THE COURT OF APPEAL

Appeal No. 2014/777

Ryan P.
Irvine J.
Hogan J.

Michael O'Driscoll (a minor, suing by his next friend, Breda O'Driscoll)

Plaintiff/Appellant

– AND -

Michael Hurley and Health Service Executive

Defendants/Respondents

JUDGMENT of Ms. Justice Irvine delivered on the 8th day of July 2015

1. This is the plaintiff's appeal against the judgment and order of the High Court (O'Neill J.) dated 20th February, 2013. On that date, the High Court judge awarded the plaintiff a sum of €50,000 by way of general damages in respect of personal injuries sustained by him as a result of clinical negligence on the part of a surgeon attached to Kilkenny Regional Hospital in the course of an appendectomy procedure. That award, which included a costs order in his favour, was made following a four day hearing that was confined to an assessment of the nature and extent of the injuries sustained by him as a consequence of that negligence.

2. The plaintiff maintains that the judgment of the High Court judge should be set aside as unsatisfactory in that it fails to set out a synopsis of the evidence adduced; it does not analyse why the evidence of one expert witness was preferred to that of another; and it does not provide adequate reasons for the conclusions reached. In addition, it is asserted that the High Court judge failed to compensate the plaintiff for certain sequelae of the defendant's negligence and that, as a result, the award of damages is inadequate. Finally, it is maintained that the trial was unsatisfactory insofar as the High Court judge allegedly precluded counsel from pursuing a particular line of cross-examination in relation to one of the defendant's expert witnesses.

Background facts

3. The plaintiff was born on 10th March, 1997. He had his appendix removed in St. Luke's Hospital in Kilkenny on 28th January, 2006. It is common case that his bladder was perforated in the course of that surgery, that he developed peritonitis and that he became acutely unwell. As a result, the plaintiff was required to undergo a surgical repair three days later. His recovery was not without complication: he was catheterised for several days, and this had to be replaced on one occasion due to difficulties with voiding urine. He was hospitalised for a period of eight days in total and, all in all, had an extremely distressing experience. The latter part of his stay took place in The Mercy Hospital in Cork to which he was transferred following the bladder repair, so that he could be nearer to his parents. Unfortunately, these events took place only a number of months after the plaintiff's mother had given birth to a daughter, Brigid, who suffers from the most severe type of epilepsy. As a result, she was not able to be with her son for the totality of the period for which he was hospitalised, much to his understandable upset.

4. It is evident from the pleadings and the evidence in the High Court that the principal injuries which the plaintiff sought to associate with the defendant's negligence were as follows:-

> 1. A complaint that he developed enuresis, a condition which he maintained continued to affect him several nights a week up to the date of trial;
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> 2. A complaint that he had developed an enlarged bladder as a result of his reluctance to pass urine. That reluctance, he maintained, stemmed from pain experienced by him on emptying his bladder, a development that emerged post surgery; and
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> 3. A complaint that he had developed and continued to suffer from the symptoms of post-traumatic stress disorder, one such symptom being nightmares referable to his hospitalisation and surgery.

5. I will endeavour to summarise the High Court judge's findings in respect of each of these claims.

Enuresis

6. The High Court judge concluded that the plaintiff's claim in respect of ongoing enuresis was simply not credible. His stated reasons for reaching that conclusion were as follows:-

> (i) The plaintiff's mother's account as to the frequency of his bed wetting episodes differed from that of the plaintiff himself.
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> (ii) While the plaintiff had attended with his general practitioner seventeen times between February, 2006 and August, 2010, no note had been made by his doctor of any complaint of enuresis
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> (iii) The High Court judge rejected Mrs. O'Driscoll's explanation for failing to report a problem of this magnitude to her G.P. Her explanation had been that her son had asked her not to do so. Having found her to be a careful and conscientious parent, the High Court judge stated that he could not accept that she would have adopted such an approach to his welfare.
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> (iv) The fact that Mrs. O'Driscoll had changed her evidence on re-examination when she stated that she had in fact mentioned her son's bed wetting to the G.P., evidence which the High Court judge found to be inconsistent with the medical records.
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> (v) The High Court judge did not accept as credible the plaintiff's evidence that, to his mother's knowledge, he brought his wet sheets downstairs and put them into the washing machine in the middle of the night three to five nights a week, so that his brother Ronan, with whom he shared a room, would not find out about his problem.

(vi) The plaintiff had not attended the hospital for a review appointment in March, 2006, as might have been expected had he been suffering some ongoing complication.

(vii) Mrs. O'Driscoll had not mentioned enuresis when the plaintiff was reviewed in the Mercy Hospital Cork in either August or October, 2006, evidence that the High Court judge considered to be inconsistent with ongoing problems of that nature.

(viii) The first doctor to whom enuresis had been mentioned was Mr. Dermot Lanigan, consultant neurologist, retained on behalf of the defendants, and he saw the plaintiff on 10th November, 2011, some five years post surgery.

(ix) The plaintiff had been assessed by two psychologists on the defendant's behalf in late 2012, and, while the interviews were lengthy and detailed, nothing was said about this medical complication.

7. The High Court judge accepted that the plaintiff's parents had mentioned their son's enuresis to Dr. Gana, Mr. Johnston and Dr. Moore-Groarke in 2013. However, while accepting that the Plaintiff did have enuresis for a short period after his surgery, he was satisfied that this had cleared up quickly, a finding which he considered consistent with Mrs. O'Driscoll's instructions to her solicitor of late February, 2006, wherein she had advised that her son "had wet the bed", a statement the High Court judge felt related to a past event.

Enlarged bladder, urinary retention and pain
8. The High Court judge found, as had been alleged, that the plaintiff had an unusually large bladder for a person of his age. He concluded that it was nonetheless functioning well and was not pathological. As to the cause of the enlargement, he was satisfied that it was not caused by the surgical repair but had developed over time due to the plaintiff's ongoing reluctance to pass urine with a normal degree of frequency. In turn, the High Court judge concluded that his resistance to passing urine stemmed from educational difficulties and bullying which he experienced at school where he was extremely reluctant to use the toilet facilities.

9. These findings led the High Court judge to proceed, from a causation perspective, to consider the factors that caused or contributed to the bullying which the plaintiff had experienced at school.

Bullying.
10. The High Court judge concluded that the bullying to which the plaintiff had been subjected was largely due to the fact that he suffered from a significant learning disability. His bullying had taken the form of name-calling that focused on his learning difficulties, and he was socially ostracised; thus, there were a combination of factors which the High Court judge considered would have made his school life a misery. He was satisfied that the plaintiff's learning difficulties would have become more obvious to his peers as the demands of the curriculum increased and that this would have made it even more difficult for him to cope. The bulling had commenced at the start of the plaintiff's primary school education and had continued to afflict him throughout his schooling. This was principally due to the fact that four of the six students who had been responsible for this bullying in his primary school followed him into secondary school; as a result thereof, at fifteen years of age, he abandoned education.

