Neutral Citation No: [2019] NIQB 109	*Ref:* MAG11124
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 06/12/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

BETWEEN:

SAM CARSON McKELVEY BY HIS MOTHER AND NEXT FRIEND

Plaintiff;

-and-

PENELOPE HILL

First-named Defendant;

-and-

THE SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST

Second-named Defendant.

_____

MAGUIRE J

Introduction

[1] The plaintiff in these proceedings is Sam Carson McKelvey. He was born on 8 October 2009 and is now aged 9.

[2] His mother (and next friend in these proceedings) is Emma McKelvey.

[3] The defendants in these proceedings are:

(a) Penelope Hill who is a consultant obstetrician and gynaecologist; and

(b) The South Eastern Health and Social Care Trust.

[4] The subject area of this action is alleged medical negligence arising from the circumstances of the plaintiff's birth.

[5] Those circumstances have generated the following pleadings:

(a) A writ of summons dated 18 May 2015.

(b) A statement of claim dated 4 May 2018.

(c) An amended statement of claim dated 29 May 2019.

(d) A defence on the part of the first named defendant dated 9 September 2019.

(e) A defence on the part of the second named defendant dated 6 September 2019.

(f) A notice seeking further and better particulars from the plaintiff served by the first named defendant on 13 September 2019.

(g) A notice seeking further and better particulars from the plaintiff served by the second named defendant on 6 September 2019.

[6] In essence the case against the first named defendant is concerned with the pre-labour treatment provided by her whereas that against the second named defendant is concerned with treatment in the course of labour.

[7] The matter is put as follows in the affidavit grounding the application before the court, which was sworn by a solicitor of Carson McDowell LLP, dated 3 October 2019:

> "(a) In summary, as against the First Named Defendant, the Plaintiff's claim can be properly categorised as a medical negligence claim. The First Named Defendant is a Consultant Obstetrician and Gynaecologist who treated the Plaintiff's Mother on two occasions on 30 September 2009 (38+1 weeks gestation) and 6 October (39+1 weeks gestation) in a private antenatal setting at Dundonald Consulting Rooms. On both occasions, the First Named Defendant examined the Plaintiff's Mother and undertook an ultrasound scan. She calculated the Plaintiff's Estimated Fetal Weight ('EFW') on both occasions and plotted them on a growth chart. In summary, the Plaintiff alleges that the First Named Defendant failed to (i) accurately predict his macrosomic birth weight (that he would weigh more than 4kg/4,000g), (ii) ensure that a doctor was present at his delivery and able to deal with the possibility of

> shoulder dystocia, (iii) acknowledge and investigate the suspicious CTG readings recorded during his Mother's labour and (iv) be present at his birth, which increased the prospects of the Plaintiff suffering personal injuries. The First Named Defendant is indemnified by her medical defence organisation (the Medical Protection Society ('MPS')) in respect of the private antenatal care, which she provided to the Plaintiff's Mother on the above two occasions.
>
> (b) The Plaintiff's claim against the Second Named Defendant can also be categorised as a medical negligence claim. The Second Named Defendant is the Health Trust responsible for the management of the Ulster Hospital. Employees of the Second Named Defendant were involved in the Plaintiff's Mother's labour and the Plaintiff's delivery on 8 October 2009 in an NHS setting. Of note, the First Named Defendant was the 'on-call' Consultant in the Ulster Hospital on the relevant date. She was, therefore, involved in providing the Plaintiff's Mother with care during her labour and also involved in the Plaintiff's birth. The Plaintiff alleges that the Second Named Defendant failed to (i) acknowledge/investigate suspicious CTG readings during his mother's labour, (ii) arrange for a doctor to be present at his delivery, (iii) undertake the McRoberts Manoeuvre and apply suprapubic pressure before applying traction to his head and (iv) seek assistance from a doctor in time or at all. The Second Named Defendant, as opposed to the Medical Protection Society, is vicariously liable for the First Named Defendant in relation to all relevant care provided to the Plaintiff/the Plaintiff's Mother under the ambit of the National Health Service ('NHS')."

[8] As the plaintiff's amended statement of claim at paragraph 4 puts it, by way of summary:

> "The combination of defaults and omissions in Mrs McKelvey's antenatal care, in her labour and in the delivery of the plaintiff resulted in the plaintiff suffering such severe and permanent personal injuries, loss and damage as hereinafter appears."

