THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 318

Woulfe J.

Donnelly J.

Barrett J.

Court of Appeal Record No. 2018/477

High Court Record No. 2016/2258P

Between

ROBERT MULLINS

Plaintiff/Appellant

-and-

THE IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE AND EQUALITY AND IRELAND

Defendants/Respondents

JUDGMENT of Mr. Justice Woulfe delivered on the 29th day of November, 2021

Introduction

1. This appeal involves an issue regarding the interpretation and application of certain provisions of the Statute of Limitations (Amendment) Act, 1991 ("the 1991 Act"). This Act sought to introduce a special limitation period for actions for personal injuries, and was

designed to ensure that plaintiffs are not prejudiced by a delay in their capacity to discover personal injuries that they have suffered or, where they are aware that they have suffered an injury, a delay in their ability to appreciate that it is a significant injury. The 1991 Act, and indeed all statutes of limitation, can be viewed within the constitutional framework of the Oireachtas seeking to balance the citizen's right of access to the Courts with the requirement of the common good that delayed and stale claims are unjust and ought not to be permitted.

2. The plaintiff appeals against the judgment of the High Court (Binchy J.) and the order made in pursuance thereof on the 24th July, 2018. By this order, the learned trial judge found that the plaintiff's claim was statute barred and ordered that his claim be dismissed, with no order as to the costs of the proceedings.

3. The plaintiff was a litigant in person before the High Court and this Court, which is highly unusual in personal injury cases.

The Factual Background

4. The matter had come before the High Court in the following circumstances. The plaintiff is a prison officer and claims to have suffered personal injuries as a result of an incident at work in Cloverhill Prison on the 8th January, 2013, which he alleges were caused by the negligence and breach of duty of the defendants and/or their servants or agents.

5. The plaintiff made an application to the Personal Injuries Assessment Board ("the Board") on the 10th September, 2015, for an assessment of his claim. The defendants did not consent to an assessment being made by the Board, and accordingly the Board issued an authorisation on the 14th September, 2015, which authorised the plaintiff to bring Court proceedings in respect of his claim.

6. On the 11th March, 2016, a plenary summons was issued by the plaintiff claiming damages for such personal injuries, loss and damage against the defendants. On the 7th July, 2016, a statement of claim was delivered by the plaintiff.

7. On the 1st September, 2016, a defence was delivered on behalf of the defendants. In the defence the defendants pleaded by way of plenary objection, *inter alia*, that "the plaintiff's claim against the defendants is statute barred in whole or in part by reason of the Statute of Limitations Acts 1957 – 2000 (as amended) and/or the Civil Liability and Courts Act, 2004".

8. The defendants issued a notice of motion dated the 19th June, 2017, seeking, *inter alia*, an order dismissing the plaintiff's claim for being statute barred pursuant to the Statute of Limitations Act, 1957, as amended. By order dated the 13th December, 2017, Ní Raifeartaigh J. refused the application to dismiss the plaintiff's claim, but directed that the matter of the Statute of Limitations be tried as a discrete/preliminary issue.

The Statutory Background

9. The relevant provisions of the Statute of Limitations Act, 1957 ("the 1957 Act") and of the 1991 Act are as follows. Section 11(2)(b) of the 1957 Act provided as follows:-

> "An action claiming damages for negligence, nuisance or breach of duty…where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, shall not be brought after the expiration of three years from the date on which the cause of action accrued."

This was amended by s.3(2) of the 1991 Act, which provided as follows:-

> "Section 11(2) of the Principal Act is hereby amended by the substitution of the following paragraph for paragraphs (a) and (b):
>
> (a) Subject to paragraph (c) of this subsection and to section 3(1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on

tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

10. Section 3(1) of the 1991 Act now provides that:-

> "An action, other than one to which section 6 of this Act applies, claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty…shall not be brought after the expiration of two years from the date on which the cause of action accrued or the date of knowledge (if later) of the person injured."

This subsection introduced a new factor in determining the period within which an action in respect of an injury may be brought, i.e. "the date of knowledge of the person injured". The facts relevant to the date of knowledge of an injured person are set forth in s. 2 of the 1991 Act, which provides that:-

> "(1) For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:-
>
> (a) that the person alleged to have been injured had been injured,
>
> (b) that the injury in question was significant,
>
> (c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
>
> (d) the identity of the defendant, and

(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant;

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire –

(a) from facts observable or ascertainable by him, or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.

(3) Notwithstanding subsection (2) of this section –

(a) a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and

(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury."

11. For completeness it is necessary to mention also s. 50 of the Personal Injuries Assessment Board Act, 2003 ("the 2003 Act"), which provides as follows:

"In reckoning any period of time for the purposes of any limitation period in relation to a relevant claim specified by the Statute of Limitations 1957 or the Statute of Limitations (Amendment) Act 1991, the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of issue of an authorisation…shall be disregarded."

12. It is clear from the foregoing provisions that ss.2 and 3 of the 1991 Act brought about a fundamental change in the law with regard to the limitation of actions in respect of personal injuries, by the introduction of the test of "the date of knowledge of the person injured" becoming an alternative date from which the period of limitation ran. Were it not for these provisions, the plaintiff's claim in this case would clearly have been statute barred by virtue of the two year limitation period, given that the incident occurred on the 8th January, 2013 but the plenary summons was not issued until the 11th March 2016, even allowing for the six month disregard in s.50 of the 2003 Act.

The High Court Proceedings

13. The defendants' motion, seeking to dismiss the plaintiff's claim for being statute barred, was grounded on an affidavit sworn by their solicitor, Mr. Ivan Durcan, on the 19th June, 2017. In his affidavit Mr. Durcan set out the background to the plaintiff's claim, and stated that it was quite clear that the plaintiff was aware of his injuries and the alleged incident which caused the injuries. Mr. Durcan was therefore advised that the plaintiff's claim was statute barred, because he had not applied to the Personal Injuries Assessment Board ("the Board") within a period of two years from the date of the incident.