11. In considering the cause of the bullying, the High Court judge noted that the plaintiff had a history of absenteeism from school and that this had commenced well prior to the events the subject matter of the claim. He accepted that his absence from school as a result of the defendant's negligence had made some contribution to, or had exacerbated his difficulties on his return to school and had perhaps isolated him further from his peers. However, he felt that any such exacerbation would have been self-limiting. He did not accept that the defendant's negligence was the dominant or main contributor to the bullying. In addition, when considering the extent to which the plaintiff's psychological problems might be ascribed to the defendant's conduct, the High Court judge expressed himself satisfied that the plaintiff had suffered and continued to suffer from a considerable amount of emotional distress due to the illness of his sister, a complication that could not be laid at the door of the defendants.

Post Traumatic Stress Disorder.
12. It is correct, as was submitted on the plaintiff's behalf, that in his judgment the High Court judge does not refer to the fact that the plaintiff was suffering from post-traumatic stress disorder, as had been diagnosed by Dr. Moore-Groarke. However, it can readily be understood from a consideration of the underlying evidence, namely his findings as to the psychological damage visited upon the plaintiff due to the existence of other life stressors for which the defendants were not liable and his findings as to the cause of the plaintiff's bullying and social ostracisation, that there was no basis for making an award of damages in respect of such condition. I will refer to some of the more material aspects of that evidence later in this judgment.

Discussion
13. Counsel on behalf of the plaintiff relied upon the decision of the Court of Appeal of England and Wales *in Flannery and another v. Halifax Estate Agencies Limited* [2001] 1 W.L.R. 377 in support of his submission that the judgment of the High Court judge was insufficiently detailed to the point that it was not possible for those in charge of his litigation to understand how he had come to his conclusions and that as a result this Court should set aside his judgment and order a new trial on the grounds.

14. In *Flannery*, the High Court judge had to decide whether or not a property had been affected by structural movement. He heard evidence from rival expert witnesses concerning the cause of certain cracks in the property. Without providing any reason, the High Court judge stated that he preferred the evidence of one expert to that of the other and proceeded to dismiss the plaintiffs' claim. The plaintiffs argued that they did not know why the judge had preferred the evidence of the defendant's expert and argued that the judgment should therefore be set aside and a rehearing ordered.

15. In the course of his judgment, Henry L.J., on behalf of the Court, explained the importance of a trial judge giving reasons in support of his or her conclusions. Firstly, he pointed to the fact that the parties to concluded litigation needed to know why they won or lost their case. Secondly, they needed to be able to identify whether the trial judge reached any erroneous legal or factual conclusions so as to considerer if an appeal might be warranted. In this regard, he stated that the extent of the trial judge's duty very much depended on the subject matter under consideration. If it was a factual dispute involving the credibility of certain witnesses, it was sufficient for a trial judge to state that they preferred one witness to the other. However, in relation to an issue involving an intellectual exchange with disputed expert evidence, the trial judge might be expected to explain why he preferred the evidence of one expert to that of another. "Transparency", he advised should be the watchword for any trial judge when reaching their conclusions.

16. As was stated by Phillips M.R., at paras. 1-2 in *English v. Emery Reinbold and Streick Limited* [2002] 1 W.L.R. 2409, the decision in *Flannery* inspired a large number of applications for leave to appeal on the grounds that various trial judges had failed to give adequate reasons for their decisions. In the course of his judgment, albeit one which concerned a different appellate procedure to that which pertains in this jurisdiction, he considered the requirement of a trial judge to give reasons at common law. He stated that

although it was not universally accepted that it was a mandatory requirement for judges to give reasons for their decisions, there was a general recognition in common law jurisdictions that this was desirable. At paras. 16-19 of his judgment, Phillips M.R. stated:-

> "16. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.
>
> 17. As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example *Flannery's* case [2000] 1 W.L.R. 377, 382. In *Eagil Trust Company Limited v. Pigott Brown* [1985] 3 All E.R. 119, 112, Griffiths L.J. stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case:
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> > "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles upon which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted ... (see Sachs L.J. *in Knight v. Clifton* [1971] Ch. 700,721)."
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> 18. In our judgment, these observations of Griffiths L.J. apply to judgments of all descriptions.....
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> 19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues of the resolution which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

17. The postscript to the judgment is also of some relevance to this appeal :-

> "Postscript
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> In each of these appeals, the judgment created uncertainty as to the reasons for the decision. In each appeal that uncertainty was resolved, but only after an appeal which involved consideration of the underlying evidence and submissions. We feel that in each case the claimants should have appreciated why it was that they had not been successful, but may have been tempted by the example of *Flannery's* case [2000] 1 W.L.R. 377 to seek to have the decision of the trial judge set aside. There are two lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the grounds of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

Decision

18. Having considered the relevant case law and the submissions of counsel, I am not satisfied that that there is any authority to support the proposition that a trial judge must set out in his or her judgment a synopsis of the evidence of the witnesses such that in default that judgment may be set aside as unsatisfactory and a new trial ordered. The premise underlying that submission was that there was no other way that the parties could be confident that the trial judge had considered all of the evidence. Counsel for the plaintiff instanced, in support of his submission, the fact that in the present case it was not apparent from the judgment that the High Court judge had given any consideration to the evidence of Dr. Moore-Groarke to the effect that it was well established in the literature that a large percentage of patients who suffer from enuresis do not report it.

19. It is true that the judgment under appeal makes no mention of this evidence, but I am satisfied, for a number of reasons, that there was no need for the same to be included therein. Firstly, this was not a case concerning a patient who had not reported his enuresis. He told his mother of his problem and she knew about it from the outset. She then decided, for reasons that the High Court judge did not find credible, to withhold that information from her son's doctors. Secondly, even if that were not so, a system that mandated a trial judge to include a consideration of every aspect of a witness's evidence, if only to discount it, would be hopelessly vulnerable to abuse. Unscrupulous litigants, disenchanted by an adverse outcome could, by identifying some piece of evidence that had not been mentioned in a judgment, seek to set aside an otherwise unchallengeable result. Thirdly, such a duty would not be in the interests of litigants or the proper and efficient administration of justice. In recent times the judiciary has been urged to refrain from writing excessively lengthy judgments on the basis that they place additional demands on practitioners, eat into the time and resources of appellate courts and increase litigation costs while rarely producing any additional benefit for the parties. (M. Arden, "Judgment Writing: are shorter judgments achievable?", (2012) 128 L.Q.R. 515-520). However, of much more fundamental significance than all of the foregoing is the fact that this submission simply ignores the existing jurisprudence concerning the purpose of judgments and the extent of a trial judge's obligations when resolving any disputed issue. The purpose of the judgment is to explain to the parties why a particular conclusion was reached so that they may properly understand why they won or lost and whether, in the circumstances, an appeal is or is not warranted. As is clear from the decision in *English*, there is no particular template to which a trial judge must conform when writing his or her judgment and their duty is confined to giving a clear explanation for their decision. I will therefore not consider this submission further.

