

THE NATIONAL MOOT COURT COMPETITION 2020



QUESTION PACK

Kindly Sponsored by A&L Goodbody

A&L Goodbody

5th October, 2020

A chara,

We are pleased to provide you with this information pack for the upcoming **National Moot Court Competition 2020**. All of the information you need in relation to this competition is in the pack, including the problem question, rules and procedures, details of the preliminary round where participants submit recorded submissions, and the outline timetable for the day for the live rounds.

PLEASE NOTE: In the current circumstances of **COVID- 19**, the **competition will take place virtually this year, in an online format**. Participants are invited to submit memorials and recordings of their oral submissions for the initial rounds. The top 8 teams will make it through to the quarter final, after which 4 teams will progress to the semi final, with the final consisting of two teams. The quarter final, semi final and final will take place live via Zoom on **Saturday November 21st 2020**.

Please note specifically the information below:

1. Institutions may enter a maximum of **5 teams**. We need to receive information on the number of teams that you are entering and the participants' names by 5pm on **Monday 26th October**. Teams should consist of 3 students, though only 2 students from each team will be entitled to present oral submissions. Please email the team names to nationalmoot@gmail.com
2. Marks awarded to memorials will not count on the day of the Moot itself, except in a tie-break situation (i.e. in deciding which teams progress to the semi-finals, if there are teams on equal points in terms of the oral rounds then they will be divided on the basis of their memorial marks). All participants must submit a memorial for each side and these will be exchanged at the beginning of each round. Failure to submit memorials by the specified deadline will mean that a team cannot participate. All arguments must be contained in the memorial and teams cannot add additional substantive arguments on the day (though you could add a new case, for example, so long as the substantive argument is set out in the memorial). A prize will be awarded to the team with the best memorials. This will be announced at the end of the Grand Final on the day of the competition.

3. We need to receive all written submissions (in MS Word or PDF format) and videos of oral submissions by **5pm on Friday 6th November 2020**. **Late submissions will not be accepted under any circumstances.** Send submissions to nationalmoot@gmail.com. As detailed further within the information pack, these submissions should include a memorial on behalf of the Plaintiff and a memorial on behalf of the Defendant. Each document should be no longer than 2,500 words. Only the designated Team Letter should appear on the memorials; there should be no way to identify the institution submitting the memorials.
4. Thanks to the kind sponsorship of **A&L Goodbody solicitors**, there is **no entry fee** for the competition this year.

The Winning Team will receive €200 worth of one-for-all vouchers and the Best Speaker in the Final will receive €100 worth of one-for-all vouchers. There will also be a €60 prize (in one-for-all voucher format!) for the Best Memorials.

Please read the information pack as it contains important information on the format of the competition, the procedures and rules, and, the problem question itself.

We look forward to hearing from you in relation to your participation, and we thank you for supporting this competition.

If you have any questions do not hesitate to contact us by emailing nationalmoot@gmail.com or by calling me on 01-7006471.

Le gach dea-ghuí,

Dr Aisling de Paor
School of Law & Government,
Dublin City University

A&L Goodbody



National Moot Court Competition 2020

Kindly sponsored by

A&L Goodbody

Guidelines for Participants

1. For the purposes of this question, students are required to address recovery under the common law tort of medical negligence (to include the question of informed consent) only. The case does not address any questions of liability under any legislation. You are required to prepare written submissions for the Plaintiff/ Appellant and written submissions for the Defendant/ Respondent. There is no need to prepare additional court documents.
2. There will be no oral evidence taken on the day. This is a legal argument only. The primary question is whether the Court of Appeal should overturn the decision of the High Court to find a case of medical negligence. No new pleadings can be raised on the day.
3. This is an appeal on point of law. Submissions should focus on whether there is a prima facie case of medical negligence. The Court of Appeal will not accept substantive arguments on remedies (including damages), or on the question of vicarious liability on the part of the hospital in question.
4. This question pack contains a total of 17 pages.

Background and facts

The claimant, Bernardo O'Keeffe Da Silva is a 30 year old male from Dublin, Ireland. He is a very well known footballer and for the past five years he has played for a leading Irish football team called Blackhall Rovers. Bernardo also does some modelling in his spare time to earn extra money. He takes good care of himself, and is proud of his well-maintained appearance and handsome good looks.

