



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 67

Appeal No. 2015/532

**Peart J.
Irvine J.
Hogan J.**

BETWEEN/

MARY McNICHOLAS

PLAINTIFF / APPELLANT

- AND -

ANDREA HERMANN

DEFENDANT / RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 28th day of February 2017

1. This is the appeal of the plaintiff, Mary McNicholas ("Ms. McNicholas"), against the judgment and order of the High Court (Barr J.), (dated respectively the 7th and 24th July, 2015), made by him in medical negligence proceedings: see *McNicholas v. Hermann* [2015] IEHC 435. Those proceedings were brought by Ms. McNicholas in respect of personal injuries sustained by her as a result of the alleged negligence on the part of the defendant ("Dr. Hermann"), a consultant obstetrician and gynaecologist, who carried out a total abdominal hysterectomy on her on the 20th October, 2005. The High Court judge dismissed Ms. McNicholas's claim and it is her appeal against that decision which forms the subject matter of this judgment.

2. Before embarking upon a consideration of the substantive submissions on the appeal it is necessary, in my view, to set out the relevant background facts.

Background facts

3. Ms. McNicholas is a married lady and the mother of two children who for many years prior to 2005 suffered from prolonged and heavy menstrual bleeding which impacted on her life for anything between fifteen and twenty days each month. Her condition was complicated by the presence of endometriosis (a condition in which tissue that normally grows inside the uterus grows outside it). She had, in addition, uterine fibroids which caused her uterus to be of a size equivalent to that to be expected in a pregnancy of eighteen weeks gestation. Her enlarged uterus was, in turn, causing her to experience some degree of urinary incontinence. To further complicate matters, any intended surgery would have to take account of the fact that Ms. McNicholas had earlier undergone prior abdominal surgery. Finally, of relevance to her medical condition at the time she first attended Dr. Hermann is the fact that a Mirena coil, which had been inserted with a view to controlling her heavy and protracted bleeding, had proved unsuccessful.

4. Because of her relatively poor quality of life, Ms. McNicholas was referred by her G.P., Dr. Kenneth Keane, to Dr. Maebh Ní Bhuinneáin, consultant obstetrician and gynaecologist, at Mayo General Hospital, for her opinion. At the time she weighed 107 kg. A total abdominal hysterectomy was advised but a date for surgery was not fixed. Ms. McNicholas was advised to reduce her weight to 84 kg and was prescribed medication for pain, excessive menstrual bleeding and a drug designed to reduce the size of her fibroids. She was to return for review in eight weeks. Dr. Ní Bhuinneáin's treatment plan for Ms. McNicholas was outlined in a two paragraph letter dated 10th May, 2005, signed by Dr. Padmanabhan, who may have been a registrar or senior house officer. Because this letter is of some controversy I will set it out in full:-

"Dear Dr. Keane,

I reviewed Mary in the Gynae Clinic today. She has heavy and prolonged periods and also has a fibroid uterus. She has a mirena in situ since March 2004. Pelvic ultrasound on 25th April 2005, shows fundal fibroid 5.2x6.5cms and a small cyst in the right ovary. Her last cervical smear in April 2004 was NAD. Mary was requesting TAH. She says she has lost 4kgs in one month.

I discussed Mary with Dr. Ní Bhuinneáin. She advised a weight reduction with a goal weight of 84kgs for a BMI of 30. She has also advised Tranexamic Acid for menorrhagia for the meantime. She was given a prescription for Ponston and Tranexamic Acid. Decapeptyl will be give[n] 8 weeks preoperatively. She was advised to attend the clinic in two months to review her progress. I have also sent a request for dietician review.

Yours sincerely,

Dr. Anitha Padmanabhan Dr. Ní Bhuinneáin"

5. Unhappy with the proposed regime advised in the aforementioned letter, principally because of her concerns about the side effects of Decapeptyl, a drug which she understood might trigger menopause, she asked Dr. Keane to refer her for a second opinion. Accordingly, on 25th August, 2005, Dr. Keane wrote to Dr. Hermann, who was then practicing in the Galway Clinic, asking that she review his patient. He enclosed the letter from Dr. Ní Bhuinneáin for her attention.

6. Following her consultation with Ms. McNicholas, Dr. Hermann booked her in for a total abdominal hysterectomy on the 20th October, 2005. She also wrote to Dr. Keane on 30th August, 2005, summarising her consultation with the patient.

7. It is common case that in the course of the surgery which took place on 20th October, 2005, Ms. McNicholas sustained permanent damage to the left femoral nerve. Post operatively she developed numbness in her leg and other symptoms consistent with such an injury. It is not necessary, for the purposes of this judgment, to detail the consequences to Ms. McNicholas of this injury, save to note that it is accepted by all that she has been left significantly disabled in a number of respects and that her disabilities will

regrettably be life long.

The proceedings

8. The within claim was commenced on 4th October, 2007, and the pleadings closed on the 19th May, 2014. From the pleadings and the particulars delivered on her behalf Ms. McNicholas's claim can be stated to fall into two parts, the first being preoperative negligence and the second being perioperative negligence.

9. Insofar as preoperative negligence is concerned, two principal complaints were made against Dr. Hermann. First, that she did not advise Ms. McNicholas to lose weight and postpone surgery to allow this to occur. Second, that she failed to advise Ms. McNicholas that her weight would increase her risk of an adverse surgical outcome.

10. Insofar as perioperative negligence is concerned, Dr. Hermann's care of her patient was challenged in two respects. First, that Dr. Hermann had failed periodically to release the self retaining retractors which she had deployed in the course of surgery with the result that the structures pulled back by the retractors damaged the femoral nerve through unrelieved pressure. Second, a claim was advanced that the retractors might have been mis-positioned on insertion such that they engaged a muscle known as the psoas muscle such that its retraction caused damage to the femoral nerve.

The anatomy

11. To place this judgment in context, it is necessary to provide a brief and, what I hope, is a non-contentious anatomical roadmap to the hysterectomy carried out by Dr. Hermann which is in keeping with the detailed description of the procedure described by the trial judge in his judgment. The operation commences with a transverse incision of the abdomen. When the surgeon cuts through the abdominal wall and into the peritoneal cavity, depending on the number of professional assistants present, self retaining retractors may be inserted. These are used to laterally draw back and then hold in position skin, subcutaneous fat, rectus muscles and the thin layer of the peritoneum. The retractors function somewhat like a car jack and the act of retraction operates in much the same way as the drawing back of a curtain. When retraction is complete the surgeon should have a field of vision which is satisfactory for the purposes of carrying out the surgery.

12. Relevant to the retraction procedure are a number of adjacent structures. The first is the psoas muscle. This is a tubular or sausage shaped muscle which passes down the side of the pelvis and out into the leg. The second is the femoral nerve, which was damaged in the course of the surgery under consideration. This lies underneath the psoas muscle and at one point emerges from the lateral or outside border of the muscle. It is not in dispute in this case that the site of the injury to Ms. McNicholas's femoral nerve occurred at this point. Retraction makes the nerve vulnerable to compression as it gets squashed between the psoas muscle on the inside and the bony lining of the pelvis on the outside. In other words, where compression occurs, the psoas muscle gets pushed back onto the nerve which has no means of escape because it lies up against the bony lining of the pelvis. Because compression disrupts the blood supply to the femoral nerve, the longer the duration of the retraction, the greater the risk and severity of any resulting injury.

The trial

13. The proceedings were heard in the High Court by Barr J. over a period of some twelve days. The claim of Ms. McNicholas was advanced through expert testimony from Prof. John Bonnar, consultant obstetrician and gynaecologist, and Dr. Timothy Counihan, consultant neurologist. On behalf of Dr. Hermann, evidence was tendered by Dr. Peter Lenehan, consultant obstetrician and gynaecologist, and Prof. Linda Cardozo, a professor of urogynaecology. Other witnesses as to fact were also called. I do not intend to summarise the evidence of any of these witnesses, but I will refer to the same as necessary in the course of the judgment.