[9] The Amended Statement of Claim goes on to specify two particulars of personal injuries. These are:

(a) Severe brachial plexus injury of the right arm.

(b) Hypoxic-ischaemic encephalopathy.

In addition it makes a claim for financial loss "to include loss of earnings, loss of employers' pension contributions, cost of care, case management costs, aids and equipment costs, additional vehicle costs, additional travel costs, Office of Care and Protection fees, court fund fees, sundry costs and interest - £2,299,746.00."

[10] The Amended Statement of Claim brought about the filing of defences by each defendant. The first named defendant denies any negligence and denies that she had caused or contributed to the injury, loss and damage alleged. She says that the private antenatal care provided by her to the plaintiff's mother was in keeping with the standard to be expected of an ordinary competent consultant obstetrician and gynaecologist.

[11] The defence then goes on to deal with denials in relation to the details of the case made against her, including denials in relation to causality.

[12] The defence also notes the following:

(i) That the management of the plaintiff's mother's labour was undertaken by employees of the second named defendant so that any injury sustained during labour was in no way caused or contributed to by the first named defendant acting in her private capacity.

(ii) That the plaintiff had been diagnosed as suffering from Kabuki syndrome which is a condition due to a gene malformation and not related to the private antenatal care provided or the circumstances of labour and delivery. Thus, the plaintiff did not sustain brain damage in association with the circumstances of his delivery and the Kabuki syndrome is the cause of the plaintiff's developmental delay and associated problems during childhood, with the exception of right-sided upper limb weakness.

[13] As regards the second named defendant's defence, it is concerned with the labour and delivery and in these contexts it denies any negligence. As regards antenatal care, it denies that the second named defendant had or has any responsibility and pleads that the first named defendant undertook the antenatal care in respect of the plaintiff's mother on a private basis.

[14] The second named defendant goes on to deny the details of the plaintiff's particulars of negligence.

[15] In similar vein, the defence goes on to deny that the plaintiff had sustained any personal injuries, loss or damage.

[16] The defence of the second named defendant notes further the following:

(i) That any brachial plexus injury sustained by the plaintiff to his right arm was sustained independently of any act or omission on the part of the second named defendant. In particular, it was denied that any such injury was related to the traction applied by the servants or agents of the second named defendant.

(ii) That while it was admitted that the plaintiff may have sustained a short period of hypoxic-ischaemic encephalopathy, it was denied that this had given rise to any sequelae.

(iii) That the second named defendant contends that any clinical manifestations that are seen in the plaintiff are the consequence of his Kabuki syndrome, rather than as a result of his delivery.

The Application

[17] The application before the court is based on a summons issued by the first named defendant (not both defendants). This was issued on 3 October 2019 and what it seeks is an order pursuant to Order 33 Rule 3 of the Rules of the Court of Judicature:

> "That there be a split trial in this action, with an initial hearing dealing with the issue of liability (the standard of care and causation) and (if required) a second hearing dealing with the issue of quantum."

[18] The basis upon which this application is made, in simple summary, is that a split trial would:

(i) Avoid unnecessary costs;

(ii) Make effective use of court time;

(iii) Would bear a substantial prospect of disposing of the whole case against either or both defendants; and

(iv) Would not adversely affect the prospects of settlement;

(v) Would be unlikely to produce any substantial duplication of factual/expert evidence.

[19] These themes are developed in the applicant's grounding affidavit which the court has carefully considered. However, it does not propose to set all of these out in detail in the interests of economy.

[20] At the hearing before the court, the applicant was the first named defendant and she was represented for the purpose of these proceedings by Mr Boyle QC. The plaintiff was represented by Mr Ringland QC and Chris Ringland BL. The second named defendant was not represented on the apparent basis that it does not support the first named defendant's application and is content for the matter to be litigated in the usual way without a split hearing.

Legal Provisions

[21] It is useful to set out the following legal provisions which have relevance to the task which confronts the court.

Order 1A of the Rules of the Court of Judicature

> "(1) The overriding objective of these rules is to enable the court to deal with cases justly.
>
> (2) Dealing with the case justly includes, so far as is practical -
>
> (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 issue;
>
> (iv) The financial position of each party.
>
> (d) Ensuring that it is dealt with expeditiously and fairly.
>
> (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."

Order 33 Rule 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."

