased at the time of his or her death (see *Read v. Great Eastern Railway Company* (1868) L.R. 3 Q.B. 555 and *Nunan v. Southern Railway Company* (1924) 1 K.B. 223). This was also the assumption on which the House of Lords proceeded in *Pickett*, although the issue itself did not arise for determination in those proceedings. It is noteworthy that in that case it was stated by Lord Wilberforce that this assumption, if correct, "provides a basis, in logic and justice, for allowing the victim to recover for earnings lost during his lost years".

15.14 In this jurisdiction, the issue has been subject to limited consideration. In *Mahon v. Burke* [1991] 2 I.R. 495, the deceased had brought an action for negligence against the defendant but settled this action before his death. The plaintiff, his widow, then brought proceedings under s. 48 of the 1961 Act, in which she claimed damages for funeral expenses, mental distress, and loss of consortium and for loss to the dependants of the deceased arising from his death. The High Court (Lavan J.), on an appeal from the Circuit Court, refused to award damages in respect of the fatal injuries claim, holding that the underlying action of the deceased had already been extinguished when the principal action had been settled by the deceased during his

lifetime and therefore there was no longer a cause of action vested in the deceased at before his death.

15.15 In a more recent decision of the Court of Appeal, *Hewitt v. Health Service Executive* [2016] IECA 194, [2016] 2 I.R. 649, the plaintiff sought to bring a claim under s. 48(1) of the Civil Liability Act in respect of the death of his wife. The respondent sought to have the claim dismissed as statute-barred, as the statutory limitation period within which the deceased could have commenced proceedings had expired prior to her death and, it was said, the cause of action vested in the deceased had been extinguished by the time of her passing. Hogan J. held that, while the cause of action under s. 48 is a separate cause of action from that which might have been maintained by the deceased, the statutory claim of dependants is interdependent with the original action which the deceased might have brought during his or her lifetime. Having examined the statutory construction of s. 48(1), as set out above, he found in favour of the respondents, stating the following at paras. 19 and 20:-

> "19. In my view, however, it is the following words in s. 48(1) ("...such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof...") which are critical and this is where I respectfully part company from the reasoning and conclusions of [the trial judge]. In other words, I take the view that s. 48(1) goes further than simply requiring that the action was in respect of a justiciable controversy measurable in damages which the deceased was capable of commencing during her lifetime: it also requires proof that the deceased would have succeeded in the action but for the death.
>
> 20. Accordingly, while s. 48 is certainly a separate cause of action, the Oireachtas has clearly linked recovery to the entitlement of the deceased – but for her death - to have sued in her own right. This is underscored by the use in the sub-section of a past conditional tense ("...such as would have entitled...")

and the consequential requirements that the decision would have been entitled to maintain the action and recover damages in respect thereof."

15.16 There is no doubt that there are complexities, both at the level of principle and as a matter of practice, in attempting to produce an internally logical and coherent regime to compensate those who may have suffered financial loss as a result of a death or reduced life expectancy occurring in actionable circumstances. This will be so in circumstances where an action is brought after the death in question by third parties who claim that they have suffered financial loss or where, as here, it is unfortunately the case that a person will suffer from a significantly decreased life expectancy with financial consequences both for themselves and for those close to them.

15.17 As noted earlier, the historic position was that no damages could be recovered for financial loss arising out of a death. As has been pointed out in judgments from many jurisdictions (some of which are cited earlier), whatever may be the merits or demerits of that historic case law, the problem with which we are now faced is not only that the case law in question has represented the established position in most common law jurisdictions for a number of centuries, but that we are also faced with the fact that the law as thus defined has clearly formed the basis of legislative intervention in most of those jurisdictions. The provisions of the Civil Liability Act 1961, already mentioned, which permit a claim to be brought by the dependants of someone who dies as a result of the wrongdoing of a defendant are a case in point.

15.18 Whatever way one looks at the situation, there are potential anomalies. A person bringing an action while they are alive can, under the established case law, recover for the so-called "lost years". On that basis, income which they might have

hoped to have earned during a normal life expectancy but are now not likely to earn because of that life expectancy being reduced can be recovered. The person concerned can, of course, provided that they have sufficient mental capacity, do what they like with the money thus recovered. However, in many cases, not least those where there has been a very significant reduction in life expectancy, it may well be that the benefit of at least a portion of the damages recovered for those lost years will go to the dependants of the person who will, tragically, die much earlier than would otherwise have been the case. It may be that, in such circumstances, those dependants will benefit financially.

15.19 On the other hand, a claim brought after death by the dependants of a deceased will, insofar as financial loss is concerned, be confined to that proportion of the future income of the deceased which would have been lost by reason of their death but which would, as a matter of likelihood, have been spent on the dependants in question. It certainly does not necessarily follow that the ultimate benefit to the dependants will be the same in either case.

