THE SUPREME COURT

[Appeal No:]

Clarke C.J.
O'Donnell J.
McKechnie J.
Dunne J.
O'Malley J.

BETWEEN/

RUTH MORRISSEY AND PAUL MORRISSEY

PLAINTIFFS/RESPONDENTS

AND

HEALTH SERVICE EXECUTIVE, QUEST DIAGNOSTICS INCORPORATED AND MEDLAB PATHOLOGY LIMITED

DEFENDANTS/APPELLANTS

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 23rd of July, 2020.

1. Introduction

1.1 Between hearing submissions on Thursday last week and the delivery of this judgment today, the Court has heard the tragic news of the death of Ms. Ruth Morrissey. On my own behalf, and on behalf of all of the members of the Court, we would like to express our deepest sympathy to the family and friends of the late Ms. Morrissey. When giving judgment on the main issues on these appeals, I started by noting the very tragic circumstances which now have, most sadly, come to fruition. However, the function of this Court is to decide the important legal issues which have arisen on these appeals and which have the potential to affect many more cases even beyond the scope of CervicalCheck. It is in that context that it is necessary to rule on the small number of outstanding issues.

1.2 Arising out of the delivery of the principal judgment on this appeal (see *Morrissey v. Health Service Executive & ors.* [2020] IESC 6 ("the principal judgment"), two issues have arisen between the parties concerning, respectively, the form of order which the Court should make in respect of the substance of the case and the orders which the Court should make in relation to costs.

1.3 Written submissions on those issues were exchanged between the parties and a remote hearing took place on the 16th July. This judgment is directed towards the issues which arose which I propose to address in turn. Parties will be described in this supplemental judgment in the same way as they were described in the principal judgment.

2. The Order on the Substantive Appeal

2.1 As appears from the principal judgment, Medlab, unlike the HSE and Quest, appealed against the quantum of damages awarded by the High Court to the Morrisseys. There were two strands to that appeal, which it will be necessary to mention in due course. However, for the reasons set out in the principal judgment, Medlab succeeded on one of those strands. Agreement was reached between Medlab and the Morrisseys that the practical result of that decision properly means that the damages awarded to Mr. Morrissey as against Medlab must be reduced by €575,000. That much is not in dispute.

It will also be necessary to return to this question, and the other issue raised in respect of quantum, when dealing with costs.

2.2 However, for present purposes, it is appropriate to start by identifying the dispute which does arise. Both the HSE and Quest suggest that the damages awarded against them by the High Court should also be reduced by the same sum of €575,000, notwithstanding the fact that neither of those parties appealed to this Court against the quantum of damages awarded by the High Court. The Morrisseys, on the other hand, suggest that the award made by the High Court against both the HSE and against Medlab should not be altered. That is the only issue concerning the substantive element of the Court's order which is in dispute.

2.3 It is, perhaps, appropriate to commence by making a number of observations. First, it is important to emphasise that the issue is not as to whether the Court should affirm the decision of the High Court on quantum in respect of both the HSE and Quest. Rather, the question is as to whether the issue of quantum against both of those parties requires any order from this Court at all. On the case made by the Morrisseys, questions of quantum did not form part of the relevant appeals, precisely because neither the HSE nor Quest had chosen to appeal that aspect of the decision of the High Court. On that basis, it is said that this Court does not have to deal with this issue at all because it is not properly before the Court due to what is said to have been a conscious choice made by parties, all of whom had the benefit of significant legal advice. In other words, it is said that it is unnecessary, and indeed inappropriate, for this Court to affirm the quantum awarded against the HSE and Quest, but rather that this Court should simply make no order in that regard so that the High Court determination would go undisturbed.

2.4 It should also be mentioned, without necessarily indicating that it should have any bearing on the proper resolution of the issue, that, prior to the appeal, it had been agreed by the Government of Ireland that the Morrisseys would, in any eventuality, be paid the full damages awarded by the High Court irrespective of the outcome of the appeals. It is the Court's understanding that those damages have been paid so that the only effect of a decision on this issue will potentially be to alter the way in which the burden of the payment of those damages will fall on the various parties.