Judgment of Barr J.

14. Having set out in some detail the expert evidence concerning Dr. Hermann's alleged want of proper preoperative care, namely, her failure to advise Ms. McNicholas to postpone her hysterectomy until such time as she had lost further weight, the trial judge expressed himself satisfied that the approach which she had adopted was reasonable in the circumstances. While Prof. Bonnar had preferred the approach which had been advised by Dr. Ní Bhúinneáin, he accepted that Dr. Hermann's decision to offer Ms. McNicholas surgery without first affording her time to lose weight, as was considered entirely acceptable by Dr. Lenehan and Prof. Cardozo, represented an alternative but nonetheless reasonable approach. Accordingly, he concluded that Dr. Hermann had not departed from an appropriate standard of care when she had advised her patient to undergo a total abdominal hysterectomy, whenever it suited her so to do.

15. As to the case that had been advanced in respect of perioperative negligence on the part of Dr. Hermann, I will try now to set out what I consider to be the more material observations and findings made by the High Court judge in the course of his lengthy and detailed judgment.

16. The trial judge found as a fact that Dr. Hermann had used Balfour retractors in the course of the surgery which had commenced at 10.17 am and was completed by 12.35 pm. The retractors were in situ for 108 minutes. He noted Dr. Hermann's evidence that she had taken "enormous care to place the retractor accurately and also in a sustainable way. She made sure that she did not impinge on bladder tissues or the small bowel or anything coming into contact with the retractor." He also noted Prof. Bonnar's evidence that "even if the retractors were in the correct position, they could still cause damage to the nerve. It was, therefore, necessary to release the retractors when operating for a prolonged period. The incidence of femoral neuropathy in benign hysterectomies is approximately 0.2%." In this regard the trial judge referred to a number of academic works produced by Prof. Bonnar which advocated the release of pressure on the retractors where the duration of the operation was in excess of two hours.

17. At para. 81 of his judgment the trial judge referred to the answer given by Prof. Bonnar to one of the most significant of all questions asked by counsel for Dr. Hermann in the course of the trial. This is what the trial judge stated concerning the question:-

"81. Prof. Bonnar was asked in cross examination, what he alleged the defendant did, that no other gynaecologist would have done if exercising reasonable care. He replied that no other gynaecologist would have put in a self-retaining retractor and kept this in position for over two hours. In his view, that was not appropriate care.

82. In the course of his evidence, Prof. Bonnar stated as follows in relation to the need to release the pressure on the retractor periodically during the operation:-

"Q. So we are down to the length of time that the self-retaining retractor was kept in position?

A. Yes, because duration of compression is a factor in injuring the femoral nerve. I think, my lord, I should just add,

removing the cervix also carries with it further use of retractors. So I am not questioning my lord... I agree entirely with what Mr. McGrath is saying... the actual surgery that was performed is reasonable and I am pleased that he has been able to give some further information which I didn't have about when the bleeding was and where the difficulties were, but still allowing for these, we cannot escape the fact that the retractor should have been released probably three or four times and that massive pressure on the lateral and on psoas should not have happened and it is possible the retractor was not put in appropriately in the first instance."

18. At para. 83 of his judgment the trial judge returned to the evidence given by Prof. Bonnar concerning the positioning and release of the retractor. The following is what he said:-

"83. Prof. Bonnar stated that even if the retractor was placed in the correct position, it should still be released to take pressure off the structures that are being pulled apart. Notwithstanding that the retractor was placed in the correct position, there was the potential for it to cause damage. It was advised when using self-retaining retractors for a prolonged period that the retractor should be released. He would not leave the retractor in place for two hours because this would run the risk of femoral nerve palsy."

19. The trial judge then proceeded to deal at length with the evidence of Dr. Peter Lenehan and Prof. Cardozo on exactly the same issue. Barr J. noted that they disagreed with what Prof. Bonnar had advised concerning the release or ease of the retractors and the risks to which the patient would have been exposed had such an approach been adopted, particularly having regard to the fact that she was losing significant amounts of blood in the course of the surgery.

20. The trial judge noted that Dr. Lenehan had accepted that the injury to Ms. McNicholas's femoral nerve "most likely occurred due to compression on the nerve from the self-retaining retractor". He also recorded the evidence of Dr. Counihan concerning the injury at para. 94 of his judgment:-

"94. In this regard, the evidence of Dr. Counihan, a neurologist retained on behalf of the plaintiff, was unchallenged to the effect that the injury in this case was caused to the femoral nerve at the site of the psoas muscle by pressure from the self-retaining retractor."

21. The trial judge also set out in its entirety the letter written by Dr. Hermann to Dr. Keane on 21st December 2005, in which in the course of referring to the patient's injury she had stated that she was "completely at a loss as to where she got that from in the first place." The trial judge noted that it was the plaintiff's case that this letter demonstrated that Dr. Hermann, at the time of surgery, must have been unaware of the possible risk to the femoral nerve.

22. At para. 106 of his judgment the trial judge referred to the central issue in the case as being the allegation made by Prof. Bonnar that Dr. Hermann had departed from the standard of care to be expected of her in failing to release the self retaining retractors a number of times during the operation.

23. Having referred to the complexity of the surgery and the plaintiff's blood loss, the trial judge went on to accept the defendant's evidence that to have released the retractors while bleeding continued would have exposed the plaintiff to even greater risks than that to which her femoral nerve was exposed by reason of ongoing compression. He accepted the evidence of Dr. Lenehan and Prof. Cardozo that it was not standard practice for a surgeon to release periodically the self retaining retractors in circumstances such as presented in the present case and went on to conclude that the plaintiff had not established that Dr. Hermann, in her failure to release the retractors, had followed a course which no other surgeon of similar skill, if exercising ordinary care for their patient, would have pursued.

24. Having so concluded the trial judge went on to deal with a number of what he described as "discrete issues". The first of these related to the fact that Dr. Hermann in her affidavit of discovery dated 5th June 2014, had scheduled the letter from Dr. Ní Bhuinneáin to Dr. Keane dated 10th May 2005. However, the copy so discovered did not include the second of the two paragraphs included in the original which Dr. Keane was satisfied he had sent to her in August, 2005. He referred to Dr. Hermann's evidence concerning the computerisation of her patients' files after which all originals had been shredded, her evidence to the effect that she had not tampered with the letter and her inability to explain how the second paragraph had come to be deleted. He noted the motive suggested by the plaintiff to explain the disappearance of this paragraph, namely that Dr. Hermann had not wanted it to be known that another consultant had, in contradistinction to her own approach, considered it necessary that Ms. McNicholas participate in a weight reduction programme prior to surgery.

25. Having considered the evidence of the parties the trial judge stated that he was not "able" on the evidence to conclude that Dr. Hermann was to be affixed with the motive for which the plaintiff had contended. He went on to state that the evidence was not sufficient to permit him reach any conclusion as to how the paragraph came to be deleted before going on to say that he considered that these were not matters upon which definitive conclusions were required to allow him resolve the proceedings.

26. The second discrete issue, which was not the subject matter of the claim for negligence, was whether Dr. Hermann had removed one of the plaintiff's ovaries in the course of the surgery. In this regard the trial judge preferred the evidence of Dr. Hermann that the ovary had not been removed.

27. The third discrete issue concerned an adverse inference that the trial judge had been asked to draw from the defendant's failure to call as a witness Ms. O'Tuairisig, Dr. Hermann's nurse manager, who was present during the operation. He rejected this submission stating that the authorities did not support the submission advanced.

The appeal

28. By notice of appeal dated 30th October, 2015, Ms. McNicholas seeks to challenge the judgment and order of the High Court in a number of respects. The nature and extent of that challenge is set out in the submissions to which I will shortly refer.

