Neutral Citation Number: [2004] IEHC 430

THE HIGH COURT

[Record No. 2001 17942P]

BETWEEN

DAVID PAYNE

PLAINTIFF

AND

PHIL SHOVLIN, KEN McDONALD AND MICHAEL HUTCHINSON

DEFENDANTS

Judgment of Ms. Justice Dunne delivered on the 17th day of December, 2004

1. This is a matter which came before me by way of notice of motion dated 19th April, 2004 seeking the Court's direction in respect of the plaintiff's obligation to disclose the reports of experts intended to be called to give evidence in relation to issues in the within proceedings pursuant to the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) S.I. No. 391 of 1998.

2. The motion came on for hearing before me on 25th November, 2004 and the motion was grounded upon an affidavit of Michael Boylan, solicitor, sworn herein on 15th April, 2004. A booklet of pleadings in respect of these proceedings was exhibited therein. It appears therefrom that the plaintiff's claim arises out of a series of events commencing on 16th November, 2000 when the plaintiff was admitted to St. Vincent's Hospital, giving a history of dizziness, high grade pyrexia, headaches and lethargy and a diagnosis was made of endocarditis associated with a staphylococcus aureus septicaemia. The plaintiff was treated by intervenous antibiotics and warfarin until 18th November, 2000. On 23rd November, 2000 the plaintiff was transferred into the first named defendant's care, commenced on low molecular weight Clexane and on 24th November, 2000 the plaintiff's routine dose of warfarin was restarted. On 28th November, 2000 for reasons of vascular access, the first named defendants, their servants or agents inserted a right internal jugular catheter which commenced bleeding slightly but continuously from two hours after it was inserted. On 29th November, 2000 the plaintiff's bleeding became excessive from the site of the catheter insertion, with the development of a large localised haematoma which did not respond to local pressure bandaging and continued to ooze throughout the day. On 29th November, 2000 the plaintiff began to develop severe headache and loss of visual fields. The plaintiff claims in his pleadings that negligence on the part of the defendants, in failure to consider the effects of the high dose of Clexane therapy along with the effects of warfarin, precipitated a cerebral bleed that was initiated in the afternoon of 29th November, 2000. The failure to monitor the Clexane therapy caused, permitted or occasioned the plaintiff to continue to bleed intra cerebrally without detection and without a reversing of the anticoagulant therapy for a prolonged period of time until 1st December, 2000 as a result of which, the plaintiff is alleged to have suffered catastrophic injuries.

3. Mr. Boylan in his affidavit states that he was consulted by the plaintiff's wife on 2nd February, 2001 while the plaintiff was an inpatient at the National Rehabilitation Hospital Dun Laoghaire. He then commenced investigating the circumstances surrounding the plaintiff's admission and care from the period of 16th November, 2000 to 1st December, 2000. As a first step, the plaintiff's records were sent to Dr. Peter Harvey MAMB. FRCP., Emeritus Consultant Neurologist, to the Royal Free Hospital, London for the purpose of obtaining his preliminary views on the issue of liability in the proceedings. It is further deposed to by Michael Boylan that Dr. Harvey reported to him on 1st August 2001 with his preliminary views. He, made it clear at that time that the expert views of a number of other specialist would have to be obtained, together with an independent interview with the plaintiff and his wife to clarify certain technical matters arising from the clinical history of the events of November 2000 and that he, would be unable to express his final opinion until then. Subsequently, a report was obtained from Professor Sam Machin, Consultant Haematologist, of University College Hospital, London on 25th October, 2001. Thereafter it was decided to commence proceedings on behalf of the plaintiff.

4. It is further stated by Michael Boylan in his affidavit that the complexities of the case mean that in preparation for and the conduct of the trial, doctors from a number of disciplines will be required to give evidence in relation to general medicine, cardiology, haematology, bacteriology, neuroradiology and neurology. Reports from experts in these fields have been obtained. He further deposes that Dr. Harvey has compiled a final and comprehensive report which contains his views on the issues of negligence having considered the findings of the haematology, radiology and cardiology experts. Dr. Harvey has indicated to the deponent that the said report contains the substance of his evidence to be adduced at the trial of the action. Further it is deposed that Mr. Boylan has been informed by Dr. Harvey and believes that his views as to liability and causation have evolved and developed since he furnished his preliminary report as a result of consulting with the other experts in the case. The views as expressed in his final comprehensive report are more refined and informed than they were at the time of his preliminary report, and take account of information obtained from the other experts, views expressed by them which were not available to him originally, together with a clinical history obtained from the plaintiff's wife. He also refers in his affidavit to the fact that the drug administration chart from the hospital, which had been lost, has now been reconstructed by the hospital from pharmacy records and that this has also been helpful to Dr. Harvey.

