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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

1. COLIN GILPIN
2. HELEN SIMMONS
3. LINDSAY JOANNE CUNNINGHAM
4. PAUL LINDSAY TAYLOR
5. CHRISTOPHER JOHN HILL
6. CAROLINE MCGRATH
7. PETER WILLIAM SALTER
8. CARDELL MCILROY
9. JULIEANN KENNY
10. CHRISTOPHER HULL
11. SARA SIMPSON
12. MARK WOODALL
13. ADRIAN PETER WATT
14. JOHN MCSORLEY
15. MICHAEL HANNIGAN
16. ANDREW MCQUEEN

Plaintiffs

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Defendant

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Mr Brian Fee KC leading Mr Smyth BL and Ms Leonard BL (instructed by Hewitt and Gilpin, McCartan Turkington Breen, Babington & Croasdale, Edwards & Co.) for the 6th, 8th, 9th, 12th, 13th plaintiffs.
Mr Patrick Lyttle KC leading Mr Ham BL, Mr Malachy McGowan BL, Mr Warnock BL, Ms Moran BL (instructed by Mac Elhatton Solicitors, McCartan Turkington Breen) for 2nd, 4th, 5th, 7th, 10th, 14th, 15th plaintiffs.
Mr Gary Potter KC (instructed by Edwards and Co., MacElhatton Solicitors) for 1st and 11th plaintiffs.
Mr Gilmore BL (instructed by Edwards and Co and MacElhatton Solicitors) for the 3rd and 16th plaintiffs.
Mr Hanna KC and Mr Lunny KC leading Ms Fee BL (instructed by Crown Solicitor) for the defendant.

MASTER HARVEY

Introduction

[1] This is an application by the defendant for a direction pursuant to Order 33 Rule 3 of the Rules of Court of Judicature (Northern Ireland) 1980 ("the Rules"), that certain generic issues be dealt with as preliminary issues prior to trial in all the cases. Further the defendant also applies pursuant to Order 4 Rule 5 of the Rules for an Order that the issues should be heard and tried at the same time in a single hearing. In addition to relying on the above provisions, the summons also applies under Order 1 Rule 1A, the inherent jurisdiction of the court and S62 (5) of the Judicature (Northern Ireland) Act 1978.

[2] The parties submitted five sets of helpful written submissions and referred me to several authorities, all of which I have considered even if not expressly referred to in this judgment. I am grateful to all counsel for their assistance to the court.

Background

[3] The 16 actions are employer's liability claims alleging negligence and breach of statutory duty while the plaintiffs were employed as police officers in a range of specialist units across different periods of time, allegedly resulting in psychiatric injury, loss and damage. The claims are at various stages, with some more advanced than others, two of which were previously listed for trial and adjourned. One of these, the case of Helen Simmons, was adjourned on two separate occasions.

The defendant's application

[4] The defendant asks the court to determine as a preliminary issue whether it was under a duty of care to implement one or more of a list of "generic measures" and if so during what period and in respect of what category or categories of officers. The defendant seeks a determination on whether there was any evidence that taking of any such proactive "generic measures" would likely do some good.

[5] The defendant avers that the measures identified are "clearly generic in character and do not turn on any case specific matters or case specific evidence."

[6] There are clearly common points which exist across the claims, however, in each case there are also individual circumstances of type of work, supervision, support and treatment of the plaintiff, the individual's personal work history, any pre-existing mental health vulnerabilities which all must be considered on a case specific basis.

The generic issues

[7] In summary, the questions the defendants seek to be determined as preliminary issues are set out in the schedule to the summons. They raise the question as to whether at any time prior to the year 2000 has there been any available evidence that the proactive measures set out, if implemented for the specialist categories of police officers, were likely to do some good in identifying those at risk of trauma related psychological harm and/or reducing the risk of such harm occurring and if so since what time and in respect of which categories of officers has such evidence been available.

[8] If the answer to the above question is yes, was the defendant under a duty to implement the measure and during what period of time and what category of officer.

[9] The generic measures include various training prior to commencing in the role, during work in the units, instruction, screening, monitoring, psychological assessment, counselling, de-briefing and self-referral where there were concerns about psychological health.

