



THE COURT OF APPEAL

[2022] IECA 83

Record Number: 2021/314

High Court Record Number: 2018/10201P

**Costello J.
Noonan J.
Faherty J.**

BETWEEN/

JOAN O'FLYNN

PLAINTIFF/RESPONDENT

-AND-

**HEALTH SERVICE EXECUTIVE AND SONIC HEALTHCARE (IRELAND) LIMITED AND
MEDLAB PATHOLOGY LIMITED AND
CLINICAL PATHOLOGY LABORATORIES INCORPORATED**

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Noonan delivered on the 1st day of April, 2022

1. This appeal is concerned with the proper implementation of the disclosure regime introduced in personal injuries litigation by S.I. 391 of 1998.

Background

2. The claim of the respondent ("the plaintiff") is one of many arising out of the operation of the National Cervical Screening Programme, better known as CervicalCheck. On the 20th October, 2010, the plaintiff underwent a cervical smear test as part of this programme. The plaintiff alleges that her sample was negligently analysed and reported as normal, when it was, in fact, abnormal. The plaintiff claims to have suffered personal injuries as a result. The operation of the sampling system is described in more detail in the judgment of this court in these and related proceedings *sub nom Wallace v HSE & Ors.* [2021] IECA 141.
3. The personal injury summons herein was issued on the 22nd November, 2018. By the time of the commencement of the proceedings, there was one expert report available to the plaintiff's solicitors from Professor John Shepherd, a consultant surgeon and gynaecological oncologist, dated the 5th August, 2018.

4. The plaintiff's solicitors herein are also the legal representatives of a significant number of women bringing similar claims relating to the operation of the CervicalCheck scheme.
5. The second, third and fourth defendants in these proceedings are all related entities to which the first defendant contracted the examination of cervical smear samples. In the course of this appeal, counsel for the plaintiff informed the court that there is, in reality, one participating defendant in this case, namely the fourth defendant, Clinical Pathology Laboratories Incorporated ("CPL"). Counsel for CPL did not disagree with this characterisation.
6. The personal injuries summons contains particulars of negligence in the normal way which are fairly generic. Thus, beyond pleading that the defendants failed to properly interpret and report on the plaintiff's sample, no greater detail is given as to the particular acts or omissions on the part of the defendants, (in reality CPL), that are said to constitute the negligence in this case. I do not overlook the fact that it is also alleged that the defendants were otherwise negligent in failing to disclose to the plaintiff the facts and circumstances surrounding a subsequent review of her smear sample carried out some years later. However, the key allegation for the purposes of this appeal is the misreading of the sample.
7. After a considerable interlude, on the 9th March, 2020, CPL's solicitors served a notice for particulars arising out of the summons. No queries were raised with regard to the particulars of negligence beyond seeking confirmation that those contained in the summons were final, or if not, that final particulars be furnished. No particulars were sought as to the manner in which it was alleged that CPL had misread the sample and the precise acts or omissions that were alleged to have constituted such negligence.
8. In her replies to the notice for particulars, the plaintiff simply reserved the right to amend and serve further particulars. In fact, no further particulars of negligence were at any time delivered by the plaintiff. All subsequent particulars were essentially concerned with updating the particulars of personal injury.
9. On the 22nd January, 2020, the plaintiff's solicitors called upon CPL's solicitors to deliver their defence. On the 30th January, 2020, CPL's solicitors said in response that they had yet to receive the relevant pathology slide from the plaintiff's expert, Dr. McKenna, and further: -

"Our client is not in a position to deliver a Defence until an expert report has been obtained on its behalf following a review of cytology slide ZA376669."

10. Despite that statement, CPL delivered its defence on the 2nd February, 2021, apparently without the benefit of such expert report, and beyond putting negligence in issue, no particular complaint was advanced that the plaintiff's claim had not been properly pleaded or was inadequately particularised to a sufficient extent to enable CPL to know the case it had to meet. At para. 1 of the defence, CPL pleaded that it awaited receipt of all relevant and necessary documentation and/or medical records from the plaintiff which its experts required sight of before advising on the alleged negligence. As would be usual, this was

presumably a reference to discovery of all of the plaintiff's relevant medical records which would clearly be required by CPL's experts prior to preparing a report. There was no suggestion that CPL's experts could not prepare a report until they saw the plaintiff's reports nor could such a proposition be understood from this plea. Indeed, CPL's statement above quoted is inconsistent with such suggestion. At the time it delivered its defence, CPL had been in possession of the relevant slide for about a year, having received it from the plaintiff's solicitors in February 2020.

11. Before the matter was set down for trial, a further issue emerged. CPL said that its experts required to carry out what is known as a blind review of various slides, including those of this plaintiff, in order to properly present its case. In order to carry out such a review, CPL said it was necessary to remove various markings from the original slides. That issue was contested in the High Court and again on appeal in this court resulting in the *Wallace* judgment above referred to. This court remitted the matter to the High Court for further determination which resulted in the order of the High Court (Reynolds J.), made on the 29th October, 2021, permitting the removal of the markings.
12. On the 13th July, 2021, the plaintiff's solicitors advised CPL's solicitors that they intended to apply to the High Court on the 27th July, 2021 for a specially fixed trial date. CPL's solicitors responded that this was premature in the absence of the plaintiff's S.I. 391 disclosure schedule. In response, the plaintiff's solicitors served the plaintiff's disclosure schedule on the 26th July, 2021.
13. The plaintiff's schedule lists nine experts as follows: -
 - (1) Professor Shepherd who, as noted above, provided a report on the 5th August, 2018. He provided a subsequent report in June 2019.
 - (2) Dr. Michael McKenna, Consultant Cellular Pathologist, whose report is dated the 12th April, 2019. Dr. McKenna will be a liability witness, if not the main liability witness, in relation to CPL's alleged negligence in reading the slide, this being his area of expertise.
 - (3) Professor Michael Wells, Consultant Gynaecological Pathologist, whose report is dated the 13th November, 2020.
 - (4) Professor David Radstone, Consultant in Clinical Oncology, whose report is dated the 23rd May, 2020.
 - (5) Professor Michael R. Keighley, Consultant Colorectal Surgeon, whose report is dated the 9th October, 2020.
 - (6) Dr. John Hillery, Consultant Psychiatrist, whose report is dated the 25th May, 2020.
 - (7) Ms. Noreen Roche, Nursing Consultant, whose report is dated the 1st April, 2021.

