Neutral Citation No: [2019] NICA 40 *Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **DEE11043** *Delivered: 10/6/2019*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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02/4078/A02

MARY BERNADETTE MAGILL

Plaintiff/Appellant;

(1) THE ULSTER INDEPENDENT CLINIC
(2) DR JOHN COLLINS
(3) MR THOMAS DIAMOND
(4) DR PETER ELLIS
(5) PROFESSOR R A J SPENCE
(6) ROYAL GROUP OF HOSPITALS
(7) BELFAST CITY HOSPITAL

Defendants/Respondents.

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Before: Deeny LJ, Treacy LJ and Sir Richard McLaughlin

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DEENY LJ (delivering the judgment of the court)

[1] This matter comes before the court on the foot of a document in the appeal book entitled as follows: 'In the matter of an application to set aside a judgement delivered by the then Honourable Mr Justice Gillen on 28 January 2010 and the order for costs which rose from it, made on 10 February 2010' and it is brought by Mary Bernadette Magill as personal representative of the estate of the late Brian Magill. What it is, in effect, is an application to appeal again to this court from the judgment of Mr Justice Gillen made some nine years ago.

[2] The application wrongly refers to the CPR which exist in England and Wales. It fails to refer to the Rules of the Court of Judicature in Northern Ireland, it fails to formally ask for what is clearly a very necessary extension of time to proceed and it fails to ask for leave to call new evidence, although it is clear that that is the basis of one of two grounds being advanced for renewing this appeal. Nevertheless, we note that the Lord Chief Justice at an earlier review hearing in this matter directed that no point would be taken regarding these frailties of form and we are prepared to abide by this indication previously given by the court while making it clear, as this court has often before made clear, that the rules are there to be obeyed.

[3] As Girvan LJ and others have said, it is wrong to indulge litigants in person so far as to work injustice on properly represented parties. So this indulgence granted to Mrs Magill is not to be taken in any way as a precedent. We therefore treat her application as though it was made under Order 59, Rule 4 and the related rules. Now, she has two grounds and she has supported her application with a skeleton argument and a subsequent document described as a legal framework and she has very fully and with, if I may respectfully say so, obvious intelligence set out the grounds on which she seeks to rely, albeit in a more diffuse way than counsel would have done if they had been instructed.

[4] She makes a point with regard to the allegation of apparent bias that she is not alleging actual bias against Mr Justice Gillen in connection with this matter but she says that there is an issue of apparent bias. She sought to argue in one of her written submissions that bias on the part of the trial judge renders the judgment a nullity. That is a misconception. We accept the written submission of Mr Robert Millar, who appeared for the first, second, third and fifth defendants in this matter; Mr Michael Lavery appearing for the fourth, sixth and seventh defendants. We accept the submission of Robert Millar that the correct view is that an allegation of bias of this kind can constitute a ground of appeal and that the plaintiff appellant does in fact require an extension of time to appeal this aspect of her application as well as the fresh evidence issue. If this aspect of the application did not involve an appeal then, as he correctly says, this court should not be hearing it, as the Court of Appeal is a body of statute and is not here to hear initial applications.

[5] So we address this as a possible ground of appeal. As to the first point – against it as a ground of appeal is that it has previously been considered by this court and rejected. If one turns to page 180 of the book of appeal one finds the judgment of this court as delivered by Lord Justice Girvan on 30 September 2010 and one of the matters the court was then dealing with was Mrs Magill's original application for an extension of time to serve a notice of appeal appealing against the judgment of Mr Justice Gillen and I think it is appropriate that I read paragraph 15 of the judgment of the court.

> "Mrs Magill called in aid a number of points to support her application. She argued that there was a matter of public importance in the case because she asserted that there was evidence of apparent bias on the part of the trial judge, a point supported only by her own version of events at the trial which, having regard to her very personal and less than dispassionate involvement in the trial, must be approached with considerable caution. A telling point against such a grave allegation lies in the fact that at no time during the trial did she raise any allegation of apparent bias and she let pass without

> comment remarks which she now attributes to the judge and the witness. She raised no point about it in her cross-examination of the witness and made no issue about it in her submission. Counsel for the respondents stated, and we accept, that the point now raised by the appellant for the first time came as a complete surprise to them. Although the appellant argued that it introduced a point of general public importance we can see no substance in that point."

Now, in law that is an end of the matter. The matter is res adjudicata but she has chosen not to stop there.

[6] Mrs Magill anticipating this difficulty sought to argue in her written submissions that she, as a lay person conducting this lengthy and difficult trial alleging medical negligence against more than one hospital and a number of medical practitioners was not aware of the law of apparent bias and that is why she did not raise it in the way that Lord Justice Girvan says she should have. She submits, therefore that we should look at the matter again fresh in the light of her submissions.

[7] We remind ourselves of the test which was set out by the House of Lords in *Porter v Magill* [2002] 2 AC 357. For convenience I will quote from the head note at 359.

