

THE HIGH COURT

[2021] IEHC 695

[2019 316 P]

BETWEEN
ANNE BRADLEY, SUSANNE KIERNAN, JONATHAN BRADLEY AND ANDREA BRADLEY
PLAINTIFFS

AND
LORCAN BIRTHISTLE

DEFENDANT

JUDGMENT of Mr. Justice Mark Heslin delivered on the 2nd day of November, 2021

Introduction

1. The plaintiffs are four members of the same family, the first named plaintiff being the mother of the other three. The plaintiffs issued the present proceedings on 15 January 2019. Para. 5 of the plenary summons of that date appears in the following terms: -

"5. The plaintiffs and each of them bring these proceedings for personal injuries sustained by them as a result of the shocking circumstances leading to and surrounding their husband/father, Mr. Seamus Bradley, sustaining severe personal injuries while a patient of and under the care of the defendant, its servants or agents".

2. The defendant is a nominee of St. James' Hospital. Mr. Seamus Bradley was the first named plaintiff's husband and was father to the other plaintiffs. He died on 08 October 2019, almost ten months after the present proceedings were issued. In the plenary summons it is alleged that the plaintiffs suffered post-traumatic stress disorder and the nature of the plaintiff's claim was described during the hearing which took place on 07 October 2021 as of a "nervous shock" type. Paras. 8 to 18 of the plenary summons plead "particulars of the circumstances relating to the commission of the wrong" and it is appropriate to set those out, verbatim as follows: -

"8. In September 2016 the plaintiff's husband/father was referred to St. James' Hospital following a recent diagnosis of malignant neoplasm of the rectum and he thereafter came under the care of and was a patient of St. James' Hospital (hereinafter the hospital) and he remained under the care of the defendant, its servants or agents, at all material times thereafter. MRI performed on 12 October 2016 confirmed the presence of a bulky mid – rectal tumour which extended through the circumferential resection margin and into the superior portion of the seminal vesicles. There was evidence of tethering of the bladder but no definite tumour invasion. The plaintiff's husband/father was initially referred for chemotherapy and for radiotherapy which he underwent between 24 October 2016 and 1 December 2016 at St. Luke's Radiation Oncology Centre at St. James' Hospital.

9. *A further MRI carried out on or about 3 January 2017 demonstrated a reduction in the bulk of the mid – rectal tumour with the overall dimensions unchanged. On 16 January 2017 the plaintiff's husband/father was admitted to the Hospital, where on 17 January 2017 he underwent pelvic exenteration with excision of his rectum, prostate and bladder and formation of an end colostomy and ileal conduit as an*

ileostomy, which procedure was carried out by servants or agents of the defendant (hereinafter "the first surgical procedure"). During the said procedure, the plaintiff's husband/father suffered an injury to the left common iliac artery during attempts to mobilise the left ureter prior to implanting the ureters in an ileal conduit. The iliac artery was repaired with a vein patch harvested from the great saphenous vein in the right groin. The vascular note for the operation indicates that the tear was at the bifurcation of the left common iliac artery into the external and internal iliac arteries (i.e. where the ureter crosses in front of the artery). The operation note does not indicate how close the tumour was to artery at this point or who performed the initial mobilisation of the left ureter. Following suturing of the patch there was good Doppler signals in the left foot.

10. *Following extubating postoperatively, the left leg was well perfused but a compartment syndrome subsequently developed consequent upon a prolonged period of ischaemia occurring between the injury and subsequent revascularisation. Hourly Doppler tests were noted to have been done on the leg at this time but the results of same are not included in the notes seen to date. On 18 January 2017 the plaintiff's husband/father underwent four left leg compartment fasciotomies. It was noted that the muscle appeared viable. Postoperatively, the plan was for elevation of the left leg and Doppler checks every two to four hours. The medical notes record the left leg as warm and well perfused with palpable pulses and on 31 January 2017, the plaintiff's husband/father underwent closure of the fasciotomy wounds.*
11. *In the early hours of 4 February 2017, the plaintiff's husband/father became very unwell. From in or around 04.00 he experienced significant pain and hematemesis (vomiting blood). An endoscopy was planned under general anaesthetic but not performed until in or around midday and which reported signs of stasis due to post-operative ileus but did not identify a source of bleeding. Resuscitation was continued and the plaintiff's husband/father was referred for an urgent CT Thorax Abdomen and Pelvis which was performed at 14.49, the principle findings of which were active extravasation of contrast from the (ruptured) left common iliac artery into the small bowel in addition to features of pseudo - aneurysm of the left common iliac artery likely to have been caused by sepsis.*
12. *Throughout this period the plaintiff's husband/father was bleeding significantly and was hypotensive and tachycardic despite transfusion with pulse and blood pressure measurements reported as follows: -*
 - *05.00: Pulse - , BP 102/80*
 - *07.40: Pulse 125, BP 97/66*
 - *08.10: Pulse 135, BP 94 systolic*
 - *08.20: Pulse 135, BP 116/80*

- 08.30: Pulse 118, BP 139/75
 - 09.30: Pulse 119, BP 89/62
 - 09.50: Pulse 103, BP 89/62
 - 10.20: Pulse 2013(sic), BP 107/72
13. *Following the CT scan, the plaintiff's husband/father was taken to theatre. From the records seen to date it is difficult to determine the exact timings of this event and the plaintiffs will plead further on receipt of full and complete records and/or other documentation but it appears that this was almost 12 hours after the onset of bleeding and in any event, there was a delay in performing an endoscopy and/or CT scan and surgery. The clinical notes seen record that the plaintiff's husband/father arrived in theatre in a shocked state with unpalpable peripheral pulses, very cold and abdominal pain his NIBP was 135/58 with a HR of 115/min. He experienced severe hypotension post induction.*
 14. *On 4 February 2017 the plaintiff's husband/father underwent an emergency laparotomy during which procedure the left common iliac artery was clamped, and an adherent segment of small bowel resected, confirming the presence of a fistula between the artery and the bowel at the site of the vein patch. The ends of the resected bowel were stapled and the common, internal and external iliac arteries were ligated. The said operation was carried out by servants or agents of the defendants and is hereinafter referred to as "the second surgical procedure". During this procedure the plaintiff's husband/father suffered a cardiac hypovolemic arrest. The medical notes record a plan to do a temporary skin only closure with re - operation the following day for anastomosis and not to revascularise the left leg at the time intra - operatively because of the risk of infection and his haemodynamic state. A post - operative ICU note of 4 February 2017 noted no plans for vascular intervention that night to restore the circulation to the left leg following ligation of the iliac arteries but that it was possible that a femora - femoral - bypass graft would be performed on 5 February 2017. A further note on 5 Januarys (sic) 2017 indicated that the left foot was mottled and cold and that there were no pulses present.*
 15. *On 5 February 2017 the plaintiff's husband/father underwent laparotomy, small bowel resection and anastomosis to restore gastro - intestinal continuity following the emergency surgery carried out the previous day. There is a further entry in the medical notes for 5 February 2017 that indicates that the left leg was cold and pulseless and that the vascular team were aware of this but had indicated that he was not for by - pass. A further entry at 20.00 on 5 February 2017 describes mottling and discolouration of the left leg, that the vascular team were aware of this and that amputation might be required.*

16. *There are contrasting notes for 6 February 2017 with one noting that the colour of the left leg/foot was worsening but an entry made on the same date (untimed) stating that the left leg remained viable. There is also a note that femora – femoral crossover was not an option and another stating that the patient could have an axillofemoral bypass graft. Some of the notes are illegible and the plaintiffs reserve the right to plead further in this regard on receipt of legible records. There is a further note following vascular review at 20.00 on 6 February 2017 advising that the leg should not be elevated and should not be exposed. The note also suggests that the limb was on a warming blanket.*
 17. *On or about 8 February 2017 the plaintiff's husband/father went a left above knee amputation for end stage acute ischaemia post – tie off of the left common iliac artery, external iliac artery and internal iliac artery carried out by servants or agents of the defendant. The findings at operation were recorded as inter alia viable muscle tissue at the point of amputation but minimal bleed. Subsequently, a left axillary – femoral by – pass was performed on 10 February 2017 due to a concern that the above knee amputation stump was ischaemic. The plaintiff's husband/father remained in hospital until May 2017.*
 18. *By reason of the matters aforesaid, and the negligence and/or breach of duty (including statutory duty) of the defendant, its servants or agents, the plaintiffs and each of them suffered nervous shock, psychiatric sequelae, personal injuries, loss, damage, inconvenience and expense”.*
3. The plenary summons goes on to plead “particulars of the acts of the defendant constituting the wrong, negligence, breach of duty and breach of statutory duty”. It is clear from these pleas comprising paras. 19 (a) – (j) that the plaintiffs allege that the defendant failed to treat their husband/father in an appropriate manner and the plaintiffs alleged that the defendant exposed them to a risk of injury which the defendant knew and/or ought reasonably to have known. It is pleaded at para. 20 that, by reason of the allegedly wrongful acts detailed at para. 19, each of the plaintiffs suffered nervous shock, psychiatric sequelae, personal injuries, loss, damage and expense. Particulars are then given in relation to the personal injuries of each of the plaintiffs. Among other things, it is pleaded that each of the first three plaintiffs were assessed by a consultant psychiatrist on 21 November 2018 and that the fourth named plaintiff underwent psychiatric assessment by a consultant psychiatrist on 10 October 2018 and on 15 December 2018. The following is an extract from para. 21 (d) which concerns the pleaded particulars of personal injuries of the first named plaintiff: -

“The plaintiff scored highly in all areas of intrusion, avoidance and hypervigilance. The psychiatrist advises that this supports his clinical impression of the plaintiff having post – traumatic stress disorder in relation to the events the subject matter of the within proceedings. He advises that the plaintiff is suffering ongoing stress due to her husband's illness and disability which is aggravated by the complications he suffered due to the intra – operative and post – operative complications suffered

by him. He has advised that the traumatic events occurring during her husband's time in hospital caused the plaintiff psychiatric sequelae and that as a result she has post – traumatic stress disorder (DSM V 309.81). While noting that it is obvious that someone in a situation where their husband of many years has a terminal illness would feel sad, he advises that the mood symptoms the plaintiff is experiencing are greatly aggravated by the traumatic events that occurred in the course of her husband's treatment in St. James' Hospital".