20. I also reject the plaintiff's submission that the High Court judge failed in his duty to set out the reasons critical to his conclusions. I am satisfied that in his judgment he has given a clear explanation as to why he reached the decisions which he did on each of the substantive issues. I am not convinced that the plaintiff's lawyers, armed with knowledge of the evidence given at the trial, could be in any doubt as to why certain aspects of his claim were rejected and others accepted.

21. Regarding the first major issue in the case, namely the plaintiff's claim for damages in respect of ongoing enuresis, the High Court judge concluded that the plaintiff's claim in this regard was not credible. Far from not stating the reasons for this conclusion, he

devoted six pages of his judgement to the issue and offered no less than nine separate reasons for rejecting this leg of the claim, as is clear from paras. 6-7 above.

22. Insofar as the second major issue in the proceedings is concerned, namely the plaintiff's complaints regarding his enlarged bladder and pain following voiding, the High Court judge accepted the plaintiff's contention that he had indeed developed an over extended bladder, had suffered from a reluctance to void urine over many years and may have experienced some pain following urination. This was what he was asked to conclude on the plaintiff's behalf. Once again, the High Court judge set out his reasons. He relied on the tests carried out by Mr. Gana to support his findings that the bladder was oversized. Regarding his conclusion that the bladder was functioning well, the High Court judge set out the differing opinions of the two experts based on their interpretation of the relevant tests. The High Court judge expressed himself satisfied that Mr. Lanigan's analysis of the plaintiff's bladder function was to be preferred to that of Mr. Gana. This is not a case where the judge merely adopted the conclusions of one of two differing expert witnesses. He made it perfectly clear why he reached his conclusion by reference to the reasoning and analysis by Mr. Lanigan of the urine flow tests. In such circumstances it is hard to see what more he could have been expected to do in terms of providing reasons.

23. As to why the plaintiff developed an enlarged bladder, once again the High Court judge sets out in significant detail his conclusions and underlying reasons. I do not intend to repeat his analysis of this causation issue as it is summarised more fully at paras. 8-10 above. It suffices to state that the High Court judge concluded that the plaintiff's bladder had become overextended because for many years he had refrained from passing urine with normal frequency. That reluctance was due to his serious educational difficulties and ongoing bullying which he had experienced at school. The bullying had commenced at the start of his primary education and had made him reluctant to use the school toilets. The High Court judge went on to find that the bullying of the plaintiff and his social isolation were, in all likelihood, exacerbated as a result of his absence from school following the medical events the subject matter of this claim.

24. While the plaintiff complains that the High Court judge did not give reasons to support his conclusion as to the self-limiting nature of this escalation in the plaintiff's problems, I am satisfied that there is no real substance to this submission. It would be clear to anyone reading the judgment in conjunction with the transcript that the judge was satisfied that such was the extent of the plaintiff's ever escalating educational difficulties and his ongoing bullying that the consequences of his absenteeism due to his surgery in terms of his psychological welfare were relatively short lived, even if not so expressly stated in the judgment.

25. The third major aspect of the claim concerned the extent of the psychological injuries sustained by the plaintiff as a result of the defendant's negligence. In the context of this appeal, a significant complaint is made concerning the failure of the High Court judge to make any mention in his judgment of the fact that the plaintiff had been diagnosed as suffering from post-traumatic stress disorder, a diagnosis which the plaintiff maintains was not challenged by the defendant. In this regard, it is submitted that the award of the High Court judge is inadequate as it fails to compensate the plaintiff for the psychological *sequelae* of the defendant's negligence.

26. It is undoubtedly true to say that the High Court judge does not mention the diagnosis of post-traumatic stress disorder in his judgment. However, I am quite satisfied that the plaintiff, being fully familiar with the evidence in relation to this issue, ought to well understand why the High Court judge cannot be considered to have been remiss in such an omission.

27. It is clear that Dr. Moore-Groarke, consultant psychologist, concluded that the plaintiff was suffering from post-traumatic stress disorder. In dealing with his presenting symptoms, she said that he had developed a severe social phobia as a result of which his attendance at school had not been regular. She was also satisfied that he was suffering from some level of depression. She noted that he reported flashbacks and nightmares, and that he had expressed to her his anger at how life had turned out for him. She was satisfied that he demonstrated levels of avoidance, intrusion and hyper arousal; and a severe level of anxiety. As a result of these symptoms, she felt he needed extensive cognitive behavioural therapy.

28. As to her analysis of the cause of these problems, Dr. Moore-Groarke's referred to the following matters as of particular significance:-

> (i) "*what happened to him in Kilkenny had an impact and contributed to a lot of the psychological difficulties that I have cited"* [my emphasis]
>
> (ii) *there was very strong evidence that he had phonetic difficulties … Perhaps …*
>
> (iii) *Dyslexia…..or special learning difficulties …. Vulnerability in learning.* The rate of absenteeism of young children with these difficulties is quite high.
>
> (iv) The plaintiff's educational difficulties were not helped by the fact that his mother only went as far as sixth class herself in school.

29. Counsel later asked Dr. Moore-Groarke about the role of the plaintiff's surgery in the diagnosis of PTSD. The relevant questions and answers were as follows: –

> "Q. I don't know whether you said it, your views that he suffered significant PTSD (post-traumatic stress disorder) – you did, yes – as a result of the surgery?
>
> A. Yes.
>
> Q. How would you see that as - what was the role of the surgery? Obviously it is multifactorial presumably?
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> A. Yes, it is. Yes, it is.
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> Q. Not everyone gets PTSD after a traumatic event experience. In this case presumably he had some vulnerability?
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> A. He had. I think it is fair to say, judge, that he was a vulnerable young lad from the outset, you know given the fact that he may, I suspect, and I know the other psychologists who did carry out an assessment on him, I think he falls into a borderline category and maybe the psychologist who did that assessment can comment further on that. But I definitely think that he was vulnerable from the outset. I think that very much accounts for the high level of absenteeism prior. Equally, I think, one of the things that he did say to me was, you know, the whole thing about the fear of medical examinations. In many respects he's had to go through a fair bit really for a young lad his age. It wouldn't be unusual either, judge, I think you know for young boys to have difficulty in talking about enuresis. That'll be my experience as

clinician."