> "The appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer having considered the relevant facts would conclude that there was a real possibility that the tribunal was biased."

[8] Now, addressing our minds to that, we have, prior to the hearing and with the assistance of the able written submissions of both counsel for the defendants, looked at the passages set out in the book of appeal at page 82A to 82G. We observe that at our own review of this matter last Thursday Mrs Magill thought that they had in some way been excluded from the transcript or even, she said, from a compact disc she had been given but in fact, that is wholly misplaced and the transcript of the exchanges are there. It is apparent on the one hand in support of her concerns that Professor Spence, in discussing another case which he seemed to think had some relevance, did refer to another patient now deceased whom he said was, "well known to My Lord." That is, to Mr Justice Gillen, and that implies either that the patient had told Professor Spence that she knew Mr Justice Gillen, or Mr Gillen as he may have been at that time, or that Mr Spence knew both of them.

[9] It does not inevitably mean that he was, as Mrs Magill contended, a friend, let alone a close friend of Mr Justice Gillen. In a small jurisdiction like this, it is inevitable that judges will know other people, obviously, and that those other people will include professional men, whether doctors, solicitors or accountants and that sometimes they will be sitting on cross-disciplinary committees on which other professional people sit. No doubt, if there was any close relationship the judge would have declared it but the mere fact that a witness believed that another person was known to the judge, would not lead any fair-minded and informed observer to conclude that the tribunal was biased. That is particularly so in this case where the judge, it is clear, sat patiently for some 45 days hearing this case and what is also clear is that Professor Spence was not a single defendant but rather, seems to have been one of some 17 doctors being criticised and being a subject of sharp criticism at times by the plaintiff in the action, criticisms rejected by the court. So both on the grounds of res judicata and on the merits, we reject the allegation of apparent bias.

[10] Now, the second ground relied on by Mrs Magill in her application to this court is the updated evidence of Alwyn Trimble. This was crystallised in an affidavit of 27 March 2018. Now, the first issue is, given that it came to her hands on 27 March 2018 and that she has actually drafted the statement that makes up the body of the affidavit and was present when it was sworn, why did she not bring an application based on it until 28 January 2019? To answer that point, Mrs Magill provided us with some notes from medical practitioners which we have carefully considered and we are sorry to note that she suffered a stroke in late 2017 and that she had a fracture of her humerus on 16 May 2018.

[11] While the court sympathises with her and these misfortunes that she has suffered, we do have to respect the written submissions of counsel and to point out that, first of all, there is no excuse for delaying between March and May of 2018 to bring this renewed application, even in the wrong form, and that further, we have to accept that the medical evidence put before us does not justify a delay from May 2018 to 28 January 2019. On that ground alone it would be our duty not to grant an extension of time but as this matter has proven so problematic, and as we have heard Mr Alwyn Trimble this morning, we think it proper to say a word more. It will be remembered that pursuant to Order 59, Rule 10(2) further evidence before this court, after there has been a hearing on the facts in the court below, can only be admitted on "special grounds." We permitted Mr Trimble to be called as the Lord Chief Justice had indicated he should be.

[12] We permitted him to give evidence on the point of whether an extension of time should be granted. In doing so, we have to apply the appropriate test and the test was established as long ago as 1954 for addressing these matters by Lord Denning and Lord Justices Hodson and Parker in the Court of Appeal in England in *Ladd –v- Marshal* and what Lord Justice Denning said at page 748 of [1954] 3 All England Law Reports 745 has stood the test of time and although there are more recent cases in the topic, it can still be quoted with safety as summarising the relevant law and I quote.

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second the evidence, must be such that, if given it would probably have an important influence on the result of the case although it need not be decisive: third the evidence must be such as is presumably to be believed, or in other words it must be apparently credible although it need not be incontrovertible."

[13] I pause there to say that, in saying that it must be capable of being believed and credible, that is not just a reference to the honesty of the witness but the reliability of a witness' recollection. It is not credible if somebody is saying what they believe to be right but the basis for that is wholly absent and the point that is made in the up to date affidavit of Mr Trimble is his contention that he was acting to assist Mr Magill on the night of 23 December 1999. So the first point to note is that he is talking now about something that happened almost 20 years ago and at paragraph 8 of the affidavit put before the court he acknowledges as follows, "I omitted some facts from my statement made to Detective Sergeant Enyon on the 2 July 2002. I now wish to correct this."

[14] Now, it is a worrying aspect if you are going to put any weight on the witness's recollection that he told us this morning: "I thought I'm sure I told the police but it is not in my statement." That is not what he said last March when he seemed to accept that he had omitted some facts from his police statement. He goes on in that statement to say, "In my statement I failed to state that two of the nurses were fast asleep. They were each sitting in an armchair with their feet and legs supported by an armchair." He then goes on to name a nurse which I will not do in case this matter appears on the internet and he says at paragraph 12, "In my statement I fail to state that the nursing auxiliary was either knitting or crocheting." Well, he gave evidence before us today and he reiterated what had earlier been said, that he had worked in the past as a care assistant, he had not worked in recent years and indeed, he had been quite unwell and was afflicted with a range of conditions.