29. It is perhaps also apposite to note that prior to the hearing before this Court on 19th January, 2017, and in addition to the documentation in the books of appeal, the Court received helpful written submissions from the parties, a full transcript of the hearing in the court below as well as copies of the written submissions made to Barr J. following the conclusion of the proceedings in the High Court. These have been read and considered in full for the purposes of considering the issues on the appeal.

Submissions of the appellant

30. Counsel on behalf of Ms. McNicholas does not seek to challenge the trial judge's conclusion concerning the issue of preoperative negligence. Neither does he contest the lawfulness of his conclusion that in failing to release the retractors in the course of the

surgery Dr. Hermann had not pursued an approach which no other consultant gynaecologist would, if using appropriate care for the patient, have adopted. In each instance he accepts that two differing medical views had been presented to the Court with the result that the trial judge was entitled to prefer one over the other.

31. Counsel submits that the trial judge impermissibly failed to afford the plaintiff an adjudication on two very important issues which she had raised and he asserts that she was entitled to have those issues decided. He relies in this regard on the decision of Clarke J. in *Doyle v. Banville* [2012] IESC 25.

32. Having concluded at para. 94 of his judgment that the damage to the femoral nerve had been caused by pressure from the self retaining retractor, it was submitted that the trial judge had impermissibly ignored the case advanced that such pressure had been caused either by the negligent placement of the retractor on the psoas muscle at the commencement of surgery or alternatively by the failure on the part of Dr. Hermann to periodically check the position of the retractor in the course of surgery so as to make sure that it did not slip onto the psoas muscle. Such slippage would result in additional pressure being brought to bear on the femoral nerve. In particular counsel highlighted the evidence of Dr. Lenehan which he submitted supported the plaintiff's case that the damage was caused "due to compression on the nerve from the self-retaining retractor." He also emphasised Dr. Lenehan's evidence to the effect that femoral nerve injury caused by a misplaced retractor was a preventable injury and that surgeons carrying out an abdominal hysterectomy had to be familiar with the anatomical features of the femoral nerve and the regions where it was most susceptible to injury, evidence with which Prof. Cardozo had been in full agreement. Counsel also referred to the evidence of Prof. Bonnar, who stated that "care should be taken with the placement of any self-retaining retractor" and his evidence that the position of the retractor blades should be "periodically checked during the case to ensure that they were not directly lying on the psoas muscle". The failure on the part of the High Court judge to address these issues left what counsel described as a "yawning" gap in the judgment. He submits that the trial judge simply did not embark upon what had gone wrong that had caused the damage. In this regard counsel relied upon Prof. Cardozo's evidence that "[s]omething obviously went wrong or the nerve wouldn't have been damaged."

33. The second major submission advanced on behalf of the plaintiff on the appeal concerned the failure of the trial judge to adjudicate upon the claim advanced based upon the doctrine of *res ipsa loquitur*. The plaintiff's intention to rely upon this doctrine had been pleaded. It was referred to in the written submissions and the evidence supported her entitlement to rely upon it.

34. Concerning *res ipsa loquitur*, counsel submits that because the injury did not normally arise and was preventable there was an onus on Dr. Hermann to demonstrate that she had taken reasonable care when inserting the retractor to prevent the injury that had occurred and she had not done so. Counsel relies upon the decision of Keane, C.J. in *Doherty v. Reynolds and St. James's Hospital Board* [2004] IESC 42 and states that the High Court judge did not engage in an assessment of the evidence nor did he consider any inferences that could be drawn. Counsel submits that when describing the surgery and the precautions which she had taken Dr. Hermann had made no mention of the need to avoid implicating the psoas muscle when placing the retractors and neither had she given evidence that she had monitored the retractors for any possible adverse slippage in the course of the surgery. Strikingly, when describing the precautions she had taken when placing the retractor Dr. Hermann had not stated, as had been advised would be her evidence, that the retractor was placed so that it would not impinge on the psoas muscle. Her focus appeared to be on obtaining a good field of vision for operating. She had given no direct evidence to show she had taken precautions to avoid the psoas muscle. Further, when she described her training regarding the use of retractors her focus was on the benefit to be obtained from the use of the retractors rather than on any dangers which they might pose to the femoral nerve. That she failed to do so was not surprising having regard to the content of her letter to Dr. Keane wherein she had disavowed any knowledge of how the injury had occurred.

35. In such circumstances, counsel submits that Dr. Hermann could not be stated to have discharged the burden of proving that the injury had occurred notwithstanding due care on her part in performing the surgery. Not knowing of the risk she could not have guarded against it, as had been advised was required by all of the experts. The High Court judge should have found that Dr. Hermann did not know of the risk with the result that she did not seek to avoid it.

36. Counsel further submits that the trial judge impermissibly failed to resolve a number of evidential issues which he maintains were critical to his analysis of the liability issue. All were issues which cast in doubt Dr. Hermann's credibility and, accordingly, would have fed into his assessment of the reliability of her evidence particularly on the *res ipsa loquitur* issue.

37. The first of the credibility issues relied upon in the notice of appeal concerns the circumstances in which Dr. Hermann, when making her affidavit of discovery, had come to discover a redacted or incomplete copy of the letter of 10th May 2005. The paragraph missing was the one which had referred to the plaintiff's weight. The second was the conflict between the evidence of Ms. McNicholas concerning what had occurred at the initial consultation. Ms. McNicholas contended that she had asked Dr. Hermann whether her weight would be of concern in terms of the risks to which she would be exposed during the proposed surgery and she was disabused of any such. Dr. Hermann's evidence had been that she would never have given such an unconditional assurance to the plaintiff. The third issue was the trial judge's failure to find Dr. Hermann's explanation for her failure to make proper discovery to be unreliable.

38. Counsel submits that the result to his client of the trial judge's failure to engage with the aforementioned issues is that she did not receive a fair or satisfactory trial and that in such circumstances this Court should direct a re-trial.

Submissions of the respondent

39. Counsel on behalf of Dr. Hermann submits that the trial judge decided the liability issue on the basis of the case made on behalf of Ms. McNicholas in the High Court. She submits that for the purposes of the appeal the Ms. McNicholas seeks to jettison the case she made at trial and has since engaged in a process of revisionism as to what her case was and that this started with her written submissions delivered after the close of proceedings in the High Court.

40. Counsel submits that the case made in the High Court was, first, that Dr. Hermann should have advised Ms. McNicholas to lose weight prior to surgery and that her failure to do so was to fall short of the standard to be expected of her as a consultant gynaecologist. Second, that in her failure to release the self retaining retractors periodically in the course of surgery which had lasted over two hours Dr. Hermann had followed a practice that no other surgeon of like expertise would have followed if acting with due care for their patient. The result of her negligence was that she had damaged the femoral nerve, an injury which would otherwise have been avoided.

41. Counsel submits that in the High Court it had been contended on behalf of Ms. McNicholas that the injury to the femoral nerve was the highly probable result of *pressure* (emphasis added) exerted on the psoas muscle which ought to have been relieved by periodically releasing the retractors during the surgery. The evidence led did not contend that the probable cause of the injury was misplacement of the self retaining retractor such that it impinged on the psoas muscle with adverse consequences to the underlying

nerve or that it had slipped such that it implicated the psoas muscle during the surgery. Ms. McNicholas, according to counsel, is now advocating for an entirely different mechanism for the injury from that which she, through Prof. Bonnar, had pursued as the highly probable cause of the injury in the High Court.