4. The following is an extract from para. 22 (d) of the plenary summons concerning the pleaded particulars of personal injuries of the second named plaintiff: -

"While noting that where somebody has a close relative who is in a terminal condition one would expect some anhedonia and distress, the consultant psychiatrist advises that in the plaintiff's case her presentation is a marked change from her pre – morbid personality and is beyond what one would expect and is at a pathological level. He has advised that this presentation is as a result of the traumatic course of her father's treatment and the shocking circumstances that she was exposed to in the course of that".

5. The following is an extract from para. 23 (c) which concerns the pleaded particulars of personal injuries of the third named plaintiff: -

"He advises that the plaintiff fulfils the criteria of post – traumatic stress disorder (DSM V 309.81) and that while it is difficult to exactly categorise his fear of attending his GP it is best seen as part of a post – traumatic stress reaction which, the psychiatrist advises, is obviously a result of witnessing his father's experiences in hospital and of his own dealings with the hospital at the time. The psychiatrist advises that it is an extreme reaction and that it is causing the plaintiff great distress and putting his own health risk (sic)".

6. The following is an extract from para. 24 (e) of the plenary summons wherein particulars are pleaded in respect of the personal injuries of the fourth named plaintiff: -

"In the opinion of her consultant psychiatrist, the plaintiff is suffering from post – traumatic stress disorder as a result of the intra – operative and post – operative complications suffered by her father".

7. Affidavits of verification were sworn in respect of the contents of the aforesaid personal injuries summons by each of the forenamed plaintiffs in early March 2019.

Defence

8. It is important to note that other than not requiring proof of the descriptions of the parties, the defendant has put the plaintiffs on full proof of all matters. In other words, no facts are agreed and everything is in dispute as is clear from the contents of a very comprehensive defence delivered on 24 June 2019. As well as denying "that the pleadings disclose a cause of action" and denying "that the plaintiffs satisfy the legal criteria

entitling them to seek compensation arising out of the injury to Seamus Bradley”, the following pleas are made in the defence: -

"A (ii) The Defendant requires proof of the following allegations specified or matters pleaded in the personal injury summons: -

- (a) *That at all material times, the defendant, its servants or agents, owed to the plaintiffs' husband/father the duty of care for which the plaintiffs contend.*
- (b) *That at all material times the defendant, its servants or agents, owed to the plaintiffs, and each of them, the duty of care for which the plaintiffs contend.*
- (c) *The factual narrative, matters and allegations pleaded in the particulars of the circumstances relating to the commission of the wrong and the particulars of the acts of the defendant constituting the wrong, negligence, breach of duty and breach of statutory duty in the personal injuries summons, of which the plaintiffs are put on full proof.*
- (d) *That the defendant, its servants or agents, were negligent or in breach of duty or in breach of statutory duty as alleged or at all; and each and every particular thereof pleaded in the personal injury summons as though the same were set forth here and proof required thereof seriatim.*
- (e) *That the plaintiffs' husband/father suffered or sustained the alleged or any personal injuries, psychological/psychiatric injury, loss, damage, inconvenience or expense as alleged or at all; and the plaintiffs are put on full proof of each and every particular thereof pleaded in the personal injuries summons as though the same were set forth here and proof required thereof seriatim.*
- (f) *If the plaintiffs' husband/father suffered the alleged or any personal injuries / psychological / psychiatric injury, loss, damage, inconvenience or expense as alleged or at all, that the same was caused by reason of the alleged or any negligence or breach of duty or breach of statutory duty on the part of the defendant, its servants or agents, as alleged or at all.*
- (g) *It is denied that the first named plaintiff suffered or sustained the alleged or any personal injuries, psychological/psychiatric injury, loss, damage, inconvenience or expense as alleged or at all; and the first named plaintiff is put on full proof of each and every particular thereof pleaded in the personal injuries summons as though the same were set forth here and proof required thereof seriatim.*
- (h) *If the first named plaintiff suffered the alleged or any personal injuries, psychological / psychiatric injury, loss, damage, inconvenience or expense, as alleged or at all, that the same was cause by reason of the alleged or any*

negligence or breach of duty or breach of statutory duty on the part of the Defendant, its servants or agents, as alleged or at all.

- (i) It is denied that the second named plaintiff suffered the alleged or any personal injuries, psychological / psychiatric injury, loss, damage, inconvenience or expense as alleged or at all; and the second named plaintiff is put on full proof of each and every particular thereof pleaded in the personal injuries summons, as though the same were set forth here and proof required thereof seriatim.*
- (j) If the second named plaintiff suffered the alleged or any personal injuries, psychological / psychiatric injury, loss, damage, inconvenience or expense, as alleged or at all, that the same was caused by reason of the alleged or any negligence or breach of duty or breach of statutory duty on the part of the defendant, its servants or agents, as alleged or at all.*
- (k) It is denied that the third named defendant suffered or sustained the alleged or any personal injuries, psychological/psychiatric injury, loss, damage, inconvenience or expense as alleged or at all; and the third named plaintiff is put on full proof of each and every particular thereof pleaded in the personal injuries summons, as though the same were set forth here and proof required thereof seriatim.*
- (l) If the third named plaintiff suffered the alleged or any personal injuries, psychological/psychiatric injury, loss, damage, inconvenience or expense, as alleged or at all, that the same was caused by reason of the alleged or any negligence or breach of duty or breach of statutory duty on the part of the defendant, its servants or agents, as alleged or at all.*
- (m) It is denied that the fourth named plaintiff suffered or sustained the alleged or any personal injuries, psychological/psychiatric injury, loss, damage, inconvenience or expense as alleged or at all; and the fourth named plaintiff is put on full proof of each and every particular thereof pleaded in the personal injuries summons, as though the same were set forth here and proof required thereof seriatim.*
- (n) If the fourth named plaintiff suffered the alleged personal injuries psychological/psychiatric injury, loss, damage, inconvenience or expense, as alleged or at all, that the same was caused by reason of the alleged or any negligence or breach of duty or breach of statutory duty on the part of the defendant, its servants or agents, as alleged or at all.*
- (o) Without prejudice to the foregoing it is denied that the plaintiffs and each of them have suffered a recognised psychiatric injury. If, which is not admitted, the plaintiffs, one or other of them, have suffered from a recognised*

psychiatric injury the defendant requires full proof that same was induced by shock which is denied.

- (p) If, which is denied, the plaintiffs, one or other of them, have suffered from a recognised psychiatric injury induced by shock, then the defendant requires proof that same was caused or contributed to by reason of the alleged or any negligence, breach of duty, breach of statutory duty on the part of the defendant, its servants or agents, which is denied.*
- (q) Further, or in the alternative, and without prejudice to the foregoing, it is denied that the plaintiffs, one or other of them, have suffered or sustained a recognised psychiatric injury which was caused or occasioned by reason of actual or apprehended physical injury to each plaintiff, respectively, or a person other than the plaintiffs, and no admission is made in respect of same.*
- (r) Without prejudice to the foregoing, it is denied that the events the subject of the proceedings were reasonably foreseeable whether in the manner as alleged or at all.*
- (s) In the event that the plaintiffs seek to adduce or deliver further particulars of alleged personal injuries, loss, damage, inconvenience or expense and/or further particulars of alleged negligence, breach of duty, breach of statutory duty without prejudice to the right of the defendant to put the plaintiffs on full proof of any further pleading and any further facts and matters pleaded and allegations specified therein the defendant reserves the right to amend the defence herein.*
- (t) Save insofar as this defence contains admissions or denials or where this defence indicates that the defendant does not require proof of a particular matter alleged or allegation specified, the defendant require (sic) proof of each and every matter pleaded and allegation specified in the personal injuries summons as if the matters pleaded and allegations specified therein were set out in full herein and this plea was repeated with regard thereto seriatim.*
- (u) The defendant requires and awaits full proof of each item of special damage in the schedule of special damages.*

B. Defence to reliefs claimed by the plaintiff:

- (a) It is denied that the plaintiffs, and each of them, are entitled to the relief claimed or to any relief as against the defendant, its servants or agents . . .”.*

The defendant's application

9. On 04 September 2020 the defendant issued a motion seeking the following reliefs:

- "1. An order pursuant to the inherent jurisdiction of this Honourable Court and/or Order 36 of the Rules of the Honourable Court, (if necessary) directing a split/modular trial with regard to the claims had in the proceedings herein.
2. Directions of this Honourable Court as may be ancillary to and associated with the foregoing.
3. Such further or other order as this Honourable Court deems fit and meet.
4. Costs."

Submissions

10. I have very carefully considered the entire of the submissions made, written and oral, on behalf of both parties and I am extremely grateful to both senior counsel in that regard. I have also carefully considered all of the authorities referred to and contained in the Book of Authorities which was helpfully furnished. In this judgment I will refer to the key principles which emerge from those authorities. I first propose to look at the question of jurisdiction.

Order 36 of the Rules of the Superior Courts ("RSC")

11. Order 36, Rule 9 of the RSC, as substituted by the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. 254 of 2016) provides as follows:

- "9.(1) Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time order:
- (a) that different questions of fact arising therein be tried by different modes of trial;
 - (b) that one or more questions of fact be tried before the others;
 - (c) that one or more issues of fact be tried before any other or others.
- (2) Subject to the provisions of the preceding rules of this Order, the Judge chairing any case management conference or pre-trial conference (each within the meaning of Order 63A, Order 63B or, as the case may be, Order 63C) or the trial Judge may in any cause or matter:
- (a) which is listed for trial in the Commercial List or which is required to be heard in the Competition List, or
 - (b) in which an order may be made under Order 63C, rule 4, make an order:
 - (i) directing that the trial be conducted in particular stages (in this rule, "modules") and determining the questions, issues or set of questions or issues of fact, or of fact and law, to be the subject of each or any module, and the sequence in which particular modules shall be tried;

- (ii) *specifying the nature of the evidence, or the witnesses, including expert witnesses, required to enable the Court to determine the questions or issues arising in each or any module;*
- (iii) *directing the exchange and filing in Court, either in advance of each or any module or following the conclusion of the module concerned, of written submissions on the questions or issues of law arising in that module.*

...”

