THE HIGH COURT

[2004 No. 13932 P.]

BETWEEN

KATHRYN SINGLETON

PLAINTIFF

AND

HEATH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 10th day of May, 2018

1. The plenary summons herein was issued on 20th July, 2004 and was renewed for a six month period on 31st July, 2007. A notice of change of solicitor dated 17th day of August, 2004 was served.

2. An application was made at the commencement of the hearing to amend the title of the defendant, recognising a change of status of the defendant which had occurred since the commencement of the proceedings. Leave was therefore given to include the Heath Service Executive as defendants in place of the East Coast Area Health Board.

3. The plaintiff has brought this case seeking relief arising out of an incident on 1st May, 2003 when she was a day patient in St. Columcille's Hospital, Loughinstown, in the County of the City of Dublin to undergo a procedure for facet joint injection. Her claim is that when she was emerging from the anaesthetic, a servant and/or agent of the defendant sought to take a blood sample from her. She alleges that this was done without her consent. She claims that she suffered severe inconvenience, distress and personal injury and pleads negligence, breach of duty, including breach of statutory duty, against the defendants their servants and/or agents.

4. The defence was delivered on 1st October, 2013 and pleads laches and/or inordinate and inexcusable delay in prosecuting the claim. Without prejudice to same, a full defence is filed and liability is fully in issue in the case. It was also pleaded that if the plaintiff suffered the alleged or any injuries, loss and damage which are denied, that same was caused and contributed to by her pre-existing psychiatric and psychological conditions, including depression and anxiety.

The evidence of Kathryn Singleton

5. The plaintiff gave her date of birth as the 26th August, 1959, and gave evidence that she lived in this jurisdiction until 2011 when she moved to live in England. The plaintiff described many aspects of poor health and said that she suffered from injuries arising out of an accident in 1994 and that she had depression and anxiety and was taking anti-depressants.

6. The plaintiff made a number of complaints as follows:

- When the doctor was trying to find a vein there was a technician in theatre to her left who made a remark to her that she had a lovely overall tan and she felt very humiliated by this because her chest was exposed and she described herself as wearing paper knickers at that point.

- The plaintiff claimed that Dr. Nally said to her, "Do you know what you are having? She described her reply as "Yes" and she was asked whether she was consenting to it.

- She describes Dr. Nally as telling her to make sure she had somebody to collect her from the hospital, that she was not to go home alone and not to be alone that night. She was to make sure that somebody cooked her tea. She was not to boil a kettle, was not to drive and not to sign any legal documents for 24 hours. Dr. Nally reiterated those same words twice outside the operating theatre.

- After the procedure she was being moved from a trolley onto a day bed in the day ward. She believed that Dr. Nally was alone with her and, in a very agitated state, said to her "Mrs. Singleton, there has been an accident in theatre". This witness claimed not to have remembered the words the doctor used but that he mentioned HIV.

- This witness alleges that she had to wait until 20th June, 2003, some seven weeks later to find out what had happened and that she was never at risk.

- This witness denied that she was fully recovered from the anaesthetic at that stage and believed that she had gone in for a facet joint injection (which she had had on a number of occasions before) and that she had come out with AIDS.

- She claimed that she wanted her husband to be present and that she felt coerced by Dr. Nally in to signing an A4 sized piece of paper containing a consent for a blood test.

- This witness described that she felt battered and vulnerable and that there was nurse called Hilda present.

- The plaintiff claims that this issue caused difficulty between herself and her husband and that she was forced to wait six weeks before matters were explained to her, that she lost faith in St. Columcille's Hospital and had further medical interventions on transfer to another hospital which caused delays in her treatment and postponement by her of some procedures.

- This witness denied that Dr. Nally asked her how she was and that he considered her to be wide awake. This witness did not remember Dr. Nally apologising for his difficulty in getting her veins. She agreed that her veins were deep set and that it was sometimes difficult to access them. She further denied that he explained to her that Dr. Gallagher had accidentally prodded himself with a contaminated needle but she did concede that he did say he wanted a blood sample although she denied he used the words "protocol".

7. This witness agreed that she had signed a consent form but said she had no recollection of specifically asking him not to contact

her GP with the result. While this witness accepted that it was her signature on the consent form, she asserted that she had never had to sign a form for a blood test before. She accepted that it was her signature on the form and that it was dated 1st May, 2003 and that Dr. Nally witnessed it.

8. This witness indicated that she didn't believe at the time that she had an appointment with Dr. Gallagher for the month of June. Notice of such appointments usually came in the post after she had been home for a number of days. However, she said that she needed to speak to him the following day and that she had no recollection leaving the hospital of having been given a review date of the 20th June, 2003. It was put to this witness that disclosure notes show that she had attended her GP on the 2nd May, 2003 and that he had recorded that she had injections of the left cervical by Dr. Gallagher, along with the query "HIV test offered" because "some doc pricked himself with her blood".

9. This witness claimed that the needle used to take this blood test was one foot long. She said a needle and syringe were all the one to her. This witness agreed that Dr. Gallagher always treated her respectfully. Her version was that Dr. Nally told her that Dr. Gallagher wasn't in the theatre when this needle stick injury allegedly occurred but that he was on his way to the High Court and that his staff had picked up an item with his blood on it and had telephoned him. She denied having a flawed recollection regarding the entire incident and she didn't accept Professor Sheehan's contention that she was not a reliable historian. She had no recollection of being given an appointment for seven weeks after the procedure when she left the hospital.

Evidence of Mr. Robin Singleton
10. This gentleman explained that he was estranged from his wife but was still her carer. He said that on the day of this procedure he received a call from the hospital indicating that they were not finished the procedure but at 1:50pm he made his own way to the hospital. He realised that his wife was upset and he was upset because the hospital hadn't called him to attend. He said that she told him that they had conducted an AIDS test on her, and had forced her and held her down during the procedure. He couldn't speak for a few minutes after this. He knew only that AIDS was a death sentence. He indicated that this affected the sexual relationship between the parties for a seven-week period and that they had not had penetrative sex since the accident. He felt that this incident led to the breakdown of his marriage. In 2008 he moved to Liverpool and since then the parties have lived independent lives.

11. This witness indicated that he insisted that his wife go to the doctor and get the GP to document that she had a HIV blood test. This gentleman complained that his wife had been asked to sign a consent while still under heavy sedation and that he and Dr. Gallagher should have been there. This witness gave evidence that his wife was told of an incident in theatre and that the reason for the HIV test was to check whether she had AIDS. This witness confirmed that he was present for the two hour interview with Dr. John Sheehan on 4th September, 2017 and that he was present at the second meeting with Dr. Anne Leader. He described his wife as extremely upset and crying in the car following the incident.

Under cross-examination
12. This witness agreed that he and his wife attended Dr. Bill O'Connell on 2nd May, 2003. He was asked why they went to the GP on that occasion and he said his wife had had a serious incident the day before. He had been an insurance broker in the 1990s and realised the seriousness of someone having a HIV test. He said he was the person who insisted she go to the doctor to have it documented. This witness confirmed that both he and his wife understood that she had had a HIV/AIDS test. This witness was asked how the GP knew that "some doc pricked himself" with her blood (this is in reference to the GP notes), but his response to this was they did not believe the story and felt they weren't told the full story.

13. This witness agreed that the only way that Dr. O'Connell could have known about the prick injury was if Mr. Singleton had told him.

14. It was put to this witness that he had to interject on three occasions during Dr. Sheehan's assessment to correct his wife's recollection of three different events. He said that it was a two hour medical and that they didn't have notes in front of them or dates, and that they were talking about something which happened fifteen years ago.