42. It is clear, counsel submits, from para. 94 of his judgment, that the trial judge was satisfied that the injury resulted from pressure and that it must be understood that what he was referring to was the indirect compression of the femoral nerve from a correctly positioned retractor, given that he then went on to consider whether the release of the retractor in the course of surgery was mandatory. She also instanced para. 103 of the judgment wherein the trial judge referred to part of the cross-examination of Dr. Hermann which was premised on her being unaware that injury might be caused to the femoral nerve arising out of compression of the muscle during the operation. This indicated that the challenge to Dr. Hermann's evidence in cross-examination had not been based upon any misplacement of the retractor so as to directly engage or implicate the psoas muscle, but, rather, by reason of her failure to release the retractor periodically. Consequently the trial judge was entirely correct when at para. 106 of his judgment, he stated that the central allegation of negligence raised by the plaintiff was Dr. Hermann's failure to release the retractor.

43. Counsel referred to the pleadings and particulars in the action to support her submission that the plaintiff had never in reality sought to make the case that Dr. Hermann had negligently misplaced the retractor or that by her failure to monitor the positioning of the retractor in the course of the surgery, it had slipped onto the psoas muscle so as to exert additional pressure on the underlying femoral nerve. She referred to the transcript of the opening of the case in the High Court in the course of which counsel had stated that the case made was one based upon an injury caused by prolonged compression rather than any direct impingement of the psoas muscle. She relied also on the expert reports of Prof. Bonnar who had advanced the case that it was sustained retractor pressure that had caused the injury. That this was so was also clear from his response to questioning concerning the manner in which he maintained Dr. Hermann had fallen short of the requisite professional standard. He stated that the "highly probable causation" of the injury was the constant pressure on the retractor for over two hours and only offered as a possible cause the incorrect placement of the retractor in the first instance.

44. While Prof. Bonnar had stated in the course of his evidence that it was possible that misplacement of a self retaining retractor could result in injury to the femoral nerve he considered it highly probable that in the present case the damage was caused as a result of the failure on the part of Dr. Hermann to release the retractor, *i.e.*, one which had in the first instance been correctly placed.

45. Contrary to what is asserted in the notice of appeal, the evidence of the defendant did not confirm that the injury to the plaintiff's femoral nerve had occurred as a result either of misplacement of the retractor or as a result of slippage. The plaintiff is now trying to recast the case she had made in the High Court by latching on to certain aspects of the defendant's expert evidence.

46. While Dr. Lenehan, on Dr. Hermann's behalf, had stated that the femoral nerve could be damaged through misplacement or slippage of a retractor, the defendant's experts were agreed that in the present case the injury had not occurred in either manner. They were satisfied that the injury was the result of pressure exerted on the psoas muscle by use of the retractor which in turn compressed the femoral nerve. Further, counsel submitted that it had never been put to Dr. Hermann in cross-examination that the retractor had slipped in the course of surgery and that this may have caused the injury. That being so, the plaintiff was not entitled to pursue any ground of appeal based on alleged negligence on the part of Dr. Hermann in permitting the retractor to move or slip in the course of surgery. Further, counsel submits that there was no obligation on the trial judge to make any determination on a causation issue where the height of the case made by the plaintiff was that misplacement of the retractor was at most a possible cause of the injury.

47. As to the alleged failure on the part of the trial judge to address the issue of *res ipsa loquitur*, counsel submits that in light of the written submissions filed by the plaintiff following the close of the evidence in the High Court the plaintiff is not entitled to raise this issue on the appeal. She had submitted that the doctrine might not apply and that the liability issue could be determined by the application of the ordinary negligence principles. In any event, the evidence did not support the entitlement of the plaintiff to rely upon this doctrine. The building blocks for a *res ipsa loquitur* argument did not come into play in circumstances where the evidence was that it was an injury that was unavoidable. The onus of proof never shifted to the defendant to establish how the injury had occurred, notwithstanding the exercise by her of all due care and attention. Prof. Bonnar had agreed in his evidence that injury to the femoral nerve was not always avoidable. Dr. Lenehan had stated that injury to the femoral nerve caused by compression due to the pressure exerted on the psoas muscle during a period of retraction was unavoidable and Prof. Cardozo had described it as a known but unfortunate and unavoidable complication.

48. As to the credibility issues which it was contended that the trial judge had impermissibly failed to address, counsel relies upon the fact that the submissions made on behalf of the plaintiff in the High Court were to the effect that it was not necessary for the Court to reach a determination on any of the credibility issues in order to decide the issue of liability. Without prejudice to that submission, counsel maintains that any credibility issues could only have been of relevance if liability was to be determined on the basis of *res ipsa loquitur*. At best, the resolution of the issues relied upon at paragraph 3 (iv) of the notice of appeal would feed into the Court's determination as to the reliability of Dr. Hermann's evidence as to how and with what degree of care she had conducted the surgery.

49. Without prejudice to that submission, counsel maintains that in her evidence Dr. Hermann did indeed, in any event, demonstrate that she knew where the femoral nerve was and that every step taken by her, including the positioning of the self-retaining retractors, had been carried out carefully and that she had not positioned them so as to cause damage. Her evidence did not demonstrate any gap in her understanding. She knew the nerve could not be trapped by the insertion of the retractor but was well aware of the fact that it could be compressed. It could not be inferred from her evidence that she had misplaced the retractor and the issue as to whether the injury had occurred because she had not monitored the positioning of the retractor against the risk of slippage was an issue that was never addressed with Dr. Hermann. Further, the High Court judge, in the submissions filed following the completion of the trial, had not been asked to infer from the evidence that the self retaining retractor had been incorrectly positioned.

50. Even if the plaintiff could overcome these hurdles concerning her entitlement to rely upon the trial judge's failure to address the case of *res ipsa loquitur* in his judgment, counsel's response to the three evidential/credibility issues relied upon in the notice of appeal are as follows. First, the High Court judge did in fact address the issue of the redacted/incomplete letter of 10th May, 2005. He rejected the motive which the plaintiff advanced in support of her claim that Dr. Hermann would have had good reason to want to redact the letter. That being so it was implicit from his judgment that he was satisfied that she had not redacted it. Second, as to the difference in the evidence between the plaintiff and defendant as to what was said at the consultation concerning the risk of her weight as a factor which might impact upon the surgery, the plaintiff in the submissions filed on her behalf in the High Court did not seek to rely upon this conflict in the evidence as relevant to the Court's determination of her claim in respect of liability. As to the third of the issues, namely the credibility of Dr. Hermann's evidence concerning the discovery made by her, once again, it had never

been submitted to the High Court judge that her evidence concerning discovery could weigh in the balance when it came to the Court's consideration of negligence and it had not been asked to draw any inference of negligence arising out of any such deficiency.

51. Accordingly, the only issue that the plaintiff was entitled to raise in terms of credibility on the appeal was that which concerned the conversation between the plaintiff and defendant as to whether the plaintiff's weight was a factor which might adversely impact upon the outcome of her surgery. Given that the High Court judge concluded in his judgment that it had been reasonable for Dr. Hermann to offer surgery without advising the plaintiff to lose weight, counsel submits that the trial judge did not err in law in failing to decide the issues of credibility referred to in the plaintiff's submissions.

52. Counsel submits that the trial judge had indeed addressed the case which had been made by the plaintiff at the trial and it simply could not be said that the plaintiff was now entitled to a re-trial based upon his alleged failure to address issues which were not key to the claim presented to him and which had taken on a completely new dimension when the case was over.

Relevant principles

53. This is not a case, in my view, that requires any particular consideration of the legal principles that often engage an appellate court on an appeal from a judgment of the High Court in a medical negligence action.

54. The outcome of these proceedings was decided in accordance with the well-known principles which emerge from the decision in *Dunne v. The National Maternity Hospital* [1989] I.R. 91. Further, the plaintiff makes no complaint regarding the findings made by the trial judge in the application of these principles.