12. On behalf of the plaintiffs, it is submitted that a case of the present type is not covered by the provisions of O. 36, r. 9(2) and that would appear to be so. It is also submitted that, in circumstances where it is a question of *law* which, according to the defendant, comprises the first issue which it maintains should be determined by way of a split or modular trial, the plaintiffs argue that the defendant cannot rely on the provisions of O. 36, r. 9(1) which refers to questions or issues of *fact*.
13. With regard to jurisdiction, the court’s attention was drawn to the decision of Ms. Justice Costello in *James Elliott Construction Limited v Lagan & Ors.* [2016] IEHC 599 which concerned an application brought by the plaintiff in those proceedings seeking an order pursuant to O. 36, r. 9 and/or O. 63A, r. 5 of the RSC or pursuant to the inherent jurisdiction of the court directing that the issues of liability and quantum in those proceedings be tried separately. Although the plaintiff was ultimately unsuccessful in its application, the learned judge stated the following in the final sentence of para. 33 of her judgment: - *“The fact that I have agreed with the defendants on this point does not imply that it is not possible to have a split trial in tort cases as was submitted on behalf of the plaintiff.”*
14. The defendant in the present proceedings also cites, with regard to the court’s inherent jurisdiction, para. [14 – 47] from *“Civil Procedure in the Superior Courts”* (Delany & McGrath, 4th Ed. 2018) which states the following:

“[14 – 47] In some cases, Order 36, Rule 9, which dealt with the trial of issues of fact, was identified as the somewhat unsatisfactory jurisdictional basis for the making of directions as to the trial of mixed issues of law and fact but it came to be recognised that the inherent jurisdiction of the court to regulate proceedings could be invoked so as to achieve the more efficient management and disposition of complex proceedings including, where appropriate, the sequencing of issues and modular trials (Cork Plastics (Manufacturing) v Ineos Compound UK Ltd [2008] IEHC 93).”
15. It seems to me that, even if O. 36 was not relied on by the defendant, this court is entitled to consider the defendant’s application having regard to its inherent jurisdiction to regulate proceedings. As Kelly J. (as he then was) observed in *PJ Carroll & Company Limited v Minister for Health and Children* [2005] 3 IR 457:

"There is a jurisdiction inherent in the Court which enables it to exercise control over its process by regulating its proceedings... It is a residual source of power which the Court may draw upon as necessary wherever it is just and equitable to do so."

It is also appropriate to quote as follows from the decision in *Cork Plastics (Manufacturing)* cited at para. 14-47 in *Delany & McGrath* where Clarke J. (as he then was) considered the jurisdiction of the court to order a modular trial and stated the following (from para. 2.2):

"2.2. In Millar- v - Peebles, [1995] N.I. 6, the Court of Appeal in Northern Ireland accepted that a jurisdiction existed to direct a split trial where it was just and convenient. The Court noted that a broad and realistic view of what is just and convenient should be taken, assessing, as appropriate, questions of the avoidance of unnecessary expense and the need to make effective use of Court time. It was also noted that the Court should balance the advantages or disadvantages to each party and take into account the public interest that unnecessary expenditure of time and money and a lengthy hearing should not be incurred. The Court also noted that undue weight should not be allowed to any tactical advantage which might accrue to either party by the presence or absence of a split trial.

2.3. It is, therefore, in my view, unnecessary to consider the precise provisions of the rules of Court. The somewhat narrow circumstances in which a formal preliminary issue can be directed under the rules of Court are identified in the jurisprudence with precision for good reason. Experience has shown that the formal separation out of a preliminary issue can often make the apparent shortest route, the longest way home. However, the conduct of complex litigation in a modular fashion is not the same thing as the formal separation of preliminary issues. Rather it involves the Court exercising its inherent jurisdiction as to how a single trial of all issues is to be conducted. Is the whole trial to be conducted at one go, or should the Court proceed to hear and determine certain issues in advance of others? Dealing with the single trial in such a modular fashion is simply the exercise by the Court of its inherent jurisdiction to order the manner in which a trial is conducted."

16. The learned judge went on to hold that the court had jurisdiction to direct the way in which the relevant proceedings were to be tried and he explicitly approved of the reasoning of the Court of Appeal in Northern Ireland in *Millar v Peebles*. In light of the foregoing I am satisfied that there is no question of the defendant's application failing for want of jurisdiction. Having dealt with that issue, I now turn to the principles which emerge from the authorities to which this Court was referred.

The "default position"

17. Both parties to the present application acknowledge that the default position is that there be a unitary hearing of all issues at the same time. Thus, what the defendant seeks is a departure from the norm. Clarke J., as he then was, put matters clearly in *Cork Plastics (Manufacturing)* as follows: -

"3. The Default Position

- 3.1 *There can be little doubt but that the default position is that there should be a single trial of all issues at the same time. In order to analyse what circumstances might legitimately lead to a proper departure from that position, it is important to start by analysing why it is normally just and convenient to have such a single trial.*
- 3.2 *The perceived advantage of a modular trial is that, if the result of earlier modules goes in one way, subsequent modules may either become unnecessary or may be capable of being dealt with in a much more focussed fashion. Thus, the most common division between liability issues and quantum issues can give rise to a saving of court time and expense in the event that the Plaintiff does not succeed on liability. In those circumstances, of course, neither the parties nor the Court are put to the time and expense of having to deal with quantum issues which do not arise. However, such a result, of course, is only a possibility. If the Plaintiff succeeds, then quantum will have to be dealt with in any event. Where the litigation is straightforward and relatively concise, then there is every risk that time and expense will be added by a modular trial in the event that the Plaintiffs succeed. In simple and straightforward litigation which might be expected to last one or a small number of days at hearing, should all issues be tried together, there is a real risk that separating the issues into, for example, liability and quantum questions, could lead to more time being spent in Court and significant additional expense being incurred by the parties in having to reassemble on a second occasion. A two to three-day action in any of Court lists and which involves broadly equivalent liability and quantum issues might nonetheless turn into two separate two day hearings if divided as to liability and quantum.*
- 3.3 *Therefore, in any straightforward litigation, and in the absence of some unusual feature (such as, for example, the unavailability of quantum witnesses which might otherwise lead to an adjournment), the risk that the proceedings will be longer and more costly if divided will be seen to outweigh any possible gain in Court time and expense in the event that the Plaintiff fails on liability."*

Factors to be considered

18. From para. 34, onwards, of his decision in *Cork Plastics (Manufacturing)* the learned judge set out a range of factors to be considered in the context of directing a modular trial and these can be summarised as follows:

- The complexity and length of the likely trial;
- the question of what is to happen in relation to any possible appeal and what measures might minimise any disadvantage;
- the need to insulate a party who is involved with only some of a wide range of issues from the expense and time of having to attend a lengthy trial;

- where there are a range of approaches to the calculation of damages depending on the basis upon which liability may be established;
 - the likely relative length and complexity of the respective modules which might be proposed;
 - the extent to which there might be significant overlaps in the evidence or witnesses that would be relevant to all modules;
 - any suggestion that true prejudice (rather than a perceived tactical prejudice) might occur by the absence of a unitary trial.
19. Having referred to the foregoing factors, the learned judge added (at para 3.14) that there may well be a whole range of other special or unusual circumstances that may arise on the facts of any individual case which may need to be given all due weight.

Four questions for a Court

20. Two years later in *McCann v Desmond* [2010] 4 IR 554, Mr. Justice Charleton, while approving of the principles laid down in *Cork Plastics (Manufacturing)*, identified a number of questions which the court might address in considering whether it was appropriate to direct a modular trial. Mr. Justice Charleton also emphasised that the default position is a full hearing and it is useful to quote, in full, para. 7 of his judgment:

"[7] Therefore, given that the default position is a full hearing, I believe that the questions which would naturally address themselves to the mind of a court in considering an application such as this for a modular hearing, would include:-

- (1) *Are the issues to be tried by way of a preliminary module, readily capable of determination in isolation from the other issues in dispute between the parties? A modular order should not be made if the case could be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate, so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues.*
- (2) *Has a clear saving in the time of the court and the costs that the parties might have to bear been identified? The court should not readily embark on a modular hearing simply because of a contention that a saving in time and costs has been identified, but rather it should view that factor in the context of the need to administer justice in the entire circumstances of the case.*
- (3) *Would a modular order result in any prejudice to the parties? If, for instance, the issue as to what damage was occasioned by reason of the wrong alleged by the plaintiff was so intricately woven in to the proofs that were necessary to the proof of liability for the wrong, so that the removal of the issue of damages would undermine the strength of the plaintiff's case, or the*

response which a defendant might make to it, then the order should not be made.

- (4) *Is a motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues? I return to the idea that a judge should always be aware that tactical decisions are made, often out of an abundance of enthusiasm, by parties to litigation, who may seek to put the other party at a disadvantage through the obtaining of an order under the Rules of the Superior Courts 1986, or one capable of being made within the inherent jurisdiction of the court. Obvious examples of pre-trial motions that may merely be tactical are motions to strike out proceedings as being vexatious or frivolous or to seek an order for security for costs under s. 390 of the Companies Act 1963. Other instances include the lengthy arguments that can sometimes ensue in relation to discovery. If the removal of issues to a modular hearing is likely to disadvantage the proper process of pre-trial preparation that discovery orders, notices for particulars and notices to admit facts involve, then such a motion should be refused as resulting not from a genuine process that will assist the trial but for tactical reasons related to wrong footing the other party."*

21. Both parties to the present application cited the foregoing extract from *McCann v Desmond* in their submissions and there is no dispute between the parties that it represents an appropriate approach for this court to take, with each party contending for different answers to the various questions posed. Similarly, both parties draw this court's attention to the decision by Clarke J. (as he then was) in the Supreme Court's decision in *Weaving Macro Fixed Income v PNC Global Investment Servicing (Europe) Limited* [2012] 4 IR 681.

Significant care to ensure there are unlikely to be significant links between issues

22. In *Weaving*, the Supreme Court overturned the High Court's decision that there be a modular trial of eight issues. The Supreme Court's judgment referred to the High Court's earlier decision in *Cork Plastics (Manufacturing)* and quoted extensively from same, in particular, passages to which I have referred to in this judgment. The Supreme Court also quoted the questions posed by Mr. Justice Charleton in *McCann v Desmond*. At para. 39 in *Weaving* the Supreme Court sounded the following note of caution:

"[39] ... it seems to me that a court must exercise significant care when directing a modular trial which takes, as its first module, some but not all of the issues which may be relevant to liability, to ensure that there are unlikely to be significant links between the issues which might arise in respect of other aspects of the liability question such as would render it unfair and/or inefficient to separate out the liability issues in the manner under consideration. That is not to say that there may not be cases where liability issues fall into clearly discreet and separate categories such that some can be tried without any reference to others and without any fear of injustice or inefficiency."