- (8) Ms. Avril McElwain, Occupational Therapist, whose report is dated the 29th November, 2020.
- (9) Segrave-Daly & Lynch, Consultant Actuaries, whose report is dated the 23rd June, 2021.
14. Since the service of this disclosure notice, the plaintiff's solicitors have not served any subsequent updated disclosure notice and appear not to intend to do so.
15. It would appear that the parties appeared before Cross J. on the 27th July, 2021 for the purpose of seeking a specially fixed trial date. Cross J. fixed the 29th April, 2022. On the same day, CPL's solicitors wrote to the plaintiff's solicitors in the following terms: -

"Dear Colleagues,

Please find enclosed Schedule of Experts and Witnesses in accordance with S.I. 391 of 1998 by way of service upon you.

We suggest an exchange of all reports listed in our respective clients' Schedules at 2pm tomorrow, 28 July 2021 in accordance with Order 39, Rule 46 RSC. Our client confirms that as per the decision in *Harrington v Cork County Council* that your client's reports will not be given, directly or indirectly, to any expert retained by our client until after such expert has furnished his report.

We await hearing from you failing which we have liberty to mention this matter to Mr. Justice Cross on Friday 30 July 2021 when if necessary we will be seeking an Order directing that all reports listed in our respective client's Schedules be exchanged at 5pm on Friday 30 July 2021 in accordance with Order 39 Rule 46 subject to the *Harrington* undertaking being provided by our client."

16. The plaintiff's solicitors did not respond to this proposal and on the last day of term, the 30th July, 2021, CPL applied to Cross J. for liberty to issue a motion compelling the plaintiff to disclose all her reports to CPL. It would appear that Cross J. granted leave to CPL to issue a motion returnable to early in the following term.
17. On the 8th September, 2021, CPL's solicitors served an updated S.I. 391 Schedule adding two experts, Dr. Peter Finian Kelly, Consultant in General Adult Psychiatry, and Ms. Niamh Terry, Nurse Consultant. In their covering letter, CPL's solicitors said: -
- "We confirm in accordance with Order 39, Rule 46(3) that **as of today's date** no further report exists which requires to be exchanged. Our client reserves the right to serve further reports which may be received prior to the trial of the action." (my emphasis)
18. On the 13th September, 2021, CPL issued a motion seeking an order compelling the plaintiff to exchange all reports in her schedule which was returnable to the 19th October, 2021.

That motion was heard by Cross J. on the 5th November, 2021 following which he delivered an *ex tempore* judgment.

Judgment of the High Court

19. He commenced by setting out the relevant provisions of O. 39, rr. 45 to 51 dealing with disclosure of reports and statements. He noted CPL's submission that under the terms of r. 46(3), where a party certifies that no report exists which requires to be exchanged, the opposite party is then required to deliver its reports. He noted that CPL had volunteered a *Harrington* undertaking and relied on a number of other authorities to which I will come in due course. He noted CPL's complaint that it had not received particulars of negligence and required the reports to understand those and avoid surprise at the trial.
20. The plaintiff opposed the application on the basis that CPL required the plaintiff's report so that they could assess the strengths and weaknesses of her case before committing to instruct their own expert(s) and produce responding report(s). The plaintiff submitted further that CPL was not the same as a normal defendant in the sense that it had a battery of in-house experts to assess the plaintiff's reports and analyse the strengths and weaknesses of her case. The judge acknowledged the practice that had developed of exchanging "like for like" reports or alternatively, of accepting *Harrington* undertakings where appropriate. He noted that the obligation was clear in the statutory instrument to exchange and that if the defendant has nothing to exchange, the plaintiff is still obliged to make disclosure. In the circumstances however, he felt that a *Harrington* undertaking was not sufficient to ensure fairness because of the particular circumstances of CPL.
21. While, therefore, he accepted the statement on behalf of CPL that it do not intend to use the plaintiff's reports for litigious advantage, he went on to say: -

"... I believe that there is a clear, present and real danger that if the reports are furnished to the defendant merely on a *Harrington* undertaking, that they will then – and the clients will ask them and normally they will be entitled to them.

These defendants are a body who are not in any way similar to the defendants in the [cases] that have been cited; they have a particular body of experts, they have a particular area of resources. And without any infringement of the averments contained in the defendant's affidavit, I believe that the primary purpose that these reports will be used, if merely a *Harrington* undertaking were given, would be, in effect, or might well be, or would be feared to be by the plaintiff – any of those reasons, I think, would create an unfairness – would be to give a litigious advantage to a well heeled and well [resourced] defendant."

