[2018] IEHC 798

THE HIGH COURT

[2017 6229 P.]

BETWEEN

SANDRA DUNNE

PLAINTIFF

AND

GRUNENTHAL GMBH, T.P. WHELEHAN SON AND COMPANY LIMITED, THE MINISTER FOR HEALTH AND CHILDREN, THE MINISTER FOR THE ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT, THE ATTORNEY GENERAL AND IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 6th day of December, 2018

1. The plaintiff in these proceedings is alleged to have suffered birth defects as a result of the consumption by her mother of the drug Thalidomide during pregnancy. She has brought proceedings claiming damages against the first defendant, the manufacturer of the drug, the second defendant, its distributor in Ireland and the State.

2. The personal injury summons herein was issued on the 10th July, 2017. The plaintiff was born on the 8th March, 1961 and attained her majority on the 8th May, 1992. Thus the proceedings were issued some 35 years later and on their face at least, would appear to be statute barred. In her summons, the plaintiff pleads that she was examined in November, 2015 by Dr. Willie Riordan, a consultant clinical geneticist who concluded that the birth deformities from which the plaintiff suffers were, on the balance of probability, caused by Thalidomide. In her replies to particulars of the 27th September, 2017, the plaintiff also refers to the fact that she was diagnosed as a Thalidomide survivor by Professor Trent Stephens, professor of anatomy and embryology arising from an examination in February, 2016. She goes on to state in the replies:

> "Accordingly, the plaintiff relies upon the expert opinions of both Professor Stephens and Dr. Riordan to the effect that she is a Thalidomide survivor and accordingly, on the basis of that knowledge, instituted these court proceedings."

3. In further replies of the 6th November, 2017, the plaintiff pleaded:

> "The plaintiff first appreciated that the injuries affected were caused, on the basis of medical opinion, by the maternal ingestion of Thalidomide upon receipt of the expert report of Professor Trent D. Stephens in 2016."

In their defences, the defendants rely upon the Statute of Limitations and by way of Reply, the plaintiff pleads:

> "The plaintiff relies upon the Statute of Limitations (Amendment) Act, 1991 ['*The 1991 Act*'] in that the plaintiff's 'date of knowledge' within the meaning of s.3 and as defined by s. 2 of that Act and for the purposes of these proceedings occurred not before the 25th November, 2015".
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> In yet further replies of the 22nd March, 2018, the plaintiff pleads:
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> > "(i) The date pleaded is the date of receipt of medical opinion attributing the plaintiff's injuries to maternal ingestion of Thalidomide.
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> > (ii) Please also see para. (1) (a) (i) above. The plaintiff did not have knowledge that the injuries were attributable in whole or in part to the acts or omissions which are alleged to constitute negligence and/or breach of duty."

4. In response to these pleas, the defendants called upon the plaintiff to produce a copy of these reports. The plaintiff declined to do so noting on the 25th May, 2018:

> "The plaintiff objects to the production of the said expert opinion which will be disclosed in due course pursuant to S.I. 391 of 1998".

5. The first defendant followed up this request by serving a Notice to Produce on the plaintiff's solicitors on the 17th April, 2018 calling for the production of the reports of Professor Stephens and Dr. Riordan pursuant to O. 31 r. 15 of the Rules of the Superior Courts. The plaintiff declined to comply with this notice.

6. This case, together with a cohort of similar claims, have been case managed by this court for a considerable period of time. The motion now before the court is brought pursuant to O. 31 r. 18 seeking to compel the plaintiff to produce the reports for inspection.

7. Order 31 r. 15 provides as follows:

> "Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; and any party not complying with such notice shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit."

8. Order 31 r. 18 provides:

> "18. (1) If the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit; and, except in the case of

documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit or list of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party.

(2) An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."

