THE COURT OF APPEAL

[2014 No. 334]

The President

Finlay Geoghegan J.

Peart J.

BETWEEN

ALAN O'LEARY (A MINOR SUING BY HIS SISTER AND

NEXT FRIEND, CHARLENE O'LEARY)

APPELLANT/PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE, IRELAND,

THE ATTORNEY GENERAL AND MARTIN HEALY

RESPONDENTS/DEFENDANTS

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

Introduction

1. The plaintiff was born on 1st November 1986 in Cork. He is incapable of independent living and is looked after by his sister. He suffers from intellectual deficits and has serious incapacities including mental retardation, learning difficulties, hyperactivity and other disabilities.

2. The claim made on his behalf in these proceedings is that he sustained brain injury caused by the measles vaccine which was given to him at the age of 15 months on 16th February 1988 by the fourth defendant, Dr. Martin Healy, a General Practitioner in Cork. He was given this treatment as part of a national programme of vaccination put in place by the State and administered by the first defendant, the HSE. It is not disputed that Dr. Healy performed the vaccination.

3. The claim against the doctor was in respect of negligence in allegedly failing to obtain the consent of the plaintiff's mother, and it was also alleged on the same basis that the administration of the vaccine by injection constituted a battery by the doctor unless it was excused by a valid consent of the mother.

4. The case against the State is summarised in the plaintiff's submissions on this appeal as being that the small group of persons who suffered injury as a result of receiving the measles vaccine in pursuance of a legitimate State immunisation scheme are the victims of an objective injustice "whereby their interests were sacrificed in the State's interest of promoting measles immunity generally within society". The State is accordingly obliged to compensate such persons who include the plaintiff among their number.

5. Proceedings were instituted in November 2002 on the plaintiff's behalf by his mother and next friend, but she died on 26th December 2007. The plaintiff was therefore left with a severe evidential deficit in regard to material aspects of the claim.

6. The oral evidence given on behalf of the plaintiff was provided by two independent expert medical witnesses, Professor Lesley Findley, consultant neurologist and Dr. Istvan Nagy, a neuroscientist. The plaintiff sought to rely on certain documentary material comprising health and development and medical records of the plaintiff that were obtained on discovery. In respect of a report of the Vaccine Damage Steering Group of the Department of Health published June 2009, it was submitted on behalf of the plaintiff that "this report described the scientific and moral basis upon which the authors of the report considered that the State was obliged to make reparation to those injured by the system of vaccination operated by the State".

7. The case was heard in the High Court before Quirke J. over eleven days in June and July 2011. After the evidence of the plaintiff

had concluded, the defendants applied to dismiss the plaintiff's claim on the grounds that the evidence relied on to support it fell short of the requirements in law to establish a prima facie case against the defendants. The judge delivered an ex tempore ruling in which he acceded to the applications. From that decision, the plaintiff appeals to this Court.

The Judgment of the High Court

8. Quirke J. said that in making his determination, he was "required to take the evidence adduced on behalf of the plaintiff at its highest point". He began with the case against the General Practitioner, Dr. Martin Healy. The judge recorded Professor Findley the consultant neurologist as confirming that his criticism of Dr. Healy was confined to the fact that the medical notes recording the visit of the plaintiff [on 16th February 1988] during which the plaintiff was injected with the Measles vaccine, did not record warnings or advices by Dr. Healy to the plaintiff's mother of risks attendant upon the injection with the vaccine. Professor Findley was of opinion that Dr. Healy ought to have made a note recording an appropriate warning dealing, inter alia, with the remote risk of brain damage associated with the vaccine. He admitted that he was unfamiliar with the practice of notation by general practitioners in Cork in 1988 in regard to informed consent. The judge said that there was no evidence to enable the court to determine what the probable reaction of the plaintiff's mother would have been if a warning, as specified by Professor Findley, had been given.

9. The judge considered the contention on behalf of the plaintiff that the court should infer from the absence of a note that Dr. Healy had failed to give the requisite warning and that this represented prima facie evidence of negligence on his part. He said that the difficulty was that even if such inference could be drawn, no evidence had been adduced to indicate that the plaintiff's late mother would have refused to permit vaccination to go ahead. Quirke J. said that Dr. White, the plaintiff's counsel, "acknowledges that this absence of evidence is potentially fatal to the plaintiff's claim in relation to informed consent. He contends, however, that he can overcome this evidential deficit by introducing the plaintiff's claim within another concept".

10. That alternative basis was the proposition that giving the child the injection constituted a battery unless it was carried out with the consent of the child's parent and guardian. Therefore, the default position, according to Counsel, was that there was a battery but it was capable of being rebutted by evidence of consent. That would have to be a proper consent, failing which the inference of a battery would stand. The judge cited McMahon & Binchy 'Law of Torts' under the heading 'Consent to Medical Procedures' and quoted a substantial passage dealing with the case of Walsh v. Family Planning Services [1992] 1 I.R. 496, where O'Flaherty J. said: "If there had been a failure to give a warning as to possible future risks that would not involve the artificial concept of an assault, but rather a possible breach of a duty of care giving rise to a claim in negligence. Claims of assault should be confined to cases where there is no consent to a particular proceeding and where it is feasible to look for a consent". Finlay C.J. agreed with O'Flaherty J. who had adopted the view of Laskin C.J. in the Canadian case of Reibl v. Hughes that the tort of battery should be restricted to circumstances of "misrepresentation or fraud to sever consent to medical treatment". Quirke J. adopted that passage.