30. The cross-examination of Dr. Moore-Groarke proceeded in a manner destined to minimise the extent to which the defendant's negligence had contributed the plaintiff's psychological welfare and condition. It was put to her that, insofar as she had relied upon the plaintiff's expressed fear of medical examinations, the only medical examination that had been carried out on him since his hospitalisation in Kilkenny was the flow test done by Dr. Gana, a test that was, as pointed out by the High Court judge (Day 3 Q.330-335), carried out very many years after the commencement of the plaintiff's psychological problems and was one about which the plaintiff himself had made no complaint to either Dr. Gana or the Court.

31. It was further put to the witness that her conclusions were "flawed" given that she had accepted as valid all of the problems that the plaintiff himself had ascribed to his surgery but which on an analysis, counsel maintained, could not be correct. Dr. Moore-Groarke was obliged to accept that the following matters had not been factored into her conclusions:-

> (i) That the plaintiff had missed 35 days from school in his first year (2002 -2003), 39 days in the following year (2003 - 2004) and 44 days in the year after that (2004 - 2005) those being the years prior to his hospitalisation, and that these were demonstrative of educational and other difficulties.
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> (ii) That the plaintiff's absenteeism was likely due to the fact that he feared his educational shortcomings would be found out by his peers and that this would have had major implications for his confidence and anxiety levels, albeit Dr. Moore-Groarke went on to say that in her opinion his confidence, which would have been low to begin with, would likely have reduced further as a result of his hospitalisation.
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> (iii) That the plaintiff would have had difficulties coping with psychological consequences of witnessing his sisters seizures and her response to the various operations that she had undergone in Beaumont Hospital apart from the upset of witnessing his mother's efforts in trying to cope with her condition.
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> (iv) The fact that his mother had not been able to give him the attention he might have liked and that this would have would have contributed to his anxiety.

32. Two other matters are of some relevance. The first is that Dr. Moore-Groarke did not demur from the proposition that bullying of the type that had driven the plaintiff out of education at 15 years of age was more likely to have had an adverse effect on his confidence than any other factor. The second is that her diagnosis as to the severity of the plaintiff's psychological problems were in part based on her acceptance that the plaintiff had suffered from ongoing significant enuresis for many years, an assertion rejected by the High Court judge.

33. As to the plaintiff's psychological injuries, the Court also had the benefit of evidence from Dr. Clare Conlon, clinical psychologist and Dr. Ian Gargan, consultant psychiatrist, both of whom gave evidence on the Defendant's behalf. Dr. Conlon told the Court that the plaintiff suffered from very significant learning disabilities. He was at the third centile of the population in terms of his learning capacity. Her evidence was to the effect that children with this type of disability become extremely disruptive due to the frustration which they experience in the school setting.

34. Dr. Conlon had queried the plaintiff about the events in his life that he considered were responsible for the anxiety that he had described to her. He referred to the distress of watching his younger sister having traumatic seizures, being bullied at school, his hospitalisation and a knee injury sustained by his cousin, for which he considered himself responsible.

35. On cross-examination, Dr. Conlon was asked about some of the plaintiff's symptoms material to a diagnosis of post-traumatic stress disorder. In her evidence she stated that, when she asked the plaintiff about whether he experienced nightmares and dreams that scared him, he answered in the positive. However, at the level of frequency and severity described, she considered that his symptoms merited a rating of 1 on a severity scale of 1 -4, (with 4 being the most severe). While she was satisfied that the plaintiff had some of the traits of post-traumatic stress disorder, she wasn't convinced that he had the disorder itself. However, if he did she was of the opinion that there were *"a lot of other factors involved that would lead a child such as Michael with his past as well as is intellectual difficulties to suffer from that anxiety and possibly close post at stress disorder"* and in particular that he had significant anxiety.

36. As for Dr. Gargan, while he agreed that the plaintiff demonstrated high anxiety, clinical depression, poor self-esteem and post-traumatic stress disorder, he was satisfied (Day 4 Q.148) that these could not be attributed to one discernible event, namely the plaintiff's hospitalisation in Kilkenny. He was satisfied that the bullying, his pre-morbid poor developmental status and his absences from school all contributed to this condition. At question 172 he expressed the opinion that the plaintiff's hospitalisation, together with all the trauma, had only minimal side effects or should only be considered to be a minimal contributor in terms of compounding what was already there. The rest was to be ascribed to the unfortunate circumstances of his life.

37. While it might have been clearer had the High Court judge engaged in a somewhat greater analysis of the psychiatric evidence than he did, it is abundantly clear, when the judgement is read by reference to the evidence, why the judge did not make a finding of post-traumatic stress disorder. At the height of the plaintiff's case, on the psychiatric evidence, was a diagnosis of post-traumatic stress disorder made by Dr. Moore-Groarke which she described as multi-factorial. As stated, that was her description of the plaintiff's condition before she accepted, as she did in the course of cross-examination, the existence of a significant number of other factors for which she had made no allowance in coming to her conclusions, including that of the High Court judge to the effect that the plaintiff's enuresis was not of the nature or severity alleged and had ceased shortly after his discharge from hospital.

38. In these circumstances, there was no basis for the High Court judge to make an award of compensation in respect of the plaintiff for post-traumatic stress disorder. It is clear from his judgment that, when considering the plaintiff's psychological welfare, he had regard to all of the emotional distress experienced by the plaintiff both prior to and after the events concerning his hospitalisation. These included his bullying, his educational difficulties, and his upset and emotional distress referable to his sister's condition, all matters that had to be excluded from his assessment. On the other hand, he stated that he accepted the evidence that his significant absence from school following his bladder repair surgery, probably exacerbated the difficulties he was already experiencing, albeit that this exacerbation would have been self-limiting.

39. Accordingly, I reject the submission made on the plaintiff's behalf that the judgment of the learned High Court judge is in any way deficient for want of reasons being provided for his conclusions. When considered in light of the underlying evidence and submissions, the plaintiff's advisers should well appreciate why the plaintiff failed in certain aspects of his claim.

The sufficiency of the award of damages.
40. Counsel on behalf of the plaintiff, Mr. White S.C., submitted that the High Court judge failed to award compensation to the plaintiff in respect of a number of complications stemming from the defendant's negligence. He instanced the injury to the bladder itself; the development and treatment of post-surgical peritonitis; the risk of the development of adhesions, depression and post-traumatic stress disorder; and the enlargement of the plaintiff's bladder.

