Neutral Citation Number: [2006] IEHC 440

THE HIGH COURT

[1992/4080 P.]

BETWEEN

JOHN WINSTON

PLAINTIFF

AND
NIALL O'LEARY

DEFENDANT

Judgment of Mr. Justice John MacMenamin dated the 19th day of December, 2006.

1. On a number of occasions in recent years it has been pointed out that the task of determining what probably occurred after a long elapse of time poses particular challenges to a court. The process is rendered more difficult when important aspects of a case are reliant, entirely, on human memory. At the hearing the assessment of oral evidence is of course one aspect of a court's function. In fact -finding a court will consider the recollection of each witness. Testimony may be affected by the passage of time itself. Perhaps there may be particular factors which may affect memory, or where witnesses to events may seek to rationalise their actions or decisions on the basis of what they believe happened, as opposed to what actually occurred. In the absence of memory, a witness may be entirely reliant on contemporaneous records. On occasion the importance or uniqueness of an event may lead to certain recollected words or deeds becoming fixed in the mind of one participant but not others. Here context and the totality of what occurred is essential. In the absence of clear corroborative evidence, a court may seek to identify whether there are 'islands of fact' which may assist in the process of testing accuracy of recollection. In the absence of strong cogent corroborative evidence one must look to all the surrounding known facts and records in order to ascertain which narrative, or version of events, is the more likely or probable, and ultimately whether respective parties have discharged a burden of proof. If there is a conflict of evidence, such conflict may only be resolved by weighing all the surrounding circumstances in order to identify which version of events is the more probable. One factor is whether, in the light of clear evidence established objectively, or ascertainable facts, the credibility of bare assertions made and denied may, in the absence of corroboration, be resolved on the basis of whether the general testimony of a witness otherwise bears scrutiny, having regard to their account of such other verifiable and objectively ascertainable facts. How a witness testifies on issues which can be otherwise established may be a helpful guide if it is the word of that witness against another person.

2. The judgment which follows seeks to summarise the testimony and submissions of this seven day hearing, consider the evidence, apply the principles of assessment outlined, and finally to analyse such evidence in the light of the legal principles which arise on this aspect of law. The primary question for determination is whether, on the evidence, the plaintiff has established negligence in the part of the defendant medical doctor. A secondary issue, that of causation, also arises.

Facts

3. In June of 1989 the plaintiff, a married man with seven children, was minded to undergo a vasectomy procedure. His wife had recently given birth to their youngest child. The couple managed a family run newsagency in Finglas. This business was a full-time undertaking. It required the whole attention of the plaintiff and his wife. The birth of the couple's second last child had been difficult. On the birth in May of that year of their last child the Winstons considered their family was complete.

4. On the 26th June, 1989, the plaintiff went to his general practitioner Dr. O'Gorman. He said he wished to have a vasectomy. Dr. O'Gorman, who practised in Finglas, indicated that he was not expert in this area. He referred the plaintiff to Dr. Niall O'Leary, the defendant herein, who had a particular interest in this field and who had carried out a substantial number of such procedures. Dr. O'Gorman did not counsel the plaintiff beforehand except in general terms. He testified he was aware that the plaintiff would receive specific and detailed counselling before the procedure.

5. The Winstons married in 1981. Mrs. Winston was pregnant for a significant amount of time in the marriage. During the eight years period to 1989 as well as giving birth to the seven healthy children in the family she unfortunately also had a miscarriage.

6. After the birth of the second last child, the Winstons decided "to take a break" and during that two year period Mr. Winston used male contraception. After the interval Mrs. Winston again became pregnant. The question of a vasectomy arose when the Winstons were leaving the Rotunda Hospital after the birth of their last child in May 1989. They were then given a family planning brochure which included vasectomy as one of the contraception options available to those who might so choose.

7. The plaintiff is now in his late forties. He presented as being an extremely anxious and at times, over-wrought witness. He described the decision to avail of this procedure as having been a very quick one. He was referred to Dr. O'Leary having been told about his experience and that he had actually lectured on the subject. The Winstons were not well informed about vasectomy. The plaintiff understood it to be a very small operation.

8. As a preface to the evidence now summarised, it should be noted that Dr. O'Leary had no recollection of the plaintiff or his wife, the advice he gave, the procedure or any subsequent meeting. The last meeting between the plaintiff and the respondent was 1st August, 1989, seventeen years prior to the hearing of the case. No motion or point on the issue of prejudice was raised at, or prior to the hearing of the case. Despite the serious concerns felt afterwards by the plaintiff, there is no evidence that, any time after the post operative consultation of 1st August 1989, he ever returned to the defendant to discuss these concerns in detail. Nor is there any evidence that any of the doctors who then saw the plaintiff ever consulted the defendant. For his views this is unfortunate for a number of reasons discussed later.

9. On the evening of the 29th June, 1989, the couple went to the defendant's surgery. The plaintiff said that he had decided on having a vasectomy. They outlined their family circumstances. The plaintiff says the defendant said that vasectomy was a very simple procedure and that there had been millions of them done around the world.

10. The plaintiff says he asked the defendant whether there were any potential problems with vasectomy and was told that "there were no problems whatsoever". He testified at one point: "I was *never* told of any risk of pain". Dr. O'Leary outlined the procedure. This firstly involved anaesthetic injections in the scrotal area. The plaintiff says he asked "will I feel any pain at all?" to which he said the defendant responded, "no you won't feel anything". When he enquired whether it would be sore he testifies that the defendant responded not generally, but that when the effect of the anaesthetic wore off, there would probably be some soreness and discomfort. Mrs. Winston (who testified) says that Dr. O'Leary did not indicate for how long such discomfort or soreness might last but that it might be alleviated with Panadol or other painkillers.

11. The Winstons say that in the course of the counselling interview the defendant put questions to them as to the choice of

vasectomy in the context of various life-contingencies such as death of a child or loss of a spouse. The Winstons provided Dr. O'Leary with a great deal of personal detail, reflected in an aide memoire filled out by the doctor at the time.

12. The questions of the advice given and the plaintiff's subsequent consent, is at the centre of this case. The additional issue of causation is dealt with later in the judgment. The plaintiff says he asked the defendant whether there were any potential long-term effects of a vasectomy. He says the defendant responded that the only possible adverse consequence after the operation might be postoperative infection which could be cleared up with a seven day course of antibiotics.