11. The judge held that the onus of proof rested on the plaintiff to which proposition there were very few exceptions and they did not apply in this case. They did not include claims where evidential deficits occurred by reason of the incapacity or even the death of essential witnesses. The judge then cited Geoghegan v. Harris [2000] 3 I.R., where, at p. 536, Kearns J. held that it was necessary for a plaintiff, not only to establish that a warning should have been given, but that a proper warning would have resulted in the person opting to forego the treatment. In this case, Quirke J. held that there was simply no basis for such an inference to be drawn in this case.

12. The judge said: "Dr. White does not suggest that evidence has been adduced from which this Court could infer that if the plaintiff's mother had been given an appropriate warning she would have refused to permit the plaintiff to be inoculated with the Measles vaccine. His contention in that respect has been premised on the argument that an action for a failure to obtain informed consent to a medical procedure should entitle the plaintiff to make a claim for damages for battery".

Since that was the only basis of criticism of Dr. Healy, the judge proceeded to dismiss the claim against him.

13. Quirke J. then turned to the claim against the State. He recorded Dr. White as claiming that "the absolute categorical and unequivocal nature of the unqualified warranty and assurance" gave an entitlement to compensation to a plaintiff if it proved that he suffered a brain injury as a result of inoculation. Such an event amounted to an interference with the right to bodily integrity of the person injured and that gave a right to compensation also. This right is independent of negligence or fault. The circumstance came about, according to Counsel, by objective injustice suffered by a small number of participants who suffered injury in a programme of national inoculation that was designed to achieve and did achieve benefits for a great many persons. Dr. White relied on the report of the Vaccine Damage Steering Group established by the State in early 2007 which published its findings in June 2009. That report recommended that the State should provide a Vaccine Damaged Payment Scheme for vaccine programmes, including the Measles Vaccine Programme. This should be on an ex gratia basis and no fault. But the State had not accepted or implemented the recommendations of the Steering Group.

14. The judge rejected the plaintiff's arguments. He held that the evidence adduced about the history of the introduction of the Measles Immunisation Programme by the State was sparse: "In general, it comprised observations made by Professor Findley upon the Steering Group's report of June 2009 and upon a newspaper advertisement and some literature circulated by the State to General Practitioners and others". He noted that Professor Findley had stated that the programme was "safe, desirable and necessary for the health of its citizens and in particular its children". Statistically, the risk of brain damage for children who did not receive a Measles vaccine was far greater than for those who did, "he agreed that it was reasonable and appropriate that the State should not, when promoting its Measles programme, warn of a risk of brain damage to participants". The judge said that Professor Findley had not identified any literature or advertising material that was couched in absolute or categorical or unqualified terms. He concluded that no evidence had been adduced from which the court could "possibly infer negligence on the part of the State or a breach of the State's duty of care to the plaintiff". Neither could the court infer that the State had been in breach of any warranty or assurance provided by the State to the plaintiff because no evidence had been adduced to enable such inference to be drawn.

15. The judge rejected the proposition of legitimate expectation based on the case of Webb v. Ireland [1988] I.R. 353. He held that a legitimate expectation must be grounded upon a representation or promise and neither was present in this case. He also dismissed the claim that the State was under an obligation to compensate any person who was injured while participating in a public health programme promoted by the State. The decision by the State to accept or reject the Steering Group's recommendations was a matter for the Executive and Legislative branches of Government. The courts would not interfere with that exercise. That was a policy decision for the State.

16. The judge rejected a claim of vicarious liability by the State for Dr. Healy's actions on the basis that he had found the latter not

to be negligent. The judge also declared, on the question of causation, that he had "found that the evidence adduced on behalf of the plaintiff has disclosed no cause of action against any of the defendants". That finding applies whether or not the plaintiff's injury has been caused by his injection with the Measles vaccine. The complex issue of causation in the case was accordingly moot and he did not believe it was appropriate to make any definitive findings upon the evidence adduced by the plaintiff at this point in the proceedings and in the context of applications by the defendant for non-suits.

The Appeal: The Plaintiff's Case

17. The plaintiff put forward 30 grounds of appeal which were amplified in written submissions and argument. Dr White argued that it was unjust and inequitable that the case was dismissed after the defendants had cross-examined the plaintiff's expert witness on the basis of the evidence that Dr. Healy and the defendants' own expert witnesses would give. Yet, these witnesses were never called to give evidence, and as a result were not subjected to cross-examination by the plaintiff's Counsel. It is submitted that it is fundamentally unfair to rely on what evidence witnesses will give to challenge evidence and then not to call said witnesses. That was a breach of common law fair trial procedures; of Article 40.3 of the Constitution and Article 6.1 of the European Convention of Human Rights.

18. The plaintiff submits that the judge failed to deal with the evidence adduced before the court and had erred in relation to the facts. Facts that the plaintiff submitted had been established were: that the measles vaccination campaign had been conducted on the basis that an unqualified representation or warranty had been made that the vaccine was safe; the manufacturer of the vaccine had advised that the vaccine should be given with caution to a child below 24 months, in cases where there was a family history of convulsions; that Dr. Healy's records were grossly incomplete; that there had already been concerns raised that the plaintiff was suffering from a delayed development disorder and neurological conditions related to speech; that there was a family history of convulsions and epilepsy; that Dr. Healy was aware of this medical history because when he had previously excluded the Pertussis vaccine from the combined "3-in-1" injection (Dyptheria, Tetanus and Pertussis) for the recorded reason of family history, along with the developmental concerns. In addition to these facts, it was submitted that the plaintiff had undergone a complete change in behaviour and personality soon after receiving the vaccination, from being a placid child to one exhibiting hyperactivity. This was submitted as evidence that the vaccination had caused the difficulties that the plaintiff has suffered subsequently.

