THE COURT OF APPEAL

[2014 No. 346]

The President

Peart J.

Hogan J.

BETWEEN

PAUL HEGARTY

PLAINTIFF/APPELLANT

AND

MERCY UNIVERSITY HOSPITAL CORK LIMITED

DEFENDANTS/RESPONDENTS

JUDGMENT of the Court delivered by the President on 10th February 2016

Introduction and Background Facts

1. This is an appeal by the plaintiff against the judgment and order of the High Court (Irvine J.) on 25th November 2011, dismissing his claim against the defendant. The plaintiff lives with his partner and their child in Cork. The claim relates to the care that the plaintiff received in the defendant hospital between 6th February and 5th April 2007.

2. Mr. Hegarty had a history of abdominal trouble. He was admitted to the Mercy Hospital in Cork with ulcerative colitis on 6th February 2007. He did not get better, and on 12th February 2007 he had an emergency subtotal colectomy because of serious deterioration of this condition. The surgery involved the removal of most of Mr. Hegarty's large bowel leaving a rectal stump that was closed off. Following the surgery, he was left with an opening in the abdomen and a colostomy bag. The patient improved at first, but then he again became very ill, and on 20th February 2007 he was taken back to the operating theatre where it was discovered that Mr. Hegarty had developed a rare but well-established complication of this kind of surgery, namely, a leak from the rectal stump causing a pelvic abscess and infection with resultant breakdown of the wound. The trial judge found that the suturing of the rectal stump failed because the plaintiff had been taking steroids long-term which had affected his body's capacity to heal. The result of this second operation was that the plaintiff had another abdominal opening with a colostomy bag and the first stoma was now used for drainage. In the result, the appearance was that he had two colostomy bags inserted into two openings.

3. There was now a serious problem because of the infection in the plaintiff's abdomen originating at the site of the original stump suturing. This meant that he had to be taken back repeatedly to the operating theatre for washout treatment under general anaesthetic and this happened every second day and required some twelve procedures in all. The doctors used strips like Velcro to enable the abdominal wound to be opened and closed. During this time, the plaintiff was very ill. Nevertheless, the abdominal infection proved amenable to this treatment. However, another complication now presented itself. A pelvic swab which was used in the course of the washing procedure under general anaesthetic on 27th February 2007 was reported positive for MRSA on 1st March 2007 which meant that Mr. Hegarty had to be treated in isolation where people in contact with him, including family visitors, had to wear gowns and gloves. He continued to be monitored for infection and MRSA and he was eventually declared to be clear, following the occurrence of three successive negative test results. The series of satisfactory results began at ten days before his discharge from hospital on 5th April 2007. At this time, Mr. Hegarty was clear of the infection in his abdomen from the original suturing and also of MRSA. He had, nevertheless, undergone a very serious illness which left him with significant sequelae.

4. To complete the factual narrative and chronology, Mr. Hegarty was again admitted to hospital – Cork University Hospital – on 15th April 2007 with meningitis where he had repeat testing for MRSA. He also attended the Mercy Hospital for outpatient appointments following his treatment there. He visited his General Practitioner on six occasions in June 2007 and ten times in July.

5. The plaintiff's case, as recorded by the trial judge in the judgment and based on a summary by counsel for the plaintiff, Dr. White SC, is first, that the hospital and its servants and agents were negligent in failing to inform the plaintiff fully and properly of the findings made in the course of the second surgical procedure, namely, a leakage of the rectal stump which caused a pelvic abscess and wound infection. Secondly, they were negligent in failing to advise Mr. Hegarty adequately or properly about the significance in a clinical setting of the positive finding of MRSA from the pelvic swab, in circumstances where there was only one such positive test result and when Mr. Hegarty had been taking the drug Linezolid which was capable of bringing MRSA under control in a short time. Thirdly, the hospital misled Mr. Hegarty into falsely believing that he continued to have MRSA until his discharge from the hospital on 5th April 2007.

6. Mr. Hegarty's case, as summarised in the written submissions made on his behalf to this Court, is stated somewhat differently. First, it is said that the hospital is liable for negligence and breach of duty in failing to advise Mr. Hegarty or to communicate properly with him with regard to the diagnosis of MRSA and his subsequent progress. Specifically, "when he was in an extremely ill post-operative condition, he was negligently allowed to believe that his life was threatened by MRSA when this was not the case. He experienced extreme emotional suffering because he was not given proper advice regarding the true implications of the single positive

MRSA test which led to his MRSA diagnosis and was not informed of subsequent negative tests for MRSA when he ought to have been, even when he had requested that information. Secondly, described as a subsidiary issue, it is alleged that the hospital was negligent in failing to explain properly the nature of the complications that arose from the first operation."