55. Likewise, the jurisdiction of an appellate court when considering the decision of a High Court judge at first instance is to be found in the equally well-known decisions of *Hay v. O'Grady* [1992] 1 I.R.210 and *Rossiter v. Dún Laoghaire Rathdown Co Council* [2001] IESC 85, [2001] 3 I.R. 578. Again, I see no need to set out the principles which emerge from these judgments particularly in circumstances where the plaintiff does not seek to challenge any of the findings made by the trial judge in respect of preoperative or perioperative negligence. The legal error relied upon in this case is rather an asserted impermissible failure on the part of the trial judge to adjudicate upon a number of allegations of negligence and issues as to credibility relied upon by the plaintiff in her notice of appeal, and his failure to address in his judgment the plaintiff's entitlement to rely on the doctrine of *res ipsa loquitur*.

56. Of some relevance in the context of the present appeal is the judgment of Clarke J. in *Doyle v. Banville* [2012] IESC 25 in the course of which he makes clear that any party to litigation is entitled to have the judge consider the main elements of the case made, and to obtain a ruling sufficient to enable them understand why it is that they won or lost their case. The court must address what he described as the "broad drift of the argument on both sides." The following is how he described the trial judge's obligations, albeit in the context of the abolition of juries in personal injury litigation:-

"2.3 In addition it does need to be said that there are other consequences of the move to trial by judge alone. Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost. Where a jury decides facts, an appellate court will only have the submissions and evidence of the parties, the judge's direction and the answers given by the jury to the questions submitted to them, to go on. Where a judge decides the facts there will be a judgment or ruling whether orally given immediately after the trial or in writing after a period. To that end, it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred. Where, as here, a case turns on very minute questions of fact as to the precise way in which the accident in question occurred, then clearly the judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred. The obligation of the trial judge as identified by McCarthy J. in *Hay v. O'Grady*, to set out conclusions of fact in clear terms needs to be seen against that background.

2.4 In saying that, however, it does need to be emphasised that the obligation of the trial judge is to analyse the broad case made on both sides. To borrow a phrase from a different area of jurisprudence it is no function of this Court (nor is it appropriate for parties appealing to this Court) to engage in rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling. The obligation of the court is simply to address, in whatever terms may be appropriate on the facts and issues of the case in question, the competing arguments of both sides. "

The evidence in the High Court

57. I find myself in full agreement with the submission made by counsel for the defendant to the effect that it is impossible to consider the grounds of appeal argued on behalf of the plaintiff other than against the backdrop of the findings of fact of the trial judge, against which there is no appeal. This is particularly so in circumstances where the complaint is that he failed to adjudicate upon the issues identified in the plaintiff's legal submissions. It is only by considering the evidence led in respect of the liability and causation findings made that this Court can fairly assess whether the trial judge complied with his obligations as per *Doyle v. Banville* or whether his failure to do so casts doubt upon the validity of his judgment to the point that justice would require it to be set aside and the plaintiff afforded a new trial.

58. Having regard to the guidance provided by Clarke J. in *Doyle v. Banville*, I have fully reviewed the books of appeal and the transcript of the High Court hearing, in order to identify what might reasonably be considered to have been the "broad drift of the argument" pursued on the plaintiff's behalf in the High Court and the central or core allegations made on her behalf. Having done so, I am quite satisfied that what follows fairly represents the thrust of the case as advanced on the plaintiff's behalf, prior to any evidence having been given on behalf of the defendant.

59. First, the claim made on the plaintiff's behalf was that her femoral nerve had been injured in the course of the surgery, a claim not disputed by the defendant.

60. Second, the site of the injury to the femoral nerve was asserted to be where the nerve emerges on the lateral or outside border of the psoas muscle, a fact once again not disputed by the defendant.

61. Third, as to why the femoral nerve was likely to have been damaged in the course of an abdominal hysterectomy in which self retaining retractors had been used, Dr. Counihan explained:

"... If the compression is severe enough and for long enough it will disrupt the blood supply to the nerve."

Dr. Counihan went on to explain that in the present case the plaintiff had two problems. First, she was losing a lot of blood herself, with the result that the blood running to the nerve might have had reduced oxygen, thereby potentially causing some compromise to the nerve, even without any compression. The second and more important factor was that the compression of the nerve, which restricted its blood supply, had been prolonged, causing the nerve to be injured through deprivation of an oxygenated blood supply.

62. Fourth, as to the mechanism of the injury, Dr. Counihan stated:-

"So in the act of retracting or pushing back the psoas muscle, the nerve is often squashed, if you like, between the psoas muscle on the inside of the bony lining, if you like, and the pelvis on the outside."

Dr. Counihan made clear that in the course of carrying out the retraction of the necessary structures "you will of necessity compress the femoral nerve".

63. Fifth, as to why the injury had occurred in the present case, the following is what Dr. Counihan advised:-

"...the longer the surgery, the longer the degree of retraction, the greater the likelihood of injury to the nerve and the greater the likelihood of the injury being severe."

It is in the context of the pressure exerted upon the femoral nerve by the pulling back of the psoas muscle that he then went on to state that "directed compression of the nerve" was what in the present setting caused the damage stating that if the compression so caused was not relieved, nerve damage was to be anticipated. As noted at para. 62 above, the act of retraction, according to Dr. Counihan, "often" causes the femoral nerve to be squashed.

64. However, what is crystal clear from Dr. Counihan's answers to questions 40 to 54 inclusive on day 6 of the trial is that when he referred to "direct compression", he was talking about direct compression on the femoral nerve in the context of "the necessity to retract or pull back the psoas muscle [which] makes the femoral nerve very vulnerable to compression" and which has the effect of squashing the nerve between the psoas muscle and the bony lining of the pelvis. What he was referring to was the proper and usual manner of retracting the relevant [fat and tissue] structures in the course of surgery. Critically, however, he did not contend for a mechanism of injury based upon the improper placement of a self retaining retractor so as to implicate or impinge directly upon the psoas muscle. In other words, he did not advance the possibility or the probability that Dr. Hermann had negligently misplaced the retractor such as to directly impinge upon the psoas muscle. Neither did he offer as a possible cause for the damage the slippage of the retractor onto the psoas muscle in the course of surgery. The only mechanism for injury advanced by Dr. Counihan was one based upon significant compression of a nerve for an extended period and one which could only have been avoided by the removal of that compression.

65. It is material in this regard to note that Dr. Counihan gave his evidence subsequent to the evidence of Prof. Bonnar who had canvassed potential negligence on the part of Dr. Hermann in relation to her positioning of the self retaining retractor at the outset of the surgery yet he was not asked to give any evidence as to whether he would support the contention that the injury was one which could possibly have been caused as a result of the misplacement of the retractor implicating the psoas muscle rather than unrelieved compression caused by a correctly positioned retractor.

66. As to the expert evidence relied upon by the plaintiff for the purposes of advancing her claim for negligence in accordance with the proof required as per the decision in *Dunne v. The National Maternity Hospital*, the evidence of Prof. Bonnar, the only obstetrician and gynaecologist called by the plaintiff, proposed two possible acts of negligence on the part of Dr. Hermann. The first concerned her failure to comply with what he maintained was the recognised standard practice of periodically releasing self retaining retractors where surgery extended beyond a two hour period. He advised that whilst compression of the femoral nerve for a short period was no problem, over a long period it was well known that it could cause damage to the underlying femoral nerve. Dr. Hermann's failure to release the retractors, having regard to the duration of Ms. McNicholas's surgery was, Prof. Bonnar urged, to have fallen short of the standard of care expected of her as a consultant gynaecologist where the risk to the femoral nerve in such circumstances was well known and understood.

67. The second allegation of negligence pursued by Prof. Bonnar was based on his opinion that the damage to Ms. McNicholas's femoral nerve might have been caused due to the possible misplacement by Dr. Hermann of the retractor at the start of the surgery such that it impinged directly the psoas muscle causing immediate compression of the femoral nerve and ultimately an ischemic injury thereto.