19. The judge should have inferred that Dr. Healy did not obtain the consent of the plaintiff's mother from the absence of any records stating that a warning or consent had been provided. The judge erred in determining that even if the above inference could be drawn from the evidence, no evidence had been adduced as to what the mother's reaction to such a warning would have been. The correct approach was, first, to consider the circumstances that existed at the time of the vaccination, applying the criterion of decision-making applicable to a submission of no case to answer. The next step was to consider the nature and extent of the information and warning required to be given to the plaintiff's mother in those circumstances. It was only then that the court could address the question of what the mother would have done. The mother, if properly informed, would have postponed the vaccination. Furthermore, as the judge did not determine the nature of the warning required, it was impossible to contemplate what the mother's reaction would be to such a warning. The judge misapprehended the evidence of Professor Findley that the plaintiff's mother should have been counselled with all the information necessary to make an informed decision.

20. Regarding the plaintiff's case under Article 40.3 of the Constitution, it was submitted that the plaintiff was seeking the fulfilment of an existing constitutional obligation and was not inviting the court to encroach on the role of the Oireachtas or Government.

21. In relation to the measles vaccination programme, it was submitted that the learned judge had been wrong in finding that Professor Findley had stated that the vaccination programme was safe; rather, he had stated that the programme was safe only when appropriate warnings of the risks associated with it are given prior to vaccination. There was a legitimate expectation that the infant plaintiff was entitled to reparation in circumstances where he suffered injury, albeit without any fault at the hands of the State, in the sense that he was injured by the measles vaccine which is overall a useful thing, but some people will suffer a reaction to it.

22. This Court should overrule the decision in Geoghegan v. Harris [2000] 3 I.R. 536 because of the House of Lords decision in Chester v. Afshar [2005] A.C. 134 (H.L.(E)).

23. The law of trespass to the person imposed on the doctor the burden of proving that he had consent for the vaccination. Dr. Healy might have provided such evidence but as he had not given evidence this could not be determined.

24. In regard to the hospital and other records, which were admitted as records for the purpose of the hearing and they had been the subject of an order for discovery but they were not admitted as evidence of the truth of what they contained, Dr. White put forward a number of suggested bases as to why this material should be admissible in evidence, but none of them represented an exception to the hearsay rule. He said that the nurses who compiled these records – which would be the case with some of them at least – were employees of the State, and he cited similar reasons for why the medical notes and records should be admissible as evidence of the truth of what they said.

Submissions of the State Defendants

Non-suit

25. The defendants submitted that the High Court correctly identified and applied the legal principles relevant to the non-suit applications on behalf of the defendants, citing a series of authorities that will be considered below: O'Toole v. Heavey [1993] 2 I.R. 544; Hetherington v. Ultra Tyre Service Limited [1993] 2 I.R. 535; O'Donovan v. Southern Health Board [2001] 3 I.R. 385; Schuit v. Mylotte (Unreported, Supreme Court, 18th November 2010); Murphy v. Callanan [2013] IESC 30 and Moorview Developments Ltd. v. First Active plc. [2009] IEHC 214.

26. There is no basis for the contention by the appellant that the defendants' conduct of the case – and, in particular, the manner in which they cross-examined his two expert witnesses – committed them to leading their own evidence and precluded the High Court from determining the applications until they did so. Nor is there any basis for the contention that the procedure was unjust or inequitable or that it entailed a breach of fair trial procedure, Article 40.3 of the Constitution and/or Article 6.1 of the European Convention on Human Rights.

Causation

27. It was submitted that the High Court was correct to hold that the issue of causation was moot. The plaintiff had to make out a prima facie case that his disabilities were caused by the measles vaccine and that the defendants were prima facie responsible in law for causing the injuries. There was no onus of disproof on the defendants in this regard. The plaintiff failed to discharge that onus on the evidence and there was no basis upon which the High Court could have made the requisite findings or inferences in favour of the plaintiff in that regard.

28. The basis for an expert opinion must be proved. This applies to facts derived from hospital records as to any other type of factual evidence. These parties cite in support the comments of Heffernan in Chapter 5 of 'Medical Negligence Litigation: Emerging Issues' (First Law, 2008) (Craven and Binchy Eds.) where it is observed that:

> "Typically, much of the relevant factual information on which the expert relies has been gleaned second hand. Any such facts must be proved at some point in the proceedings by other independent evidence, a technical obstacle that is side-stepped in examination in chief through the expedient of Counsel asking the witness to couch his or her expert opinion in hypothetical terms. The opinion is elicited in the form of responses to a series of hypothetical questions which assume facts that have yet to be proved by the party presenting the expert testimony. The expert's opinion is thus intrinsically linked to the promised proof of the facts on which the hypothesis is based."

29. In circumstances where the plaintiff called no factual evidence, the necessary factual foundation for the opinions of the plaintiff's experts was absent. The vicarious liability claim also failed because there was no evidence that the doctor was an employee of the State defendants when administering the vaccine to the plaintiff and not an independent contractor.