13. However, in evidence, Mr. Winston also said that he was not told that there would be *any* risk of pain and that long-term adverse consequences were not mentioned *at all*.

14. Mrs. Winston testified to the same effect.

15. The plaintiff now says if he had been informed then as to the potential of any long-term risk of ongoing pain it would have given him "food for thought". It would have led him to consider for a longer period whether to undergo the procedure. This would have entailed discussions with his wife, particularly as to the effect of any long-term consequence upon his ability to work and help provide for his family. He says that he would have enquired as to how it would have interfered with his general ability to conduct his life and if he had been informed that there was a risk, or if his ability to carry on his life as normal might be compromised, he would have decided against vasectomy.

16. Mrs. Winston too says Dr. O'Leary informed them it was just a simple operation. She said specifically the defendant gave no warning at all as to a risk of long term pain. Had she been told about this she would have advised her husband not to proceed. She says that she and her husband proceeded on the basis that what was involved was a simple operation with no risk of long term pain or consequences. At another point she too said that Dr. O'Leary did not mention the risk of pain *at all*.

The Consent Form

17. The plaintiff says that on this basis he signed a consent form in the surgery on the 29th June, 1989.

18. This form states that, in consenting to a bilateral male vasectomy the signatory understands:

1. That it should make him incapable of fathering children;

2. That it may not be possible to reverse the operation;

3. That two consecutive semen tests must show that no sperms are present before stopping other methods of birth control;

4. That it will be done using a local anaesthetic and as a private patient;

5. That no assurance could be given that the operation will be 100% safe or successful.

19. On signing the form the plaintiff says he asked Dr. O'Leary as to its purpose. He was told that on some occasions the operation was unsuccessful. For a period after the procedure it would be necessary to use contraception. The form itself states that the nature, purpose, and intended effect of the procedure had been explained to the plaintiff. The form was countersigned also by Mrs. Winston and by the defendant. The plaintiff made an arrangement to meet Dr. O'Leary in his surgery two weeks later on the 15th July, 1989, to undergo the vasectomy.

20. Mr. Winston arrived on that day accompanied by his wife. A nurse lead them into the surgery. His wife went into a waiting area. In evidence the plaintiff gave a most graphic description of the procedure. After preparation, he described being placed on a table covered with a piece of green material. The doctor identified the area of the vas deferens. The plaintiff says he was injected with anaesthetic on *both* sides of the scrotum prior to any step in the operation. The defendant made an incision. Mr. Winston says that he felt immediate pain. He described the defendant placing a clamp on the vas deferens. He says he then felt sharp pain into his stomach. He was pushing down on the table. He commented on the pain. He says that when the defendant cut the vas deferens, he felt sharp pain again and told Dr. O'Leary that this had had hurt him. The plaintiff testified he was given more anaesthesia; again on both sides of the scrotum. He says that as the doctor had performed the procedure his back was "arching up". Altogether he says he had four injections of anaesthetic. The plaintiff says the defendant then had problems with the cauterising machine. He felt pain and burning on the vas deferens as it was applied. He says that as the procedure was effected he was "pushing down all of the time". He told Dr. O'Leary at one stage to take the clamp off because he felt the cauterising machine was not functioning.

21. Mr. Winston said this procedure was repeated on the other side of the scrotum, again with pain.

22. The notes made by Dr. O'Leary do not record anything untoward at all as having occurred in the course of the procedure or afterwards. They are dealt with below.

23. The plaintiff was extremely distressed, emotional and tearful in his evidence as to what occurred in the surgery. It is clear that what happened then, has been a source of regret and ongoing preoccupation. He says that he was weak after the procedure. He was unable to get up. He had to ask the nurse for water and for a cloth to wipe the sweat off himself. He had trouble getting his clothes on. He had difficulty tying up his laces. He says he asked Dr. O'Leary for painkillers and was told that there was a chemist shop not far off. After they left the surgery, Mrs. Winston, who had been waiting in another room, went to the chemist's shop. The plaintiff remained holding onto the railings outside the defendant's surgery. He was dizzy and weak. He was unable to proceed further until they got a taxi. The plaintiff said that the pain continued after the procedure when he went home to bed.

24. In the days following the plaintiff says that he continued to suffer pain. He remained in bed. The pain never left him. He went down to Dr. O'Gorman's surgery on the 18th July, 1989. There he was treated by Dr. O'Gorman's partner Dr. Barnes. The medical notes taken on that day record that the right side of the plaintiff's scrotum was bruised but that there was no infection. The left side was described as "perfect". The plaintiff was complaining of pain in the lower abdomen but his bowel movements were unremarkable. Dr. Barnes noted that on palpation there was nothing abnormal detected. There is no other comment on these notes on the vasectomy procedure or its effects. There is no remark on anything unusual having occurred on the day of the operation, or any complaints about Dr. O'Leary's conduct. These are the most proximate objective evidential material to the operation accepted in evidence in that objection by both parties.

28. The plaintiff says he had a sense, after the operation that, as he put in his own words the "joints" might be leaking because of the trouble which he thought the defendant had encountered with the cauteriser. Dr. Barnes advised him to get back in touch with Dr. O'Leary. The plaintiff says the scrotal pain continued. Dr. Barnes advised him to go back to the defendant. He made an appointment with Dr. O'Leary for the 1st August, 1989. On that occasion the defendant's notes reflect that he simply prescribed Progesic a mild to moderate painkiller. He did not record any sign of any infection or haematoma. Mr. Winston was advised to contact the defendant in the event of any difficulty arising.

29. This short and routine record must be contrasted with the very vivid account which the plaintiff gave in court of ongoing pain which he says he described to Dr. O'Leary. Mr. Winston testified he told the defendant that his testicular area was excruciatingly painful and sensitive. It was "on fire". He was unable to let his children near him because of this sensitivity. He described the defendant using a pencil to move his testicles in examination. He was prescribed painkillers and assured that the pain would settle down.

30. None of the medical records kept by Dr. O'Leary record the allegations which Mr. Winston now makes as to the extent of the pain he was suffering and as described in evidence.

31. The sperm tests carried out later showed that the vasectomy was successful. The plaintiff was no longer fertile. The plaintiff did not attend his own doctor at all for months.