[10] The six defined units stated in the schedule are cyber-crime, e-crime, rape crime, child abuse, the body recovery unit and family liaison officers.

Defence submissions

[11] The defendants claim that by dealing with these issues at a preliminary stage it will avoid further delay, save costs, avoid potential difficulty experienced by the experts in the provision of their reports and will shorten the trials of the substantive actions of each individual claim in due course. The defendant proposes that expert

evidence be called on those generic issues. The grounding affidavit confirms at paragraph 8 that the defendant "is not seeking to have all of these actions conjoined under one single writ….or to have them formally consolidated". Therefore, the plaintiffs retain autonomy to engage their own legal team and instruct their own expert(s). It is only with those generic issues which have been raised by the plaintiffs in their statements of claim that the present application is concerned. They are extensive and constitute a substantial part of the allegations made by most of these plaintiffs. The defendant relies on the comments of Hale LJ in proposition 4 in the *Hatton* case which I will turn to in the legal principles section of this judgment, that there were no occupations which should be regarded as intrinsically dangerous to mental health. The defendant submits that plaintiffs appear to be making the case that the specific nature of the work carried out by individuals assigned to each of these specialist units placed them, intrinsically, and without any prior knowledge about any individual plaintiff, at a heightened risk of harm to their mental health which was sufficient to trigger a duty on the defendant to take pre-emptive action (ie the generic measures) for their protection. In other words, the plaintiffs appear to be saying that, within the general occupation of police officer, there are particular kinds of work, namely work in these specialist units, which are intrinsically dangerous to mental health. The defendant maintains that there is, and was at all material times, no evidence that any of the generic measures, implemented generically, were "likely to do some good" or that, in the circumstances, it was reasonable for the defendant to have implemented any of those measures. The defendant says, in effect, that there is no evidence capable of supporting or justifying the implementation of any of these pre-emptive measures generically in respect of all individuals prior to joining the specialist units, or while they remained members of those units.

Plaintiff submissions

[12] One of the plaintiffs' senior counsel robustly asserted this is a "ridiculous" application and all of the plaintiffs share a strenuous resistance to what they see as a proposed approach by the defendant completely devoid of merit which will cause further delay, duplicated costs and time. They assert there is no precedent for an application of this nature in this jurisdiction seeking to deal with certain liability issues in advance of trial in the manner suggested. This is not akin to an application seeking to deal with an issue such as limitation as one would see more often, but rather an attempt to hive off a distinct liability issue which should instead be dealt with in the individual actions. It is neither practicable, workable, desirable, fair nor in the interests of justice to have preliminary hearings on the issues contended outside of the cases proper. The defendant seeks a determination on whether there was any evidence that taking of any proactive "generic measures" would likely do some good. It is submitted that the answer will in every case depend on the individual circumstances of the plaintiff.

Legal principles

[13] The defendant's application is pursuant to Order 33 rule 3 which is in the following terms:

> "Time, etc, of trial of questions or issues
>
> 3. The Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated."

[14] The provision for dealing with such matters at the same time is within Order 4 Rule 5 which states:

> "Consolidation etc. of causes or matters
>
> 5. – 1) Where two or more causes or matters are pending in the same Division and it appears to the Court-
>
> (a) that some common question of law or fact arises in both or all of them, or
> (b) that rights to relief claimed therein are in respect of or arise out of the same transactions of or series of transaction, or
> (c) that for some other reason it is desirable to make an order under this rule, the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or immediately after another or may order them to be stayed until after the determination of any other of them.
>
> (2) Where the Court makes an order under paragraph (1) that two or more causes or matters are to be, tried at the same time but no order is made for those causes or matters to be consolidated, then a party to one of those causes or matters may be treated as if he were a party to any other of those causes or matters for the purpose of making an order for costs against him or in his favour.

[15] The defendant further relies on S62 (5) Judicature (Northern Ireland) Act 1978 which states:

> "Subject to subsections (1) and (3), the High Court may in accordance with rules of court order that different questions of fact arising in any action be tried at different times or by different modes of trial."

[16] There is some helpful commentary from the Court of Appeal in an employment law case, regarding the issue of preliminary points. *In Ryder v NI Policing Board* [2007] NICA 43 Kerr LCJ stated that:

> "the power to determine a preliminary point should be sparingly exercised" as it is "often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided."