22. In those circumstances, the judge declined to make an order directing disclosure of the plaintiff's reports based merely on a *Harrington* undertaking. He proposed in the alternative that if the defendants were prepared to give an undertaking to the effect that the reports would be disclosed only to CPL's legal team, but not CPL itself, that he would be prepared to allow the application on those terms. He allowed the parties to take instructions on this

proposal but both sides agreed that it was unworkable and accordingly, the application was refused.

The Disclosure Regime

23. The passage of the Courts and Courts Officers Act, 1995, and in particular s. 45, ushered in a new era in the conduct of personal injuries litigation. It empowered the Rules Committees of the Superior Courts and the Circuit Court to adopt rules requiring parties to personal injuries actions to disclose to each other the expert reports upon which they intended to rely at trial and to identify in advance any witness as to fact intended to be called. It also empowered the Rules Committees to impose sanctions for non-compliance with any such new requirement.

24. This resulted in S.I. 391 of 1998 - Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements), 1998. This S.I. added new rules 45 to 51 into O. 39 of the RSC dealing with evidence. In *Naghten (A Minor) v Cool Running Events Limited* [2021] IECA 17, I described the new rules thus: -

"32. S.I. 391 of 1998 was introduced to bring about a degree of transparency designed to avoid trial by ambush and as a consequence, in theory at least, to facilitate earlier resolution of personal injuries litigation. This was seen to be particularly important in the context of expert evidence where there was a perceived absence of equality of arms or, to use a more current expression, a level playing field. The requirement for simultaneous exchange of expert evidence meant that plaintiffs no longer laboured under the disadvantage of having to call their expert evidence without knowing what the defendant's expert might say, or indeed if the defendant had an expert at all. This conferred litigious advantage on defendants which was rightly seen as unfair."

25. Even a cursory examination of the new rules disclosed a clear intention to avoid unfairness and ensure that parties met on equal terms. They were intended to address, amongst other things, the litigious advantage previously enjoyed by defendants described above. To borrow an analogy from another area of litigation, the intention was to ensure that both sides went into the trial with their cards face up on the table. Judicial consideration of the rules since their introduction have interpreted them, where necessary, to ensure the fairness and transparency they were designed to bring about.

26. It is convenient to set out now the rules in so far as relevant to this appeal: -

"46. (1) The plaintiff in an action shall furnish to the other party or parties of their respective solicitors (as the case may be) a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the court.

Within seven days of receipt of the plaintiff's schedule, the defendant or any other party or parties shall furnish to the plaintiff or any other party or parties a schedule listing all reports from expert witnesses intended to be called. Within seven days of

the receipt of the schedule of the defendant or other party or parties, the parties shall exchange copies of the reports listed in the relevant schedule.

- (2) The parties in an action shall exchange with the other party or parties or their respective solicitors (as the case may be) the information and statements referred to in section 45(1)(a)(iii), (iv) and (v) within one month of the service of the notice of trial or within such further time as may be agreed by the parties or permitted by the Court.
- (3) In any case where a party or his solicitor certifies in writing that no report exists which requires to be exchanged pursuant to subrule 1, any other party shall, on the expiry of the time fixed, agreed or permitted (as the case may be) deliver any report within the meaning of the section to all other parties to the proceedings.
- (4) Any party who, subsequent to the delivery required by subrule (1) above, obtains any report within the meaning of the section or the name and address of any further witness, shall forthwith deliver a copy of any such report or statement or details of the name and address of any such witness (as the case may be) to the other party or parties or their respective solicitors (as the case may be).

...

- (6) Any party who has previously delivered any report or statement or details of a witness may withdraw reliance on such by confirming by letter in writing that he does not now intend to call the author of such report or statement or such witness to give evidence in the action. In such event the same privilege (if any) which existed in relation to such report or statement shall be deemed to have always applied to it notwithstanding any exchange or delivery which may have taken place."

27. R. 47 allows a party to bring a motion seeking directions arising from non-compliance with r. 46. It empowers to court to make a range of orders on foot of such an application including "such other order as the justice of the case may require".

28. R. 48 provides for the powers of the court where there has been non-compliance with the rules and r. 50 provides as follows: -

"50. (1) In any case application may be made to the Court by motion on notice by any party for an order that in the interests of justice the provisions of rule 46 shall not apply in relation to any particular report or statement (or portion thereof), which is in the possession of such party and which he maintains should not be disclosed and served as required. The Court may, upon such application, make such order as to it seems just. ..."

29. The first consideration of the new rules at appellate level was in *Galvin v Murray and Cork County Council* [2001] 1 IR 331. In that case, engineers employed by the County Council had prepared reports for the purposes of the proceedings on technical matters but the reports also included comments by the engineers on other matters which the Council did

not wish to disclose. The Council accordingly made an application under O. 39, r. 50(1) seeking, in effect, to exempt them from the requirement to provide the reports to the plaintiff. The issue that appears to have arisen in that case was whether the Council's own engineers were to be regarded as "experts" within the meaning of the rule. The High Court held that they were not and the plaintiff appealed. The Supreme Court allowed the appeal holding that the Council engineers were in fact "experts" within the meaning of O. 39, r. 46.

30. In the course of giving a judgment with which the other members of the court agreed, Murphy J. said (at p. 336): -

"Of course it must be remembered that reports such as those obtained by the second defendant from its own engineers are documents which would be privileged from discovery. It is only if and when the employer determines to call the authors of the reports to give evidence that the requirement of disclosure arises. Clearly, the disclosure rules are designed to forewarn other parties of expert evidence with which they may be confronted. The rules have no role to play in investigating the strengths or weaknesses of an opponent's case."