15. This witness accepted that he had been to one of the consultations with Dr. Leader. He didn't recall interjecting during that interview because his wife was able to handle the situation herself at that stage.

Under re-examination
16. This witness accepted that the note signed by Dr. Buggle was one written by Dr. O'Connell, now retired. This witness accepted that they had built up a rapport with Dr. Gallagher because both of them had had cervical facet injections and they knew the procedures, following an accident in which both were involved. This witness confirmed that he always thought Dr. Gallagher to be a gentleman and never had a problem with him.

Evidence of Dr. Michael Matheson, Consultant Anaesthetist based in Nottingham University Hospital, England
17. This witness concluded that at the time the plaintiff was approached to give her consent for the blood test to be taken, there was a very high likelihood that she would still have had the effects of Propofol sedation in her body causing her not to necessarily be completely with her full complete faculties. By this he meant not being able to reason and to take in the information and make an informed decision. This witness says that from examining the notes, the plaintiff entered recovery at 12:40pm and that she was returned to the ward at 13:20pm. In the nursing notes it is indicated that at 13:20pm, the plaintiff was seen by Dr. Nally in relation to having the blood test. This witness estimates this at 40 minutes in terms of recovery time, after she had initially left the theatre and gone to recovery. This witness indicated that there is a very high chance that at that point the plaintiff would still have had the effects of Propofol in her system and that recovery from anaesthesia or sedation is gradual. He felt that there can be sometimes be a long period with this drug where the patient appears awake but doesn't necessarily have memory of that time nor do they necessarily fully understand what is happening to them. This witness indicated that nothing would have been lost by waiting for her husband to arrive or not to have taken the blood test at that particular time.

18. This witness clarified that he differs from Dr. Loughrey, anaesthetist for the defendants, who holds that after 30 minutes or so the plaintiff would be able to have a conversation, should be able to give consent. He says that there is research supporting his belief that after 30 minutes one may not have fully recovered. This witness says that the patient should not take important or legal decisions, drive, operate dangerous machinery, for 24 hours after conscious sedation. This witness does say that we do not know how quickly people recover. 24 hours may be very conservative but he felt 40 minutes is at the other end of the scale. There is a very high chance at that point that people would still have the after effects of Propofol in their body affecting their judgment. This witness indicated that he hadn't given facet block injections himself for ten to fifteen years but has given sedation on a very frequent basis for many procedures.

19. This witness did agree that at 30 minutes it was possible that the plaintiff had normal conversation and ability to write but

disagreed that at that time she would have been able to give fully informed consent.

20. This witness agreed that her husband could not have provided the consent for the plaintiff in respect of the blood test. He further agreed that there would have been very little reason for the plaintiff not to be able to go and see another practitioner the following day to seek a blood test. This witness confirmed that the conditions on "discharge form" indicated that there was no dizziness, no drowsiness, no nausea, no pain on mobility, were found to be present.

Evidence of Dr. John Loughrey
21. Dr. Loughrey, Consultant Anaesthetist, gave evidence to the court of his qualifications and experience and indicated that he has administered anaesthesia and sedation weekly for the last 25 years. This witness described a 30 minute wait in the recovery suite as protocol and standard. On this witness's analysis of the records, he concluded that approximately 45 minutes after the Propofol had been discontinued there was evidence in the notes "at 13:20 hours written evidence of a consent to take blood … for laboratory analysis was documented and a sample was taken by Dr. Nally". Dr. Loughrey considered the consent form. He noted that it was signed and that it is not actually currently required to have a written consent for testing for HIV, but he said that it was evident that a discussion or consent had taken place. This witness indicated that in his opinion, alertness, consistent with normal conversation and ability to hand write, would have provided reasonable conditions for Dr. Nally to assume reasonable patient capacity to obtain consent to take a blood sample and to explain the purpose of same to the plaintiff.

22. This witness registered his agreement with the opinion of Dr. Matheson that the husband couldn't give consent for the plaintiff. The difference between Dr. Matheson's evidence and the evidence of Dr. Loughrey is that Dr. Matheson took the view that the test should be done on another day but this witness under cross-examination said that it could be done on the same day when a patient has clinically recovered from an anaesthetic. Dr. Loughrey agreed that while he couldn't attest to what conversation took place at the time, the consent process would incorporate counselling the patient or advising.

Cross-examination of Dr. Loughrey
23. It was put to this witness that the plaintiff left the hospital not understanding that in fact that Dr. Gallagher sustained the needle stick injury and that she was labouring under the impression that she had suffered AIDS and continued to labour under that impression for approximately six weeks or thereabouts. He was asked if she went to her GP the following day and told the GP that she had an injection of the left cervical facet joint at St. Columcille's Hospital under Dr. Gallagher, had a HIV test after this because "apparently, some doctor pricked himself with her blood. His response was that there was an accurate recollection of events and that there wasn't a misunderstanding on the plaintiff's part. It was confirmed to the court that the date in question (regarding her visit to the GP was the 2nd May, 2003), was the day after the procedure.

24. The court asked this witness whether, if two females of the same weight were given the same procedure using Propofol, it was possible that the recovery phase for one patient would take longer than the other to get back to consciousness. The response was in the affirmative, that while patients vary in their response, it would be just a matter of minutes. Dr. Nathanson was asked this question in similar terms by the court and indicated that weight and frailty were factors as well as age, their general state but that anaesthesia was a bit of an art form, like a lot of medicine.

25. Dr. Loughrey indicated that if he gave a large dose to a small patient she might come round two or three minutes longer or later than a patient who got a lower dose. He said the nature of the drug Propofol is one that is re-distributed to other parts of the body and that the liver and kidneys excrete it over the following 24 hours or so. Any difference in recovery time it would be a matter of minutes.

26. This witness clarified under re-examination that for HIV there are national guidelines from the Health Protection Surveillance Centre. They specify in terms of management of the source patient what should and should not be done. They specifically state that consent should be taken and documented but that a written consent form is not required. He confirmed that these guidelines were updated in 2016.

Evidence of Dr. Anne Leader, Consultant Psychiatrist
27. This expert witness authored two reports, one of 19th May, 2011 and follow up report of 25th February, 2016. She stressed that she was not the plaintiff's treating psychiatrist and had prepared these reports for medico-legal purposes. Dr. Leader confirmed that 95% of her work is medico-legal. This witness confirmed that she first saw the plaintiff on 11th May, 2011 and later on the 25th February, 2016. She believed that Mr. Singleton was present for the entire time during the second interview and that he was there on the first occasion as well but not for the entire interview. This witness gave evidence that following the procedure which the plaintiff underwent, she was asked to sign a consent form and felt that she was dopey and sedated and could not think clearly. This doctor felt that the plaintiff had been clear that the doctors considered her to be a high risk patient and she was able to connect that with the fact that she had blood transfusions in the past so they would have considered that she had a high risk of problems concerning HIV or AIDS. She explained that the plaintiff contacted Dr. Gallagher because she wanted to know what her HIV/AIDS status was, suspecting that she was at a high risk. For that reason she stopped having sexual relations with her husband. From what she told the doctor, she suspected that there was a very high risk that she had HIV/AIDS. At her second interview with the doctor, Dr. Leader reviewed her first report with her and the plaintiff on this occasion indicated to the doctor that she was told that there were three things she was warned about: she was warned not to sign anything, not to use electrical equipment or to drive.

28. The plaintiff indicated to her that she was to have polyps removed in 2012 and that she had a major panic attack and cancelled the procedure. Dr. Leader found this to be a very unusual thing for a patient to do.

