THE HIGH COURT

[2014 No. 2900 P]

BETWEEN

PATRICK KEEVE

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE AND LETTERKENNY GENERAL HOSPITAL

DEFENDANTS

JUDGMENT of Mr. Justice MacGrath delivered on the 13th day of February, 2019.

1. By order dated 31st July, 2017, Barr J. directed the trial of a preliminary issue in these proceedings, in which the plaintiff claims damages for injuries allegedly suffered by him in consequence of the alleged negligence and breach of duty on the part of the defendants when treating his late wife. Although not stated in the order, the court has been informed that the order was made on consent and it is in the following terms:-

> *"IT IS ORDERED that without further pleadings a preliminary issue be tried before a Judge without a jury wherein the Defendants shall be Plaintiff and the Plaintiff Defendant the question at the trial of such issue be as to whether the Plaintiff can maintain a claim for nervous shock in witnessing the back pain suffered by his late wife Mary Keeve which shock is alleged to have been caused by negligence claimed against the Defendants in failing to diagnose a disc legion".*

2. The plaintiff instituted proceedings by way of personal injuries summons on 4th March, 2014 having received an authorisation from the Personal Injuries Assessment Board on 30th October, 2013. He claims damages for physical harm and emotional distress allegedly caused by the negligence and breach of duty of the defendants, its servants or agents in failing to diagnose and care for his wife in the period from July, 2011 to February, 2012.

3. Mr. Keeve's wife passed away on 6th July, 2012 from a cause unconnected with her back ailment. In replies to particulars delivered on 29th February, 2016, it is stated that her death is believed to have been due to a burst ulcer and cirrhosis of the liver. The late Mrs. Keeve endured a number of medical conditions from approximately 2009 onwards and these required frequent visits to hospital. It is pleaded that in the summer of 2011 she developed back pain which became chronic and severe. Conventional pain management by her general practitioner failed and the pain continued after her transfer to St. Joseph's Nursing Home, Stranorlar. Her condition worsened to the extent that in early December, 2011 she was admitted to Letterkenny General Hospital. It is also pleaded that the defendant's medical team accepted that there had been a failure to diagnose her condition correctly and that she had suffered unnecessarily.

4. It is the contention of the plaintiff that as a result of the failure to diagnose his wife's condition correctly, he suffered acute distress which impacted upon his physical health. He further pleads that when his late wife resided with him in the summer and autumn of 2011, he witnessed her severe pain and felt helpless. It is to be noted that this period predates her admission to hospital in December, 2011.

5. The plaintiff also pleads, in particular, that his "*seeming inability to convince the Defendant, its servants or agents of her condition for several months caused him depression*". It is also alleged that:-

> *"The events leading up to the death of his wife in July 2012 has caused him distress and depression, which is still ongoing. This was compounded by this inability to convince the Defendants, its servants and or agents of the gravity of the situation until it admitted at the end of December 2011 that it has failed to diagnose a disc lesion between her L2 and L3 discs.*
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> *Further the ongoing depression caused him to develop hyper-tension, high blood pressure and cardiac pain, all of which required treatment.*
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> *The circumstances of his Wife's treatment from July 2011 – February 2012 and in particular the resistance of the Defendant's agents to his appeals for help, coupled with her death, have prolonged his physical and emotional problems."*

6. The personal injuries summons was verified by affidavit sworn on 6th March, 2015.

7. A notice for particulars was raised requesting, *inter alia*, details of Mrs. Keeve's experience of pain in the summer and autumn of 2011 and of the plaintiff's attempts to convince the hospital of the seriousness of that pain. In reply it is confirmed that the plaintiff had complained to the defendants, their servants and/or agents on numerous occasions and on a daily basis when his wife was in the hospital.

8. A full defence has been delivered. It is pleaded that the claim is barred pursuant to the Statute of Limitations 1957, as amended. This issue, however, does not fall for consideration on this application. A further argument advanced in written submissions is that it is an abuse of process to maintain proceedings for medical negligence where the plaintiff does not and has not ever possessed medical opinion in support of the allegations of negligence. In the personal injuries summons allegations of negligence and breach of duty are not particularised. The court is invited to draw an inference from this that the plaintiff does not have the benefit of expert medical opinion to support his claim and, it is submitted, that this has been confirmed by Mr. Dominic Brennan, solicitor for the plaintiff, in an affidavit sworn on 27th June, 2018. It must be stated that this issue is not expressly reflected in the order of Barr J. and it has been referred to as a secondary issue. Reliance is placed on *Flynn v. Bon Secours Health Systems Ltd* [2014] IEHC 87. While it may well be appropriate for the defendants to pursue an application to dismiss the proceedings for abuse of process, it appears that this issue does not fall clearly within the terms of the order of Barr J. It is fair to say that the central issue pursued and debated on this application relates to the nature and extent of the duty of care alleged to be owed by the defendants to the plaintiff.