2.5 Finally, it is appropriate to observe that there were, of course, technically three appeals before the Court brought by, respectively, the HSE, Quest and Medlab. That fact is also of some possible relevance to the question of costs, for it is said by some of the appellants that any award of costs should relate only to the appeal brought by the appellant concerned. In that sense, it is argued that, while arising out of the same proceedings in the High Court, there were technically three separate appeals before this Court (even though all three were managed and heard together) so that, it is said, there are separate sets of costs referable to each of the respective appeals. There does seem to be something of an inconsistency between some of the arguments which seek to treat the set of appeals as being substantially the same case for some purposes but separate cases for others. The Morrisseys suggest that the appeal of the HSE and that of Quest

are separate from that of Medlab in the sense that the only issues that can properly arise on the appeals of those parties are the issues addressed in their notice of appeal. However, for the purposes of costs, the Morrisseys argue that there should be a single order for costs jointly and severally against each of the appellants.

2.6 What is perhaps even more striking is the argument made by Quest to the effect that, insofar as the substance is concerned, its appeal should not be taken as being hermetically sealed from the other appeals so that it should get the benefit of findings which were only made in another appeal, while at the same time arguing that, for the purposes of costs, the appeals should be treated as separate procedures. This is an issue to which it will be necessary to return.

2.7 It did appear at one stage that there might have been an issue between the parties as to whether this Court had jurisdiction to consider reducing the award as against the HSE and Medlab. However, counsel for the Morrisseys did not, at the oral hearing, suggest that there was an absence of jurisdiction. Rather counsel, very fairly, accepted that there was a jurisdiction but argued strongly that it was not one which should be exercised in the circumstances of this case.

2.8 The issue, therefore, comes down to one as to whether it is appropriate for the Court to exercise an accepted jurisdiction to reduce the damages awarded against both the HSE and Quest in the same manner as the Court must undoubtedly reduce the damages as against Medlab.

2.9 There are strong arguments in favour of the proposition that a court should not, or should certainly not ordinarily, give a party the benefit of a decision made in a group of appeals on an issue in respect of which the party concerned had chosen not to appeal. In that context it is important to distinguish between the sort of situation, which very frequently arises in multi-party cases, where there is a helpful agreement between the legal teams representing parties who have a common interest which divides the task of making submissions between the legal teams insofar as they have common ground. It would be a waste of scarce court resources and an unnecessary expenditure of monies if each party were required to repeat more or less the same arguments on the same point in circumstances where the parties concerned do not have any difference of interest. That is simply a practical way of ensuring the efficient conduct of a case. In such circumstances, all parties will make the same case even though, as a matter of practicality, it may involve some parties indicating that they adopt the arguments of others. This is not such a situation. This is a case where neither the HSE nor Quest, either expressly or by implication, made the case that the award of damages by the High Court was excessive. That situation is made all the clearer by the procedures now followed in the conduct of appeals before this Court. The matter was before the Court in case management for some time and, indeed, had been the subject of an earlier oral hearing on the question of whether leave should be granted to appeal directly to this Court from the High Court (*see Morrissey v. Health Service Executive* [2019] IESC 60). It was, therefore, very clear to the HSE and to Quest that Medlab were making an argument on quantum and that they

were not. It would have been very easy for either or both of those parties, during the course of case management, to have indicated that they too wished to raise the same quantum issues as were going to be heard in any event, having regard to Medlab's appeal. Neither party made any such suggestion. Furthermore, no real explanation was given as to why that course of action was adopted, save a tentative suggestion that those parties felt that they might get the benefit of any success which Medlab might achieve on the issue of quantum.