No modular trial if the Court would not order trial of a preliminary issue

23. The submissions by both parties also refer to the High Court decision by Clarke J. (as he then was) in *Donatex Limited & Anor. v Dublin Docklands Development Authority* [2011] IEHC 538 and it is useful to quote as follows from the decision in which the learned judge commented on the approach of Laffoy J. in *Atlantic Shellfish Limited v Cork County Council* [2010] IEHC 294:

"2.3. The longest way round being often the shortest way home is perhaps a useful synopsis of the thinking which underlies that jurisprudence. The point which Laffoy J. was making is that it is not appropriate to use an application for a modular trial as a backdoor method of seeking to have the court determine that which is, in truth, a preliminary issue, to be tried in circumstances where the court would not, on the basis of the existing jurisprudence, order the trial of a preliminary issue in the first place.

2.4. The reason for the court's reticence in ordering the trial of preliminary issues is not based on any technical consideration of the law or the Rules of the Superior Courts. Rather, it is based on the experience of the courts that the directing of preliminary issues of that type can often, at the end of the day, make litigation more costly and complex rather than less so. There is no logical or rational basis, therefore, for directing a modular trial of an issue which the court would decline to direct to be tried as a preliminary issue on those same practical grounds."

Fairness and the administration of justice

24. In *James Elliott Construction Limited*, Costello J. noted that the parties before her agreed that *"the default or normal position is that there should be a unitary trial"*. (Para. 5) going on to state that *"it was also accepted that in deciding the issue, the court must consider the interests of the plaintiff, the interests of the defendants and the interests of the administration of justice . . ."*

25. Later (at para. 27) Costello J. stated that: -

"In assessing the application, the overriding consideration of the Court must be the administration of justice and, in particular, to ensure that the trial is a fair one. In some cases, this may require that there be a modular order made in order that potentially significant costs may not be incurred and court time saved. In other cases, it may require that the Court refuse the order sought and the proceedings are conducted in the normal way as a unitary trial".

It does not seem to me that there is any material dispute between the parties as to the relevant legal principles and it is the foregoing principles which have guided this court in the approach to the present application. I now turn to the affidavits which were before the Court.

Grounding affidavit of Nessa O'Roarty

26. I have carefully considered the contents of the grounding affidavit sworn by the defendant's solicitor who, at para. 4 avers that: -

"The within proceedings are personal injury in nature and arise out of medical negligence alleged on the part of the defendant".

27. From paras. 4 to 8, she refers to the proceedings. For the sake of clarity, I felt it was appropriate to quote at some length from both the personal injuries summons and the defence delivered. As the pleadings made clear - and as Ms. O’Roarty avers at para. 6. - Liability is very much in issue between the parties. At para. 9, Ms. O’Roarty avers that: -

"The plaintiffs have been examined by expert witness on behalf of the defendant who has found that the plaintiffs have not sustained a nervous shock or recognised psychiatric injury and do not satisfy the clinical criteria in respect of such diagnoses".

28. In paras. 10 – 13, Ms. O’Roarty refers to separate High Court proceedings entitled *Shamus Bradley v. Lorcan Birthistle*, bearing record number 2018 / 7176 P (hereinafter “the related proceedings”). She goes on to aver that the course of those related proceedings was expedited in circumstances where the plaintiff was in receipt of a terminal cancer diagnosis and had a limited life expectancy. At para. 12, she avers that mediation took place on a “without prejudice” basis on 14 May 2019, with liability being in issue between the parties. She avers that those proceedings were resolved on a without prejudice basis and that this represented a wholly reasonable approach by the defendant to those proceedings. It is clear from her averments that the defendant at no stage accepted liability in the related proceedings and, at para. 13, she makes clear that liability is in issue in the present proceedings. Ms. O’Roarty goes on, at para. 13, to make the following averment: -

"In the present proceedings, for the plaintiffs to succeed for claims in nervous shock and/or recognised psychiatric injury, the plaintiffs herein will be required to establish liability in respect of alleged medical negligence for the matters concerning their husband/father and leg amputation as alleged in the substantive related action by Seamus Bradley. This is the context where the defendant challenges the plaintiff's claims in nervous shock and/or for recognised psychiatric injury as not meeting the criteria in law for compensation and not meeting the clinical criteria for such diagnoses".

The issue giving rise to a split/modular trial, as stated by the defendant

29. It will be recalled that the defendant’s Motion does not specify the issue in respect of which it seeks a modular or split trial. At para. 14, Ms. O’Roarty refers to certain inter – partes correspondence and she exhibits two letters. The letter sent by the defendant’s solicitors to the plaintiff’s solicitors on 16 December 2019 puts in the following terms the issue which, according to the defendant, should be dealt with by way of a split/modular trial: -

"Dear Sirs,

We refer to the above matter. As you are aware, we had obtained supportive expert opinion in relation to the lead case. The issue of liability has not been determined.

*As you are also aware, we have obtained expert opinion in relation to the plaintiff's personal injuries and we believed that in law, these do not satisfy the criteria for nervous shock, as set out in the various jurisprudence. Accordingly, we write to request that you agree to a split trial, **the first issue being whether or not the plaintiff's claims satisfy the criteria for nervous shock, to include the question of proximity.** We believe that this would result in a significant saving in costs, to approach these cases by way of split trial. The issue of liability can then be determined at a later stage, in the event that the plaintiffs were successful in establishing at the split trial that their injuries meet the requisite criteria for compensation. In the event that they do not meet that criteria, then considerable costs in dealing with the liability issue can be avoided . . .". (emphasis added)*

30. The second letter exhibited is one sent by the defendant's solicitors, dated 23 March 2020 and it identifies the issue which, according to the defendant, should be dealt with by way of a split trial, as follows: -

"Dear Sirs,

*I refer to the above matter and to our letter of 16th December last, sent by email and post, seeking your consent to the matter proceeding by way of split trial, **dealing with the issues of causation and whether the claim satisfies the criteria for compensation for nervous shock,** as set out in that letter. . .". (emphasis added)*

31. The averment made by Ms. O'Roarty at para. 15 begins as follows: -

"The proceedings herein arise in circumstances where the plaintiffs, and each of them, respectively, allege that nervous shock and/recognised psychiatric injuries have been sustained by each of them and that same is attributable to the amputation of the leg of their husband/father Seamus Bradley . . ."

At this juncture it seems appropriate to say that the foregoing is not an accurate summary of the case pleaded by the plaintiffs. This is plain from a reading of the personal injuries summons which makes clear that the injuries alleged by the plaintiffs are not limited to the fact of the amputation of the leg of the late Mr. Bradley. On the contrary, the personal injuries summons pleads that Mr. Bradley sustained injuries while a patient at the hospital over a three – week period from 17 January to 10 February 2017 and it is the circumstances surrounding the sustaining by Mr. Bradley of the injuries as pleaded in the personal injuries summons which the plaintiffs allege caused them to suffer injury.

32. At para. 16 it is averred by Ms O'Roarty that: -

". . . the Defendant herein challenges as a matter of fact and in law and principle the bases and nature of the bases of the plaintiff's claim for nervous shock and/or

recognised psychiatric injury which the plaintiffs allege arise by of (sic) the matters complained of in the substantive related action regarding leg amputation. In the premises, the defendant seeks an order of this Honourable Court directing that the matter as to whether the plaintiff's claim herein satisfied the criteria in law for compensation for nervous shock, to include the question of proximity proceed by way of split/modular trial for determination in respect of same in the first instance".

33. The characterisation, in para. 16, of the present proceedings as being "*regarding leg amputation*" does not seem to me to accurately encapsulate the claims pleaded by the plaintiffs. Notwithstanding the foregoing, the issue which, according to the defendant, requires to be dealt with by split/modular trial is stated by Ms O'Roarty in para 16 of her affidavit to be "***whether the plaintiff's claims herein satisfy the criteria in law for compensation for nervous shock, to include the question of proximity . . .***" (emphasis added)
34. At para. 17, it is averred that the advantage of proceeding by way of a split/modular trial ". . . is that if it were held that the plaintiff's claims do not meet the criteria in law, then considerable costs of dealing with the substantive liability issue in alleged medical negligence can be avoided". It is also averred that this could be done whilst ensuring that a fair trial take place and that there would be no prejudice to the plaintiffs in circumstances where, if the plaintiffs were to be successful, the trial of liability for the substantive cause of action would proceed thereafter.
35. At para. 18, it is submitted that a split/modular trial would promote more efficient management, would be more expeditious and more cost effective, saving time, costs and expense, including court time. It is fair to say that these assertions are made in general terms. There is no estimate given, for example, as to the likely duration a unitary trial would take, as opposed to a split/modular approach. Nor is there any averment made as to the total number of witnesses anticipated to be needed were a unitary hearing to take place, compared to the estimated number of witnesses if a split/modular approach were to be taken. Equally, there is no averment made in relation to the category or type of witnesses likely to be required to deal with the first issue (as the defendant sees it) and the extent to which same might represent a sub-category of the entire complement of witnesses if a unitary trial proceeded.
36. At para. 19, it is averred that ". . . *there is a logical division between the issues in the case to be tried by way of a split/modular trial and that they are capable of determination in isolation from the other issues in dispute between the parties (liability for the substantive medical negligence action) . . .*" and again it is asserted *inter alia* that "there is a clear saving of court time and costs" but this is an assertion made in general terms.