Legal Principles

[22] It is worthwhile to draw attention to a number of cases which may be viewed as relevant to how the court goes about its task. The Northern Ireland Court of Appeal in *Miller v Peeples* [1995] NI 6 approved the views of the England and Wales Court of Appeal in *Coenen v Payne* [1974] 2 AER 1109. In that case Lord Denning had said that:

"The normal practice should still be that liability and damages should be tried together. But the courts should be ready to order separate trials whenever it is just and convenient to do so" (see page 1112).

[23] In *Miller* Carswell LJ, having referred to the quotation above, referred to the phenomenon of split trials. He said that they had been ordered or agreed between the parties with relevant frequency in recent years and that "if the power is used properly it is an effective means of saving unnecessary expense and hearing time".

[24] He went on at page 10 of the report as follows:

"The court should in our view take a broad and realistic view of what is just and convenient, which should include the avoidance of unnecessary expense and the need to make effective use of court time …

> In weighing up what is just and convenient the court should balance the advantages or disadvantages to each party and take into account the public interest that unnecessary expenditure of time and money in a lengthy hearing should not be incurred."

[25] In the case of *Mohan v Graham* [2005] NIQB 8 Deeny J, in a personal injuries context, having drawn attention to the approach taken in *Miller v Peeples* said:

> "It is important to note at the outset that the normal course of events in this jurisdiction is that the trial of both quantum and liability should be heard together … the court will not depart from the normal practice without good reason." (Paragraph [3]).

[26] Notably Deeny J went on at paragraphs [4] and [5]:

> "…it does not seem to me that it is the practice in the Queen's Bench Division that every paraplegic case where there are liability issues should be dealt with by way of a split trial merely because the quantum issues there may be complex and time consuming but the liability issues may be dealt with expeditiously. The courts are more ready today than perhaps they once were to acknowledge that the compromise of disputes is an important aspect of the fair and expeditious administration of civil justice. Now that juries hear few cases it is more natural and more normal for judges to speak more robustly about such matters than they once did. The compromise of actions allows all parties to reduce costs, it reduces court time, it reduces the possible stress the parties and witnesses sustain from litigation and it avoids the unnecessary using up of the time of various valuable medical, professional and managerial personnel as witnesses. It seems to me, and counsel did not dissent from this proposition, that it is often easier to resolve a personal injury action if the parties and their legal advisors are dealing with one trial with all the issues before them. At the commencement of such a trial they should have, and would normally have, a reasonably clear appreciation of the value of the case and of the strength or otherwise of their position on liability and therefore it is easier for them to resolve the action as a whole. It is clear that as a matter of fact

> in our courts most of the actions being listed in the Queen's Bench Division are listed to deal with both quantum and liability and are indeed resolved.
>
> [5] While in theory parties can compromise cases on liability only, by the allocation of percentages, and leave quantum to another day, experience would indicate that settlement is facilitated less by such a situation than where the parties can arrive at an actual monetary sum. One obvious reason for that is that the settlement of a final figure on damages leads to finality there and then and is therefore more attractive to all concerned."

[27] To similar effect is the judgment of Stephens J in *McClean v McLarnon* [2007] NIJB 297. This also was a personal injuries case where the issue concerned the court ordering a split trial. At [13] the following is found:

> "It was contended on behalf of the defendant that whether a split trial would adversely affect the prospects of settlement was not a factor which I should take into account. I reject that submission. … If a split trial adversely affects the prospects of settlement then that is a factor that should be taken into account."

The main strands in the evidence submitted

[28] The applicant's application was grounded on an affidavit filed by the applicant's solicitor. This is an extensive document running to some 11 pages of text with close to 120 pages in exhibits. The court wishes to make it clear that it has considered this material in its totality but will provide in this judgment only a selection of points from it, with some commentary from the court.

[29] The same can be said in respect of the affidavit of the plaintiff's solicitor which is 12 pages of text with about 40 pages of exhibits.

[30] A problem with both affidavits which the court briefly wishes to mention is that each contains opinion evidence and assertional material which the court finds itself unable to place great weight upon, especially as neither deponent has sought to establish himself as an expert witness and often statements are made without any factual support.

[31] As is well-known, the primary purpose of the serving of an affidavit is to communicate factual or historical material to the court and this is not achieved by turning parts of the affidavit into a quasi-skeleton argument, especially in

circumstances where each counsel themselves has provided to the court a skeleton argument on the law, for which the court expresses its gratitude.