[17] In the same case, Girvan LJ stated at paragraph 7:

> "the dangers posed by inappropriate preliminary issues are pointed out in Tilling v Whitman [1980] AC 1. At 17 Lord Wilberforce said:
>
> > `I…have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the costs and time of legal proceedings.'
>
> Moreover, Lord Scarman at 25 said –
>
> > 'Preliminary points of law are too often treacherous shortcuts. Their price can be, as here, delay, anxiety and expense.
> >
> > Unless a preliminary point of law, if decided one way, is going to be decisive, a preliminary point will rarely be appropriate…Tribunals must approach with caution and care the question whether a preliminary issue should be ordered.'

[18] The plaintiff referred me to *Boyle v SCA Packaging* [2009] 4 All ER where the court commented on the power to deal with matters at a preliminary hearing at p1186:

> "The essential criteria for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in *CJ O'Shea Construction Ltd v Bassi* [1998] ICR 1130 at 1140 there is a succinct knockout blow which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where the issue cannot be entirely divorced from the merits of the case, or the issue will require consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the maters in dispute."

[19] An issue of law should only be tried as a preliminary issue if the legal point is short and easily resolved, and the factual issues are complex, and should be designed to lead to judgment for one party or at least to a material shortening of the issues at the trial: *Donaldson v Chief Constable* [1989] 7 NIJB 21, at 27-9.

[20] Though the issue be described as one of law, it may be necessary to hear some factual evidence: *Deighan v Sunday Newspapers* [1987] NI 105, at 107H (Carswell J).

[21] Trial of a preliminary issue of law must be based on facts which are proved or at least agreed for the purpose of the preliminary issue: *McCabe v Ireland* [1999] 4 IR 151.

[22] Turning to the generic issues the defendant seeks to have determined in these cases, para 43 of *Sutherland –v- Hatton* [2002] EWCA Civ 76 sets out the 16 practical propositions for the consideration of the Court. This includes, at proposition 10, the proposition which the defendant intends to rely on here, that an employer can only reasonably be expected to take steps which are likely to do some good and the court is likely to need expert evidence on this. The plaintiffs assert that the defendant clearly bases its approach on this practical principal to the exclusion of the remainder of the evidence in each of these cases and fails to properly address or refer to other practical propositions of relevance.

[23] In *McClurg –v- The Chief Constable [2009] NICA 37* involving a post traumatic disorder and psychiatric disorder group action against the Police, the comments of Girvan LJ at para 21 addressed the need to deal with cases on their own facts:

> ''It is necessary to take into account the circumstances of the persons to whom and by whom it is alleged the duty is owed. One plaintiff may fail to establish negligence which might be established in favour of a different plaintiff with different characteristics in otherwise similar circumstances. It is for this reason that the normal approach of the common law is to decide individual cases on their own facts. As individual cases are decided it may be possible to draw more general conclusions that may assist in the determination of other cases in a similar factual matrix."

[24] At para 31 Girvan LJ further:

> "For these reasons it cannot be concluded that the defendant's failure to provide training and education to officers to identify signs and symptoms triggering a need for referral to the OHU or to other medical advice was a breach of the defendant's duty of care to individual plaintiffs. What the judge has in this context categorised as a systemic failure accordingly does not in itself provide any ground on which a plaintiff could establish an actionable breach of duty by the defendant. Individual cases will have to be decided on

their own facts, as in fact has happened in relation to the individual lead cases."

[25] Finally, the defendant relies on the overriding objective at Order 1 Rule 1A of the Rules which is in the following terms:

> "1A.–(1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
> (2) Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate to –
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
> (3) The Court must seek to give effect to the overriding objective when it –
> (a) exercises any power given to it by the Rules; or
> (b) interprets any rule."