32. Eight month later, on the 19th April, 1990, the plaintiff attended Dr. O'Gorman, his general practitioner, complaining of a urinary tract infection with swelling and extreme pain in the left testicular area described and noted as being "similar" to that after the vasectomy. Four days later Mr. Winston went to Dr. O'Gorman again. The doctor found he was no better and referred him to the Mater Hospital. The plaintiff still thought that there could be "leaking" that is that the cauterisation process had not been complete. These concerned, unrecorded by Dr. O'Gorman, did not lead the plaintiff to return to Dr. O'Leary for advice.

33. The plaintiff in evidence described suffering pain, often very severe, through the interim period up to April 1990. On occasion the pain was so bad that he was on his hands and knees and deeply distressed.

34. I do not believe the plaintiff or his wife were untruthful in evidence. However, I find difficulty in accepting that if the pain was of such severity at that time, that he did not attend his own doctor or any other practitioner more frequently No medical records reflect the sequence of events as narrated in evidence. In fairness to the plaintiff it could be seen in evidence that he considered Dr. O'Leary to have been unsympathetic to him which might account for the fact the did not return to him, as opposed to other doctor.

The aide-memoire

35. At the first consultation, Dr. O'Leary had a form in heavy paper which he used at the time. This was headed "Family Planning Association" beneath which are the words "Vasectomy Discussion". It was designed as an aide-memoire for vasectomy counselling. The background details described in this form bear out closely the family details described by the plaintiff and his wife. Under the heading "Consideration of Female Sterilisation" there are the words, in the defendant's handwriting, "his turn". This conveyed Dr. O'Leary's understanding that Mrs. Winston had said she felt that it was now her husband's turn to deal with the question of contraception as she had tried other forms previously. Dr. O'Leary recorded that the plaintiff had been considering vasectomy for two years. This view is disputed by the Winstons who state that the reference to this two year period reflected the time Mr. Winston had used a condom. The conflict of evidence on this issue is not of direct relevance. It is not disputed that the question of a two year time gap was discussed.

36. The form records the discussion as to various life contingencies. It records that both the plaintiff and his wife were satisfied to proceed. Beneath this is a heading "Details of Vasectomy to be given to couples if Vasectomy as seems appropriate.

1. Operation must be regarded as Irreversible. BUT WARN PATIENT OF:

    (a) Risk of early recanalisation before sperm counts which may necessitate repeat operation.

    (b) Risk of late recanalisation after two clear sperm counts.

    (c) *Risk of residual pain*." (emphasis added)

37. The form then deals with details of the operation and anaesthetic, its effect, the possibility of post operation fertility, recommendations for post- operative contraception and the collection of sperm specimens post operation for the purpose of testing fertility. At item 8 of the form there is the heading "Disadvantages of Vasectomy", opposite which are the words:

- "Irreversibility",

- many months before completion,

- occasional incidence of bleeding and infection,

- some discomfort usual but should be controlled by simple analgesics.

38. The check list is completed by reference to the consent form (which was signed by the plaintiff and his wife) and also a statement that the absolute reliability of vasectomy is unknown but that it is better than any other method.

39. Each item on the checklist was ticked off by Dr. O'Leary who testified this was his procedure.

Subsequent Events

40. In April 1990 Mr. Winston suffered pain. He attended the Mater Hospital. Ultimately he was informed by Professor Fitzpatrick there that he had a sperm granoloma - a collection of inflammatory cells and fibroid tissue which react to sperm.

41. On the 27th September, 1990, the plaintiff called to his general practitioner Dr. O'Gorman. He indicated then that he felt "let down" and that it should have been clear earlier what was wrong with him. Dr. O'Gorman pointed out that whatever occurred was not his responsibility. Mr. Winston was admitted to the Mater Hospital on the 28th September, 1990. It appears he stated to a doctor there that he had a leak from "the joint" post vasectomy but that he was told he did not know what he was talking about and that the granuloma had nothing to do with it. Dissatisfied, he discharged himself and arranged to go to London for medical treatment. Dr.

O'Gorman's note records that the plaintiff was by then contemplating taking legal action arising from what had occurred to him.

42. A surgeon, Mr. Ross Witherow carried out an operation for the sperm granuloma in London on the 3rd October, 1990. A little more than a fortnight later Mr. Winston returned for a follow-up. He was still complaining of pain and swelling on the right side of the scrotum. He had multiple tests. He also saw a Dr. Malcolm Carruthers, (who gave evidence) who was described as a Consultant Urologist in Harley Street in London. The pain did not cease.

43. Mr. Witherow did not testify in the proceedings. No records of his were produced. The court therefore had no evidence as to his diagnosis, treatment, on the outcome of the operation, or the history which the plaintiff gave pre operatively.

44. On the 29th January, 1991, the plaintiff saw Mr. Witherow again, still complaining of pain. He says then he was referred to a pain clinic with ongoing discomfort and swollen epididymi.

45. By this stage or later the plaintiff says he had begun to drink heavily, sometimes he said up to 10 pints of Guinness a day. He was neglecting the shop. His relationship with his wife was unsatisfactory. He gave no clear explanation as to why this alcohol abuse had commenced although there it was suggested there might be a connection between this and the vasectomy. No psychiatric evidence was called, although the plaintiff had consulted a psychiatrist Dr. Harry Kennedy. The court has no evidence as to the causation or extent of the plaintiff's psychiatric symptoms other than the plaintiff's own testimony.

46. On the 6th February, 1991, the plaintiff was seen by Mr. Denis Murphy of the Bon Secours Hospital in Dublin who apparently diagnosed conjunctive epididymitis on the left side. Dr. Murphy was not called. The plaintiff says he was prescribed antibiotic medication, and says he thought it advisable to gain such treatment abroad, perhaps in the Mayo Clinic. Ultimately, because he had relatives in Florida the plaintiff made an appointment at the Jackson Memorial Hospital in Miami and was seen there by a Dr. Bejany. An epidymectomy was carried out on the 7th May, 1992. The plaintiff then developed a post-operative infection on his return home and attended hospital in Blanchardstown. He continued on pain medication from June, 1992, to November, 1994. His left testicle shrunk considerably and he says he returned to Dr. Bejany on the 26th November, 1994. An orchidectomy was recommended and carried out on the 1st December, 1994, after which a prosthesis was inserted.