On 25th October 2018 while playing a challenge match against rival club, Dublin City Wanderers, Bernardo scored the winning goal. While celebrating excited with a team mate, he ran, jumped to embrace his team mate and they collided at speed into each other, and Bernardo slid off the pitch. Bernardo suffered a serious laceration to his forehead and head. He was in pain and bleeding profusely. There was extensive damage to his forehead and the bone was visibly exposed. He attended A&E at Galaxy General Hospital, Dublin for initial wound treatment, stitching and bandaging. He was later discharged from the hospital. Bernardo was told that he would likely require further surgery to ensure the full closure of the wound and to improve the appearance and feeling in the forehead area. The following month, although the wound was healing, Bernardo was still experiencing some pain and reduced feeling and expression in the forehead. He was also particularly dissatisfied with the appearance of his forehead and surrounding area, including the hairline.

Bernardo had an appointment with Mr. John Murphy, a consultant surgeon at the Galaxy General Hospital on 25th November 2018 who specialises in head and face injuries and reconstructions. Mr. Murphy told him that he could perform a procedure to alleviate the pain and ensure complete and effective closure of the wound. He also informed him that this procedure would improve the appearance of the face/ forehead area. The operation involved a split skin graft plus a complete terminalisation of the tip of the forehead (which would involve pinching the skin as tight as possible to close the wound).

During the consultation, Mr. Murphy informed Bernardo that there were several ways of carrying out the procedure, all of which have varying degrees of success. Mr. Murphy further informed him that the particular method he advises (which is practiced by a growing body of medical professionals – particularly in the United States), in his view, has the best outcome. Another surgical option is removal of some of the scalp and skin around the forehead, resulting in hair loss but Mr. Murphy indicated that his preference is always, where possible, to preserve the area and function of the entire face. During the consultation, Bernardo expressed that he agreed with Mr. Murphy on the preferable surgical approach.

The operation was scheduled to be carried out by Mr. Murphy at the Galaxy General Hospital, Dublin on 4th February 2019. On 4th February 2019, on the morning of the operation, Bernardo was told that Mr. Murphy (who was one of only four specialist facial surgeons in Ireland) was unexpectedly unavailable (due to an emergency surgery that morning) and that his colleague, Mr. Jack Roberts, a general surgeon at the clinic (with extensive experience in surgical procedures) would carry out the operation. Bernardo, who was anxious for the

operation to be carried out, agreed to this, although he felt nervous that Mr. Roberts would perform the operation, as he had not previously met him.

The operation was scheduled to be performed at 3pm at the Galaxy General Hospital. At 2pm, approximately one hour before the operation was due to be carried out, Bernardo was informed by Mr. Roberts of the nature of the procedure and what was involved, including the general benefits and risks associated, as well as the general advantages and disadvantages. At this point, Bernardo was also informed by Mr. Roberts that there was a risk of complications during the operation that may result in severe forehead or head deformity as well as nerve damage, paralysis and chronic pain. On being informed of these details, although feeling confused and anxious, Bernardo gave his consent to the performance of the operation.

As part of the operation, some of the bone was removed (shaved down), pulling the tissues together to cover the bone, stitching it and using the split skin graft to cover the hole left by the missing skin. Unfortunately, complications arose during the operation and upon commencement of surgery, the consultant found that there was insufficient tissue and bone to effectively complete the skin graft. As a result, a more extensive skin graft needed to be performed on the area, which would result in a facial deformity.

Following the operation, Bernardo was very upset to discover that his forehead and surrounding area was severely deformed. He was also informed that there was some nerve damage to the area, which could lead to chronic pain and potential paralysis of the area in the future. He has been informed by Mr. Roberts that further surgery may be needed in the future to eliminate the pain and to improve overall head and facial functionality. He is unhappy with the appearance of his forehead, hairline and surrounding area (which he says he relies upon for job as a footballer and model) and its functionality, which has been reduced. He regularly experiences chronic pain in his forehead that causes him a great deal of distress. In addition to the personal impact it is having on him, he is concerned that it will have a negative impact on his career progression and employment prospects as a footballer. Since the procedure, he has been unable to return to work as a result of the pain and reduced functionality of his head and surrounding area.

