

THE HIGH COURT

[2011 No. 4081 P]

BETWEEN/

AGNES ARMSTRONG

PLAINTIFF

AND

SEAN MOFFATT AND THOMAS MOFFATT T/A BALLINA MEDICAL CENTRE AND MAURA IRWIN

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on the 28th March, 2013

1. At issue in the present application is the extent to which the plaintiff is required to respond to a notice for particulars served by the defendants on 23rd November, 2012. By this application the Court is also called upon to re-examine the extent to which the traditional understanding regarding the extent to provide particulars in personal injury cases has been affected by the enactment of the Civil Liability and Courts Act 2004 ("the 2004 Act").

2. In the present case the plaintiff sues three medical practitioners in respect of injuries which were said to have occurred while the plaintiff was being treated at the Ballina Medical Centre on 15th May, 2009. The plaintiff was aged 67 at the time of the alleged incident. She contends that she was endeavouring to transfer from the lying to the sitting position on an examination couch when, following that examination, she was caused to slip and fall from that couch to the floor. Ms. Armstrong contends that she suffered a fracture of her right hip and that she was shocked and greatly shaken as a result. She maintains that she was taken by ambulance to Mayo General Hospital where she underwent a right hip hemi-arthroplasty and was detained in hospital for one week and was obliged to recuperate in another home hospital for a further four weeks. She further contends that these injuries brought about a right foot drop which causes her considerable problems and she sets out further adverse consequences which are said to have occurred as a direct and foreseeable of this particular accident.

3. It is important to state that this is not a claim for medical negligence. It is rather a claim for personal injury by reason of an accident which – it is said – occurred in the examination room of the medical centre by reason of the negligence and breach of duty on the part of the defendants. It is also important to note that the defendants have not yet filed a defence following pending the resolution of the issue of the extent to which the plaintiff is required to furnish particulars.

The changes brought about by the 2004 Act with regard to pleading in personal injury cases

4. Before considering the notice for particulars itself, it should be recalled that the 2004 Act introduced very significant changes to the system of pleading in personal injury cases. Section 10 of the 2004 Act recites that the personal injury summons must contain the following information:-

- (a) the plaintiff's name, address and occupation;
- (b) the plaintiff's public service number;
- (c) the defendant's name, address and occupation;
- (d) the injuries alleged;
- (e) the particulars of special damage;
- (f) full particulars of negligence; and
- (g) full particulars of each incidence of negligence by the defendant.

Section 13(1) of the 2004 Act further provides:-

"All pleadings in a personal injuries action shall –

- (a) in the case of a pleading served by the plaintiff, contain full and detailed particulars of the claim of which the action consists and of each allegation, assertion or plea comprising that claim -

..."

5. A further departure from the pre-existing practice is that s. 14 now requires that the plaintiff in a personal injuries action must verify on affidavit assertions or allegations contained in any pleading and further information supplied to the defendant in the course of that litigation.

6. Section 11 also allows the defendant in a personal injuries action to request the following further information, namely:-

- "(a) particulars of any personal injuries action brought by the plaintiff in which the court makes an award or damages,
- (b) particulars of any personal injuries action brought by the plaintiff which was withdrawn or settled,
- (c) particulars of any injuries sustained or treatment administered to the plaintiff that would have a bearing on the personal injuries to which the personal injuries action relates, and

(d) the name of any persons from whom the plaintiff received such medical treatment...”

7. On 23rd November, 2011, the solicitors for the first and second named defendants issued a notice for particulars which sought a range of different information arising out of this incident and which particulars were said to arrive from the plaintiff's personal injury summons and indorsement of claim dated 9th May 2011.. The plaintiff's solicitors immediately wrote back on 28th November, 2011, to say:-

“In the light of recent experience and court practice we will not be responding to a notice for particulars, save and except in so far as the notice requires further information in accordance with s. 11 of the Civil Liability and Courts Act 2004. This is a practice we have had to adopt in the light of some experience of colleagues who persist in sending detailed notice of particulars, in the old practice format notwithstanding the enactment of the Civil Liability and Courts Act 2004. Accordingly, you may wish to consider the notice for particulars you sent us and insofar as you require answers to any queries provided for in s. 11 of the said Act we will be happy to consider same.”