9. The principles to be applied in applications under O. 31 r. 18 were considered by this court in *Cooper Flynn v. Radio Telefis Eireann* [2000] 3 I.R. 344 (recently applied in *Maye v Adam & Ors* [2015] IEHC 530). The defendant sought an order against the plaintiff's employer, a bank, requiring it to make available in unredacted form the documents it had disclosed in a non-party discovery affidavit. Kelly J. (as he then was) observed that r. 18 (2) makes clear that the court ought not make an order if it is not necessary for disposing fairly of the action or for saving costs.

10. In that latter regard he approved the judgment of Simon Brown L.J. in *Wallace Smith Trust Company Ltd v. DeLoitte Haskins and Sells* [1997] 1 WLR 257 which contained the following passage:

"2. The burden lies on the party seeking inspection to show that that is necessary for the fair disposal of the action….

5. Disclosure will be necessary if: (a) it will give 'litigious advantage' to the party seeking inspection (*Taylor v Anderton* [1995] 1 WLR 447 at p.462 and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g. interrogatories) or from some other source (see e.g. *Dolling-Baker v Merrett* [1990] 1 WLR 1205 at p. 1214) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (see *e.g. Science Research Council v Nasse* [1980] AC 1028 at p. 1076 *per* Lord Edmund-Davies)."

11. The court was also of the view that if a prima facie case was made out for disclosure, the court should examine the documents involved to ensure that inspection was indeed necessary and to see if the loss of confidentiality involved could be mitigated. In the present case, I directed that the documents be made available to me for that purpose.

12. On the issue of what constituted "necessity", Kelly J. also referred with approval to the dicta of Bingham M.R. in Taylor v. Anderton [1995] 1 WLR 447 at 462 where the Master of the Rolls said:

"The crucial consideration is, in my judgement, the meaning of the expression 'disposing fairly of the cause or matter'. Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it, if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test."

13. Reliance was placed by the applicants in this motion on the judgment of the Supreme Court delivered by Hardiman J. in *Hannigan v. DPP & Anor* [2001] 1 I.R. 379. The applicant in those judicial review proceedings was charged with a sexual assault offence. The respondent DPP directed that he be tried on indictment unless he pleaded guilty in which event, the matter could be disposed of summarily. The applicant challenged that decision in judicial review proceedings in which he asserted that the DPP was guilty of oppression in not consenting to summary disposal of the matter in the absence of a guilty plea. The issue before the court was whether a letter written by the DPP to the Garda authorities concerning the prosecution should be disclosed to the applicant.

14. Disclosure was refused and a motion was brought to compel the DPP to produce the document for inspection. One of the issues in the case was whether or not the respondent DPP had changed position concerning disposal when the matter was before the District Court. A replying affidavit was sworn by a Garda superintendent who referred in the affidavit to the letter received from the DPP containing directions as to prosecution and venue for trial. The contents of that letter were summarised by the superintendent in his affidavit. The applicant sought a copy of the letter and this was refused.

15. Hardiman J. considered that as the superintendent had not merely referred to the existence of the letter but actually summarised its contents, this meant that the letter had been "deployed" in the proceedings and thus privilege had been waived. He noted that no grounds specific to the document itself had been urged against its disclosure. The court concluded that in that event, it was just and equitable that the DPP, having deployed the letter for the purposes of the application, the applicant should be entitled to have access to it to see whether it supported the proposition in support of which the DPP deployed it.

16. The disclosure of the mere existence of a document without more does not amount to deployment. Thus Clarke J. (as he then was) noted in *Byrne v. Shannon Foynes Port Company* [2008] 1 I.R. 814 (at p. 826):

"[39] 6.2 However, it is important to note that the test is to the effect that the document concerned was 'deployed'. It is clear from *Marubeni Corporation v. Alafouzos* [1988] C.L.Y. 2841 that a mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege and that this is so even if the document referred to is being relied on for some purpose, for reliance in itself is not the test. Properly speaking, the test is whether the contents of the document are being relied on rather than its effect." (my emphasis).