7. By reason of the defaults that he alleges, the plaintiff claims to have suffered "extreme emotional suffering" but he does not allege any specific psychiatric injury or condition. This circumstance alone, as the plaintiff's counsel candidly acknowledges, represents a major obstacle in the way of success in the action or on this appeal. Moreover, since the case is entirely one about information, and it is not suggested that the plaintiff would have done anything different if the information he suggests ought to have been given was in fact provided, the speculative nature of the case is in no way diminished. Thus, as the plaintiff acknowledges, in order to succeed on this appeal, the court would at least have to recast the law on damages for psychiatric injury so as to allow recovery for psychological upset falling short of recognised psychiatric injury.

The Judgment

8. The trial judge held that the hospital fully informed Mr. Hegarty about the complications that followed his original surgery. She was satisfied that he was given all of the relevant factual and clinical information. The judge set out, in eleven sub- paragraphs, the detailed reasons why she accepted the defendant's evidence and she concluded that she was "satisfied as a matter of fact that there was no lacunae in the medical or clinical information furnished to the plaintiff as to the complications that had arisen subsequent to his subtotal colectomy that could have caused him subsequently to attribute those complications to MRSA". She said that the complications that arose were explained to him in terms that he should have been readily able to understand.

9. In respect of what the plaintiff was told about MRSA, the trial judge concluded, in light of her analysis of the evidence and witnesses, that Mr. Hegarty was advised on 1st March 2007 that MRSA had been isolated in a pelvic swab, that antibiotics would be administered to take care of the infection and that he would be moved to an isolation ward to protect others. The nurse who explained his infection sought to reassure him by telling of her own experience. She told him that he needed three negative test results before he could be considered clear of the infection. The judge found that Mr. Hegarty was advised of all the microbiology reports as they became available, including those that were negative for MRSA, before he was finally discharged on 5th April 2007. At that stage, he was fully reassured that MRSA had been eradicated. The judge was satisfied that he was seen by the locum consultant, Mr. Mayilone, who fully apprised him of the significance of MRSA in the clinical setting. The consultant explained, as the other doctors, Mr. Andrews and Mr. McGreal had previously done, that the complications following the initial surgery were caused by an abscess which developed as a result of a rupture of the rectal stump. The judge held that neither Mr. Hegarty nor his family were ever advised that any of these complications should be attributed to MRSA.

10. The trial judge also found, in resolving a dispute between Mr. Mayilone's evidence and that of the plaintiff's partner and sister, Ms. Greenwood and Ms. Jones, that there had been a meeting outside Mr. Hegarty's hospital room subsequent to the diagnosis of MRSA in which Mr. Mayilone furnished accurate information. This meeting was a significant one that lasted a considerable time – the doctor's evidence was that it took some 40 minutes – and it was a subject of considerable controversy as to whether it had happened at all. Counsel for the defendant did not put the doctor's evidence to the plaintiff's witnesses when he was cross-examining them. When the doctor came to give evidence of this alleged conversation, objection was taken by counsel for the plaintiff, and Mr. McCullough S.C. for the defendant, told the court that he should have put the conversation to the relevant witnesses but had omitted to do so. The plaintiff's witnesses were subsequently recalled so that they could address this issue and have the doctor's evidence as to the conversation put to them. They denied that such a conversation ever took place. One of the major planks in the appeal is the contention by Dr. White S.C. for the plaintiff that the trial judge erred in finding as she did in relation to the conversation and in referring to and apparently relying on the explanation given by counsel for the defendant as to why the matter had not been put in cross-examination.

11. In regard to this meeting, the judge said that she found Mr. Mayilone to be an impressive witness whose evidence on this question was "much more credible" than that of the plaintiff and his family.

The Appeal Grounds and Submissions

12. Notwithstanding the isolation by the plaintiff's Counsel of the essential issues in the case, as noted in the judgment of the High Court, the notice of appeal contains some 36 grounds, many of which are subdivided into separate paragraphs. Almost all of the specified grounds complain about specific findings of fact made by the trial judge on the basis of her assessment of the witnesses. Primary findings of fact made by a trial judge are not amenable to review by an appeal court if they are based in the evidence given at the trial: see Hay v. O'Grady [1992] 1 I.R. 120, which is referred to below.

13. The plaintiff submits in a general way that the trial was unsatisfactory by reason of alleged failures by the judge to give reasons for how she resolved conflicts of evidence; for failing to refer to certain witnesses; for reaching decisions that were unfavourable to the plaintiff; for intervening to ask questions in the course of the trial; for comments that she made that the claim was unmeritorious and worse and for specific procedural rulings and factual findings. The specific grounds are covered in the other headings while the general points may be considered as introductory comments.