8. I should break off my narrative at this juncture by noting that two of the specific requests for particulars do in fact come within the scope of s. 11(1) of the 2004 Act. Paragraph 8 of the notice for particulars sought to ascertain whether the plaintiff was involved in any accident or suffered any personal injury or personal disability prior to the May, 2009 incident and sought details of same. Paragraph 9 was in similar terms, save that these queries related to any accident or illness, injury or disability which occurred after May, 2009 and particulars of any such accident or illness were also sought.

9. In my view, these particular requests plainly come within the scope of s. 11(1)(c) namely:-

“Particulars of any injury sustained or treatment administered to the plaintiff that would have a bearing on the personal injuries to which the personal injuries action relates.”

It follows, therefore, that as these specific requests for particulars fall within the scope of s. 11, the plaintiff is obliged to answer them insofar as this has not already been done.

10. Returning now to the narrative, the solicitors for the first and second named defendants responded on 14th December 2011, saying:-

“In respect of your reference to s. 11 of the Civil Liability and Courts Act 2004, we would like to point out that [this section] does not confine us in relation to the particulars we may raise and by way of opinion that the notice for particulars we have raised is perfectly reasonable and arises of the matters pleaded in the personal injuries summons. If you decide not to reply to some or all of same, that is a matter for your good selves and it is a matter for the court to determine a motion by us as to whether or not your failure to do so is in fact reasonable in all the circumstances. Please furnish us now with your replies to particulars without any further delay.”

11. Matters reached an impasse at that point and the defendants have now sought an order pursuant to Ord. 19, r.7 directing the plaintiff to reply to this notice for particulars.

General principles regarding the delivery of particulars and the 2004 Act

12. The general principles regarding the delivery of particulars are, of course, unaltered by the 2004 Act. Yet for the reasons I will presently set out, the *manner* in which these principles should be applied by the courts must perforce be significantly changed as a result of the enactment of this Act.

13. The object of particulars nevertheless remains that as identified by Henchy J. in *Cooney v. Browne* [1984] I.R. 185, 191:-

“Where particulars are sought for the purposes of delivering a pleading, they should not be ordered unless they can be said to be necessary or desirable to enable the party seeking them to plead, or for some other special reason: see O. 19, r. 6(3). Where the particulars are sought for the purpose of a hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing....Thus, where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial.”

14. It follows, therefore, that particulars will be ordered in the interests of fair procedures and to ensure that a litigant will not be surprised by the nature of the case which he has to meet. The case-law shows that this is essentially the governing principle in all cases where the issue of whether the particulars should be ordered has been considered.

15. In *Mahon v. Celbridge Spinning Co. Ltd.* [1967] I.R. 1 Fitzgerald J. stated that the object of pleadings (of which particulars form part) was to ensure that a party “should know in advance, in broad outline, the case he will have to meet at the trial.” This principle - namely, that particulars must convey the “in broad outline” the nature of the case which the litigant must meet, as distinct from the nature of the evidence which the other party may lead in support of that case - has also been consistently endorsed in the subsequent case-law.

16. Thus, for example, in *McGee v. O'Reilly* [1996] 2 I.R. 229 the plaintiff sued a medical practitioner for professional negligence in respect of the treatment of a young child. In his defence the medical practitioner had contended that he had examined the child following a house call and recommended that the child be brought immediately to hospital. Arising from this the plaintiff sought further and better particulars of the examination which the medical practitioner claimed to have undertaken, including the details of the observations and symptoms and the diagnosis made, and, in particular, the terms in which he had allegedly advised the parents to take the child to hospital.

17. The Supreme Court refused to order the particulars sought. As Keane J. noted, the plaintiff already knew from the defence “in broad outline” what was going to be said at the trial by the defendant regarding the house call. Keane J. further added ([1996] 2 I.R. 229 at 234):-

“In our system of civil litigation, the case is ultimately decided having regard to the oral evidence adduced at the trial. The machinery of pleadings and particulars, while of critical evidence in ensuring that the parties know the case that is being advanced against them and that matters extraneous to the issues as thus defined will not be introduced at the trial, is not a substitute for the oral evidence of witnesses and their cross-examination before the judge.”