Consent

30. In Geoghegan v. Harris, and other cases subsequently decided in which it was approved, Kearns J. held that "[i]t is not sufficient to establish that a warning should have been given that was not given to entitle the plaintiff to recover damages" and that the plaintiff "must also establish that had he been given a proper warning he would have opted to forego the procedure".

31. The plaintiff in Chester v. Afshar [2005] AC 134 would have deferred the operation if she had been informed of the risks and the decision is distinguishable and is not the law here.

32. The strict liability claim could not succeed; the evidence established that it was a safe vaccine which was administered by a qualified medical professional who would advise as appropriate in relation to the risks of its administration.

33. A determination that the State is strictly liable for injuries sustained as a result of the administration of the measles vaccine – or vaccines generally – is a policy matter for the Legislature and not the courts because of the separation of powers.

34. The plaintiff, through Counsel, acknowledged the difficulties in the negligence claim and the case is unsustainable under that head.

35. The report of the Steering Group, and the other documents upon which the plaintiff relied, were not admitted as proof of their contents. So far from being bound to make the findings which the appellant contends should have been made on the basis of the Steering Group report, there was no basis upon which the High Court could have made such findings.

36. The court held that a legitimate expectation must be grounded upon a representation or promise, but there was no evidence of either.

Dr. Healy's Case

37. The plaintiff had to prove that Dr. Healy failed to obtain the informed consent of the plaintiff's mother, and that had she been given the appropriate warnings she would not have proceeded with the vaccination. Since no evidence reasonably capable of proving a lack of fully informed consent was adduced, the question of causation was moot, as the judge found.

38. The defendant was not required to go into evidence. The mere fact of putting to the plaintiff's witness what the evidence was going to be did not preclude seeking a direction at the conclusion of the plaintiff's case.

39. In O'Toole v Heavey [1993] I.R. 544, Finlay C.J. stated that the correct test was whether the plaintiff had made out a prima facie case against the defendant. There was no evidence from which the trial judge could conclude that Dr. Healy was liable and he was correct in his finding.

40. There was no evidence to establish causation. The evidence of Professor Findley was based on medical records and so was hearsay. In respect of Dr. Nagy, his only source of information was the report of Professor Findley. Additional evidence that the respondents submitted included medical records that stated that the source of the plaintiff's febrile seizures were diagnosed as having been caused by a fever, the source of which had been acute purulent tonsillitis. Furthermore, none of the doctors treating the plaintiff in respect of his developmental problems suggested that this was caused or contributed to by the measles vaccination.

41. As the plaintiff did not call any family members, treating doctors or nurses to give evidence in relation to the plaintiff's medical condition before or after the vaccination, there was no evidence of causation. Evidence is required of the primary facts relied upon. Evidence was also required from a doctor qualified to give it of the professional standards pertaining at the time of the administration of the measles vaccine to the plaintiff. In the absence of such evidence, there was no basis for concluding that Dr. Healy deviated from the approved practice. As a result, it was submitted that there was no evidence sufficient to ground a finding of liability against Dr. Healy.

42. In response to the plaintiff's reliance on the English case of Chester v. Afshar [2005] 1 AC 134, it was submitted that this case can be distinguished as the plaintiff in that case was particularly anxious about the risks of a proposed procedure and made specific enquiries which were brushed off in a light-hearted manner by the treating doctor. Furthermore, the Irish authorities do not require

that all risks are disclosed in relation to elective procedures. However, the doctor must disclose all known risks of grave injury or severe pain. The obligation of disclosure is greater the more elective the nature of the procedure. Irish authorities cited included: Walsh v. Family Planning Services [1992] I.R. 496; Farrell v. Varian (Unreported, High Court, O'Hanlon J. 19th September 1994) [1994] WJSC-HC 2813; Bolton v Blackrock Clinic (Unreported, High Court, Geoghegan J. 20th December 1994) [1995] WJSC-HC 239; Geoghegan v. Harris [2000] 3 I.R. 536; Winston v. O'Leary (Unreported, High Court, MacMenamin J. 19th December 2006) and Fitzpatrick v. White [2008] 2 I.R. 551. A plaintiff cannot recover damages on proof only of an absence of informed consent; a causative connection is required to be established on the balance of probabilities, between the breach of duty and the injury suffered.

43. Since the mother presented the child to Dr. Healy for treatment, she had provided a basic consent, which absolved Dr. Healy of any liability for trespass.

44. Regarding informed consent, the test is what would a reasonable person in the position of the plaintiff's mother have done? This test requires oral evidence to be given by the party who is faced with giving the consent. The evidential deficit in this case cannot be overcome by calling expert witness, who may only give evidence on disclosure practices and clinical experience. In this case, the expert witnesses were not in a position to give such evidence. In response to the plaintiff's submission that no written consent was obtained, the respondents raise the point that subsequent to receiving the measles vaccination, the mother signed a written consent form for the measles/rubella vaccine at school. On the form, the mother stated that the plaintiff had previously had the measles vaccination and that he had had no major reaction to same. If proven, the said consent form would amount to evidence that she would have probably signed a consent form for the measles vaccine. In the absence of the mother's evidence or that of a suitably qualified and experienced General Practitioner, no prima facie case was established on the issue of whether fully informed consent was obtained, and as a result the learned judge was correct in dismissing the case.