14. The plaintiff submits that the following facts are incontestable:

> (a) He never developed clinical MRSA and that played no part in his illness.
>
> (b) The hospital notes have no record that he was advised by a doctor or nurse except for the information given to him by Nurse Murphy on 1st March 2007.
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> (c) The only doctor who spoke to Mr. Hegarty about MRSA was Mr. Mayilone, who only spoke to him briefly which worsened his concerns. Even accepting the doctor's account of another meeting, he did not say that he gave Mr. Hegarty advice concerning what the plaintiff submits were necessary matters, namely, the significance of the single pelvic swab that was positive for MRSA; the properties of the drug Linezolid; the significance of successive negative swabs or screens; or the outlook for the plaintiff after a full negative screen.

In the circumstances, it is claimed that Mr. Hegarty was subjected to wholly unnecessary and avoidable mental distress and anxiety.

15. The plaintiff argues that the hospital failed to communicate properly to Mr. Hegarty the nature and consequences of the complication that followed from the first operation and that contributed to the anxiety and distress he experienced in relation to the MRSA diagnosis and progress. It is said that the trial judge disregarded the unchallenged evidence of the plaintiff's experts that he was extremely ill after the second operation and for most of his subsequent stay in hospital. The hospital had an obligation to ensure that he understood what happened to him as a result of the surgery and the plaintiff submits that the absence of any record in the hospital notes of such an explanation is very significant.

16. The judge's findings in regard to Mr. Mayilone's evidence are a major part of the plaintiff's appeal. The parties were in agreement that a conversation took place in the plaintiff's room about MRSA when the persons present were the plaintiff himself, Ms. Jones, Ms. Greenwood and Mr. Mayilone. There was disagreement as to what was said and how it was said on that occasion, but the conversation itself was not in issue. No other conversation was raised or suggested in cross-examination by counsel for the defendant. However, when Mr. Mayilone gave evidence, he testified to a conversation that he had had outside the plaintiff's room before going in when he spoke to Ms. Jones and Ms. Greenwood for about 40 minutes. Counsel for the plaintiff, Dr. White SC, objected to this evidence on the basis that it had not been put to his witnesses. Mr. McCullough SC for the defendant said that he had inadvertently omitted to put this conversation when he was cross-examining Ms. Jones and Ms. Greenwood. The judge permitted the evidence to be adduced and Ms. Jones and Ms. Greenwood were recalled so that they could be cross examined and re-examined on this evidence, at which stage they flatly denied that any such conversation had taken place.

Dr. Mayilone told the court that he had discussed the whole case with Ms. Jones and Ms. Greenwood, including the original operation, the need for regular washouts to bring his wound together and to wash out any infection within the abdomen. He explained that MRSA was found in the pelvic swab; that Mr. Hegarty was being treated with antibiotics and again, that he was having regular washouts and his abdomen was being closed. At the end of the conversation, the two persons went into Mr. Hegarty's room and the doctor followed them and reassured Mr. Hegarty. The doctor denied that he was angry or annoyed. He did not recall saying that they had found fluid in the wound and were trying to save Mr. Hegarty's life – that is not the kind of phrase that he would use and he said it seemed a bit unnatural.

At para. 27 of the judgment, the judge said that she had taken into account the statement by counsel for the defendant that from his instructions he should have put this conversation to the relevant witnesses but had omitted to do so: "I believe I should accept that he had instructions regarding this conversation which unfortunately he had overlooked at the time of conducting his cross-examination".

17. The plaintiff submits that it is patent that the doctor had not instructed his solicitors about this conversation. (The defence solicitors are not, of course, Dr. Mayilone's solicitors.) The evidence is internally inconsistent with the cross-examination by Mr. McCullough S.C., which is correct and which is the very matter that gives rise to the difficulty. The point is made that in the several cross-examinations, this matter was not mentioned. If an error had been made by senior counsel that had not been noticed by junior counsel or instructing solicitor, it is submitted that the defendant's solicitor should have been called to give evidence that the doctor had made a statement referring to this meeting. There is no reference to the meeting in the hospital notes. The doctor was unable to provide a date for the meeting. Neither was he able to explain why the meeting took so long. The plaintiff's partner and sister denied that such meeting happened. The plaintiff also advances some further inferential arguments concerning the content of the conversation and the role played by Mr. Mayilone in the management of the plaintiff's MRSA.

18. On the recoverability of damages, the plaintiff submits that the trial judge was in error in holding that damages could not be recovered for distress and anxiety that admittedly did not amount to a psychiatric injury. His submissions distinguished Kelly v. Hennessy [1995] IR 253 on the ground that the plaintiff is a primary victim in this case. He relied in particular on Philp v. Ryan [2004] 4 I.R. 241.

