

THE HIGH COURT

RECORD NO. 2000/8756P

**CHERYL DOHERTY (A MINOR) SUING BY HER MOTHER
AND NEXT FRIEND, SARA DOHERTY**

PLAINTIFF

**AND
THE NORTH WESTERN HEALTH BOARD**

DEFENDANT

**AND
BRIAN DAVIDSON**

THIRD PARTY

**AND
THE MEDICAL DEFENCE UNION LIMITED**

SECOND THIRD PARTY

**AND
M.D.U. SERVICES LIMITED**

THIRD THIRD PARTY

Judgment of Finnegan P. delivered on the 1st day of December 2005.

1. While as between the Plaintiff and the Defendant this action has been disposed of there are outstanding issues between the Defendant and the Third Parties. Before me is a motion by the Defendant seeking to compel the First Third Party to furnish certain documents by way of compliance with the provisions of Order 39 Rule 46 of the Rules of the Superior Courts. Rule 46 provides as follows –

"(1) The Plaintiff in an action shall furnish to the other party or parties or their respective solicitors (as the case may be) a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the court.

Within seven days of receipt of the plaintiff's schedule the defendant or any other party or parties shall furnish to the plaintiff or any other party or parties a schedule listing all reports from expert witnesses intended to be called. Within seven days of the receipt of the schedule of the defendant or other party or parties, the parties shall exchange copies of the reports listed in the relevant schedule.

(2) The parties in an action shall exchange with the other party or parties or their respective solicitors (as the case may be) the information and statements referred to in section 45(1)(a)(iii), (iv) and (v) within one month of the service of the notice of trial or within such further time as may be agreed by the parties or permitted by the court."

2. Order 39 Rule 45 contains definitions the following of which are relevant –

"45(1)(a) "Action" includes any claim for damages in respect of any personal injuries to a person howsoever caused (including a claim for fatal injuries brought pursuant to section 48 of the Civil Liability Act 1961) but does not include an action to which section 1(3) of the Courts Act 1988 applies so as to entitle a party to trial by jury in that action.

45(1)(c) "Parties" includes a plaintiff or co-plaintiff, defendant or co-defendant or any third party, counterclaimant or notice party to the action save where the context otherwise requires.

45(1)(e) "Report" means a report or reports or statement from accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists, scientists, or any other expert whatsoever intended to be called to give evidence in relation to an issue in an action and containing the substance of the evidence to be adduced and shall also include any maps, drawings, photographs, graphs, charts, calculations or other like matter referred to in any such report, any copy report (including a copy report in the form of a letter), copy statement or copy letter however made, recorded or retained from any such expert mentioned above intended to be called to give evidence in relation to an issue or action and containing the substance of the evidence to be adduced, the original of which has been concealed, destroyed, lost, mislaid or is not otherwise readily available, shall also be deemed to be a report for the purposes of this rule."

3. The provisions of Order 39 set out above were introduced into the Rules of the Superior Courts by S.I. No. 391 of 1998 and are designed to give effect to the provisions of the Courts and Court Officers Act 1995 section 45 which provides as follows –

"45(1) Notwithstanding any enactment or rule of law by virtue of which documents prepared for the purpose of pending or contemplated civil proceedings (or in connection with the obtaining or giving of legal advice) are in certain circumstances privileged from disclosure, the Superior Court Rules Committee, or the Circuit Court Rules Committee as the case may be, may, with concurrence with the Minister, make rules –

(a) requiring any party to a High Court or Circuit Court personal injuries action, to disclose to the other party or parties, without the necessity of any application to court by either party to allow such disclosure, by such time or date as may be specified in the Rules, the following information, namely

(i) any report or statement from any expert intended to be called to give evidence of medical or paramedical opinion in relation to an issue in the case;

(ii) any report or statement from any other expert of the evidence intended to be given, by that expert in relation to an issue in the case;

(iii) the names and addresses of all witnesses intended to be called to give evidence as to facts in the case;

(iv) a full statement of all items of special damage together with appropriate vouchers, or statements from witnesses by whose evidence such loss would be proved in the action;

(v) a written statement from the Department of Social Welfare showing all payments made to a plaintiff

subsequent to an accident or an authorisation from the plaintiff to the defendant to apply for such information;

and

(vi) such other relevant information or documentation (as may be provided for by Rules of Court) so as to facilitate the trial of such personal injuries actions;

4. In this case the First Third Party in compliance with Order 39 Rule 46(1) furnished to the Defendant a Schedule listing all reports from expert witnesses intended to be called and furnished copies of the reports of their expert medical witnesses and in particular a report of Professor E.M. Symonds dated the 11th October 2004 and a report of Dr. Ian McKenzie dated the 11th day of September 2001. Both Professor Symonds and Dr. McKenzie in their reports set out the documents to which they had regard for the purposes of their respective reports. The Defendant requires the First Third Party to furnish the said documents and the First Third Party, in relation to some of the documents, declines to do so on the grounds that the documents attract privilege.