29. The plaintiff further indicated to Dr. Leader on the second visit that she was held down by a nurse when having the blood test, that the needle was very large, that she wanted her husband to attend the hospital and that she considered after the incident that she must be at high risk of having contracted AIDS or HIV. This witness concluded that the 2003 incident aggravated anxiety in a patient already compromised because she had a large number of medical complaints, a history of anxiety and was on treatment. That anxiety was specific to medical procedures and engagement with doctors and she felt that the plaintiff would not have cancelled a procedure, left a hospital on one occasion, turned down a procedure on another unless she was genuinely very anxious and stressed.

30. Under cross-examination, Dr. Leader confirmed that the plaintiff was under a Dr. James O'Sullivan, Psychiatrist, was on anti-depressants on and off, and had made attempts at self-harm in the 1990s. The plaintiff's history to this doctor and the conclusion of Dr. Leader in relation to it was that before she had the incident she had not been aware that she was at high risk of having HIV or AIDS, but that after the incident it was made clear to her that because of the needle stick injury she had to have blood taken and he must have considered her a high risk and not the other way around. Dr. Leader accepted the plaintiff's explanation of matters that she genuinely believed that the doctors considered she was somebody who was a high risk. This would fit in with the fact that he had to have his blood taken as he considered her a high risk because she had had blood transfusions.

31. This witness accepted that she was not aware that the plaintiff and her husband went to visit her general practitioner, Dr. O'Connell on 2nd May and that they told them that "some doc pricked himself". It was put to this doctor that this was a matter of paramount importance and was a relevant fact not disclosed to her. The doctor agreed that that information could only have come from the plaintiff to the GP. This witness accepted under cross-examination that the plaintiff's reference to an injection needle as being very long and very big was clearly incorrect. This witness accepted that the form she was given to sign and signed on 1st May, 2003, does not state HIV or AIDS on it and does not contain the instructions she indicated that she had been given, although Dr. Leader felt she may have been told that by someone. This witness accepted that it was unusual that the plaintiff did not go and take a blood test herself and accepted that while a subsequent test was not offered, she did not request one.

Evidence of Professor John Sheehan, Consultant Psychiatrist

32. Professor Sheehan gave evidence of his qualifications to the court and confirmed that he examined the plaintiff on 4th September, 2017, for over two hours and five minutes. He said that at the plaintiff's request, her husband, Robin Singleton, was also present throughout this interview. He indicated that the purpose of the examination was to provide an expert opinion to the court as to whether the plaintiff has a recognisable psychiatric injury and, if so, how this related to the incident, and to give an opinion on her current psychiatric condition and future prognosis.

33. Papers furnished to the professor included "a book of papers for an expert", a book of medical records from St. Columcille's Hospital and medical records in relation to the plaintiff from Dr. Nick Buggle, GP. This witness confirmed that the book of papers included the plaintiff's discovery documentation.

34. By way of background history, the plaintiff told the doctor that Dr. Gallagher had suffered a needle stick injury, that blood had been found on a glove and that Dr. Nally had to take blood from the plaintiff for both HIV/Hepatitis tests. This was part of the procedure advised by occupational health.

35. The plaintiff claimed that the blood was taken under duress and that she had not given an informed consent for the procedure.

36. Professor Sheehan described the plaintiff clearly indicating that Dr. Nally asked her to sign the consent for the facet joint block injection and that she remembered clearly that that form included instruction that she ought not sign a document for 24 hours, that she ought not be alone and that she ought not drive for 24 hours. She asserted that these items were clearly written on the consent form. Professor Sheehan, however, clearly indicated to this Court that those aforesaid three instructions were not contained in that consent form, nor were they referred to anywhere in the documentation.

37. Professor Sheehan indicated that the plaintiff alleged that while she was in the operating theatre with her chest exposed for an ECG cardiogram, a male technician made remarks about her having a lovely all over tan. She further alleged that no person in theatre took any notice or made any comment about this and that she felt that individual was "leeching" or "leering" at her and she felt like a "lump of meat".

38. On Professor Sheehan's account given to him by the plaintiff, she claimed further that the staff in the hospital were unable to get a vein so, in her words "they gassed me". In relation to the necessity for a subsequent blood test, the plaintiff indicated to Professor Sheehan that Dr. Nally brought a form for her to sign. Though initially she told Professor Sheehan that she did not know what she was signing, she subsequently said she knew she was signing the consent form for a blood test for HIV but that she was drowsy and trying to stay awake and had signed the form under duress.

39. Professor Sheehan then indicated that the plaintiff described the needle used to take the blood as being a foot long, excluding the syringe. Professor Sheehan indicated that a blood test is not taken with a foot-long needle as described by the plaintiff.

40. On her account, the plaintiff told Professor Sheehan that Dr. Nally was asked by her not to take blood from the left hand side because she had surgery on her bladder and that he then took the sample from the right side.

41. Professor Sheehan noted that although it is standard procedure for a GP to be informed in relation to all procedures, for someone then not to authorise sending a result to the GP was a very specific instruction. The plaintiff told Professor Sheehan, on his account, that on 2nd May, 2003, she telephoned Dr. Gallagher's secretary repeatedly to get an appointment with him, that she had to wait for six weeks for her follow up appointment and had expected to get the results of the blood test that day. On the plaintiff's version of events as described by her to Professor Sheehan, she thought that Dr. Gallagher had again told her he suffered a needle stick injury and that she therefore had to have a blood sample taken because she had previously received blood products some months beforehand so there was a possibility that her blood might have been infected. The plaintiff further indicated that she did not believe what Dr. Gallagher was saying and believed that he was lying to her. She used the words "it's a total cover up". The plaintiff told him categorically that she did not go to the general practitioner although her visit is recorded in the GP records. Professor Sheehan was surprised that the plaintiff did not have a second blood test taken herself. He would have expected her to have done that when the first blood sample had clotted because she had a concern about HIV. The plaintiff gave an extensive history of her medical problems including mental health problems prior to this incident. She described a difficult early life and significant problems following a road traffic accident in 1991. She had four or five admissions for mental health difficulties, she had overdosed and she began to improve in the late 1990s.

42. In taking this history, Professor Sheehan noted that the plaintiff's husband corrected her version of events and indicated that the plaintiff did not stop taking her medication in the late 1990s. He also interrupted to say that she was on antidepressant medication following a road traffic accident in 1999 and that he had to treat her with kid gloves all of the time. Her husband further interjected in this interview when the plaintiff told Professor Sheehan that she had moved to Ireland in 1991 to be closer to her mother but her husband said the reason for returning was that he had lost his job and they had lost their house in England because they were unable to pay the mortgage.

43. Professor Sheehan referred to the plaintiff's claims history and noted that in 1991 she sustained a whiplash injury. In relation to this, her version of events was that she alleged that the solicitor she had instructed in that case got into financial difficulties and that he had lied in court, so she lost the case. She indicated that she had taken a case against AIB because they issued her with a cheque book. She had used the cheque book after which AIB had said they had not sent it to her. She sued and received €10,000 in compensation. The plaintiff and her husband had sued Fairy Liquid arising out of an allegation of contact dermatitis in relation to a new lemon product and she had received approximately €3,000 from the manufacturers of that product.

44. The plaintiff settled her action in relation to the 1999 accident in or about 2009/2010, and confirmed that she received €160,000 in relation to that case.

45. The plaintiff described to Professor Sheehan how she thought blood tests were automatically tested for HIV and that any subsequent blood test would be automatically tested and that it would be negative. She felt that she was never reassured in the following six weeks. She told Professor Sheehan that she was not sleeping in that time, that she was overeating, that physical relations with her husband came to an end because of her concern about HIV. However she then categorically indicated that she did not speak to her GP or tell anybody about her anxiety over HIV. Her reasoning for not doing so was that she said that she felt like a leper.

