THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 94

Record Number: 2014 195

RYAN P.
PEART J.
WHELAN J.

BETWEEN:

DENIS O'LEARY

PLAINTIFF/APPELLANT

- AND -

MERCY UNIVERSITY HOSPITAL CORK LIMITED,

AND KHALID M. ALI CHIAD AL-SAFI

DEFENDANTS/RESPONDENTS

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 12TH DAY OF MARCH 2018

1. This is an appeal from the judgment and order of the High Court (Quirke J.) dated the 20th May 2010 dismissing the plaintiff's claim in negligence against the defendants for damages arising from treatment that he received at the Mercy University Hospital in Cork, firstly in January/February 2002, and some years later in April/May 2006, after a hearing that lasted some twenty two days.

2. There is no appeal against the findings of the trial judge in relation to the treatment received in early 2002. However, a finding of fact made in relation to that treatment is that by January 2002 there was no recoverable function in the plaintiff's left kidney. That finding, which is not appealed, has some relevance to the plaintiff's claim that the treatment he received in April/May 2006, and in particular the augmentation cystoplasty that was performed on him by Mr Al-Safi on the 16th May 2006 in order to increase the capacity of his bladder, was not an appropriate procedure for the plaintiff, given his particular condition, and that it was negligent to have carried it out.

3. In addition the plaintiff maintains that he did not give a proper fully informed consent to augmentation cystoplasty since he was not informed of all of the known facts and risks associated with augmentation cystoplasty before agreeing to undergo this surgery, and in particular that thereafter he would have an increased risk of cancer, stone formation and mucus production, and would have to self-catheterise for the rest of his life.

4. It was contended also that he should have been fully apprised of two alternative treatments for his condition, namely a substitution cystoplasty, and urinary diversion by ilial conduit (often referred to as "the bag").

5. In addition the plaintiff complained that prior to the surgery Mr Al-Safi had assured him that the surgery would be 100% successful, whereas as matters have turned out he feels that he is in a far worse position than he was before the surgery.

6. The plaintiff maintained that if he had been warned of all the risks he has subsequently been made aware of, which are associated with augmentation cystoplasty, and what it would involve for the future, and if he had been told of the possible alternatives open to him, and had not been assured that the surgery would be 100% successful, he would not have given his consent to the augmentation cystoplasty carried out by Mr Al-Safi on the 16th May 2006.

7. Another element of the plaintiff's claim in negligence is that Mr Al-Safi was not appropriately qualified or experienced to properly manage and medically treat the plaintiff's condition, and in particular to carry out this particular form of surgery. While the plaintiff's experts supported this criticism of Mr Al-Safi's qualifications and experience, the trial judge noted that "all the experts who gave evidence had acknowledged that the surgery was carried out by him competently, efficiently and carefully and that the technique and skill level demonstrated by Mr Al-Safi was fully in accordance with general and approved medical practice in this jurisdiction in 2006".

8. The trial judge found that a 20 minute conversation which took place between Mr Al-Safi and the plaintiff on the evening of the 15th May 2006 prior to the surgery on the 16th May 2006 was a sufficient amount of time for Mr Al-Safi to have imparted to the plaintiff the information which he says that he imparted during that period to enable him to give a fully informed consent. There is no doubt that there is a difference of opinion between the experts called by the plaintiff and the defendants' experts as to what the plaintiff was entitled to be told before giving his consent. If the plaintiff's evidence was accepted it is clear not only that the information given to him by Mr Al-Safi fell short of what his experts said ought to have been given, but also fell short of what the defendants' experts regarded as the appropriate level of disclosure. But the trial judge, having heard Mr Al-Safi's evidence as to what he told the plaintiff, and having heard all the experts on both sides, concluded that he was not satisfied that the plaintiff had established on the balance of probabilities that Mr Al-Safi had failed to advise him of all the known facts and risks associated with augmentation cystoplasty.

9. It is important to note also that in reaching these conclusions, the trial judge stated that he did not find the plaintiff to be a reliable or credible witness. On the other hand he stated he found Mr Al-Safi to be a conscientious witness, and he believed that his account of the warnings that he gave to the plaintiff in respect of the risks associated with augmentation cystoplasty "is probably an accurate and correct account". He went on to state:

> "It follows that I am satisfied on the evidence and on the balance of probabilities:
>
> (a) that he explained to the plaintiff in full the nature and extent of the surgery which he was recommending and the need for a cystoscopy and biopsy in order to rule out any possible cancerous condition,

(b) that he warned the plaintiff that self-catheterisation might be a consequence of the surgery and might be permanent and lifelong,

(c) that he explained to the plaintiff that he might need re-exploration if there were bowel obstructions or complications resulting from the surgery, and

(d) that he also warned the plaintiff of the risk of nocturnal wetness, infection, stones and the presence of mucus within his bladder.

It is also probable that Mr Al-Safi warned the plaintiff of the risk of cancer resulting from the surgery, but told him that it was a very small risk and might need to be investigated between 10 and 15 years after the surgery and that he could not guarantee the success of the treatment, but was hopeful that it would relieve the plaintiff's symptoms and protect his left kidney.

In particular I do not believe that it is likely or probable that Mr Al-Safi told the plaintiff that his chances of successful surgery were 100%."

10. As for the alleged failure by Mr Al-Safi to inform the plaintiff, as part of the consenting process, of the two alternative procedures referred to, namely substitution cystoplasty and diversion by ileal conduit, both Mr Al-Safi and his expert witnesses said in evidence that they did not consider it necessary to inform the plaintiff of procedures that they would not consider appropriate to his condition, and therefore that they would not be in favour of doing so. The trial judge found that Mr Al-Safi, and the experts, Mr Lanigan, Mr Drumm and Mr Rogers, all were of the same view, namely that the successful treatment of the plaintiff's symptoms and condition could best be achieved by augmentation cystoplasty. The trial judge noted that Mr Al-Safi had stated in evidence that there were significant risks to the plaintiff's health and well-being with the two alternatives referred to, and that it was not in his best interests to be subjected to either of them.

11. In this regard the trial judge concluded:

"Mr Al-Safi was under a duty to explain to the plaintiff the nature and extent of the augmentation cystoplasty which he was recommending and to further explain to him that the decision as to whether or not this surgery should be undertaken was for the plaintiff to make and not for Mr Al-Safi. I am satisfied that he did so.

The plaintiff was quite entitled to choose not to undergo the surgery and, indeed, was entitled to choose not to accept any treatment.

I do not, however, accept that Mr Al-Safi was under a duty to offer the plaintiff any surgical procedure which he was not recommending and which he did not consider was an appropriate treatment for the plaintiff's symptoms and medical condition.

I accept the evidence of Mr Lanigan and of Mr Drumm that the warnings given by Mr Al-Safi to the plaintiff in respect of the augmentation cystoplasty were the appropriate warnings which should be given to patients in respect of the relevant urological surgery in 2006.