Certain observations

37. Some observations seem appropriate to make before I continue looking at the affidavits which were before the court. The defendant contends that the court can and should first determine "*whether the plaintiff's claims satisfy the criteria in law for compensation for nervous shock, to include the question of proximity*" and argues that "*liability for the*

substantive medical negligence action” can be left for determination at a later stage. It is entirely uncontroversial to suggest that, to deal with the issue as framed by the defendant, would inevitably involve the giving of evidence by each of the plaintiffs, by expert psychiatrists and, indeed, by medical staff of the defendant. That the plaintiffs would each have to give evidence seems entirely obvious. It also seems to me that any judge hearing the first module would also have to hear from medical staff. This is because of the nature of the claim made by the plaintiffs. For example, it seems to me that the court would need to hear from all those doctors and nurses who dealt with the late Mr. Bradley and who interacted with the plaintiffs. In other words, it does not seem to me that the first issue, as framed by the defendant, could be determined without the trial judge hearing evidence of, for example, what each relevant doctor and nurse said to each plaintiff as regards the treatment of the late Mr. Bradley. What medical staff said in relation to the treatment provided is obviously interlinked with the treatment provided. I think it is also uncontroversial to say that where psychiatric injuries are alleged, all of the evidence in relation to what occurred and the effect of that upon the plaintiffs is inextricably interlinked. To my mind this also brings into focus the question of damages. No mention is made in para. 19 (or elsewhere in the grounding affidavit) of the issue of *damages*. If that issue were to be left over in the manner contended for by the defendant it seems that expert psychiatrists for both parties would need to be called in the context of dealing with the first module and would also be needed a second time to deal with the damages issue depending on how matters progressed. If, for example, the defendant was unsuccessful in the first module and appealed, as it would be entitled to, there is a real prospect of very considerable delay and, depending on the outcome of that appeal, the same psychiatrists will have to come back and give the same evidence again in order to address the question of damages (their expert evidence being relevant both to whether a nervous-shock injury was suffered and the question of damages). It is fair to say that the grounding affidavit does not address at all the consequences of an appeal by either party against a determination of the first module, whether in practical terms or from the perspective of ensuring fairness. I now turn to the replying affidavit sworn on behalf of the plaintiffs.

Replying affidavit of Clare Flavin

38. On 28 January 2021 Ms. Clare Flavin, solicitor for the plaintiffs, swore an affidavit opposing the reliefs sought. At para. 5 she averred that the trial would involve the resolution of a number of interrelated issues which are inextricably linked and she averred that it was neither just, nor convenient to break up a trial into separate modules of (i) causation (ii) breach of duty, and (iii) assessment of damages. She also averred that this is not a case where the issues proposed to be split by the defendant are readily capable of determination in isolation from one another.
39. At paras. 6 – 8, Ms. Flavin makes averments with regard to the nature of the claims made by the plaintiffs. She avers that it is not correct to simplify the factual basis of the plaintiff’s claims to an injury *“attributable to the amputation of the leg of their husband/father”* as suggested by Ms. O’Roarty and she emphasises that the plaintiff’s claims are pleaded (see para. 5 of the personal injuries summons) as arising to the

plaintiffs by reason of the ". . . *shocking circumstances leading to and surrounding [the Deceased] sustaining severe personal injuries, loss and damages while as a patient under the care of the defendant*". Ms. Flavin refers to the contents of the personal injuries summons and to the events and injuries pleaded as between 17 January and 10 February 2017. At para. 8, Ms. Flavin avers that it was the circumstances surrounding the pleaded injuries to the late Mr. Bradley which gave rise to the nervous shock injury suffered by the plaintiffs and that ". . . *these are the circumstances, together with the plaintiff's responses to same, which will have to be considered by any Court in determining whether or not the plaintiff's claims satisfy the criteria in law for nervous shock*".

40. From para. 9 to 16, Ms. Flavin makes averments in relation to the overlap of issues and the evidence to be adduced. At para. 9 she notes that the grounding affidavit refers to the opinion of an unidentified expert that the plaintiffs have not sustained a nervous shock or recognised psychiatric injury and Ms. Flavin points out that no such reports have been exhibited. She avers that if reliance is placed on expert opinion as justifying a departure from the usual rule of a unitary trial, it is essential that such evidence be before the court. She also avers that the plaintiff's claims are each supported by the expert opinion of a consultant psychiatrist.

41. At para. 10, Ms. Flavin avers that in order for a court to determine the issue as proposed by the defendant, evidence would be required: -

". . . from expert and lay witnesses regarding the medical treatment afforded, the complications arising, what the plaintiffs were told about these complications, the need for fasciotomies, emergency surgery and amputation, the basis for those decisions and the condition of the deceased leading up to that point, the consequences of same for the deceased, the likely impact of such treatment and consequences for the plaintiffs as well as the deceased's condition, what the family were being told about the deceased's condition, including the life – threatening nature of the situation and the reason why this was so, his condition thereafter, the consequences of same on the plaintiffs and the nature of the injuries suffered by each of them".

42. At para. 11, Ms. Flavin avers that all the foregoing feed into any proper consideration of breach of duty, causation of injury and the assessment of damages and that there is a significant inter – relationship between the evidence to address those issues and she avers that this is not a case which lends itself to a simple division between liability and quantum, nor is it one which lends itself to further division into three modules, with causation being determined separate from, and before, everything else. At para. 12 she avers that there is likely to be a substantial overlap in the evidence of witnesses called to give evidence regarding breach of duty, causation and quantum. She goes on to aver that the defendant contends for a situation where a trial judge would be asked to consider the facts adduced exclusively from the point of view as to whether or not the plaintiffs, or any of them, had suffered a recognised psychiatric injury in consequence of the events surrounding the deceased's treatment, yet the same judge would be asked not to make

any findings in relation to that course of treatment which would be relevant to other parts of the proceedings, including the parts dealing with breach of duty and quantum of damages, even though the same facts are relevant to the court's consideration of each of those three issues. Ms. Flavin asserts that this is an entirely artificial premise upon which to ask any court to determine a plaintiff's entitlement to damages for personal injuries.

43. At para. 13 Ms. Flavin avers that if the case were to be "carved up" as suggested by the defendant, a significant number of and perhaps all witnesses would be required to attend court on a number of occasions to give evidence concerning the same factual matrix and that this would be not only artificial and time consuming but would give rise to the risk of an unjust result, both in terms of different evidence being adduced on different occasions or different inferences being drawn from what should essentially amount to the same evidence albeit given at different times by the same or possibly different judges. Reference is also made to the process being further undermined if witnesses who were available to give evidence on one occasion were not available on the next.
44. At para. 14, Ms. Flavin avers that, the position contended for by the defendant would mean that witnesses who would normally be called only once to give evidence on all issues in which they had a role would instead have their evidence confined in a way which is not actually clear but which would be unworkable. She suggests that the issue urged by the defendant to be determined first is not truly a stand-alone issue and that it would be very difficult if not impossible to set boundaries around the evidence that would be relevant or admissible for the purposes of that issue, leading to delay and disruption. She also submits that the degree of limitation would give rise to controversy between the parties and would be disruptive of the proceedings.
45. At para. 15, Ms. Flavin makes the point that Ms. O'Roarty's grounding affidavit says nothing about the consequences of any potential appeal of an initial determination. She submits that it would be unrealistic and unfair to expect that any judge could retain relevant evidence and information until a resumption of the trial, following appeal. She also makes the point that, on the other hand, it would be wholly unsatisfactory for relevant evidence and submissions to have to be repeated to the same judge. Alternatively, if the original judge were unavailable for a resumed hearing, there would be wholesale duplication of effort with significant increases in cost and time and the potential for conflicting views to be taken on the same issues by two different judges.
46. At para. 16, Ms. Flavin asserts that it is simply not feasible or practical to seek to separate out the inquiry to be carried out into one which artificially focuses on causation, but ignores breach of duty and that, even if it were, this would result in little if any savings in court time and costs and she is of the view that the opposite is likely to be the case. She avers that the nature of the case is such that the issues at play are interwoven and interlinked and that an entirely artificial separation is being proposed which cannot work on a practical basis and that there is no logical reason why the evidence required to resolve the issues in dispute between the parties should not be adduced in the usual manner on one occasion only.

47. Paras. 17 to 20 of Ms. Flavin's affidavit address the question of costs and delay. She disputes the suggestion that to split up the issues in the manner contended for by the defendant would lead to efficiencies in court time or cost savings. At para. 18, she submits that, subject to the issue of discovery, which she asserts should not be protracted in circumstances where the related proceedings had progressed to the stage where they were ready for trial, the present proceedings are ready for hearing. Ms. Flavin submits that it is unclear why the defendant waited until the resolution of the related proceedings brought by the late Mr. Bradley and she avers that the plaintiffs had all been assessed by the defendant's medical expert prior to the mediation in the related proceedings.
48. At para. 19, Ms. Flavin submits that it must be the case that the costs of investigating and reporting on the allegations of breach of duty have already been incurred by the defendant who knows the case they wish to make and she asserts that there would be no saving in that regard, were a modular trial to be directed. She goes on to submit that, as against the foregoing, to proceed by way of a modular trial risks a significant injustice to the plaintiffs in terms of the costs associated with preparing for and attending for different modular trials, including the costs which would be incurred by them on a solicitor/client basis which might not otherwise be recoverable on adjudication of costs, even with an order for costs in favour of the plaintiffs, and she submits that these are costs which would have to be borne by the plaintiffs themselves. Ms. Flavin asserts that the defendant, by contrast, has the benefit of insurance/State capital resources at its disposal and is better placed to take on the additional costs burden associated with separate modular trials as proposed by the defendant. At para. 20, Ms. Flavin avers that to proceed as suggested is not in the interests of justice.
49. Paras. 21 and 22 of Ms. Flavin's affidavit concern correspondence and communication between the parties and a letter sent by the plaintiff's solicitors, dated 23 December 2020 is exhibited. That letter set out, in detail, the plaintiff's position with regard to the present motion and reflect the averments made by Ms. Flavin in her 28 January 2021 affidavit. The letter called upon the defendant to withdraw the motion and invited the defendant to engage in mediation to resolve the issues giving rise to the motion.

