

## THE HIGH COURT

[2016 No. 2162 P.]

BETWEEN

J. McP.

PLAINTIFF

AND

M. McP. AND M. (OTHERWISE M.E.) McP.

DEFENDANTS

**JUDGMENT of Mr. Justice Barr delivered on the 6th day of December, 2017****Introduction**

1. This is a somewhat unusual application, in which the plaintiff is seeking an order directing that the first named defendant should make discovery of his medical records from two psychiatric institutions. There is also an application that both of the defendants should make discovery of documents in their possession, power or procurement concerning the transfers of certain properties from the first named defendant to the second named defendant, which it is alleged by the plaintiff, were undertaken with a view to defeating her claim for damages against the first named defendant.

2. As this is an unusual application which seeks to oblige the defendant to make discovery of his confidential psychiatric records, it is necessary to set out the history of the matter in some detail.

**The Plaintiff's Application**

3. The plaintiff is a young woman of 22 years of age. The defendants are her paternal grandparents. In these proceedings, it is alleged by the plaintiff that when she was aged between 9 years and 12 years, she was subjected to a large number of sexual assaults carried out by the first named defendant. She alleges that these assaults occurred at various locations, both within Ireland and in Portugal, when she was in the care of the first named defendant. It is alleged by the plaintiff that the abuse involved the first named defendant intimately touching and rubbing the plaintiff in the area of her vagina and elsewhere. It is alleged that the abuse by the first named defendant occurred on a weekly basis during the years in question. The abuse is alleged to have occurred between June 2005 and January 2008.

4. It appears that at some time subsequent to 2008, the plaintiff made a formal complaint to the gardaí. Following that investigation, criminal charges were brought against the first named defendant. From the affidavit sworn on 13th July, 2017, by Mr. James Glynn, the plaintiff's solicitor, he has averred that he attended at the Circuit Criminal Court on 15th April, 2010, when the first named defendant entered a guilty plea to eighteen counts in respect of criminal offences committed by him against the plaintiff. Upon his conviction, the first named defendant was sentenced to a term of imprisonment.

5. The present proceedings were commenced by way of plenary summons issued on 9th March, 2016. A statement of claim was delivered on 14th March, 2016. In it, the plaintiff claims damages, including aggravated damages, against the first named defendant for assault, trespass to the person and for breach of her constitutional right to bodily integrity and breach of fiduciary duty.

6. The plaintiff also claims damages against the second named defendant, her paternal grandmother, for negligence on the part of the second named defendant in failing to exercise reasonable care for the safety of the plaintiff, while she was being looked after by the defendants.

7. The plaintiff further claims that on dates unknown, but sometime prior to 10th May and 19th May, 2010, the defendants entered a conspiracy to defeat the plaintiff's claim for damages against the first named defendant. That with intent to defraud the plaintiff and/or to render worthless any judgment obtained by the plaintiff against the first named defendant, the first named defendant transferred and/or conveyed to the second named defendant his interest in three specified properties. On this account, the plaintiff claims against both defendants, an order pursuant to s. 74 of the Land and Conveyancing Law Reform Act 2009, declaring void the said transfers and conveyance by the first named defendant to the second named defendant in 2010, of the three properties identified in the statement of claim.

8. A defence was filed on behalf of both defendants on 1st December, 2016. It was a somewhat unusual defence, in that, while it contained the usual denials, certain partial admissions were made and the first named defendant put in issue certain matters in relation to his mental state at the time that the admitted acts were carried out. It is on the basis of these specific pleas, that the plaintiff seeks discovery of his psychiatric records. Accordingly, it is necessary to set out the relevant portion of the defence, which was in the following terms:-

"3. The first defendant admits touching and rubbing the plaintiff in the area of her vagina for very brief momentary periods of time and on a limited number of occasions, and the first defendant will say that such touching occurred on occasions of playfulness between him and the plaintiff, and he considered it to be in the nature of platonic, friendly, caressing and innocent tickling and innocent horseplay.

4. The first defendant expressly denies that he had any inappropriate level of cognitive distortions about children and sex, but admits that he had little insight at the time into his offending behaviour and accepts fully that it may properly be perceived to have been abusive and injurious to the plaintiff."

9. The defence went on to deny that any of the incidents complained of occurred during periods of time when the plaintiff was in the care and custody of the second defendant. She denied that she had any knowledge, or means of knowledge, of the abuse alleged to have been committed by the first named defendant against the plaintiff. She denied that she had failed to exercise such care for the plaintiff's safety, as would be exercised by a careful parent, or that she failed to see or to heed and/or to prevent the actions of the first defendant, thereby causing or contributing to the plaintiff's injuries, loss or damage.

10. The defence also contained a denial that the first and second named defendants had entered into any conspiracy in relation to the transfer of properties between them, as alleged or at all. The defence went on to state that save as had been specifically admitted in the defence, the plaintiff was required to prove each and every other matter set out in her statement of claim.

11. On 9th January, 2017, the plaintiff delivered a reply to the defence filed by the defendants, in which it was indicated that the plaintiff would request the trial court to treat the assertions made in the defence as additional grounds for awarding to the plaintiff aggravated and/or exemplary damages, in addition to the nature and conduct of the defence of the defendants herein. The reply also denied all the assertions and allegations contained in the defendants' defence.