47. Unfortunately rejection of prosthesis began and worsened in January, 1995, as a result of which on the 17th February the prosthesis and the sac was removed. The plaintiff continued to suffer continuing pain on his right side.

48. Mr. Winston says he continued to have difficulties involving pain and stress as a result of which he says ultimately he made an attempt on his own life in April, 1998. In January, 1999, he entered rehabilitation for drink and drug dependency and thereafter ceased all medication.

49. In October, 2006, the plaintiffs attended hospital in Miami and apparently saw a Dr. Cava who apparently diagnosed the plaintiff as suffering from a sperm granuloma of the spermatic cord and recommended further surgery. It was suggested that a vasovasostomy (i.e. a reversal of vasectomy) might help to relive the pain on the right side.

50. None of the medical personnel named above (save Dr. Carruthers) gave evidence, nor have their medical records being produced or the history which Mr. Winston gave them. It is quite clear on the evidence that the plaintiff endured periods of prolonged pain, and frequent adverse outcomes from the many medical procedures on him during this time.

Other Evidence on Behalf of the Plaintiff

51. Mr. Michael O'Reilly was called on behalf of the plaintiff. He stated that he attended the defendant for the purposes of a vasectomy in February, 1990, having been referred by his general practitioner. Mr. O'Reilly was a friend and family acquaintance of the plaintiff. The court acceded to an application that he be called at late notice. The witness was uncertain as to the precise month and year of the events which he described. However said that Dr. O'Leary carried out a vasectomy successfully on him eight months after Mr. Winston's procedure.

52. Mr. O'Reilly testified that when he attended for counselling with the defendant he was warned as to the possibility of pain over a period of 24 to 48 hours after the procedure but that no warning was given as to any risk of pain over a longer period.

53. Even assuming the evidence as material, I find it puzzling, in view of the fact that there was a social connection between the plaintiff and the defendant, that Mr. O'Reilly apparently went to Dr. O'Leary in the first place unaware of Mr .Winston's concerns and in circumstances and at a time when the plaintiff says that he was suffering ongoing and extreme pain as a result of the procedure which the same practitioner, the defendant, had carried out on him in such unusual circumstances as described.

54. I do not consider Mr. O'Reilly was seeking to mislead the court in any way. However I find it difficult to accept evidence of what had happened in one brief part of a medical consultation sixteen years ago in the absence of other supporting objective material.

Dr. Carruthers' Evidence

55. Dr. Malcolm Carruthers testified on behalf of the plaintiff. He is a Doctor of Medicine and a Fellow of the Royal College of Pathologists. He originally specialised as a chemical pathologist, but said that for the last 15 years he had been in consulting practice as a specialist in an area of mens health. He described his specialism as being an "Andrologist", a field he described as relating to general health and to the symptoms and complications of testosterone deficiency.

56. While Dr. Carruthers indeed had held a number of hospital and academic posts in pathology it emerged in evidence that he has never in fact carried out a vasectomy at all, although some 40 years ago he witnessed a number of such procedures with his brother also an andrologist. He was not in a position therefore to testify as to the general practice adopted by doctors who engaged in this procedure in Ireland or elsewhere, or as to generally accepted procedures by such practitioners in 1989 of now or any time.

57. The witness accepted that he holds and has written about a range of reservations he feels about vasectomy both from the point of view of pain and testicular function. In fact when asked directly he indicated that he was generally hostile to the procedure. He had not attended any pre-vasectomy counselling sessions other than those of 40 years ago. The particular and special question of warnings generally given by experienced practitioners was outside his experience. He had no such expertise in an Irish or English context. Nonetheless he testified that the defendant should have given the plaintiff a specific warning as to the risk of long term pain and possibly given a percentage figure as to the incidence of long term pain as being between 2 and 5%.

58. It must be said that other earlier parts of Dr. Carruthers testimony were based on a number of assertions which, it transpired, were not supported by concrete objective or statistical evidence. Among the recognised risks he identified as arising from a

vasectomy procedure were fainting, and vaso vegal reaction, that is a slowing of the heart. However he did not identify any expert articles or textbooks, statistics, or literature which set out the statistical basis or risk of such reactions. When asked, he was unable to state whether such risk was 1% or one hundredth of that figure, although he believed the risk of these reactions to be a risk factor of .01% of operations.

59. Dr. Carruthers evidence therefore should be seen as being helpful more in the context of having seen the plaintiff in 1991 although he did not produce any records from that time although he testified as to the plaintiff's complaints.

60. The witness testified that in his own practice he had encountered 5 patients who he said had suffered long term adverse chronic effects of vasectomy. He referred to a number of reports in medical literature referring to the risk of long term chronic pain. The preponderance but not all of these articles were published after the year of Mr. Winston's vasectomy. Two articles which he referred to specifically are referred to later in the judgment. He stated that a risk of long term chronic pain was "well recognised". In so saying however Dr. Carruthers did not otherwise refer to any recognised guidelines medical textbooks or guidelines. His evidence did not refer to generally recognised literature or expert evidence as to risks perceived by experienced clinicians in this aspect of medicine in 1989 or later which might form a basis of departure from generally accepted norms.

62. The witness described seeing the plaintiff in 1991 following the plaintiff's removal of the sperm granuloma in London. He made particular criticism of the usage of the word "residual" in the aide memoire used by Dr. O'Leary because it is not a term that he had heard used before and was unlikely to have had meaning for the plaintiff. The plaintiff was not in fact asked to how he understood the term "residual". His own evidence as to warnings of risk of pains set out earlier.

63. Dr. Carruthers did not tender any evidence as to the precise type of warning which it might be expected a doctor of the general level of skill and knowledge engaged in this work either as a general practitioner with a specialism or as a consultant, should give prior to engaging in such procedure. While he indicated that a specific warning ought to have been given, he did not testify that such a specific procedure was customarily adopted by competent practitioners generally in this area at that time. He testified that as the risk of long term pain in vasectomy candidates fell in the range 2% and 5%, a warning should be given in very specific terms as to this risk. This range of risk was he testified reflected in two of the articles to which he made reference, although these were not dealt with in any detail in evidence.