[32] It is proposed to use bullet points in what follows as a way of picking out a range of information from each affidavit and as an aid to economical exposition of some of the themes which have been developed. On occasions the court will provide some limited commentary of its own.

The applicant's grounding affidavit taken with submissions at the hearing

[33] The main points of interest are:

- The issue of the plaintiff's Kabuki syndrome features extensively. This has already been referred to above. The importance of this in these proceedings relates to the extent to which, if at all, it establishes that the first named defendant has a strong defence case. The affidavit states that in 2013 the plaintiff was diagnosed with this condition. This is not disputed. But what does appear to be in dispute is the impact of this condition upon him. This has the appearance of an issue which would be live and significant at any hearing in relation to the liability issue; indeed, it also will have relevance to the issue of quantum. In an exhibit to the first named defendant's affidavit, there is a half-page letter, dated 7 August 2013, from a Dr Dabir, a Consultant in Clinical Genetics. This is not in the form of a medical-legal report. *Inter alia*, the letter states that Kabuki syndrome "should be considered as the primary diagnosis responsible [for the plaintiff's] developmental delay as opposed to any hypoxic-ischaemic injury". On the face of it, this statement is important but its importance has to be judged in the light of other material which is before the court. That other material is found in the answers of Mr Boyle to questions asked by the court and elsewhere in the papers in respect of this application. First of all, Mr Boyle confirmed that in fact the first named defendant does not have any form of expert medical-legal report on this issue. It appears, therefore to be relying on what Dr Dabir has said, and that alone. Mr Boyle stated to the court that his client had not seen any report dealing with this issue which had been obtained by the second named defendant. Secondly, it is clear that the plaintiff has sought and obtained a view on this issue from Dr Denise McCartan, a Consultant Clinical Psychologist. This has been exhibited to an affidavit filed in these proceedings on behalf of the plaintiff and is dated 3 April 2018. In that report the author spends some considerable time on this issue but ultimately concluded that "it is not possible to say at this time whether [the plaintiff's] cognitive difficulties are likely to be caused by Kabuki syndrome or by mild HIE" ("Hypoxic Ischaemic Encephalopathy"). In her report it is notable that Dr McCartan referred to an earlier report of Dr Peake in which this doctor attributes the plaintiff's neurocognitive and neurodevelopmental deficits to the hypoxic insult experienced at birth. Finally, to complete the picture, it is the case that the second named defendant has commissioned a report on this issue from a

Dr Rosenbloom but this is not found in the papers before the court and it is unclear what view he has arrived at. On this issue, having reviewed what evidence the court has available to it, it seems to the court that while it accepts that there may well be a triable issue arising from the plaintiff's Kabuki syndrome, it cannot at this time adopt any view as to the strength of its influence on the plaintiff for the purpose of this application. It does not, therefore agree with the proposition that the court should presently view this issue as one which would give rise to a substantial prospect of enabling the case to be disposed of.

- Another issue which arises from the first named defendant's affidavit relates to the balance of time, effort and resources which may have to be expended as between a split and an un-split trial. On this issue the first named defendant's affidavit does contain some material on the numbers of expert reports which may be required at each stage of the process and some information about the costs of the collection of quantum related reports. As regards the former, the suggestion made is that 24 experts would be required for the purpose of the liability hearing (subject to any sharing of evidence between defendants) and that overall, in respect of the trial on all issues, some 45 experts would be required (subject to the same proviso as before). These figures show that a case of this nature is resource intensive, though the court would be surprised if there was not some witness sharing between the defendants at both stages and between the plaintiff and the defendants in respect of quantum witnesses, in particular. As regards the latter, a small number of quotations were provided in respect of the commissioning of reports for the quantum aspect of the matter. These certainly show that the commissioning of reports is expensive, a fact which comes as no surprise to the court. However, the court is of the opinion that it is unlikely that there would have to be duplication of every quantum report and it noted that Mr Ringland was at pains to assert that his quantum reports (which number in the region of four) have, in substance, already been obtained and provided to the defendants. Mr Ringland also indicated that he did not anticipate that these would be added to. The court, in the course of the hearing, asked the parties to provide it with their best estimates as to the duration in this case of each of the two stages. Mr Boyle said that liability (including causation) would take 2 weeks and quantum issues (assuming they had to be determined) a similar amount of time. Mr Ringland was of the view that liability would take longer than 2 weeks to try but probably less than 3 weeks. In respect of quantum he thought well less than 2 weeks would be required and he thought that, in that sphere, there was room for substantial agreement of reports. The court's assessment on this matter is that for present purposes it is likely that liability (which both sides accepted would involve a range of complex matters) will likely take longer than 2 weeks but probably less than 3 weeks. On the other hand, the court is of the view that while it may be necessary for a substantial number of reports to be commissioned for the quantum stage, it is unlikely that that stage would last 2 weeks, given the less difficult terrain the court