Group Litigation Order

[26] The plaintiffs assert that the defendant's application is in effect, an application for a Group Litigation Order (GLO). There is no specific provision contained in the Rules in Northern Ireland analogous to Part 19 of the Civil Procedure Rules in England providing for GLO's. The most notable such action in this jurisdiction was *McClurg*. This involved the management of claims brought by approximately 5,500 police officers. There was an agreed approach between the parties from the beginning of the litigation, to manage a large number of plaintiffs, using the inherent jurisdiction of the court to deal with the proceedings, including that the cases should be managed by an identified judge and there was one set of solicitors and one set of counsel dealing with all plaintiffs. I do not consider in the present action that the defendants are seeking a GLO, or similar. The fact a dispute has arisen in the present cases between the parties as to precisely what the defendant was proposing to seek may well have arisen from correspondence and comments made previously or misunderstandings, but that is not a matter for this court, and I consider this irrelevant in the context of the application as the relief sought in the present summons is clear.

Defective pleadings

[27] Much was made in oral submissions on behalf of the defendant of the purported deficiencies in the plaintiff's statement of claim, their medical reports and replies to a notice for further and better particular served by the defendant on the 12 February 2024. The notice provoked differing responses on behalf of the plaintiffs ranging from an assertion these were not matters for particulars or the information sought was within the knowledge of the defendant. There are procedural mechanisms available should the defendant wish to challenge the perceived issues with the plaintiffs' pleadings, moreover, if weaknesses exist in the plaintiff's cases one wonders why there has not been greater impetus on the defendant's part to expedite the trials of these actions, given that some of the proceedings date back six years from issue of the writ. These matters are not the basis of the relief sought in this application.

[28] I will now address the various factors which the defendant asserts forms the basis of their application as follows.

Delay

[29] The issue of delay was cited by the defendant as a factor which should lead the court to accede to this application. During the hearing, I referred the parties to one of the cases which, due to its chronology and advanced state of readiness for trial, is worth considering.

The case of Helen Simmons

(i) The plaintiff retired on ill health grounds on 14 March 2017.
(ii) Writ of summons issued and served 11 January 2018
(iii) 18 April 2028 - delay of four months by the defendant in filing an appearance such that the plaintiff threatened to enter default judgment.
(iv) Statement of claim and report of Professor Millar served by the plaintiff 3 May 2018.
(v) Defence served 30 August 2018. The plaintiff raises issues with the defence as it purportedly does not address particulars of negligence etc. The plaintiff pursues this, threatens and then lodges a strike out application, resulting in a court order.
(vi) Amended defence served 14 April 2019.
(vii) Defendant serves Professor Fahy's report 22 July 2019.
(viii) Plaintiff's issues a notice for particulars 26 October 2021, and subsequently serves correspondence on the defendant with reminders for failure to provide replies.
(ix) Plaintiff seeks specific discovery 7 April 2022 and again writes to the defendant due to their failure to provide the discovery requested.
(x) The action is set down for trial on 15 June 2022.

(xi) The court issues an order in relation to the defendant's failure to provide discovery or replies 17 February 2023.
(xii) Defence serves a notice for particulars 3 February 2023, the plaintiff serves replies 6 April 2023. Issues arise as defendant writes to plaintiff and claims replies not adequate.
(xiii) Trial in February 2023 is adjourned as issue arises with Professor Millar's availability.
(xiv) Review by judge 20 February 2023.
(xv) On 27 February 2023, the case is listed for hearing on 18 September 2023.
(xvi) Contested adjournment application 28 June 2023, trial is adjourned on application by defendant.
(xvii) Plaintiff issues strike out application 8 September 2023.
(xviii) The defendants serve a list of documents and replies to particulars in September 2023, seven months after being directed to do so by the court.
(xix) Trial on 18 September 2023 adjourned.

[30] There has been inordinate delay in this case. The defendant has had the statement of claim and plaintiff's medical report for six years and their own medical report for five years. There is always a risk in civil proceedings that the cogency of the evidence to be adduced will be impacted by delay and in a situation in which the court is required to consider all the circumstances of the case, the fact that the action has now been adjourned twice and is the subject of an application at this late stage cannot be irrelevant. Where it comes to the attention of the court that there has been delay in the conduct of proceedings, the administration of justice requires that the court take steps to ensure no further delay occurs. I consider that the prospect of a hearing on generic issues will serve to cause further delay, not prevent it.

[31] The case of Simmons is one of several examples of these claims which are close to or ready for trial. In another case of Paul Taylor, the plaintiffs reverted to the court on five separate occasions seeking an order due to the defendant's failure to provide discovery or comply with court orders. Five separate Masters issued orders in that one case alone, all arising from the defendant's default. The writ in that case dates back to March 2019 and pleadings have closed.