18. Yet one cannot help thinking that the reported cases did not quite reflect the reality of practice on the ground. Not least in personal injury cases, the particulars sought in many cases had reached something of an art form. Quite often no possible detail or dimension of a statement of claim (or, since the 2004 Act, the indorsement of claim required for a personal injury summons) remained unexplored at the hands of pleaders who at times seemed to revel in this glorious new art form. It was by no means uncommon to find notices for particulars stretching to twenty or more paragraphs, often replete with individual sub-paragraphs. Most litigants (or, perhaps more accurately, their solicitors and junior counsel) simply yielded dutifully to these requests, as it was often more convenient and expedient to do so rather than to take a stand on principle. In retrospect, the courts should, perhaps, have been more prepared to strike out many of the pre-rehearsed requests as oppressive and, in some cases, as constituting quite simply an abuse of process.

19. Accordingly, it must be candidly admitted that an important and useful forensic tool had become partially debased by the habitual and indiscriminate use of the notice for particulars procedure. Here it may be observed that Ord. 19, r. 7(1) provides:

"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceedings requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

20. The Oireachtas evidently sought to curb these excesses with the enactment of the 2004 Act. If, therefore, a personal injuries case is properly pleaded in the manner required by s. 10, the necessity for further extensive particulars in the manner that was common and standard prior to the enactment of the 2004 Act should be very much the exception, not the rule.

21. In the present case, the information required by s. 10 has been duly supplied in the plaintiff's indorsement of claim and, moreover, particulars of negligence and breach of duty alleged run to two full pages. Yet the first and second defendants (who, for convenience I shall hereafter describe as the defendants) have raised a significant number of particulars which may now be considered in turn..

No. 1 Legal expenses insurance

22. With this request for particulars the defendants inquire whether the plaintiff has legal costs insurance in respect of this claim. This query is irrelevant to the case they have to meet and I shall accordingly disallow it.

23. It must, however, also be observed that a request of this nature reflects a widespread and ingrained practice whereby what amounts to an interrogatory is dressed up as a request for particulars. Here it may be recalled that Ord. 19, r. 7(1) provides:

"A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceedings requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just." (emphasis supplied)

24. The underlined words make clear that the particulars sought must relate a matter stated in *the pleading*. Yet as the plaintiff has said nothing about legal costs insurance in her indorsement of claim, it follows that, quite independently of any changes brought about by the 2004 Act, the defendants would not be entitled to particulars of this kind.

25. As we have just noted, this request for particulars in reality an attempt to serve an interrogatory by means of a notice for particulars. But this is plainly outside the scope of Ord. 19, r.7. This very point was made by Lowry L.C.J. in *Coyle v. Hannan* [1975] N.I. 160. Here the plaintiff put in an estimate for future loss of earnings as a result of a car accident, but admitted that he had been unemployed for the last two years prior to the accident. The defendants then sought particulars of his previous employment, but the Northern Irish Court of Appeal would not allow particulars of this kind.

26. As Lowry L.C.J. stated ([1975] N.I. 160, 163-164):

"The defendant has no right, under the guise of seeking particulars, to interrogate him about his working record before the accident, to interrogate him about his working record before the accident unless the plaintiff by his mode of pleading, as, for example, by alleging that he had been in steady employment for ten years preceding the accident, has rendered himself liable to furnish and better particulars of a matter stated in his pleading."

27. This passage captures the point perfectly. So far as the present case is concerned, the question of legal costs insurance does not even remotely arise from "any matter stated in any pleading". This is yet a further reason why this request for particulars must be disallowed, because as the request for particulars does not arise from a matter stated in the pleadings, it falls outside of the scope of Ord. 19, r. 7.