31. Murphy J. went on to note that in a case such as the present, the court could make an order under O. 39, r. 50 to redact the sensitive parts of the report if it thought appropriate to do so. He continued that if in-house experts were not to be regarded as captured by the rule, it would lead to unfairness, saying (at p. 337): -

"On the other hand, if that or any other factor of itself were to permit an employee/expert to escape the requirements of the disclosure rules, it would mean that substantial corporations with a wide variety of in-house experts would have the advantage of knowing the expert evidence to be adduced by their opponents without having themselves to provide a comparable facility. That would be a manifest injustice."

32. Although some reliance was placed on this latter passage by counsel for the plaintiff in this appeal, the injustice identified by Murphy J. appears to be the possibility that the plaintiff would have to disclose his expert reports, but if the defendants had in-house experts and intended to call them to give evidence, they would be exempt from the requirement to provide their reports to the plaintiff, a clear unfairness.

33. A different issue arose in *Kincaid v Aer Lingus Teo* [2003] 2 IR 314. In that case, the defendant included a well-known orthopaedic surgeon, Mr. Mulvihill, in its disclosure schedule but before the exchange of reports took place, withdrew reliance on him. The plaintiff claimed this was impermissible and she was entitled to see the report and the witness could not be withdrawn until that happened. The High Court agreed with that proposition, but the Supreme Court allowed the appeal. The sole judgment was given by Geoghegan J. with whom the other members of the court agreed.

34. In considering the judgment of the High Court, Geoghegan J. said (at p. 317 – 318): -

"[The High Court Judge] found that it was not an 'easy call to make' and that O. 39, r. 46 seemed to contain conflicting provisions. However, the judge came down in favour of the plaintiff on the grounds that the rules were intended to provide for 'an element of mutuality which would guarantee transparency between the parties'. He seems to have considered it to be contrary to the intentions of the rules-making committee that one side could see the report of another and then, perhaps on foot of what it saw, withdraw reliance on a witness included in its schedule of reports and on the report itself. As I will endeavour to explain, it does not necessarily follow, on the wording of the rules, that that abuse, if it is an abuse, could necessarily be achieved but, even if it were so, it is not, in my opinion, relevant to the question at issue. The purpose of the rules is not to disclose the strengths and weaknesses of each other's case but, rather, to prevent surprise evidence being thrown up at a trial with which the other party, at that stage, is unable to deal."

35. The "abuse" with which the High Court appears to have been concerned was a defendant seeing a plaintiff's report and on foot of that, proceeding to withdraw reliance on its own report. That of course could only arise in circumstances where there had been a non-simultaneous exchange and the defendant was reacting to the plaintiff's report by withdrawing its own. That is presumably what occurred in *Kincaid*. What was considered by the High Court to be objectionable was the opportunity to evaluate the plaintiff's reports and then decide whether to rely on the defendant's own existing reports or not. The unfairness therefore envisaged by the High Court was the ability of a defendant to assess the strengths and weaknesses of his opponent's report before committing to produce a report it had already obtained, unlike in the present case where CPL wishes to see the plaintiff's reports before even deciding if it will instruct an expert or not

36. The pragmatic solution to that "abuse" was identified by Geoghegan J. (at 320):

"There is just one other observation which I think it relevant to make. The obligation under O. 39, r. 46(1) is to 'exchange' scheduled reports. If a party's solicitor ensures that the 'exchange' is contemporaneous, there is no danger of the so called 'abuse' arising.

If each party's solicitor ensures that an actual contemporaneous exchange of reports takes place, there is no danger that the procedure can be abused in the manner suggested by the plaintiff."

37. These comments were subsequently considered by the High Court (Kearns P.) in *Harrington v Cork City Council and Anor.* [2015] 1 IR 1.

38. There, the plaintiff delivered his schedule of expert witnesses and reports pursuant to O. 39, r. 46 (1). The first defendant delivered its schedule certifying the non-existence of any reports requiring exchange but reserving its right to produce such reports subsequently. The plaintiff refused to disclose his reports unless the first defendant was prepared to provide an undertaking that it would not make the plaintiff's reports, directly or indirectly,

available to any experts subsequently retained by the first defendant. The first defendant refused.

39. Accordingly, the first defendant brought a motion seeking the directions of the court under O. 39, r. 46. Although it does not appear from the terms of the judgment itself, the head note to the official law report suggests that the plaintiff in response argued that the court should exercise its power under O. 39, r. 50 to exempt him from the ordinary disclosure rules or alternatively require the first defendant to furnish the undertaking.
40. In the course of his judgment, Kearns P. referred to the passage from *Kincaid* cited above saying (at 4): -

“The Supreme Court in *Kincaid v. Aer Lingus Teo*. [2003] 2 I.R. 314 held that the ‘exchange’ of reports should be contemporaneous to avoid the danger that the rules can be abused to enable one party to gain an advantage over another.”

41. He also cited the *dicta* of Murphy J. in *Galvin* to which I have already made reference noting that the plaintiff and the first defendant agreed that the disclosure rules had no role to play in investigating the strengths or weaknesses of an opponent’s case. The President went on to say (at 4): -

“[7] It is the plaintiff’s submission that *fairness* requires that his obligation, which is not disputed, to disclose his reports in accordance with O. 39 r. 46(3) be conditional upon the first defendant’s undertaking that those reports will not be given, directly or indirectly, to any expert retained by the first defendant until after such expert has furnished his report. The plaintiff submits that should he be required to disclose his expert reports under the current circumstances the first defendant would obtain an unfair litigious advantage which was the very tactic the Supreme Court feared in *Kincaid v. Aer Lingus Teo*. [2003] 2 I.R. 314.