5. The documents in issue and referred to in the report of Professor Symonds and in respect of which the issue arises are the following –

- (a) Letter from Dr. Davidson to the MDU dated 24th October 2004
- (b) Letter from Dr. Davidson to McCann Fitzgerald dated 21st November 2001
- (c) Letter from Dr. Davidson to McCann Fitzgerald dated 12th February 2002
- (d) Solicitors attendance note on Dr. Davidson dated 19th October 2001
- (e) Solicitors attendance note on Dr. Davidson dated 12th December 2000
- (f) Solicitors attendance note on Dr. Davidson dated 10th July 2002
- (g) Letter from McCann Fitzgerald to Dr. Davidson dated 13th May 2003
- (h) Solicitors attendance note on Dr. Davidson
- (i) Letter from Dr. Michelle O'Sullivan dated 19th April 2002
- (j) Letter from Dr. Michelle O'Sullivan 17th April 2003
- (k) Letter from Dr. Michelle O'Sullivan dated 30th August 2003
- (l) Letter from Dr. Gareth Duffy dated 30th March 2001
- (m) Letter from Gareth Duffy dated 31st May 2002
- (n) Letter from Dr. McAuley dated 15th September 1998
- (o) Expert report of Kathryn MacQuillan
- (p) Expert report of Dr. John Murphy

6. The documents in issue and referred to in the report of Dr. McKenzie are the following –

- (a) Draft statement of Dr. Davidson
- (b) Letter from Dr. McAuley dated 15th September 1998
- (c) Expert report of Kathryn MacQuillan
- (d) Expert report of Dr. John Murphy

7. On this application I do not propose to determine whether the documents above in fact enjoy privilege. If requested to do so I will determine that issue and will peruse the documents for that purpose. I propose to determine the net issue as to whether the effect of Order 39 Rule 46 is to compel the Third Party to disclose the documents in question on the assumption that they would otherwise be entitled to legal professional privilege. In relation to the documents described as expert reports of Katherine MacQuillan and Dr. John Murphy these are statements by witnesses as to facts and not, I am told, expert reports.

8. I turn first to the Courts and Court Officers Act 1995 section 45. It is clear from subsection (1) that the legislative intention was that privilege could be removed from documents falling within the clauses set out at (a)(i) to (vi). It is quite clear that the Superior Courts Rules Committee were given power to provide in Rules for disclosure of the reports of medical experts: section 45(1)(a)(i). In addition under section 45(1)(vi) the Superior Courts Rules Committee was empowered to require disclosure of other documentation so as to facilitate the trial of personal injury actions. Pursuant to these powers Rules of the Superior Courts were amended by the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 S.I. No. 391 of 1998 and thereby inserted into the Rules of the Superior Courts Order 39 Rules 45 to 51. The definition of "report" contained in Rule 45 includes medical reports. However the Defendant relies on the following words in the definition –

"shall also include any maps, drawings, photographs, graphs, charts, calculations or other like matter referred to in any such report."

9. The Defendant contends that the documents which I have listed above and in respect of which privilege is claimed come within the clause "other like matter referred to in any such report". I am satisfied that the Defendant is incorrect. The phrase "other like matter referred to in any such report" must be construed ejusdem generis with the words preceding it. I am satisfied that the documents

referred to by Professor Symonds and Dr. McKenzie cannot be considered as a like matter to a map, drawing, photograph, graph, chart or calculation. There is accordingly no obligation to disclose the same or to exchange the same arising under Order 39 Rule 46(1) the documents in question not coming within the definition of report.

10. It may well be in the case of some of the documents that they require to be discovered upon an Order for Discovery being made. I have indicated that I am willing to peruse the documents with a view to determining whether or not they enjoy privilege. Many of them it would appear are clearly privileged – correspondence between the Third Party and his own Solicitors, statements taken by his Solicitors from him and correspondence between the Third Party and his Insurer. Others less clearly so. If the parties are agreeable I will peruse the documents in respect of which privilege is claimed with a view to determining that issue with a view to expediting the preparation of the matter for trial.