46. The plaintiff had told this witness that she did not seek any help but Professor Sheehan contrasted this with the actual visit to the general practitioner where she had reported a very marked sleep disturbance.

47. The plaintiff complained to Professor Sheehan that she subsequently lost faith in St. Columcille's Hospital and sought and was referred to St. Vincent's University Hospital for her chronic pain treatment. In fact, she felt that she had been treated inhumanely. Four years later she had to be treated in St. Columcille's for kidney stones but saw Dr. Nally. She asked him to leave at that point and sought to be transformed St. Vincent's Hospital for treatment. Professor Sheehan describes this witness telling him that she never spoke to anyone regarding her anxiety about HIV either in England or in Ireland, that she postponed elective surgery in England which was later carried out in March 2017, and that she had the same feelings then as she had when in St. Columcille's Hospital. Although she was was referred for cognitive therapy in 2012 in Liverpool, England, she did not continue same. In 2016, she was referred to a community mental health service in England and was offered therapy but stopped attending after two sessions. She was on a standard antidepressant, Venlafaxine. In addition, Professor Sheehan recorded that the plaintiff told him she became distressed when this case came before the courts in 2017 and had it moved to 2018 and that the actual timing of the case was a matter of stress for her.

48. This witness initially formed the view that the plaintiff suffered from an adjustment disorder described medically as histrionic, where a person will tend to speak in hyperbole, and will tend to exaggerate. The doctor concluded, however, that because there were so many contradictions in her account to him that he did not believe she suffered from a recognisable psychiatric disorder. Professor Sheehan indicated that it was the doctor with the needle stick injury whose health and welfare was at issue in terms of the blood test and that this was paramount. Professor Sheehan found the plaintiff's understanding or thinking that every blood test is a test for HIV as unusual thinking. He felt that it was quite unusual for a vulnerable and anxious individual that she had not gone to have a HIV test afterwards.

49. This witness noted that the fact that the plaintiff was able to specify that she did not want her GP to have the result of the blood test was evidence of a capacity to make informed decisions at that time. This witness clarified that the present symptoms on their own would not be a psychiatric disorder but that a depressive illness would be one. This witness distinguished between the plaintiff's use of exaggerated language going beyond the usual parameters and said that it was not just histrionic, it was inaccurate and wrong. The whole pattern of inaccuracies led him to believe that his original diagnosis of an adjustment disorder was an unsafe one and he felt that with an anxious personality, that such a person would immediately look for a HIV test or a repeated HIV test and would not be waiting passively. Rather, they would be actively seeking a result. While this witness confirmed that what the plaintiff said to describe her own symptoms would indicate an adjustment disorder, he concluded he could not depend on everything she said. He said that there was a complete thread of unreliability and that if he had accepted that uncritically, he would say it was consistent with an adjustment disorder i.e. a recognisable psychiatric illness, but because of the inconsistencies in her account to him, he concluded she did not have such a disorder. This witness accepted that the plaintiff was a vulnerable person, however.

50. Professor Sheehan indicated his view and understanding of the notes that it was a year and half almost after the incident before she was given an antidepressant. He further concluded that both he and Dr. Anne Leader, Psychiatrist, were essentially saying the same thing because a lady with vulnerability and anxiety could certainly have heightened anxiety after such an event as the blood test. He said that this is different to saying a lady developed a mental disorder as a consequence. He said his reading of Dr. Leader's report showed nothing anywhere to indicate that Dr. Leader herself believed that the plaintiff had a mental disorder.

Evidence of Dr. Bernard Nally, Consultant Anaesthetist

51. Dr. Nally confirmed that he is a retired Consultant Anaesthetist. He outlined his qualifications to the court. Dr. Nally confirmed that he worked in St. Columcille's Hospital, from 1993 until his retirement in 2013.

52. Dr. Nally confirmed that he did a regular Thursday session giving anaesthetic cover for an anaesthetist, often Dr. Gallagher, who was giving facet block injections. He outlined his functions as being firstly to ensure the patient's safety, to administer the anaesthetic to the appropriate depths, to monitor the depths of that anaesthetic, to monitor the side effects of the drugs he was using and to monitor the general condition of the patient throughout the procedure. This included covered dealing with any other needs which came up during the procedure. At the end of the procedure, he saw his function to get the patient back awake safely into the recovery ward and to see that they were comfortable afterwards.

53. This witness took Dr. Nally through the booklet dealing with the plaintiff's admission on the day and the standard form of consent for a day case procedure. He had written "very difficult venepuncture". This witness indicated that the plaintiff only received one drug, Propofol. This witness described how the drug works, how the machine gives an initial fast rate dose to make sure the patient is asleep and then continues at a lower maintenance rate to keep the patient asleep. This witness was taken through a standard document of the recovery period. He noted that it is a regulation that the patient has to spend 30 minutes in recovery. This witness noted that the quarterly recordings of vital signs appear to have been every five minutes roughly. He confirmed that nothing untoward happened during this procedure save that he noted that the venepuncture was extremely difficult and that this was not normal because anaesthetists are the best at obtaining venepuncture in patients.

54. This witness recollects that this was the last case on the list and that he received a message from Dr. Gallagher wanting to see him at the door of the theatre unit. Dr. Gallagher was now dressed in his outdoor clothes. He informed him about this needle stick injury and asked whether he could go and explain to the patient at a later stage what had happened and if he could organise blood specimens to be tested for Hepatitis B and HIV. This witness explained that this was necessary in light of the needle stick injury. This witness agreed to undertake this task for Dr. Gallagher. This witness was then referred to the post-op document which referred to 13:20 as the time at which the patient would have been returned to the day ward and the fact that observations were continued at that stage, although probably less frequently. He said the vital signs were then recorded. The record commenced at 13:20 and continued right up to 2:10pm and he noted that all the vital signs appeared to be very normal.

55. This witness confirmed that the policy at the time in the hospital was for a minimum of 30 minutes in the recovery. In explaining the notes, this witness explained that the laboratory had phoned to say the blood sample had haemolysed and that Dr. Gallagher was informed. This witness read into the record the note at 2pm. The essential portion indicated a history of needle stick injury in OT "with IV cannula. Patient's blood sent for HIV, Hepatitis B and C and consent obtained".

56. He developed the habit of not asking straight off but waiting for the patient to volunteer information. This witness said he would then do his little check that his observations were OK. He said he would then have approached the subject of the needle stick injury to Dr. Gallagher and explained it to the plaintiff that it was as part of the protocol that they had to test Dr. Gallagher's blood and her blood for communicable diseases. He said as far as he can recollect, the plaintiff was a little bit taken back but he did recollect there was no scene involved and that it had been extremely difficult to get a vein. He said he explained that the only reasonable place they could get blood to take the test was from the groin. He noted that she did not disagree with that at the time.

57. He was referred to the standard consent form for blood tests. It was read into the record as follows: "I have been fully informed of the test to be carried out on my blood sample and I am agreeable to these tests being carried out. I understand the confidential nature of the test and the result will only be sent to Dr. H Gallagher, St. Columcille's, of the Occupational Health Department, Eastern Health Board. I am not also agreeable to the result being sent to my family doctor". He confirmed that this document was dated 1st May, 2003 and signed by himself below the patient's signature. This witness confirmed that he did recall the plaintiff saying she didn't want her own doctor to be sent the report. That struck him as odd, as a GP is the doctor who knows a person's whole medical history and he had never before been requested not to give a medical result to the GP. In any event, that is what she said and he crossed out the word "am" and underlined "am not". He said he explained it to her to the best of his ability. In answer to the question as to whether he formed a view as the person taking the consent whether the plaintiff was capable of giving the consent or not, he said she was wide awake and she was alert and "we had had quite a conversation". He said he had no reason to think that she was in any way comprised. This witness confirmed that at the post-op record at 13:20 when she was returned to the day ward having spent time in recovery, the box denoting "awake" had been ticked out of a choice of four boxes. The boxes gave a choice of either "1. awake, 2. rousable, 3. asleep or 4. unconscious". This witness confirmed that unfortunately the sample had haemolysed.