[32] I pause to observe the average disposal time for a writ of summons in the King's Bench Division is currently 166 weeks (just over three years) from issue to resolution. These cases, while undoubtedly complex, need to progress with greater expedition and a hearing on preliminary issues will hinder, not assist, such progress.

Saving time and costs

[33] The experts who will deal with the generic issues on behalf of both parties would have to give evidence on these complex issues. It is unclear just how many such experts would be called at a preliminary hearing given the defendant conceded it does not seek to impinge on the autonomy of individual plaintiffs to engage their own lawyers and experts. While I recognise there may be a joint plaintiff expert and it might be unlikely each of the 16 plaintiffs would either wish to or be able to source their own expert, and I note the defendant asserts there are not many in this niche field, there is a real possibility the court could be tied up for several days or up to a week dealing with such matters. It is difficult to conclude that there is an opportunity to save time or costs in the manner the defendant describes.

[34] The defendants contend that if all the generic issues are heard and determined at the same time it would avoid the need for the expert witnesses to repeatedly attend each individual trial separately, on different trial dates, to deal with the generic issues raised in each individual case, in respect of each individual specialist unit, and in respect of each specific timespan relevant to that case. They claim it is "clearly in nobody's interests." It occurs to me that such experts can give evidence in the initial case(s) which come before the court which may well dictate or assist the trajectory of the remaining actions. I am not persuaded the proposal advanced by the defendant is a common sense or pragmatic approach which has a greater likelihood of saving costs and time.

Disclosure of evidence

[35] The defendant seeks that the plaintiff identify as a a matter of fact, confirmation of the existence of contemporary published evidence which will be relied upon by the plaintiff's experts at trial to show that a particular measure was likely to do some good in respect of individuals required to carry out the kind of work undertaken in each of these units. They query if that evidence, as a fact, existed and if so, did it exist at the relevant point in time, was it published, or otherwise available such that the defendant was, or ought to have been, aware of it. They do not seek disclosure of the report of such experts the plaintiffs may hold, as they concede this is liability evidence, the disclosure of which is not provided for in the Rule. The defendant asserts the existence of the evidence is a factual matter and should be disclosed but I consider that is clearly not the purpose of the present application before the court. They claim that despite having been asked to do so, the plaintiffs have so far failed to factually identify any such evidence, either in their statement of claim or at all and in defence written submissions state:

> "if they are not in a position to factually identify any such evidence this needs to be acknowledged as soon as possible so that further time is not wasted on this issue. On the other hand, if they are in a position to identify the existence of any such evidence, capable of establishing a duty on the part

> of the defendant to take one or more of the generic measures, they need to do so without further delay."

This has been raised in a Notice for Particulars and the provisions of Order 18 Rule 12 are the appropriate mechanism to challenge the extent of the Replies they received, just as Order 18 provides a similar procedural mechanism to challenge the purported deficiency in the statement of claim, the parties can also consider interrogatories on these issues.

The trial of the action

[36] The defendant suggested the trial would inevitably have to be adjourned if the plaintiff's expert(s) gave evidence which their own expert did not have time to consider. This lacks any credibility for reasons which I will turn to shortly. Using the "Simmons" case as one example, while any liability report has not been disclosed, the plaintiffs assert that their psychiatric expert, dealing with causation and quantum, clearly refers to and cites various literature and academic sources in the report which the defendant's expert has seen and has been in the possession of the defendants for several years. In advance of trial such references would be collated into a core bundle to assist the trial judge. The plaintiffs also correctly observe that while there is no provision for the exchange of expert liability reports in cases of this nature, the claims will be carefully case managed by the trial judge and that in advance of trial, the judge may well direct the parties to consider a meeting of the experts with a joint minute to be produced narrowing the issues in dispute and avoiding the possibility of either party being taken by surprise.