Elapse of Time
64. The court did not hear they exactly why this case took seventeen years to come to hearing. A statement of claim was filed in 1997. There was a change of solicitor in 2000. There was correspondence with regard to the threatened motion to dismiss the proceeding for want of prosecution. However a court should not draw any adverse inference this delay itself. These observations should not be seen as implying any criticism of the solicitors retained as delay may arise from many causes including obtaining instructions.

The Defendant's Evidence
65. Dr. Niall O'Leary studied medicine in Trinity College Dublin. He qualified in the year 1974. He has been in practice for 26 years. He is now the principal of a group general practice in Finglas.

66. He says had an early interest in family planning. He was trained by a surgeon Ms. Deborah Orr in the technique of vasectomy in 1982. Since then he has been carrying out these procedures on a continuous basis. By the time the plaintiff attended him in 1989, he had carried out approximately 2,500 vasectomies. By the date of hearing, November 2006 he had carried 9,000 such procedures.

67. The defendant described the general procedure which he adopted for counselling patients. He said he proceeded through the aide memoire with patient and spouse dealing with the health of the candidates and their medical background. The age of the plaintiff, at the time 30 years, is generally the starting point for consideration of the procedure. While he had no specific memory of the plaintiff his testimony was based on his customary procedure, his records, the aide memoire check list, and the consent form.

68. The defendant says he obtained information as to the couple's contraceptive history, their consideration of the issue of female sterilisation, as well as their precise reasons for seeking sterilisation. Going through the aide memoire he ticked off with his pen each relevant heading in a box once it had been dealt with. The form outlined the possibility of four options for the patient, being either "accepted, deferred, refused, or withdrawn". He had ticked "accepted" in the case of the plaintiff. He did not identify any contra-indication to a vasectomy. Each of the checklist headings in the form was he said dealt with sequentially and ticked off by him thereafter.

69. Dr. O'Leary defined the important phrase "risk of residual pain" (referred to in the aide memoire) as meaning a risk of persistent pain.

70. As to the risk of ongoing pain he said that he might occasionally use the expression that such risk constituted a "rare outside chance". Thereafter he would indicate the possible need for using painkillers which might be obtained from a chemist over the counter.

After the procedure he warns that it would be necessary for a couple to use contraception for a considerable period after the procedure when at 16 and 18 weeks post procedure, specimens are sent in for testing.

71. His note of the procedure of 15th July, 1989 simply describes a bilateral vasectomy under local anaesthetic using a hyfrecator, a surgical "welder" used for carrying out cauterisation of small blood vessels and also for the purposes of heat sealing each end of the vas deferens. The operation notes also recorded that he had removed half an inch of the vas deferens on each side.

72. No reference is made in the notes to the plaintiff having complained of pain or of any difficulty with the hyfrecator. The notes do not contain any record of the plaintiff moving, arching his back, or that the operation was anything other than routine.

The Nature of the Vasectomy Procedure and its Outcome
73. The defendant described in detail the delicate operative procedure which he says he universally adopted.

74. This consists in first administering a local anaesthetic. This procedure is carried out on one side of the scrotum and thereafter the other. He never administered anaesthetic to both sides prior to operation.

75. The vas deferens runs posteriorly in the scrotum. It must be brought around anteriorly, and tethered between the clinician's finger and thumb, at which time the local anaesthetic is injected. If the vas is let go, and if the clinician were to go to the other side of the

scrotum, then on return it may not be possible to bring the vas deferens back to exactly the same point previously anesthetised. It might therefore be necessary recommence the procedure from the beginning.

76. Dr. O'Leary says that a vasectomy never involve anesthetising of both sides of the scrotum prior to embarking on the operative procedure. He says he would commence the procedure on the left side of the patient's scrotum and thereafter proceed to the right side. The anaesthetic would have taken effect by the time he commenced the procedure with the scalpel. In the event of there being any feeling in the area, or insufficient anaesthetic, more would be administered by injection until the area is numb.

77. If a clinician one were to use scalpel of the hyfrecator in the absence of adequate anaesthetic the defendant commented the pain to the patient would be intolerable. The patient would move. It would be impossible to proceed or to complete the procedure which would necessarily then be unsuccessful and incomplete.

78. Here, the defendant pointed specifically to the fact the semen analysis carried out subsequent to the operation indicated that by logical process the anaesthesia must have worked satisfactorily. He had been able to carry out the entire procedure. If the plaintiff had reacted as described he would have been unable to complete the operation which generally takes approximately 15 minutes in total.

79. Generally speaking the numbing effect of the anaesthetic lasts approximately 2 to 3 hours after the operation.

80. In the case of a patient complaining of acute pain post-vasectomy the defendant said he would have particularly recorded it, taken further notes and discussed it with colleagues. Pain of the kind described by the plaintiff would have been twice particularly remarkable because the area in question had by then been bilaterally anesthetised on the plaintiff's evidence. The notes of the procedure on 15th July, 1989 indicated to him that the procedure carried out had been essentially routine. His further notes of 1st August, 1989 record having prescribed Progesic a mild to moderate painkiller and his further finding that there was no infection of haematoma together with an indication that should he require further help Mr. Winston might contact the defendant. There was nothing in those notes to indicate to him that anything untoward had occurred on or after the procedure.

81. The defendant could conceive of no reason why, in this case, he would have departed from his normal procedure in describing to the patient a risk of three types of pain that is first immediately post operatively; second medium term i.e. for a period of some weeks or months; third long term: The defendant flatly rejected the suggestion that he would have proceeded with this vasectomy without having warned the plaintiff in any way as to a risk of pain whether short medium or long term. The defendant specifically rejected too the plaintiff's description of a difficult operative procedure, and the plaintiff's evidence of moving, arching his back or any question of expressions of pain. He specifically rejected also that post operatively he ? the plaintiff using a pencil or that on the 1st August, 1989 the plaintiff had given him any description of the graphic type outlined by the plaintiff of unceasing pain or extreme sensitivity.

Dr. Oliver Lynn

82. Dr. Oliver Lynn a General Practitioner qualified in 1976 and has been involved in family practice in the north east region since 1983. He has been a member of the Irish Family Planning Association since he qualified in 1976. He has been in general practice since 1983. He described undergoing training in Dublin under Dr. Deborah Orr. He is a colleague of the defendant and they have met at family planning symposia although they were not socially friendly.