58. Under cross-examination this witness indicated that he couldn't remember everything about what occurred 15 years ago. What struck him as unusual was that the plaintiff was one of the most difficult patients he had ever met for venepuncture. He said he also remembered the nature of the blood test he was required to take and he said that in itself was very unusual. He noted that the patient entered recovery at 12:40.

59. This witness agreed that this would have been a very distressing thought for a patient back in 2003. This witness recalled that he had a dialogue with the patient and he confirmed that that happened a half an hour after writing the note at 2pm, which read "wrote it at 14:00 hours wrote it before Dr. Gallagher spoke to me." He stressed that he clearly remembered his visit to the plaintiff in the ward. Dr. Nally said that he didn't recall the plaintiff ever saying anything about her husband or that he and the nurse went away and came back later saying that the husband could not be contacted. Dr. Nally said that as far as he can remember he explained things to the plaintiff. He got to the bit where they requested a blood specimen for testing for HIV and Hepatitis and recollected that she was unhappy about this. He explained to her that it wasn't about her, that it was the risk to the doctor who had the needle stick injury and it was routine that the bloods of the patient and where it came from is checked out. Dr. Nally could not remember whether he took blood from the left or right groin, but he did recall that he took same from the groin. In relation to the contention of the plaintiff that a nurse was holding her right side down at that point, he said he did not remember anything about that but he presumes that there would have been a nurse with him because to take blood from the groin in a female you would probably have a female nurse with you, for obvious reasons. This witness indicated that he recalls having a clear, lucid two-way conversation with the plaintiff. The doctor was adamant that the patient was wide awake and having a conversation with him at the point at which he received her consent and took the blood test. He said this happened back in the ward long after the theatre procedure. He said it was not true that it happened in theatre just as she was wakening up.

60. This witness said that if the patient is alert enough and awake enough to have a lucid conversation and one is of the clinical belief that they understand what you are saying to them, it is probably sufficient alertness to sign a consent form. He said in relation to the subjective element that it could only be a matter of minutes and that that was what Dr. Loughrey had said and it was not a huge difference in terms of time. This witness agreed with Dr. Loughrey that the difference in terms of subjectivity as between two patients would be a matter of minutes between a person coming around to alertness compared to another patient of the same weight.

Evidence of Dr. Hugh Gallagher, Consultant Anaesthetist

61. Dr. Gallagher gave evidence that at the end of the procedure he indicated to his colleague Dr. Nally that he had got a needle stick injury from one of the cannula or the stylet from one of the cannula that Dr. Nally had used. Dr. Nally was quite upset about that and spontaneously offered to do whatever was necessary in terms of blood testing. This witness indicated that there is a procedure/protocol. This witness indicated that he had three needle stick injuries in his career. He said that occasionally a person does not want their results sent to the GP but that would be very occasionally. The doctor indicated that he spoke to Mr. Thorsney and Dr. Nally and that he came back at 6pm, went to the Emergency Department out of hours for blood tests as was normal for such an event and followed the protocol. The standard consent was signed, the same form as the plaintiff signed for Dr. Nally. Reference is made to the "injured employees report form". He confirmed that it was his writing. He confirmed that the details were as per the form.

62. This witness is then referred to the letter of 12th August, 2003, which he wrote to Mr. Tom Murnane, the hospital manager. He wrote this letter concerning the day to day events of 1st May, 2003 and he said at that stage his report was written from memory.

63. This witness recalled meeting the plaintiff and her husband on 22nd June, 2003 at the Outpatients Clinic. He confirmed that that appointment was arranged following the procedure of 1st May, 2003. This witness confirmed that he remembered it because of the event which had happened. He recalled their meeting and that the meeting lasted for more than an hour, which is longer than most routine outpatient visits would be. He said that first of all he explained what had happened again in theatre, and he tried to stress to the plaintiff that the risk was to him, not to her and that it was certainly not a reflection on her life, lifestyle or anything else. He explained that, unfortunately, the first blood sample had been incapable of being analysed because it had haemolysed and that that was fed back to him but that it took some time to come back to him. He explained that the reason for doing the test on the day was to save her having to come back again to have a blood test taken. He said had she been an inpatient they would probably have waited until the following day.

64. When the plaintiff indicated that she had lost faith in the hospital the doctor offered to refer her on to another institution and made that referral. In relation to the letter which Dr. Gallagher wrote, he clarified and he said that he thought he had given her a full and frank and open explanation as to everything which had happened. He felt that he wanted to assuage her concerns about having acquired some type of infection or lethal disease while she was on the table in the operating theatre. He tried to explain that that was not the case at all. He said he sympathised with her, but stressed that he was the person at risk from HIV or Hepatitis. This witness explained that when he discovered that the sample could not be processed because it was haemolysed, that this was reasonable close to her return date of 22nd June, 2003. His intention was therefore to repeat the test on that date. He didn't want to inconvenience her to come back for a test which would more than likely, based on his own blood results being normal, was to be negative. He thought that it would be kinder to her, not having a full comprehension at the time of the distress she was experiencing,

to have that done on a visit to the outpatient clinic as scheduled. This witness also explained that because the plaintiff was a day patient there would have been nowhere for her to wait on the day ward beyond lunch time because afternoon patients were coming in at that stage and he thought it would have been a bit unfair to her to ask her to stay beyond discharge time or their street fitness time for the sake of having a blood test taken.

65. Dr. Gallagher conceded that it was not unreasonable for the plaintiff to have requested to have her husband present but confirmed that the husband could not give consent for the wife.

Legal submissions on behalf of the plaintiff

66. It is submitted that the duty of care was owed by the defendant to the plaintiff to ensure that she provided a full and informed consent to the procedure and that there was a duty not to carry out the procedure without that consent. The true test referred to as set out in the case of *Dunne v. National Maternity Hospital* [1989] IR 91 is whether "[the medical practitioner] has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would have been guilty of if acting with ordinary care". The plaintiffs say that for the defendants to satisfy the Court that they acted with ordinary care they ought to have ensured that the plaintiff had recovered fully from the effects of Propofol at the time at which the defendant purported to take her consent. Further they submit that a full length detailed explanation ought to have been given to the plaintiff as to the circumstances which had led to the request for the procedure to be carried out and further that the plaintiff ought to have been specifically informed as to the reasons why the blood sample was being taken from her groin area and further that the plaintiff's husband ought to have been present for the discussion as to the reasons the blood sample was being requested, given that the plaintiff had requested his presence.

67. It is argued on behalf of the plaintiff that based on Dr. Nathanson's evidence, given that the procedure was a test for a significant medical condition and was being carried out for the benefit of another person, that there was a greater onus on the defendant than usual to ensure the plaintiff understood fully all of the relevant circumstances before providing her consent. It is further argued on behalf of the plaintiff that on the evidence of Dr. Nathanson, if one is seeking consent for a procedure, one should not do it straight after recovery from anaesthesia even if the patient appears to be alert. He argued that the plaintiff would have continued to be affected by the anaesthetic agent Propofol when the defendant purported to take her consent for the procedure. Dr. Loughrey conceded that Propofol can affect different people in different ways and that the evidence of certain studies demonstrated that people can recover at different rates and that Propofol can cause defects of memory and attention for up to two hours. Dr. Loughrey accepted that the plaintiff could have been affected in that way. Dr. Nathanson said that there was a very high chance that the plaintiff still had the effects of Propofol in her system when the purported consent was taken. He said that just because a patient could appear to be able to converse normally and have the ability to write, that does not mean that they have, behind that, the ability to understand why they are making those statements or taking those decisions. It is common case that approximately 40 minutes after the administration of Propofol had ceased, the plaintiff was asked to make a decision as to whether or not to consent to the said blood test. While Dr. Nathanson gave uncontradicted evidence that it is standard procedure to tell patients not to make important decisions for 24 hours after the administration of Propofol, Dr. Loughrey gave evidence that whether or not to give a blood sample was an important decision. It is therefore contended that standard anaesthetic practice dictates that the plaintiff should not have been asked to make that decision at the time at which she was, being 40 minutes after the Propofol had been stopped.