Discussion

(a) General Comment

45. The case began with an opening presentation by counsel for the plaintiff, Dr. John White S.C. Professor Findley was called and he gave his evidence-in-chief which was almost completed in one day. His cross-examination was postponed because he was not available on the following day, a situation that is relatively common in medical negligence actions. Dr. Nagy then gave his evidence in chief and was cross-examined and that went into another day. At the end of Dr. Nagy's evidence, there was some discussion and Counsel for the plaintiff told the court that his only other witness was Professor Findley, whose examination in chief remained to be completed and who would then be cross-examined by counsel on behalf of the two defendant parties. At this point, Mr. Sreenan S.C. for the HSE/State parties notified the court and the plaintiff that issues would arise in relation to evidential deficits unless they were repaired. He noted that the schedule of witnesses had six witnesses, whereas the plaintiff was only intending to rely on Doctors Nagy and Findley and no other evidence. He mentioned that the hospital and medical discovery had been made available but had not been proved. Neither was there any evidence as to fact, as he asserted. He made clear that it could not be presumed that the contents of the discovery material were to be considered as evidence given in the case.

46. Although the trial judge did not rely on this fact in his judgment on the applications for dismissal and concentrated instead on the cross-examination and examinations of Doctors Nagy and Findley, the evidential deficit in regard to the basic facts of the case cannot be ignored. It is particularly relevant to the contentions made on behalf of the plaintiff as to facts that it is proposed the trial judge ought to have found or inferred when he was deciding the question.

47. In cross-examination, Professor Findley reduced his criticism of Dr. Healy to the failure to warn the plaintiff's mother about the remote possibility that her child might have an adverse reaction to the measles vaccine. He acknowledged that the danger that measles represented vastly outweighed the matter requiring caution. The plaintiff argues that his witness's concessions were based on things that were put to him as facts when he was cross-examined, but were not proven at the time of the dismissal application. That point is correct factually, but it does not mean that the procedure was flawed.

48. It is true that what Counsel put to the witness was not evidence. The expert had given his opinion evidence to the court in direct examination and was being challenged by the defence. The doctor's Counsel did so, first, by reference to the factual assumptions on which the Professor based his opinion that the doctor was negligent, to use a shorthand term. (It may be objected that negligence is a conclusion for the court to reach). Secondly, Counsel set out his expert testimony, putting it to Professor Findley for his comments.

49. All of the expert witnesses had in common that their function was to give the court their opinions based on facts that had to be established in court by other evidence or by agreement. The expert provides an analysis based on facts that have been given to him or which he has deduced from documentary records. He cannot vouch for the facts or the accuracy of what is in the records; that must be proved by witnesses to fact or it may be agreed.

50. The exchange between Counsel and Professor Findley was therefore hypothetical on both sides. This witness had not proven any fact.

51. The plaintiff had to prove that the GP did not warn the mother. The expert said that the record did not say he warned her so it could be inferred that he did not. The record was the defendant's patient sheet for the child, so proving that document would not be particularly difficult, although a punctilious lawyer might look for formality. However, when the expert criticised the GP on other grounds, he was making assumptions arising from facts that required to be proven. For example, Professor Findley said that the GP should have advised postponement of vaccination because of the plaintiff's history of investigation for developmental delay, but that could only arise on evidence that Dr. Healy had that information or that he ought to have known. In the latter case, a factual basis for the inference would be needed.

52. The point is that it was not only the facts put by Counsel that were unproven at the time of the application, but the facts underlying the Professor's evidence. The purposes of putting facts that were to be the subject of defence testimony were to show that his assumptions were disputed, to invite his concessions on different facts and generally to question the basis of his criticisms of the doctor.

(b) Procedural Fairness

53. The plaintiff makes the case that the defendants were not entitled to a non-suit or direction because they had cross-examined on the basis that their witnesses would give evidence of particular matters that Counsel had put to Doctors Nagy and Findley. Also, they had put reports before the court which had the same consequence i.e. that they were not entitled to apply for a non-suit at the end of the plaintiff's evidence. Clearly, that would have suited the plaintiff because of the defendants had had to call their evidence, then it would have been open to Dr. White for the plaintiff and his colleague to cross-examine the experts and the defence witnesses with a view to seeking to find some chinks in the armour and establishing some weaknesses by probing questions so as to establish liability. That avenue was closed off because of the judge's ruling.

54. It was not suggested that the defendants had gone into evidence, and in my view, having regard to the transcript of evidence, I am satisfied that the defendants did not do so. The only specific item that I can find that could possibly constitute going into evidence is a document produced by Mr. Sreenan S.C. for the HSE/State defendants when he was cross-examining Professor Findley. The Professor quoted in his report from what he said was a data sheet about the measles vaccine that was produced by GlaxoSmithKline, the manufacturers. This was a misstatement because it was not a quotation from a GSK leaflet that was current or relevant at the time, but rather from a document issued by the Minister for Health at the time. It seems that this document was included in agreed books of documents, but there was some difficulty about locating it for the Professor during his evidence and Mr. Sreenan appears to have handed up a copy of the document from his side of the house. I cannot see that that could be reasonably considered to be going into evidence given that the quest was to search for the source of the quotation, having established that it did not emanate from the manufacturer's leaflets.