41. In relation to the injuries allegedly overlooked by the High Court judge, I am satisfied from the opening paragraph of his judgment that he intended to, and did as a matter of fact, award general damages to the plaintiff to compensate him for the injury to his bladder, the consequential development of peritonitis and the surgical repair. This is what he said at p.4:-

> *"In the course of this operation the plaintiff's bladder was perforated and the plaintiff was extremely ill after the operation, and three days later on the 31st January 2006, it was necessary to carry out a further surgical repair procedure on the plaintiff in order to repair the perforation of his bladder, and that in turn required catheterisation of the plaintiff for several days ….."*

42. The High Court judge made several further references to these injuries in his judgment. When commenting on the plaintiff's eight days of hospitalisation, he remarked at p.5 as follows:-

> *"I am sure that the whole experience was extremely distressing for him".*

At p. 15 of his judgment he said:

> *"Thus the plaintiff must be compensated for having to have undergone the bladder repair surgery".*

Further, in the last paragraph thereof he also referred to the plaintiff's need of bladder repair surgery.

43. In light of these pronouncements and references, it is in my view impossible to argue that the plaintiff was not compensated for these, the most significant of the injuries sustained by him as a consequence of the defendant's negligence. Indeed, having regard to the High Court judge's findings of fact, one might rhetorically ask the question as to what other injuries, if not these, could the €50,000 award of damages have been directed?

44. While it is true to say that the High Court judge, in his judgment, did not refer to the word "peritonitis", it is clear that in referring to the fact that the plaintiff had become "extremely ill" post-operatively, that it was this complication to which he was addressing his attention.

45. As to the failure of the High Court judge to award compensation to the plaintiff in respect of his enlarged bladder, I am satisfied that this was not an omission. The High Court judge concluded on the evidence that the plaintiff had not developed an enlarged bladder as a result of the defendant's negligence. These were his conclusions commencing at the bottom of page 12 of his judgment:-

> *"I do not think that this problem was caused by the bladder repair surgery in January 2006, but is caused by the plaintiff's extreme difficulties at school, part of which is a complete reluctance to use the toilet facilities in the school, and as a consequence he has developed the habit of avoiding passing urine … which abnormally distends his bladder.*
>
> *In light of the bullying to which the plaintiff has been subjected over several years at school, it is quite understandable that he would not want to risk using the toilet facilities in the school."*

46. As to the High Court judge's failure to award damages for post-traumatic stress disorder and/or depression, this aspect of the claim and the evidence that was before the Court in relation thereto has already been dealt with earlier in this judgment, and it is therefore unnecessary to repeat it. In my view, having regard to the High Court judge's findings of fact as to the cause of the plaintiff's bullying, the at best multi-factorial nature of the plaintiff's post-traumatic stress disorder and the depressive symptoms exhibited by the plaintiff as well as High Court judge's rejection of the plaintiff's complaint of ongoing enuresis, there was no basis, from a causation perspective, for the High Court judge to make an award of damages for such an injury.

47. There are, however, two matters that concern me which are not mentioned by the High Court judge in his judgment. The first of these concerns the evidence given by Mr. Johnson, Consultant Gastroenterologist, to the effect that as a result of the complications of the plaintiff's surgery he is at a 5% risk of developing adhesions into the future and a 2.5% risk of requiring surgery as a result.

48. The second matter to which the High Court judge does not refer to in his judgment is the plaintiff's complaint made to Dr. Moore-Groarke that he suffered from nightmares referable to his hospitalisation and surgery. This evidence was not contested. He made a like complaint to Dr. Conlon who had assessed the plaintiff's nightmares, having regard to their severity and frequency, at 1 on the trauma scale of 1 to 4.

49. Given that neither of these complications is mentioned in his judgment, it is not clear whether or not the High Court judge took these matters into account when he assessed the general damages to which the plaintiff was entitled.

50. However, the following can be said about these omissions. Firstly, the risk of adhesions and the plaintiff's nightmares are not matters that should be considered to be of fundamental significance to the plaintiff's claim when viewed in the context of the totality of the injuries sustained or the overall value of the plaintiff's claim in respect of general damages. The risk of the plaintiff developing adhesions or the even more remote possibility that he might develop symptomatic adhesions requiring intervention, as advised by Mr. Johnston, was so small that, in my view, the inclusion or exclusion of this risk would not have materially affected the value of the claim. Likewise, I am satisfied that plaintiff's nightmares, which remained unreported for over five years post inception and which were categorised at the lowest end of the trauma spectrum by Dr. Conlon, were such that they would have attracted a relatively modest sum by way of general damages.

51. Having considered the submissions of the parties on this issue, I reject the submission made that judgments must be written in the type of prescriptive and formulaic manner advanced on the plaintiff's behalf. No authority was cited in support of the assertion that a trial judge when delivering judgment in a case such as this is obliged to make an exhaustive list of every injury and potential future risk, regardless of its significance, which he or she considers flows from the defendant's negligence such that, if perchance one such injury is omitted, it should necessarily be inferred that the same was not taken into account in the assessment of damages and that, as a consequence, the award must be set aside on the assumption that it is insufficient.

52. A trial judge should identify the significant features of the case that give rise to the court's determination of the issues between the parties. In an assessment of damages, the judge will refer to the injuries and future risks which he or she views as significant in the context of the defendant's negligence. The parties are entitled to know the basis upon which the court reached its conclusions. In the event of an appeal, this court similarly needs to be able to evaluate the correctness of the judge's approach. If the judgment of the trial court omits to mention some important matter, that may give rise to the inference that the judge did not take it into account and that the trial was unsatisfactory as a result. But it is not an absolute rule and neither is it necessary for the judge to cover every point for every item of evidence.

53. But this is not such a case. Here, the High Court judge dealt with all of the major aspects of the plaintiff's injuries when making his award of general damages. His risk of adhesions and his nightmares were of relatively modest significance in the context of the seriousness of the other injuries and, perhaps, this is why it is not readily apparent from a consideration of the award as to whether or not these lesser complications of the defendant's negligence were rolled up, so to speak, in the judge's assessment of the damages to which the plaintiff was entitled, as often occurs with the more minor *sequelae* in personal injuries actions. This raises the question as to the proper approach to be adopted by the court in such circumstances.

54. I am satisfied that where it is alleged that the trial judge may have overlooked an injury or injuries which the appellate court is satisfied, on the evidence, were relatively modest in the context of the overall claim, it should be guided in its conclusions by reference to the award of damages made in respect of the injuries identified by the trial judge with particularity in his or her judgment. If satisfied that the overall award of damages is clearly inconsistent with the inclusion of the injuries that the plaintiff maintains were omitted, then the justice of the case would warrant a reassessment of the award to which the plaintiff is entitled. However, if the award is within the range of damages that might be considered reasonable based on the inclusion of such injuries or *sequelae*, then the court should infer from the level of the award made that they were so included.