68. Dr. Loughrey agreed that if the plaintiff had not been told what the purpose of the test was, and was not given the full circumstances surrounding it, she could not have given a valid or an informed consent. Essentially, the plaintiff argues that she was only told that there had been an accident in theatre and that Dr. Nally went on to mention HIV to her. As she could not understand what happened she became distressed. She was not told the circumstances of the incident and she understood from the conversation that she may have contracted HIV due to an accident in the theatre. Her evidence was that "no one said I was not at risk. No one told me it was the doctor who was at risk. No one told me that".

69. It is contended that notwithstanding that Dr. Nally's evidence was to the effect that he provided an explanation to the plaintiff, he admitted that the plaintiff found it difficult to understand, and the plaintiff says that she felt under pressure and coerced into signing the consent form. On behalf of the plaintiff it is argued that neither the nurse, Hilda, (believed to be present at the time when the blood test was taken) nor Dr. Maddy (referred to by Dr. Gallagher in his evidence, who was a Registrar and whom Dr. Gallagher says he asked to reassure the plaintiff) were called to give evidence. The plaintiff gave uncontradicted evidence that she was never given any reassurance or information from the hospital after her conversation with Dr. Nally on the 1st May 2003, until she met with Dr. Gallagher on the 20th June 2003.

70. The plaintiff gave evidence that there was no explanation given in relation to the taking of a sample from the groin area. Dr. Nathanson described this as unusual and as requiring an explanation.

71. The plaintiff makes the complaint that she wished her husband to be present and that, although she was told that attempts were made to contact him but that his telephone was engaged, his evidence was to the effect that he was at a nearby hospital waiting for a call from the hospital which never came. He says that he was not aware of any attempts made to contact him.

72. It is common case that nothing would have been lost by waiting for one hour after the procedure. Dr. Nathanson gave evidence that the blood sample could have been taken in the subsequent few days.

73. The plaintiff argues that she resisted the sample being taken with the words "no, no, no" but that she was not in a position due to the continuing effects of Propofol to express adequately the fact and the reasons for not wanting the procedure to be carried out on her at all. She described the manner in which the sample was taken as being "very bully-ish".

74. It is argued on behalf of the plaintiff that the requirement to prove that the plaintiff suffered a recognised psychiatric illness (as per *Kelly v. Hennessy* [1995] 3 IR 253) arises only in a case in which there has been no physical injury to the plaintiff. The plaintiff claims that she suffered the following physical sequelae: -

(a) the physical act of extracting the blood sample with a needle;

(b) the delay in treatment for her pain condition for a period of approximately two years;

(c) the cessation of a sexual relationship with her husband for a period of time. It is argued that the plaintiff does not have to satisfy the test of proving she developed a recognised psychiatric injury. The plaintiff is described in the present case as vulnerable and it is argued that the eggshell skull rule "dictates that the defendant must take the plaintiff as it finds her". It is further argued that her pre-existing depression and anxiety put her into a category which would distinguish her from the type of plaintiff envisaged in a *Kelly v. Hennessy* case. Without prejudice to this argument the

plaintiff contends that her injuries are sufficient to satisfy the test in Kelly v. Hennessy. Her evidence, coupled with the evidence of Dr. Leader, demonstrate that she suffered an exacerbation of her anxiety condition and she suffered panic attacks when faced with medical procedures in later years.

75. It is argued on behalf of the plaintiff that the "fear of diseases" cases lack the element of a physical injury to the plaintiff and contend therefore that those decisions have no application to the present case.

Legal submissions of the defendant

76. The defendants, relying on the medical records, note that Dr. Nally obtained the plaintiff's consent to her blood test at 13:20. This document, the consent form, was signed by the plaintiff and reads; "I, Kathryn Singleton, have been fully informed of the test to be carried out on my blood sample. I am agreeable to those tests being carried out. I understand the confidential nature of the tests and the results will be sent only to Dr. H. Gallagher of St. Columcille's Hospital of the Occupational Health Department, Eastern Health Board. I am not also agreeable to the result being sent to my family doctor." (Transcript Day 2, p. 21, lines 16-23).

77. The plaintiff argued in her evidence that it was the manner in which the blood sample was taken caused her mental injury as well as the fact that for seven weeks she was left callously thinking that she had AIDS. She argued that the information she got was not enough for her to understand what she was signing and that there was no need for them to do this in the manner in which they had done.

78. Based on a combination of recollection, medical notes and his usual practice, Dr. Nally's evidence was to the effect that he met the plaintiff after her procedure, introduced himself to her, checked her nursing observations and asked if she were comfortable. He described her as a little taken aback and he imagines that this was because when a doctor comes to see you after the procedure you were expecting to hear that all went fine. He had to request that as part of the protocol that they test both Dr. Gallagher's blood and her blood for these communicable diseases. Dr. Nally said that he specifically remembers that she found this a little bit difficult to understand because that is not what she was expecting to hear, and he explained it to her that it was important that the medical staff in any hospital, if this were to happen, do not get contaminated and that therefore it was part of the protocol requiring that they check her blood for Hepatitis B and C and HIV. Dr. Nally says that as far as he can remember there was no major difficulty with this. There was no scene created, so he went to take the blood. Dr. Nally said that it was a long time ago and that as far as he can remember, she was a little bit put out as to why the blood test was necessary. He accepted that she found it difficult to understand but he explained it to her to the best of his ability. In terms of whether she was capable of giving the appropriate consent or not, his answer was that she was wide awake, alert, that they had had quite a conversation and that he had no reason to think that she was in any way compromised.

79. The plaintiff herself did not give direct evidence that she lacked the capacity to give her consent. She relied on expert evidence from Dr. Nathanson. He argues that he did not think she was necessarily completely with her full complete faculties, by which he meant not able to reason, to take in information and to make an informed decision. Dr. Loughrey, in his expert opinion, confirmed in his evidence that alertness consistent with normal conversation and ability to handwrite would have provided conditions for Dr. Brian Nally to assume reasonable patient capacity to obtain consent to take a blood sample and explain the purpose of same to the plaintiff. He noted that Propofol is used primarily for its rapid recovery time, permitting patients to recover without residual effects of sedation thus permitting early discharge from hospital, and that it is used as a sole agent for anaesthesia, allowing patients to be clinically alert following a standard 30-minute in recovery. Dr. Loughrey explained that difference in response in return-to-consciousness time from patient to patient would only be a matter of minutes. Dr. Loughrey said that that if Dr. Nally had formed the opinion that the plaintiff was in a position to give an informed consent, then he was in the best position to assess that capacity. Dr. Nathanson effectively agreed the same thing.

80. By way of corroborative evidence that the plaintiff understood the nature of her blood test, reference is made to the record of her general practitioner of the 2nd May 2003, the day after the blood test. The plaintiff herself had no recollection of visiting her general practitioner the day after, but her husband acknowledged under cross-examination that he and his wife did indeed attend her general practitioner the day after her procedure and he told the general practitioner what had happened based on what his wife had told him.