[37] Any expert instructed on behalf of either party would normally be suitably qualified in their respective fields such that at trial they can assist the court and adequately deal with the points made by their opposite number. I simply fail to see why the defendant takes such a pessimistic view of their expert's prospects of dealing with the case put forward by the plaintiffs which is set out in their pleadings, and in the case of "Simmons" as referred to above, they have been provided with a report which at least addresses the quantum and causation issues and they have had it for many years. In any event, the trial judge is there to ensure a fair trial and that all issues are comprehensively addressed to assist the court in its determination. In the event that any issue or procedural irregularity arises which has the potential to unfairly disadvantage any party, the trial judge will no doubt deal with that, with the Article 6 rights of the parties and interests of justice core considerations.

The duration of a preliminary hearing

[38] Defence counsel asserted the trial of the generic issues could take anywhere from one to three days. The defence written submissions claimed it could take up to

a week although I note the defendants stated during the hearing the latter time period was unlikely. They also state the trial of each substantive case will take up to two weeks. These assertions were strongly rejected by the plaintiffs who state that the generic issues will be complex, time consuming and involve multiple experts giving evidence and even in advance of such a hearing it will require careful case management. They point out the generic issues are not agreed by the parties and the judge would have to consider these in advance. This was rejected by defence counsel who asserted that the direction from this court pursuant to Order 33 Rule 3 forms the basis of the questions to be determined by the judge, and this does not require such case management and certainly not agreement from the plaintiffs. The plaintiffs assert that it is an exaggeration to suggest the trial of the individual cases would take anywhere near two weeks and they would be dealt with in a trial of much shorter duration.

[39] The difficulty in these cases is that what might appear as a shortcut could prolong matters. If the application is granted following this hearing, it requires another hearing on the generic issues, this could then be subject to appeal and lead to another hearing on the issue. This would take up several months if not a year and the parties would be nowhere near resolution or listing of the trials necessary in each claim on the case specific issues. A trial of the preliminary issues will be complex and take several days, just as the trial of the individual claims, which will not be obviated regardless of the outcome of the preliminary hearing, will similarly take up several days. This court must consider the interests of justice, potential for increased costs and the allocation of court resources. I envisage a preliminary hearing will lead to duplicated effort for all concerned.

Is this an appropriate case in which to exercise a power which is sparingly used?

[40] The defendant asserts that "while accepting that the power to order the preliminary trial of any issue should be sparingly exercised, the defendant contends that the issues identified in the summons in this case constitute a textbook exemplar of a case in which it would be appropriate to make such an order." I consider this is a textbook example of a misguided application which has only served to add to the costs of this litigation, take up court time and prolong these claims even further when a pragmatic and sensible approach surely would be to list at least one of the cases for hearing rather than getting bogged down and sidetracked on an interlocutory dispute.

[41] The rulings sought in the defence summons, particularly on issue 2 as to the extent of duty of care, are arguably not in fact possible at this juncture as they are plaintiff specific. From a practical perspective, even if the issues were capable of resolution at this stage, it will not in any event determine the proceeding as each case will have to be assessed on its merits.

[42] As stated above, the order sought will likely cause more delay. A number of the cases are of considerable vintage and have been in the court lists for some time and are otherwise ready for trial. The orders sought have the potential to further delay such cases by linking them unnecessarily to other cases.

The conventional approach

[43] It is the plaintiffs' contention that the cases should simply be heard in the conventional fashion dealing with them separately as they come on for hearing. It is submitted that is the most cost effective and expeditious way of dealing with these cases. The first case that is ready to proceed, if not resolved, will be heard and judgment will then be given. Although it will relate ultimately to the individual circumstances, clearly the parties will have a very useful and binding yardstick with respect to the how litigation proceeds in the remaining cases.

[44] The plaintiffs submit that the defendant is essentially asking the court to provide a preliminary advisory opinion, which should not be permitted.

[45] I am aware that currently there are only 16 cases, not the 5,500 cases referred to above which led to a group litigation type order some years ago involving the same defendant. Other unrelated but linked cases such as asbestosis claims or the several hundred neurology claims arising from a well-documented patient recall in a local health trust are in much greater number and demonstrate that the conventional approach of allowing individual claims to proceed to trial assists all involved to narrow the issues, proceed to trial/settlement as appropriate and from which insights are gained which may expedite resolution of the other cases in either parties favour. I consider that even though these plaintiffs may have worked in different units or at different time periods, that if one or two of the claims were to proceed to hearing that the generic and case specific issues will be addressed and may well assist in dictating the outcome of the remaining claims. The alternative is that by acceding to this application, these actions will inevitably become bogged down in a preliminary dispute of undoubted complexity which will prolong matters, prove contentious, increase costs, take up further court time, cause further delay, further anxiety and inconvenience for all involved, will not prove decisive for the claims nor a "knockout blow" and may well tie up an appellate court having to consider issues sought to be addressed via what I consider to constitute a potentially treacherous shortcut.