It follows from what I have just found, that the plaintiff has not established on the evidence and on the balance of probabilities that Mr Al-Safi failed to disclose to him all of the known facts and risks associated with the augmentation iliocystoplasty performed by him upon the plaintiff on the 16th May, 2006."

12. As for the allegation that Mr Al-Safi lacked the necessary qualifications and experience to have performed this surgery on the plaintiff, the trial judge was satisfied on the evidence that he heard that Mr Al-Safi "had all the qualifications which were required for the management and treatment of the plaintiff's condition at the time when he did so". He went on:

" It is not the function of this court to assess or review [whether] the level of qualification required for particular professional medical appointments made by the Hospital or other medical authorities have been adequate or appropriate. Such matters are within the jurisdiction of the relevant State and professional authorities.

The courts may intervene upon evidence of illegality or misconduct but, prima facie, the qualifications required by relevant State and statutory authorities for medical posts such as that occupied by Mr Al-Safi are presumed to be adequate and appropriate until the contrary has been established. The onus of proof, which rests upon the plaintiff in this case has not been discharged by him."

13. The trial judge went on to state that where the court was presented with genuine conflicting expert medical opinion as to the appropriate medical management or treatment of patient, a medical practitioner cannot be deemed negligent simply because the management or treatment which has been chosen or prescribed or undertaken does not achieve its desired objective and is otherwise unsuccessful. He stated that in the present case there were two genuinely held expert professional views as to the appropriate management of the plaintiff's condition. He stated also that the court was not competent to determine which expert medical opinion was correct, or indeed if either was correct. He then stated "the question for this court to determine is whether, in the circumstances, Mr Al-Safi acted reasonably". Having considered the principles identified by the Supreme Court in *Dunne v. National Maternity Hospital* [1989] I.R. 91, and having discussed the differing views between the experts on both sides, the trial judge stated:

"The cumulative evidence adduced on behalf of the parties on this issue falls far short of evidence from which this court could possibly find or infer that Mr Al-Safi at any point deviated from proper medical practice or followed a course which "no medical practitioner of like specialisation and skill would have followed, had he been taking the ordinary care required from a person of his qualifications.

It also falls far short of evidence from which the court could find, or infer, that Mr Al-Safi failed to act reasonably in the circumstances, or failed to follow general and approved medical practice in respect of the management and treatment of the plaintiff's condition.

Accordingly, the plaintiff has not established, on the evidence, that Mr Al-Safi was in any way negligent in his management of the plaintiff's condition, in recommending augmentation cystoplasty to the plaintiff or in the performance of that surgery for the plaintiff or on any other respect.

It follows that the plaintiff's claim fails and must be dismissed."

The Grounds of appeal

14. A number of grounds of appeal are advanced by the plaintiff:

(a) The trial judge relied upon an erroneous finding of fact for his conclusion that the plaintiff was not a credible or reliable witness.

(b) The trial was fundamentally unfair because the trial judge permitted the defendants to lead evidence on certain matters relating to informed consent which had not been put to the plaintiff or his expert witnesses, and had not been pleaded, and therefore there was no opportunity for the plaintiff to refute that evidence.

(c) The finding that the plaintiff was informed of the risks associated with augmentation cystoplasty was against the evidence.

(d) The trial judge erred in concluding that the plaintiff was not entitled to be informed as part of the informed consent process to be told of the possible alternatives to an augmentation cystoplasty which Mr Al-Safi intended to carry out.

(e) The trial judge erred in holding that the burden of proving that Mr Al-Safi had not obtained an informed consent rested upon the plaintiff.

(f) The generally unsatisfactory nature of the trial.

(g) New ground based on the level of the defendants' experts' fees, discovered by the plaintiff's advisers only upon receipt of the defendants' bill of costs.

Ground (a): The trial judge relied upon an erroneous finding of fact for his conclusion that the plaintiff was not a credible or reliable witness

15. This ground relates to the trial judge's statement at p.12 of his judgment that he did not find the plaintiff to be credible or reliable. The plaintiff's evidence as to what he was told by Mr Al-Safi on the evening before his surgery differed from that given by Mr Al-Safi. In his summary of the plaintiff's evidence the trial judge stated, *inter alia*, that on the evening before the surgery Mr Al-Safi had visited the plaintiff and had discussed the need for this particular procedure. This was the first time the plaintiff became aware that it was Mr Al-Safi and not Mr Rogers who was to perform the surgery the following day. The trial judge stated also that the plaintiff had told Mr Al-Safi that he did not want the surgery, and that he had been told to think about it overnight. The following morning there was another discussion. The plaintiff said that he felt pressurised into having the operation, and that he did not want Mr Al-Safi to do it, but he was assured that he would be "perfect" after it. The ground of appeal relates to the trial judge's statement in his judgment that [the plaintiff] said his sister was present with him when he made his decision [to have the surgery] and decided to agree to the surgery because Mr Al-Safi had 'guaranteed me that it would be 100%'. Having referred to other evidence that the plaintiff gave as to being told for the first time by Mr Al-Safi after the surgery that he would have to return for bowel biopsies every twelve months because he would be prone to cancer, the trial judge then stated at p. 9 of his judgment that "although the plaintiff's sister was in court and in contact with the plaintiff during his testimony she did not testify in these proceedings". At p. 12 thereof, the trial judge addressed the evidence that the plaintiff gave of his discussion with Mr Al-Safi prior to the surgery and then stated: "He said that his discussion with Mr Al-Safi on the evening before his surgery had been witnessed and fully overheard by his sister". The trial judge then went on to say that "during his evidence he pointed to his sister and stated that she would corroborate his account of his conversation with Mr Al-Safi" and then noted that "no corroborative evidence was adduced by the plaintiff's sister in the support of his account of what was said". That is immediately followed by the trial judge's statement that he did not find the plaintiff to be a reliable or credible witness, and that he was not satisfied that the plaintiff had established on the balance of probabilities that Mr Al-Safi had failed to advise him of all the known facts and risks associated with the surgery performed.

16. It is accepted by all parties that the trial judge erred in his judgment where he stated that the plaintiff's sister was present during the discussion between Mr Al-Safi and the plaintiff on the evening of the 15th May 2006. It is submitted that the trial judge clearly relied upon the fact that the sister did not give evidence to corroborate the plaintiff's evidence of what was said during this discussion for his conclusion that the plaintiff's evidence was not reliable or credible.

17. The plaintiff states that what he in fact said in his evidence was that his sister had been present *in the hospital* at that time, and not that she was present with him and Mr Al-Safi when this discussion took place prior to the surgery. It is submitted that since this error led the trial judge to find that he was not a reliable or credible witness, and to conclude therefore that the plaintiff had not proven his case on the balance of probabilities, a new trial should be directed by this Court.