14. The plaintiff furnished a replying affidavit sworn on the 27th November, 2017. He said that it would have been disingenuous and impossible for him to have applied to the Board at any point prior to the date of application because of the date of knowledge of his injuries, and that he had done all in his power to attempt to recover from the initial injury as was evidenced by all of the treatments he had undergone so as to remain in work and feed his family. He stated that the incident and injuries were evidenced by the incident report form of the Irish Prison Service and he exhibited a copy of same. In this report the investigating officer recorded that the plaintiff reported that on the 8th January, 2013, he was part of a team involved in the removal

of a prisoner from his cell, and during the course of same he experienced severe back pain and was unable to continue and was instructed to report to the surgery, where medical attention was administered on site. At the surgery he was advised to rest for a period until the situation stabilised and he felt more comfortable. He returned to duty on the 16th January, 2013, after six days on sick leave.

15. The plaintiff averred that he was not aware of the extent, severity or indeed nature of the injuries involved until November, 2014 as he was doing all he could which was more than would be expected of a reasonable person under the circumstances, and when it became evident that there was something far more seriously wrong than originally anticipated an MRI was then advised and sought. The MRI was performed and the outcome of same was not as the plaintiff had hoped, and surgery was advised.

16. The plaintiff exhibited a medical report from Mr. Ashley Poynton, Consultant Orthopaedic Spinal Surgeon at the Mater Private Hospital, dated the 10th July, 2015. Mr. Poynton had previously reviewed the plaintiff in August, 2012, and had recommended an epidural steroid injection together with core muscle stability exercises to help his pain, and Mr. Poynton stated that he initially had one full year's relief from this injection. Mr. Poynton had not anticipated that surgery would be required. The plaintiff had then experienced an acute exacerbation of pain in November, 2014. He was referred by Mr. Poynton for injection in the Mater Private Hospital on the 12th November, 2014. However, an up to date MRI scan at that time confirmed a large sequestrate L5/S1 disc herniation on the right side. As he was in a lot of pain and his right foot had gone numb, Mr. Poynton had to schedule the plaintiff for surgery on the 14th November, 2014.

17. Mr. Poynton concluded this report by offering the following opinion as to the knowledge of the plaintiff:-

"He could, therefore, not have any awareness prior to November that his injury was significant. Neither would he have gained knowledge of the extent of his symptoms until his pain recurred and an MRI was performed. While I would have requested that Mr. Mullins keep in touch with my office in relation to his progress, he would not reasonably have been expected to seek my professional opinion until he experienced an acute exacerbation of pain in November, 2014."

18. In his affidavit the plaintiff then added that in the months post-surgery it became apparent that his injuries were long term, and that there is the very real possibility that he may not be in a position to resume the specific duties of his current occupation, and that he may be impaired for the rest of his life and never regain full function, and that the defendants are critically aware of this. He stated that the statute of limitations has exceptions as to the date of knowledge, and that this report of Mr. Poynton clearly indicates same.

Trial of the Preliminary Issue

19. The trial of the preliminary issue came before Binchy J. on the 15th May, 2018. During the opening of the matter by counsel for the defendants, Mr. Gilligan B.L., the following exchange took place with the Court and with the plaintiff:-

"**Mr. Gilligan**: …essentially the defendants will say and contest that on the 8th January, 2013, he suffered an injury, he was out of work for some time thereafter and that is the date of knowledge and as such, his claim is statute barred. The plaintiff will say that he had pre-existing back injuries which is agreed and is not contested. He did not realise the extent of the injuries sustained on the 8th of January 2013 until he had an appointment with Ashley Poynton in the Mater Hospital and at that time, he then became aware of the significance of the injury and he says, that's the date of knowledge.

Mr. Justice Binchy: What date was that?

Mr. Gilligan: The date of knowledge according to that is 2015, Judge, and if that is the date of knowledge, let the Court find that there is no issue –

Mr. Justice Binchy: Right, thank you.

Mr. Gilligan: - this motion has to fail.

Mr. Justice Binchy: Okay.

Mr. Mullins: Sorry, Judge, it's actually 2014.

Mr. Gilligan: 2014, apologies.

Mr. Justice Binchy: That's your consultation with?

Mr. Mullins: Ashley Poynton, Consultant Surgeon, in the Mater Private.

Mr. Gilligan: Sorry, yes, it's November, 2014. So, he is well within time for his application with the Injuries Board if the Court holds that that is the date of knowledge.

Mr. Justice Binchy: I see."

20. The defendants very fairly agreed that the plaintiff would be allowed to give oral evidence, if he wanted to, as to the date of knowledge in case his affidavit had not dealt completely with all matters, and the plaintiff elected to do so.

21. The plaintiff began his evidence by giving some further details about the incident on the 8th June, 2013, and the immediate aftermath. He was part of the control and restraint team which was required to remove a prisoner from his cell and to bring to hospital. When moving the prisoner, he was non-compliant and very violent, and it took twelve or thirteen minutes to restrain him in the cell. When he was moved outside he lay on the floor and was again non-compliant and violent. The plaintiff and another prison officer were told to pick him up and carry him and, in the process of carrying him to the reception area in Cloverhill Prison, the plaintiff experienced back pain. The plaintiff and his colleague had to stop several times to lower the prisoner back to the floor to readjust grips, and on one of these occasions when the plaintiff squatted down to readjust the prisoner he was unable to stand back up to due to pain.

22. The plaintiff was helped into the prison surgery. He was sent home and he went to see his own GP who gave him a medical certificate for eight or ten days (as mentioned above, it appears from the incident report form that he only in fact stayed off work for six days). Because he had had a previous back issue, he assumed that the GP assumed that it was a flare up of the same condition, and she prescribed painkillers and physiotherapy. He took the medication, went to see a physiotherapist, went back to work and progressively over time the condition worsened. He had maybe six or eight visits to his GP for pain medication, and attended physio, until it got to a point where he could not walk. When asked by the trial judge when that was approximately, he said he thought "late October", when he was on annual leave due to back pain as he was conscious of trying to keep his sick leave levels low. At that point the GP referred him to Mr. Poynton again. Mr. Poynton did a new MRI and that is when he discovered there were new findings and that surgery was required to fix the problem, and that was in November, 2014.

23. The plaintiff stated that he would even argue that the date of knowledge is later than November, 2014, but he was happy to go with that date, because that is when the surgery was and when the MRI was performed. But it was in the months afterwards, from having consultations with Mr. Poynton, that it became apparent as to the significance of the injury and that it wasn't the previous injury, and that the long effects would be forever.