Procedural history:

Bernardo contacted his solicitors, a leading law firm, Specter, Litt & Associates and obtained legal advice. Following unsuccessful correspondence between Bernardo's solicitors and the solicitors for Galaxy General Hospital to settle the matter, proceedings were initiated on Bernardo's behalf in the High Court on 12 December 2019 against Galaxy General Hospital. Bernardo pursued an action for medical negligence. A full defence was entered by the defendant, Galaxy General Hospital.

In the initial hearing of the case, the Plaintiff claimed that:

The Galaxy General Hospital was responsible for the negligence by Mr. Roberts in carrying out the procedure. Specifically, he claimed that Mr. Roberts was negligent in his performance of the procedure, which he alleged was carried out in a sub-standard manner. He claimed that the procedure

carried out was not a general and approved practice, and in any event, it contained inherent defects, which should have been apparent. It is practised primarily in the United States. He stated that, even though the alternative surgical method would have involved some scarring to the forehead, nerve damage and subsequent reduced utility/ mobility, this would have been his preferred option (in consideration of the likelihood of future further side effects, including hair loss). In response to this, the Defendant claimed that the procedure in question is common practice. The Defendant accepted there were a number of acceptable surgical methods available but the surgeon in this case took the option he believed to have the most effective and successful outcome.

Mr. Jack Roberts was negligent in failing to ensure that effective consent to this procedure was given. He claimed that the warning given to him by Mr. Jack Roberts regarding the possibility of severe deformity, chronic pain and other serious risks, just one hour before the operation took place, was invalid and not sufficient to ensure the appropriate informed consent was obtained. He further claimed that this delay in providing such warning, and the late stage at which it was communicated, caused undue stress and confusion, and therefore impacted on his ability to give fully informed and voluntary consent. In this regard, he claimed that the possibility of severe deformity and chronic pain, which he claimed were material risks and which should have been clearly communicated to him.

That he suffered confusion and stress, caused in part as a result of the shock of being told at a late stage that there was a change in surgeon who would carry out the procedure. He trusted and felt safe with Mr. Murphy, and he was not familiar with Mr. Roberts.

The Plaintiff sought the following relief:

Damages for medical negligence on the part of Galaxy General Hospital. He also claimed damages for inability to work as a result of the pain, suffering, as well as the reduced mobility suffered.

THE HIGH COURT:

At first instance, Campbell J. of the High Court found the following and held in favour of the Defendant in refusing to find a case of medical negligence:

Campbell J. held that Mr. Roberts had not been negligent in carrying out the procedure. Campbell J. considered expert medical testimony from both sides (including medical testimony from an expert in Ireland who indicated that the procedure in question was not widely used and practised in the field, and medical testimony from an expert in the United Kingdom who gave evidence that this procedure is gaining increasing popularity, and is also innovative and in line with technological advances in the field). She held that the procedure carried out by Mr. Roberts was a general and approved practice, which was in recognition of recent medical and technological developments in the field. Although she acknowledged that it was the first time that the procedure was carried out in Ireland, she referred to the increasing popularity of the procedure in the United States, and the United Kingdom, as highlighted in the medical testimony provided. She also failed to find that the practice contained inherent defects (including some undesirable side effects, such as hair loss).

Campbell J. acknowledged the difficulties faced by surgeons who are dealing with this type of injury when making choices as to what procedures to adopt. Campbell J., referred to the case of *Dunne v Eastern Regional Health Authority* where Peart J. concluded that, whilst not all surgeons might on all occasions use this method of closing the forehead wound that it was nevertheless “recognised as a reasonable method of achieving closure of the wound.”¹ Campbell J., relying upon the *Dunne* judgment referred to the plaintiff's profession as football player and part-time model and stated that he would have a stronger case if it had been his legs or other body parts that had been injured and operated on. The judge further stated that an honest difference of opinion between surgeons does not amount to negligence.

Campbell J. found that the procedure was evidently non-elective surgery in the sense that it was not a matter for the Plaintiff to decide whether or not he would undergo such a procedure and give or withhold consent to same. It was a medically necessary procedure.