18. The defendants on the other hand submit that whether or not the trial judge made an error in stating that the plaintiff's sister was present during the discussion with Mr Al-Safi either on the evening before the surgery or the morning of the surgery is really neither here nor there as far as the adverse credibility finding is concerned, since it is clear on the transcripts of this lengthy hearing that there were many other aspects of the plaintiff's evidence which led the trial judge to conclude that his evidence was not reliable or credible besides his failure to call his sister to corroborate his evidence as to what he was or was not told by Mr Al-Safi. Having said that, the defendants also point to the fact that his sister was actually named by the plaintiff on the schedule of witnesses as to fact disclosed to the defendants under S.I. 391/1998, as were two other friends of the plaintiff, who also were not called, and who the plaintiff had stated during his evidence had witnessed an alleged incident on the day after the surgery involving a cannula, which had caused blood to leak over his bed and that there was blood on the walls also. He also said that this had been seen by Mr Al-Safi. However, that was not put to Mr Al-Safi in cross-examination, though he did say that the plaintiff had told him about it in November 2006, some six months later. In addition the plaintiff had said in his evidence that this incident had been witnessed by two other friends of his who were working at the hospital at the time, but, again, these people were not called to give evidence.

19. There are other matters pointed to by the defendants which the trial judge would have had in mind from the evidence in the case when making the adverse credibility finding. For example, the defendants refer to the fact that the plaintiff stated in evidence that when he first saw Mr Al-Safi in April 2006 he was told that it would be Mr Rogers who would be performing his surgery. They suggest that this was a bizarre statement by the plaintiff given (a) that Mr Al-Safi would have been aware that by April 2006 Mr Rogers had left the Mercy Hospital one month previously, and (b) that when writing to the plaintiff's GP after that consultation in April 2006 Mr

Al-Safi had informed the GP that it would be he (Mr Al-Safi) who would be doing the surgery.

20. Another matter relied upon by the defendants is in relation to the plaintiff's past medical history. It suffices to recite this by way of the defendants' written submissions where it is succinctly explained as follows:

> "The plaintiff was cross examined at length in relation to his previous medical history and in particular, the entry in the General Practitioner's Records … and psychiatric records to the effect that he was (i) taking Valium for some 21 years and had (ii) suffered panic attacks for some 21 years prior to any surgery at the Mercy University Hospital. The plaintiff denied that he had suffered panic attacks over that period or had given such history in August 2007 [c.f. Transcript day 5 at p. 84]. Despite this past medical history being documented within the notes, the plaintiff did not seek to call either the plaintiff's former or current general practitioner in relation to the plaintiff's injuries generally, or more specifically, in relation to his past medical history."

21. The defendants refer also to numerous occasions during the hearing when the trial judge expressed his concerns about the plaintiff's credibility and reliability and in fact found it necessary to warn the plaintiff of the seriousness of giving false evidence. They have referred to specific passages in the transcript for Day 4 at pp. 68-70 by way of example. They referred also to the fact that on Day 4 the trial judge in fact rose from the bench for a while after he had requested counsel for the plaintiff to inform the plaintiff of the consequences of not being forthright in court. They refer to numerous questions put by the trial judge to the plaintiff in relation to a certain letter that the plaintiff had asked his GP to write for him which referred to his having an operation scheduled at the Mater Hospital for 19th August 2009. There was no such surgery scheduled. It appears that the purpose of the letter was to help him avoid losing a deposit which he had paid on a holiday in Spain which he was cancelling. In his evidence he also asserted that his sister would be in a position to explain the circumstances giving rise to this letter from his GP. Again, she was not called as a witness. However, under questioning from the trial judge on Day 4, the plaintiff admitted that he had lied to his GP when getting him to write that particular letter. The trial judge indicated his dissatisfaction with the plaintiff's answers, and stated that he was not putting this down to the plaintiff's depression, and further stated that he was finding it hard to believe some of the things that the plaintiff was saying under oath.

22. There are several more examples given by the defendants of matters which emerged during the hearing and on which the trial judge was perfectly entitled to have regard when reaching his conclusion that the plaintiff was unreliable and lacking credibility. I will refer to one additional matter which, although not specifically referred to by the trial judge in his judgment, he would have been fully aware of. I will refer to it by reference to how it is described in the defendants' written submissions:

> "In his first Statement of Case furnished to Mr Bishop (the plaintiff expert) on behalf of the plaintiff, the plaintiff claims that he had *no pain* prior to the augmentation cystoplasty, the Statement setting out as follows:
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> > 'Mr O'Leary says that his problems before ere as follows:
> >
> > He had to urinate frequently – maybe once per hour but he had *no pain*. He could manage if he went over the hour. He was training as a Security Man and could attend training sessions in work without problems. He was generally in excellent health'. (emphasis added)
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> On receipt of Mr Bishop's report, a second Statement of Case was prepared, excluding that instruction, relying solely on the documented references to pain pre-procedure and asserting that the plaintiff was indeed suffering from pain.
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> In this regard, given the extent to which the level of pain suffered by the plaintiff prior to the procedure became central to the plaintiff's claim of professional negligence based on Mr Bishop's report, the evidence given by the plaintiff as to the level of pain suffered by him previously during the course of his evidence was in fact false and misleading.
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> Furthermore, in so far as the records referred to pain, it should be noted that in the second Statement of Case it was represented that the plaintiff was suffering pain on presentation to the Mercy Hospital in November 2005. However there is no record of this in the plaintiff's Medical Records.
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> The plaintiff's medical records contained a number of references to the Matter Hospital, and to surgery which was scheduled in that hospital. This was a lie. The plaintiff concocted a story about having surgery in the Mater and misled his Doctor (GP) in that regard. He did so because he was cancelling a holiday in the Costa Del Sol and wanted to ensue that he would not lose his deposit. The plaintiff at the very least conceded to the trial judge that he was prepared to lie for the purposes of financial reward.
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> Further, with regard to the Mater Hospital, the notes of the plaintiff's General Practitioner, dated 13 February 2008 record that the plaintiff was attending the 'Mater Private'. There was a corresponding entry on the same date in the Psychiatric Notes to meeting a surgeon, yet the plaintiff denies that this was correct. The GP, Dr Nick Flynn, stated in evidence that this information would not have been recorded but for the fact that it was stated by the plaintiff to the locum at that time. Another untruth."

23. I should at this stage add that at the conclusion of the hearing, and therefore in advance of the trial judge's conclusion that the plaintiff lacked credibility and was unreliable, he had directed written submissions, and the above matters are all set out in detail in those written submissions prepared for the High Court. The fact that the trial judge has not set out in detail the basis for his adverse credibility and reliability finding in respect of the plaintiff, other than by referring to the fact that the plaintiff's sister was not called by him to corroborate his evidence as he indicated she would, cannot be taken as any indication that the failure to call his sister was the sole basis for his finding.