Replying Affidavit of Ms Nessa O'Roarty sworn 29 July 2021

50. After the usual averments, Ms. O'Roarty avers, in para. 4 of her replying affidavit sworn on 29 July 2021 that "*...the issue to be tried is whether the plaintiffs' claims herein satisfy the criteria in law for an alleged secondary claimant to recover damages for nervous shock.*" (emphasis added). At para. 5 she avers *inter alia* that one of the purposes of pursuing the matter by split trial is "*... to reduce Court time and costs.*" It is fair to say however, that no specifics are given as to how costs savings might arise, with no identification of the number of witnesses or category of witnesses which, according to the defendant, would not have to give evidence in respect of a trial of the first issue. Ms. O'Roarty also asserted that the issue identified by the defendant was capable of separate determination. This is an issue I touched on earlier in this decision when looking at the first of Ms. O'Roarty's affidavits. No assessment of the likely duration of a full trial is given

in either of the defendant's affidavits. Nor is there any identification of the number of witnesses likely to be required for a full trial, as opposed to the number which, according to the defendant, would be required for a modular trial. There is not, for example, any identification of the number of medical professionals who, according to the defendant, spoke to or interacted with the plaintiffs. If the foregoing is said by the defendant to represent only a sub-set of the total number of medical professionals involved in the care of the late Mr. Bradley, this is not asserted in either of the affidavits sworn by Ms O'Roarty on the defendant's behalf. These are not criticisms but they are appropriate observations to make, particularly in circumstances where it was made clear in oral submissions on behalf of the defendant, for a court to determine the first module in the manner contended for by the defendant could require evidence from doctors and nurses who treated Mr. Bradley "*as to what was their interaction with the plaintiffs*" (see transcript p. 38, line 23).

51. At para. 6, Ms. O'Roarty averred that ". . . *the fact that the plaintiff's claims are alleged to arise from the Deceased having sustained alleged injuries while an inpatient under the care of the defendant is another reason why the Court is being asked to facilitate a split trial*". At para. 7, Ms. O'Roarty refers to the nature of the plaintiff's claims and at para. 8 Ms. O'Roarty avers that ". . . *the traditional and established jurisprudence of claims in nervous shock is that the injury alleged to have been sustained by the secondary claimant, which itself is required to be a recognised psychiatric injury, must be one that is shock induced, that is, so far outside of the ordinary human experience and so shocking that it impacts on the plaintiff such as to cause recognised psychiatric injury*". At para. 9, Ms. O'Roarty rejects the proposition that the defendant has misunderstood the nature of the plaintiff's claims and asserts that it is because of the nature of the claims that the relief is being sought by the defendant.
52. At para. 10, Ms. O'Roarty avers that the assertions made by Ms. Flavin, with regard to the hearing of a split trial and the evidence "are disputed" by the defendant. Although this averment is made, it is fair to say that there is no engagement with the specific averments made by Ms. Flavin in relation to the overlap and interconnectedness of witness evidence in respect of the issues of breach of duty, causation and quantum.
53. At para. 10, Ms. O'Rourke also asserts that ". . . *the entirety of a trial on breach of duty and causation for injuries alleged to have been sustained by the deceased husband/father while an inpatient is not, and ought not, be required for a determination as to whether the plaintiff's claims meet the legal criteria for nervous shock. The defendant submits that significant time and costs could be saved*". The foregoing averment does not appear to me to engage with the scale of witness evidence likely to be required to determine the very issue which the defendant has identified. How can that issue be determined by a trial judge without hearing (a) evidence from each of the plaintiffs as to what occurred during the relevant period e.g. what they saw, what they were told by medical staff and what effect it had on them, as well as (b) evidence from each doctor, nurse or other medical practitioner who provided treatment to the deceased and who interacted with the plaintiffs or either of them, including as to what information they gave the plaintiffs or

any of them regarding the treatment of the late Mr. Bradley including any complications and his condition, the foregoing having an obvious inter-connection with the treatment actually provided and (c) expert evidence from psychiatrists on both sides (such evidence not only being relevant to establishing a psychiatric injury but also being of fundamental evidence to the assessment of damages, being an issue which the defendant seeks to divorce from the first module). As to the submission on behalf of the defendant that "*significant time and costs could be saved*", once again no specifics are given in relation to why this might be so, whereas the defendant asserts that it is "*disingenuous*" for the plaintiffs to say that to proceed in the manner sought by the defendant is not in the interests of justice.

54. It will be recalled that in the grounding affidavit, there was no engagement with the possibility of an appeal, by either party, against a determination of the first module. At para. 11 of the replying affidavit the only engagement by the defendant with this issue is by way of the following averment: -

"It is disputed that granting the reliefs sought would impact on potential for appeal in general or in the manner suggested. It is respectfully submitted that an appeal may lie in the ordinary course of an appeal from a determination of the honourable court".

55. The foregoing does not, to my mind, adequately address or engage with the potential consequences of proceeding in the manner contended for by the defendant, both from the perspective of practicality as well as fairness. Just one potential outcome is that the court, in dealing with the first module, would hear evidence from expert psychiatrists in respect of establishing a psychiatric injury yet would not, according to the defendant's proposal, deal with the question of damages in respect of which the self – same evidence is fundamentally relevant. On the approach contended for by the defendant, it is conceivable that following the determination of an appeal and after a period of delay, be it months or years, the damages issue could fall to be considered and determined. In practical terms, what is the answer according to the defendant? In the event that the question of damages falls to be determined after this delay, is the judge confined to a review of the DAR in respect of evidence given months or years earlier when, according to the approach contended for by the defendant, the damages issue was not to be determined? Are psychiatrists to be called again to give the same or additional evidence? Is additional cross – examination to be permitted? What if the trial judge who dealt with the first module is no longer available? It is fair to say that none of this is engaged with by the defendant.
56. It will be recalled that, at para. 19 of the plaintiff's replying affidavit, Ms. Flavin averred that there would be no savings were a modular trial to be directed and pointed to the additional costs, in terms of preparing for different modular trials, including costs which would be incurred by the plaintiff on a solicitor/client basis which might not be otherwise recoverable even in the event of the plaintiffs achieving a costs order in their favour. At para. 12 of her replying affidavit, Ms. O'Roarty states that "*The matters averred to by Ms.*

Flavin at para. 19 are disputed. As a general principle, costs follow the event and any costs order made may be adjudicated in default of agreement". Again, this does not seem to me to engage with the specifics of the averments made on behalf of the plaintiffs.

Nervous shock

57. During the course of oral submissions reference was made by Mr. Nolan SC to a leading authority with regard to nervous shock, being *Mullaly v. Bus Eireann* [1992] ILRM 722. Mr. Nolan also opened sections from this Court's decision (Cross J.) in *Morrissey v. HSE & Ors* [2019] IEHC 268, beginning with para. 196, wherein the learned judge refers to the *Mullaly* decision as well as to a later decision in *Kelly v. Hennessy* [1996] 1 ILRM 321: -

"196. *In Mullaly v. Bus Éireann* [1992] ILRM 722, the plaintiff's husband and children were involved in a serious bus accident of which the plaintiff learnt when [s]he was away on a visit to another town and she telephoned a hospital and was told that one of her sons was 'very bad' and she phoned another hospital to be informed that her husband was dying and that a second son was there as well. As a result, the plaintiff developed PTSD which is a recognisable psychiatric injury, Denham J. analysing the situation stated: -

'It appears to me that the causal link is there. That the illness was reasonably foreseeable. The facts of this case clearly establish, a horrific situation for the plaintiff from the time of learning of the accident, through her journey to the hospital, to the appalling sights at the hospital, the terrifying sights of her sons Paul and Francis, and the fact of her apparently dying husband. All these events were caused by the accident caused by the defendants. It would be unjust, and contrary to the fundamental doctrine of negligence, not to find that there is a legal nexus between the actions of the defendants causing the accident, and the resultant aftermath of the accident in the scenes in the hospitals ... The duty of care of the defendants extends as to injuries which are reasonably foreseeable...'

197. *The real issue on this aspect of the case, therefore, is whether the defendants owed to Mr. Paul Morrissey a duty of care and are his injuries reasonably foreseeable. In Kelly v. Hennessy* [1996] 1 ILRM 321, Hamilton C.J. identified five requirements for a successful claim for nervous shock: (i) the plaintiff must establish that he has suffered a recognisable psychiatric illness; (ii) the illness must have been shock-induced; (iii) the nervous shock must have been caused by the defendant's act or omission; (iv) the nervous shock must have been 'by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff'; and finally; (v) the plaintiff must show that 'the defendant owed him or her a duty of care not to cause him or her a reasonably foreseeable injury in the form of nervous shock'. It is the last of the five requirements that is open to debate.

198. *I believe that approaching this case on the basis of the duty of care issue is more satisfactory than an analysis as is sometimes engaged in courts in England as to distinctions between 'primary' and 'secondary' victims. The neighbour principle*

established by Lord Akins in Donohue v. Stephenson [1932] A.C. 562, is the principal basis for establishing a duty of care. However, since the decision of the Supreme Court in Glencar Explorations plc v. Mayo County Council (No. 2) [2002] 1 I.R. 84, a court must consider three or four (and whether it be, there are three or four, is not of any great significance) preliminary conditions in cases where the issue of whether a duty of care is owed arises, i.e. is there reasonable foreseeability, is there proximity of relationship, are there any countervailing public policy considerations and, finally, the justice and reasonableness of imposing a duty of care. Whereas, Glencar and other related cases dealt with the issue of economic loss, where the existence of a duty of care has been denied, I believe that Mr. Morrissey's claim for personal injuries must also be subject to this analysis. The fact that Mr. Morrissey suffered a physical injury (the return of his colitis symptoms) which was brought on by stress as well as psychological injuries is not of importance".

58. During oral submissions, counsel for the defendant emphasised that the *Morrissey* judgment was "the most important" of the authorities which were provided to the court (see transcript p. 37, line 8). Counsel for the defendant went on to quote as follows, paras. 198 to 202 from *Morrissey*: -

"198. I believe that approaching this case on the basis of the duty of care issue is more satisfactory than an analysis as is sometimes engaged in courts in England as to distinctions between 'primary' and 'secondary' victims. The neighbour principle established by Lord Akins in Donohue v. Stephenson [1932] A.C. 562, is the principal basis for establishing a duty of care. However, since the decision of the Supreme Court in Glencar Explorations plc v. Mayo County Council (No. 2) [2002] 1 I.R. 84, a court must consider three or four (and whether it be, there are three or four, is not of any great significance) preliminary conditions in cases where the issue of whether a duty of care is owed arises, i.e. is there reasonable foreseeability, is there proximity of relationship, are there any countervailing public policy considerations and, finally, the justice and reasonableness of imposing a duty of care. Whereas, Glencar and other related cases dealt with the issue of economic loss, where the existence of a duty of care has been denied, I believe that Mr. Morrissey's claim for personal injuries must also be subject to this analysis. The fact that Mr. Morrissey suffered a physical injury (the return of his colitis symptoms) which was brought on by stress as well as psychological injuries is not of importance.