24. At this point in the hearing a set of medical reports was handed up to the trial judge, and it is necessary to summarise these reports before dealing with the remainder of the plaintiff's oral evidence. The first report was from the plaintiff's GP, Dr. Aoife Keegan, dated the 21st August, 2015. She describes how the plaintiff presented to her on the day of the incident, the 8th January, 2013, with acute back pain. Examination revealed tenderness over his left sacro iliac joint and pain on flexion of his lumbar spine. Straight leg raise was painful and slightly reduced on the left side. The plaintiff had a history of known lumbar disc disease,

following an MRI in June, 2012. Before the incident he was last seen by Dr. Keegan in relation to back pain in June, 2012.

25. Dr. Keegan had viewed the plaintiff's back injury in January, 2013 as an aggravation of his pre-existing back condition. She certified the plaintiff unfit for work for ten days. He had two physio sessions a week for a few months, then reduced to once a week. He was next seen by Dr. Keegan in relation to his back in August, 2014, but no details of that attendance are set out.

26. Two detailed reports from Mr. Poynton were handed up dated the 4th February, 2015 and the 7th April, 2015, in addition to the report dated 10th July, 2015, described earlier in this judgment. Mr. Poynton explained how the plaintiff was referred to him initially by his GP in August, 2012, for assessment of intermittent low back pain and left sided leg pain. An MRI scan performed in June, 2012 showed moderate degeneration of the discs at L4/5 and L5/S1, with a central and left sided disc protrusion at L5/S1. Mr. Poynton recommended at that time an epidural steroid injection, together with core muscle stability exercises. Following the epidural, the plaintiff did very well, his pain settled down considerably, he began increasing his physical activity and returned to training, and he lost a considerable amount of weight and was in good condition until he was injured during the incident at work in January, 2013. Following the incident, the plaintiff developed back pain and right sided sciatica, and this right sided leg pain was a new symptom that he had not experienced before. His symptoms persisted and did not respond to treatment.

27. The plaintiff contacted Mr. Poynton's office subsequently in October, 2014, complaining of persistent sciatica. An MRI scan at that point showed a large right sided disc protrusion at L5/S1 which was a new finding. He underwent an epidural steroid injection on the 12th November, 2014, but as this did not lead to a resolution of pain, he reverted to Mr. Poynton complaining of excessive pain and foot numbness due to the large disc herniation on

the right side. Mr. Poynton felt that he required immediate surgical treatment, and he ultimately underwent surgery on the 14th November, 2014, which involved a right sided L5/S1 microdiscectomy. When reviewed by Mr. Poynton post-operatively in February, 2015, whilst surgery had alleviated the majority of his right leg pain, the plaintiff continued to have some pain down his leg and he also had back pain, particularly on the left side. Mr. Poynton had concerns that the plaintiff may have ongoing intermittent low back pain.

28. The plaintiff was then cross-examined by Mr. Gilligan B.L. When asked about having gone into work on the morning of the incident in reasonably good shape, the plaintiff answered "100% yes". Counsel asked if he had been out of work on sick leave for a total of 16 days as a result of the incident, and the plaintiff replied that he did not think it was that long, he thought 10 days perhaps. The plaintiff stated that he had no intention of issuing proceedings until he was aware of the significance of his injuries, and he agreed that he found out how significant the injury was "as in that it had long term consequences".

29. The plaintiff was asked by Mr. Gilligan whether he was aware that he had an injury caused by lifting the prisoner, prior to Mr. Poynton's advice in November, 2014. He replied that he was aware that he had a back issue that he had had for several years, and he thought the injury sustained on the 8th January, 2013, was an exacerbation of that. He was not aware that there was a new injury or new issue until the MRI was performed in November, 2014. He accepted that he was able to attribute the flare up or exacerbation to the incident in January, 2013, as previously he had been fine up to that date.

30. When questioned about the right sided sciatica, the plaintiff agreed that this was a new development in his back pain, which was directly attributable to the January, 2013 incident. He denied that this came on fairly quickly, and said that it was progressive over time. When asked if it came on in the weeks and the months following the incident, he replied "yes, well again,

it was a year and a half between the injury and the surgery so, progressively over that time, it worsened".

31. The plaintiff was also asked some questions by the trial judge, starting with the nature of the discomfort he had prior to the January, 2013 incident. He replied that he had back pain, which he thought had been present for maybe six to seven years, in his lower back on the left side. There was a bulge on the left side which never needed any correction or surgery. The lower back pain would come and go, sometimes it would be once in a blue moon, once or twice a year maybe at times, then sometimes there would be no rhyme nor reason to it, but it never stopped him working. The epidural steroid injection in August, 2012, seemed to clear up the back discomfort, and as far as the plaintiff was concerned he was 100% until the incident in January, 2013.

32. After the incident the plaintiff had a kind of generalised pain in his lower back from time to time. He was getting physio and taking medication while back at work after the January, 2013 sick leave. He had several flare ups along the way, but did not take sick leave and used up annual leave instead. He had a number of visits to his GP surgery. (It appears from Dr. Keegan's report that these were times when he would get a prescription filled without actually seeing his GP). The lower back pain came to a head in August, 2014, when he had a big flare up which lasted for a couple of weeks. The repair carried out by way of the November, 2014 surgery was to the disc on the right side which had sequestered, which the plaintiff thought meant had burst.

33. In his closing submissions, Mr. Gilligan drew the Court's attention to the case of *Whitely v. The Minister for Defence* [1998] 4 I.R. 442. In that case Quirke J. noted that the equivalent English legislation expressly defined the circumstances whereby a person would know that an injury was significant, but it appeared as of June, 1997 that there had no judicial consideration of s. 2(1)(b) of the 1991 Act within this jurisdiction and no similar consideration

in any other jurisdiction of similar provisions in the absence of an express definition of the word "significant". Quirke J. then continued as follows (at p. 453):-

> "Accordingly, s. 2 of the Act of 1991 expressly avoids any attempt to define what is meant by a "significant" injury within the meaning of s. 2(1)(b) of the Act, and I take the view that by excluding any definition it was the intention of the legislature to avoid confining the sense in which the word "significant" ought to be understood to the terms of the definition contained in s. 14(2) of the English Act, or to any particular terms. If I am correct and it was intended that a broader test should be applied than was contemplated by the definition contained within s. 14(2) of the English Act, then it would seem to follow that the test to be applied should be primarily subjective and that the Court should take into account the state of mind of the particular plaintiff at the particular time having regard to his particular circumstances at that time.
>
> As I have indicated, I believe the appropriate test to be *primarily* subjective, because it must be qualified to a certain extent by the provisions of s. 2(2) of the Act of 1991, to which I have already referred. That sub-section introduces a degree of objectivity into the test and potentially requires the additional consideration of whether or not the particular plaintiff at the particular time ought reasonably to have sought medical or other expert advice having regard to the symptoms from which he was suffering and the other circumstances in which he then found himself."