5. In those circumstances, the directions of the court are sought to ascertain whether or not the deponent is obliged to disclose to the defendants, Dr. Harvey's preliminary report for the purposes of preliminary advices and guidance to counsel in drafting.

6. It is further deposed that it is intended that Dr. Harvey would comment on the defendant's expert reports at a later stage for the assistance of counsel in the cross examination of the defendant's medical experts. The deponent referred to other medical negligence cases in which he states that defendants have adopted a practice of employing medical experts on a consultancy basis to prepare analysis, commentaries and critiques of the plaintiff's expert reports. Those defence medical experts are not called as defence witnesses, but would act solely in a consultancy capacity. In those circumstances Mr. Boylan seeks guidance from the court as to whether or not there is an obligation under the definition of reports to disclose Dr. Harvey's written observations on the defendant's case.

7. Finally, Mr. Boylan deposes that he has been advised by counsel that it is only Dr. Harvey's final report containing the substance of the evidence intended to be adduced by him which should be disclosed to the defendants to ensure that the interests of justice are protected balancing on one side the plaintiff's right to legal professional privilege as against the interests of justice served by avoiding trial by ambush and to ensure that the issues are clarified by the exchange of reports prior to a trial.

8. A replying affidavit was sworn herein by Margaret Muldowney, solicitor on behalf of the second named defendant herein. (It should be noted that proceedings against the third named defendant herein have been discontinued). The affidavit of Margaret Muldowney was sworn herein on 3rd June, 2004. In the course of the replying affidavit Ms. Muldowney refers to correspondence passing between the plaintiff's solicitor and herself in relation to the fixing of a trial date. It was pointed out on behalf of the second named defendant that no trial date could be agreed until all the requirements of Order 39(46) of the Rules of the Superior Courts were fulfilled. She further disposes that the plaintiff's solicitors acknowledge their obligations under the Rules but without addressing the issue continued

to suggest dates for the trial of the proceedings. Having dealt with this correspondence Ms. Muldowney goes on to depose in her affidavit as follows:

> *"Mr. Boylan refers to 'refined and informed' views of the final report of the expert retained by him on behalf of the plaintiff Dr. Harvey. Without an opportunity of examining all the reports of Dr. Harvey, neither the second named defendant, nor his legal or expert advisors, can confirm whether the informed views of Dr. Harvey in his earlier report or letters will be of assistance in understanding his final views or will be of assistance in any cross examination to elicit the true position."*

9. She goes on to depose that her firm, contrary to what Mr. Boylan deposed to in his affidavit about employing medical experts on a consultancy basis to prepare analysis, commentaries and critiques of the plaintiff's expert reports, indicates that she has no practice of engaging such medical experts. She further indicates that this practice has not been adopted in this case or in other cases in which she has been involved. She goes on to depose that the written comments of Dr. Harvey, concerning the case of the defendant as disclosed in the exchange of pleadings, should become evidence if Dr. Harvey gives evidence at the trial. She avers that the omission of such a statement with comments of that kind would be in breach of Order 39(46). She adds that the plaintiff is in breach and continues to be in breach of the obligation to list "all reports from expert witnesses intended to be called within one month of the service of the notice of trial." She goes on to state that the fact that Mr. Boylan appears to baulk at disclosing Dr. Harvey's report of 1st August, 2001 and letters raises an understandable concern that the report and letters may contain information and views that may assist the defence. Equally she is of the view that future reports of Dr. Harvey whether they are prepared for counsel or not, as referred to in the affidavit of Mr. Boylan do not fall outside the definition of reports.