9. The personal injuries summons was amended on 4th March, 2014 and from what can be observed, the only amendment made at that time related to the substitution of the name of counsel who settled the proceedings.

10. Mr. James Sweeney, solicitor for the defendants, swore an affidavit on 9th May, 2017, for the purpose of the application to have the preliminary issue tried. Exhibited to that affidavit is a medical report in which opinion is expressed that the plaintiff had not suffered a recognised psychiatric injury. It is the contention of the defendants that any psychiatric illness which the plaintiff experienced was not *shock induced*. They contend that the plaintiff did not witness any single, horrifying event and that he pleads distress which developed over a prolonged period and on an incremental basis. The defendants submit that such incremental development of a condition is excluded by the legal test applicable to recovery for nervous shock and that the plaintiff must prove that the condition complained is induced by shock.

11. The application comes before the court without any significant evidence having been adduced. In fact, the application has been based largely on the pleadings and the affidavit upon which the initial application to Barr J. was brought. To add further complication, application has been made to amend the pleadings and I shall address this below. The affidavits grounding this application were also opened to, and considered by, the court.

Preliminary issue – clarity and the determinative nature of the issue
12. While there may be circumstances in which justice requires that a case be determined on a preliminary application, nevertheless, a cautious approach should be adopted on such application was advised by the Supreme Court in *L.M. v. Commissioner of An Garda Siochána* [2015] IESC 81, where O'Donnell J., with whom the other members of the court agreed, stated at para. 32:-

> *"It is, as a general matter, important that the point sought to be tried as a preliminary issue should have the possibility of either terminating the claim altogether or at least resulting in an obvious saving in both costs and time consequent on a reduction of the issues to be tried. A point should also raise a clear issue to which it is possible to give a clear answer. The more qualified and contingent the possible answers, the less likely that the court will be able to provide a clear and decisive disposition of the case and a clarification of the law. The decision to direct a trial of a preliminary issue is therefore one which requires careful consideration by trial judges. It is important that judges do not too readily accept a respondent's protestations of complexity, impossibility or inconvenience in trying a preliminary issue, while at the same time interrogating with some scepticism a moving party's claim that the point is clear and potentially dispositive of the litigation or some significant portion of it."*
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> The Supreme Court had been requested to consider preliminary issues in three separate cases which raised similar points of law. In one of the cases, *L.M.,* the fixing of the issue was not contested and indeed may in fact have been ordered on consent. Nevertheless, and despite the fact that the parties may have agreed to approach the case on such basis, O'Donnell J. stated at para. 34:-
>
> *"However, I also consider that a court is entitled, on the hearing of the preliminary issue, to consider if it is an appropriate case for determination by this procedure. If, for example, the court proceeded to hear and seek to determine the preliminary issue after a full and elaborate argument, it would, as I conceive it, still be open to the court to conclude that in the light of the arguments and the matters advanced, that it was not possible to give the sort of clear and unequivocal answer to the issue which would dispose of the case or any issues in the case. Therefore, the case should proceed to trial to have issues of law determined in the concrete and precise circumstances of an individual case. Indeed, counsel for the defendants in these cases conceded that this could be done in an appropriate case, but I do not wish to rest this decision, particularly in the context of this case, on any such concession.* In my view, a court retains power to refuse to determine a preliminary issue if, after careful analysis, it becomes apparent that some aspect of the issue was heavily fact dependent, or that a possible outcome would be so contingent or qualified as to require almost a form of advisory opinion." (Emphasis added)

Ultimately, he concluded that it would have been wrong to seek to address important issues of law in the context of the limited available information in that case.

13. Can it be said, in this case, that the preliminary issue which has to be determined by the court, on the pleadings, or indeed on the basis of the proposed amendments, is clear? The consideration and determination of whether there is a *clear point, to which it is possible to give a clear answer*, and the manner in which that issue or point has been formulated has not proven to be straightforward and the task of the court has not been made any the easier by a last minute application to seek to amend the pleadings.