55. Applying this approach to the facts of the present case, I am satisfied that the sum of €50,000 so awarded by way of general damages would be within the range that might reasonably have been awarded by the High Court judge taking into account the risk of adhesions and the plaintiff's nightmares. To my mind, an appellate court would be unlikely to interfere with an award in that amount if appealed by the plaintiff on the grounds of its inadequacy. €50,000 was a far from insignificant sum having regard to the High Court judge's conclusions as to the relatively modest *sequelae* which could be attributed to the defendant's negligence once he was discharged from hospital eight days after his unfortunate surgery.

Interference in the cross-examination of Mr. Lanigan, Consultant Neurologist by counsel for the plaintiff.

56. Counsel for the plaintiff submits that the trial was unsatisfactory by reason of the fact that he was precluded from pursuing a particular line of cross-examination with Mr. Lanigan, consultant urologist, an expert witness retained by the State Claims Agency in support of the defence of the proceedings. He also maintains that the High Court judge failed to have regard to the evidence which cast doubt the independence of Mr. Lanigan's testimony. In this context, therefore, a brief summary of the relevant evidence and the manner in which that cross-examination proceeded is perhaps apposite.

57. At the commencement of the cross-examination, a fee note which Mr. Lanigan had presented when acting on the instructions of the State Claims Agency in another concluded medial negligence claim was put to him. When the High Court judge queried counsel as to the relevance of the proposed line of cross-examination, he explained that an expert witness had to be impartial and where extravagant fees had been charged by such a witnesses, then, in the eyes of a reasonable person, their independence would be questionable.

58. When the High Court judge asked counsel if he was suggesting that the fees paid by the State Claim's Agency were a bribe or that the witness's evidence had been bought, he declined to go that far but stated that where large sums of money were paid witnesses were required to "go the extra mile".

59. While it is apparent from the transcript that the High Court judge felt that counsel ought to have been prepared to challenge the witness on the basis that his evidence had been bought, as that was what was to be inferred by the questioning, he nonetheless made it clear, notwithstanding the protestations of counsel for the defendants, that the cross-examination could proceed. This is apparent from his comment to counsel for the defendants when he stated, "it is plainly obvious what he [counsel for the plaintiff] wants to do, and he is entitled to do it. Now, over to you Dr. White".

60. Thereafter, several exchanges took place between counsel and Mr. Lanigan in the course of which he was questioned as to the basis of his fee of €19,588.00 in the earlier case. Mr. Lanigan described spending three weeks, two hours each night, reading transcripts that had been sent to him via email. He explained that he read these because he was asked to do so and also because he felt it necessary to be able to defend his position against other expert witnesses and such questioning as might be advanced by the relevant barristers. In addition, he confirmed that he had then spent three whole days attending the hearing in the High Court and that the fees charged were in line with what he had agreed in advance with the State Claims Agency.

61. Counsel then proceeded to cross-examine Mr. Lanigan in relation to his intended fees in the present proceedings. He did so on the basis of a note of those fees which had been sent in error to his instructing solicitor. This established that he was charging a fee of €5,000 per day for attendance in the High Court, a fee which counsel suggested was egregiously excessive.

62. At that point, counsel for the defendant, Mr. Buckley S.C., objected to the line of questioning. He submitted that it should not be allowed unless the plaintiff intended calling evidence to demonstrate that the fees complained of were excessive and out of line with those being charged by the plaintiff's own experts. Following this intervention, the High Court judge indicated that as far as he was concerned the further pursuit of the disputed line of examination was a waste of time "unless there is something else emerging from it". In response, counsel for the plaintiff, presumably because he had no evidence to tender on the matter of Mr. Lanigan's fees, stated "very well, Judge, I will move on".

63. Based upon the aforementioned exchange, counsel for the plaintiff maintains that the trial was unsatisfactory. He states that he was not given a proper opportunity to establish by cross-examination that the witness was not impartial. He maintains that the "egregiously extravagant" fees paid to Mr. Lanigan in the earlier case, which he maintained were "wildly above anything the State Claims Agency could have been expected to pay", and the demand for payment of €5,000 per day in the present case were evidence that Mr. Lanigan had become an advocate for the defendants and could not be considered to be an independent expert witness. Fees of such extravagance were, he submitted, calculated to introduce a conflict of interest and by agreeing to pay such fees the Agency was, he submitted, inciting the witness to give partisan evidence.

64. In support of his contention that Mr. Lanigan should not be viewed as an independent witness, counsel relied upon the fact that he had admitted reviewing the transcripts in the earlier proceedings so that he would not be caught out when giving evidence and so

that he would be able to stand over his professional opinion. Counsel submitted that he had been "fed transcripts of the evidence" and that this amounted to the "prepping" of expert witnesses. This, he maintained, was an abusive practice developed by the State Claims Agency and one designed to enable the defendant's experts anticipate questions that they might be asked and to prepare their potential answers and to ensure that the defendants expert evidence was seamless.

65. Having carefully reviewed the transcript, I am satisfied that the High Court judge afforded counsel a tremendous degree of latitude in terms of the questions which he allowed him to ask Mr. Lanigan. It is simply not correct to state that he was forced to pull back from his cross-examination. At the point at which counsel decided not to pursue this line of cross-examination further, counsel for the defendant had intervened to query whether the plaintiff intended calling evidence to establish a disparity between the fees being charged by the plaintiff's own experts and those of Mr. Lanigan. At that stage, the High Court judge, quite correctly in my view, indicated that if the plaintiff had no evidence to offer beyond that which had been put to the witness, there was little to be gained by pursuing the matter further. Counsel, at that point, could have chosen to continue with his examination but elected to move on to other matters. He did not advise the High Court judge that he had any further important questions or materials to put to the witness. Neither did he protest that he considered himself wrongfully curtailed in his cross-examination of the witness.

66. That said, I believe that the High Court judge should have put a stop to this particular line of cross-examination as soon as it became clear that the plaintiff did not intend calling expert evidence in support of his otherwise bald assertion that the fees that Mr. Lanigan had charged in another case were so egregiously extravagant that he should be considered incapable of discharging his professional obligations to the court. While counsel did not directly accuse the witness of accepting a bribe to give favourable evidence for the defendants, the clear import of his chosen line of cross-examination was to challenge the honesty, independence and integrity of the witness based upon the fees he charged. To my mind, when an expert witness comes to court to give evidence, their professional reputation should not be treated as a disposable and worthless commodity. They should not easily be allowed to become an open target for unrestricted questioning of a damning nature. I believe that questions destined to tarnish their reputation by reference to the level of fees they charge should only be permitted where the party challenging the witness can state that it is their intention to call expert evidence to prove that the fees under scrutiny are exorbitant to the point that, in all of the circumstances, the court should consider that their independence must be considered to be in doubt.