10. At this stage I think it would be useful to look at the statutory basis for the making of the Rule which is under consideration in this particular case. Section 45 subs. 1 of the Courts and Court Offices Act, 1995 provides as follows:

> *"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 of the obtaining or giving of legal advice) or in certain circumstances privileged from disclosure, the Superior Courts Rules Committee or the Circuit Court Rules Committee as the case may be, may, with the concurrence of 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;.*

11. Order 39 Rule 46 was made pursuant to the said statutory provision by way of a S.I. No. 391 of 1998 entitled Rules of the Superior Courts (No. 6) (Disclosure of reports and statements) 1998. Order 39 Rule 46(1) provides as follows:

> *"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 form 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."*

12. Order 39 Rule 45 is the definition section of the relevant rules and it provides at Order 39 Rule 45(1)(e) as follows:

> *""report" means a report or reports or statement from accountants, actuaries, architects, dentists, doctors, engineers…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…"*

13. Order 39 Rule 50(1) provides as follows:

> *"In any case application may be made to the court by motion on notice by any party for an order that in the interests of justice the provisions of Rule 46 shall not apply in relation to any particular report or statement (or portion thereof), which is in the possession of such party and which he maintains should not be disclosed and served as required. The court may, upon such application, make such order as to it seems just."*

14. It is pursuant to the provisions of Order 39 Rule 50(1) above that the plaintiff brings this application. Mr. McCullough, S.C., on behalf of the plaintiff submitted that the final report of Dr. Harvey contains the substance of his evidence. He stated that his views (Dr. Harvey's) have developed since he furnished his preliminary report as a result of consulting with other experts together with examining the clinical history and pharmacy records. He indicated that there was a second issue namely, does a commentary on the reports of others amount to a report containing the substance of the evidence to be given. He acknowledged that the provisions of the Court and Court Officers Act, 1995 and the Rules made thereunder constitute a modification of legal professional privilege but he submitted that the principal of legal professional privilege notwithstanding the provisions of the Act and the Rules remains, for example, if a witness is not called, a report previously listed and made available can be recalled. He emphasised that contrary to what was averred in the affidavit of Margaret Muldowney, that the purpose of the disclosure Rule was to prevent surprise and not to assist in the cross examination of expert witnesses. He referred to para. 12 of Ms. Muldowney's affidavit and stated that it does not state therein that in dealing with the written comments of Dr. Harvey in respect of the case of the defendant that what is required to be disclosed under the Rule is a report containing the substance of the evidence to be given. He notes that in this regard the earlier statutory instrument brought in to deal with the disclosure of documents did not include the phrase "*reports containing substance of the evidence to be adduced*." He went on to refer to the remainder of her affidavit and in respect of para. 15 and para. 18 again emphasised that in his submission Ms. Muldowney misunderstood the purpose of the Rule. Further he went on to point out that evidence of substance as referred to by Ms. Muldowney at para. 19 of her replying affidavit is not the same as the substance of the evidence to be adduced, the phrase used in the Rule.

15. Mr. McCullough submitted to the court that the real question to be determined is what does the phase "*substance of the evidence to be adduced*" mean. In this regard he referred to the equivalent rules in English law contained in Rule 36(1). He posed the question as to whether the disclosure requirement extends to all preliminary reports which reports may not have crystallised at that stage. He asked the question should every single document of a witness who is to be called be disclosed and queried whether that could be the correct interpretation of the Rules. Insofar as the purpose of the Rules is concerned he submitted that the purpose of the Rule was to remove the element of surprise.

16. Mr. McCullough in support of his submissions referred to two decisions of the Supreme Court. The first of these was *Galvin v*

Murray, 2001, 1 I.R. 331, Murphy J. at pages 336 and 337. In the *Galvin v Murray* case the first issue was to consider what was an expert in the context of the relevant Rule. In that case the issue concerned an engineer in the employment of a corporation or county council and whether such engineer was or was not an expert or expert witness for the purpose of Order 39 Rules 45 and 46 of the Rules of the Superior Courts 1986. In the course of his judgment at page 336 it was stated as follows by Murphy J.:

> *"I do not think it is possible to escape a similar conclusion here. Of course it must be remembered that reports such as those obtained by the second defendant from its own engineers are documents which would be privileged from discovery. It is only if and when the employer determines to call the authors of the reports to give evidence that the requirement of disclosure arises. Clearly, the disclosure Rules are designed to forewarn other parties of expert evidence with which they may be confronted. The Rules have no role to play in investigating the strength or weaknesses of an opponent's case. It is still open to any litigant to obtain reports from a variety of experts and decide to call as witnesses some but not others of them. It is only in respect of those whom he determines to call as witnesses that he must provide the required report."*