55. The next question is whether the cross-examination could have denied the defendants the opportunity of applying for a non-suit. There is no logical basis on which this could be the case, but the question is whether there is some rule of practice or procedure that might apply in favour of the plaintiff in the circumstances. I am specifically concerned with the issue of cross-examination. Counsel for each of the defendant parties put to the plaintiff's two experts certain statements that their witnesses were going to make or that were contained in reports from their expert witnesses whereby to contradict the experts giving their evidence. This did not constitute going into evidence and neither is there some other rule that would prevent the parties applying for a direction. Indeed, it would have been remiss of Counsel not to put their case to the expert witnesses. But by doing so, they were not advancing down a path that stopped them making the case at the end of the plaintiff's evidence that they did not have a case to meet. It would be a rule that was unjust and unfair and would also make no sense if such were the case. There is no such rule. The point is that Counsel is required to put the case for the defence to the witnesses for the plaintiff so that the latter have the opportunity of commenting on the evidence. Otherwise, the plaintiff witnesses have to return to give evidence in response to what has been said by the defence experts. There is often a battle in court as to whether evidence has been put to the plaintiff's witnesses in full or at all and it is a regular feature of forensic debate. But the basic point is that the appropriate and proper thing to do is for Counsel to put the case to the plaintiff's witnesses.

56. Such putting of the defence evidence is always done with the implied but unspoken – usually but not always – understanding that this evidence would be given, if necessary i.e. if it comes to that in the course of the case. There is always an implicit reservation of that kind. And even if there were no suggestion, or even understanding, implicit or otherwise to that effect, how could a defendant, in justice and fairness be shut out from making an application that there was no case to meet in the event that there was some failure of the plaintiff's proofs. The trial judge's role is to ensure that fairness prevails and so no unjust advantage is taken of the plaintiff. On the other hand, the nature of litigation is that one party presents and the other party defends, and if the claimant does not succeed in making out a prima facie case, then the other party is entitled, as of right, to have the action dismissed. To do otherwise is to impose on a defendant an obligation to prove a negative, that the defendant is obliged, in the case of a claim made against him or her, to positively demonstrate by evidence that he or she was not to blame in the circumstances. There is no such obligation.

57. What could the plaintiff have done? A plaintiff in this situation has a number of options. The most obvious one is, first, to ensure that the discovery material is formally proved as being the records of the hospital or the doctor, as the case may be. That may mean having subpoenas issued to a number of witnesses and the usual response, if that happens, is for the defendant to agree that the discovery material can be, not alone confirmed as the medical records, but can also be used as evidence of the contents thereof. In default of agreement, it is necessary to produce the relevant witnesses to prove the documents. A court is going to be sympathetic to a plaintiff if faced with opposition from a defendant which is considered unreasonable, which it would be if the defendant actually persisted in resisting the admission of the documents discovered as evidence of their contents. So, this point alone is not one on which a court would be comfortable in giving a direction. Nevertheless, the hearsay rule is what it is and is still applicable in our law.

58. It is also open to the plaintiff to call the relevant defendant witnesses to give evidence of the facts, but in that situation he is not in a position to have his Counsel cross-examine the witnesses. That is a major disadvantage. The more usual option is to apply for interrogatories and to seek to prove as much of the case as possible by this means, whereby a defendant is required to answer questions on foot of a court order to that effect. By assembling as much material as possible, whether by way of discovery or interrogatories or by seeking further and better particulars as appropriate, a plaintiff seeks to assemble the case as best he can.

59. It also a matter of great importance to assemble the correct expert witnesses. This in itself is probably the most important step because the right experts can actually analyse the documents and put a plaintiff in a position to make as strong a case as possible. I do not think that happened in this case. I have mentioned Professor Findley's involvement in the case and how it came at relatively late stage and then was reactivated after a dormant phase. As for Dr. Nagy, he was brought into the case no more than a couple of weeks before the actual hearing. He was asked to furnish a view as to two questions that were contained in the instructing solicitor's letter to him and I have to say I find some difficulty in actually understanding the questions that were asked in the letter. I think that they mean to ask him for his expert view on the risk of brain damage to a baby who has a high temperature of perhaps 105° Fahrenheit. My understanding is that the doctor was inclined in the first place to say that if a baby got such a temperature, then there was a significant danger of brain damage as a result. But when he was pressed on this, he was unable, as far as I can se from the transcript, to produce any relevant peer-reviewed documentary material in support. He had actually, as it seems to me, overstated the position very substantially by not explaining that this would apply for a prolonged period of high temperature and in a child or infant who was already vulnerable. All that is to leave out of contention completely the actual evidence as contained in the medical records or indeed the lack of medical evidence.

(c) Application for a Direction

60. If, at the conclusion of the evidence for the plaintiff, the defendant applies for a dismiss and Counsel making the application indicates that, if refused, his client intends to go into evidence, then the issue is whether the plaintiff has made out a prima facie case.

61. Where more than one defendant is sued and claims for contribution have been made between the defendants on the basis that they are joint tort-feasors, the trial judge should not decide on an application for a non-suit made at the conclusion of the plaintiff's evidence unless he is completely satisfied that the eventual outcome of the case could not result in the patently unjust anomaly that the plaintiff could lose out because the remaining defendant was able to put the blame on the defendant already dismissed.

62. Where a plaintiff has not made out any form of plausible or arguable case against any of the defendants, it must remain clearly within the discretion of a judge to dismiss the action in its entirety at that stage. See Hetherington v. Ultra Tyre Service Ltd. [1993] 2 I.R. 535 and O'Toole v. Heavey [1993] 2 I.R. 544.

63. The question is whether there is a case to meet: see O'Donovan v. Southern Health Board. In Murphy v. Callanan [2013] IESC 30, Denham C.J.said that "a judge when applying the correct test, even though he or she is bound to take a plaintiff's case at the highest mark, would be entitled to dismiss if a plaintiff had not established a prima facie case, or if a plaintiff's case manifestly lacked credibility and no sufficient weight could be attached to it".