[8] In order to guard against this injustice the plaintiff urges the court to invoke its inherent jurisdiction and duty to protect the fairness of its own processes. ...

[9] In addition to the court's inherent jurisdiction the plaintiff submits that O. 39, r. 50 expressly recognises the risk of injustice in the disclosure process by providing that the court can, in the interests of justice, make an order that the provisions of r. 46 shall not apply in relation to any particular report or statement (or portion thereof), which is in the possession of such party and which he maintains should not be disclosed and served as required.”

42. Having considered a number of arguments advanced by the defendant, Kearns P. expressed his conclusion in the following terms (at 7): -

“[16] I am satisfied by reference to the various authorities cited that the requirements of fairness require a simultaneous exchange of expert reports and that requirement is not abrogated by the non-existence at this point in time of expert reports to the defendants. While specific cases have not been opened to the court, the

jurisprudence of the European Court of Human Rights in recent years has repeatedly emphasised the concept of 'equality of arms' in litigation and I think it fair to say that this concept has increasingly permeated judicial thinking in this jurisdiction also. The plaintiff's apprehension that the first defendant will secure a litigious advantage in the current circumstances obtaining in this case is not one without any foundation."

43. The court went on to observe that there was no suggestion that the defendant did not in fact intend to retain an expert and although the first defendant had certified that no report existed so that the onus fell on the plaintiff to furnish his reports, the court ordered that the plaintiff's disclosure be conditional upon the first defendant's undertaking that the reports would not be given, directly or indirectly, to any expert retained by the first defendant until after such expert had furnished his report.
44. I think a number of points emerged from *Harrington*. The first is that it was not an O. 39, r. 50 application by the plaintiff but rather an O. 39, r. 46 application by the first defendant. In responding to the application, the plaintiff relied both on the court's inherent jurisdiction to prevent an abuse of process and that arising under r. 50. Second, the plaintiff volunteered to disclose his reports provided he was given an undertaking fashioned by the plaintiff's solicitor. Third, the court did not make a prescriptive order compelling the plaintiff to disclose his reports and compelling the defendant to furnish the undertaking. Rather, what Kearns P. said was "It is the order of this court that the plaintiff's disclosure of his reports in accordance with O. 39, r. 46(3) be conditional upon the first defendant's undertaking...".
45. In other words, the court held that the plaintiff was not obliged to furnish his reports unless and until he received the undertaking. The defendant remained free to decline to give the undertaking but of course it made little sense not to do so. The plaintiff's disclosure was ultimately made on a consensual basis, the plaintiff having from the outset indicated that he was prepared to disclose his reports once he received the assurance sought. There is no question of the court having imposed the undertaking on the plaintiff. The plaintiff was always willing to accept it, unlike the plaintiff in the present proceedings.
46. Although the formula adopted in *Harrington* has come into widespread use as a convenient template to facilitate disclosure by plaintiffs of their expert reports where no corresponding reports exist on the other side, a *Harrington* undertaking, as it is now known, is not something that can be foisted upon an unwilling plaintiff. The undertaking was devised to avoid the potential unfairness identified by the authorities as arising from non-simultaneous exchange. As I noted (at para. 25) in *Dunne v Grunenthal and Ors* [2018] IEHC 798, in both *Kincaid* and *Harrington*, the court identified the non-simultaneous exchange of expert reports as potentially amounting to an unfair litigious advantage.
47. In the same case I also said (at para. 23): -

"The landscape in personal injury litigation was significantly changed by the introduction of the disclosure regime comprised in S.I. 391 of 1998 in regard to expert reports. One of the issues grappled with by practitioners was whether the S.I.

required simultaneous exchange. It was often argued that it would be patently unfair for a plaintiff to be compelled to disclose his or her expert evidence to a defendant before any reciprocal requirement on a defendant's part. That would enable the defendant to analyse and critique such reports with the benefit of expert assistance before being required to commit itself to producing such reports as it considers it suitable to respond."

48. In *Naghten* (op. cit.), the defendant furnished two disclosure schedules, neither of which included an engineer. The plaintiff's disclosure from the outset listed an engineer. On the third day of the trial, the defendant served a new disclosure schedule listing an engineer for the first time. By the time this schedule was served, the plaintiff's engineer had already actually given evidence before the High Court. The defendant's engineer provided a report which analysed and criticised the evidence of the plaintiff's engineer. Commenting on this, I said (at para. 35): -

"By its actions in this case, the defendant sought to, and did in fact, achieve an unfair litigious advantage of the kind identified by the Supreme Court in *Kincaid* as amounting to an abuse of process."

49. I went on to express considerable doubt as to whether an expert in the position of the defendant's expert ought to have been permitted to give evidence at all but reserved the question for an appropriate case where it might arise directly.
50. I think it important to note that in *Harrington*, as in this case, a literal application of O. 39, r. 46 required the plaintiff to make disclosure, but he refused to do so. In *Harrington*, the court exercised the wide jurisdiction conferred by r. 47 to permit the plaintiff to decline to make disclosure until the defendant satisfied a condition. That might be thought to be more appropriately the subject of a r. 50 application by the plaintiff. In the present case, counsel for CPL has emphasised that this court should not deal with its application as if it were a r. 50 application in the absence of the plaintiff bringing a motion under that rule.
51. I am not persuaded by that submission. The appropriate exercise of the jurisdiction of the court to regulate its own processes should not depend on who is first to the punch. In the present case, following the plaintiff's refusal to disclose, CPL almost immediately asked Cross J. for liberty to issue this motion and did so shortly thereafter. Had the plaintiff then sought to bring a r. 50 application, she might well have been open to the criticism that this was an unnecessary further accumulation of costs to deal with precisely the same issue.
52. Aside from the question of *Harrington* undertakings, the practice has evolved, now over many years, of exchanging expert reports on a "like for like" basis. This pragmatic approach adopted by practitioners which, like *Harrington* has no explicit basis in S.I. 391, recognises the reality that it is inevitable that in many, if not most, cases the plaintiff will obtain his or her expert reports before the defendant does so. Our adversarial litigation system requires that a plaintiff must first state their case and a defendant must then respond to it.