Submissions of the Defendant

19. The written submissions of the defendant followed the grounds of appeal as enumerated and sub-divided in the notice of appeal. Having regard to the way the appeal was presented and to the submissions, it is unnecessary to rehearse the factual answers submitted by the defendant in regard to the many detailed criticisms of the trial judge in the notice. It is relevant to record, however, that the defendant addresses every specific point with detailed references to the evidence.

20. It was a matter for the trial judge to weigh the evidence of Mr. McGreal, Mr. Andrews and Mr. Mayilone, the three surgeons, and Nurse Hickey, as against that of the plaintiff, Mr. Hegarty, his partner, Ms. Jones, and his sister, Ms. Greenwood. It is submitted that the medical and nursing staff had no reason and no possible motive for withholding relevant information from Mr. Hegarty. His evidence was that they either conspired to keep the information from him or that they just could not be bothered telling him.

21. In respect of each of the findings made by the trial judge and recorded in her judgment, there is a basis in the evidence given at the trial, except for one reference (at para. 47) where the judge refers to the absence of expert testimony on a specific point, but that is a minor error in the circumstances and could have had no impact on the result of the case. The questions to be decided by the court ultimately came down to the resolution of conflicts of evidence, in respect of which the judge provided ample detailed reasons for the evaluation that she made.

22. The trial judge was correct in her analysis of the law and her decision that in the absence of any psychiatric injury sustained by the plaintiff, he would not have been able to recover in any event, even if the findings were otherwise. See Kelly v, Hennessy [1995] I.R. 253, Larkin v, Dublin Corporation [2007] IEHC 416 and Fletcher v. Commissioners of Public Works [2003] 1 I.R. 465.

The Approach of this Court

23. In Hay v O'Grady [1992] 1 I.R. 120, the Supreme Court set out the principles governing the proper approach of an appeal court to findings of fact and inferences made by the court of first instance. They may be summarised as follows: –

> 1. Were the findings of fact made by the trial judge supported by credible evidence? If so, the appellate court is bound by the findings, however voluminous and apparently weighty the testimony against them.
>
> 2. Did the inferences of fact depend on oral evidence of recollection of fact? If so, the appeal court should be slow to

substitute its own different inference.

3. In regard to inferences from circumstantial evidence, an appellate court is in as good a position as the trial judge in that regard. Did the judge draw erroneous inferences?

4. Was the conclusion of law drawn by the trial judge from a combination of primary fact and proper inference erroneous? If so, the appeal should be allowed.

5. If, on the facts found and either on the inferences drawn by the trial judge or on the inferences drawn by the appellate court in accordance with the principles set out above, it is established to the satisfaction of the appellate court that the conclusion of the trial judge as to whether or not there was negligence on the part of the individual charged was erroneous, the order will be varied accordingly.

Discussion

24. Mr. Hegarty was admitted to hospital as an emergency with a very serious condition. He did not respond to conservative treatment and had to undergo radical surgery, involving, as it did, the removal of the greater part of his colon. The internal suturing failed to hold as can sometimes happen with this surgery, and Mr. Hegarty became dangerously ill as a result. It may be that this complication arose because of the effect of previous drugs. He had a second operation which revealed extensive infection that had to be treated by many repeat openings for washing out. Mr. Hegarty was in a very serious condition during all this time, and it seems understandable and inevitable that the hospital staff would have been concentrating on the specific condition that brought Mr. Hegarty to them for treatment and on the unfortunate complication that had now added to the perilousness of his situation. The fact that he was testing positive for MRSA in addition to his other difficulties was a major cause of concern on top of everything else, but it did not actually add to the patient's suffering, except that he was put in isolation after the diagnosis. As it happened, he was actually already on the drug that would have been the choice to treat MRSA, namely, Linezolid. It is correct, therefore, that MRSA did not actually feature as a cause of any particular symptom or condition other than its presence in itself represented a reason for anxiety. Mr. Hegarty had to be treated as if he had MRSA, whether that was clinically the case or not. The hospital could not take a chance. It had to put the patient into isolation and treat him for the condition.

25. The major issues in this case are, first and primarily, whether the trial judge was entitled to come to the conclusion that the hospital gave Mr. Hegarty full and correct information about his condition and about the MRSA. That is the essential question that determines liability. Secondly, the judge held that Mr. Hegarty had not suffered an injury or condition that could have attracted an award of damages. The judge concluded that the hospital was not negligent or in breach of duty and that even if it had been in default as aforesaid the plaintiff was not entitled to damages.