would be having to encounter and the ability of the parties to co-operate and shorten proceedings by compromise and agreement. However, what appears to the court to be reasonably clear is that litigation in the medical negligence field is costly. Because of this, there is an imperative on all concerned to limit costs as far as reasonably possible, especially where funding for litigation is coming from the public purse. In the court's estimation the present case is not one in which it could be said that there is a dis-proportionality between the time and costs which may have to be expended as between the liability and quantum stages. This is not a case where there would be likely to be a short liability hearing and after it a much longer quantum hearing such as might be found in a catastrophic injury road traffic accident case. In such cases, the attraction of a split hearing is likely to be substantial but this is not such a case.

- While a claim is made in the first named defendant's grounding affidavit that a split trial would not adversely affect the prospects of settlement, the basis for this claim is unclear and it sits uneasily with the *dicta* of Deeny J in *Mohan v Graham supra.*

- The question of the likelihood of duplication of witnesses as between the liability and quantum witnesses who may be called, especially on the plaintiff's side, is addressed in the grounding affidavit of the first named defendant. However, on this issue Mr Boyle seems to the court to be correct when he accepted that it would be likely that the plaintiff's mother would have to give evidence at both stages, a point not acknowledged in the grounding affidavit. Mr Ringland was of the opinion that in addition to the plaintiff's mother giving evidence twice he thought that at least one expert (Mr Cosgrove) would be in the same boat. However, Mr Ringland seemed to row back from the list of 5 experts whose evidence would be duplicated found in his client's grounding affidavit. For the court's part, it considers that the most important feature in respect of this topic is that the plaintiff's mother would have to give evidence twice if a split trial is ordered and, as a result, two hearings eventuated. This is not a small matter. The plaintiff's mother is a lay person who undoubtedly will be facing an ordeal in giving evidence once, never mind, twice. It also appears to the court to be likely that a witness, such as Dr McCartan, might have to give evidence twice.

- There are many points in the applicant's grounding affidavit with which the court would take little, or no, issue. It acknowledges that the role of the defendants is different and that the precise way in which one or other defendant may be liable will be an issue, as will be the question, in that event, of which defendant is responsible for what damage. Quantum issues, while they can be prepared for in a relatively standard way, may generate in a given case particular areas of difficulty.

- In the applicant's affidavit, it appears to be accepted that a liability hearing could take place in June 2020 and that the quantum hearing (if required) could take place in January 2021. The court has its doubts about this timetable as the resolution of the liability hearing may not be for some time after the hearing and if the first named defendant is holding back from commissioning quantum reports until it knows the outcome of the liability hearing (which seems to be the logic of this application as otherwise the hoped for savings of costs would not be obtained) the task of gathering evidence for the quantum hearing would only begin then. It thus seems likely that it will be inevitable that if the court grants this application one effect of it doing so will be to delay the resolution of the case. This delay could easily be in the region of 12 months from the date of the court's liability judgment.

The respondent's grounding affidavit and submissions at the hearing

[34] The main points of interest in the respondent's affidavit have largely been referred to in the last section of this judgment, as they have emerged in the course of discussion of the applicant's affidavit. However, the court notes additionally that:

- It raises issues about the contractual position which existed between the plaintiff's mother and the first named defendant and how this might affect the liability of the latter to the plaintiff. The court accepts such issues may arise but considers that their existence would not be likely to affect significantly the considerations of time and expense which it has already addressed.

- It emphasises the scope for co-operation between the defendants and the plaintiff in relation to the preparation of materials for the quantum phase. While the court encourages this, it would be slow to overstate the chances of this occurring.

- It notes that it can be said that the various heads of claims for damage have been substantially standardised in respect of this type of claim. This is a point which the court, in large part, accepts, though all cases are ultimately different and in a field such as medical negligence knotty and unusual issues do, of course, arise from time to time.