53. A plaintiff will normally have both liability and quantum experts retained before proceedings are commenced for obvious reasons. Thus, for example, an engineer's report may be required to enable the plaintiff's lawyers to advise whether there is a stateable case. Medical reports may be required to enable particulars of personal injuries to be properly and adequately pleaded. Indeed, in professional negligence cases, it is normally regarded as an abuse of process to commence proceedings without supportive expert evidence on liability. A defendant will sometimes, but not invariably, only know what case he has to meet when he receives the summons and in consequence, what experts he may require to defend the claim.
54. On the other hand, in many cases, the defendant will know a great deal about the plaintiff's case before any proceedings issue but a claim is anticipated. So, defendants' insurers will routinely investigate road traffic or industrial accidents at an early juncture and arrange medical examinations of plaintiffs once a claim is intimated. That is all part of the ebb and flow of litigation, but it is the exception rather than the rule that both sides will have all of their expert reports ready to be exchanged at the same time.
55. In order to avoid the now well-recognised unfairness arising from non-simultaneous exchange, the "like for like" practice has emerged as a way of preserving fairness while facilitating case progression. In the majority of personal injury claims, the like for like convention operates efficiently and successfully. There will normally be no difficulty about its practical application where say, an engineer or an orthopaedic surgeon is the relevant expert. Equivalence may not however always be so obvious in complex litigation involving many experts or, who is marking who, so to speak.
56. Experience, however, suggests that parties and their lawyers can normally overcome such perceived difficulties, but in the case of genuinely intractable disputes, there remains the possibility of resorting to the court for directions under O. 39, rr. 47 or 50. That is far from suggesting that this should routinely occur and the development of satellite litigation around such issues is not to be encouraged. However, there is a mechanism for resolution of genuine disputes, should resort to it become unavoidable.
57. It is plain from S.I. 391 and the authorities that consider it, that it seeks to promote fairness between the parties to personal injuries litigation by, *inter alia*, precluding one side from gaining a litigious advantage over the other. All the cases identify non-simultaneous exchange of expert reports as potentially giving rise to an illegitimate litigious advantage. This is particularly so in the context of liability experts. Simply put, the plaintiff should not be required to show his hand before the defendant. Where non-simultaneous exchange is not possible, a contingency recognised by O. 39, r. 46(4), the mechanisms of like for like and *Harrington* undertakings are designed to achieve the same result by avoiding the accrual of an unfair advantage.
58. *Harrington* was not a professional negligence claim and the plaintiff had no concerns about the defendant and its lawyers seeing his reports, provided that the defendant's expert(s) did not. The plaintiff's lawyers took the view that the plaintiff would be adequately protected and no disadvantage would ensue if the undertaking sought was given.

59. Although, as the authorities show, the purpose of S.I. 391 is not to disclose the strengths and weaknesses of each side's case, inevitably that is its consequence. If the plaintiff's expert reports are given to the defendant's experts on a non-mutual basis, the obvious concern is that the latter will be best equipped to decide how to structure their reports so as to undermine the plaintiff's experts.
60. That is not for a moment to suggest that such experts would ignore their duty to the court to be impartial and independent. The position of experts was also considered in the judgment in this court in *Naghten* (at paras. 38 to 40). The *dicta* of Charleton J. in *James Elliott Construction Limited v Irish Asphalt Limited* [2011] IEHC 269 (para. 13) was cited with approval: -

"A judge must bear in mind that, notwithstanding that an expert may firmly declare a duty to the court, it is a natural aspect of human nature that even a professional person retained on behalf of a plaintiff or defendant may feel themselves to be part of that side's team."

61. It is interesting to note that in *Harrington*, the defendant advanced the argument, in reliance on authority from England and Wales, that it was actually desirable that one party may be required to disclose his report first so that the expert on the other side may address his mind specifically to the points made in it and assist in crystallising the issues. It was thought that this may even lead to an earlier and fairer settlement of the action – see *Kirkup v British Rail Engineering* [1983] 1 WLR 190 (at p. 194). That argument did not find favour with Kearns P. in *Harrington* and is inconsistent with our jurisprudence. Indeed Kearns P. noted that it was self-evidently inconsistent with the principle of simultaneous exchange approved by the Supreme Court in *Kincaid*.
62. At one level, the point made by CPL in this appeal is a simple one. It says that O. 39, r. 46 (3) requires the plaintiff to deliver all her expert reports once the period provided for under the rules after the delivery of a notice of trial has elapsed and CPL's solicitor certifies in writing that no report exists that requires to be exchanged. It has offered a *Harrington* undertaking which they say is sufficient to protect the plaintiff. The plaintiff is unwilling to accept it and cannot be compelled to do so, as I have explained.
63. However, despite a literal reading of O. 39, r. 46 in *Harrington* imposing a similar obligation, the court was not prepared to impose that obligation on the plaintiff in circumstances where an obvious unfairness would arise. Kearns P. held that the requirement for simultaneous exchange of expert reports was not abrogated by the non-existence at that point in time of any experts, particularly where there was no suggestion that they did not intend to retain such experts and had the means to do so.
64. The position is even clearer in the present case where CPL has indicated that it does intend to instruct experts on the key liability issue, at least, equivalent to Dr. McKenna. It says, however, or at least did before the High Court, that it has not yet instructed such expert to prepare a report because until it sees the plaintiff's reports, it simply does not know what

case it has to meet. It says that in doing so, it does not intend to gain litigious advantage and the plaintiff will be fully protected by the *Harrington* undertaking which it has offered.