26. The criticism of the judgment that it does not contain reasons for its findings seems to me to be entirely misplaced. It is a systematic analysis of the evidence with conclusions that are justified for detailed reasons. The judge dealt fully with the allegation that the hospital did not give Mr. Hegarty proper or full information about the complication that arose after the first operation. She carefully reviewed the evidence of Mr. McGreal and Mr. Andrews, which she accepted, and she was entitled to do that. The absence of a note to the effect that either of those doctors discussed the complication with Mr. Hegarty is not in itself evidence that it did not happen.

27. In relation to this point, it could well be said that the fact that Mr. Hegarty was extremely ill during his time in hospital was unlikely to be disputed by any of the witnesses, but it might also be a reason for doubting the particular distinction that the plaintiff seeks to make as between his general illness and what must have been his very real anxiety about his known and established condition, as compared with the distress that he claims emanated from failures to distinguish between testing positive for MRSA and actually having clinical signs thereof.

28. On 16th of March 2007, the plaintiff was seen by a psychiatrist who noted that his mental state was pleasant and cooperative; his mood was normal at the time and there was no evidence of acute mental illness. Mr. Hegarty said that he had plenty of support from his family and did not want follow-up.

29. The judge had to make a decision in relation to Mr. Mayilone's evidence of the conversation he said he had had with Ms. Jones and Ms. Greenwood outside the plaintiff's room. At one end of the spectrum of choice was exclusion of the doctor's evidence of this conversation. That would have been an extreme course that might have wreaked injustice since it would have meant refusing to hear relevant admissible evidence. A less drastic, but nevertheless radical measure would be to declare a mistrial, abort the hearing and re-list the action for a fresh trial, but again, the fairness and justice of that option would be difficult to justify. The judge decided to hear the evidence which was subject to cross-examination and to permit the plaintiff to recall his witnesses to deal with the unanticipated evidence. In proceeding in this way, the trial judge followed what would be the usual choice of a judge who is faced with this issue. Which of the courses available the judge follows depends on the particular circumstances; the positions adopted by the parties; whether it is a jury trial or a hearing by judge alone, and above all, the judge's own perception of what is required in the interest of fairness and justice. It seems to me that the abiding principle is that the evidence is relevant and admissible, so the inclination of the court should be for reception of the disputed testimony subject to appropriate, fair and just procedural measures to deal with collateral issues in relation to the evidence. My own experience at the Bar and on the bench is that these complications at trial are unfortunate, but they happen occasionally and they are dealt with in the course of the trial. What Irvine J. did in this case accords with the general practice of judges when such a mistake is made by Counsel. She was entitled to deal with the issue in the way she did. In my view, the judge dealt with the problem justly, reasonably and correctly.

30. There was substantial conflict arising from this evidence given by Mr. Mayilone. The judge preferred his account. She found him to be an impressive witness generally and accepted his evidence. By contrast, the judge was not favourably impressed by the evidence of Ms. Jones and Ms. Greenwood.

31. In relation to the nurses, the evidence by and on behalf of the plaintiff was that he asked after each and every wound washout following the diagnosis of MRSA. Ms. Jones testified that she was present on every such occasion. When Mr. Hegarty asked, the response of the nurse was the same on each occasion, which was to go to the computer and consult it and then tell him that the test was positive.

32. The trial judge did not accept the evidence of the plaintiff and his witnesses on these questions. She first decided that the surgeons who treated Mr. Hegarty prior to the diagnosis of MRSA on 1st March 2007 had fully informed him about the outcome of the

operations, including the complications that occurred that made the repeat procedures necessary. The judge accepted that Mr. Hegarty had consented to the various procedures, which involved being satisfied that the treating doctors had provided him with the relevant information.

33. The trial judge noted that in cross-examination, the plaintiff was forced to accept that he had been told of each clear swab result as it became available, although he had earlier maintained that the nursing staff lied to him regarding the results. The transcript makes it clear that the plaintiff did indeed acknowledge in cross-examination that he was told about the swab results as they became available. This contrasted with previous testimony that on enquiry by him, the nurses would consult the computer before telling him that he still had MRSA. This is precisely the kind of finding that the Supreme Court was referring to when cautioning against interference by an appeal court. The very fact that Mr. Hegarty could have returned even partly to his original position when he was re-examined emphasises the importance of the role of the judge trying the facts at first instance.

34. Mr. Hegarty's inconsistencies in evidence as to whether he was told about negative test results undermined his own evidence and also that of Ms. Jones. Obviously, insofar as he accepted that he had been properly informed, he was contradicting Ms. Jones's assertions about the nurses' communications.