Considering what she found to be the non-elective nature of the surgery, Campbell J. held that the Plaintiff failed to satisfy the court that he had not been sufficiently warned about the consequences of the procedure and specifically the risk of severe deformity and chronic pain. The High Court found that regardless of whether a warning had been given to the Plaintiff, he would have undergone the procedure anyway. The court found that although ideally, the warning of such risks would have been disclosed to the patient in a more timely manner, this did not impact upon the validity of the consent obtained.

¹ *Dunne v Eastern Regional Health Authority* [2008] IEHC 315.

Court of Appeal:

On 23 August 2020, the Plaintiff (Appellant) caused a Notice of Appeal to be issued from the Court of Appeal Office, which was served on the Defendant (Respondent) the same day. In the said Notice of Appeal, the Appellant indicates his desire to appeal the findings of the trial judge.

Bernardo O'Keeffe Da Silva

Appellant

-and-

Galaxy General Hospital

Respondent

The Appellant argues that:

Campbell J. erred in law in holding that Mr. Roberts was not negligent in performing the operation. He claims that the procedure in question was not a general and approved practice, and was not used frequently in Ireland. He argues that the procedure was not carried out with the appropriate standard of care, and that it contained inherent defects.

The Appellant argues that the procedure was elective. On account of the procedure being elective, there was a duty to inform the Plaintiff of material risks and complications of the medical procedure in question. These risks should be explained and communicated in a clear manner to the patient. In addition, there is a duty to carry out the procedure to a certain high standard and in accordance with respected medical practice, in other words, a general and approved practice.

The timing of the warning from Mr. Roberts (coming just one hour before the procedure), and just before he was due to be brought down to theatre was inordinately late and not sufficient to ensure that effective consent was given. The Appellant contends that the trial judge did not take into account the unsatisfactory nature of the consent obtained. He claims that he was stressed and anxious at the time and felt compelled to consent.

The Respondent argues that:

Campbell J. was correct in her findings in the High Court, particularly that Mr. Roberts was not negligent in carrying out the procedure on the Appellant. The Respondent claims that the procedure in question was carried out with the appropriate standard of care. It was a general and approved practice, which is gaining increasing popularity in the United States and the United Kingdom.

Campbell J. was correct in finding that there was informed consent given, and that regardless of the timing of the warning, that this was clearly communicated to the Appellant, and clearly understood by the Appellant.

RULES AND PROCEDURE OF THE COMPETITION

***Please read carefully and take note of relevant dates**

Parties: Plaintiff/Defendant

For the purposes of the National Moot Court Competition the **Plaintiff/ Appellant** will always be **Bernardo 'Keeffe Da Silva**, and the **Defendant/ Respondent** will always be **Galaxy General Hospital**. In the preliminary oral presentation rounds, teams will be given an opportunity to act as counsel for **either** the Plaintiff/Appellant or the Defendant/Respondent (in the recorded oral submissions – see below).

What is required of participants?

A. Written Requirements

Students, working in teams of three, are required to prepare

- 1) A Memorandum on behalf of the Plaintiff setting out the arguments which will be made on his behalf.

And

- 2) A Memorandum on behalf of the Defendant setting out the arguments which will be made on its behalf.

Each document should be no longer than 2,500 words and should make reference to relevant case-law, legislation, constitutional provisions or other relevant legal sources.

Written Submissions must be sent to nationalmoot@gmail.com in MS Word or PDF by 5pm on Friday 6th November 2020. In order to maintain anonymity, please do not note your institutional affiliation on the written submissions – please use the team letter that you are allocated on registration.

B. Oral Rounds

(i) Pre- recorded oral submissions

For the preliminary round of the competition, participants are required to submit recorded oral submissions. Each team is required to submit one recording; either a recording of submissions for the Appellant, or a recording of submissions for the Respondent. It is up to each team to submit what they feel is their preferred or strongest side. **Two speakers from each team** may deliver submissions for the recording. Each recording from a team should last no more than **10 - 12 minutes** – with each speaker speaking for **5 – 6 minutes each**. Note: Please record submissions in one continuous shot and do not use edited compilations of several recordings. Recorded submissions should be sent to nationalmoot@gmail.com via **Google drive link by 5pm on Friday 6th November 2020.**

A panel will assess the recorded oral submissions and the top 8 will progress to the live rounds. Candidates will be notified by Friday 13th November as to whether they make it to the live rounds.