83. He described having carried out approximately 3,500 vasectomies since 1986. He had never seen pain of the type described by the plaintiff.

84. Dr. Lynn was asked about but was not familiar with two articles which form part of the references cited by Dr. Carruthers: (*Schmidt Spermatic Granuloma An Often Painful Lesion in Fertility and Sterility February 1979*) and a further article, (*Selikowitz and Anor Late Post 'Vasectomy Syndrome* J. Urol 1995 136).

85. Dr. Lynn's testified that the form of warning given by the defendant was adequate assuming that it consisted of advice as to the risk of residual pain post operatively. He accepted that if he felt there was a 2% risk of an adverse result in any medical procedure this would be deserving of an explicit warning. However he was quite disinclined to accept that the actual risk involved in the procedure was in that range on the basis of his experience of the procedure in the cases he had encountered.

Professor Tanner

86. Professor Arthur Tanner is currently Director of Surgical Affairs at the Royal College of Surgeons in Ireland and Associate Professor of Surgery in Trinity College Dublin. Prior to recently taking up his current appointment he was Head of the Department of Clinical Surgery in the Adelaide and Meath Hospital. He holds a number of academic and professional distinctions and has published widely in learned journals. His evidence demonstrated his experience and expertise in this field of medicine and was therefore of particular assistance.

87. In the course of his own practice he himself had carried out between 9 to 10,000 vasectomies. He considered that the aide memoire form used on the date in question was both useful and extremely thorough. His view was that it would be hard to say that it missed out on any of the risks associated with the procedure. He made no criticism of the form of warning which the defendant described, that is as to risk of pain immediately post operatively, medium term and long term. He considered the term 'residual' an appropriate warning of the nature of the risk.

88. While short term pain was a consequence of the procedure, medium term pain was extremely prevalent, gradually diminishing over a period of four to six weeks. In the course of his own practice he had encountered just two patients who encountered long term pain. A number of others were referred to him. The total of such referred patients was in single figures. There was little but anecdotal evidence as to the incidence of long term pain. Professor Tanner knew of no *prospective* randomised studies carried out on vasectomy the purpose of assessing risk. Such retrospective studies as exist were in his view fraught with difficulty as they are not based on a representative sample of all patients.

89. He considered that it would be sufficient to warn a patient that there is a risk, albeit small of long term or residual pain. Such a warning would be adequate without going into percentages. In his own practice he would not have gone into the causes of long term chronic pain and simply warned patients that there was an outside risk that such pain might develop.

90. Professor Tanner's expert evidence was of value on one further aspect of the case, in that he felt that the plaintiff had probably suffered from congestive epididymitis caused by a continued production of fluid from the testicle which found its way into the epididymus. This in turn created a high pressure tension within the epdidiymus causing pain by stretching. Such pain is chronic and continuous in the literature on the subject. The risk of congestive epididymitis ranges from in the region of 0.1% up to in the region of

3.4% although this should be seen in the context of his own new as to the value of such statistics.

91. On the basis of Professor Tanner's evidence, Dr. O'Leary's description of his management of the patient, counselling, the vasectomy itself, and the follow up appointment and the warnings regarding post operative pain was not negligent, assuming that was what had taken place.

92. Professor Tanner added that the first vasectomy carried out in this country was in 1979. Since then approximately 40,000 such procedures had been carried out. The knowledge of post operative complications and risks associated with the operation has improved with the passage of time as has knowledge as to how to deal with complications arising from the procedure.

93. However the witness went so far as to describe the statistical evidence as to the incidence of post vasectomy pain as to all intents and purposes useless. His reasons were that the surveys carried out are retrospective, and based on postal or telephone questionnaires. To his knowledge no such survey had reached the 50% return rate.

94. It might be observed that the defendant and the two witnesses who testified on his behalf have in total by now in 2006 carried out more than half the vasectomies completed in Ireland. Yet the concrete evidence as to pain syndrome appears to amount to 12 ceases known to these practitioners in their case experience of substantially more than 20,000 cases in the total of 40,000 procedures. While Professor Tanner suggests that this reporting figure may be low, it can hardly be seen on the present evidence as a very highly significant risk although well known. No evidence was adduced or referred to in these proceedings of other risks arising from the procedure or whether they are significant or had a bearing on the warnings which should be given.

Consideration of the Evidence

95. The evidence from the plaintiff and his wife is as to what is said to have happened in the defendant's surgery some 17 years ago. This presents an immediate difficulty. How can such an issue now be established as a matter of probability? Our jurisprudence is now replete with cases wherein the issue of fading or alteration in memory over time has been considered. The plaintiff's case, supported by his wife is that the plaintiff failed to give any warning at all as to the risk of pain (not to mention long term pain) arising from the procedure. The question which must therefore be asked is whether the evidence as to alleged absence of any or any sufficient warning as to the risk of long term pain is sufficient to discharge the burden of proof which rests first upon the plaintiff? The defendant says he has no specific recollection of the events. He relies upon the checklist contained in the form and the fact that each heading and subheading is ticked by himself including the risk of residual pain. No evidence was adduced with regard to the nurse who was said to be present. She was not referred to in the defendant's evidence one way or the other.

96. In the absence of other close supporting evidence one way or the other one, must look to all surrounding circumstances in particular anything contemporaneous, particularly written records in order to ascertain which version tendered to the court is more likely. The event was of course was important for the plaintiff and his wife. For the defendant it was one of 9,000 such cases. The actual testimony of the plaintiff and his wife at one point was to the effect that there was no mention of pain **at all** by the defendant. The plaintiff's case as a whole on the issue as to whether pain was mentioned at all seems somewhat inconsistent. On the one hand he suggested in his evidence that he himself raised the question of pain: "will I feel anything at all" to which the defendant responded "no you won't feel anything". But at another point the plaintiff and his wife say that there was no mention of pain *at all*, the subject did not arise in any way. Is it probable that the most obvious first question any patient would ask went unanswered? The first questions should surely be whether the procedure would be painful? Yet the effect of the plaintiff's case is that Dr. O'Leary gave no answer or suggested that the procedure would be quite pain free. I do not consider this probable.

97. While not canvassed either in evidence or submissions there might be a third possibility that a warning of long term pain was given, albeit insufficiently clearly in the context. It is unnecessary to deal with this contingency therefore.