68. These two alternative acts of negligence and mechanisms for potential injury were pursued with Prof. Bonnar in the course of his cross-examination. To anyone who, like myself, has had the benefit of reading in full the evidence of Prof. Bonnar and, in particular, his cross-examination, it is clear that, while never abandoning the possibility that the retractor had been misplaced by Dr. Hermann such that it was brought into direct contact with the psoas muscle, his repeated and most vigorously pursued complaint was of Dr. Hermann's failure to release the retractor periodically in the course of the surgery. As was noted by the trial judge at para. 81 of the judgment, when asked by counsel on behalf of the defendant precisely what it was he maintained that all other gynaecologists would have done that Dr. Hermann had not done, he stated that no other gynaecologist would have left a self retaining retractor in position for over two hours without releasing it. This, he stated was the "highly probable" cause of the damage although he went on to assert that it was nonetheless "possible" that the retractor was not put in appropriately in the first instance. Further, when asked by counsel for Dr. Hermann whether in truth his complaint was confined to the length of time that Dr. Hermann left the self retaining retractor in position he stated as follows:-

"Yes, because duration of compression is a factor in injury to the femoral nerve."

69. For the purposes of seeking to identify the key elements of the plaintiff's claim, I consider it of some marginal relevance that a perusal of the pleadings reveals no specific plea which might alert the defendant to the likelihood or even the possibility of the claim being advanced based upon a misplacement or slippage of the retractor. It should come, therefore, as little surprise, that neither of the defendant's experts in their expert reports addressed the possibility that the injury might have been caused by misplacement or slippage. Each of the defendant's experts, when preparing their reports, restricted their consideration to the question of whether, in the context of complex surgery which lasted for over two hours, and which involved considerable blood loss, the failure on the part of Dr. Hermann to release the retractors was to fall short of the standard to be expected of her.

70. That is not to state that the pleadings were not sufficiently widely drawn to permit of such an approach given that Prof. Bonnar's expert report containing the substance of the evidence he would give at trial referred to an article authored in 2013 by Clarke-Pearson and Geller in which the following was stated:-

"Care should be taken with the placement of any self retaining retractor. Examination of placement of the retractor blade[s] should be performed and periodically checked during the case to ensure that they are not directly lying on the psoas muscle."

71. However, in the context of the plaintiff's complaint that she received an unfair trial because the trial judge did not decide all of the requisite liability issues it is material to note that when it came to setting out his conclusions in his report of the 9th July 2014, Prof. Bonnar made no mention of the possibility of the incorrect placement of the retractor blades being causative of the plaintiff's injury. He noted the difficult surgery, the extensive blood loss and the consequential need to use the retractors. However, he stated that the circumstances did not require sustained retractor pressure and that such an approach would result in ischemic injury to the femoral nerve. His sole complaint was of sustained retractor pressure. In the third and final paragraph of his conclusions in the expert report he stated as follows:-

"7.3: I conclude that:

- (i) Mary McNicholas did not have the appropriate standard of pre-operative management and
- (ii) The standard of surgical care during the operation of abdominal hysterectomy was not appropriate in that sustained retractor pressure has been used probably on the psoas muscle resulting in ischemic injury to the left femoral nerve".

72. Sustained retractor pressure was the case made on behalf of the plaintiff. This, according to Prof. Bonnar, was a well known and recognised risk of abdominal surgery. It was the plaintiff's case that it was standard practice to release the retractor blades because of this risk and there is a high probability the plaintiff had been injured by reason of this failure.

Decision

73. What is clear to me is that the case made to the High Court judge in the written submissions represented a clear departure from the case that had been made on behalf of the plaintiff, not only in the evidence adduced on her behalf, but also in the pleadings and expert reports procured for such purpose, all of which were apparently admitted into evidence. That is not to say that following the conclusion of the proceedings she was not fully entitled in the written submissions filed on her behalf to seek to obtain the benefit of any advantageous evidence that was given by the defendant and her experts in the course of the oral hearing. However, even allowing for the change in approach adopted by the plaintiff in the written submissions, I am nonetheless satisfied that the criticisms made in respect of the findings of the trial judge in this appeal are unsustainable. None of the grounds of appeal advanced have satisfied me that it can reasonably be said that the plaintiff did not have the case which she advanced fully and fairly determined in accordance with the evidence and the relevant legal principles.

74. In addition to what I have already stated concerning what I consider to have been the broad thrust of the claim made by the plaintiff in the High Court, I will briefly address in turn the principal grounds of appeal.

Slippage

75. I reject the submission that the trial afforded to the plaintiff was unjust by reason of the failure on the part of the High Court judge to address as a liability issue the alleged failure on the part of Dr. Hermann to monitor the retractors once positioned to avoid slippage and potential consequential damage to the femoral nerve. While Prof. Bonnar in his evidence made a passing reference to the obligation of a surgeon to keep an eye on the retractors in the course of surgery, it was not his opinion that Dr. Hermann might negligently have allowed a retractor to slip in the course of surgery. Further, of even greater significance is that such a possibility was never put to Dr. Hermann in the course of her evidence. In such circumstances it is not permissible for the plaintiff to seek to argue that the trial judge fell into error in failing to determine this negligence issue in the course of his judgment.

Misplacement of the retractors

76. As to the submission that the plaintiff did not receive a fair trial because the trial judge failed to consider liability on the basis that the plaintiff's injury was caused by the negligence of Dr. Hermann in misplacing the retractor, that is a submission that I reject for a number of reasons.

77. The first reason for rejecting the submission is that I believe it is implicit from the judgment of the trial judge that in finding as he did, he rejected the negligent misplacement of the retractor as being causative of Ms. McNicholas's injury. Whilst he did not specifically state that he was satisfied as a matter of probability that Dr. Hermann had not misplaced the retractor so as to implicate the psoas muscle, before finding as he did concerning the alleged duty of Dr. Hermann to release the retractor periodically, he noted her evidence that she had carefully positioned the retractor. Then he referred to Prof. Bonnar's evidence that even with correctly positioned retractors there was a 0.2% risk of damage to the femoral nerve, following which he noted the evidence of Dr. Counihan that the injury was caused to the femoral nerve at the site of the psoas muscle by pressure from the self retaining retractor. Insofar as the trial judge then stated that Dr. Counihan's evidence was unchallenged, it is reasonable to assume that he accepted his opinion concerning not only the site of the injury but also as to the mechanism for the injury which was pressure from the retractor rather than injury caused by the misplacement of the retractor so as to directly engage the psoas muscle. The use of the word pressure in this context would suggest that the High Court judge rejected the case made for the misplacement of the retractor.

78. However, even if I am wrong about what I believe to be implicit in the judgment of the High Court judge, the plaintiff nevertheless could not on the evidence have succeeded in her action based upon the misplacement of the retractors. The height of Prof. Bonnar's evidence was that it was possible that misplacement of a retractor caused the injury and, contrary to what was urged upon the Court in the course of this appeal, Dr. Lenehan did not lend any support to that proposition.

79. It is true to say that when dealing generally with the potential cause of femoral nerve damage, Dr. Lenehan did indeed state that the misplacement of a self retaining retractor so as to incorporate the psoas muscle could cause injury to the femoral nerve. However, he made clear that this was a risk relevant only in cases where the patient was very thin and had a narrow pelvis, such as might be the case where the patient was of Asian extraction. They were to be contrasted with the plaintiff who was obese, thus rendering it physically impossible for the Balfour retractor to reach the psoas muscle. As to the likelihood of this being the mechanism for the injury in the present case the following is what he said in his evidence in chief on day 9:-

"It would be my view in this particular case, using the Balfour retractor, that it would be, I would have thought, impossible for the Balfour retractor in a woman weighing 105 kilos to actually reach the psoas muscle ...So I don't think there is any-

- to me there's any likelihood that it was the misplacement of the retractor..."