Please note: if a team progresses to the live rounds of the competition, they should be prepared to deliver submissions for both the Appellant and the Respondent sides.

(ii) Live rounds (21st November 2020)

The live rounds of the competition will take place via Zoom. The live rounds will consist of the quarter final (which includes 8 teams) semi final (which includes 4 teams) and the final (with the final 2 teams).

For the quarter final, semi final and final rounds, teams will be provided with the relevant Memorandum of the opposing team 10 minutes before each round. Having had 10 minutes to consider this information, the round will begin. Teams will have been assigned Team Letters so as to ensure anonymity of institutions. Teams **must not reveal** their institution of origin to judges at any time during the competition. The Administrators may disqualify or impose a penalty against any Team that

intentionally or inadvertently discloses its institution of origin to a judge, whether or not such disclosure occurs during an Oral Round.

Only **2 students** from each team will be entitled to present oral submissions in each round (though these need not necessarily be the same 2 students for each round). Each student may speak for **7 minutes**. Students may not interrupt one another when speaking, though a student may confer with his/her colleagues (including the third student team member who may sit at the bench as counsel). Students may deviate from their written submissions so as to take into account the submissions of the opposing team. Students will be asked questions by the judges during their oral submissions.

The two speakers on behalf of the Plaintiff will present their submissions to the court first, followed by the two speakers on behalf of the Defendant. Students will then each be afforded **2 minutes** rebuttal time, in the same order as their original submissions to the Court. Rebuttal must be confined to submissions already before the Court and **no new material** may be introduced at this time. Judges may ask questions during rebuttal and su-rebuttal.

Ex Parte Procedure

In extreme circumstances, such as when a Team fails to appear for a scheduled Oral Round, the Administrator, after waiting 10 minutes, may allow the Oral Round to proceed *ex parte*. In an *ex parte* proceeding, the attending Team will present its oral pleadings and these will be scored by the judges to the extent possible as if the absent Team had been present and arguing. In such a case, the Team that fails to appear for its scheduled Round forfeits the points.

Advice on Oral Submissions (both recorded and live)

Teams should address the Court at all times with the utmost respect. Students should mirror the language which is used in courts when addressing the judge or their colleagues. The following tips may be of assistance in preparing your legal submissions.

A. Opening Submissions

When a student commences his or her oral submission, the student will stand and say:
“May it please the court, my name is I appear on behalf of the Plaintiff/Defendant in this matter”

The speaker should also make some reference to his colleague: *“My learned friend, Mr./Ms. X will also be addressing/has already addressed the Court on the Plaintiff’s/Defendant’s behalf.”*

The student should briefly refer to the issues of the case with which he / she will deal:
“I will deal with the issue of ...”

B. Content of submissions

In different courts, different modes of address may be used. The correct mode of address for judges of the Superior Courts as set out in the Rules of the Superior Courts specify “Judge” or “A Bhreithimh” as the correct modes of address. You can also refer to “the Court” if you prefer.

When a judge asks a question of a student, the student should listen to the question and should never interrupt the judge when he/she is asking the question.

A judge is only human. The judge’s question may not be clear to the student. The student may ask the judge to repeat or re-phrase the question: *“Judge, could you please repeat the question?”*

Students representing a party must not interrupt a student who is making an oral submission. A student making an oral submission may consult with a colleague. As a general rule when counsel is on his/her feet, it is custom that the opponent sits. There should only be one barrister standing at a time – unless the judge is addressing them both.

A student may refer to legal materials during the course of an oral submission. Students must have this material in the court with them. The judges may ask to view the legal materials that students rely upon.

When referring to a case in some detail, you should “open the case to the Court” e.g. *“May it please the Court, I wish to open the case of DPP v Potter,² reported in volume 2 of the 1995 Random Law Reports Weekly at page 4 and referred to at paragraph 5 of the Plaintiffs’ submissions. Would you like me to state the facts of the case, Judge?”*

C. Closing submissions

If you are the first speaker for your team, make sure that you have made all your points clearly. Repeat them in summarised form. End by asking if the judge has any questions. Then introduce your teammate and give a very brief statement of what he/she is about to say. e.g

“In summary, the Plaintiff makes the following points: 1, 2, 3...”