15.20 Whether, in practice, the total amounts from which the dependants may benefit might be better under one or other model is difficult to estimate and may well depend on the particular circumstances of each individual case. On one view, which is in substance the argument put forward on behalf of Medlab, essentially, as the law currently stands, that is a choice which parties must address on the basis of their best estimate of the circumstances prevailing in their own case. It is, of course, a choice which only arises where a person remains alive but has a significantly reduced life expectancy for in any case in which the person has already died as a result of an actionable wrong, the only recourse is to a claim under the Civil Liability Act.

15.21 On the other hand, there is the question as to whether it would ever be permissible for the dependants of a deceased to bring an action under the Civil Liability Act arising out of the death of the deceased in circumstances where the deceased him or herself had, while still alive, successfully prosecuted a case arising out of the same wrongdoing. The case law of the High Court and the Court of Appeal in that regard has already been briefly referred to. The issue awaits a final determination. If it is not possible for the dependants to bring such an action, then the difficulty is that the deceased would either have to forego bringing an action during their life (which might be unfair to them, for they might well have benefited during their remaining but reduced lifespan from whatever damages might have been awarded) or the dependants might potentially benefit unless there were to be a rule, as counsel for the Morrisseys suggested might exist, which prevented double recovery.

15.22 However, how such a rule would operate in practice might not be altogether fully clear. For example, a person may, at different times in their life, choose to exercise a decision to engage in paid employment and use some of that money to pay others to do work in the home or may do some of that work themselves. I use the term "work in the home" very loosely to encompass the whole range of things which may be provided free for the other occupiers of a household or others who may be dependent. To the extent that a person might have engaged in paid employment then damages might be recovered under the "lost years" doctrine. However, to the extent that they might have provided free benefits to their dependants and others from the same household, damages might only be capable of being recovered in an action taken by those dependants after the relevant death had occurred. But estimating which course of action would have been taken and, potentially, in what proportions, could present a very difficult equation.

15.23 As I see it, the underlying problem is that the entire basis of both the case law and legislative intervention in the area of damages arising out of death or reduction in life expectancy has operated for many centuries from a starting point that no such damages are recoverable, with very limited exceptions identified by the courts or by intervention by the legislature. While there may be particular circumstances where the courts can identify a straightforward evolution of the existing case law so as to accommodate a particular head of damage which may logically fit in with the overall scheme, it seems to me that there is an insurmountable danger in attempting to rewrite the underlying basis of the law of damages in this area. There are already anomalies enough without creating more.

15.24 To that must be added the fact that it is clear that statutes have been passed by the Oireachtas on an apparent assumption that the default position in law is that damages cannot be recovered for death save for those limited exceptions to which I have referred. Indeed, it seems to me that there is much merit in the argument put forward on behalf of Medlab, which drew attention to the fact that the only areas where the American courts would appear to have felt free to develop common law principles in this area was where there had not been legislative intervention.

15.25 In those circumstances, it seems to me that any further significant evolution in this area is one that can only be achieved by comprehensive legislation rather than by an evolution in the case law. I appreciate that the current situation does contain some anomalies. But the risk of creating further anomalies by a piecemeal approach on the part of the courts involving a radical alteration in the underlying common law assumption in this area is one which, in my view, should be avoided.

15.26 It follows, it seems to me, that the trial judge was in error in awarding Mr. Morrissey damages in respect of the costs of providing for services which Ms. Morrissey might have been expected to provide free for the family in the event that she had lived to a normal life expectancy. It seems to me that such damages can, under the law as it currently stands, only be recovered in an action brought by dependants under the Civil Liability Act. If there are to be further changes in this complex area, it seems to me that they will be much better carried out through considered legislative intervention.

15.27 While it is true that one of the strengths of the common law is its ability to evolve to reflect changed circumstances, it is equally true that there are dangers in over-radical intervention, particularly where the consequences are by no means clear and the risks of creation of further anomalies are significant. Furthermore, where, as here, the legislature has already intervened to define the parameters of certain categories of loss which can be recovered, it seems to me to be appropriate to view this as an area where the legislature has adopted the common law position and sought to amend it. In such circumstances, the courts should lean against over-radical reinterpretation of the common law which might be said to be potentially inconsistent with the legislation.

15.28 In all those circumstances, it seems to me that if a less anomalous situation is to be arrived at in this area it will require legislation. I would, therefore, allow Medlab's appeal against that head of damage awarded to Mr. Morrissey in respect of the cost of future services.

16. Conclusions

16.1 As noted at the beginning of this judgment, the background to this case involves a particular human tragedy. However, this Court has to deal with the legal issues which arise and, as agreed with by counsel at the oral hearing, there were essentially five sets of legal issues with which the Court was confronted. For the reasons analysed earlier in this judgment, I would propose the following conclusions in respect of each of those issues.