Application to amend
14. On the hearing of this application and some considerable time after the preliminary issue was set down for hearing, application was made by the plaintiff in relation to the pleadings. Counsel for the plaintiff, Mr. Kilfeather S.C., requested the court to consider, in the first instance, entertaining an application to permit an amendment of the pleadings. While counsel for the defendant, Mr. Bland S.C., indicated that he had no objection to such an application to amend on the basis of inadequate notice, he submitted that the court's jurisdiction on this application was established by the order of Barr J., which directs the trial of a preliminary issue on the basis of the proceedings as originally instituted. The defendant thereafter objects to the court considering the personal injuries summons, if and to the extent that such amendment is permitted, within the context of the preliminary issue as specified in the order of Barr J. In essence, the defendants approach is to stand on the order of Barr J. and to contend that any proceedings, as might be amended, do not fall to be considered against that order. It appears that this objection is centred on the concern that any such amendments may have the effect of introducing a new cause of action and that this may have an impact on the preliminary issue. Following further exchanges on this issue a measure of consensus emerged, based on practicality, that if the court considered the application to amend, Mr. Bland S.C. would address the court on an alternative basis – being the consideration of the preliminary issue on the basis of the original summons and, alternatively, on the basis of the summons as it might be amended. Nevertheless, it is the court's understanding that the defence position is to insist on the matter being considered in the first instance on the basis of the preliminary issue as directed by Barr J. and in the context of the original pleadings. Indeed, that order refers to the determination of the preliminary issue "*without further pleadings".*

15. The application to amend is grounded on two affidavits sworn on the same day, the 27th July, 2018 by the solicitor representing the plaintiff, Mr. Dominic Brennan.

16. At para. 3 of the first affidavit opened to the court, Mr. Brennan avers that the proceedings as originally drafted and issued do not adequately reflect the nature of the plaintiff's claim. He also avers that the proceedings as issued are not in conformity with the Rules of Court. A draft summons is exhibited to that affidavit. Mr. Brennan avers that without the amendment of the pleadings, the case will necessarily fail but that the claim as articulated in the amended proceedings is sustainable.

17. A second, more comprehensive, affidavit was sworn on the same day, also by Mr. Brennan, to which a proposed amended

personal injuries summons is exhibited. Mr. Brennan avers that the reliefs sought by way of preliminary issue requires evidence in relation to the facts, as well as the law, something which was not envisaged by the rules of court; and despite the fact that the making of the order by Barr J. was on consent. He now seeks to take issue with the procedure. The draft summons is considerably more detailed than the original summons and is said to reflect the true nature of the plaintiff's claim. In the proposed amended version, under the heading "*Nature of the claim*", the following is pleaded:-

> *"The Plaintiff's claim is for damages for personal injuries, loss, damage and expense sustained as a result of the negligence, breach of duty and breach of statutory duty of the defendants, their servants and / or agents in the treatment, care and management of the Plaintiff's wife Mary Keeve who died on the 6th of July 2012 while under the care of the First Named and Second Named defendants, their servants and / or agents and as a result of the delay in diagnosing Mrs. Keeve's lesion, the ongoing pain and suffering of Mrs. Keeve that was not being dealt with, the sense of helplessness that arose in the plaintiff as a result, the fact that the deceased was in severe pain for a number of months prior to her death caused the Plaintiff physical and psychiatric difficulties in the form of nervous shock which developed into a recognisable psychiatric illness. The trauma caused by the Plaintiff's perception of the Defendants' treatment of his wife's illness and his protestations which fell on deaf ears."*

18. Other proposed amendments include a pleading that the plaintiff's mental health was adversely affected. The allegations of negligence and breach of duty are detailed for the first time. Also contained in the draft is a more detailed recital of the acts of the defendants on which the plaintiff intends to rely as being the wrong complained of. It is proposed to plead that the plaintiff was greatly shocked and traumatised by the manner of his wife's death and the pressure placed upon him by the first defendant to provide care for her in her critically ill condition, something which he was unable to do. The pleading continues:-

> *"He developed hypertension problems and cardiac pain. The plaintiff sustained physical injury as well as a recognisable psychiatric injury and further compounded by the fact that he believes that his wife's death was unnecessary due to the failure of the Plaintiff to convince the First Named Defendant, its servants and/or agents that his wife needed to be in hospital. The Plaintiff has suffered a recognisable psychiatric illness as a result of the nervous shock induced by the Defendants, their servants and / or agents and their treatment of his wife and the Plaintiff's personal injury, loss and damage are continuing."*

19. Included in the allegations of negligence is a failure to listen to the plaintiff's complaints concerning his wife's treatment and her medical condition when she was at home. There is also an allegation that the plaintiff was placed under undue pressure to take her home and to look after her when she was wrongly discharged from hospital. Thus, the plaintiff alleges that he developed a recognisable psychiatric illness because of undue pressure placed on him to take his wife home to look after her, something which he alleges he was entirely unable to do. It seems that in the proposed amended summons, more significant emphasis is placed on the allegation that there was a failure to listen and to take cognisance of the plaintiff's protestations regarding his wife's condition and treatment. Again, it is proposed to plead that the plaintiff became extremely resentful about the way in which the defendants managed his wife's illness and the fact that he had not been listened to. He pleads that being ignored led to great emotional distress and shock over a period of time, resulting in what is described as traumatisation and shock by his perception of the defendants' treatment of his wife.