17. He then went on to say at page 337:

> *"The disclosure Rules represent a radical change in the manner in which personal injury litigation will be processed in this jurisdiction. No doubt there will be difficulties in adjusting to the new dispensation and also in the application and interpretation of the Rules themselves. Indeed it must be expected that further problems will arise. On the other hand it may be anticipated that expert witnesses – with the assistance of the lawyers concerned – will produce reports in such a manner as will enable the parties to comply with the disclosure Rules as effectively, expeditiously and as inexpensively as the draftsman intended."*

18. Mr. McCullough also referred to the Supreme Court decision in the case of *Kincaid v. Air Lingus Teoranta* delivered by Mr. Justice Geoghegan on 9th May, 2003. In the course of that judgment it was stated as follows by Geoghegan J. at page 10:

> *"The purpose of the Rules is not to disclose the strength and weaknesses of each others case, but rather to prevent surprise evidence been thrown up at a trial which the other party at that stage is unable to deal with."*

19. Mr. McCullough then referred to Delaney and McGrath, *Civil Procedure in the Superior Courts*. Chapter 17 deals with the issue of disclosure in personal injury actions. At para., 17. 001, the basis underlying the introduction of the provisions contained in s. 45 of the Courts and Court Officer's Act, 1995 is considered. The following comment is made:

> *"This approach, which fostered surprise and 'trial by ambush', became the subject of increasing criticism on the basis that it militated against the possibility of settlement and thereby prolonged litigation and increased costs."*

20. In *O'Sullivan v. Herdmans Limited*, Lord McCoy pointed to the benefits of production before the trial of medical reports and said that:

> *"The interests of justice are in my opinion served by the promotion of settlements rather than the prolongation of litigation and by the possibility of early, complete preparation for both parties to a trial rather than by obliging one party to delay its full preparation until after the trial has actually started."*

21. It was contended on behalf of the plaintiff that what was required to be disclosed was the substance of the evidence, not all the evidence that could have been given in this regard, reference was made to the decision in the case of *Darby and Company Limited v. Weldon*, a decision of Staughton L.J., referred to in The Times of November 9th 1990, which is referred to in para. 17. 011 of *Delaney* and *McGrath*. It was stated as follows:

> *"It would seem to follow that all that is required to comply with the disclosure obligation is a précis of the expert's evidence containing 'a substance of the evidence' which the expert intended to give on behalf of the party calling him. Thus, if an expert did not intend to give evidence in relation to a matter unfavourable to the case of the party calling him, then arguably, there is no obligation to disclose that matter."*

22. Reference was then made to the decision of Staughton J. who took the view that what had to be disclosed was the substance of the evidence which it was intended that the expert should give and not all the evidence which the expert could conceivably give. However, as pointed out in *Delaney* and *McGrath* at para. 17. 012 "*an alternative interpretation of the Rules is that they are directed not just towards removing the element of surprise but towards disclosure per se.*" This was the view taken by Wright QC in *Kenning v. Eve Construction Limited*, 1989, 1 W.L.R. 1189, who stated that a solicitor in deciding whether to call an expert was presented with a simple choice:

> *"He must make up his mind whether he wishes to rely upon that expert, having balanced the good parts of the report against the bad parts. If he decides that on balance the expert is worth calling then he must call him on the basis of all the evidence that he can give, and not merely the evidence that he can give under examination in chief, taking the good with the bad together. If, on the other hand, the view that the solicitor forms is that it is too dangerous to call that expert, and he does not wish to disclose that part of his report, then the proper course is that that expert cannot be called at all."*

23. *Delaney* and *McGrath* continue:

> *"This interpretation of the disclosure obligation can be bolstered by consideration of Rule 50(1) which provides a mechanism whereby a party can apply for an order that, in the interests of justice the disclosure obligation should not apply to any particular report or statement (or portion thereof)."*

24. This provision would not seem to be necessary if a party could discharge its obligations by disclosing a "sanitised" expert report which merely set out the substance of the evidence which he intended to give on examination in chief. Indeed if this was the case, then the application of the county council in *Galvin* was unnecessary and its concerns misplaced. It was further submitted by Mr. McCullough that the disclosure Rules served to reinforce the duties and responsibilities owed by an expert to the court. He went on to refer to a further passage at para. 17. 013 as follows:

> *"The practical effect is more likely to be that experts will simply become more careful in drafting their reports to omit anything that could be construed as damaging to the case of the party retaining them, reserving such comments for*

oral communication. Indeed it might be questioned whether the rules might not be counterproductive in this regard because the party will be unlikely to call as a witness an expert who has furnished an impartial and balanced report for fear of having to disclose it."