80. Under cross-examination, the following is what Dr. Lenehan said concerning the possibility of femoral nerve damage caused by misplacement of the retractor in the context of one of the medical articles introduced by Prof. Bonnar:-

"Yes, I mean, it's dealt with in the articles, he refers to as a possible mechanism of injury. What I said yesterday was that I thought – I think I said virtually impossible in somebody who is overweight. And it's well shown in those articles that the women considered at risk of that type of injury with those of thin body habitats because, naturally, the blades could go [inaudible]."

81. It is to be noted that counsel for the plaintiff challenged Dr. Lenehan concerning this evidence on the basis that he had not stated in his expert report that the retractor blades could not have reached the psoas muscle. However, that criticism was, in my view, unwarranted in circumstances where no specific plea was ever made that Dr. Hermann had negligently implicated the psoas muscle by misplacing the retractor. Accordingly, at the time Dr. Lenehan prepared his report he could not have known that the plaintiff might seek to rely on the negligent misplacement of the retractor as the cause of her injury. That possibility would only have come to Dr. Lenehan's attention following the exchange of expert reports.

82. Apart from Dr. Lenehan's evidence on the issue of misplacement of the retractor so as to damage the psoas muscle, Prof. Cardozo also gave evidence that the retractor blades would not be anywhere near the psoas muscle when inserted.

83. The plaintiff's case at its height rested upon the evidence of Prof. Bonnar that it was possible that the injury was caused by the negligent misplacement of a retractor which directly implicated the psoas muscle. Yet this evidence was at odds with his evidence that the highly probable cause of the injury was the failure to release a correctly positioned retractor. In these circumstances it is very difficult to see how the trial judge could properly have concluded that negligent misplacement of the retractor was the probable cause of the plaintiff's injury.

84. Having considered the broad thrust of the plaintiff's claim as earlier identified in this judgment, the individual allegations of negligence made against Dr. Hermann and the evidence given in the course of the proceedings, I am satisfied that the failure of the High Court judge to specifically address the possibility that Dr. Hermann might have misplaced the retractor so as to cause the injury did not deprive the plaintiff of a full and proper adjudication upon the claim she had pursued. The expert evidence called by the defendant clearly showed that the release of the retractors was not required by standard medical practice. This was especially so in the course of a (relatively) lengthy and complex surgery where the patient had already lost a good deal of blood, since the release of the retractors would have inevitably delayed the completion of the surgery and led to further blood loss.

85. In these circumstances it cannot be said that Barr J. was in any way in error in finding that professional negligence on the part of the defendant had not been established.

Res ipsa loquitur

86. As to the plaintiff's submission that her case was not justly or fairly determined by the High Court judge such that she should be entitled to a retrial because he did not address the plaintiff's reliance on the doctrine of *res ipsa loquitur*, that is a submission that I reject.

87. It is undoubtedly the case that the plaintiff's intention to rely upon this doctrine was notified to the defendant in the particulars of negligence furnished, even though as a matter of law *res ipsa loquitur* can be relied upon even if it is not formally pleaded. However, the real question is whether it can legitimately be claimed that this was an issue which the trial judge was required to determine so as to afford the plaintiff a fair trial.

88. The first thing I would note is that in the opening of the plaintiff's claim before the High Court judge there was no indication that he might be called upon to consider the evidence otherwise than in the context of a specific plea of negligence (namely, principally, the failure to release the retractors) which would be established against the backdrop of the test for medical negligence advised in *Dunne v. The National Maternity Hospital*.

89. The second matter of some relevance is that extensive written submissions delivered on behalf of the plaintiff, following the conclusion of the evidence, contained only the most oblique of references to the doctrine of *res ipsa loquitur*. The submission concerning its possible applicability could hardly have been more tentative, with only one paragraph of the 27 pages of written submissions concerning itself with this issue.

90. The opening two sentences of that paragraph read as follows:-

"This maxim might not be relevant to this case, having regard to what the Plaintiff argues is the clear evidence that the Defendant was negligent and that such negligence caused her injury. However, attention is drawn to the legal principle that where a plaintiff undergoes a procedure and suffers injury in circumstances where that injury does not ordinarily arise if the defendant exercises ordinary care, the defendant is obliged to give positive evidence, whether by reference to precise recollection, or established practice, that the procedure at issue was carried out with ordinary care."

There then followed a brief reference to the decision of Keane C.J. in *Doherty v. Reynolds and St. James's Hospital Board* [2004] IESC 42.

91. It is important to record that the plaintiff's case as advanced in the High Court was that she had in fact established negligence on the part of Dr. Hermann in failing to release the retractors. The plaintiff's case was not that negligence might be inferred from the overall circumstances of the surgery and its unhappy outcome.

92. Of even greater significance is that the written submissions made no effort to demonstrate how the doctrine might be applied in the context of the evidence in the present case, or how reliance upon that doctrine could be squared with the submission that the case could be decided on the ordinary *Dunne* principles. This is by way of sharp contrast to the extremely detailed written and oral submissions placed before this Court to demonstrate how the doctrine might have assisted the plaintiff in establishing liability having regard to Dr. Hermann's evidence.

93. I have to state that I am not convinced that the analysis of Dr. Hermann's evidence as contained in the plaintiff's written submissions to this Court is necessarily an accurate one. It is, perhaps, sufficient to state that the extensive analysis of the evidence submitted to this Court represents in my view the type of submissions warranted where a plaintiff, who files written submissions following the close of the proceedings, claims an entitlement to succeed on the basis of the doctrine of *res ipsa loquitur*.

94. In the foregoing circumstances I consider that for the plaintiff now to contend that she did not receive a fair trial because the trial judge did not address the issue of *res ipsa loquitur* in his judgment is a criticism that cannot be sustained. He was not asked or given any encouragement to reach a determination on that basis. He was specifically advised that the doctrine "might not be relevant". No effort was made to demonstrate how, on the facts of the case and the evidence available, the doctrine was applicable and why having regard to that doctrine liability should be found against the defendant. If a party considers the determination of any legal issue key to the fair and just disposal of proceedings then that fact should be obvious from any written or, indeed, oral submissions made at the conclusion of proceedings.

95. In considering this aspect of the plaintiff's appeal one could easily borrow the language of Clarke J. from *Doyle v. Banville* where he stated that it was no function of the appellate court "to engage in rummaging through the undergrowth of the evidence tendered or arguments made in the trial court to find some tangential piece of evidence or argument which, it might be argued, was not adequately addressed in the court's ruling". It might equally be said in the present case that in light of the written submissions filed on behalf of the plaintiff at the conclusion of the evidence in the High Court, it had been left to the trial judge to rummage through the undergrowth of the evidence and decide for himself whether the plaintiff's claim could be sustained on the ground of *res ipsa loquitur* and, if so, how that could be achieved. That is not the obligation of the trial judge.

96. While it is not a factor to which I have attached any weight in reaching my conclusions on this issue, it is perhaps worth recording that the trial judge was not alone in considering that *res ipsa loquitur* was either not "in the case" having regard to the evidence or if it was it was not being pursued, given that the defendant's submissions, which were lodged in Court independent of sight of the plaintiff's submissions, made no reference whatsoever to the doctrine.

97. For the aforementioned reasons I would reject the plaintiff's submission that Ms. McNicholas received an unsatisfactory determination of her claim by reason of the failure of the trial judge to consider her case in the context of the doctrine of *res ipsa loquitur*.

Credibility

98. It is clear from the manner in which ground number (iv) of the notice of appeal is drafted that the issues which the plaintiff now seeks to raise in terms of credibility are possibly only material if the High Court judge was obliged to address the issue of *res ipsa loquitur*. This is because his conclusions on issues of credibility might feed into his assessment of the credibility of Dr. Hermann's evidence as to the level of care she afforded to her patient in the course of the surgery.