35. It is impossible to find any motive or explanation for why the nurses would want to mislead Mr. Hegarty about his test results. One can understand how a nurse might make a mistake, but that is not what is suggested here. Ms. Jones's evidence, if correct, makes one wonder why any nurse would behave as she says all of the nurses did. In fact, what happened was that three tests proved negative and Mr. Hegarty was declared free of MRSA and discharged from the hospital. If the nurse went to the computer screen and checked Mr. Hegarty's results, there is simply no reason why he or she would give the wrong information. It is possible that the result might not yet have been logged and so the nurse would not know, but if the test outcome was recorded, there is no reason why she would say that a negative result was positive. And there is even less basis for thinking that all the nurses would behave in that inexplicable and pointless fashion. And as I have said, the fact is that the nurses did not adhere to such course of conduct.

36. Contrary to the plaintiff's submissions, there is ample basis for the trial judge's rejection of the evidence that the nurses misinformed Mr. Hegarty as to the status of the MRSA test results. The judge was entitled to accept the evidence of the treating doctors that they fully and properly informed Mr. Hegarty of the course of his illness and treatment. She was entitled to draw the inference she did from the evidence of the various witnesses. And as between the evidence of Mr. Hegarty, Ms. Greenwood and Ms. Jones, on one hand, and Mr. Mayilone on the other. The judge was not only entitled to come down on one side, but was obliged to decide where the truth lay as a matter of probability on the contradictions in the evidence.

37. The position here is that the trial judge addressed all the relevant issues and reached the conclusions that she did following a careful analysis of the evidence. She provided detailed reasons for preferring one version to the other. It is clear that there was evidence sufficient to justify these findings and it is not open in the circumstances to this court to overturn the judge's conclusions. On this point the law is clear. It is not the function of an appeal court to retry the case or to re-examine the evidence with the view to reviewing findings of fact.

38. Obviously, it is not a question of counting the witnesses on one side as against those on the other to determine the weight of evidence. Neither is it necessary for counsel to put to a witness that he or she is lying or mistaken in express terms. The purpose of cross-examination is to test evidence against the background of the case as a whole, the other evidence that has been given or that is anticipated and the inherent probabilities of the general circumstances and situation that are under consideration. The point of untruthfulness or unreliability or improbability may be canvassed and explored in a variety of ways, and indeed it will not always be proper to pinpoint explicitly a particular reason for rejecting the whole or part of the evidence being given by a witness. It is not, therefore, a ground of appeal to suggest that the trial judge did not have any choice but to accept the evidence of witnesses whose testimony was not expressly impugned in cross-examination.

39. One example may be selected to illustrate this point. When Ms. Jones gave evidence as to how Mr. Hegarty asked the nurse on each and every occasion when he returned from having his washout procedure about the test results, defence Counsel and the judge invited her to confirm that she was claiming to have been present on every such occasion. It would have been obvious to Counsel on each side, and perhaps to anyone else in court, that the witness was being given an opportunity to retreat from an extreme and putatively improbable position. There might, of course, be an explanation and the witness did appear to address the point.

40. It was agreed by both sides at the trial that the hospital responded correctly to the positive test for MRSA. Whether Mr. Hegarty actually had a clinical condition of infection with that organism, or something short of that, did not make any difference to how he was treated. When there was a positive test, it was obligatory on the hospital to proceed as it did to isolate the patient and treat him as if he had the infection. And it was also correct to consider him as still being affected until three successive tests proved negative. That, again, is what happened. He was already being treated with a drug that was appropriate for MRSA and he continued on that therapy. In the circumstances, it is not easy to see how he might have been reassured by being given the information that he says he ought to have had. The test was positive and he would not be considered clear until three successive negative results were obtained. Leaving aside the question of whether he was misinformed by the nurses about test results, the mere fact that he was not told that the positive test might not be confirmed by subsequent results is far from an adequate basis for a finding of negligence or breach of duty.

Recovery of Damages for Psychiatric Illness

40. The circumstances in which damages for nervous shock are recoverable were set out as follows by Hamilton C.J. in Kelly v. Hennessy [1995] 3 I.R. 253 at p. 258:-

> "1. The plaintiff must establish that he or she actually suffered 'nervous shock'. This term has been used to describe 'any recognisable psychiatric illness' and a plaintiff must prove that he or she suffered a recognisable psychiatric illness if he or she is to recover damages for 'nervous shock' …
>
> 2. A plaintiff must establish that his or her reasonable psychiatric illness was 'shock-induced'. …
>
> 3. A plaintiff must prove that the nervous shock was caused by a defendant's act or omission. …
>
> 4. The nervous shock sustained by a plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff. …

> 5. If a plaintiff wishes to recover damages for negligently inflicted nervous shock he must show that the defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock."