64. In my judgment, there was no case for the defendants to meet at the close of the plaintiff's case and the judge was obliged to accede to the applications.

65. The plaintiff's case was that the report of the Vaccine Damage Steering Group of the Department of Health (June 2009) was admitted into evidence. The group said that in circumstances "where the State actively encourages all parents to participate in a national immunisation programme, the group concluded that there is an onus on the State to look sympathetically at the very rare number of cases where children suffer serious adverse reactions because of their participation". The group recommended that the State should make payments to individuals who suffered an adverse event following immunisation where damage occurred as a result, on the balance of probabilities. So, the first point that the plaintiff relies on is the contents of this report. The State did not and has not put in place a compensation scheme for children or persons who are damaged as a result of having been vaccinated. The plaintiff says that there is a duty on the State to do so, and not only that, but that the plaintiff has a right to be compensated in view of the onus recognised or accepted by this advisory group.

66. The trial judge held against this proposition on the basis that the court was not entitled to legislate for a scheme of compensation and that was entirely and exclusively within the province of the Oireachtas. A decision that the State is strictly liable for injuries resulting from the administration of a vaccine is a policy matter for the Legislature and not the courts because of the separation of powers.

67. The report of the Steering Group and the other documents upon which the plaintiff relied were not evidence in the case. The court could not have made findings based on their contents.

68. The court held that a legitimate expectation must be grounded upon a representation or promise but there was no evidence of either. Again, there was no evidential foundation for such a finding.

69. Dr. Healy's clinical records relating to the plaintiff's vaccination merely stated "measles vaccine" in respect of the vaccine administered on 16th February 1988. Dr. Healy did not record details of any consent that he obtained from the mother. That did not constitute evidence of any relevant failure on his part in regard to treatment or advice; any such basis of criticism had to be founded in evidence. Since the doctor did not give evidence and the mother is unfortunately deceased, there is simply no evidence on this point. Dr. White SC makes the case and Professor Findley stated in evidence that he would have expected and would have regarded it as good practice for the General Practitioner to record the fact that he had obtained the mother's consent to the vaccination, and indeed that he had warned her about the possible serious side effects, including brain damage. That seems to me to be going very far by way of warning but that is the case that is made. However, the bigger problem that the plaintiff faced was that the failure of the doctor to write down the terms in which he obtained consent and what he said and what warnings he gave is no indication and no basis for the Court deciding that he did not give an appropriate warning. There is simply no evidence about the matter one way or the other and the failure to record is not evidence that it did not happen. The Professor was also at a disadvantage in not being able to speak about proper practice in the case of a General Practitioner back in 1989/1990.

70. It strikes me that the reality is here that the plaintiff's case is that the doctor should simply not have given the vaccine and that it was negligent in the circumstances for him to do so. If the mother had requested the vaccine, then it would seem to be the plaintiff's case that the doctor should actively have advised her not to have the baby vaccinated. Of course, if the child then contracted measles and suffered seriously as a result, there would be nobody to blame but the doctor. That is one of the difficulties that arise in any of the vaccination cases, but it is not a matter for this case.

(d) Consent

71. The leading Irish authority is Geoghegan v. Harris [2000] 3 I.R. 536, which was adopted and approved in subsequent decisions of the Supreme Court and followed in the High Court. See Fitzpatrick v. White [2008] 2 I.R. 551 and Winston v. O'Leary (Unreported, High Court, MacMenamin J. 19th December 2006). Other Irish authorities cited included Walsh v. Family Planning Services [1992] I.R. 496; Farrell v. Varian (Unreported, High Court, O'Hanlon J. 19th September 1994) [1994] WJSC-HC 2813 and Bolton v. Blackrock Clinic (Unreported, High Court, Geoghegan J. 20th December 1994) [1995] WJSC-HC 239.

72. A plaintiff cannot recover damages on proof only of an absence of informed consent; a causative connection is required to be established on the balance of probabilities, between the breach of duty and the injury suffered. In Geoghegan v. Harris, Kearns J. held that it was "not sufficient to establish that a warning should have been given that was not given to entitle the plaintiff to recover damages" and that the plaintiff "must also establish that had he been given a proper warning he would have opted to forego the procedure".

73. The Irish courts have not adopted the test in Chester v. Afshar [2005] AC 134 and subsequent English cases. It also seems to me that that decision can be distinguished on the facts as found. The High Court judge relied on the decision in Geoghegan v. Harris [2000] 3 I.R. 536 and the appellant's submission in this case boldly declared that this court should overrule the decision, but the authority is clearly established in our law until overturned by the Supreme Court.

74. The judge's reference to the absence of any evidence as to what the mother would have done if she had been properly advised is correct as a statement about the state of the evidence. It is impossible to criticise the trial judge for holding that there was no evidence one way or the other as to what the doctor said to the plaintiff's mother. Applying the Geoghegan test would assess the

question by reference to the reasonable person in the situation, unless there was some specific information to show how the particular person would have responded.

75. In my view, applying the criterion of the reasonable person who had brought her child to the doctor for vaccination does not advance the plaintiff's case any further towards cogency sufficient to avoid being non-suited. Professor Findlay acknowledged that the features that in his opinion demanded a warning because of increased risk of brain damage depended on there being evidence that Dr. Healy knew about those matters.