16.2 The first question concerns the proper standard of approach to be adopted by a screener involved in a scheme such as CervicalCheck. I have set out the reasons why I consider that the *Dunne* test remains the basis for identifying the legal standard of care by reference to which a claim in clinical negligence is to be assessed. To avoid any lack of clarity, I have made a number of observations in respect of that test. In substance, the legal standard of care applied in any clinical negligence claims, or indeed other professional negligence claims, requires the court to assess whether no reasonable professional of the type concerned could have carried out their task in the manner which occurred in the case in question. That overall test requires a court to determine what standard a reasonable professional would apply. For the reasons set out earlier in this judgment, I have used the phrase "standard of approach" to describe the standard that a reasonable screener would be expected to apply in order to avoid any confusion with the term "standard of care", because that latter term has a precise legal meaning. As noted earlier, I consider that the use of the term "absolute confidence" may have created more confusion than clarity. However, it is clear that all of the relevant witnesses agreed that a screener should not give a clear result in respect of a slide unless they had no doubt but that the sample was adequate and did

not contain any suspicious material. That standard is not one imposed by the court but rather one which stems from the profession itself. The determination of that standard requires either agreement between the parties or, in the event of disagreement, an assessment by the court of expert evidence.

16.3 I have also set out the reasons why I consider that it is clear that the trial judge applied the appropriate standard in reaching his conclusions.

16.4 The second and third set of issues concerned the contention made by both Quest and by Medlab which suggested that the trial judge had failed to engage properly with certain aspects of the case which they made on the facts and had, thereby, delivered an insufficiently reasoned judgment. I make some observations on the legal principles to be applied in assessing such a contention. I also note that, for laudable and understandable reasons, a somewhat truncated procedure was adopted in the High Court in this case.

16.5 As set out in the judgment, I conclude that, while there were a number of areas where it would have been preferable for the trial judge to have given more detailed reasons, the judgment did not, in its reasoning, fall below the irreducible minimum of reasoning, even where the Court has made all due allowance for the adoption of a truncated procedure. I also suggest that it might well be that, in some respects, the judgment might have fallen short of the standard required to survive a successful appeal had these proceedings followed their normal course. However, I conclude that the grounds of appeal put forward under this heading by, respectively, Quest and Medlab must fail.

16.6 The fourth set of issues arise in respect of the appeal brought by the HSE in relation to the finding of negligence made against it. The High Court had found the

HSE liable both on the basis of being vicariously responsible for the actions of the laboratories and also on the basis of having a non-delegable duty to the patients who availed of CervicalCheck such that the HSE must be taken to have accepted responsibility for the non-negligent delivery of the service.

16.7 For the reasons set out earlier in this judgment, I have concluded that the High Court judge was incorrect to hold that the HSE were vicariously liable for the negligent acts of the laboratories. However, having analysed the law in the evolving area of non-delegable duty, I express the opinion that the HSE did, in all the circumstances of this case, have such a duty in respect of patients availing of CervicalCheck. On that more limited basis than the one adopted by the High Court, I would dismiss that aspect of the HSE's appeal which suggested that it should not be fixed with any liability in respect of negligence established against the laboratories.

16.8 Fifth, and finally, there were two sets of issues arising under the heading of damages. An appeal on the award of damages was brought solely by Medlab with no similar appeal begin brought either by Quest or by the HSE.

16.9 The first area of appeal concerned the award of €500,000 for general damages to Ms. Morrissey. Having analysed the relevant case law, I express the view that €500,000 now represents the appropriate maximum damages to be awarded for pain and suffering in personal injury cases. I also express the view that Ms. Morrissey is entitled to that maximum sum. It follows that, in my view, the appeal brought by Medlab in respect of the award of €500,000 for pain and suffering should be dismissed.

16.10 The second issue raised by Medlab in respect of damages concerned the award of damages to Mr. Morrissey in respect of losses attributable to having to replace

services which would have been provided to the family by Ms. Morrissey had it not tragically transpired that she will have a significantly reduced life expectancy. I have analysed the law in this area in some detail and set out the reasons why it may, in certain respects, be potentially anomalous. However, the underlying basis for this law goes back many centuries, has been followed in most common law countries and has been the subject of intervention by the legislatures in such countries in circumstances where it can only be inferred that the legislature accepted that the law which it was seeking to amend was as set out in that established common law jurisprudence. In those circumstances, I conclude that any change in the law in this area is a matter which must be the subject of legislation. It in turn seems to me to follow that the High Court was incorrect in awarding the sum in question to Mr. Morrissey. In that respect, I would allow Medlab's appeal in that regard. It is suggested that if the parties are not in a position to agree on the amount of such damages in respect of which the appeal is to be allowed, submissions are to be made to the Court on the matter within three weeks of today's date.

16.11 In summary, therefore, I would dismiss all of the appeals save for the appeal of Medlab in relation to the award of damages in respect of loss of services. I would invite the parties to file, electronically, in court, within three weeks of today's date, submissions as to the precise orders which the Court should make, including issues concerning the costs of these proceedings. In the event that there is any difference of opinion between the parties as to the precise orders which should be made, I would propose that the Court consider, in the current difficult circumstances, how best to arrange for the proper debate of those issues in a manner which is consistent with the highest levels of safety while at the same time complying with the requirements of justice.

Approved
12th - VIII - 2020