Separating generic issues from case specific issues

[46] The authorities demonstrate the difficulty in practicably separating issues from the individual circumstances of each case. It is not possible for the court to make a determination in respect of the duty of care without hearing all of the

relevant circumstances of each individual case, as was observed in *McClurg*:

> "Individual cases will have to be decided on their own facts."

There is no appropriate generic approach to the issues. The various cases herein present different factual scenarios which are materially relevant to the determination of the issues and will require the court to undertake an assessment of each individual set of circumstances.

Consideration

[47] I have carefully considered the various material before me including affidavits, written submissions and after a lengthy hearing, I am not persuaded these cases warrant a direction pursuant to Order 33 Rule 3. The defendant also cites the inherent jurisdiction of the court but where there are specific court rules providing for the application they seek, I am not persuaded such inherent jurisdiction should be invoked to circumvent the requirements of the Rules of Court of Judicature. I have also had regard to the overriding objective and considered factors such as the nature of the dispute, the delay to date, the risk of duplicated effort for all concerned, the costs implications, the complexity and sensitivity of the issues and the potential for additional anxiety for the plaintiffs in circumstances where there is independent evidence before the court which points to the vulnerability of the plaintiffs in these actions. It is of note that the defendant acknowledges several of the plaintiffs have, in their submissions, set out in full the commentary on the provisions of Order 33 Rule 3 from "*Valentine, Civil Proceedings in the Supreme Court*." Other than stating "the defendant acknowledges the validity of this commentary," the defendant deftly avoids making any written or oral submissions on the various authorities in this area which, for a moving party in an application of this nature, is a glaring omission.

[48] I consider that this application was bound to fail. Even if the defendants succeed at a preliminary hearing it would not be a knockout blow for either side, in fact one of the plaintiff's counsel described it as "death by a thousand cuts". As was observed in the *Donaldson* case, a court at an interlocutory stage should only deal with such matters it if is short and easily resolved, these cases are far removed from that.

[49] It is clear from the authorities, and the defendant fails to cite any which support their assertions, that the trial of preliminary points presents potentially significant difficulties. I consider that the generic issues the defendant seeks to have determined in these cases as preliminary points will not prove decisive meaning this is a far cry from an appropriate case for a direction under Order 33 Rule 3.

[50] When one considers a more common application under the above provision for a split liability/quantum trial such as might occur in a road traffic accident claim, this could prove a pragmatic approach for a defendant where the liability issue would have the potential to bring the entire claim to an end and avoid the unnecessary expense and time involved in undertaking extensive quantum investigations. In the present case, that simply will not happen. It is common case that all these plaintiffs will require a trial of the case specific issues pertaining to their individual circumstances. That will not be avoided if the hearing of the generic issues goes in the defendant's favour.

[51] It is difficult not to conclude this is an entirely misconceived application. These cases have not been the subject of a consolidation (or quasi consolidation) application, they remain standalone actions and if the first or second cases which proceed to trial do not provide sufficient insight to both parties to expedite resolution of the remaining cases, they will all proceed to hearing, a prospect I would have thought unlikely. As previously observed by this court, this jurisdiction has a long history of parties for the most part adopting a common sense and pragmatic approach to civil claims with a degree of flexibility and compromise on both sides, leading to the resolution of hitherto seemingly intractable disputes. I urge the parties in these cases to expedite the progress of claims which will save further stress, inconvenience, time and money on both sides.

Conclusion

[52] For the reasons set out above, I therefore refuse the defendant's application and award costs of this application to the plaintiffs. I certify for counsel on behalf of the parties.

[53] I am advised that several of these actions are ready for hearing and in five of the cases the plaintiffs have the same legal team and worked in the same units meaning there is a significant overlap between the claims. I direct that all these actions shall be referred to the judge for review and consideration of such pre-trial directions as may be considered appropriate.