98. One turns to the aide memoire. It is noteworthy that it accurately describes and bears out almost all the information the plaintiff and his wife gave as to their personal background and all the considerations which were in their minds at the time the vasectomy was under discussion. Save for the dispute as to the meaning of the two year interval, there is a close correlation between the evidence of the plaintiff and his wife on the one hand and all the other contents of the form as recorded by Dr. O'Leary.

99. Why then, of all the issues recorded should the question of pain have been ignored? The plaintiff at one point testified specifically "I was never told of any risk of pain". He added at another stage that he said that he was not told of the risk of anything residual. He said that there was no mention at all of long term pain. When Mrs. Winston was asked about whether pain was mentioned at all she responded:

> "No John asked would there be any pain, and that was it, he said no, it was just a simple operation."

100. When she was asked as to whether the question of medium or long term pain had been discussed she completely denied that those issues were mentioned at all.

101. In the light of all other of the contents of the form does this simple oral evidence alone after such an elapse of time establish matters as a probability unless there was contemporaneous surrounding evidence objective in nature or in the written form to that effect?

102. The evidence of the plaintiff and his wife does not tally fully with the evidence of Mr. O'Reilly, who said that the question of pain was in fact raised but that the defendant gave a minimal account of possible pain and it was only in the context of its being incidental to the administration of the anaesthetic.

103. One looks to the other evidence. First the description of the operation. On balance, I consider the plaintiff's evidence regarding his operation less probable for the reasons given in evidence by Dr. O'Leary. The plaintiff said he suffered continuing pain immediately post operatively. Is it probable that after the administration of two (or four) anaesthetic injections he would or could have suffered ongoing pain even in the hours immediately after the operation? Or is his memory fallible on this issue? I think the latter is more likely.

104. The plaintiff says that during the operation he arched his back and felt pain through to his stomach. Had the plaintiff reacted in the manner in which he himself described, would the procedure have been possible to complete? What is indisputable is that the procedure involved extremely fine work with the scalpel, the identification of the vas, the excision of part thereof and finally the cauterising procedure.

105. Had the plaintiff reacted in the way in which he described so graphically in the course of the operation, could the procedure itself have been completed at all? I am not persuaded that it could. Had the plaintiff been suffering from the degree of pain as he

described it subsequent to the operation and the 1st August, 1989 is it probable that this would have gone completely unrecorded in the defendant's records out of concern or even if only for medico-legal purposes. Instead the later notes record only a simple prescription of moderate painkillers. The actual operation notes are entirely silent on any other issue. The absence of comment in Dr. Burns and Dr. O'Gorman notes have already been pointed out.

106. Rather than any further follow up treatment taking place there is a gap in any the medical records between 1st August, 1989 and 19th April, 1990 where Dr. O'Gorman records the plaintiff (as seen in the Mater Casualty Department) having pain in the left testis *similar* to that which the plaintiff had experienced post vasectomy.

107. The plaintiff had not visited his general practitioner or the defendant since August of 1989. Is this a medical record consistent with a description of extreme ongoing and continuous pain after the procedure? Or is it more consistent with the occurrence of pain in April 1990 **similar** to that experienced at the time of the vasectomy. I consider the second to be the more probable.

108. A court may then have regard to the nature of the case as it is pleaded. The statement of claim was filed herein on 31st January, 1997. It was subsequently amended (at the first day of the hearing) on 3rd November, 2006. The case, made first in 1997 was that the defendant had failed to exercise sufficient or reasonable care in the carrying out the vasectomy procedure. This complaint has now been abandoned completely. So also has an allegation that the defendant knew or ought to have known that a local anaesthetic injection was likely to cause the plaintiff pain and discomfort and that consequently a general anaesthetic should have been applied.

109. An allegation in the initiating letter of 15th April, 1991 from the plaintiff's then solicitor (one and a half years post operation) related to the alleged negligent manner in which the operation had been carried out as well as failure to provide adequate warning. As stated, this former issue was not made at hearing at all.

110. Instead, the case now made is simply the allegation of inadequate counselling and consent. The stance of the defendant as to what occurred was outlined in a letter from the defendant's solicitor Messrs Arthur Cox as long ago as 19th June, 1991.

111. I would add that there is other significant material. The evidence of the defendant that it was his universal practice to go through the consent form in detail with the patient and spouse. From time to time he would allow the patient to ask questions of him regarding the procedure and any other issue arising. He stated that he always discussed each and every bullet point outlined in the aide memoire consent form including the risk of residual pain and that he outlined three types of pain with each patient i.e. short term medium term and long term. Once each point had been discussed he testified that he would tick that point with his pen to indicate that it had been covered. These notes which were made contemporaneously bear out this evidence that the necessary information for the carrying out of the procedure was obtained from the plaintiff.

112. For the reasons outlined therefore. It is more probable then that the question of risk of pain was dealt with as described by the defendant.

113. I accept too the expert evidence of Professor Tanner and the evidence of Dr. Glynn as to the adequacy of the warning as to residual pain in the aide memoire. I do not consider Dr. Carruthers evidence helpful on this point. His evidence did not establish that if the warning was given as described by Dr. O'Leary it was inadequate. The evidence otherwise showed it fell within the parameters of what should be expected of an experienced medical practitioner in this area.

114. I do not consider that on this issue the plaintiff has satisfied the court his narrative is more probable as to what occurred, or that on the balance of probabilities the defendant did not follow his normal practice, that on this occasion he deviated from it, and that no or no adequate information regarding the risks of the vasectomy operation were provided, having regard to known identified material risks or what was appropriate in the circumstances. There are good reasons, having regard to what occurred afterwards to conclude that the plaintiff's memory might not be totally reliable while not at all doubting his desire to tell the truth. Similar considerations apply to Mrs. Winston's evidence.

Causation

115. The defendant's notes indicate the reason given by the plaintiff for having the vasectomy and for not wanting any more children was recorded as "cannot afford more". The plaintiff has not contested that he and his wife may have used these words but they might have been used in their context of possible time spent away from the business rather than in the context of purely financial considerations. Dr. O'Gorman wrote to Dr. O'Leary that the plaintiff was "anxious" for a vasectomy.