199. *Mr. Morrissey has a recognised physical and psychiatric injury. His injuries started when he was advised in Galway of the return of the cancer. Clearly, there is a close proximity of relationship between him and his wife, especially so given the nature of the disease being suffered by Mrs. Morrissey. In relation to issues of countervailing policy, insofar as Mr. Morrissey's claim is for physical injury caused by reason of his wife's misdiagnosis, issues of countervailing policy do arise in that every spouse or close family member of a victim of medical malpractice is not per*

se entitled to compensation for psychological or physical stress related injury. To so hold would be to broaden considerably and unacceptably the number of plaintiffs who could claim damages in respect of a legal wrong done to their family members. Accordingly, Mr. Morrissey's claim for damages for personal injuries arising from the misdiagnosis of cancer should fail on public policy alone. I make this point even assuming it was established that a duty of care exists.

200. *However, Mr. Morrissey's claim is also that his physical and psychiatric injuries have been considerably exasperated by the breach of duty of the defendants in their failure to notify himself and his wife of the results of the audit. In this regard, the quantity of potential plaintiffs is clearly very small and is a limited claim which would not be of general application so issues of countervailing policy may not arise.*

201. *The overriding issue in the case of Mr. Morrissey's claim for damages for his personal injuries is that of the duty of care and, in particular, whether Mr. Morrissey's injuries insofar as they relate to the issue of the nondisclosure of the audits are reasonably foreseeable.*

202. *I do not believe that a reasonable person in 2009, 2012 or 2016 could reasonably have concluded that if they negligently misread the slides or failed to tell Mrs. Morrissey of the results of the audits that her husband would be so affected that he would suffer a recognisable physical and mental injury. Accordingly, I have come to the conclusion with some reluctance that Mr. Morrissey is not entitled to maintain a claim for his personal injuries apart from naturally the issues that are compensatable under the heading of general damages for loss of consortium. I have come to this conclusion bearing in mind also the fact that I have found that the breach of duty of the first named defendant in relation to the failure to advise the plaintiffs of the result of the audit was caused because in his own words, Mr. M.H. 'forgot'.*

Discussion and decision

59. In oral submissions, counsel for the defendant stated as follows with regard to the Morrissey decision: *"It is that key judgment, from Mr. Justice Cross, that as a matter of public policy members of a victim of medical malpractice, family members of a victim of malpractice are not entitled to per se to compensation for psychological and physical distress. And that is clearly an absolute key component to what we are trying to establish by way of modular trial in this case, Judge".* (see transcript page 53, lines 2-9). Counsel for the defendant went on to submit that, not only did the plaintiffs not meet the criteria for psychological injury, the defendant contends that as a matter of public policy, the plaintiffs are not entitled to bring their claims. The submission was made that, in the foregoing context, it was appropriate to direct a split or modular trial and that the order sought by the defendant was the most appropriate one subject to what the defendant's counsel describes as *"some fine tuning in relation to the precise wording of the order"* (see transcript p. 53, line 21) which, he suggested, could be easily agreed between the senior counsel representing both sides.

60. *In light of counsel's reference to some fine tuning as regards the wording of an order and against the backdrop of the issue as identified in the defendant's affidavits and in correspondence, I invited a submission as to what, from the defendant's perspective, constituted the question or questions for a modular trial (the defendant's motion not specifying the issue). In response, the defendant's counsel indicated that he had "a template already in the wording of Chief Justice Hamilton" (see transcript page 54, line 26). It will be recalled that Hamilton CJ gave the decision in Kelly v. Hennessy to which Cross J referred at para. 197 in Morrissey. The defendant's counsel went on to submit that the following would be the three questions which would constitute the core of a modular trial: -*

- 1 *"Have the plaintiffs established that they have a recognised psychiatric injury?"*
- 2 *Has the psychiatric injury been shock induced over a three-week period?*
- 3 *Does the defendant owe a duty of care to the plaintiffs not to cause him or her reasonably foreseeable injury?"*

61. As the defendant's counsel made clear, the foregoing questions reflect three of the five elements in respect of a successful claim for nervous shock as identified in *Kelly v. Hennessy*, to which Cross J. referred in *Morrissey*, namely items (i), (ii) and (v). Thus, the defendant contends that a modular trial should determine three of the five requirements for a successful claim for nervous shock without determining, in particular, item (iii) as articulated in *Kelly v. Hennessy*, namely that the nervous shock must have been caused by the defendant's act or omission. Even at this juncture, I am entirely satisfied that I am entitled to take the view that there is likely to be a very significant overlap in terms of the witnesses who are likely to be of relevance to the questions the defendant seeks to address by way of a modular trial and to the issues which the defendant contends should be determined later or not at all, depending on the result of the modular trial.

"liability witnesses"

62. By way of illustration, counsel for the defendant submits, with regard to the contended-for modular trial that " . . . *the liability witnesses and the witnesses relevant to the issue of liability of the treatment of Seamus Bradley, that those witnesses are not necessary and, in fact, to have those witnesses at a full hearing is going to add very much to the costs . . .* " (see transcript p. 24, line 25). Despite this skilfully-made submission, a careful consideration of the pleadings and the affidavits exchanged in this application entitles me to conclude that, in order to determine the question or questions by way of a modular trial in the manner argued for by the defendant, the trial judge would have to hear from a range of witnesses and these would include some if not all of the witnesses relevant to the issue of liability concerning the treatment of Mr. Bradley. I say this because, in addition to a trial judge having to hear from the plaintiffs and expert psychiatrists from both sides, any court determining the modular issue would need to hear evidence from doctors, nurses or other medical professionals in respect of their interactions with the plaintiffs, or each of them, concerning the treatment of the late Mr.

Bradley. Evidence of those interactions is plainly of potential relevance to the claim which each plaintiff makes. Thus, even if medical professionals were giving evidence as regards their interactions on behalf of the defendant with the plaintiffs, or each of them, concerning Mr. Bradley and his condition and his treatment, there is a prospect of the self – same witnesses being required, at a later stage (possibly much later in the event of an appeal) to give evidence with regard to the treatment, as opposed to interactions with the plaintiffs concerning the treatment.

63. What can be said with certainty is that, regardless of how the defendant frames the question - be that as articulated in the correspondence and affidavits or as framed in the three questions helpfully articulated by the defendant's counsel and representing three out of five requirements for a successful nervous shock claim - it is impossible for me to conclude that what the defendant refers to as "*liability witnesses*" would not, in fact, be required to give evidence in order for the first module to be determined. That being so, I cannot fairly conclude that there is a genuine prospect of a saving of costs or time.
64. With regard to the foregoing issue, counsel for the defendant also made the submission during the hearing that, if the course urged by the defendant were adopted, there would be "*. . . court savings of a week or maybe two weeks with certain liability witnesses no longer having to give evidence . . .*" (see transcript, p. 32, line 28). Counsel for the defendant made a range of submissions with force, commitment and skill, but it is fair to say that the foregoing submission is not based on any evidence which is before the court. As I observed when discussing the affidavits, the defendant makes an assertion in general terms only that savings will arise. There was, however, no attempt to estimate, for example, the number of witnesses likely to be required for a full unitary hearing as opposed to the number of witnesses which the defendant regards as being required to fairly determine the first issue in a modular trial. The defendant does not provide any information as to how many medical professionals were involved in the treatment of the late Mr. Bradley and whether those representatives of the defendant who interacted with the plaintiffs or either of them is said to comprise a smaller sub-set of the total number of medical professionals involved in Mr. Bradley's care.
65. Furthermore, even the defendant acknowledges – very appropriately - that, in order for a modular trial to proceed in the manner contended for, evidence might be required from nurses or doctors who treated Mr. Bradley "*as to what was their interaction with the plaintiffs*" (See transcript, p. 38, line 23). The defendant's counsel characterises the foregoing as "*a discrete issue*" if there was a requirement "*for one or two of them to be called*" concerning their interactions with the plaintiff. However, there is no evidence before this Court that only "*one or two*" representatives of the defendant interacted with the plaintiffs, or either of them, and this Court cannot fairly hold that in order for the first module to be determined, there would only be "*one or two*" of the defendant's medical professionals who would have to give evidence as to their interactions with the plaintiffs. Any and all representatives of the defendant who interacted with the plaintiffs would appear to be potentially relevant witnesses in respect of a determination of the question or questions contended for by the defendant. Furthermore, and to the extent that those

professionals were involved in the treatment of Mr. Bradley, the self – same witnesses are also of relevance to the liability issue which the defendant contends should not be dealt with if a modular approach is taken.

66. The approach contended for by the defendant was put, during oral submissions by the defendant's counsel, as follows: -

"The issue of breach of duty, I'm saying, should be parked. The issue of causation of nervous shock, as opposed to causation of the injury to Mr. Bradley, certainly is an issue. And the assessment of damages, if the plaintiffs are successful, well, then maybe mediation may come back into play. So the real key issue here is: do these plaintiffs, in this factual matrix, give rise to a factual set of circumstances, given public policy – and public policy is very important here, Judge – for nervous shock?" (see transcript p. 28, line 8).