Conclusions

76. The fact that the judge entertained an application for the dismissal of the action at the close of the plaintiff's evidence is not a good ground of appeal. This was a matter of discretion and the trial judge exercised it properly. The defendants were not making a case one against the other; there was therefore no possibility of a continuing defendant being able to escape liability by passing the blame onto one whose application had succeeded. The judge followed the jurisprudence on this procedural issue. He considered the relevant points and applied the correct test, which was to take the plaintiff's case at its highest.

77. The cross-examination of Professor Findley did not create an obligation on Dr. Healy or the State to give evidence. What happened was normal and appropriate practice which is actually intended to promote fairness in the procedure of the trial. A party is not precluded from applying for a non-suit because his Counsel has cross-examined the opponent's witnesses. Apart from questions designed to explore and test the evidence that was given in this case by the plaintiff's expert, the purpose of putting the defence case is to afford the testifying witness an opportunity of commenting and rebutting evidence of fact or opinion that has not yet been given. Witnesses testifying for the defence are aware of the evidence that has been given for the plaintiff and can address it directly. The process of putting evidence is for the purpose of apprising the testifying witness of what is going to come when the defence comes to give evidence, assuming that the defence does have to give evidence. It is a feature of daily practice in court for objections to be made to evidence given by defence witnesses on the ground that it was not put to the plaintiff's witness or witnesses. It is considered to be so serious to omit to suggest important matter that the defence testimony on the point may even sometimes be excluded, although the correct view would appear to be that failure to put evidence goes to considerations of weight rather than admissibility. It may also be suggested by counsel in cross-examining a witness for the defence that the failure of counsel for that party to put the testimony implies that the witness did not inform the defendant's representatives of the matter or even that it indicates recent fabrication.

78. The absence of a note recording that Dr. Healy obtained the consent of the plaintiff's mother to the vaccination of her child is another major plank of the appeal. As a matter of logic and evidence, failure to record can only be considered relevant if there was an obligation to make a note or if it was an accepted practice to do so. The plaintiff has to prove these facts in addition to the absence in order to ground the inference he seeks. It is true that the trial judge did not make a finding on this point, but proceeded instead to hold that since there was no evidence to suggest that the mother would have declined the vaccination in the event of a warning such as Professor Findley had proposed, the case could not succeed on that ground. In my view, the plaintiff's criticism of the trial judge for failing to make the finding that the doctor did not give a warning because it was not recorded in his note is not a valid criticism because the judge would not have been entitled to come to the conclusion that the plaintiff needs for this purpose.

79. The judge held that there was no evidence as to how the plaintiff's mother would have reacted to any particular warning, which is of course correct. Applying the test by reference to the reasonable person in the situation does not change the position. And there was no specific information to show how the particular person would have responded. There is still a test to be satisfied, even in the absence of any or any proper consent by or on behalf of a patient to a treatment given by a doctor, as to whether consent would have been given if proper advice and information had been furnished. The test that was expounded by the High Court in Geoghegan v. Harris was subsequently approved and applied by the Supreme Court in Fitzpatrick v. White and subsequent cases.

80. It is difficult to see how the trial judge could have decided differently than he did on the application by the defendants. He did not come to his conclusion because of the absence of evidence, except in regard to the second leg of the consent issue. The judge considered the evidence of Professor Findley in regard to the alleged negligence of the defendants without reference to the absence of any proof of the materials on which that expert based his opinion. There was in fact a dearth of evidence of any admissibility kind actually put before the court. The judge therefore not only took the plaintiff's case at its height but went further and considered the Professor's opinions as if they had been or would be founded on a basis of admissible evidence.

81. The plaintiff faced a formidable series of legal hurdles he would have to overcome in order to succeed. The many difficult legal questions involved, to name but two, the law on consent you and establishing liability on the part of the State irrespective of any fault. The issue of causation loomed large on the horizon. It was quite unrealistic to think that such enormous obstacles could be overcome by the evidence of a consultant neurologist and a non-practising medical neuroscientist, no matter how eminent they were in their fields.

82. The practical and procedural problems were just as daunting. There was a want of basic proof of what had happened to the plaintiff and why. Unfortunately, his mother had died in late 2007. The hospital notes and medical records that had been listed in affidavits of discovery and that had been furnished in copy form were not themselves evidence of their contents. They had to be proved before they had any status. In order to establish the contents as being true, the plaintiff would have had to adduce evidence of the persons who made the records. Agreement is often reached in these cases between the parties for the use of the medical and hospital records but if that does not happen, the ordinary rules of evidence apply. The question of admissibility of records arose in a criminal trial in England in 1965 and the law was changed by legislation in 1968. The Law Reform Commission discussed this question in a Consultation Paper in 2010. This case highlights the difficulty that the law of evidence presents when agreement cannot be reached for the production of records. The problem goes far beyond medical negligence cases but it is particularly acute in such litigation.

83. Many difficulties surround the use that the plaintiff might have been able to make of the Report of the Vaccine Damage Steering Group in 2009. The plaintiff submitted that it described the scientific and moral basis on which the authors considered that the State was obliged to make reparation to those injured by the system of vaccination operated by the State. It is sufficient to comment that the very fact of the report would have to be proved and that in respect of its contents and recommendations a veritable catalogue of evidential objections may be envisaged. Absent agreement between the parties as to the admission and terms of use of such a report, it has no evidential status.

84. In my judgment, the plaintiff has not demonstrated any basis for overturning the decision of the High Court.

85. Accordingly, I would dismiss the appeal.