24. The questions of credibility and reliability of a witness and of any testimony given by him are quintessentially a matter for the trial judge who has had the opportunity of seeing and hearing the plaintiff giving his evidence, and observing his demeanour. It is well settled that an appellate court will be very slow to interfere with a finding of lack of credibility and reliability, and will only do so in exceptional circumstances where it is clear that there was no credible evidence upon which the trial judge could rely for such a finding. The present case is the polar opposite of such a case. In the present case, there was in my view compelling evidence demonstrating that the plaintiff was, to put it at its mildest, an inaccurate and unreliable historian whose evidence in relation to important matters would need independent corroboration before it could be considered reliable.

25. In my view there is no basis for criticising the trial judge's finding that the plaintiff was not a reliable or credible witness.

Ground (b): The trial was fundamentally unfair because the trial judge permitted the defendants to lead evidence on certain matters relating to informed consent which had not been put to the plaintiff or his expert witnesses, and had not been pleaded, and therefore there was no opportunity for the plaintiff to refute that evidence

26. The basis for this ground of appeal lies first of all in particulars provided to the plaintiff's solicitors by the defendants' solicitors in a letter dated the 25th March 2009 of the risks information which the defendants say they gave to the plaintiff for the purpose of obtaining his informed consent prior to performing the augmented cystoplasty. This information is referred to as "the particularised risks". That letter stated:

> "11. It was explained to the plaintiff on the 23rd February 2006, Mr Rogers, Consultant Neurologist, that the plaintiff would need an augmentation cystoplasty and that he would have to know how to self-catheterise [sic] and accept this before embarking on the type of surgery. The plaintiff indicated that he was going to study self-catheterisation [sic] with Marion Hickey who would be seeing him in St. John's Unit and that the plaintiff would then be listed for the surgery. He was seen by Mr Safi, the second named defendant on the 12th April 2006 when Safi explained to him that there had been no biopsies taken at any stage and that Mr Safi would feel it safer to take biopsies from the bladder before embarking on any augmentation cystoplasty just to rule out the presence of pathology in the bladder. Accordingly, Mr Safi advised that he would repeat a rigid cystoscopy and take random biopsies [from] the bladder. If the biopsies only showed tuberculosis which would be the main reason for his contracted bladder, then Mr Safi would proceed to augmentation cystoplasty which Mr Safi explained in detail to the plaintiff on that occasion. He also explained to him that the plaintiff may need to self catheterise [sic] after as a new bladder would be a little bit hypo-tonic. Mr Safi also discussed the possibility of nocturnal enuresis and wetness may occur. He also discussed bowel-related complications in the form of obstruction and exploration. He also advised him to quit smoking. Mr Safi in particular explained the need for a biopsy to rule out any possibility of malignancy and that if the biopsies were free from malignancy then he would proceed with the procedure. He also discussed (again) the issues around his operation and the nature of the operation enlarging its size by patching a piece of bowel and the need for self catheterisation[sic] after the operation and stressed the possibility of requiring medication after as there was no guarantee of complete freedom from symptoms after the surgery."

27. It is submitted that the plaintiff was entitled to presume that the case would be met by the defendants on the basis that these "particularised risks" would be relied upon by the defendants as the basis for having obtained an informed consent from the plaintiff, and that they would give evidence consistent with those "particularised risks". It was the plaintiff's case, which was supported by the five experts called by the plaintiff, that if these were the particularised risks and information being relied upon, it was insufficient to satisfy the requirements for a fully informed consent for the surgery, and that unless the defendants made a different case based on additional risks and information alleged to have been explained to the plaintiff, the plaintiff would have to succeed in his case.

28. The present ground of appeal relates to the fact that when the defendants' experts were giving their direct evidence, they were permitted by the trial judge, in the face of strenuous objection by counsel for the plaintiff, to lead evidence in relation to other risk information said to have been given to the plaintiff by Mr Al-Safi over and above the 'particularised risks', and which had not been put to the plaintiff or his experts during their cross examination, and never pleaded. The plaintiff complains that a fundamental unfairness thereby occurred, whereby the plaintiff's case was 'ambushed', and that the trial judge erred in permitting this to happen, particularly in the face of strenuous objection at the time by counsel for the plaintiff.

29. The plaintiff also draws attention to the fact that the 'particularised risks' are identical to the risks that Mr Al-Safi recorded in his own note dated the 12th April 2006 of what information he had given to the plaintiff, and also that he had told the plaintiff's GP he had given to the plaintiff. They are the same also as the risks which Mr Al-Safi informed the CEO of the Mercy Hospital that he had informed the plaintiff of, in a report dated the 19th December 2006 which he had been required by the CEO to prepare for Cork University Hospital.

30. After the plaintiff had completed his direct evidence, it was put to him under cross examination for the first time that he had also been informed of a risk of cancer occurring as a result of this surgery, and that he would have to be checked in this regard after 10 to 15 years. While the plaintiff denied that he was ever informed of a risk of cancer prior to the surgery, he complains that this cancer risk was not among the particularised risks that the defendant had pleaded the plaintiff had been informed of for the purpose of his informed consent. The plaintiff has submitted that this was opportunistically put to him because the defendants had become aware from the exchanged experts' reports that the plaintiff's experts were all going to say that a warning of the risk of cancer would have to be given for a fully informed consent for an augmentation cystoplasty. In essence it is an allegation that the defendants changed their pleaded and particularised case in order to counter the evidence that they knew the plaintiff was going to make. It is suggested that they must also have been aware that their own expert, Mr Lanigan, was also going to say that the cancer risk would have to be notified, and that therefore this had to be put to the plaintiff. While the matter was at least put to the plaintiff so that he had an opportunity in the witness box to deal with it, the complaint on appeal is that it was an alteration of the case pleaded and particularised by the defendants, and that as a matter of fairness the trial judge ought not have been permitted it. It was always the plaintiff's case that he was told of an increased risk of cancer only after the surgery had been performed, and that it came as a great shock to him since he has a particular fear of cancer because both of his parents had died of cancer at a relatively young age. I should add at this stage that the defendants are sceptical to say the least about the extent of his stated fear of cancer given that there is no doubt that he ignored all urgings by medical personnel that he quit his heavy smoking, and that he continues to this day apparently to be a heavy smoker.

31. In his written submissions prepared for the High Court after the conclusion of the evidence, the plaintiff submitted that this evidence ought not to be accepted by the trial judge on the basis that it was unreliable in circumstances where the cancer risk was not noted by Mr Al-Safi in his notes, and was not mentioned as a 'particularised risk', and that it was now being remembered by Mr Al-Safi for the first time, some four years later.

32. The further complaint under this ground of appeal is that for the first time while he was giving his direct evidence, Mr Al-Safi stated that he had also warned the plaintiff that there was a risk of stone formation and of mucus production associated with an augmentation cystoplasty. This, unlike the cancer risk just referred to, was not even put to the plaintiff when he was being cross-examined. It was simply stated by Mr Al-Safi as part of his direct evidence. Again, the plaintiff submits that these risks were not included in the 'particularised risks', and that the trial judge ought not to have permitted this evidence to be given, particularly where objection was raised by counsel for the plaintiff. It is submitted that it was clearly something that Mr Al-Safi thought he had better cover in his evidence since they had been referred to by the plaintiffs' experts as matters that the plaintiff should have been told about before he could give a fully informed consent. When he was cross-examined about his failure to have mentioned these risks previously, Mr Al-Safi stated that he had mentioned them to the defendants' solicitor for the first time on the date he commenced giving his evidence – i.e. after he had heard the evidence given by the plaintiff's experts.