81. The GP's note of the attendance reads; "Had injection of left cervical facets at SCH with Dr. H. Gallagher? HIV test offered because some doc pricked himself with her blood" Based on that entry Dr. Gallagher's view was that that note was consistent was an accurate recollection of events and that there was not a misunderstanding on the plaintiff's part.

82. Counsel for the defence submit that in *Paul Hegarty v. Mercy University Hospital* [2011] IEHC 435, the High Court rejected a similar claim to the instant claim. In that case the plaintiff alleged that he was not properly advised about a diagnosis of MRSA. He further argued that he was negligently allowed to believe that his life was threatened by MRSA and that he suffered "extreme emotional suffering" as a result. The plaintiff did not allege any specific psychiatric injury. Irvine J. dismissed the plaintiff's claim, holding that he had been properly advised about the infection and its significance. The Court of Appeal dismissed the plaintiff's appeal. In that case the plaintiff accepted that he was told about at least some negative result. That necessarily had to have happened prior to his discharge. The hospital was found to have been concerned about his mental health during his stay when it was entirely understandable that he would be very anxious given the severity of the condition from which he was suffering and the complications that followed the radical surgery that he had undergone. The Court of Appeal found that the High Court judge made findings of primary fact as to credibility based on assessment of the witness, which is the exclusive preserve of the trial judge and not of a Court of Appeal. The case on appeal was that the defendant suffered distress and anxiety, not nervous shock in the sense of a recognised psychiatric illness, and there was an alleged failure to inform the plaintiff that he might not actually have MRSA despite testing positive for it, and also an allegation that he was misinformed as to the negative test results. Ultimately the claim was limited and narrowly based on what the plaintiff believed wrongly about MRSA.

83. The defence in the instant case submits that Dr. Nally obtained the plaintiff's consent and took her blood in an appropriate manner on the 1st May 2003.

84. The defendants request that the court look at the inordinate delay of the plaintiff in prosecuting her claim and that her memory, given that the alleged events occurred in 2003 and we are now in 2018, is not credible at that remove.

85. The court is invited to look at numerous inconsistencies in the plaintiff's version of events surrounding her blood test and of its effect on her.

86. The defendants assert that the plaintiff's evidence in relation to the events of the 1st May 2003 are very much at variance with the GP's note of the 2nd May 2003. She alleges by contrast that Dr. Nally told her that "there has been an accident in theatre, and I

have contracted AIDS, how did that happen? There must have been somebody in before me with a dirty needle or something, and something has happened."

87. The plaintiff insisted that the first time she knew it was Dr. Gallagher who injured himself was when she met him in June 2003. Under direct questioning by this Court, the plaintiff continued to assert that she could not fathom how it had happened and nobody had explained to her nor could she understand how it had occurred.

88. The evidence of Dr. John Sheehan is deemed to be significant as he was minded to find that she had sustained an adjustment disorder, but when he compared what she recounted to him with what had happened to the medical records and with her actual behaviour immediately after the 1st May 2003, he confirmed that she was "somewhat histrionic and exaggerated". The Court is asked to note that the plaintiff told Dr. Sheehan that she did not attend with her GP the day after her procedure when she had done so.

89. Dr. Sheehan found further inconsistencies in a contention by the plaintiff that the needle used to take the blood was a foot long, excluding the syringe. The impossibility of her having seen a foot-long needle was put to the plaintiff by Senior Counsel for the defendant yet she persisted in her view.

90. Professor Sheehan laid some stress on the fact that when her blood sample had haemolysed before it could be tested, the plaintiff did not request a second test and said that she believed her blood would have automatically been tested for HIV as part of other blood tests. Professor Sheehan found this inconsistent with her attitude towards further blood testing, which did not match her alleged fear of having HIV. He felt that an anxious person would want the result and would not be waiting passively, rather looking for the result.

91. The defence referred to the decision of *Michelle Kenny v. St James' Hospital* (unreported decision of O'Hanlon J. 4th May 2014). In that case the plaintiff had been wrongfully told that she had tested positive for HIV. The plaintiff was so distraught by the news that she submitted blood for two additional HIV tests within a week of the first result and a further test to her GP a month later because of her continuing anxiety and mistrust of the hospital concerned. The plaintiff was found to have a recognised psychiatric injury as a result of the events and was awarded damages.

92. Both psychiatrists in the case, Dr. Anne Leader for the plaintiff, Professor John Sheehan for the defence, gave evidence that the plaintiff has suffered with anxiety but neither of them gave evidence that she suffered a recognised psychiatric illness.

93. With reference to the decision of Hamilton C.J. in *Kelly v. Hennessy* [1995] 3IR at 258-259, in a claim for nervous shock, the court can only find for a plaintiff if the plaintiff meets each and every one of the five requirements set down, including that the plaintiff has established that he or she has suffered a recognisable psychiatric illness, that the illness was shock-induced, that the nervous shock must have been caused by the defendant's act or omission, that 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 that the plaintiff must show 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. The defence submit that the plaintiff's claim fails on the first and fourth ground of the above requirements, referring to the decision of Irvine J. in *Hegarty v. Mercy University Hospital* [2011] IEHC 435,

> "Evidence of an actionable injury was seriously lacking in the case advanced on the plaintiff's behalf and without actionable damage, stress and anxiety alone are insufficient to support a claim, the plaintiff's claim as a matter of law is not sustainable".

In *Hegarty v. Mercy University Hospital*, Ryan P. observed that even if the hospital had been guilty of negligence, the claim must be dismissed because the plaintiff did not show that he had developed a recognised psychiatric injury.

94. Under public policy grounds it is argued that if the plaintiff developed a recognised psychiatric illness as a result of the events of the 1st May 2003, the plaintiff's claim should still fail because it is based on a fear of disease which was not caused by any act or omission of the defendant. Reliance is placed on *Fletcher v. Commissioner for Public Works* [2003] 1 IR 465.

95. Reference is made to Fullam J., *Frank Browne v. Health Service Executive* (unreported decision of Fullam J. 3rd December 2013), where he dismissed the plaintiff's claim after finding that the plaintiff did not have a prolonged adjustment disorder and for public policy reasons.

96. Regarding the submissions on behalf of the plaintiff in a case for direction, when it was argued by the plaintiff that there was an issue of assault which is not pleaded, it is noted that the plaintiff admitted signing the consent form and specifically noted that the results of the test should not be forwarded to her GP. It is significant, in the view of the defence, that the plaintiff denied attending her GP the day after this procedure and denied it when interviewed by Dr. Leader and Professor Sheehan. In this attendance by the GP there is no reference to the plaintiff feeling violated or battered or having a needle plunged into her groin without her consent. The court is urged to prefer the evidence of Dr. Nally regarding the taking of the blood to that of the plaintiff.

Findings of fact

97. There are many inconsistencies in the evidence of the plaintiff. Firstly, the plaintiff did not obtain an independent medical report prior to initiating the within proceedings, which is a necessary requirement to set out that the plaintiff's case has a reasonable chance of success. In addition the plaintiff changed solicitors but could not explain to the court any reason for so doing, other than that she said that she could not recall the reason for change of legal team. Most significant and telling evidence in the view of this Court is the GP's note taken the following day after the procedure which clearly indicates an understanding on the part of the plaintiff that she understood the reason for the blood test. Of great significance is the fact that she did not relay to Dr. Leader, psychiatrist for the plaintiff, that she had gone on this visit to her GP and did not indicate what had been told to the GP and recorded by the GP. The plaintiff persisted even though questioned by the court in this regard and continued to deny that particular visit to the GP even though there was objective evidence available to the court.