- The court is inclined to the view that it may be too sweeping for the respondent's deponent to say (as he does) that "it is difficult to envisage circumstances where the defending parties will seek matching experts of their own". The court would not go this far.

- The court does accept that in respect of the quantum issues it is not unusual for the parties to make headway towards if not settling issues reducing the areas of disagreement.

The court's assessment

[35] The court has carefully considered all of the materials put before it. It reaches the following key conclusions:

(a) The court is of the opinion that on the important issue of the prospects of the first named defendant succeeding in its defence of these proceedings there is no sufficient evidence which has been placed before it which provides a basis for concluding that the first named defendant would succeed or that there is a substantial basis for believing she would succeed at a trial on liability. This, of course, is not a finding that the first named defendant will not succeed; it is only a finding that, setting aside purely assertional statements found in the grounding affidavit to this application, and in the pleadings, the court has not been presented with material which persuades it that there is a likelihood that the plaintiff's claim will be dismissed at that stage.

On this issue, the court adopts the view that it is not in a position to arrive at any such conclusion.

This is not, therefore, a case which falls into that category where the strength of the defendant's defence is such as to promote the view that it would be appropriate, by reason of this alone, to order a split trial.

(b) It is also not a case where any purported imbalance between the liability stage of a hearing and the quantum stage supports the contention that the former should be separated from the latter. In this case the court's best estimate is that the liability phase of this litigation will be likely to be lengthy and complex whereas the quantum phase will be likely to be less complex and probably less lengthy.

In other words, the court rejects any notion that it should order a split trial on the basis that there is a disproportionality between the time which may have to be taken to deal with liability (including causality) and the time taken to deal with quantum. In some cases such a disproportionality may provide a weighty reason for a court to consider that a split trial would be a good idea but, given that the liability stage will likely last for a minimum of two weeks and probably closer to three weeks and the quantum stage probably will fall well short of 2 weeks, the splitting up of the proceedings on this basis is unattractive.

(c) In the court's view the most important remaining issue relates to the saving of expense. The court accepts that it could be said that in a proportion of cases there will likely be a saving of costs if a split trial was to become the norm - as a proportion of cases do not succeed on

liability grounds. However, the civil justice process to date has rejected the policy option - as a generality - of dealing first with the issue of liability, leaving aside the issue of quantum to be determined at a second phase of the hearing only in cases where first liability has been established. Accordingly, there was no dispute at the hearing that ordinarily in a personal injuries case liability and quantum are to be dealt with sequentially at a single hearing. It is only in cases where it is just and convenient to split the trial that such a step should be taken.

The proposition before the court on this aspect of the matter is that the court should view a split trial as just and convenient on financial grounds irrespective of the defendant's prospects of a successful defence and irrespective of the issue of whether the quantum hearing would be disproportionately lengthy.

In the authorities placed before the court the only case which might be viewed as lending support to the above submission notably is not a personal injuries case but a commercial case and notably is not a case about the splitting of liability from quantum but a case about the holding of a preliminary hearing on a point of law. This case - *Glen Water Limited v Northern Ireland Water Limited* [2016] NIQB 55 - did involve an issue concerned with the saving of costs but notably this was against the background that in that case deciding the preliminary point of law would itself only have taken in the region of two days whereas the hearing of all issues together would have taken several weeks.

The court is of the opinion that the *Glen Water Limited* case is distinguishable from this case and needs to be viewed in its own context.

[36] In considering the question of what is just and convenient the court will approach this case having regard to the particular subject area of this litigation and having regard to the major factors which might be viewed as supporting a split trial and the major factors which may be viewed as not supporting this option.

[37] As regards the subject area, the court is dealing with a very serious case of the personal injuries *genre* which involves alleged medical negligence at the time of birth which has arguably resulted in very significant injuries which have a severe and continuing impact on a plaintiff who is now aged nine. There is no dispute between the parties that the subject of liability is complex and there is no dispute between the parties that the potential damages that might have to be paid by the defendant or defendants may be substantial and will involve the court's consideration of the evidence of experts who are used to dealing with the effects of catastrophic injuries.

[38] It seems to the court that in the sphere of medical negligence claims of this sort, it is usual for the parties to prepare each's case on liability and quantum simultaneously with a view to resolution either by the court or by way of settlement at a single trial.