33. In his judgment the trial judge did not make reference to the controversy about Mr Al-Safi going beyond the particularised risks

when stating in his evidence what he had told the plaintiff. He noted the evidence given by Mr Al-Safi that he had told the plaintiff of the risk of cancer, albeit a small risk, and that he would probably need to be investigated between 10 and 15 years post-surgery, and also that he might need re-exploration surgery if there was bowel obstruction, and that he had warned of possible nocturnal wetness, stones and mucus in his bladder. The trial judge noted also that Mr Al-Safi had stated that this particular discussion had taken place on the night before the surgery, namely on the 15th May 2006. Apart from the objection being taken that Mr Al-Safi strayed beyond the particularised risks in his evidence, counsel points out that Mr Al-Safi stated in his evidence also that in fact he had not been obtaining an informed consent from the plaintiff on the night before the surgery, and that consent had been obtained as a result of what had been discussed on the 12th April 2006. That discussion is what is the subject of the notes made of that discussion by Mr Al-Safi and which makes no reference to these matters which are now said to have been discussed on the 15th May 2006.

34. The trial judge stated in his judgment at p.11:

> "Messrs. Lanigan and Drumm [two of the defendants' experts]were in broad agreement with the plaintiff's expert witnesses in relation to the nature and level of disclosure and the warnings required before the performance of an augmentation cystoplasty.
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> They were both of the opinion that the note made by Mr Al-Safi on 12 April [2006] was consistent with his evidential account of the disclosure and warning which he gave to the plaintiff.
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> Both said that it was not feasible or customary for urological surgeons to record in detail every aspect of the warnings and advice given to patients for whom surgery was being recommended. They said that notes such as that made by Mr Al-Safi on 12 April [2006] were normal in such circumstances.
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> Mr Drumm said that if complex detailed records of warnings given by all surgeons on all relevant occasions are to be required then the number of patients who can be accommodated in clinics will be greatly reduced."

35. Counsel for the plaintiff had argued in the High Court that there could not have been sufficient time during a 20 minute conversation between the plaintiff and Mr Al-Safi on the 12th April 2006 for him to have made adequate disclosure of the relevant risks to the plaintiff, thereby seeking to cast doubt upon Mr Al-Safi's evidence that he disclosed all relevant risks to the plaintiff on that occasion for the purpose of an informed consent. The trial judge however concluded: "I do not understand why he would not have been able to do so within that time".

36. Having thus stated, the trial judge at that point went on to state that Mr Al-Safi and the plaintiff had discussed some of the relevant matters on the evening before surgery, and that the plaintiff, in his evidence, had confirmed that some of those matters had been discussed on that evening, although he gave a different account of what was said. It was at this point in his judgment that the trial judge referred to matters to which I have already made reference, in relation to the plaintiff saying during his evidence that his sister had witnessed and overheard this discussion on the 15th May 2006. As I have already stated, the trial judge then made reference to the plaintiff's lack of credibility and reliability as a witness, and concluded that he was not satisfied that the plaintiff had established on the balance of probabilities and on the evidence, that Mr Al-Safi had failed to advise him of all the known facts and risks associated with the proposed surgery.

37. As can be seen from the judgment, the trial judge did not address the controversy as to the alleged change of position of the defendants, from their pleaded position, in relation to the 'particularised risks'. However it is clear that he was satisfied that all relevant risks had been discussed with the plaintiff, and he appears to have included matters which the evidence indicated had been discussed on the 15th May 2006, and did not confine his consideration of what the plaintiff had been informed of to what had been noted to have been discussed between plaintiff and Mr Al-Safi on the12th April 2006.

38. The defendants in their submissions accept that the letter dated the 25th of March 2009 which particularised the information given to the plaintiff for the purposes of his informed consent made no specific reference to the risk of cancer, the risk of stone formation, and the risk of mucus production in the bladder. However they submit that there was no unfairness in the trial resulting from the fact that it was not put to the plaintiff during cross examination that he had been informed of a risk of cancer, or that Mr Al-Safi for the first time during the course of his direct evidence stated that he had informed the plaintiff of the risks of stone formation and mucus. The reason they submit that no unfairness resulted in reality is that both the plaintiff and the plaintiff's experts gave their evidence on the basis that these matters had not been warned. In other words, it is submitted that nothing was lost to the plaintiff by reason of these matters not being put, because it is clear that he would have denied it in any event. The plaintiff's experts had stated that the plaintiff ought to have been warned of these additional risks, and would not have been prejudiced or misled since they gave evidence to the effect that there was no informed consent because these particular risks had not been advised to the plaintiff.

39. While this controversy was not addressed by the trial judge in his judgment, the defendants submit that the trial judge was entitled to conclude as he did by reference to all the evidence that he heard during the trial, including that about which the plaintiff complained.

40. I am not satisfied that any fundamental unfairness can be said to have arisen from the fact that these particular matters were not put to the plaintiff in his cross-examination. I accept of course that it would have been preferable that they were put so that he would have the opportunity to deny them if he wished to do so. He could of course have been recalled to the witness box so that these matters could be put to him. He was at all times available if necessary for that purpose. However, given the evidence that he gave, it is inconceivable that he would not have denied that these matters were discussed with him either on the 12th April 2006 or the 15th May 2006. I agree also that the plaintiff's experts were not prejudiced in giving their evidence in support of the plaintiff's case since their evidence was given on the basis that these specific matters had not been discussed with him. I cannot see how the failure to have mentioned them earlier has rendered the hearing so unfair that a retrial should be directed.

41. The trial judge was entitled to permit the evidence to be given even though it referred to other risks not previously notified as having been discussed with the plaintiff. That evidence was admissible. It was a matter for the trial judge thereafter to attach such weight to it as he considered appropriate. He was entitled to take account of the fact that these particular risks had not been referred to in the letter dated the 25th March 2009 or in the notes made by Mr Al-Safi after his consultation with the plaintiff on the 12th April 2006, or indeed in his report to the Cork University Hospital. It may very well be that the report to the hospital and the solicitors' letter were based on the doctor's notes of the 12th April 2006 meeting so that it is not as if there were three separate and unrelated declarations. The defendants' experts had endorsed the doctor's own record, not as a complete account but as being in accordance with standard practice.

42. It is also to be noted that there is a difference between the risk of cancer, which was put the plaintiff in cross-examination and

the risks in regard to stone formation and mucus. In regard to those items that were not put either to the plaintiff or his experts, the doctor furnished an explanation which was obviously accepted by the trial judge since he expressly recorded his acceptance of the doctor's credibility.