Observations

20. A number of general propositions may be stated. On an application such as this, the plaintiff's case must be taken at its height. There must be no contest as to the facts which must, as a general proposition, be agreed or conceded for the purposes of the application. Where any factual dispute arises then this is an unsatisfactory procedure.

21. If there is a defect in the pleadings but the case may be capable of being properly pursued if they are amended, the court should be slow to dismiss the proceedings without entertaining an application to amend. It is clear from the decision of the Supreme Court in *Sun Fat Chan v. Ossseous Limited* [1992] 1 I.R. 425 that where the pleadings admit of an amendment which might save the action, the action should not be dismissed. The defendants submit that even if amended, the central basis of their application remains unchanged.

22. I appreciate that a very candid averment is made at para. 11 of the first affidavit sworn by Mr. Brennan that if the pleadings are not amended, the claim will necessary fail. In the light of the legal arguments advanced before the court, I do not believe Mr. Brennan's averment should be viewed as anything other than an expression of concern or opinion. It should not be viewed as dispositive of the issue.

Nervous Shock

23. The defendants argue that the plaintiff cannot maintain a claim for nervous shock as he cannot establish that the witnessing of his spouse's back pain over several months constitutes the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It is submitted that this case does not even come to the threshold of some of the very hard cases which have fallen short of the requirements of the cause of action. It is also submitted that the plaintiff's action is one in negligence only, as distinct from an action in contract where damages for emotional or mental distress may in principle be recoverable. The plaintiff was not a patient of, nor had he a contractual relationship with, the hospital. The defendants argue that there is no redress in negligence for distress, emotional upset, grief or sorrow falling short of psychiatric illness, and reliance is placed on the decisions of Clarke J. (as he then was) in *Larkin v. Dublin City Council* [2008] 1 I.R. 391 and Irvine J. in *Hegarty v. Mercy University Hospital Cork* [2011] IEHC 435. The defendants also rely on dicta in *Walter v. Crossan* [2014] 1 I.R. 76, in which Hogan J. reviewed the authorities and summarised the law as follows at p. 78:-

> *"Can a plaintiff in an action for negligence recover damages for the upset and inconvenience caused by a breach of a duty of care that is owed to them where that upset, distress and inconvenience falls short of nervous shock and psychiatric injury?*
>
> *[…]*
>
> *There is no doubt but that damages for distress and inconvenience of this kind are at least in principle recoverable in an action for breach of contract.*
>
> *[…]*
>
> *… injuries which the plaintiffs suffered (mental distress, upset and inconvenience falling short of nervous shock or psychiatric illness) are not recoverable in an action for negligence, as distinct from an action for breach of contract."*

24. The defendants also submit that the principles of negligence in relation to a claim for nervous shock, constitute an exception to the general rule that a doctor does not owe a duty of care to a non-patient third party arising out of treatment of a patient.

25. Considerable emphasis is placed by the defendant on the five conditions specified by Hamilton C.J. in *Kelly v. Hennessy* [1995] 3 I.R. 253, as summarised in *Devlin v. National Maternity Hospital* [2008] 2 I.R. 222 as follows:-

> *"…in order to recover damages for nervous shock a plaintiff must establish:-*
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> *(a) that he or she actually suffered a recognisable psychiatric illness;*
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> *(b) that such illness was shock induced;*
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> *(c) that the nervous shock was caused by the defendant's act or omission;*
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> *(d) that the nervous shock sustained was by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff;*
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> *(e) that the defendant owed him or her a duty of care not to cause him or her a reasonably foreseeable injury in the form of nervous shock as opposed to personal injury in general."*

26. The defendants submit that the plaintiff cannot satisfy the second condition, that the psychiatric condition was "*shock induced*". Shock must be a sudden and horrifying event and psychiatric illness caused incrementally over a period of time will not suffice. Reliance is also placed on *Fletcher v. Commissioner of Public Works* [2003] 1 I.R. 465 where Keane C.J., citing *Kelly v. Hennessy*, stated at p. 481:-