“If the Court has no further questions, my learned colleague, Mr./Ms. X will make submissions based on to which I referred at the beginning of my submissions...”

or

“Ms. X will rebut the legal submission made on behalf of the Defendant with respect to....”

The second speaker from the team should end his/her speech by summarising the argument of the team as a whole, recapping what the first speaker said, as well as reiterating the points he/she has made. Again, questions should be invited. Before sitting down the speaker should enquire if the court wishes to hear any more from him/her: *“May I be of any further assistance to the court?”*

D. Other tips

Students will be anxious - even the greatest advocates get nervous. A case in point is Cicero who during his defence of Aulus Clentius Habitus for murder stated that:

“I am always nervous when I begin a speech. Every time I get up to speak I feel as if it is I myself who am on trial, nor merely for my competence but for my integrity and conscience as well. I fluctuate between two fears: either I shall be claiming more than I can achieve, which would be imprudent, or I shall not be making the best of my

² Always say “DPP and Potter”. Never say “DPP v Potter” or “DPP versus Potter”.

case, which would be a blameworthy act of negligence, a failure to meet my obligations.”

Students should not fear the oral submissions! The judges are not attempting to trick the students but attempting to determine whether students understand the legal issues involved, and can persuade the court.

If you have a well-researched and well-constructed argument, presenting it orally should not pose a problem, provided you are familiar with each aspect of it. The aim is to present the argument clearly, calmly, without reading, with only a minimal reference to notes. While you should be relaxed and in control of the argument, you do need to present it with a degree of formality.

E. Useful phrases

- *“In my submission I will show that...”*
- *“It is my respectful submission that...”*
- *“Opposing counsel’s argument overlooks the fact that...”* or *“...overlooks the case of...”*
- *“I appreciate your point, Judge, however, I would (nonetheless) submit that...”* or *“...I would argue that...”*
- *“My learned friend Ms./Mr. X...”*
- *“Learned counsel for the Plaintiff/Defendant...”*

F. Dress Code

Students should dress smartly for all rounds of the National Moot Competition. The winning team will be making legal submissions before a High Court/Supreme Court Judge and therefore teams should look the part as well as act the part.

Marking Scheme

Memorials

Teams must submit 2 memorials – each will be given a mark out of fifty. The marking scheme is as follows:

Command of the Issues, including application of relevant law to the facts	30
Structure and Clarity	20

These marks are relevant to the **Best Memorials competition** and will only be relevant on the day of the oral submissions in the context of a tie-break situation, i.e. in deciding which teams progress to the semi-finals, if there are teams on equal points in terms of the oral rounds then they will be divided on the basis of their memorial marks.

Oral Presentations

Each individual speaker on the team will be given a mark out of 100 for their oral presentation, including their rebuttal. The marking scheme is as follows:

Command of the Issues, including application of relevant law to the facts	30
Persuasiveness	30
Ability to answer questions/respond to points made	20
Structure and Clarity	10
Courtroom Manner	10

Scoring will not reflect the merits of the facts of the case but only the quality and force of the legal arguments.

National Moot Court Competition 2020

Outline Timetable 21st November 2020

Opening Welcome: **10.30 - 10.45**

Quarter- final: **11.00 – 12.15**

Teams in Zoom Courtrooms: 11.00

Reading of Memorials: 11.00 - 11.10

Oral Presentations: 11.10 - 12.10

Break: **12.15 – 2.00**

Semi-final: **2.00 - 3.15**

Teams in Zoom Courtrooms: 2.00

Reading of Memorials: 2.00 - 2.10

Oral Presentations: 2.10 - 3.10

Break: **3.15 – 3.30**

Grand Final: **3.30 - 5.00**

Teams in Zoom Courtrooms: 3.30

Reading of Memorials: 3.30 - 3.40

Introduction of Judges

& Preliminary Comments: 3.40 – 3.45

Oral Presentations: 3.45 - 4.45

Judgment Pronounced: **circa 5pm**