25. It was submitted that the decisions of the Supreme Court in the *Galvin* and *Kincaid* cases were examples of a conservative view being expressed as to the interpretation of the Rules namely that the purpose of the Rule was to prevent surprise. It was further pointed out by Mr. McCullough that the decision in the *Kenning* case referred to above was subsequently expressly disapproved. Finally, it was submitted by Mr. McCullough that a valid construction of the relevant Rule having regard to the decision in the Supreme Court cases referred to, is that it is not necessary to disclose every report, just the final one and it was urged upon the court that this was a sensible construction of the Rule. In this particular case it is said that if that interpretation is correct the defendants herein will get a report that will show what the plaintiff's case is and will be and what the expert evidence to be given in that regard will be.

26. In his submission Mr. McGovern on behalf of the second named defendant referred to the relevant law. He pointed out that the precise wording in Order 39(46)(1) is that "*the plaintiffs…shall furnish… a schedule listing all reports from expert witnesses intended to be called…*". He therefore submitted that prima facie, the Rules require that all reports have to be listed. He accepted that Order 50(1) allows the possibility of any report to be excluded. He submitted that the second named defendant was entitled to know what was in the earlier report. He said it could be relevant to the state of knowledge of the person who is the defendant in the proceedings. He urged that there was no ambiguity in the wording of the Rules. Insofar as Order 50(1) of the Rules provides that reports may be excluded, he pointed out that the basis for such an Order to be made is stated to be in the interests of justice. Upon any such application the court may make such Order as to it seems just.

27. Mr. McGovern indicated that he was not seeking to have disclosure for the purpose of assessing the strengths and weakness of the plaintiff's case. He referred to the decision in the case of *McGrory v. ESB,* (2003), 3 I.R. 407 in which Keane C.J. cited with approval the Canadian case of *Hay v. University of Alberta Hospital*, 1991, 2 MED. L.R. 204. At page 414 of his judgment in that case Keane C.J., stated as follows:

"Those principles which have been adopted by courts in other common-law jurisdictions, should also, in my view, be adopted in our jurisdiction. In the present case the fact that it would be possible for the defendant to obtain the x-ray and test results which Mr. Pidgeon wishes to see by means of the process of discovery does not entitle the plaintiff to withhold them from the defendant at this stage. There is no room today in properly conducted litigation for an approach which denies one side access to relevant material which in any event will be available at a later stage of the proceedings. That was the view taken in the authorities and other jurisdictions to which I have already referred and I have no doubt that it accords with fairness and common sense. The same considerations apply to the contention on behalf of the plaintiff that since, in accordance with the requirements of the Rules of the Superior Courts (No. 6) (Disclosure of reports and statements), 1998, reports from each parties' expert witnesses must be exchanged within prescribed periods following the service of the notice of trial, there is no reason why, at this stage of the proceedings, the expert witness retained on behalf of the defendant should be furnished with information in the possession of the plaintiff's treating doctors as to his medical condition. The plaintiff is not entitled to impede access to such information by withholding his consent to the treating doctors giving information, as to his condition to the defendant's expert at this stage which will, in any event, be available at a later stage. The right of the defendant in an action where the plaintiff claims damages for personal injuries to have the plaintiff medically examined, to have access to his medical records and to interview his treating doctors is not dependent on the pleadings having been closed."

28. Mr. McGovern then referred to the English Rules and, in particular, quoted from the decision in *Kenning v. Eve Construction Limited*, 1989, 1 WLR. 1189.

29. Mr. McGovern then referred to the duties and responsibilities of expert witnesses as described in the case of *Ikarian Reefer*, 1993, 2 QB. 68. Having referred to the duties of expert witnesses Mr. McGovern then quoted from the decision of Denning, Master of the Rolls, in *Harmony Shipping v. Saudi Europe Line Limited*, 1979, 1 WLR. 1380 at page 1384 where he stated: "

Many of the communications between the solicitor and the expert witness will be privileged. They are protected by legal professional privilege. They cannot be communicated to the court except with the consent of the party concerned… subject to that qualification it seems to me that an expert witness falls into the same position as a witness to fact. The court is entitled, in order to ascertain the truth, to have the actual facts which he has observed adduced before it and to have his independent opinion on those facts."