116. It is quite clear that the unfortunate plaintiff is now in a state of very considerable distress and bitterness over what has occurred. It is not denied that he has suffered long term pain. It is not denied that this was actually caused by the vasectomy procedure. Professor Tanner on behalf of the defendant has testified he considers that the cause of the plaintiff's symptoms is congestive epididymitis.

117. This court cannot determine whether all the various surgical procedures which the plaintiff availed of from 1990 onwards were necessary. It cannot establish whether the procedures were helpful to him or not. No expert evidence or record is available as to any of these procedures. The plaintiff has regrettably undergone a number of painful operations including an orchidectomy. As described earlier the after effects of some or all of these operations can only have been very painful and distressing.

118. But there was no specific urgency with regard to the plaintiff undergoing the vasectomy procedure as of June or July 1989. It was an elective procedure. The plaintiff states that had he been given a warning as to the risk of long term pain it would have given him "food for thought". It would have made him consider the option more or over a longer period. He says would have discussed matters with his wife, his family situation, their need to provide for their family and the fact that there was considerable economic and financial reliance upon him. He says *now* that if the risk had been known to him that he would have declined to the procedure. He would not have gone back to him after the first counselling meeting. He could not take the risk of undergoing the procedure. Mrs. Winston states that had she known about the risk of pain even for a six month period post operatively she would have advised him not to have the procedure. Had she known there was a risk of indefinite pain she would have insisted that he not have it done.

119. Had the plaintiff and his wife *actually* known as to the entirely unfortunate and regrettable sequalae which arose from this operation, clearly it would not have proceeded. But other considerations arise here. In elective surgery any risk which carries the possibility of grave consequences for the plaintiff should be disclosed. That duty is however confined to such consequences as may be foreseeable or predictable. Therefore even if the court has erred in making its earlier findings, and even accepting hypothetically that there was a culpable failure to warn the plaintiff, the next issue must necessarily be assuming such failure occurred what consequence flowed from any alleged failure to warn the plaintiff?

120. In *Geoghegan v. Harris* [2000] 3 I.R. 537 Kearns J. held that a medical defendant was obliged to give a warning to the plaintiff of any material risk which is a known or foreseeable complication of an operation. Despite the fact that the nature of a risk was extremely remote if it was a known complication a warning of the risk was required. The test to be adopted by a court as to what risks ought to be disclosed to a patient before an operation was the test of a reasonable patient. By adopting this test it is the patient thus informed, rather than the doctor who made the real choice as to whether the treatment was to be carried out.

121. *Geoghegan* decides that when deciding whether or not a warning *would* cause a patient to forego an operation a court should first adopt an objective test; that test should yield to a subjective test where there was *clear evidence in existence from which a court could reliably infer what a particular patient would have decided*.

122. The approach adopted by Kearns J. in *Geoghegan* has considerable relevance in the instant case.

123. Applying these tests, the first question therefore to be asked is whether residual pain was in 1989 a known complication of vasectomy? To this the only answer must be that on the evidence there was a known risk of residual pain. This much is clear too from the form itself. (See also *Walsh v. Family Planning Services* 1992 1 I.R. 496 in some ways similar factually to the instant case). It is clear that there was a duty to warn from the evidence of the defendant. He himself had not encountered this particular risk and had not, in the course of any of the operations which he had carried out encountered such sequalae. Applying the principles identified in *Dunne v. National Maternity Hospital* I.R. 91 there was a duty to warn the plaintiff regardless of the remoteness of such risk.

124. Assuming that the plaintiff had discharged the burden of proof on the first issue, what then would a reasonable person properly informed had done in the plaintiff's position? This should be seen in the context of the plaintiff's age, pre-existing health, family and financial circumstances, the nature of the surgery and any other factor that can be objectively assessed although personal to the plaintiff this (objective) criterion would the plaintiff would have proceeded with the operation?

125. An objective test must yield to subjective only when credible evidence (not necessarily that of the plaintiff) in a particular case so demands. As pointed out by Kearns J. in the judgment in *Geoghegan* while a court must accord due deference to the testimony both of the patient and the medical practitioner the many cases cited in that judgment highlight the difficulties each may have in providing an account in which the court can safely or absolutely rely. Wherever possible the court should look elsewhere for credible confirmation. No such other information has been provided which assists the plaintiff.

126. Applying a purely subjective test it may be said *now* that the plaintiff would not have proceeded with the operative procedure.

127. But even the application of a subjective test does not necessitate the acceptance of subjective evidence. It cannot necessitate the acceptance *ipso facto* of any of the plaintiff's evidence when clearly quite different considerations now arise in hindsight as contrasted to the plaintiff's state of mind in 1989. The very phraseology of the questions put with skill by his counsel Mr. McDonnell S.C. in direct examination to the plaintiff and his wife, unavoidably in conditional form, demonstrate the fallacy of applying an absolute subjective test where necessarily a plaintiff must find it difficult to avoid seeing matters through the prism of hindsight.

128. On balance the plaintiff's conduct and behaviour in 1989 speak more eloquently than the oral testimony now. He considered that the procedure was a simple one. He was "anxious" to undergo it. His wife's continued health was an issue quite properly in his mind. There is nothing in the material before this court to indicate that in 1989 he was unusually cautious or the kind of man who would have backed away at the mention of a remote risk. Even after two weeks reflection between counselling and operation he had no hesitation in proceeding. For these reasons, I do not consider that a hypothetical breach of duty of the type posited by the plaintiff, no matter how formulated, would have induced the plaintiff to proceed with this operation when he would not otherwise have gone ahead with it.

129. I do not consider the evidence given now, in hindsight, as to "food for thought" or other considerations to be persuasive sufficiently to supplant the objective evidence. I consider that the claim fails on the issue of causation also.

130. On the basis of these findings it is unnecessary to give consideration to the application of the persuasive authorities of *Chester v. Afshar* (2005) 1 A.C. 134 or *Thompson v. Bradford* (2005) EWCA or whether the principles decided therein should be followed or applied.

Conclusion

131. There is no doubt the unfortunate plaintiff has suffered pain and an extremely significant and detrimental effect to his life as a result of what occurred. Whether or not the procedure is now remediable does not arise as an issue although one can only hope for his sake that it can.

132. But the sympathy one must inevitably feel must not cloud assessment of the evidence. On the evidence the defendant is entitled to a finding that it has not been established there was negligence on his part. The court must therefore dismiss the claim.