[39] As regards the factors which may promote a split trial, the court accepts that there are two factors which may, to a greater or lesser extent, in this case have this effect.

[40] Firstly, it is undeniable, as has already been mentioned above, that there will be a percentage of claims of this type which will fail in respect of liability. There is, however, no particular reason for the court to believe that this case will fail, as the court has already recorded, but insofar as this case is viewed through the lens of the pleadings dismissal is a possibility.

[41] In these circumstances the court acknowledges that it is likely that there would be a substantial saving of costs for a defendant if it is able to create circumstances in which it can achieve a dismissal of the claim without at the same time having to accumulate the costs connected with having to prepare for a quantum hearing.

[42] Secondly, if the case can be disposed of by virtue of the holding of a liability hearing alone, it is right to acknowledge that it would bring with it the benefit of a saving in the use of court time, as compared to the situation where a single hearing runs its full course and the court has to resolve both issues of liability and quantum.

[43] But the problem remains that there is no particular basis for the court to believe that the present case in fact is one in which the defendants, and in particular, the first named defendant, will be likely to succeed.

[44] The key factors, on the other hand, which point towards the court favouring the usual model of holding a single trial on all issues number three.

[45] Firstly, a regrettable aspect of a split trial in this particular context will be that it is likely, in the court's estimation, to bring about delay. This is because if, contrary to the defendant's hopes, the plaintiff's case is wholly or in part successful at a liability hearing, the effect of having gone down this road will probably be that the defendant would have to, at that point, begin its preparation for a quantum hearing. This would generally involve a process of assembling the necessary quantum evidence in circumstances where it has put off collecting such evidence in order to save costs. While it is correct that in theory the defendant could seek to agree the plaintiff's quantum evidence which in this case has already, for some time, been in the process of assembly, it would, in the court's view, be unlikely that all of the plaintiff's reports or even a majority of them would, in fact, be agreed.

[46] It is not unrealistic, in the court's estimation, that the delay between the outcome of the liability hearing becoming known and the beginning of the quantum hearing may be in the region of 12 months.

[47] Secondly, a casualty of a split trial approach, in the court's estimation, will be that if adopted it will be likely to reduce the prospects of a negotiated settlement. At the hearing of this application, it was accepted that the court could legitimately and properly take into account when making a decision under Order 33 the adverse effect that a decision permitting a liability only hearing may have on the prospects of a settlement being achieved.

[48] While such an adverse effect is not inevitable, it is likely, as in most cases the court would expect the defendant to place the issue of settlement, other than perhaps a "buy off", on the backburner, while it prepares for the liability hearing. Indeed, the first named defendant would be quite likely to adopt a "hard" position against settlement of any sort.

[49] It seems to the court that if such a position is adopted by the defendant this would fit in with the stance that it would not prepare for any quantum hearing until after the liability hearing has been determined.

[50] Thirdly, it is right that the court should take into account that a likely impact of ordering a split hearing - at least in many cases - is that it would mean that some witnesses, especially lay witnesses, may have to go through the process of giving evidence twice. In general, in the court's view, this would be undesirable. In the present case, it is common case that the plaintiff's mother, a lay person, would have to go through the process of giving evidence and being cross-examined twice if the court were to order a split trial and subsequently a quantum hearing had to be held. It is the court's experience that in a context such as the present involving significant injuries to a child any mother faced with having to give evidence would be likely to find the process nerve wrecking and difficult. The court therefore would reject in this case any argument that this is a matter in respect of which the court should invest little importance. Consequently, the court would be slow in the present case to require the plaintiff's mother to have to give evidence twice and this is a factor, in the court's estimation, against the first named defendant's application.

Conclusion

[51] In the present case, the court is clear in its overall assessment that it should decline to order a split trial. In the last section of this judgment it has considered what seemed to it to be the most significant issues in this application. Looked at individually, the court regards the main points made by the applicant as unconvincing. For the avoidance of doubt, however, the court will stand back and consider the various factors cumulatively and ask itself whether, approaching the matter in that way, it should conclude that the application should succeed. Having

done so, the court does not consider that any different outcome is warranted by virtue of that approach.

[52] In all of the circumstances of this case, the court dismisses the application of the first named defendant. In the court's opinion, this conclusion is consistent with the overriding objective of the Rules of Court.