17. It seems to me that the concept of litigious advantage has to be analysed by reference to the purpose for which the particular document in question is deployed. Thus in *Persona Digital Telephony Ltd & Anor v. Minister for Public Enterprise & Ors* [2015] 1 I.R. 124, this court (Donnelly J.) noted (at p. 147 – 148):

"[71] Furthermore, insofar as the defendants rely upon *Cooper Flynn v. Radio Telefís Éireann* [2000] 3 I.R. 344 , it is important to recall that the case concerned inspection of documents referred to on discovery. Bearing that in mind, it can be seen that the reference to 'litigious advantage' must be understood as relating in some way to an issue between the parties, whether in the substantive action or indeed in a truly interlocutory hearing. It could not and does not mean a litigious advantage by the gaining of knowledge of the other party's litigation tactics."

18. It goes without saying that the relevant litigious advantage to be gained must be a legitimate one and moreover must be an advantage in relation to the issue in respect of which the document has been deployed.

19. In the present case, the two reports in issue were deployed for one specific purpose only in the context of the pleadings, namely in relation to the plaintiff's date of knowledge within the meaning of the 1991 Act. The plaintiff relies on s. 2 (1) (c) which provides that her date of knowledge is the date on which she first knew, *inter alia*, that the injury was attributable to the defendant's negligence. She pleads that accordingly the date of the first report, the 25th November, 2015, is the first time she knew that Thalidomide was the cause of her injury, that being the conclusion of both reports.

20. Therefore, how that conclusion was reached by the experts concerned is immaterial to the issue in respect of which the reports have been deployed. The defendants are already aware that this is the conclusion of the reports and they are also aware that the plaintiff relies on the communication to her of that conclusion as constituting her date of knowledge. Disclosure of the reports does not advance matters one way or the other it seems to me in the context of that single issue. Whether the conclusion is right or wrong, or has a valid scientific basis, is of no relevance to the issue in respect of which the reports are deployed.

21. It is also important to bear in the mind that, as Simon Browne L.J. in *Anderton* made clear, disclosure will not be ordered where the information is otherwise available to the party seeking it. In the present case, if and when the issue of S.I. 391 disclosure arises, the defendants will be entitled to sight of these reports, but on the basis of simultaneous exchange of expert reports. Thus what is really in issue here is the timing rather than the fact of disclosure and whether the defendants should gain the advantage of seeing the plaintiff's expert reports before they are compelled to disclose theirs, if any.

22. The defendants have made clear that they wish to take advice on these reports by having them analysed by medical experts, *inter alia*. That will of course potentially confer significant litigious advantage on the defendants, but not it seems to me in relation to the date of knowledge issue which is the only relevant one for the purpose of this application. The question thus arises as to whether such litigious advantage is one that ought in fairness be accorded to the defendants at this stage of the case.

23. The landscape in personal injury litigation was significantly changed by the introduction of the disclosure regime comprised in S.I. 391 of 1998 in regard to expert reports. One of the issues grappled with by practitioners was whether the S.I. required simultaneous exchange. It was often argued that it would be patently unfair for a plaintiff to be compelled to disclose his or her expert evidence to a defendant before any reciprocal requirement on a defendant's part. That would enable the defendant to analyse and critique such reports with the benefit of expert assistance before being required to commit itself to producing such reports as it considers suitable to respond.