34. Mr. Gilligan also referred to the judgment of Geoghegan J. in the Supreme Court decision in *Gough v. Neary* [2003] 3 I.R. 92. In his judgment, Geoghegan J. cited a passage from Donaldson M.R. in *Halford v. Brookes* [1991] 1 W.L.R. 428 as follows (at p. 129):-

> "The word (knowledge) has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start

any proceedings. In this context "knowledge" clearly does not mean "know for certain and beyond possibility of contradiction". It does, however, mean "know with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking legal and other advice, and collecting evidence". Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice."

35. In his submissions Mr. Gilligan appeared to focus on other elements of the "date of knowledge" test in s. 2(1) of the 1991 Act, such as knowledge that the person had been injured, and knowledge that the injury was attributable to the incident on the 8th January, 2013, rather than on the element of knowledge that the injury was significant. While he cited the passage from Quirke J. in *Whitely*, he did not expressly address how the "primarily subjective" test should be applied in this case having regard to the plaintiff's evidence as to his own state of mind, and to the evidence of Mr. Poynton as to the plaintiff's knowledge or otherwise. Mr. Gilligan concluded his submissions by asserting that the 8th January, 2013 was the date of knowledge, because there was an incident on that date, the plaintiff was in immediate pain to the extent that he took it upon himself to visit the nurse officer, he was sent home, he visited his GP and he took time off work.

36. In his closing submissions the plaintiff submitted that if there was a delay in his doctor sending him for expert medical advice, that could not be his fault. He had assumed that the back injury was related to the previous back issue until Mr. Poynton performed a new MRI scan in November, 2014, and identified that there was a separate issue on the opposite side of his spine, on the right hand side. He relied on Mr. Poynton's reports as to his lack of knowledge, and he noted that the defendants had not adduced any medical evidence to refute Mr. Poynton's reports.

37. In concluding the hearing, the trial judge asked both parties some further questions. He first asked the plaintiff whether there was anything different about how his back felt after the January, 2013 incident by comparison with previously, and whether the back pain was more on one side or the other at any different times. In reply, the plaintiff stated that the back pain became worse over time. It was chequered across his lower back, and because there was an issue on the opposite side he imagined one side had exacerbated the other side, and it was very difficult to separate the two. When he had an MRI performed in 2012, there were no right sided issues. He had an injection which seemed to clear everything up a hundred per cent, and he continued to work, continued to do everything as normal until the injury and then everything started to deteriorate.

38. The trial judge then asked Mr. Gilligan about the requisite knowledge that an injury was "significant". He posited a scenario whereby a person injured himself, attended a doctor in the way the plaintiff did, and the doctor says he thinks the person has strained his back and puts him out of work for ten days, and the trial judge asked if Mr. Gilligan said that was a significant injury, to which Mr. Gilligan replied yes. The trial judge followed up by asking if the matter was being discussed six months later with friends, would Mr. Gilligan say that the person did himself a significant injury there, six months ago he put his back out and he was out of work for a week?

39. In reply Mr. Gilligan emphasised in terms of "significant" that over the next weeks and months the plaintiff was with his GP a number of times, (as noted above it appears from Dr. Keegan's report that he may have attended the surgery for repeat prescriptions but may not have seen Dr. Keegan), he got physio a number of times and ultimately took himself to Mr. Poynton. He accepted that his previous back condition was a complicating factor in this particular case. In conclusion, Mr. Gilligan submitted that if, within the two years from the incident, the plaintiff says to himself "since I put my back out on the 8th January, I have not

really been the same or have not really been right", that was where the significance of the injury comes in.

The High Court Judgment

40. Mr. Justice Binchy delivered his reserved judgment on the 24th July, 2018. In summarising the plaintiff's evidence the trial judge stated as follows:-

> "The plaintiff gave evidence that he took medication and had physiotherapy, but by late October, 2013, his condition had worsened to the point that he could not walk. By this I took him to mean that he had great difficulty in walking, rather than that he literally could not walk at all. He was referred by Dr. Keegan to a Mr. Ashley Poynton in November, 2014."

41. In my opinion the learned trial judge fell into error in construing the plaintiff's evidence as being to the effect that this worsening of his condition had occurred by late October "2013". As set out in para. 22 above, when asked by the trial judge when approximately it was that it got to the point that he could not walk, the plaintiff answered "late October, I think" without specifying whether he was referring to October, 2013 or October, 2014. However, the totality of the evidence, including the medical evidence, clearly indicates to me that the plaintiff must have been referring to October, 2014 and not 2013.

42. By way of example of how the reference must have been to October, 2014 and not 2013, later in the plaintiff's evidence the following exchange with the trial judge took place:-

> "Q. But then subsequently anyway after you had, you went back to work and you were still going back to work and you were getting physio and medication while back at work but you were just getting worse?
>
> A. Yes.
>
> Q. And it just came to a head then when?

A. August 2014, I had a large or a big flare up and which lasted for a couple of weeks and from that point then until October, it just never - -

Q. August, ’14 or ’13?

A. -- ’14 and I had never –

Q. So, are you saying to me, just so I am clear about this?

A. Yes?

Q. You went back to work after your 10 day and then, so now that’s January, 13; wasn’t it?

A. Yes.

Q. So, from the end of January you were back at work and you continued back at work all throughout the rest of ’13?

A. Pretty much, yes, yes.

Q. And right into August ’14 before you had a flare up?

A. Well I had several flare ups along the way but I just didn’t take sick leave, I try to, as I said I try to alleviate the sick leave and use holidays.”