99. Given that I am satisfied that the High Court was not required to consider the case on the basis on *res ipsa loquitur*, it is perhaps unnecessary to address the plaintiff's submissions concerning the issues of credibility addressed in the notice of appeal. However, I feel it is nonetheless appropriate to observe that, much like the criticism that was made of the trial judge for his failure to address the claim on the basis of *res ipsa loquitur*, when it came to the written submissions in the High Court the plaintiff advised the High Court judge that he did not need to determine any issues of credibility to decide liability in the case.

100. The following is the first of the final six paragraphs in the written submissions under the heading "Issue of credibility":-

"It is not necessary for the Court to reach [a] final determination on the issues of credibility of the Defendant in order to decide the principal issue of liability. Nevertheless, the Defendant was challenged as to her *bona fides* on certain matters and this challenge has no doubt concerned the *Defendant's legal team*. (emphasis added). It is appropriate that the Court understands the Plaintiff's position on this aspect of the case"

101. As is clear from the aforementioned paragraph, the trial judge was in effect invited to reach his decision on the liability issues without regard to the issues of credibility that the plaintiff then proceeded to identify. How then can she claim a mis-trial on the basis that the trial judge excluded from his considerations factors which she now maintains would have caused him to reach a different conclusion?

102. What is of further concern is the fact that the issues of credibility identified in the notice of appeal which the plaintiff complains the trial judge impermissibly failed to address are not the same as those which were identified on her behalf in the written submissions in the High Court. The issues so identified were as follows:-

(i) whether Dr Hermann had removed one of the plaintiff's ovaries in the course of surgery, and

(ii) the allegedly unsatisfactory affidavit of discovery sworn by Dr. Hermann which included an incomplete copy of the letter of 10th May, 2005, described as a "disturbing" aspect of the defendant's credibility" but one which "the court does not have to determine."

103. To the credit of the trial judge he addressed both of these issues in his judgment. He found as a matter of probability that Dr. Hermann had not, as had been alleged, removed one of the plaintiff's ovaries. Then, in a lengthy section of his judgment, commencing at para. 118, he considered Dr. Hermann's evidence in relation to the letter dated 10th May, 2005, and the manner in which she had transferred all of her patients' files onto her computer. Having done so he expressed himself satisfied that the motive which had been suggested by the plaintiff that she might have had for deleting the paragraph from the letter of 10th May, 2005, had not been established, and that he was not in a position having regard to the evidence to reach a definitive conclusion on how the paragraph came to be deleted.

104. Having regard to what the trial judge stated in his judgment, I am satisfied that he addressed both of the credibility issues raised by the plaintiff, even though he was told that this was not necessary.

105. The three issues of credibility sought to be relied upon by the plaintiff in the notice of appeal before this Court relate to:-

(i) Dr. Hermann's alleged redaction of the letter of 10th May 2005.

(ii) Dr. Hermann's failure to warn the plaintiff of the risk of proceeding with the surgery without further weight loss, and

(iii) Dr. Hermann's evidence concerning her efforts to comply with the order for discovery.

106. Given that the plaintiff did not submit in the High Court that the credibility of Dr. Hermann's evidence on any of these issues needed to be addressed in order that the liability issue might be determined, reliance upon them at this stage for the purposes of this appeal is both misplaced and impermissible. However, I would also add that insofar as issue (i) above is concerned, that issue was

addressed by the trial judge as earlier advised in this judgment. As to issue (ii) the trial judge obviously did not consider it necessary to resolve the differing accounts of the exchange had between Dr. Hermann and Ms. McNicholas concerning the surgical risk to be attached to her obesity given that he concluded that Dr. Hermann had not been negligent in failing to advise her patient to postpone surgery until such time as she had lost further weight. Further, no submission was made in the High Court to the effect that it was necessary to resolve that evidential dispute because it was material to Dr. Hermann's credibility on the issue of perioperative negligence, or that it needed to be resolved because it might support an inference that Dr. Hermann had been negligent in some regard.

107. As to issue (iii), while the adequacy of the affidavit of discovery sworn by Dr. Hermann was indeed raised in the plaintiff's submission in the High Court, once again, the Court had been advised that the liability issue could be determined without reference to this or any other "credibility" issue. Further, the High Court was not asked to draw any adverse inference from the complaints made concerning Dr. Hermann's affidavit of discovery.

Conclusion

108. For the reasons already stated in this judgment I am satisfied that the High Court judge in the course of his careful and thorough judgment delivered on the 7th July, 2015, considered and decided the claim advanced on the plaintiff's behalf for a finding of negligence against Dr. Hermann. That case was that no other consultant gynaecologist of equivalent expertise to Dr. Hermann, if acting with due care for their patient in circumstances such as presented in the present case, would have failed to release the self retaining retractors periodically in the course of surgery. He rejected that case for reasons that he made clear in his judgment, namely, that he was satisfied that there was no recognised practice which required such an approach and, indeed, that to have adopted such an approach, having regard to the extensive bleeding which had occurred in the course of the surgery, would have exposed Ms. McNicholas to unwarranted risk.

109. I am also satisfied that the trial judge directed his attention to all of the issues that he was required to decide for the purpose of affording the plaintiff a fair and just trial having regard to the manner in which the claim was pursued both in evidence and in submission. The plaintiff's alleged entitlement to a new trial based upon her claim that the trial judge impermissibly failed to address whether her injury had been caused by the misplacement of a retractor or one which had slipped in the course of surgery must for the reasons earlier advised in this judgment, also fail.

110. I am also satisfied, for the reasons earlier expressed in this judgment, that the plaintiff has no grounds upon which she might legitimately seek a new trial by reason of the failure on the part of the High Court judge to address her claim in the context of the doctrine of *res ipsa loquitur*. Likewise, the criticism of the trial judge's approach to certain evidential disputes alleged to be material to the credibility of Dr. Hermann's evidence provides no permissible basis upon which the plaintiff might seek to disturb the findings of the High Court judge.

111. One must have every sympathy for the plaintiff. The surgery in which she had placed so much hope for a real improvement in her quality of life has been at best only partially successful. She has been left as a result with a debilitating condition which will affect her mobility and quality of life for the rest of her life. The Court is acutely conscious of this and fully understands her concerns that the conduct of the operation and the performance of the defendant be subjected to scrutiny.

112. This Court is, however, a court of law and it is, accordingly, obliged to apply the established legal principles governing medical negligence in a neutral and dispassionate fashion. This means that the otherwise disappointed litigant is not entitled to pass a fine tooth comb over the judgment of the trial judge and demand a re-trial should they find that the trial judge has not addressed some peripheral issue which, with the benefit of hindsight, they consider was arguably material to the outcome.

113. Litigants are not entitled to demand that a trial judge resolve every evidential or legal dispute which may arise in the course of proceedings. That is particularly so in proceedings which are complex and are heard over a protracted period. A party's right of access to the court is not without limit. The court's own resources are scarce and must be deployed to the advantage of all who seek access to the courts. Judges must strive to hear as many cases as they can consistent with their ability to provide a fair and just result to the litigants before them. That being so, they cannot be expected to engage with issues which they consider are unnecessary for the purposes of delivering a fair and just judgement. Accordingly, it behoves the parties at the end of lengthy proceedings, such as those the subject matter of this judgment, to give guidance to the trial judge as to precisely what issues they consider that he or she should address. It follows that for a party to seek a retrial on the basis that the trial judge impermissibly failed to address some evidential or legal dispute they must to be in a position to demonstrate that the issue was one which had been advanced in such clear and certain terms that it was obvious that a failure to address it would likely cast in doubt the validity of the judgment otherwise given. I am not satisfied that the plaintiff in this case has discharged such a burden.

114. For all of the reasons earlier referred to in this judgment, I would dismiss the appeal.