41. In Fletcher v Commissioner of Public Works [2003] 1 I.R. 465, there was a failure of the defendants as employers to take proper precautions for the safety, health and welfare of the plaintiff, as a result of which the plaintiff was exposed to asbestos. The plaintiff suffered from a recognisable psychiatric risk as a result of being informed of the risk that he might contract a painful and potentially lethal disease (mesothelioma) because of the exposure. Keane C.J. stated at p. 474:-

> "Since Bell v. Great Northern Railway Company of Ireland (1890) 26 L.R. (Ir.) 428 (following the earlier unreported decision of Byrne v. Great Southern and Western Railway Company of Ireland (1884) cited at 26 L.R. (Ir.) 428), it has been the law in Ireland that a plaintiff who sustains what has usually been described as 'nervous shock', even where unaccompanied by physical injury can recover damages, where the other ingredients of negligence are established. It was undoubtedly the law that damages were not recoverable for grief or sorrow alone; no degree of mental anguish arising from the wrongful acts or omissions of another was compensatable at common law. But nervous shock, even where there was no physical injury or even fear of such injury, was compensatable when caused by the negligence of a defendant."

42. The Supreme Court held that the law should not be extended by the courts to allow the recovery of damages for psychiatric injury resulting from an irrational fear of contracting a disease because of his negligent exposure to health risks by his employer, where the risk was characterised by their medical experts as very remote. Keane C.J. stated that since the plaintiff suffered no physical injury which might "piggy-back" a psychiatric injury, and since the respiratory consultant was not asked to quantify the risk of the plaintiff developing mesothelioma, the issue for determination by the Supreme Court was simply stated:

> "The issue, accordingly, which this court has to resolve is whether the plaintiff was entitled to recover damages for the impairment of his 'mental condition' which, according to the evidence of the psychiatrist, has resulted from his exposure to the risk of contracting mesothelioma, a risk which, it is beyond argument, was created by the failure of the defendants to take the precautions which a reasonable employer would have taken to ensure that he was not exposed to any such risk."

43. This issue, according to Keane C.J., in turn depended on whether the consequences for the plaintiff ought reasonably to have been foreseen by the defendants. Whether the absence of the reasonable foreseeability element is fatal because either there is no duty in such a situation or because the damage is too remote does not need to be determined, in Keane C.J.'s view, since it is an essential element for liability under both headings.

Keane C.J. held at p 482:-

> "Before considering the policy arguments that arise in the present case, it is right to say that although, as I have already pointed out, the courts have for long approached cases of psychiatric disorder on the basis that illness of that nature can be as real, painful and disabling as physical injuries, that is not to say that there are not special considerations applicable to such cases which must be borne in mind when the broader policy arguments are being considered. Thus, as I have already noted, the law, while recognising that damage, in the form of a recognisable psychiatric disorder, is compensatable, does not permit the recovery of damages for mental anguish or grief which results from a bereavement or injury to a member of one's family caused by another's wrong. It is clear, however, that grief or mental anguish of that nature can result in recognisable psychiatric illnesses such as a reactive depression, and, in the light of developments in psychiatric medicine in recent decades, it must surely be questionable whether the inflexible boundary drawn by the law between recognisable psychiatric conditions, which are compensatable and grief or mental anguish, which is not, is entirely logical. The fact that the latter category is not compensatable is because the courts have adopted a pragmatic approach and have left it to the legislature to determine when and to what extent, such undoubted suffering should be the subject of an award of damages (as under s. 49 of the Civil Liability Act 1961)."

44. In Philp v. Ryan [2004] 4 I.R. 241, the plaintiff was diagnosed with prostate cancer. This diagnosis had been missed by the defendant eight months earlier. The plaintiff was awarded damages in the sum of €45,000 in the High Court for the distress suffered as a result of the negligence of the first defendant. On appeal, the Supreme Court held that the plaintiff was entitled to aggravated damages by reason of the behaviour of the defendants in the preparation and presentation of their case. Aggravated damages could be awarded in claims of negligence. The court was entitled to infer the probable effect this false information had on the plaintiff. The plaintiff clearly would have suffered additional stress and anxiety in the belief that there was, at least in documents shown to him, a strong defence to his action. The loss suffered by the plaintiff was greatly increased due to the grossly improper behaviour of both the defendant and his legal advisors.

45. The issues on this appeal did not, however, address the nature of the injury sustained by the plaintiff and his entitlement to recover in the absence of psychiatric injury as such. The case cannot therefore be considered to be a departure from the principles declared by the Supreme Court. The High Court judgment, moreover, may be distinguished from the present on the basis that the misdiagnosis was established, as was its impact on the plaintiff, its foreseeability and there was not any element of the irrational in the plaintiff's reaction.