43. At para. 24 of the his judgment the trial judge set out of some of his conclusions as follows:-

“Following upon the incident on 8th January, 2013, he attended with his general practitioner who, like the plaintiff, considered that whatever injury he sustained was an aggravation of his pre-accident condition. If these proceedings were concerned solely with such an injury, then they would undoubtedly be statute barred because the plaintiff had sufficient knowledge (of both the injury and its cause) at the time, or soon afterwards, for the purposes of s. 2 of the Act of 1991. The only question about which there might be any doubt in this regard is whether or not the injury was “significant” for the purposes of that section. However, given the level of discomfort which the

plaintiff describes that he experienced, the fact that he was certified unfit for work for ten days, prescribed painkillers and advised to attend physiotherapy (and did, in fact, attend for physiotherapy), all suggest that the injury was significant for the purposes of s. 2 of the Act of 1991, even applying a subjective test and taking into account the state of mind of the plaintiff at the time, in accordance with the test postulated by Quirke J. in *Whitely v. Minister for Defence*. If there was any doubt about this however, the issue as to the significance of the injury was fully put to rest by October, 2013. By this time the plaintiff had been suffering for ten months, approximately, and his condition had worsened to the point that he said that he could not walk. So he would have had sufficient knowledge as to the significance of his condition by that time, at the very latest. I might add that this part of the plaintiff's oral evidence is somewhat at odds with his averment, referred to at para. 21 above, that he was not aware of the severity of his condition until November, 2014."

44. The trial judge then referred to certain aspects of the reports of Mr. Poynton before concluding as follows:-

"28. It is clear that 12th November, 2014, when he had the MRI scan, was the first date on which the plaintiff became aware that he had a right sided disc protrusion at L5/S1, although he had probably been suffering from the condition since the incident of 8th January, 2013. If 12th November, 2014, is taken to be the date on which the plaintiff had knowledge of having sustained significant injury, for the purposes of s. 2 of the Act of 1991, then these proceedings are not statute barred. But did the plaintiff need a diagnosis in this level of detail in order to be able to issue the proceedings? The first point to be made in response to this question is that in the proceedings as issued, the plaintiff makes no reference at all to the condition diagnosed in November, 2014. Nor does he do so in his statement of claim. Such detail as is provided in the proceedings

as issued by the plaintiff could readily have been provided in proceedings issued immediately following the incident of 8th January, 2013.

29. Even making allowances for the plaintiff being a lay litigant, the fact is that he did not need the outcome of the MRI scan in November, 2014 in order to issue the proceedings as issued. He knew, as of the date of the accident, or by the very latest by October, 2013, when he said he could not walk, that he had sustained a significant injury. Whether it was an exacerbation of a pre-existing condition or a new injury was neither here nor there; it was a back injury of sufficient significance to merit the institution of proceedings, or at a minimum, to put him on the inquiry as to his legal entitlements. Moreover, he knew the injury was attributable to the incident of January, 2013, because, up to that time, he had been enjoying the relief afforded to him by the injection he had received from Mr. Poynton in 2012. This is apparent from the reports of Mr. Poynton referred to at paras. 6 and 8 above. The fact that a more detailed or specific diagnosis was not yet available to him is immaterial. I have no doubt at all that had the plaintiff attended with his solicitor in the course of 2013, he would have been advised that the exacerbation of his pre-accident condition was actionable, and that he would almost certainly have been advised to obtain a report from an expert to advise with more precision as to the cause of his symptoms. I am satisfied therefore that the plaintiff had the necessary knowledge, or must be deemed to have the necessary knowledge, for the purposes of s. 2 of the Act of 1991, no later than October, 2013, when he said he was unable to walk because of his discomfort. That being the case, these proceedings were statute barred at the time of their issue, and the defendant is entitled to succeed with this application."

Notice of Appeal

45. The plaintiff filed a notice of appeal to this Court on the 9th May, 2019, and set out five grounds of appeal. The first ground was that the trial judge relied solely upon s. 2(1) and (2) of the 1991 Act when clearly at law s. 2(3)(a) applied to his case. Further grounds advanced were that the trial judge miscalculated the time allowed under the 1991 Act, and in particular failed to apply the six month stay on proceedings afforded by the PIAB in the issuing of their letter of authorisation to pursue legal action (*i.e.* by s. 50 of the 2003 Act, as set out at para. 11 above). In the respondent's notice filed on the 28th June, 2019, the defendant pleaded that the learned trial judge was correct in finding as of fact that the plaintiff was aware of the significance of the injury as of the date of the accident, and that the date of knowledge was not found to be October, 2013, but was found to be in or around the 8th January, 2013.

Submissions on Appeal

46. In his submissions the plaintiff highlighted s. 2(3)(a) of the 1991 Act and submitted that he could not be statute barred as a consequence of that provision owing to the fact that he had, at all material times, engaged with and sought expert advice, and followed and acted on the said expert advice as soon as same was made known to him. He noted the trial judge's finding that he first became aware of the right sided disc protrusion on the 12th November, 2014, and submitted that it would have been impossible for him to have filed proceedings sooner than he was made aware of this newly diagnosed injury, and indeed its significance, with the help of expert medical advice as is required by s. 2(3)(a) of the 1991 Act. The plaintiff also focused on the findings of the trial judge which suggested the date of knowledge was "by the very latest…October, 2013" or "no later than October, 2013". He submitted that in the light of this finding the trial judge had clearly miscalculated the time period allowed to him for bringing an action having regard to the six-month disregard in s. 50 of the 2003 Act.

47. In their written submissions the defendants referred to the finding made by the trial judge, at para. 29 of his judgment, that the plaintiff "knew, as of the date of the accident, or by the very latest by October, 2013, when he said he could not walk, that he had sustained a significant injury", and they accepted this phrase is somewhat contradictory. They submitted, however, that this statement must be read in the context of the overall decision, which they say amounted to a finding that the plaintiff knew or ought to have known that he had suffered a significant injury "on 8 January, 2013 or shortly there afterwards". They accept that if it is the case that the date of knowledge is October, 2013, when the plaintiff states he was no longer able to walk, then his case would not have been statute barred.

48. During the course of her oral submissions counsel for the defendants, Ms. Moorhead S.C., suggested that the case law in this area was fraught with difficulties. Each case was to a large extent dependent on its own facts. Many of the cases were cases involving medical negligence, and particular complexities may attach to the issue of "date of knowledge" in the context of medical negligence cases. As regards the *Whitely* case, discussed at para. 33 above, Ms. Moorhead submitted that the principles set out by Quirke J. in that case may have been to some extent overtaken by the Supreme Court judgment in *O'Sullivan v Ireland* [2019] IESC 33, although she accepted that the *O'Sullivan* judgment also placed reliance on the subjective nature of the knowledge required in s.3 of the 1991 Act.