> *"In considering what circumstances will amount to nervous shock in that context, one can begin by recalling that Brennan J., as he then was, in Jaensch v. Coffey (1984) 155 C.L.R. 549, said that psychiatric illness which was not induced by shock but by the experience of having to cope with bereavement did not entitle the injured person to damages. He gave the examples of the spouse worn down by caring for an injured wife or husband or the parent rendered distraught by the wayward conduct of a brain damaged child and who suffered psychiatric illness as a result. Even though the injury to spouse or child may have been the result of a tort, the affected spouse or parent will have no action in damages against the wrongdoer.*
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> *In Alcock v. Chief Constable of Yorkshire [1992] 1 A.C. 310, Lord Ackner said at pp. 400 to 401:-*
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> *'Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways such as by the experience of having to cope with the deprivation consequent upon the death of a loved one attracts no damages. …*
>
> *"Shock", in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.'*
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> *The plaintiffs in Kelly v. Hennessy [1995] 3 I.R. 253 and McLoughlin v. O'Brian [1983] 1 A.C. 410 each sustained 'nervous shock' in the sense indicated by Lord Ackner and were held entitled to recover because the resultant psychiatric illness was the foreseeable consequence of the wrongdoing which brought about the shock. In the present case, there was no shock of that nature: no sudden perception of a frightening event or its immediate aftermath, disturbing the mind of the witness to such an extent that a recognisable psychiatric illness supervened. If the plaintiff is entitled to recover damages it must be because such damages can be recovered in respect of a psychiatric disorder brought about otherwise than by 'nervous shock', in this case, by a combination of anger and anxiety which was the result of the plaintiff having been informed of his exposure to the risk of contracting mesothelioma because of his employers negligence."*

27. Mr. Bland S.C. contends that while there may be a move to a more liberal approach in other jurisdictions, the Supreme Court has repeatedly approved the *Alcock* definition of shock. He submits that although certain claims for nervous shock may be described as hard cases, and while the term "*nervous shock*" is considered by some to be archaic, a line has been drawn and this line has been repeatedly approved. Thus, it is argued that to find in the plaintiff's favour in this case would do violence to the line drawn in *Kelly v. Hennessy* and result in unforeseen consequences. It is argued that if the Court is to extend nervous shock to witnessing the suffering of a loved one by reason of a failure to diagnose, it could extend to other members of the family, or to a range of different people. This would be a most significant development, would likely have unforeseen consequences and would offend against the views of the Supreme Court in *Glencar* and in *Fletcher* about such developments being approached on an incremental basis.

28. Reference is also made to a number of English authorities, including *Sion v. Hampstead Health Authority* [1994] 4 Med. L.R. 170 (CA). There, recovery for nervous shock was denied on the grounds that the injury had been suffered incrementally and not during a violent or sudden event. A father had witnessed his son's death in hospital over 14 days, the defendant having negligently failed to diagnose bleeding in his left kidney. Mr. Bland S.C. however emphasises that the period in this case is far in excess of 14 days. He refers to *Mills, Medical Law in Ireland*, 3rd Ed., (Bloomsbury Professional, 2017) on nervous shock at p. 202, footnote 20, which contains the following paragraph:-

> *"So, eg, the slow unfolding of negligent care – as distinct from a more sudden event – may not meet the criteria: Sion v Hampstead Health Authority [1994] Med LR 170 (CA). That this is the approach in Irish medical negligence cases appears clear from Devlin v National Maternity Hospital [2007] IESC 50, per Denham J at para 48:*
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> *'The common law has evolved by reference to the occurrence of a specific event – a railway or car accident. In Alcock & Ors v Chief Constable of South Yorkshire Police [1992] 1 AC 310, Lord Ackmer said at p 401:*
>
> *"'Shock', in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system."*
>
> *This statement reflects the common law in Ireland where the 'aftermath' cases either relate to the event, or the*

situation in its immediate aftermath.'

The crucial element is the unexpected, shocking nature of what the plaintiff has witnessed rather than the character of the event in question: see Sion v Hampstead Health Authority [1994] Med LR 170 (CA), per Gibson LJ at 176. What constitutes an 'event' may – on the English cases – be somewhat elastic: North Glamorgan NHS Trust v Walters [2003] EWCA Civ 1792, [2003] Lloyds Rep Med 49 – the court construed the legal test (at para 34) to encompass a 'series of events which make up the entire event beginning with the negligent infliction of damage through to the conclusion of the immediate aftermath whatever that may be'."

29. The plaintiff's wife was admitted to Letterkenny General Hospital in early December, 2011, and the defendant contends that in any event, any failure to diagnose postdates the events of summer and autumn of 2011. Thus, even if the plaintiff had pursued this claim on the basis of witnessing his wife's pain between early and late December, it is submitted that this is precisely the type of case that is excluded by the second precondition for recovery in a nervous shock type case. It is further observed that as the plaintiff pleads that he was worn down by seeing his wife suffer back pain over a prolonged period of time, it follows that the plaintiff is not making the case that his injuries were shock induced or attributable to any specific event.