In Larkin v. Dublin City Council [2007] IEHC 416, the plaintiff was a fireman who was employed by the defendant. He was wrongly informed by defendant that he had succeeded in an internal promotional exam. Subsequently, the plaintiff was informed there had been an error and the result was corrected. He sued the defendant. Clark J. held that although the defendant owed a duty of care to the plaintiff in the matter, and there had been a breach of that duty, since there was no recognised psychiatric illness, in the sense that term was used in Kelly v. Hennessy, no liability would be imposed on policy grounds. Having examined the conditions set down by the Supreme Court, Clark J. dismissed the claim as follows:

> "The plaintiff did not and does not suffer from a recognisable psychiatric condition. He suffered undoubted upset, humiliation, sensitivity and disappointment but required no treatment or medical intervention. His employers quite correctly offered a full and unreserved apology as soon as the mistake was discovered and he was offered €5,000 as an ex gratia payment. Counselling was offered and availed of. A period of six months paid leave was permitted during which time he stayed away from work while leading a normal life. He then returned to the work which he loves and where the uncontroverted evidence is that he is an excellent and committed fire-fighter. He has not established any psychiatric illness such as depression or indeed any other illness. He is therefore akin to the person who suffers grief and distress who for public policy reasons is excluded from the recovery of damages. While there was a breach of duty it did not give rise to any injury which entitles the plaintiff to recover damages. I would dismiss this claim."

46. It follows that if the case were to be accepted in full, as stated in the plaintiff's submissions, it would not amount to a cause of action in law. Assuming negligence, as alleged by reason of misinformation, the plaintiff does not suggest that he suffered psychiatric injury. He claims to have suffered something less than that, but maintains that he ought to be entitled to recover damages in respect of this lesser interference with his psychological equilibrium. On this question the law is clear and the trial judge correctly held that the plaintiff would not have been entitled to recover.

Summary Conclusions

1. This case was novel, speculative and difficult. The trial judge observed in the early part of the judgment how the nature of the case had altered over time, a point that is highlighted in the submissions of the defendant. The claim was that the defendant suffered distress and anxiety, not nervous shock in the sense of a recognised psychiatric injury. This arose from alleged failure to inform the plaintiff that he might not actually have MRSA despite testing positive for it and also in allegedly misinforming him as to negative test results. Ultimately, the claim was limited and narrowly based on what the plaintiff believed wrongly about MRSA.

2. The plaintiff himself, however, accepted that he was told about at least some negative results and that necessarily had to have happened prior to his discharge. The hospital was concerned about his mental health during his stay, when it was entirely understandable that he would be extremely anxious given the severity of the condition from which he was suffering and particularly the complications that followed the radical surgery that he initially underwent.

3. On the important questions arising from the plaintiff's case, the trial judge had to decide as between different versions of the facts principally relating to what the plaintiff was told. She made findings of primary fact as to credibility based on assessment of the witnesses, which is the exclusive preserve of the trial judge and not of a court of appeal.

4. The judgment contains a detailed analysis of the relevant parts of the evidence that required to be examined in order for the issues to be resolved.

5. The criticisms levelled by the plaintiff are unfounded and/or inapplicable. The judge addressed the relevant issues and decided them in light of the evidence. The judgment contains a full exposition of her analysis of the evidence in relation to the issues, her findings of fact, the reasons for those findings and her conclusions.

6. The judge was entitled to deal with counsel's failure to put Dr. Mayilone's evidence about the conversation to the plaintiff's witnesses in the manner that she did.

7. The judge's decisions in relation to negligence and breach of duty follow from her findings of fact.

8. The essential question for this Court is whether the judge was entitled to come to the conclusions that she reached. In my view, there was ample basis in the evidence for the judge to do so. In those circumstances, the case of Hay v. O'Grady [1992] I.R. 120 makes it clear that the findings are unimpeachable.

9. It is true that the trial judge did make an error of fact in the judgment in saying that there was no expert testimony that the hospital was under a duty to advise Mr. Hegarty that the diagnosis of MRSA would have to be confirmed by further tests and that his isolation was precautionary. However, in my view, nothing came of that and my remarks above concerning the nice distinction between being treated as if a person had MRSA and actually having it express my view that this matter is wholly unimportant.

10. In view of the evidence that is not disputed, namely, of the examination by the psychiatrist on 16th March 2007 at the request of the hospital of the plaintiff's subsequent medical history in his attendances with his General Practitioner, on a return visit to the defendant hospital and attendances at another hospital and that he availed himself of none of those opportunities to make any complaint about distress or anxiety in relation to what is now the subject of this case, the underlying factual basis of this case is fragile in the extreme.

11. For the plaintiff to succeed, this court would have to make new law on the availability of recovery of damages for distress and anxiety based on misinformation or even misunderstanding by the plaintiff and in the absence of any recognised psychiatric injury. There is nothing in the circumstances of the case or the evidence to warrant consideration of such a step.

47. I would dismiss the appeal.