49. Ms. Moorhead also referred to certain observations made by Finlay Geoghegan J. in the *O'Sullivan* case regarding the determination of a limitation issue by way of the trial of a preliminary issue (as in this case). At paras. 88 – 89, Finlay Geoghegan J. recognised that it may be appropriate sometimes to decide to proceed in this way, particularly where the limitation period is a period running from the date of accrual of the cause of action and capable of being established with limited evidence. However, where reliance is placed on the later date of knowledge in s. 3(1) of the 1991 Act, it seemed to her that the limitation issue may not be

capable of being determined on limited evidence. Ms. Moorhead suggested that if this Court was concerned about the present matter, and in particular about possible confusion regarding whether something occurred in October, 2013 or October, 2014, it would be open to this Court to remit the matter back to the High Court for a full hearing of the plaintiff's personal injury claim with the limitation issue remaining alive.

Decision

50. The findings made by the trial judge fall to be considered against the backdrop of the following principles:-

(a) As the plaintiff was relying on the provisions of s. 3 of the 1991 Act, i.e. asserting that his date of knowledge arose within the two year period prior to the issue of these proceedings, the burden shifted to the plaintiff to demonstrate that the date of knowledge was within the timeframe of two years prior to the date of issue of the proceedings (as extended by s. 50 of the 2003 Act): see the judgment of Charleton J. in the *O'Sullivan* case at para. 44.

(b) As per the *Whitely* case, discussed at para. 33 above, the test as to when the plaintiff first had knowledge of the fact that his injury was "significant" is primarily a subjective test. The Court should take into account the state of mind of this particular plaintiff at the particular time having regard to his particular circumstances at that time. Quirke J. held that s. 2(2) of the 1991 Act qualifies this primarily subjective test to a certain extent, and introduces a degree of objectivity into the test, and potentially requires the additional consideration of whether or not this particular plaintiff at the particular time ought reasonably to have sought medical or other expert advice, having regard to the symptoms from which he was suffering and the other circumstances in which he then found himself. Quirke J. ultimately decided the case on the basis of the

other objective dimension in s. 2(2)(a) of the Act, concluding on the facts of that case that the plaintiff knew or ought reasonably to have known from facts which were observable or ascertainable by him alone that he had sustained an injury which was significant and accordingly, it was not necessary for him to consider the application of s. 2(2)(b) of the Act.

(c) I note the defendants' submission that the *Whitely* case may have been overtaken to some extent by the *O'Sullivan* case. In her judgment in *O'Sullivan*, Finlay Geoghegan J. set out a two or three step approach for determining a plaintiff's date of knowledge for the purposes of s. 2 of the 1991 Act. She first emphasised that s. 2 is concerned with ascertaining the date upon which the plaintiff first had knowledge, actual or constructive, of certain "facts". Section 2 refers to two types of knowledge of the relevant facts, to which she would refer for the purposes of clarity as "actual knowledge" and "constructive knowledge". She appreciated that s. 2 did not refer in terms to "actual knowledge" or "constructive knowledge", however, she felt that was the effect of the express terms of the section. Section 2(1) refers to the date upon which a plaintiff "first had knowledge of the following facts…". If the section contained no further provision as to what is to be included in the knowledge a person has for the purposes of the section, then the words used by the Oireachtas would require a court to ascertain only when a plaintiff first had actual knowledge of the following facts as set out in s. 2(1)(a) – (e). However, s. 2(2) includes in a person's knowledge for the purpose of determining the date of knowledge, knowledge of relevant facts which he did not have (that is, actual knowledge which he did not have) but which "he might reasonably have been expected to acquire" and that is what she termed "constructive knowledge". Finlay Geoghegan J. then continued as follows:

"I would suggest, therefore, in a personal injury claim where a defendant pleads by way of defence that a claim if statute barred and the plaintiff contends for a "date of knowledge", in the sense of actual knowledge, not earlier than a date within two years of the date of issue of the proceedings, a defendant should then make clear to the court whether or not it is contending for an earlier date of constructive knowledge in application of s. 2(2)(a) or (b) of the 1991 Act. The first factual issue to be determined by the court should probably be the date upon which the plaintiff first had actual knowledge of the cumulative relevant facts in paras. (a) – (e) of s. 2(1) of the 1991 Act. If the date of actual knowledge is outside of the two year period, then the claim is statute barred…

29. If, however, the plaintiff's date of the first actual knowledge of the relevant facts set out in s. 2(1)(a) – (e) is within two years of the date of issue of the proceedings and the defendant contends that, in accordance with s. 2(2)(a) or (b), the plaintiff must be imputed to have constructive knowledge of all the relevant facts of an earlier date, then the court will have to continue and determine that issue.

30. Where a court is required to determine the date upon which a plaintiff is to be imputed with constructive knowledge of the relevant facts, it must be recalled that such knowledge is that "which he might reasonably have been expected to acquire". Hence, it is the date upon which, on the evidence, the court decides that "he might reasonably have been expected to acquire" the relevant factual knowledge is he had taken steps to ascertain the facts with or without expert advice. That is the "date of knowledge" for the purposes of s. 2, and not simply the date upon which he might reasonably have been expected to

set about ascertaining the relevant facts, with or without the assistance of medical or other expert advice.

31. The inclusion of constructive knowledge in accordance with subs (2) is, however, subject to subs (3). It essentially provides that a person is not to be fixed with constructive knowledge of a fact in accordance with subs (2), where it is "ascertainable only with the help of expert advice for so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice". There is also a preclusion where the injury itself prevents a plaintiff acquiring knowledge of a fact relevant to the injury, as was referred to in *Fortune v. McLoughlin*. If, on the evidence, a plaintiff has acquired actual knowledge of the relevant facts with the assistance of expert advice, then it may be appropriate for a court to determine whether the plaintiff took all reasonable steps to obtain the advice and acted on it and if it so concludes, subs. 2(3)(a) precludes the imputation of constructive knowledge at a date earlier than the date of actual knowledge.