24. This issue was considered in *Harrington v Cork City Council* [2015] 1 I.R. 1. The parties exchanged schedules of witnesses, the defendant indicating that it did not propose to call experts. The defendant sought disclosure of the plaintiff's expert reports and the plaintiff refused unless the defendant undertook not to make the reports available to any expert they subsequently retained. The defendant refused to give the undertaking sought. Kearns P. referred to an earlier Supreme Court judgment on this issue (at p. 4)

> "The Supreme Court in *Kincaid v Aer Lingus Teo.* [2003] 2 I.R. 314 held that the 'exchange' of reports should be contemporaneous to avoid the danger that the rules can be abused to enable one party to gain an advantage over another. Geoghegan J. giving the sole judgment of the court, with which McCracken and McGuinness JJ. concurred, held, at p. 320:-
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> > 'The obligation under O. 39, r. 46(1) is to 'exchange' scheduled reports. If a party's solicitor ensures that the 'exchange' is contemporaneous, there is no danger of the so called 'abuse' arising.
> >
> > If each party's solicitor ensures that an actual contemporaneous exchange of reports takes place, there is no danger that the procedure can be abused in the manner suggested by the plaintiff'…
>
> [7] It is the plaintiff's submission that *fairness* requires that his obligation, which is not disputed, to disclose his reports in accordance with O. 39 r. 46(3) be conditional upon the first defendant's undertaking that those reports will not be given, directly or indirectly, to any expert retained by the first defendant until after such expert has furnished his report. The plaintiff submits that should he be required to disclose his expert reports under the current circumstances the first defendant would obtain an unfair litigious advantage which was the very tactic the Supreme Court feared in Kincaid…" (my underlining).

The court resolved the issue in the following way (at p. 7):

> "[16] I am satisfied by reference to the various authorities cited that the requirements of fairness require a simultaneous exchange of expert reports and that requirement is not abrogated by the non-existence at this point in time of expert reports to the defendants. While specific cases have not been opened to the court, the jurisprudence of the European Court of Human Rights in recent years has repeatedly emphasised the concept of 'equality of arms' in litigation and I think it fair to say that this concept has increasingly permeated judicial thinking in this jurisdiction also. The plaintiff's apprehension that the first defendant will secure a litigious advantage in the current circumstances obtaining in this case is not one without any foundation.
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> [17] While the court is not going so far as to express a view as to whether some calculated strategy to that effect exists in this case, it would hold with the plaintiff's submissions. This is to do no more than follow and implement the decision of the Supreme Court in *Kincaid*…"

25. In the context of the within proceedings, it is important to note that in both *Kincaid* and *Harrington*, the court identified the non-simultaneous exchange of expert reports as potentially amounting to an *unfair* litigious advantage. In personal injury litigation, expert reports are frequently relied upon to assist in the drafting of pleadings, whether the reports or their authors are specifically identified in the pleadings or not. Thus particulars of negligence are often drafted on the basis of the report of a forensic engineer. Particulars of injury are commonly based on the reports of treating doctors. Details of special damage regularly reference reports from a variety of experts such as actuaries, accountants, valuers, motor assessors, loss adjusters and the like.

26. In clinical negligence claims, as in all claims against professional persons, the jurisprudence requires a plaintiff to obtain supportive expert opinion before launching proceedings, which might otherwise be regarded as an abuse of process. Such opinion is also commonly relied upon to found the claim, as here, in answer to a limitation plea by the defendant, that the plaintiff's date of knowledge derives from the receipt of that opinion. To a greater or lesser extent in all of the foregoing cases, it could be said that such expert reports are "deployed" in the litigation. Their susceptibility to disclosure and inspection should not logically depend on whether the actual report or its author is identified or relied upon in express terms. In the present case, could the plaintiff have

avoided inspection by the simple expedient of pleading only that her date of knowledge was the receipt of expert opinion within two years prior to the institution of proceedings?

27. That can hardly be the intent of O. 31. If it was, S.I. 391 would be largely redundant and the equality of arms rationale underpinning it substantially frustrated. Were the plaintiff to be now compelled to produce the reports the subject matter of this application, it seems to me that it would lead to undesirable effects. It would bring about the very mischief the court sought to avoid in both *Kincaid* and *Harrington*.

28. Bearing all these factors in mind, the defendants have not satisfied me that the production of these reports for inspection is necessary for the fair disposal of the case.

29. I will accordingly refuse this application.