30. Mr. Kilfeather S.C. on behalf of the plaintiff, refers to a letter from the hospital dated the 6th February, 2012, exhibited in Mr. Brennan's affidavit, as confirming that both Mr. and Mrs. Keeve attended the hospital on four occasions and as an acknowledgment of a delay in diagnosis. He also submits that the question before the Court is not whether the plaintiff, within the confines of the authorities, can *succeed* in an action for nervous shock, but whether he can *maintain* such an action. It is submitted that the wording of the order of Barr J. directing the trial of a preliminary issue is not that the matter be looked at on the pleadings. It is submitted that it is a very broad question, one of academic interest. It is thus submitted that the manner in which the order is phrased is such as permits the parties to address the court on the generalities of the case as opposed to the specifics.

31. Referring to the decisions in *Kelly v. Hennessy and Courtney v. Our Lady's Hospital*, Mr. Kilfeather S.C. submits that while *Kelly v. Hennessy* is the law in this jurisdiction, it is not as restrictive as *Alcock* or *Sion*. He argues that it is highly unlikely that a court in this jurisdiction would arrive at the same conclusion, on the facts of *Sion*, as the English court did. It is submitted that other jurisdictions are moving in a different direction. He draws the Court's attention to the following paragraph in McMahon and Binchy, *Law of Torts*, 4th Ed. (2013, Bloomsbury Professional), as follows at 17.71:-

"In Courtney v Our Ladies Hospital and Others, the plaintiffs claim for damages for nervous shock was conceded and the case proceeded as an assessment of damages only. It was conceded that the injury was 'shock induced'. The circumstances were as follows: the plaintiff was mother of a half-twin, Aisling, who was two and a half years of age when she became ill one night in February 2006 at about 11.30 pm. The parents became concerned, as the infant was hallucinating and they brought her to the defendant hospital. She was seen initially by a triage nurse who gave her Paracetamol. Later at approximately 7 am she was examined by a doctor who diagnosed her as having a viral gastric bug. Later the child developed purple spots, was put on a drip and later at approximately 10.25 am, after being transferred to the intensive care unit for meningitis, she died of a heart attack. The plaintiff stayed with the child all night and witnessed Aisling's rapid deterioration. The Court noted that 'the plaintiff's immediate and very understandable reaction to these horrific events was one of intense shock' which in the Court's view led to a depressive illness 'which was caused by her exposure to and experiencing of the shockingly traumatic sequence of circumstances in the defendant's hospital, culminating in the death of Aisling'.

A few comments are invited. First, the award of €150,000 in total awarded by O'Neill J is more generous than the Courts have been accustomed to give in these types of cases up to now, which may reflect that the Courts are becoming accustomed and comfortable with these cases in more recent times. Second, the requirement that the psychiatric injury was 'shock-induced', does not mean that the shock must be a single act or event. In Courtney, the Court acknowledged that the shock in question was prolonged and covered a period of more than 12 hours. Third, the case illustrates that while it may be difficult in some cases to distinguish between normal grief, for which no compensation is available except in the dependant's action under Part IV of the Civil Liability Act 1961, and a recognisable psychiatric illness which warrants compensation, it is not an impossible distinction for the Courts to handle in many cases."

The plaintiff lays emphasis on the second point, that the shock in question was prolonged and occurred over a period of more than 12 hours. On this point, however, Mr. Bland S.C. states the instant case is not concerned with a 12 hour event, but with a period extending to at least six months. What he describes as such "*elasticity*" cannot be stretched to this case.

32. Mr. Kilfeather S.C. argues that in Australia, South Africa and Canada, there is a move away from the requirement of sudden shock. In *Skea v. NRMA Insurance Limited* [2005] ACTCA 9 it was found that there was only one psychiatric injury which was brought on by an initial series of events but which was exacerbated and aggravated by the requirements to look after the person for a period of time. Damages were awarded for the entirety of the psychiatric injury. It is contended that *Skea* feeds into the decision of O'Neill J. in Courtney, which is an acknowledgement that shock can be due to prolonged exposure over a period of time. While counsel for the plaintiff argues that *Skea* may have gone further than Courtney, it may be stated to be an extension of O'Neill J.'s decision that there does not have to be a sudden, abrupt event; it may involve a prolonged exposure over a period of time. He also argues that *Sion* and *Alcock* are more restrictive than the Irish authorities. Thus in *Sion* it is stated at pp. 28 and 29:-

"Although there are dicta in the McLaughlin case and the Alcock case suggesting that this law may be further developed, in the light of the Alcock case there is in my judgment no prospect whatever of the Plaintiff succeeding in an argument that there is no need to prove a sudden or any shock."