No. 2: Time of the accident

28. The plaintiff has not made any issue in her pleadings as to the time of the incident. There may well be many cases where the time of an incident might be highly relevant. If, for example, the incident occurred at business premises outside of regular hours, that might be relevant to the scope of an occupier's duty.

29. No such case is, however, made here and it is implicit in the plaintiff's statement of claim that the incident occurred during the course of the regular business hours observed by the medical centre. The actual time of the incident is, therefore, irrelevant to this claim and to the scope of any possible defence which the defendants might have. I will accordingly disallow this particular. It is also not an admissible notice for particulars since it does not arise from the plaintiff's pleadings and it is again in reality a form of interrogatory.

No. 3 Whether an ambulance was called

30. No issue has been raised by the plaintiff regarding the quality of the medical treatment she received *after* the incident occurred. In those circumstances it is hard to see how queries directed to the question of whether an ambulance was called, the identity of the person who called it and the time the plaintiff was admitted to hospital have any direct bearing on her claim. If the defendants contend that such injuries as the plaintiff suffered were caused or aggravated by the failure, for example, of a hospital promptly to send an ambulance, then these are matters which should be canvassed by means, for example, of non-party discovery against the hospital or ambulance provider prior perhaps to an application to join that party as a co-defendant. But as these particulars are irrelevant to the present claim, I will disallow them.

No. 4: The identity of witnesses to the incident

31. Quite independently of the enactment of the 2004 Act, it has been clear that "particulars of the witnesses to be called by a party will not be ordered, save in exceptional cases": Delany and McGrath, *Civil Procedure in the Superior Courts*.

32. This point is illustrated by the Supreme Court's decision in *Doyle v. Independent Newspapers (Ireland) Ltd.* [2001] 4 I.R. 594. Here the plaintiff, who was a former coach of the Irish rugby team, sued for defamation in respect of a newspaper article which alleged that he had "become ostracised by the decision-making core among the players." In response to a plea of justification, the plaintiff raised particulars in respect of the manner in which it was contended that he had been ostracised by senior players of that team and this Court ultimately directed the defendant to furnish these details.

33. The plaintiff had, however, also sought the actual names of the members of the team who were said to have ostracised him. Although this Court (Quirke J.) directed that these names be furnished, an appeal against this specific aspect of the order was allowed by the Supreme Court. Keane C.J. concluded that it could not be said that the pleading of justification was so "general or imprecise" that the plaintiff did not know the nature of the case he had to meet at the trial. While the plaintiff did not know the actual names of the players concerned, Keane C.J. further noted ([2001] 4 I.R. 594 at 598) that the cases "in which a court will actually order a defendant to say what witnesses he is going to produce at the trial are extremely rare and unusual."

34. The present case cannot be said to come within this exceptional or unusual category of cases. It is rather a routine personal injuries case with few special features and certainly none which call for particulars of this kind. I will accordingly disallow this claim, since it effectively seeks to elicit evidence rather than clarify the scope of a pleading in the manner actually envisaged by Ord. 19, r. 7(1).

No. 5: Request for a narrative account of the accident

35. The Court has an inherent jurisdiction with regard to the production of evidence. There may well be cases where the Court would direct a party to supply a narrative account by way of witness statement, quite independently of the any specific provision for this in Rules of Court (such as, *e.g.*, as are contained in Ord. 63A with regard to the Commercial Court).

36. What, however, is abundantly clear is that a defendant has no right whatever to seek what amounts to a witness statement from the plaintiff by way of particulars. The object of particulars is to clarify the scope of pleadings and the case alleged by the other party and the provision of a witness statement has no connection at all with particulars. I will accordingly disallow this claim for particulars as being manifestly outside the scope of Ord. 19, r. 7.

No. 6 Particulars of negligence and breach of duty

37. The plaintiff has given very full and detailed particulars of negligence, set out in the schedule to the statement of claim. Yet this notice for particulars almost proceeds on the premise that no such particulars have been given. In these circumstances, I will disallow this request for particulars as unnecessary.