67. If the parties to litigation were to be permitted to challenge the integrity and independence of professional witness by reference to the fees charged by them in the current litigation or in some other proceedings, the orderly conduct of litigation would, potentially, be significantly undermined. The court would find itself embroiled in conducting a myriad of internal inquiries concerning the appropriateness or otherwise of professional fees, a matter about which the court, unlike the Taxing Master, has no expertise and without the assistance of any expert evidence on the matter.

68. That is not to say that the independence of a witness may never be challenged unless the party mounting that challenge intends to call expert evidence. The role of the expert witness is well understood. They must be seen to be independent and their opinion should be unbiased and uninfluenced by external matters such as fees. That being so, they cannot be considered independent if they have a financial interest in the outcome of the litigation or if it can be shown that they have an improved prospect of recovering their fees depending on the persuasiveness of their evidence.

69. Accordingly, if the solicitor for a particular plaintiff was to learn that one of the defendant's experts had agreed to give evidence on the basis that they would receive an uplift of 30% on their fees if the case was satisfactorily concluded in the defendant's favour, then clearly cross-examination based on that agreement and its effect on the independence of the witness would be permissible without the need to call expert evidence on the matter given that the law is well settled that such agreements are not permissible. However, there was no such agreement at play in the current litigation. The €19,558 paid to Mr. Lanigan in the earlier case was in respect of fees agreed with the State Claim's Agency in advance of the proceeding, as was the case in respect of his fees in the current litigation. The fees in each case had been paid at the agreed rate regardless of the outcome.

70. I am satisfied that, if the plaintiff wanted to rely on the amount charged by Mr. Lanigan to establish his lack of independence, he was only entitled to do so by reference to expert evidence on the matter. It does not follow, just because a fee may seem large or even extraordinarily large, that it is in any way demonstrable of a lack of independence or impartiality on the part of the witness. Experts in a given case, even those acting for the same party, may charge significantly different levels of fees. The fee will usually depend upon a wide range of factors, including the demands for the professional services of that witness and the extent to which they are prepared to discommode their professional lives to give evidence. It cannot be asserted that the witness who is paid the larger fee is likely to be less independent than their counterpart who has charged a significantly lesser fee. Indeed, the opposite argument could just as readily be advanced, namely, that the lower fee might be viewed as evidence of an effort on the part of that witness to curry favour and obtain more work from the party who had retained them.

71. I also reject as unsubstantiated and without any foundation the bald assertion made in the written submissions on this appeal that the State Claims Agency, by agreeing to pay such "extravagant remuneration induced a clear and present inducement to the expert to over extend himself and become partisan in his testimony". The reference by counsel to the State Claims Agency having "an open cheque book" and being intent upon paying him "egregiously extravagant fees for his evidence" on the basis that his performance would likely thus be affected to their benefit is quite frankly unacceptable in circumstances where no evidence was tendered to criticise the fees so agreed. Likewise, the assertion that the fees paid to Mr. Lanigan were "wildly above" anything that the State Claims Agency could "properly be required to pay" is also unacceptable in such circumstances.

72. I also reject the submission that the High Court judge should have viewed Mr. Lanigan's independence as in doubt by reference to his evidence as to why he read the transcripts in the earlier proceedings. Firstly, he was asked to do so. Secondly, I see nothing irregular about what he did. In many instances witnesses will be in court for the entirety of the relevant proceedings and are fully conversant with all the evidence prior to giving their own evidence. Following the logic of the plaintiff's argument, witnesses should be excluded up to the point at which they give their own evidence, lest, by having been present to hear the evidence they might be better prepared for the giving of their own evidence and be less capable of being taken by surprise by the opposing party. Thirdly, the procedure of sending transcripts to witnesses is not, as was submitted, an abusive practice developed by the State Claims Agency for the purpose of coaching its witnesses. It is a practice adopted regularly by parties in almost every type of litigation, particularly where the proceedings are lengthy and it is unreasonable to expect witnesses to attend court for the duration of the trial. The practice has perhaps relieved many an overburdened solicitor of the need to prepare a lengthy memo at the end of the day which would otherwise be forwarded to intended witnesses to keep them updated regarding the evidence. The transcript allows all concerned keep up to date with the evidence as it evolves. It is bizarre to suggest, particularly having regard to the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements), 1998 (S.I. No. 391 of 1998), that expert witnesses should come to court blindly unaware of any alteration in the facts as were known to them when they prepared their expert report or should not be told of the opinions of other experts as expressed to the court.

Recusal of a member of the Court

73. Before concluding this judgment it is finally necessary to address an issue which counsel for the plaintiff raised at the start of the hearing, namely, that I should recuse myself on the ground I had delivered an address on aspects of medical negligence litigation at a medico-legal conference hosted by the solicitors for the State Claims Agency in April, 2014. It was contended that this fact *in itself* gave rise to a reasonable apprehension of bias. The Court ruled that the objection was without substance, and it now gives its reasons for that conclusion.

74. Every person appointed a judge is required by Article 34.5.1 of the Constitution to subscribe to a public declaration in open court that they will execute the judicial office "without fear or favour, affection or ill-will" towards any litigant. This declaration obliges each judge to discharge his or her judicial duties in an impartial fashion in a way which will not compromise the administration of justice.

75. While adjudication by a detached and impartial judge is a central element of the administration of justice pre-supposed by Article 34.1 and Article 34.5.1 of the Constitution, it has long been recognised that any such objection on the ground of supposed bias must not be contrived or artificial. This Court has recently held that a judge is not disqualified merely because he or she has a banking relationship with a particular bank. As this Court stated *in Bank of Ireland v. O'Donnell* [2015] IECA 73 at para.62:

> "Ireland is a small country with a relatively small number of commercial banks. As a matter of common sense, all judges have bank accounts and other banking facilities including in many cases a loan secured by a mortgage on their home or other property. The duty of a judge to make disclosure derives from the judge's obligation to ensure a hearing by an impartial court. Both duties must be considered in the context of the declaration made by every judge in the terms set out in Article 34.5.1 of the Constitution."

76. One could replicate these examples in many other aspects of life. It has never been suggested, for example, that a judge could not a hear case against Iarnród Éireann even if he or she travelled to work daily by train. A judge could legitimately hear a case involving a health insurer even though he or she might be a policy holder with that company.