2.10 Analogies are always dangerous, but sometimes, when treated with care, of some use. Two analogies spring to mind. The first concerns a case where two separate proceedings run before the High Court which have a common issue (perhaps even the issue which led to the reduction in the award against Medlab). The defendant in one case decides to appeal quantum but the defendant in the other case does not. The defendant who appeals succeeds and has quantum reduced in circumstances where it is clear that, had the other defendant also appealed, that defendant too would have been similarly successful. I do not think it could be suggested, in those circumstances, that the defendant who decided, for whatever reason, not to appeal could then seek to have the issue reopened simply because a subsequent decision of an appellate court had made clear that he might have had a successful appeal had he chosen to bring one. The principle of finality of litigation would lean very heavily against allowing any such reopening. I appreciate that the situation with which this Court is now confronted is not the same. All of the relevant parties were before this Court in one guise or another, and there is certainly not a complete analogy with a case where one party simply chooses not to bring an appeal at all. However, the analysis of that analogy does demonstrate that there may well be circumstances where the principle of finality may lead to a court award remaining in place, even in circumstances where it would be clear that the award could have been reduced by a successful appeal in the light of the view which the relevant appellate court had taken in separate proceedings raising exactly the same issue.

2.11 The second analogy, or perhaps more accurately example, derives from an issue which was discussed during the oral hearing. In order to simplify matters a relatively straightforward example was suggested to counsel for their observations. In the example, a trial court was said to have found against two co-defendants who were concurrent wrongdoers. The trial court assessed their respective liabilities between themselves at 50/50. The trial court awarded €200,000 in damages. The net effect of such a decision would, of course, be that the plaintiff could seek to recover €200,000 against either defendant but there would also have been an order in favour of both defendants to the effect that they could recover a contribution from their co-defendant of €100,000 in the event that they paid the full sum to the plaintiff. Such a decision amounts in substance to one immediately effective order in favour of the plaintiff, which can be enforced against either defendant, together with two conditional orders in favour of each defendant, which would allow either of them to recover the appropriate contribution in the event that they end up being the party who pays the plaintiff. While it may be that, colloquially, such a judgment might be seen as being, in practice if not in theory, an award of €100,000 against each defendant. That is not strictly speaking

correct and the difference may well be important in cases where one or other of the defendants might not be in a position to discharge any award made.

2.12 Be that as it may, the question that was asked of counsel was as to what would happen in the event that only one of the two defendants appealed to an appellate court on the question of quantum and was successful in reducing the damages to €100,000. On one view, it might be said that the net effect of that would be that the defendant who successfully appealed could only be liable to pay the plaintiff €100,000, but would still be entitled to a 50% contribution from the co-defendant who did not appeal. If that were to be the correct approach, then the somewhat anomalous situation would arise whereby the defendant who did not appeal would find his practical liability increased as a result of a decision in an appeal to which he was not a party. The better view, in my judgment, is that the defendant who appealed would have been required to join the co-defendant as a party to the appeal in order to invite the Court to alter the consequences of the indemnity issue as determined by the trial court. The complications, insofar as these appeals are concerned, is that the High Court made no order for indemnity or contribution, so that analogy with the situation addressed does not strictly speaking arise.

2.13 The other side of the argument is that it might also be said to be anomalous if a party who actually participated in a set of appeals, which were conducted together, should nonetheless end up with an award of damages against it which was greater than the Court had determined as being appropriate even if, strictly speaking, that determination arose in an aspect of the combined appeals which was raised only in an appeal brought by another party. As counsel for the HSE put it, such a situation would leave the plaintiff with what might in substance be considered to be a windfall gain, as the plaintiff would end up recovering more damages than the Court would have considered just. In reply, counsel for the Morrisseys, while accepting that argument insofar as it goes, made the point that, if such a consequence were to arise, it would derive from the failure of the party, who was to bear the additional burden, to include an appeal on the quantum issue in the first place.

2.14 It seems to me that the Court is faced with two competing but important principles. On the one hand, I am strongly of the view that a court should be reluctant to give a party the benefit of a decision made on an issue which that party must be held to have consciously decided not to pursue. Indeed, it did occur to me that it would be interesting to speculate what the situation might have been had some other aspect of the appeal succeeded but that the Court had held against Medlab on its standalone quantum point. Given the submissions made by the other defendants on costs (to which I will shortly turn), it would be very surprising indeed if they would not, in those circumstances, have suggested that they should not have to pay any costs in relation to the issue, which was only raised by Medlab and on which Medlab failed.