65. It seems to me however that there is an inherent contradiction in this position. CPL says that it needs the plaintiff's report in order to instruct its expert. It must follow that what is contained in the plaintiff's report will form the basis for instructing the defendant's expert. It is therefore impossible to understand how CPL intends to instruct its expert without, despite its best endeavours, directly or indirectly, disclosing the contents of the plaintiff's report to its chosen expert.
66. In the course of this appeal, counsel for CPL repeatedly submitted that if it did not see the plaintiff's reports, it would be taken by surprise at the trial and as matters stand, it does not know the case it has to meet. Counsel laid emphasis on the fact that despite all of the plaintiff's reports, bar one, post-dating the personal injuries summons, the plaintiff had at no stage updated the particulars of negligence. However, the implication of that argument is that the case was not pleaded properly or fully in the first instance. It is striking that CPL's arguments in this regard about not knowing the case it will have to meet, are precisely of the same character as are normally advanced by parties who complain that the case is not properly pleaded against them.
67. I have some sympathy with CPL's position in this regard because, as I have already pointed out, the precise case against them is pleaded in the most general and non-specific way. Thus, the complaint might reasonably be made that CPL does not yet know what its cytoscreeners and/or pathologists are alleged to have done, or failed to do, that constituted negligence. It must be the case that the plaintiff, now being in possession of all her expert reports, is in a position to state with particularity each and every aspect of the negligence alleged. This is not a radical proposition. Expert reports are relied on by lawyers on a daily basis to enable them to plead acts or omissions with particularity that are alleged to constitute negligence.
68. In the present case however, it seems for whatever reason that CPL determined not to seek such particulars of negligence but rather await the plaintiff's expert reports in order to understand the case being made against it. That is not, in my view, a permissible approach. Expert reports are evidence, not pleadings and if a defendant says it does not know the case it has to meet on the pleadings, it has a remedy. It is entitled to seek particulars and if it does not get them, apply to the court to compel the plaintiff to furnish them. Indeed, in debate with the court during the hearing of the appeal, the court sought a concrete example of how CPL might be surprised by something in the plaintiff's expert reports which would not equally amount to a failure to plead the relevant matter. No clear answer emerged.
69. Counsel for CPL also agreed with the proposition put by the court that on the approach it was advocating, it would be perfectly legitimate for CPL to either instruct no expert, or alternatively instruct its existing experts to prepare no report, and demand disclosure of each and every one of the plaintiff's reports. It could then, it is said, proceed to instruct whatever experts it wishes to instruct who CPL considers best placed to undermine the

plaintiff's experts. I reject such a proposition. While it may on its face appear to be compliant with the rules, it is entirely in the teeth of all the jurisprudence. CPL in response says that the Harrington undertaking addresses this danger.

70. However, as I have noted, the facts in *Harrington* were very different to those arising here. It involved a road traffic accident and the plaintiff obtained what was presumably a relatively standard engineer's report. The plaintiff's lawyers considered that sufficient protection would be afforded by the undertaking they proposed. Professional negligence cases are however different because by definition, the defendant itself will normally be expert in the area of controversy. In this case, the trial judge recognised the expertise of CPL, with which he was of course well familiar from experience of other cases. Although he accepted the evidence of CPL's solicitor that CPL does not intend to use the plaintiff's reports for litigious advantage, he nonetheless concluded that there was a danger that this would be the effect. I agree with his views in this regard.
71. CPL is not in the same position as the defendant in *Harrington*. It undoubtedly has available to it resources and expertise that will enable it to assess the strengths and weaknesses of the plaintiff's case once it sees her reports and react accordingly, while complying with the *Harrington* undertaking. Irrespective of such undertaking, it seems to me that the illegitimate litigious advantage that contemporaneous exchange avoids would accrue to CPL were the plaintiff to be compelled to disclose her expert reports now and before any corresponding expert has been retained or has prepared a report on behalf of CPL. In my judgment, the disclosure regime, as it has evolved, would be significantly undermined, especially in professional negligence claims, if the approach proposed by CPL herein were to be routinely adopted.
72. Section 45 of the 1995 Act repeatedly refers to witnesses "intended to be called" and this language is carried over into the statutory instrument. Counsel for the plaintiff advanced an elaborate argument around the concept of the formation of such intention, and when such intention crystallised so as to trigger the exchange obligations. I think there are practical problems inherent in such an approach, not least because of the difficulty in a court being able to discern when a party's subjective intention to call a witness has crystallised.
73. Rule 46 itself recognises at subrule (4) that a party may perfectly legitimately obtain an expert report subsequent to the service of its schedule of witnesses and reports. A party must of course remain free to call whatever witnesses it wishes, subject always to the court's inherent jurisdiction and recent case management rules of court, and the Rules Committee would clearly have faced constitutional difficulties were it to have prescribed that a schedule of witnesses, once served, was set in stone.
74. However, that aside, most parties to personal injuries litigation, and particularly defendants in clinical negligence claims, will have a fairly clear idea from an early juncture what experts they intend to call. That knowledge will normally be enhanced when the defendant sees the plaintiff's list of expert reports and will then be aware of the areas of expertise of these witnesses. Of course, r. 46(4) applies specifically to reports and again, it would be

commonplace for existing experts to provide updated reports up to, and even during, the trial.