32. The advantage, in practical terms, of the two or three step approach I am suggesting in determining a plaintiff's date of knowledge for the purposes of subs. 2 of the 1991 Act and distinguishing between actual knowledge and constructive knowledge, if necessary, is that the court in the first step, in relation to the date of actual knowledge, is not required to consider issues such as whether or not a plaintiff was put on an inquiry of certain facts or whether the plaintiff acted reasonably in ascertaining facts or seeking expert advice. Those are issues which may have to be considered, but only if a court is required to determine the date upon which a plaintiff is to be imputed with first having constructive knowledge, *i.e.* knowledge of facts he might reasonably have been

expected to acquire in accordance with subs (2). The issues which a court has to consider in determining the date upon which a plaintiff first had actual knowledge are all questions of fact as to what a plaintiff did or did not know on a given date."

(d) The date of knowledge test includes knowledge of the fact that the injury in question was "significant". As mentioned above, in *Whitely*, Quirke J. noted that s. 2 of the 1991 Act expressly avoids any attempt to define what is meant by a "significant" injury within the meaning of s. 2(1)(b) of the Act, and he took the view that by excluding any definition it was the intention of the legislature that "a broader test" should be applied than was contemplated by the definition contained within s. 14(2) of the English Act. In the absence of any definition of "significant" in the legislation, it seems to me that one should look at the ordinary and natural meaning of the word, but also consider that meaning in the relevant legal context, *i.e.* the context of personal injuries litigation. In that particular context, it seems to me that the concept of a "significant" injury usually denotes an injury which is something more than a minor injury.

(e) In making that assessment as to whether an injury is something more than a minor injury, it seems to me that the following (non-exhaustive) type of factors may arise for consideration:

(i) the nature of the injury is normally seen as relevant to classifying an injury as minor or significant; was there something like a fracture involved or merely a soft tissue injury which is normally viewed as a more minor injury?

(ii) the nature of the treatment required is also normally seen as relevant;

was the treatment of a more invasive nature, say involving surgery, or was it more conservative treatment involving say physio and medication?

(iii) the time span of the symptoms caused by the injury is almost always a highly relevant factor. Did the injury only cause symptoms over a fairly short period of time or did it cause symptoms over a reasonably lengthy period of time?

(iv) another possible consideration may be whether the injury, at the relevant date, was overall capable of attracting only a small level of damages or was it capable of attracting a greater level? I acknowledge, however, that this possible consideration could be highly subjective.

(f) I accept the submission made by counsel for the defendants, Ms. Moorehead S.C., that each case in this area is a large extent dependent on its own facts. This was highlighted by Finlay Geoghegan J. in *O'Sullivan*, at para. 35 of her judgment.

(g) The findings of the trial judge constitute a decision based upon an amalgam of affidavit and oral evidence, but appear to be based primarily upon the oral evidence given by the plaintiff. The principles to be applied by the appellate Courts in considering an argument that a trial judge was incorrect in making a finding of fact based on oral evidence were set out in *Hay v. O'Grady* [1992] 1 I.R. 210, 217 by McCarthy J., and were recently concisely summarised by Charleton J. in *Tracey v. Anderson* [2020] IESC 76 as follows (at para. 3):

"For the purposes of clarity, these principles can be more concisely stated as follows:

1. Findings of fact supported by credible evidence are not to be disturbed.

2. Inferences of fact derived from oral evidence can be reconsidered, but an appellate Court should be slow to do so.

3. Inferences drawn from circumstantial evidence can be more readily put aside by an appellate court since that court is in as good a position to draw its own inferences as the court of trial."

51. The first issue to be considered regarding the findings of the trial judge is precisely what finding did he actually make as to the plaintiff's date of knowledge that the injury sustained by him on 8th January, 2013 was "significant"? As can be seen from the passages of the High Court judgment set out earlier in this judgment, some extracts appear to support the defendants' contention that the trial judge found the date of knowledge to be the date of the accident, while other extracts appear to support the plaintiff's contention that he found the date of knowledge to be October, 2013, arising from the trial judge construing (erroneously) the plaintiff's evidence as being to the effect that the worsening of his condition had occurred by late October, 2013.

52. I am satisfied that the trial judge's ultimate finding on this issue must be viewed as the finding in the concluding paragraph of his judgment that the plaintiff "knew, as of the date of the accident, or by the very latest by October, 2013, when he said he could not walk, that he had sustained a significant injury". The problem with this alternative finding is that it is a contradictory finding, as acknowledged by the defendants, as it leads to a contradictory result on the limitation issue. If the date of knowledge is held to be the date of the accident, then the plaintiff is statute barred. However, if the date of knowledge is held to be the later date of October, 2013, then it is common case that the plaintiff would not be statute barred.

53. In the circumstances the alternative finding cannot be upheld, and it seems to me necessary to consider each of the alternative findings on an individual basis. Insofar as the trial judge made a finding that the plaintiff knew, as of the date of the accident, that he had sustained

a significant injury, I do not believe that there was any credible evidence to support such a finding. Applying the actual knowledge test as to the plaintiff's state of mind at the date of the accident, his evidence clearly established that he regarded the back pain which he experienced on the 8th January, 2013, as merely a flare up or exacerbation of a pre-existing lower back condition which had been present for maybe six to seven years, and that he was not aware that he had suffered a significant injury (whether one calls it a significant new injury or a significant exacerbation of a pre-existing condition) until sometime afterwards. It is important to note that this evidence was essentially unchallenged by the defendants, and that the defendants adduced no evidence to the contrary.

54. As regards the constructive knowledge test in s. 2(2)(a) of the 1991 Act, in my opinion there was no basis upon which the trial judge could have found that the plaintiff might reasonably have been expected to acquire knowledge as of the date of the accident that his injury was significant from facts observable or ascertainable by him as of that date. One might consider the factors relevant to significance, as set out in para. 50(e) above. The nature of the injury was that it appeared to be an exacerbation of a soft tissue injury, which is normally viewed as a more minor injury. The nature of the treatment indicated by his GP was conservative treatment, by way of physio and medication. The time span of the symptoms at that stage, by definition, can only have been a mere matter of hours, which would normally indicate a very minor injury as of that date. Such an injury of such a limited duration would only have been capable of attracting the most minor level of damages.