33. With regard to his contention that the preliminary issue must be dealt with only in the broadest manner, Mr. Kilfeather S.C. points out that the plaintiff developed a psychiatric illness in the context of a number of visits to Letterkenny General Hospital, and in circumstances where the plaintiff maintains that he brought matters to the attention of the defendants and that his concerns were not acted upon. It is contended that for the purposes of this application it must be accepted that the plaintiff can establish a recognisable psychiatric injury and negligence. Success will be determined on the evidence. In reply, it is argued on behalf of the defendants that the word "*maintain*" in the order directing the trial of a preliminary issue means to prosecute or advance a claim, and not whether the plaintiff should be permitted to advance a case that is bound to fail.

Decision

34. In the personal injury summons it is pleaded that the *seeming inability* of the plaintiff to convince the defendants of his wife's condition caused him depression. On initial view, this appears to be a different cause of action – relevant to the plaintiff's actions and inactions and the defendants' response thereto, rather than injury caused as a result of him observing his late wife's condition.

Implicit is that the plaintiff claims to be owed a duty of care in relation to the manner in which his protestations and concerns were dealt with, and not simply as a result of observing his wife's condition. Also of note is a general reference to the plaintiff having suffered a physical injury.

35. While there is a lack of clarity on the pleadings, in the affidavit sworn by Mr. Brennan on 27th June, 2018, in support of the application to amend, the following is stated:-

> *"…this is a personal injuries action brought about because of the failure to diagnose, delay in treatment and the ongoing inability of the defendants to deal with the medical condition of Mrs Mary Keeve, deceased; not the plaintiff Mr. Patrick Keeve. He suffered as a result of developing a personal injury of and concerning the situation wrought by the defendants in relation to his wife"*

This would tend to suggest that the claim is based on Mr. Keeve being a victim of exposure to an alleged failure on the part of the defendant to treat his wife appropriately and in time, and his observation of her ongoing discomfort and pain which resulted in his injury. Nevertheless, the proposed amended pleadings suggest that it was because the plaintiff had become resentful regarding the matter of his wife's treatment and the fact that they had not listened to his complaints that led to emotional distress and shock over a period of time. Indeed, during the course of the hearing, Mr. Kilfeather S.C. stated that he wished to maintain this line of argument. On this point, the defendants argue that the plaintiff was not a patient of, nor had he a contractual relationship with, the hospital.

36. There are aspects of this case which, in my view, create confusion regarding the nature of the claim being advanced by the plaintiff, and therefore give rise to an issue of whether it is satisfactory to proceed to determine it by way of preliminary issue. I must be mindful of the warning of O'Donnell J. in *L.M. v. Commissioner of An Garda Siochána* [2015] IESC 81, at para. 32, which I repeat:

> *"It is, as a general matter, important that the point sought to be tried as a preliminary issue should have the possibility of either terminating the claim altogether or at least resulting in an obvious saving in both costs and time consequent on a reduction of the issues to be tried. A point should also raise a clear issue to which it is possible to give a clear answer"*

37. On the one hand, certain allegations made by the plaintiff relate to him suffering from a psychiatric (and physical) injury as a result of observing his wife in pain. On the other hand, it is specifically pleaded that Mr. Keeve's seeming inability to convince the defendant its servants or agents of her condition for several months caused him depression. Whether this is intended to be advanced as a separate cause of action, or as a cause of action based upon an extension of the principle in *Kelly v. Hennessy*, is not at all clear to me.

38. The leading authority on recovery for negligently inflicted nervous shock in this jurisdiction is *Kelly v. Hennessy* [1995] 3 I.R. 253, where the court outlined the requirements for recovery, which it is stated include that the illness must be shock induced. In this regard, reliance was placed in *Kelly* on dicta of Brennan J. in *Jaensch v. Coffey* [1984] 155 C.L.R. 549 where he stated:-

> *"A plaintiff may recover only if the psychiatric illness is the result of physical injury inflicted on him by the Defendant or if it is induced by shock. Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness."*

39. That there has been a general reluctance in this jurisdiction to extend the duty of care owed in respect of psychiatric injury/nervous shock is evident from the decision of the Supreme Court in *Fletcher v. The Commissioner of Public Works in Ireland* where it was held that it was unreasonable to impose a duty of care on employers to guard against mere fear of disease, even if such fear might have led to a psychiatric condition. During the course of argument, counsel for the defendants, Mr. Bland S.C., relied on dicta in *Fletcher* where Keane C.J. stated at p. 481:-