98. This leads the court to the difficult finding that the plaintiff has not been a credible witness with regard to the above matters. It is the court's finding that this plaintiff understood fully the reason for the blood test. She gave a full, free and informed consent to the procedure being carried out and showed alertness and full comprehension in that she was able to instruct that she did not wish her General Practitioner to be informed of the result of the blood test. This would be an unusual approach to take given that the thrust of the evidence was that the General Practitioner would usually be informed of any result of a patient in such circumstances.

99. This witness went so far as to assert that she had no recollection at all of visiting her GP and that she knew the reason for the blood test based on the GP's note. She even suggested that the GP may have spoken to the hospital himself about this.

100. The plaintiff did not accept that Professor Sheehan found her not to be a reliable historian. The plaintiff had no recollection of leaving the hospital with an appointment for seven weeks later, although she did say one has to stick to the appointment time. Finally, the plaintiff said that if her visit to the GP of 2nd May, 2003 was in his notes she accepted that.

101. There is a dispute as between the two anaesthetists as to the point at which true recovery takes place. The recovery time in this case is given at 12:40, but both doctors agreed that the person carrying out the procedure would be the best person to ascertain whether an informed consent is given or not. All the medical people agree that the husband could not give the consent for her and it is understood that she wanted him there for moral support. This Court accepts the evidence of Dr. Loughrey in full and in particular the fact that the plaintiff did not want her GP to have a note of the result which implies some reasoning being done by her. The court notes that Dr. Nathanson had not done a facet joint procedure for approximately fifteen years although he is, of course, a practicing anaesthetist. Both anaesthetists agree that nothing would have been lost by the test being taken one hour later. This Court accepts the evidence of Dr. Nally in full, of Dr. Gallagher in full, of Dr. Loughrey in full, and of Professor Sheehan in full. This Court accepts that Dr. Leader was not given the full information by the plaintiff regarding the GP visit. Dr. Leader's findings do not indicate a psychiatric disorder.

102. Dr. Nally says that because it was so difficult for him to take the blood, that the case itself stuck out in his mind. For that reason his recollection is clear of the essential elements. He very fairly says he cannot remember every single last detail, but Dr. Nally appeared very modest in his approach to his evidence, and is careful to say that he had now retired for a period of time. The court accepts his evidence in full as a truthful and credible witness and accepts that his taking of the consent and the blood test from this patient was done applying the same level of skill as any medical practitioner of equal status, acting with ordinary care in accordance with the ethics of his own profession and in line with the standard required.

103. While there is some lack of clarity around the letter sent by Dr. Gallagher to his CEO and what the plaintiff says he said to her, nonetheless Dr. Gallagher is the person who suffered the injury and for whose benefit the test had to be taken. He had absolutely no hand, act or part in the procedure for taking the blood. The plaintiff and her husband accepted that he had always been courteous to them and that they had essentially no complaint with Dr. Gallagher. In terms of the procedure, it appears clear that what happens is that before release as a day patient, one is given an appointment for six to seven weeks hence. That is exactly what happened in this case and on that occasion Dr. Gallagher stressed that he gave an hour to the plaintiff and her husband and fully went over her concerns.

104. While there are standard issues of conflict in the case, this Court finds on the balance of probabilities, having heard the evidence of the anaesthetists, that the plaintiff was fully conscious and capable of giving and did so give a full and informed consent at the time when she signed the consent form. I do not doubt for one minute but that Dr. Nally acted appropriately with ordinary skill and care in explaining fully to her the reason why the blood sample had to be taken. He was conscious in giving his evidence that he had acted with the appropriate degree of skill and care explaining matters to the plaintiff and in taking the blood sample. He relied on the paperwork involved and on his normal practice and approach and he said that because it had been so difficult to get blood from this patient that he recalled the incident quite clearly. It was never put to this witness that the plaintiff was told by him not to sign any document for a period of time after the procedure nor that was it put to him that he told her not to drive. It was quite clear from the evidence given by Dr. Nally that it was very difficult case from the anaesthetist's point of view, to get blood from her. The plaintiff could have obtained a blood test herself in terms of the seven week gap between having the blood test taken and seeing Dr. Gallagher. This Court notes that the plaintiff had the opportunity or possibility of getting in touch with the Medical Council to complain about Dr. Nally had she so wished or had she believed there were grounds for so doing but that she had not done this. This Court notes that the blood was taken in 2003 and that the plaintiff waited till 2004 to institute proceedings. The summons was renewed in 2007. We are now a decade later. Litigation has moved forward very slowly on behalf of the plaintiff.

105. In terms of anaesthesia, the medical distinction was made that the plaintiff did not have a general anaesthetic. She had sedation for her procedure and this is echoed in Dr. Leader's report. Dr. Gallagher confirmed also that the plaintiff had a right cervical facet block injection under sedation. He relies on the records that she was taken into recovery at 12:40pm and she was the last of five patients that morning. Notes indicate that post operatively, she was returned at 13:20.

106. In terms of any potential delay in further treatment, the plaintiff opted to leave as a public patient and wanted a referral elsewhere. She obtained this from Dr. Gallagher who referred her to Dr. O'Keeffe. There was no delay at all because she was seen by Dr. O'Keeffe on 8th March, 2003 and was treated, in accordance with the medical records, with painkillers *etc*. on that occasion. On subsequent occasions she was seen by Dr. O'Keeffe. The fact that she had to wait a period of time to undergo further injection was not the responsibility of this defendant. The patient made a choice to change hospital and team. It is quite clear that Dr. Gallagher in his letter to Mr. Murnagh of 12th August, 2003 indicated that the risk was to him, that the blood sample taken had haemolysed, that it had taken time for that information to come to him and that he had ensured that the blood test was taken on the day of the operation because she was a day patient as they did not have the space in the unit for her to wait around and he did not want to put her through the inconvenience of having to come back.

107. What is important to note about this case is that Professor Sheehan accepts that this patient has a vulnerable personality. He said initially on his objective analysis that he believed she suffered from an attachment disorder which he described as something which lasts for a short period of time following an event. However on further reflection he found that the follow through does not match up and was struck very much by the fact that the plaintiff did not tell her general practitioner of her subjective concerns and, indeed, she did not tell her GP that she was concerned nor did she seek medication from him on May 2nd, 2003. Nor did she communicate her HIV-related concerns to the GP, although may have spoken to him about her poor sleep. It was August 2004 before this lady was given antidepressants. Professor Sheehan makes the clear and subtle distinction that a person can have depressive symptoms without having a depressive illness as such as would come within the categorisation of a recognised psychiatric disorder. He then made the distinction between a person who has a histrionic personality and one who is simply not recording accurately what occurred and unfortunately the plaintiff in this case fits into the later category. This Court accepts his evidence in full.

108. This Court notes by comparison the situation in the case of *Michelle Kenny v. St. James' Hospital Board*. In that case, the plaintiff had been wrongly told that she tested positive for HIV and described it having a devastating effect on her. The plaintiff herself was proactive in that case and had a further blood test herself. The plaintiff in that case had developed an acute anxiety state and had had seventeen sessions of therapy. In that case, the shock of receiving a false positive result was one which precipitated an acute anxiety state associated with panic attacks and such a state would be recognised as a panic disorder, a recognised psychiatric diagnosis as per the DSM – 5 manual. This Court found that while that case came within the test formulated by the Supreme Court in *Kelly v. Hennessy* to a high degree, the instant case is not in the same category. Even if the plaintiff had been a credible witness, she does not fulfil the criteria for a recognised psychiatric disorder arising from this incident. This Court therefore dismisses the plaintiff's claim.