[15] He recounted as he had before that Mr Magill was in the bed beside him and was distressed and asked him to get a nurse and that he, Mr Alwyn Trimble, went down to the nursing station where there were three girls, as he put it initially, and he clarified that as three nurses, and they were all sitting on the seats with their feet up and two of them had their eyes closed and crochet needles in their hands, two of the nurses, and the nursing auxiliary got up and walked back with him to see Mr Magill. Now, first of all, you can see the inconsistency between that and what he said only a year ago. There, he was saying the nursing auxiliary was either knitting or

crocheting. Now, he says the two ladies with, he says, their eyes closed, that they both had crochet needles in their hands.

[16] He said to us that he went back a second time and he makes no allegation to us this morning that they were sleeping, although he had in his affidavit of a year ago. He was cross-examined in a respectful and highly professional fashion by Mr Michael Lavery. I have already illustrated one of the discrepancies that he identified but he reminded us that, of course, the witness had given evidence at the trial before Mr Justice Gillen, heard in 2009 and in which judgment was delivered in 2010 and we did not really hear any satisfactory reason why, when Mrs Magill called him to give evidence at that trial, it never emerged between the two of them that two of the nurses were sleeping.

[17] Mrs Magill feels very strongly about what happened on 23 December. I should make it clear her husband did not pass away on that occasion, he was moved from the Royal Victoria Hospital to the Belfast City Hospital and received further treatment, seemed to recover but died a little later, but it's a point that counsel invites us to rely on, why was this never said and how, implicitly we are asked, how could we conclude that this evidence could not have been obtained with reasonable diligence for use at the trial and that test is not met. Mr Alwyn Trimble also accepted, in cross-examination, that he had given evidence as recently as 13 November 2017 at an inquest which is being conducted into the death of Mr Brian Magill.

[18] Apparently the attorney general directed such an inquest and it is still ongoing. Why did he never tell the inquest, he was asked, that the nurses were sleeping and we received no satisfactory explanation of that except that their eyes were closed with the implication that they may not have been sleeping at all. A further matter arises; he says that he told Mrs Magill at the time that her husband was being moved and when Mr Alwyn Trimble was being discharged, that he had told her this but she had no memory of this but that is perhaps a smaller point; she was no doubt distressed at the time because of her husband's condition. Mrs Magill apparently sought him out in March 18 and in the course of a telephone conversation this allegedly new evidence appeared. We could only say that it is a significant factor against the credibility of this evidence that it was never raised in 2002 with the police, apparently, as Mr Trimble says in his affidavit, never raised in evidence in 2009 and never raised as recently as 2017. Mr Trimble was examined also by Mr Millar and re-examined by Mrs Magill.

[19] In the course of the re-examination she was seeking to repair some of these difficulties that had arisen in cross-examination and Mr Trimble volunteered this. "I don't retain memory, I forget sometimes, I can't store information very well, sometimes I can and sometimes I can't." And then, in answer to a question from myself, he said, confirming what I thought he had said earlier, that the nurses in his experience as a former care assistant, were entitled to nod off from time to time in the ward and that these particular nurses in 23 December 1999 may not have been

asleep, they may just have closed their eyes. It is obvious even if they were asleep that it was brief because they had their knitting or crocheting materials on their laps in front of them.

[20] It is necessary for this court to form a view about this evidence. Is it evidence that is apparently credible? We do not find that and indeed we could not possibly find on the balance of probabilities that a court could be satisfied that nurses were asleep in dereliction of their duty in different periods on the night of 23 December 1999 on the basis of the evidence we have heard. It is far too fragile. To refer to the phrase of Lord Lowry in *Davis v Northern Ireland Carriers* [1979] NI 19, we see no substance to this evidence, it is far too frail to support the allegations made. Mrs Magill says that the evidence of the nurses sleeping is the basis of her allegation of fraud. It is perhaps helpful, therefore, to point out that we see no conceivable basis at all for an allegation of fraud here, against any nursing staff. That is a very serious allegation. If it is included in pleadings drafted by counsel, senior counsel should sign the statement of claim to confirm that the allegation is justified. It is not an allegation that should be made lightly against anyone, including those who care for the sick.

[21] We may say, therefore, that at least two of the Ladd v Marshal tests are failed. The submissions of Mr Lavery in his skeleton argument helpfully take us to the evidence that Mr Justice Gillen summarised at paragraphs [590] to [598] of his judgment. It is not necessary for us to do so but if it had been necessary the pointers are very heavily that, even if the new evidence was admissible, it would not be likely to impact on the decision that the judge ultimately made, i.e., that it would not have an important influence on the result of the case in Lord Denning's phrase. So in the light of those findings of law and fact, we dismiss this application.