30. Mr. McGovern then went on to refer to the concept of partial disclosure in discovery. He quoted from the decision of Lord Justice Waller of the Court of Appeal in *Dunlop Slazenger International Limited v. Joe Bloggs Sports Limited*, on 11th June, 2003 as follows:

"To answer the question whether waiver of parts of a privileged communication waives the complete information, it is that dictum of Mustill J., as he then was, which applies. A party is not entitled to cherry pick and a party to whom privileged information is provided is entitled to have the full content of what is being supplied in order to see that cherry picking is not taking place. If this material (para. 13 and 14 of Ms. Ahmed's statement) had been evidence given at a trial, there really would no answer to the point that the full information should be provided in order to make certain that cherry picking is not taking place."

31. Finally in relation to the obligation to obtain a report Mr. McGovern referred to the decision in the case of *Darby and Co. Limited and Ors v. Weldon* (The Times 9th November, 1990), the decision previously referred to by Mr. McCullough on behalf of the plaintiff. Relying on that particular decision it was submitted by Mr. McGovern that there is no obligation on the experts from either side in Irish litigation relating to damages for personal injury to prepare reports about reports from other experts. He stated however that in this case the plaintiff or his legal advisers took it upon themselves to seek such reports. Such refining reports may reduce the amount of evidence which will be adduced but do not necessarily diminish the amount of evidence which will otherwise emerge. Finally he submitted that it is necessary for the plaintiff to show that there is a good reason in the interests of justice not to disclose the report. He said there was no suggestion of prejudice and emphasised that as between the parties everything should be available to both sides; in considering the interests of justice he emphasised it was justice for both sides not just the plaintiff. He referred again to the starting point for considering the requirements in respect of disclosure, namely, that all reports must be disclosed. He submitted that there was no doubt about it on the wording. In addition to Mr. McGovern's oral submissions I had the benefit of the very careful written submissions prepared by Mr. O'Connor, his junior.

32. Mr. Hennessy also made submissions on behalf of the first named defendant. He reiterated the legal position and referred again to

Order 50(1). He indicated that no injustice had been demonstrated in the application of the plaintiff and further that there would be no injustice if it was a case where an expert changed his view as a case developed and was in a position to explain his change of view. He pointed out that it was on foot of the preliminary report furnished by Dr. Harvey that the plaintiff's solicitor was in a position to launch the proceedings in this particular case. So far as the facts of this particular case are concerned he submitted that no injustice had been established.

33. He then went on to consider the definition of a report in that regard he examined the wording of Order 39 Rule 46(1) and in particular the definition of the word "report" contained in Order 39 Rule 45. He asked the question whether or not the first report at issue in this particular case did not contain the substance of the evidence to be adduced. He pointed out that it was not stated by Mr. Boylan on behalf of the plaintiff that that was the case. In other words he stated that there was no evidence before the court that the first report of Dr. Harvey was not a report coming within the definition set out in the Rule. He argued that the only person who could say whether or not the substance of the evidence was contained in the report is the expert himself. As there was nothing from the expert to indicate that, he argued that a preliminary report was nonetheless still a report. He argued that absent any evidence saying it does not contain evidence of substance to be adduced, it cannot be excluded. In his view the judgments of the Supreme Court in the two cases cited namely *Galvin* and *Kincaid* supported the application for discovery in this particular case. He argued that a wide ranging interpretation of the Rules allowed for cherry picking and that it was not intended that the Rules should allow a party to cherry pick.