2.15 However, the overriding obligation of this Court is to do justice as best it can in all the circumstances of the case and not to allow procedural issues to get in the way of doing justice where that can be achieved without risking prejudice to a party who has procedure

on their side. Courts always lean in favour of dealing with procedural problems through orders as to costs or the like rather than by visiting procedural failure on a party through the medium of making an ultimate award which is not just.

2.16 While an aspect of this question will also be relevant when turning to the costs issues which arise, it is, in my view, important to consider whether the substance of the three appeals before this Court, in reality, gave rise to a single appeal although conducted in form as three separate appeals. It must be recalled that most of the issues canvassed were common to each of the appellants. While they may have placed more or less emphasis on the question of the appropriate standard to be applied by a screener in the circumstances of this case, each of three appellants placed reliance on that point even though it may have been the HSE who put forward the most comprehensive arguments. It certainly cannot be said that either Quest or Medlab would not have been happy to obtain the benefits of any success which the HSE might have achieved on that ground. There was also much common ground between Quest and Medlab on the so-called engagement issue. The proper approach of an appellate court to considering whether sufficient engagement has been shown by the trial judge in the judgment with the case made by the respective defendants was common to the appeal made by both Quest and by Medlab. It is true that the application of that principle to the specific facts of the case was different in each case, but the overall approach was the same. In addition, the HSE would also have benefited by any success which either of those parties might have achieved under that heading. The liability of the HSE, whether it was to lie in vicariously liability or under a non-delegable duty of care, could only arise if one or other of the laboratories was found liable. If the laboratories succeeded in overturning the decision of the High Court on lack of engagement grounds, then the HSE would have benefited. There was much common ground between all of the parties on those issues. The only matters on which it might be said that there was not common ground were the liability issues in relation to the HSE (which were largely of no concern to the laboratories) and the Medlab damages issue.

2.17 This was a case where all of the parties were before the Court for the entire appeal. It is true that there were, as a matter of technical procedural analysis, three separate appeals. However, it seems to me that, as a matter of substance, there was a single appeal with only limited issues not being of some interest to all of the parties.

2.18 In the very unusual circumstances of this case, and having regard to the above analysis, I have come to the view that, despite it being a very marginal call, the more just course of action to adopt would be to reduce the award against both the HSE and Quest by the same amount as it is agreed that the award against Medlab must be reduced. I would, therefore, propose that all three appeals be allowed but only to the extent of reducing the award in each case in favour of Mr. Morrissey by €575,000. In all other respects, as indicated in the principal judgment, I would propose that the appeals should be dismissed. I now turn to the question of costs.

3. Costs

3.1 The first question which arose was as to whether, as the Morrisseys suggest, there should be a joint and several order against each of the appellants in respect of all of the costs of appeals, thus leaving it up to those appellants to dispute between themselves, in whatever forum may be appropriate, as to how the burden of those costs should actually fall, or whether, as the appellants suggest, the costs to be awarded against each of them should only be the costs attributable to their own appeal, leaving it up to a legal costs adjudicator to work out exactly what that means in practice.

3.2 In that context, I return to a point made earlier concerning the question of whether it is appropriate to view each of the separate appeals of the three appellants as being a hermetically sealed proceeding. In this respect, it is important to emphasise two points. Firstly, these three appeals arose out of the same High Court proceedings. This is not a case where, as a matter of convenience, it was decided to run appeals in two separate sets of proceedings together. This is a case where all the appeals arose out of the same proceedings and arose in circumstances where, as already noted, there had been significant common ground between each of the appellants in respect of many aspects of the proceedings and the appeals. While the HSE took what counsel described as a backseat position in respect of the allegations of negligence against Quest and Medlab, it nonetheless remains the case that the HSE would have been happy to obtain the benefit of any success which either of those parties might have achieved in that regard. While, again, the HSE may have taken something of a backseat position in respect of the quantum of damages in the High Court, nonetheless the HSE would have been happy to obtain the benefit of any headway which either of the other defendants might have made as to quantum.

3.3 In those circumstances it does not seem to me that it is appropriate to characterise the process which was conducted before this Court as being, in substance, three separate appeals. Rather, there were three appeals brought in respect of the same first instance proceedings where the issues were sufficiently connected that it was considered appropriate to deal with all issues together.