> *"The plaintiffs in Kelly -v- Hennessy [1995] 3IR 25 and McLoughlin -v- O'Brian [1983] 1 AC 410 each sustained "nervous shock" in the sense indicated by Lord Ackner and were held entitled to recover because the resultant psychiatric illness was the foreseeable consequence of the wrongdoing which brought about the shock. In the present case, there was no shock of that nature: no sudden perception of a frightening event or its immediate aftermath, disturbing the mind of the witness to such an extent that a recognisable psychiatric illness supervened. If the plaintiff is entitled to recover damages, it must be because such damages can be recovered in respect of a psychiatric disorder brought about otherwise than by "nervous shock": in this case, by a combination of anger and anxiety which was the result of the plaintiff having been informed of his exposure to the risk of contracting mesothelioma because of his employers' negligence."*

40. Further in *Devlin v. National Maternity Hospital* [2008] 2 I.R. 222, Denham J. acknowledged that there are limits in law to liability for nervous shock. That case concerned an allegation by the plaintiffs that the hospital had wrongfully carried out a post-mortem examination on a stillborn child and had removed and retained organs without the knowledge or consent of the plaintiffs. The court reaffirmed the principles in *Kelly v. Hennessy* and *Fletcher v. The Commissioner of Public Works*. It further reaffirmed that the nervous shock sustained by the plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff and that damages for nervous shock would only be awarded where a person has perceived an accident or its immediate aftermath and suffered a recognised psychiatric illness. At p. 240, Denham J. stated as follows:

> *"this is a tragic case. In essence it arises because of the receipt of bad and sad news in a letter from the hospital. It is a hard case. The parents are entitled to deepest sympathy for their loss. However, the law as it stands does not entitle them to damages and I would not extend the law. Any such development would give rise to uncertainty in the law of liability generally and to potentially unforeseeable repercussions."*

41. Counsel for the plaintiff reliess on Skea as illustrative of an extension of the law where there is an incident of a gradual nature that results in the development of nervous shock. An analysis of the facts of that case, however, suggests that while at the scene the plaintiff had suffered an initial shock and what was under consideration was whether an exacerbation or aggravation of that shock as a result of having to care for the loved relative was compensable. Therefore, I do not believe that this decision necessarily advances the position of the plaintiff. There are Australian authorities, however, which appear to introduce a relaxation on the requirements to establish a duty of care, such as *Annetts v. Australian Station* [2002] HCA 45 and *Gifford v. Strang*. [2003] HCA 33. In *Gifford*, a father was crushed by a forklift truck and died instantly. His sons and estranged wife were informed of the death. They never saw the badly damaged corpse as they were advised against this. The High Court of Australia held that the deceased's sons were owed a duty of care by their father's employer not to cause them nervous shock. The decision was made in light of the earlier decision in *Tame and Annetts* in which the High Court of Australia is said to have relaxed the criteria to permit recovery for nervous shock which is caused in a gradual manner. At the heart of these developments is the court's analysis of its earlier decision in *Jeansch*

v. Coffey [1984] HCA 52, and in particular dicta of Brennan J. to which reference is made by both Hamilton C.J. and Denham J. in *Kelly v. Hennessy*. Thus, Gaudron J. expressed the view that *"no aspect of the law of negligence renders 'sudden shock' critical either to the existence of the duty of care or to the foreseeability of a risk of psychiatric injury"*. Gummow and Kirby JJ. observed that:-

> *"Cases of protracted suffering, as opposed to 'sudden shock', may raise difficult issues of causation and remoteness of damage. Difficulties of that kind are more appropriately analysed with reference to the principles of causation and remoteness, not through an absolute denial of liability"*

42. But as a more fundamental issue, there are factors in this case which, in my view, make it unsatisfactory and contrary to the warning of the Supreme Court in *L.M. v. Director of Public Prosecutions* [2015] 2 I.R. 45 to attempt to dispose of it on the proposed basis.

43. I have set out the arguments and submissions of the parties in detail. The circumstances in which the duty of care is said to arise, or not, are unclear. The state of the pleadings is unsatisfactory. No evidence has been subjected to consideration by the court beyond reference to affidavit evidence adduced for the purposes of the initial application; and two further affidavits which have been prepared in the context of the application to amend. The court is in effect being requested to determine the preliminary issue without any real evidence and on the basis of pleadings acknowledged to be less than satisfactory, or on the basis of pleadings that might exist. Even approaching the case on a *de bene esse* basis i.e. as if the pleadings were amended in line with the proposed motion, in my view if this court was to rule on the preliminary issue as it has now unfolded it would be to fail to heed the warning in *L.M*. To rule on the application on the basis of the proceedings as initially instituted, in my view, is even more unsatisfactory and somewhat inconsistent with the approach adopted by the Supreme Court in *Sun Fat Chin*. Even on the original pleadings, complaint is made that the manner in which the plaintiff was treated led to injury.

44. Therefore, in the circumstances I do not propose to accede to the defendants' application.