77. In this context it must be recalled that only qualified legal practitioners with the requisite experience are eligible for appointment as a judge. In the case of appointments to the High Court, Court of Appeal and the Supreme Court, twelve years experience as a practising lawyer is required: see s. 5(2) of the Courts (Supplemental Provisions) Act 1961 (as amended). In the nature of things prior to their appointment, judges will necessarily have acted for and against the State, State bodies, local authorities, major companies and other prominent institutions who regularly sue and are sued. It could not be realistically suggested, for example, that a judge who had acted in the past qua counsel for a State body could not by reason of that fact alone hear a case against the State following his/her appointment.

78. The same principle must necessarily apply in respect of litigation involving solicitors firms who had previously instructed the judge in question qua counsel. No one would suggest that a judge should not hear a case merely because a firm who had previously instructed him or her was acting for one of the parties.

79. In this context, the test is that which was applied by Finlay C.J. in *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419 at pp. 438 to 439, namely, whether a reasonable person "should apprehend that his chances of a fair and independent hearing …. [do] not exist by reason of the pre-judgment of the issues." Finlay C.J. stressed that the test was an objective one. This test has been consistently applied: see*, e.g.,* the decisions of the Supreme Court in *Bula Ltd. v. Tara Mines Ltd.* (No.6) [2000] 4 I.R. 412; *Kenny v. Trinity College, Dublin* [2007] IESC 42, [2008] 2 I.R. 40; and the decision of this Court in *O'Donnell.* Perhaps the three cases which are the closest in point are *O'Ceallaigh v. An Bord Altranais* [2009] IEHC 470, [2011] IESC 50*; Bula Ltd. v. Tara Mines Ltd.*; and *O'Reilly v. Cassidy* (No.2) [1995] 1 I.L.R.M. 311.

80. In *O'Ceallaigh v. An Bord Altranais* [2009] IEHC 470, Hedigan J. in the High Court rejected the applicant's contention that a structural relationship of significance existed between a chairperson of a fitness to practice committee and an independent expert witness in domiciliary midwifery, who were both employed by the same hospital, such that it could be assumed not only that they had regular communication and ongoing interaction, but further that the chairperson would view the witness as one of her employees in receiving her evidence.

81. On reviewing the relevant case-law, Hedigan J. distilled the following four principles:

> "(1) Objective bias is shown where a reasonable, well informed observer would reasonably apprehend that the plaintiff would not receive a fair and impartial hearing because of the risk of bias on the part of the judge.
>
> (2) A relationship between the judge and a party, or a witness to the proceedings, or another member of public involved with a case, be it personal, social or professional, is not sufficient of itself to prove objective bias. It must be shown that the circumstances of that relationship and its connection with the proceedings are such that it has the capacity to influence the mind of the decision-maker.
>
> (3) The impugned relationship between the judge and the party, witness or other relevant person, must normally display a community of interest between them which is directly related to the subject matter of the proceedings for objective bias to arise. This link must be cogent and rational.
>
> (4) Where the impugned relationship concerns a witness or other person, not a party, who does not have a stake in the outcome in the proceedings, the threshold to establish objective bias will necessarily be higher. "

82. Hedigan J. found that neither the witness nor the hospital had any stake in the outcome of the proceedings; thus, there was no community of interest. Similarly, Hedigan J. found that there was no cogent reason for believing that, because the witness worked in the same hospital, the chairperson would prefer her evidence to the committee. In particular, he noted:

> "Ms. Hanrahan is one of a very small pool of experts in domiciliary midwifery. In a country such as Ireland, the likelihood of some degree of familiarity between expert witnesses and professional nurses sitting as members of an inquiry is very high, if not inevitable."

83. On appeal to the Supreme Court*, O'Ceallaigh v. An Bord Altranais* [2011] IESC 50, Fennelly J. upheld the findings of Hedigan J.

84. In *Bula* objection had been taken to the fact that two members of the Supreme Court had a long time previously acted for the defendant. That Court held that the mere fact that a judge had, prior to being appointed, acted as counsel for one of the parties was

not in itself sufficient to establish grounds for recusal. As Denham J. put it (at p.446):

> "A judge is not disqualified from adjudicating in a case merely because one of the parties was in receipt of his or her professional legal services at an earlier time … It requires special additional circumstances to disqualify a judge from adjudicating on a case. Thus, a long, recent and varied connection may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the case. Special circumstances precluding a judge from presiding include a situation where the judge as counsel had previously given legal services to a party on issues alive in the case to be heard by the court."

85. In *O'Reilly* Flood J. had previously held that the mere fact that counsel appearing before the judge was a close family member did not *of itself* give rise to the reasonable apprehension of bias, although that could change if there were additional factors. As it happens, Flood J. held that the family relationship between judge and counsel did give rise to a reasonable apprehension of bias in circumstances where the opposing counsel had been severely rebuked by the judge for his criticism of the conduct of counsel who was the daughter of the judge. On this point, Flood J. stated at p.319:

> "Counsel for the applicant in this Court had anchored his case to the proposition at the mere fact of the judge's daughter being briefed before him is sufficient to give rise to the possibility of a reasonable man considering that bias could follow. Stated in that bold and rigid fashion, I would reject his submission. To accept it would, in my opinion, be to derogate the oath made and subscribed by every judge and appointment pursuant to Article 34.5.1 of the Constitution to a totally empty formula. In my opinion, there must exist in addition to a mere relationship, some element or factor which could (not would) give rise to a fear in the mind of a reasonable man that in the circumstances the relationship between counsel and judge could affect the outcome of the case . . . . It follows … that this Court must look to all the circumstances of the proceedings in question. In my opinion, in the circumstances prevailing in the court on the 21st March, the complaint by the applicant's counsel as to the relationship between counsel and the judge got so inextricably entangled with other factors that there was a real possibility that the end product could give rise to a fear in a reasonable person that the outcome of the proceedings could be affected, in an indeterminate way, by, *inter alia*, the relationship between the judge and counsel. In the last analysis the overriding principle is that justice must manifestly be seen to be done."

86. It follows that if a prior legal relationship between a legal advisor and client does *not in itself* disqualify the prior adviser acting as a judge in a matter to which the client is a party *(Bula)* or it is accepted that a close family member may appear qua counsel or solicitor before a judge does not *of itself* give rise to a reasonable apprehension of bias *(O'Reilly),* it necessarily follows that the mere fact that a judge participated in a public seminar on an aspect of medical negligence litigation organised over a year previously by the defendant's solicitors firm could not be objectionable. No reasonable person aware of the true facts would consider that the outcome of the proceedings might be affected *simply* by reason of my participation in that seminar.

Conclusions

87. For my part, for the reason just stated, I would dismiss this appeal.