34. I have set out at length the party's submissions in relation to this issue. It seems to me that in considering this matter it is necessary to look at a number of matters. The first of these is the definition of the word "report" contained in Order 39 Rule 45(1)(e). It refers to a report from an expert intended to be called to give evidence in relation to an issue in the action and containing the substance of the evidence to be adduced. I do not think that there is any difficulty in interpreting the words of this rule and their clear meaning. To interpret the meaning of the definition of report in the manner contended for by Mr. McCullough seems to me to require the insertion of the words "save and unless the same is a preliminary report" in the Rules. I have come to the view that I cannot interpret the Rule in such a way, given that the definition of the word "report" is, in my view, clear. There is no apparent reason which would justify such an interpretation. Order 39 Rule 46(1) then goes on to provide that the plaintiff shall furnish to the other party a schedule listing all reports from expert witnesses intend to be called. Again it seems to me that there is little difficulty in considering what is required under this heading. The report at issue in this case is the report prepared by Dr. Harvey at a preliminary stage in this matter. According to Mr. Boylan, at para. 9 of his affidavit grounding this application, the preliminary views of Dr. Harvey, which appear to have been very properly couched with a number of reservations in relation to other steps that would require to be taken before he expressed a final opinion, were used by the plaintiff's solicitor together with a report from Professor Sam Machin, for the purpose of considering whether or not the plaintiff had a good cause of action and upon the basis of those reports having concluded that there was indeed a good cause of action, the reports were forwarded to junior counsel for the purpose of enabling the junior counsel to draft particulars of negligence and breach of duty in the statement of claim. It was further deposed as I have already referred to, that the views of Dr. Harvey have evolved and developed since he furnished his preliminary report as a result of consulting with other experts in the case. This is not surprising. In any litigation, this would not be an unusual feature. Nonetheless it does not appear that as a result of the evolution and development of Dr. Harvey's views as to liability and causation, that there has been any change in the case being made in the case of the plaintiff. For example, there is no suggestion that the pleadings require to be amended, altered, changed, added to or reduced in anyway to accommodate the changing views of Dr. Harvey. That being the case, it would appear that as Mr. McGovern stated, *prima facie*, the report of Dr. Harvey of 1st August, 2001 must as a matter of probability contain the substance of the evidence to be adduced in relation to an issue in the action.

35. Having concluded that the position is that the report of 1st August, 2001 is captured by the provisions of Order 39 Rule 46 it then becomes necessary to consider whether an order should be made in the interests of justice that the provisions of Rule 46 shall not apply in relation to the said report. In support of the application that the report of 1st August, 2001 should not be disclosed, the most that is stated on behalf of the plaintiff herein is that the views expressed by Dr. Harvey in his preliminary report have evolved and developed. The views as expressed in his final report are more refined and informed and take account of information obtained from other experts together with other matters which were not previously available to him. There is no suggestion in the grounding affidavit that the plaintiff will suffer any prejudice as a result of being required to produce the preliminary report. In those circumstances I cannot see that the interests of justice could be served by acceding to the plaintiff's application herein. On the contrary, it may be of use to both sides to consider how those views have evolved and changed. I think in this regard it is useful to quote again the words of Murphy J. in the Supreme Court decision in the case of *Galvin v. Murray* referred to above,

> *"The disclosure Rules represent a radical change in the manner in which personal injury litigation will be processed in this jurisdiction. No doubt there will be difficulties in adjusting to the new dispensation and also in the application and interpretation of the Rules themselves. Indeed, it must be expected that further problems will arise. On the other hand it may be in anticipated that expert witnesses – with the assistance of the lawyers concerned – will produce reports in such a manner as will enable the parties to comply with the disclosure Rules as effectively, expeditiously and as inexpensively as the draftsman intended."*

36. Undoubtedly, as stated by Mr. Justice Murphy, there are difficulties in adjusting to the new dispensation, particularly as parties are, to the extent provided for in the Rules, losing the legal professional privilege which would formally have attached to such reports. However, it is for the overall benefit of litigants as a whole that the process of disclosure has been made simpler, cheaper and more expeditious.

37. The final issue relates to the question as to whether or not comments made by Dr. Harvey on the defendant's expert reports could come under the definition of reports contained in Order 39 Rule 45 aforesaid. It seems to me that that question can only be answered by asking if the comments made will contain the substance of the evidence to be adduced. Clearly it is not possible at this stage to make a determination on this issue. Clearly, the issue that will arise is whether in relation to an expert's report Dr. Harvey's comments will comprise the substance of his evidence in respect of those reports. If so, it seems to me that such reports would come within the ambit of the Rules.

38. Finally, I should add that I have had the opportunity to consider the report of Dr. Harvey of 1st August, 2001 and that of 13th April, 2004. Having considered the two reports, I see nothing which would alter my view that the two reports require to be disclosed under Order 39 Rule 46 and that there is nothing in the reports to give rise to a view that the earlier report should not be disclosed in the interests of justice.