75. What is however unusual, if not indeed unique, is for a sophisticated defendant in a clinical negligence claim to assert that by the time it receives the plaintiff's disclosure schedule, it has formed no intention to call any witness and will not form such intention unless and until it sees all the plaintiff's reports. That would be a somewhat extraordinary position to adopt and one that certainly seems to offend the spirit, if not the letter, of s. 45 and S.I. 391 and, not least, the views expressed in the caselaw that the optimum exchange should, as far as possible, be simultaneous exchange.
76. Section 45 envisages the making of rules of court requiring parties to disclose information. That information includes reports from experts intended to be called and the names and addresses of witnesses as to fact intended to be called. This is mirrored in S.I. 391. Notably, the information that must be disclosed does not include the names and addresses of experts intended to be called. The draughtsman may have assumed, not unreasonably, that this was an unnecessary inclusion as it would, in any event, appear from the expert's report. It does however leave it open to a party to retain and instruct an expert it intends to call without having to disclose that fact to that party's opponent, as long as the expert is instructed not to prepare a report.
77. This has the potential for abuse of the kind identified in the authorities and is an abuse that the conventions of exchanging like for like and *Harrington* undertakings are designed to guard against.
78. As Murphy J. pointed out in *Galvin*, a party is free to retain any number of experts who may write reports and those reports do not have to be disclosed if the party does not intend to call the expert to give evidence. It is perhaps noteworthy that the undertaking approved by the High Court in *Harrington* applies to any expert retained by a party, and not just an expert intended to be called to give evidence.
79. The mischief the *Harrington* undertaking is aimed at preventing is the ability of a party to see his opponent's expert evidence, deconstruct it with expert assistance and then decide how best to secure tactical litigious advantage over his opponent. In order to achieve this, a party would normally require to retain an external expert but would be precluded from doing so by the *Harrington* undertaking. However, where a party does not require an external expert to achieve this objective, because the party is itself expert in the relevant issue, then a *Harrington* undertaking may become ineffective to achieve its purpose.

Conclusion

80. It is difficult to avoid the conclusion that there are significant shortcomings in the disclosure regime introduced by S.I. 391, as this case casts in stark relief. As the 25th anniversary of the disclosure rules approaches, they would, I think, benefit from recalibration to take account of the issues thrown up by this and previous cases which consider them. It may indeed be necessary to revisit s. 45 itself.

81. To my mind, the authorities demonstrate that where a literal application of the rules has the potential to result in injustice, the court will intervene to ensure the equality of arms that the rules were intended to assure. The rules themselves cannot be permitted to become a source of unfairness. In the particular circumstances of this case, in my judgment, fairness between the parties would best be achieved by adopting the following approach:
- (i) Each party's disclosure schedule should identify the experts it intends to call to give evidence and their areas of expertise, whether they have written a report or not;
 - (ii) Exchange of expert reports should, where possible, occur on a simultaneous basis;
 - (iii) Where either party has not yet decided what, if any, experts they intend to call, or has so decided but not yet received a report, exchange of expert reports should be undertaken on a like for like basis as reports become available;
 - (iv) Where genuine difficulty arises in identifying what amounts to like for like, resolution would be facilitated by each party indicating in a general way what issue or issues in the case the expert's evidence is directed toward;
 - (v) Where CPL confirms that it does not intend to call an expert to give evidence on a particular issue, the plaintiff should furnish her expert reports on that issue subject, if required, to a *Harrington* undertaking;
 - (vi) If, having seen any expert report of the plaintiff, CPL decides that, contrary to an earlier indication, it now wishes to call an expert in relation to an issue disclosed in the plaintiff's report(s), it should satisfy the High Court that it is in the interests of justice that it be permitted to do so;
 - (vii) Any necessary application in that regard should be made, where possible, on foot of a motion on notice grounded on affidavit;
 - (viii) The stipulations at (v), (vi) and (vii) will apply *mutatis mutandis* to the plaintiff;
 - (ix) The parties must remain free to withdraw any expert from their schedule as they see fit.
82. Other cases may of course require a different solution as unforeseen issues arise and what is suggested here is by no means intended to apply in every personal injury action, or even every such claim involving professional negligence.
83. I would accordingly dismiss this appeal.
84. With regard to costs, as the plaintiff has been entirely successful, my provisional view is that she should be entitled to her costs. If, however, CPL wishes to contend for an alternative form of order, it will have liberty to notify the Court of Appeal Office within 14 days of the date of this judgment of its intention to seek a brief further hearing on the issue

of costs. If such hearing is sought and does not result in an order different from that proposed, CPL may also be responsible for the additional costs of such supplemental hearing. In default of same being requested, an order in the terms proposed will be made.

85. The court is conscious of the fact that the matters set out at para. 81 above may have an impact on related or similar cases currently pending in the High Court. While the plaintiff in written and oral submissions herein proposed what was described as a roadmap for the better management of this litigation, CPL has understandably not yet indicated any particular position in that regard. The court is concerned that both parties should have an opportunity, if required, to briefly address the court on this issue before the perfection of the final order herein. The court will accordingly list the matter for mention on 25th April, 2022 at 10.30am.
86. As this judgment is delivered electronically, Costello and Faherty JJ. have indicated their agreement with it.