55. Section 2(2)(b) also requires the additional consideration of whether or not this particular plaintiff at the particular time ought reasonably to have sought medical or other expert advice, having regard to the symptoms from which he was suffering and the other circumstances in which he then found himself, and this could be seen as a separate or alternative constructive knowledge test. In the present case the evidence clearly established that the

plaintiff took the prudent course of attending his GP, Dr. Keegan, on the day of the incident. Dr. Keegan's report suggests that she viewed the plaintiff's injury as an aggravation of his pre-existing back condition, and that she regarded physio and medication as the appropriate treatment for same. There is no suggestion that she considered referring the plaintiff back to Mr. Poynton at that time, and it appears that she did not even arrange a follow up appointment with herself, and her report states that she next saw the plaintiff in relation to his back in August, 2014.

56. This brings us on to consideration of the alternative finding, that the plaintiff knew by October, 2013, when his condition worsened, that his injury was significant. In my opinion there was ample evidence to support a potential finding based upon the date when the plaintiff's condition worsened, although the trial judge fell into error in deeming that date to be October, 2013, when the evidence as a whole clearly indicated that date to be somewhere between August and November, 2014.

57. The import of the plaintiff's evidence was that he thought he had suffered a flare up of the same lower back condition which he had had for several years. He took the precaution of attending his GP on the day the incident occurred, but because of his previous back issue he assumed that she assumed that it was a flare up of the same condition, and she prescribed painkillers and physiotherapy.

58. It seems abundantly clear from the evidence that the plaintiff's mind-set was that he hoped and expected that the flare up would subside with the passage of time, while taking medication and attending physio. His evidence was that he had a kind of generalised back pain in his lower back from time to time, but it never stopped him working after the initial six days of sick leave, and while he had several flare ups along the way he did not take any further sick leave but used annual leave if necessary, which is to his credit.

59. Despite the physio and the medication, the plaintiff's lower back problem worsened progressively over time and it came to a head in August, 2014, when he "a large or a big flare up…which lasted for a couple of weeks". This flare up appears to have been the trigger for him attending his GP, Dr. Keegan, again in August, 2014. Notwithstanding the plaintiff's statement that the August, 2014 flare up lasted for a couple of weeks, it appears that the position deteriorated again after that and by October, 2014 his condition had worsened to the point that he had great difficulty in walking. His GP referred him back to Mr. Poynton in or about October, 2014, and this led to the second epidural steroid injection on the 12th November, 2014, and ultimately the surgery on the 14th November, 2014.

60. In my opinion it was legitimate for the trial judge to draw an inference of fact from the plaintiff's oral evidence that he knew that he had sustained a significant injury by the time his condition worsened to the point he had great difficulty in walking, subject to the variation that the time in question was in fact August/October, 2014, and not October, 2013. While the plaintiff may not have known the full extent of his injury until after the surgery in November, 2014, that is not the test. The test is whether he had knowledge that his injury was significant, and pursuant to s. 2(2)(a) of the 1991 Act, knowledge includes knowledge which he might reasonably have been expected to acquire from facts observable or ascertainable by him. In the present case it would have been open to the trial judge to find that he knew or ought reasonably to have known by August/October, 2014 that his injury was significant, given the passage of time since the incident and the fact that the injury had not cleared up but instead had progressively worsened to the point where he had great difficulty in walking and had to seek medical advice again.

61. I note that the trial judge stated that he had no doubt at all that had the plaintiff attended with his solicitor in the course of 2013, he would have been advised that the exacerbation of his pre-accident condition was actionable, and that he would almost certainly have been

advised to obtain a report from an expert to advise with more precision as to the cause of his symptoms. While this speculation may be well-founded, the trial judge appears to imply that a potential visit to a solicitor may be relevant to the date of knowledge in this case, presumably in the context of s. 2(2)(b) of the 1991 Act. With respect, I do not think this is correct, and indeed an injured plaintiff may in some cases be criticised for attending a solicitor before attending a medical expert, but it may of course be reasonable to seek advice from a solicitor in relation to other elements of the date of knowledge test, such as the "attributable" element in s. 2(1)(c) of the 1991 Act.

Conclusion

62. In conclusion, I am satisfied that the trial judge erred in finding that the plaintiff knew as of the date of the accident that he had sustained a significant injury. As regards his alternative finding that the date of knowledge was when his condition worsened and he had difficulty walking, I am satisfied that such a finding could be viewed as amply supported by credible evidence, subject to the variation that the date in question was August/October, 2014 and not October, 2013.

63. Accordingly, the plaintiff's appeal from the decision of the High Court should be allowed, and the question then arising is whether this Court should substitute its own decision on the limitation issue or remit the matter back to the High Court for re-hearing. I note the defendants' reference to the observations of Finlay Geoghegan J. in the *O'Sullivan* case regarding the drawbacks of determining a limitation issue on possibly limited evidence, and their counsel's suggestion that it would be open to this Court to remit the matter back to the High Court for a full hearing.

64. While remittal may be an appropriate option to exercise in some cases, there may be other cases where, given how the proceedings have evolved and the state of the evidence, it

may be unfair to a plaintiff to remit. In the light of the degree of ambiguity and some confusion surrounding the findings made by the trial judge, on balance (albeit with some hesitation) I agree with my colleagues that the limitation issue should be remitted back to the High Court to be re-heard, but as part of a unitary trial. It is unfortunate that the separate trial of this issue as a preliminary issue has caused lengthy delay in these proceedings, and hopefully the case can now move ahead to trial with despatch.

65. With regard to costs, as the appellant has been entirely successful in this appeal, my provisional view is that he is entitled to his costs of the appeal and of the proceedings in the Court below. I note that he was a lay litigant, but he may still have certain costs in terms of expenses and outlay such as Court fees etc. This result follows from the Court applying the traditional approach whereby "costs follow the events", and I see no circumstances present that would justify making any alternative orders as to costs. If either party wishes to contend for an alternative order, they have liberty to apply to the office of the Court of Appeal within fourteen days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the above proposed terms, the requesting party may be liable for the additional costs of such a further hearing. In default of receipt of such application, an order in the above proposed terms will be made.

66. As this judgment is being delivered electronically, I note that each of Donnelly J. and Barrett J. have indicated their agreement with the orders I propose, but will each deliver separate judgments outlining their own reasoning.