No. 7 Particulars of breach of statutory duty

38. While it must be said that the existing indorsement of claim is expertly and comprehensively pleaded, there is nonetheless a bare plea that the defendants were "in breach of statutory duty in failing to comply with the particulars of the Occupiers Liability Act 1995." Yet in the particular circumstances of this case – while noting that other less straightforward personal injury claims involving the 1995 Act might call for different treatment – the defendants cannot really be heard to complain that the plea against them is imprecise. It is implicit in the statement of claim that the plaintiff was a "visitor" to the medical centre within the meaning of the Occupier's Liability Act 1995 and that the defendants breached their common duty of care to her qua visitor.

39. In these circumstances, while I will disallow this claim for particulars, I will nevertheless require the plaintiff to correspond with the defendants to confirm that the claim in relation to the 1995 Act is as so indicated.

No. 8 and No. 9 Details of other claims

40. This issue has already been dealt with and with these particulars the defendants seek details of other claims both before and after the accident. As I have already indicated, the defendants are clearly entitled to these particulars pursuant to s. 11 of the 2004 Act

No. 10 Particulars of treatment

41. In her pleadings the plaintiff has already given full details of her injuries and hospital stays. It would not appear that any issue arises from that hospitalisation or the treatment she received there. What matters rather are the consequences which the plaintiff claims she suffered from the *accident*, as distinct from any hospital treatment. If that is so, then these requests which are directed to inquiring at almost prodigious length into the nature of the hospital treatment are entirely irrelevant to the issue at hand. Why should it be necessary to know, for example, the details of the medication prescribed (Particular 10(g)) or the identity of the plaintiff's medical advisers (Particular 10(j))?

42. I will accordingly disallow these particulars on grounds of relevance.

No. 11 The plaintiff's prognosis

43. The plaintiff's pleadings already contain full details regarding the plaintiff's prognosis under the heading of particulars of personal injury. There is, frankly, little point in asking this question in a several different ways as if the plaintiff had not already supplied adequate details to the defendants. I will disallow these particulars as unnecessary.

No. 12 Social Welfare Act entitlements

44. The plaintiff has already made clear that details of these entitlements will be supplied once these are to hand from the Department of Social Protection. I will accordingly disallow these particulars as being premature and, at present, unnecessary.

No. 13 Special Damages

45. There is presently a claim for €500 for travelling expenses and €100 for sundry and miscellaneous expenses. The plaintiff has already stated that particulars of all items of special damage being claimed in these proceedings will be furnished when these are to hand. In these circumstances, there is little point in raising fresh particulars at this juncture. After all, the plaintiff cannot claim under this heading beyond those claims itemised and particularised.

46. I will accordingly disallow these particulars as being premature and, at present, unnecessary.

Conclusions

47. It will be seen that the vast majority of the claims for particulars raised by the defendants have been disallowed. It may be said that while the scope for particulars has been curtailed by the pleading changes introduced by the 2004 Act, yet quite independently of this, requests for particulars have been allowed to proliferate in many areas of legal practice far beyond the boundaries stipulated by Ord. 19, r. 7(1). There is no reason to believe that the requests for particulars advanced here are not representative of

contemporary practice and thinking with regard to particulars.

48. Yet it is difficult to avoid the impression that the very fact that the particulars sought here are representative of current practice and that many of the requests in this and similar cases are either irrelevant or not permissible in law as particulars are nonetheless steadfastly advanced shows that many pleaders have simply gone astray in their enthusiasm to interrogate every possible detail of their opponent's claim. One must accordingly conclude that in the process sight of the true purpose and object of particulars as delineated in particular by Ord. 19, r. 7(1) has been lost.

49. The misplaced enthusiasm for this practice calls to mind Lee's words in respect of a subordinate general who rashly and indiscriminately confronted his opponents at every possible opportunity: "too much of the lion and not enough of the fox." Perhaps, accordingly, what is called for is a more discriminating approach on the part of the general legal community to the question of particulars which avoids the prolix, the unnecessary and the irrelevant and which opts instead for the well placed question which genuinely clarifies a matter which actually is contained in the pleadings. In this – as in much else in litigation – the fox is more likely to prevail than the lion.