43. It was a matter for the trial judge to consider the weight to be given to that evidence. He was entitled to accept the evidence for the purpose of his conclusion that he was satisfied that the plaintiff had been adequately warned of all matters relevant to his informed consent. Alternatively, he could have found that the plaintiff's version of what he was told was preferable to the evidence of Mr Al-Safi. He might have expressed some criticism of Mr Al-Safi for not having referred to these matters earlier. He could have found him to be lacking credibility on the basis that he was recalling these matters only some four years later, and had made no reference to them in his contemporary notes. But instead, he stated that he found Mr Al-Safi to be a conscientious witness, and that he believed him. That is in stark contrast to his remarks about the plaintiff's reliability and credibility which I have already addressed above. This very experienced trial judge had the opportunity of seeing and hearing these witnesses giving their evidence, and could assess their respective reliability as witnesses as to fact.

44. In my view this Court could not interfere with his findings. I do not consider that the failure of the trial judge to allow the complained of evidence to be given by Mr Al-Safi amounted to a fundamental unfairness to the plaintiff, such that a new trial should be directed. This ground of appeal is not in my view made out.

Ground (c): The finding that the plaintiff was informed of the risks associated with augmentation cystoplasty was against the evidence

45. To some extent the evidence related to this ground of appeal has been touched upon already above. There seem to be three questions for consideration:

> (i) What risks were disclosed to the plaintiff prior to his consent being given to the surgery;
>
> (ii) Whether all the relevant risks which ought to have been disclosed before a fully informed consent could be considered to have been given by the plaintiff, were disclosed to him;
>
> (iii) Even if all the relevant risks that ought to be disclosed were disclosed to the plaintiff, whether the defendants ensured that the plaintiff sufficiently understood those risks before he gave his consent.

46. In dealing with *ground* (b) above, I have already concluded that the trial judge was entitled to find as a fact that Mr Al-Safi had disclosed to the plaintiff all the risks that he was required to disclose in order to put the plaintiff in a position to give a fully informed consent to the augmentation cystoplasty procedure undertaken on the 16th May 2006. That is a finding of fact for which there was credible evidence which the trial judge was entitled to accept, no matter how much evidence to the contrary was adduced by the plaintiff and his experts. Clearly the trial judge had heard and considered the evidence of Mr Al-Safi. He heard also the plaintiff's evidence as to what he recalled he had been told. The trial judge concluded that the plaintiff was an unreliable witness, unlike Mr Al-Safi who he found to be a conscious witness. These were findings that the trial judge was entitled to make. Under *Hay v. O'Grady* principles, this Court cannot overturn such findings of fact where they are supported by credible evidence, no matter how weighty the evidence to the contrary.

47. As to whether the plaintiff understood what was being disclosed to him as to the risks associated with the surgery, the trial judge did not make a finding in that regard, although at p. 10 of his judgment he does record Mr Al-Safi's evidence that "he believed that the plaintiff understood what he was telling him". That statement was made in the context of the discussion on the evening of the 15th May 2006, and not the 20 minute discussion on the 12th April 2006.

48. On this appeal the plaintiff submits that part of the defendant's obligations in relation to disclosure of risks is that in addition to disclosing the risks involved, it is incumbent upon the defendants also to take all reasonable steps to make sure that what is being disclosed is actually understood by the plaintiff. It has been submitted that "it is not sufficient for the treating doctor to simply presume or hope that the patient picks up bits of information along the way as he passes through the hospital system toward surgery". In this latter regard the plaintiff has referred to the fact that Mr Al-Safi stated in his evidence that in the discussion which he had with the plaintiff on the15th May 2006, the evening before his surgery, he was not on that occasion consenting the plaintiff, and that this had been done on the 12th April 2006 after which he had made a note of what risks had been disclosed.

49. The plaintiff has referred to the evidence of the defendant's expert, Mr Lanigan, who said during his evidence on Day 19 of the hearing, that it was necessary to make clear to the patient what was the worst case scenario.

50. It has been submitted on this appeal that there was no evidence given by the defendants to indicate that the plaintiff was given the worst case scenario. It is submitted also that there was no evidence given to indicate that steps were taken to ensure that the plaintiff understood what was said to him in relation to the risks of the surgery. The plaintiff points to the following matters as relevant to this question:

> (i) There was uncontested psychiatric evidence that the plaintiff is of below average intelligence
>
> (ii) The particular surgery and the risks to be explained are complex;
>
> (iii) Mr Al-Safi had never met the plaintiff prior to the 12th April 2006, having just taken over his file from Mr Rogers.
>
> (iv) There was at most a 20 minute discussion with the plaintiff.

51. It has been submitted that it is "ridiculous, absurd, even repugnant to common sense" to think that a man of such limited education as the plaintiff might have achieved a proper understanding and appreciation of the implications of the proposed augmentation ileocystoplasty surgery during a mere 20 minute discussion with Mr Al-Safi whom he had never met previously.

52. The problem as I see it with this submission as regards the allegation that the defendants have not established that the plaintiff understood what he was being told about in terms of risks is that the plaintiff did not say in his evidence that he had not understood what he was told. That case was not made. The trial judge noted Mr Al-Safi stated that he believed that the plaintiff had understood what he was being told. But in addition, the plaintiff did not dispute that he had been told that if he had any queries about any particular matter he could contact the hospital. It was accepted that the plaintiff had not made any such contact to have any particular matter clarified.

53. In making this submission, the plaintiff seeks to put the burden of proof in this regard upon the defendants. In other words, it is being submitted that the defendants have not established that the plaintiff understood what he was told as to the risks. In my view the onus is first upon the plaintiff if he wishes to make that case. He must first satisfy the trial judge that he did not understand the risks that were explained to him. He did not do so. In my view this is fatal to this particular ground of appeal.

Ground (d): The trial judge erred in concluding that the plaintiff was not entitled to be informed as part of the informed consent process to be told of the possible alternatives to an augmentation cystoplasty which Mr Al-Safi intended to carry out

54. The plaintiff complained in the High Court that he had not been advised of two possible alternative procedures to that of augmentation cystoplasty as part of the consenting process. Those alternatives were a urinary diversion by ilial conduit, colloquially known as "a bag", for the collection of urine externally, and a substitution cystoplasty, being the creation of a completely new bladder internally from part of the bowel. Neither of these alternative procedures was recommended for the plaintiff's particular condition, and he was not told about them. Mr Rogers and Mr Al-Safi both said that they would not have been appropriate procedures for the plaintiff given his particular circumstances. On the other hand the plaintiff's experts said that they would have been appropriate options for him to consider and therefore that he should have been informed about them as part of the consenting process. The defendants submitted that there was no requirement as part of the consenting process to advise the plaintiff of the availability of, and to explain, other procedures that they would not recommend and would not be performing. The trial judge agreed. In reaching his conclusion in this regard, the trial judge stated at pp. 13-14 of his judgment:

> "It was suggested during the course of the proceedings that there was an obligation upon Mr Al-Safi, (having first explained the known facts and risks associated with each procedure), to give the plaintiff the option of choosing between three surgical procedures, (augmentation cystoplasty, substitution cystoplasty, and diversion by ilial conduit), which are sometimes used for the treatment of his urological symptoms and condition. I do not accept that there was such an obligation upon Mr Al-Safi.
>
> Both Mr Rogers and Mr Al-Safi stated in evidence that, exercising their clinical judgment, they each believed that the successful treatment of the plaintiff's symptoms and condition could be best achieved by augmentation cystoplasty. Mr Lanigan and Mr Drumm were of the same opinion.
>
> Mr Al-Safi explained that, in his opinion, there were significant risks to the plaintiff's health and wellbeing associated with both substitution cystoplasty and diversion by ileal conduit and he did not believe that it was in the plaintiff's best interests for him to be submitted to either procedure.
>
> Why then should Mr Al-Safi be expected to offer to perform such surgery for the plaintiff?
>
> Mr Al-Safi was under a duty to explain to the plaintiff the nature and extent of the augmentation cystoplasty which he was recommending and to further explain to him that the decision as to whether or not this surgery was to be undertaken was for the plaintiff to make and not for Mr Al-Safi. I am satisfied that he did so.
>
> The plaintiff was quite entitled to choose not to undergo the surgery and, indeed, was entitled to choose not to accept any treatment.
>
> I do not, however, accept that Mr Al-Safi was under a duty to offer the plaintiff any surgical procedure which he was not recommending and which he did not consider was an appropriate treatment for the plaintiff's symptoms and condition."

55. According to the plaintiff's experts each of these three options were viable options for the plaintiff to have considered, and he should have been informed about them so that he could make an informed choice as to which he wanted to undergo before giving his consent to the only surgery being offered to him. The defendant's experts and Mr Al-Safi considered that provided that the plaintiff was able to and willing to self-catheterise post-operatively, the only recommended and appropriate surgery for his condition was an augmentation cystoplasty, and that it was only in the event that he either would not, or could not manage to self-catheterise that either a diversion by ilial conduit or a substitution cystoplasty would be considered as alternative treatment options. There was evidence that by the time this surgery was performed the plaintiff had learned how to self-catheterise, and was so doing in preparation for the augmentation cystoplasty.

56. In this case the trial judge was presented with expert evidence from both sides. Each expert was expert in his/her field. There were honestly held but differing expert opinions as to whether an augmentation cystoplasty was the only appropriate treatment for this particular plaintiff in May 2006, and whether the plaintiff ought to have been informed about the two alternative procedures referred, as part of the informed consent process so that he could make an informed choice, rather than the binary choice of either consenting to having the augmentation cystoplasty performed, or not consenting to same.

57. Where the trial judge is presented with differing but honestly held opinions from experts, he/she is not required to decide which expert opinion is correct. That would be an impossible burden to impose upon the court. The task is rather to decide whether it was reasonable for the plaintiff's treating surgeon to have proceeded as he did. In the present case the trial judge needed to decide whether it was reasonable for Mr Al-Safi to have considered that an augmentation cystoplasty was the appropriate treatment to offer to the plaintiff, and the only one that he was prepared to recommend and perform. The trial judge decided on the basis of the defendants' experts' evidence, as well as the evidence of Mr Al-Safi and Mr Rogers that this was a reasonable opinion to hold, and that he was not required to discuss the options of diversion by ilial conduit or substitution cystoplasty, neither of which he was prepared to recommend in the circumstances in which this plaintiff found himself at the relevant time.

58. While the plaintiff stated that if the ilial conduit option had been offered to him he would have chosen to have that procedure, the defendants' experts considered that the 'bag' procedure was a far more radical, complex and permanent procedure to have performed, and one that was likely to impact negatively on the plaintiff's remaining good kidney. It will be recalled that his left kidney was found to have no useful function when in August 2002 a DTPA renogram was undertaken. In such circumstances the defendants have submitted that when objectively considered having regard to the position of this particular plaintiff, no reasonable patient in that position would have opted for a diversion by ilial conduit ('the bag'), or a substitution cystoplasty, and that in such circumstances it was not incumbent upon Mr Al-Safi to explain the alternatives to the plaintiff, and that the trial judge's conclusion was therefore correct.

59. In my view, there was expert evidence which the trial judge was entitled to accept for the purpose of reaching his conclusion on this issue, and that this ground of appeal must fail.

Ground (e): The trial judge erred in holding that the burden of proving that Mr Al-Safi had not obtained an informed consent rested upon the plaintiff

60. I have already referred to the trial judge's conclusion that the plaintiff had failed to establish on the evidence and the balance of probabilities that Mr Al-Safi had failed to disclose to him all of the known facts and risks associated with an augmentation cystoplasty. On this appeal the plaintiff has submitted that the trial judge erred as a matter of law in placing the burden of proof on the issue of informed consent on the plaintiff. It is submitted that there is an unusual feature in this case which should lead to the conclusion that in fact it is the defendants who have the burden of proving that they obtained a fully informed consent, rather than the plaintiff having to prove that they did not. That feature is that while the defendants got the plaintiff to sign a form of consent before the surgery was performed, they never sought to rely upon it at the hearing. This form of consent was disclosed to the plaintiff as part of the defendants' discovery, but they never sought to prove it, and indeed offered no explanation for failing to do so. Neither was this form of consent even put to the plaintiff during his cross-examination.

61. It is suggested accordingly that the Court should have inferred that the defendants accepted that the consent that they obtained from the plaintiff was not a lawful consent, and therefore that the burden of proving that they obtained a lawful consent should have rested with the defendants and not the plaintiff.

62. Quite apart from that particular feature of the present case, it is submitted that this Court should find that as a general principle the burden of proving a fully informed consent should rest with the defendants. The rationale put forward for that submission is that the patient's consent is a pre-requisite to performing surgery on the patient since without consent it would constitute a battery. It is submitted that there is no justification for placing that burden upon the patient in the same way as it rests on the plaintiff to prove negligence in relation to diagnosis or treatment.

63. The plaintiff has sought support for this submission from the decision of the House of Lords in *Chester v. Afshar* [2005] 1 A.C. 134.

64. In answer, the defendants say that the plaintiff did not seek to argue that the burden of proving consent fell upon the defendants, and that in so far as he relied upon *Chester v. Afshar* in the High Court, he did not do so for the purpose of that argument. In any event, they submit that the case does not provide support for the proposition, and that it is not good authority in this jurisdiction. The plaintiff has not pointed to any Irish authority for the proposition that the burden of proof in relation to consent is different from the burden upon any plaintiff in a negligence action, namely that he who alleges must prove.