3.4 It was suggested that there could be unfairness in treating separate appeals as being, in substance, a single case if, for example, one appellant only made a single point which was dealt with on the first day but other appellants raised additional issues which lengthened the appeal substantially. Such a situation could give rise to an injustice and it might well be that there could be circumstances where, applying principles analogous to those identified in *Veolia Water UK Plc & ors v. Fingal County Council* [2006] IEHC 240, it might be appropriate to make a nuanced order as to costs in order to reflect the fact that one of a number of appellants fought a much narrower case than others. However, it seems to me that the starting point in a case such as this, where all appeals arise out of a single set of first instance proceedings and involve at least a significant degree of overlap between the grounds raised, is that the Court should approach costs on the basis of a single set of proceedings.

3.5 Indeed, it seems to me that this is a corollary of the very point made by Quest and the HSE in support of their case to the extent that this Court should reduce the damages awarded against them. I proposed earlier in this judgment that the Court should agree to reduce the damages against those parties precisely because the issue arises in the same appeal hearing involving appeals which were not separate in substance. However, that finding cuts both ways. It cannot avail the HSE and Quest on the issue of the substantive order but be ignored in the context of costs. I would, therefore, propose that the costs of the appeal be addressed on the basis of treating it as a single appeal.

3.6 It is then necessary to consider the second set of issues which concern the undoubted fact that Medlab succeeded in part. It seems to me that the order for costs against Medlab must reflect that fact. To paraphrase the principles identified in the *Veolia* jurisprudence, Medlab had to bring their appeal to this Court to get something which they would not otherwise have obtained, i.e. a reduction in damages. In passing I might note that counsel confirmed that there were no Calderbank letters written by either side in this case. I agree with counsel that, where there are no Calderbank letters on either side, that issue is neutral. It would have been open either to the plaintiffs to say that they would be prepared to take less or the defendants to say that they would be prepared to pay a certain sum but neither side did so.

3.7 I should also say that, again consistent with the overall approach identified in *Veolia*, it is never a question of adding up the number of issues and deciding that a party to proceedings won on *X* issues and lost on *Y* issues. Rather, it is a case of attempting to make a reasonable estimate of how much of the burden of the appeal was directed towards the issue on which there was partial success. I would also suggest that, in common with much of the case law, it is not appropriate to attempt to do this to a level of particular mathematical rigour. To suggest such a course of action will only lead to disputes about costs themselves, giving rise to excessive additional costs. The broad brush approach has the merit of preventing costs issues turning themselves into costs centres.

3.8 It is also relevant to take in to account the fact that neither the HSE nor Quest appealed on the quantum issue on which Medlab partly succeeded. To the extent that a reduced award of costs should be made against Medlab, then it will inevitably follow that this will increase the costs burden on the HSE and Quest. However, there is nothing inappropriate about such a consequence having regard to the fact that those parties chose not to appeal the quantum issue in the first place.

3.9 In the light of all of the above factors and mindful that the proper approach is to seek to make an order which is just in all the circumstances even if not one which is capable of exact mathematical precision, I would propose the following approach.

3.10 In principle, Medlab would have been entitled to recover some costs from the Morrisseys to reflect their victory on the quantum issue. I have come to the view that it would be just to confine the costs of the Morrisseys as against Medlab to two thirds of the total costs of the appeals. I do that to reflect the fact that Medlab would have been entitled to

at least some of the total costs of the combined appeals and that it would be appropriate to set off those costs against the remainder of the costs that the Morrisseys would themselves have been entitled to as against Medlab.

3.11 In the light of the views which I have expressed in relation to both costs questions, it seems to me to follow that the appropriate order should be that the entire costs of all the appeals should be treated as the costs of a single procedure involving all issues arising under each of the appeals. Those costs should be awarded as to two thirds jointly and severally against all three appellants and as to the remaining one third jointly and severally against the HSE and Quest. No issues as to contributions or indemnities as and between the appellants were before this Court and I would, in those circumstances, make no comment on where the ultimate burden of those costs should lie.