67. A number of comments seem to me to be appropriate with regard to the foregoing. It is plain that considerable reliance is placed by the defendant on the decision in *Morrissey*, wherein the learned judge referred to public policy concerns. The present application is not, of course, the hearing of a substantive issue and in my view nothing in *Morrissey* is determinative of the present motion. Furthermore, and this is in no way a criticism of the defendant or their legal advisers, I take the view that the module contended for by the defendant is (to quote from para. 47 of the Supreme Court's decision in *Weaving*) *"insufficiently precise and its parameters are open to legitimate debate"*. I take this view regardless of how the defendant frames the question or questions because it seems to me that, in light of the pleaded case, there is a very significant overlap in terms of the witnesses potentially relevant to the issues which the defendant contends should be dealt with first by way of a modular trial, as opposed to the issues which the defendant contends should be left over.
68. I also take the view that, irrespective of how the defendant has framed the question or questions, be that on affidavit or in oral submissions, in order for any trial judge to determine what is contemplated in the first module would (to quote again from *Weaving*, para. 46) *"require a drilling into the detailed facts"*. That this is so cannot be in doubt and earlier in this decision, I quoted at some length from the personal injuries summons which contains a detailed narrative of facts all of which are put in issue. To determine the first module would undoubtedly require a fact-finding exercise by the trial judge. When counsel for the defendant refers in his submission to *"this factual matrix"*, it is important to note that there are no agreed facts. This is not, for example, the trial of a preliminary issue where, for the purposes of determining that issue, there is no dispute in respect of the facts. On the contrary, all material facts are in dispute.
69. When looking at the affidavit evidence before the court, I observed that the defendant did not seem to me to have engaged with the consequences, both in terms of practicalities and fairness, in the event of an appeal by either party following a determination of the first module in the manner contended for. Nor, it seems to me, has the defendant adequately addressed the reality that, in claims for nervous shock, expert evidence by

psychiatrists is not only relevant to establishing the existence of a psychiatric injury, but also of fundamental relevance to the question of damages. Yet the approach contended for by the defendant would involve expert psychiatrists giving evidence to establish injury, but with the question of damages left over. In the event of the defendant being unsuccessful in the first module and appealing it is inconceivable that there would not be months if not years of delay until the appeal was determined. Depending on the outcome of such an appeal, there is a prospect of the court having to determine the damages issue years after the expert psychiatrists gave their evidence. What, from the perspective of practicality and fairness would be done in that case? As counsel for the plaintiffs submit, the defendant has never suggested any way in which the assessment of damages would not involve an entire rehearing of all events that occurred and the effect that those had on the plaintiffs. Furthermore, in the foregoing scenario is the question of damages to be determined years after expert psychiatrists gave their evidence? Counsel for the plaintiff highlights, and earlier in this judgment I touched on other questions which naturally arise, such as: what role the DAR would play? Whether further cross-examination would be allowed? Whether evidence would be given again, or a "refresher" of that evidence presented? What happens if the judge who dealt with the first module has retired or is no longer available? As counsel for the plaintiffs fairly points out, these are matters which arise but which are not addressed by the defendant in the present application.

70. It can also be said that the present motion does not involve a proposal to split the issue of liability from the issue of quantum. Rather, it is an application which seeks to have some, but not all, of the issues relevant to liability tried as a module, prior to the balance of the issues concerning liability (as well as the issue of quantum) being determined. No facts are agreed, and regardless of how the defendant has framed the question or questions, it is plain that what the defendant contends should be dealt with first by way of a modular trial involves mixed questions of fact and law for which evidence would need to be led by both sides. At a minimum, this would require evidence from the plaintiffs, from expert psychiatrists on both sides and from medical professionals who interacted with the plaintiffs. I accept the submission made on behalf of the plaintiffs that whether a particular plaintiff suffered "*nervous shock*" as that term is understood in law, cannot be tried in a vacuum and it can only be considered in the context of the factual matrix pertaining at the relevant time. The factual matrix in the case of the plaintiffs, is concerned with medical treatment of their father/husband which was allegedly negligent and caused him injury and the plaintiffs plead that they sustained personal injuries as a result of the circumstances involving the late Mr. Bradley's treatment.
71. It seems to me that counsel for the plaintiff is correct in the submission that the factual evidence necessary for the court's assessment of whether, and in what circumstances, an injury was sustained are the same facts as feed into the assessment of whether the defendant was in breach of duty. I also accept the submission that the court cannot come to a final conclusion on the assessment of disputed facts in the absence of hearing all of the evidence relevant to that determination and that there is a significant potential for unfairness in the event that, in a subsequent module determining the balance of the liability issues in the manner contended for by the defendant, the plaintiffs were to be

bound by findings of fact made at a time when all of the relevant evidence, to include expert medical evidence, was not before the court.

72. The foregoing highlights that the question or questions which, according to the defendant, should first be determined by way of a modular trial are not truly issues which are capable of determination in isolation from the other issues in dispute between the parties. For the reasons explained, I have no hesitation in answering question (i) as posed by Charleton J. in *McCann v. Desmond*, in the negative. In my view, the pleaded in the present proceedings case can, to quote Charleton J. "be characterised as an organic whole, the taking out from which of a series of issues would tear the fabric of what the parties need to litigate, so that the case of either of the plaintiff or the defendant would be damaged through being seen in the isolated context of a hearing on a number of limited issues".
73. As to question (ii), a clear saving in the time of the court and the costs that the parties might have to bear has not been identified in my view. It has been asserted on behalf of the defendant, but only in general terms, that a saving of time and costs will result from a modular approach. It is fair to characterise this as a "bald" assertion however. This is in circumstances where, in opposing the reliefs sought, the affidavit sworn on behalf of the plaintiffs raises a range of issues which undermine the proposition that a saving of cost and time is likely (including, but not at all limited to the question of an appeal after the first module) and other than to say that these averments are "disputed", there is no detailed engagement with these issues on behalf of the defendant. Nor have any details been given in respect of any identifiable savings. Furthermore, although asserting that a modular approach would do away with the need for "liability witnesses", the defendant accepts, very properly, that the defendant's doctors and nurses might be required as witnesses even to determine the first module (those self-same witnesses being inevitably of relevance to the liability issue which the defendant argues should be hived off).
74. Regarding question (iii) as posed in *McCann v. Desmond*, I take the view that to direct a modular trial could result in prejudice to the plaintiffs. It seems to me that the evidence likely to be relevant in order for the court to determine whether the plaintiffs sustained a recognisable psychiatric illness and whether that illness was shock-induced is inextricably linked with evidence relevant to whether such injury was caused by a breach of duty on the defendant's part. Furthermore, I take the view that for some, but not all, of the issues relevant to liability to be tried as a preliminary module also has the potential to cause prejudice including but not limited to significant delay, e.g. in the event of an appeal where the approach contended for by the defendant would see evidence which is of fundamental relevance to the question of damages being adduced, including by expert psychiatrists, during the first module with the potential for no determination of the question of damages, subject to the outcome of an appeal by either party, until years later.
75. The suggestion made on behalf of the defendant that "*mediation may come back into play*" (see transcript p. 28, line 12) in the event of the plaintiffs being successful following

the determination of the first module does not seem to me to adequately address the potential prejudice caused by delay as a result of an appeal which would mean the damages issue potentially not being dealt with until years after relevant evidence was given. That is in no way to criticise the defendant or their legal representatives who conducted the application with commitment, professionalism and skill. It is, however, to acknowledge that this is a case where there are very significant overlaps in relation to the evidence and witnesses which would need to be heard and there is an artificiality, in my view, in attempting to hive off some, but not all, of the issues relevant to liability whilst also proposing to leave the question of damages for a later date, even though evidence relevant to whether the plaintiffs have sustained recognisable psychiatric illness is also of relevance to the damages issue and evidence from medical professionals who treated the deceased and interacted with the plaintiffs is relevant to issues which the defendant wishes to have determined by way of a first module *and* to issues which the defendant does not want to have dealt with in this manner. Satisfied, as I am, that prejudice might occur if this Court were to order a modular trial, I am entirely convinced that this Court should not depart from what, it must be remembered, is the default position.

Decision summarised

76. As Costello J. noted in *James Elliott Construction Limited*: "*The burden of satisfying a court that a modular trial should be directed rested upon the moving party*" and the applicant has not discharged that burden. I take this view cognisant of the emphasis laid by Costello J. on ensuring that the trial was a fair one. In my view, if the court were to grant the reliefs sought, it has the potential to give rise to very real unfairness.
77. No adequate reason or reasons have been advanced which would justify divorcing certain liability issues from others (i.e. determining 3 out of 5 only of the requirements for a successful claim for "nervous shock" as identified by Hamilton C.J in *Kelly v. Hennessy*) as well as divorcing from those 3 liability issues, the question of quantum.
78. Having carefully considered the pleadings and the affidavit evidence before the court, I agree with the submission made on behalf of the plaintiffs that the present case is one in which the evidence relating to liability, causation and damages is strongly interlinked and overlapping.
79. They are not in my view clearly discrete and separate issues capable of being tried and determined without reference to the other, having regard to the pleaded case and the full defence and in circumstances where no facts whatsoever are agreed (and had the application been to seek the trial of a preliminary issue, the court would not have ordered same).
80. I take the view that what the defendant seeks to have determined by way of a preliminary module is not truly capable of determination in isolation from the other issues remaining in the case thereafter.
81. A careful consideration of the evidence does not entitle me to conclude that any clear saving of court time or costs has been identified if a modular trial were to be ordered.

82. It seems to me that there is a genuine prospect of prejudice to the plaintiffs and the possibility of injustice arising if an attempt were made to determine, in the present proceedings, some, but not all issues which touch on liability.
83. I am satisfied that the question (or 3 questions) which, according to the defendant should first be determined by way of modular trial are questions of complexity involving what is likely to be a lengthy hearing, necessitating evidence from numerous witnesses and requiring the court to engage in very considerable fact-finding on a range of matters all of which are in dispute.
84. I also take the view that there is a very real prospect of legitimate debate as to the ambit of the first module which, it seems to me, is not at all a "net" or specific issue, but one inextricably interlinked with other issues which, according to the defendant, should not be addressed in the first module and I regard the defendant as attempting to divide, artificially, what in the present case is not truly divisible.
85. As well as that fear of injustice, I am entitled to conclude that there would certainly be inefficiency involved in attempting to determine some, but not all, of the elements of a nervous shock claim without reference to other liability issues and I am satisfied that it is neither just nor convenient to order a modular trial.
86. I am entirely satisfied that the effect of ordering a modular trial as contended for by the defendant could very well be to make the present proceedings more costly, more complex and more time-consuming and the defendant's suggestion that "*mediation may come back into play*" (see transcript page 28, line 13) in the event of the defendant being unsuccessful following a hearing of the first module is no answer, in my view, to the likelihood of additional complexity, cost and delay.
87. There is no question in these proceedings of the defendant being involved in only certain of the issues which must be determined at trial and, thus, no question of the need to "insulate" a party involved only with some of a range of issues.
88. This is not a case where there are a range of approaches to the calculation of damages depending on the basis upon which liability may be established.
89. Regardless of the undoubted sophistication and skill with which submissions were made on behalf of the defendant, I am satisfied that, in light of the evidence and for the reasons detailed in this judgment, the defendant's application should be refused.
90. With regard to the question of costs, my preliminary view is that costs should follow the event in circumstances where the plaintiffs have been entirely successful in their opposition to the defendant's motion. If a different order as to costs is contended for, written legal submissions should be furnished within 14 days from the date of this judgment.