65. I must say it seems to me in any event that the issue raised under this heading of appeal is somewhat academic in the light of the conclusions reached by the trial judge in relation to the matters found by the trial judge to have been disclosed to the plaintiff. The trial judge was satisfied on the evidence adduced by the defendants that they had disclosed to him all that they were required to disclose for the purpose of enabling the plaintiff to give an informed consent. It seems to me therefore that whether the burden rested on the plaintiff or rested on the defendants is in a sense neither here nor there. As I have set forth already, the trial judge expressed himself in this respect by saying:

> "I accept the evidence of Mr Lanigan and of Mr Drumm that the warnings given by Mr Al-Safi to the plaintiff in respect of the augmentation cystoplasty were the appropriate warnings which should be given to patients in respect of the relevant urological surgery in 2006."

66. This is not a case where the defendants sought and obtained a dismissal of the plaintiff's claim at the conclusion of the plaintiff's case on the basis that no case was made out for the defendant to answer. The defendants went into evidence. The trial judge decided that he was satisfied that the required disclosure had been made. He clearly preferred the evidence adduced by the defendants to that adduced by the plaintiff. He was entitled to do so. His conclusion, while expressed in terms of the plaintiff not having discharged the onus of proving that Mr Al-Safi had failed to disclose to him all the known facts and risks associated with the augmentation cystoplasty, the same conclusion would inevitably have been reached had the onus been the other way. One way or the other he heard all the evidence adduced by each side and concluded in effect that appropriate disclosure had been made for the purpose of an informed consent by the plaintiff. This ground of appeal must fail.

(f) The generally unsatisfactory nature of the trial

67. In view of the conclusions I have reached above, it is unnecessary to address this very general ground of appeal based on the accumulated complaints that the plaintiff makes about the trial judge's conclusions.

(g) New ground based on the level of the defendants' experts' fees, discovered by the plaintiff's advisers only upon receipt of the defendants' bill of costs.

68. It was only when the defendants furnished a detailed bill of costs to the plaintiff's solicitors for the purpose of having their costs taxed following the dismissal of the plaintiff's proceedings that the plaintiff discovered the amount of the professional fees payable to the defendant's medical experts that this new ground was sought to be argued as a new ground of appeal. A costs accountant engaged by the plaintiff to express a view on these fees has stated on affidavit that the scale of these fees is unusual, and that he has not come across fees of this magnitude in his extensive experience of taxing bills of costs. The size of the fees in question has caused the plaintiff to doubt the independence and impartiality of these witnesses as experts. They say that the scale of the fees is such as to have inevitably clouded the experts' objectivity. Without putting a tooth in it, the allegation is that their support for the defendants' case in these proceedings has been bought. It is said that it was the evidence given by both Mr Drumm and Mr Lanigan that determined the proceedings in the defendants' favour. It is alleged that the amount paid to these experts by the State Claims Agency is extravagant and far in excess of any fee that ought reasonably to have been payable. It is submitted that the size of these fees created a conflict of interest for the experts in question. It is suggested that their testimony as experts was severely compromised as a result.

69. It is submitted that the amount of any fee payable to an expert witness must be fixed and agreed in advance of the hearing, in order to avoid any perception or suggestion that the fee constitutes a reward for a successful outcome. In the present case these fees were not agreed in advance, and were only negotiated after the case concluded. It has been submitted that the scale of the fees to be charged ought to have been disclosed to the Court so that the court could determine whether they should be permitted to give their evidence as experts, and if so, the weight that should properly be given to their evidence.

70. In her affidavit sworn to answer the affidavit filed on behalf of the plaintiff in relation to this new ground of appeal, Ms. Una Doyle, solicitor for the defendants, has stated that it was necessary for these experts to acquaint themselves with the evidence adduced by the plaintiff and his experts, prior to them giving their own evidence, and that they were provided with a transcript of each day's evidence so that could keep up to date with the evidence given. She made the point also that in this way these experts were in a position to advise the defendants' legal team in relation to the defence strategy, and that this case was one of some

complexity. The plaintiff criticises that role of litigation strategist and says that it is not appropriate for an independent and objective expert witness to be entering into the adversarial arena and advising the party who instructs them as to its litigation strategy.

71. Counsel for the plaintiff has criticised what he describes as a modern practice of a defendant using the overnight transcript in order to "prep" the expert witness, and enabling the expert to tailor his expert evidence to meet the case being made by a plaintiff during the hearing as it progresses, and to ensure that it suits the case being made by his principals.

72. The defendants reject the plaintiff's allegations that the size of the fees agreed with their experts after the hearing are such as to compromise their independence and objectivity as experts. They submit that both Mr Drumm and Mr Lanigan are highly regarded as experts in their field who agreed to provide expert reports and to make themselves available to give evidence in court in accordance with their reports. They submit also that it was never suggested to these witnesses during cross-examination that there was anything inappropriate in relation to the evidence they were giving. Indeed they point to aspects of these experts' evidence that the plaintiff himself sought to rely upon both in the High Court and again in this appeal.

73. The defendants also reject the criticism by the plaintiff addressed to the fact that the experts were provided with overnight transcripts so that they would be aware of what evidence was being offered by the plaintiff and his experts. They make the point with which I am in complete agreement that since the expert witness's role is to assist the Court by providing objective and unbiased opinions on matters within their sphere of expertise, it is desirable that they know what is said by all sides of the case, in case what they learn of the other side's case may affect the opinion expressed in their report which will have been prepared on the basis of the facts contained in the instructions given to them by the side which engages them. This seems to me to be a perfectly legitimate reason for providing the expert with a transcript. The alternative would of course be to incur an even greater cost by requiring the experts to attend court for every day of the hearing in order to be apprised of the evidence being given. It is entirely appropriate that an expert who has prepared a report in advance of the hearing based on instructions received may wish to alter or vary in some way that opinion based on the evidence given by the other side at trial. If anything this ensures that he has the opportunity to assist the Court in an entirely appropriate and proper way as an expert.

74. Quite apart from that particular question related to the provision of a transcript, and liaising with the legal team instructing him or her, the plaintiff is seeking to have the evidence of the defendants' experts excluded on the basis that their evidence cannot be seen to be objective and independent and impartial because of the size of the fee agreed to be paid to them after the determination of the case. In my view there is no basis for making that argument in circumstances where the experts involved have no opportunity to answer the very serious accusation being levelled against them. It is an accusation at least of unprofessional conduct. It could be seen also as an accusation that an expert has given false or misleading evidence under oath tailored to suit the case being made by his/her instructing principal. Even if such an accusation could in theory be made, it demands at the very least that the issue is raised during the trial so that the accusation can be made to the expert concerned thereby giving him/her the opportunity to respond to it. It is a very serious accusation to make, and in my view simply cannot be dealt with as an issue on an appeal where the factual basis for it to be made (*i.e.* the size of the fee) becomes known only after the case has concluded at first instance. The person so accused has no opportunity to address it in the appeal court.

75. I would reject this ground of appeal.

76. For all the above reasons I would dismiss this appeal.