12. Arising out of the defence filed on behalf of the defendants, the plaintiff's solicitor wrote on 9th January, 2017 and 9th March, 2017, seeking voluntary discovery of the first named defendant's psychiatric records with St. John of God's Hospital and the Granada Institute and also seeking as against both defendants, discovery of the conveyancing files in relation to the three specified properties. The plaintiff's solicitor did not receive any reply to these letters. Accordingly, on 24th May, 2017, the plaintiff's solicitor issued a motion seeking the following orders:-

- (i) An order directing the first named defendant to make discovery on oath of the following categories of documents:-
  - (a) the first named defendant's medical records from 1st January, 2008 to date to include files and records from St. John of God's Hospital; and
  - (b) the files and records of the Granada Institute pertaining to the defendant's attendance and/or counselling and/or treatment there and/or under its auspices.
- (ii) An order directing both defendants to make discovery on oath of the following categories of documents:-
  - (a) the conveyancing files in relation to any transfers or transactions concerning the lands comprised in [three specified properties] between 1st January, 2008 to date....

13. The plaintiff's solicitor, Mr. James Glynn, swore two affidavits grounding this application. In essence, he stated that in light of the defence filed on behalf of the defendants, in which the first named defendant had put in issue his mental state and which expressly denied any level of cognitive distortions about children and sex and asserted that he had little insight at the time into his offending behaviour, that this had been done in an effort to minimise his liability for the assaults, or his liability for the injuries sustained by the plaintiff as a result thereof.

14. In his second affidavit, Mr. Glynn stated that during the plea in mitigation in the course of the sentencing hearing held on 15th April, 2010, a report compiled by a Mr. Kieran Power, was furnished to the presiding judge. Mr. Glynn, who was present in court on that occasion, averred that Mr. Power gave evidence that the first named defendant had attended at St. John of God's Hospital and at the Granada Institute at a time after the complaint had been first made by the plaintiff to the gardaí. Mr. Glynn stated that during the course of his evidence, Mr. Power gave evidence as to the first named defendant's state of knowledge and insight into what had happened.

15. In argument at the Bar, Mr. Keys, B.L., submitted that, while it was certainly unusual for a plaintiff to seek discovery of a defendant's medical or psychiatric records, in this case there were special circumstances due to the specific plea that had been raised on behalf of the first named defendant in his defence. He submitted that as the first named defendant had specifically chosen to put in issue his mental state and level of insight at the time that the admitted assaults were carried out, this opened the door to an application by the plaintiff to have sight of his psychiatric records from the relevant period, to ascertain whether the assertions made by the first named defendant in his defence, as to his mental capacity and insight at the time, were true, or were merely a fraudulent plea, designed to minimise his culpability in the matter.

16. In the course of his submission, counsel, referred to the *ex tempore* decision of O'Flaherty J. delivering the judgment of the Supreme Court in *O'R. v. L.* [1998] IESC 41. That was an appeal in relation to a discovery order that had been made by the Master of the High Court, which had been affirmed on appeal by Kinlan J. in the High Court. The action was a nullity suit, in which it had been alleged that prior to and at the time of the marriage, the respondent, by reason of her state of mind, mental condition, personality and/or emotional and/or psychological development, did not have the capacity to enter into or sustain a normal and functional life long marital relationship with the petitioner. Discovery had been ordered in respect of any treatment that the respondent might have received for seven years before the marriage. No medical documents which came into existence after the marriage were to be the subject of the discovery order. In the course of his judgment, O'Flaherty J. stated as follows in relation to discovery generally:-

"The law is not in doubt. It is old law as laid down in *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* 11 Q.B.D. 55 which has been consistently followed by our courts. All documents relevant to matters in issue have to be disclosed. To quote from the judgment of Brett L.J. which is reproduced in the judgment delivered by Kenny J. in *Sterling - Winthrop Group Limited .v. Farbenfabriken Bayer Aktiengesellschaft* [1967] I.R. 97: -

"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may, not which must, either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences..."

17. Applying those dicta, the Supreme Court expanded the ambit of the discovery ordered against the respondent and directed that an order for discovery in the ordinary way, which would require all relevant documents to be discovered, would be made. Mr. Keys, B.L., submitted that, while the issue as to the first named defendant's perception of the appropriateness or otherwise, of the actions which he admitted carrying out, may not be relevant to his liability at civil law, nevertheless, as he had chosen to put his mental state and level of insight at the time of the assaults in issue in his defence, it was appropriate and indeed necessary, for the plaintiff to have sight of his psychiatric records. He further submitted that having regard to the plea in the reply seeking exemplary damages, on the basis that the first named defendant was fraudulently trying to minimise his culpability in the matter, presumably with a view to lessening his liability for damages, this was a sufficient basis on which to justify the making of the order sought.

18. In relation to the second category of discovery, being discovery of the files concerning the transfers and conveyance of the three specified properties, it was submitted that having regard to the time at which such transfers had taken place and having regard to the existence of criminal proceedings in the months prior to that time and as to the likelihood of civil proceedings following

therefrom, there was a basis on which the plaintiff could seek the relief sought under the 2009 Act. In order to properly pursue that claim, it was necessary for the plaintiff to have discovery of the files concerning these transfers and conveyances.

### **The Defendants' Response**

19. Mr. Boyle-Harper, B.L., on behalf of the defendants, submitted that the court should refuse the order sought at para. 1 of the notice of motion. He stated that under that heading, the plaintiff was seeking production of the defendant's confidential psychiatric records. He denied that the first named defendant had done anything in the course of the proceedings, which would open up his private medical records to scrutiny by third parties, including the plaintiff. He submitted that those records were not relevant to either the issues of liability, or quantum in these proceedings. Liability would rest on whether the acts complained of by the plaintiff, if proven, or as admitted, constituted an assault or battery. The view of the first named defendant as to the appropriateness of those acts was not relevant, if they were held by the court to constitute an assault or battery on the plaintiff.

20. Counsel further submitted that the issue of quantum in these proceedings would be determined by the level of injury and losses established by the plaintiff in evidence to have arisen as a result of the assaults. The issue of quantum did not depend on the mental state of the first named defendant at the time of the assaults. In these circumstances, it was submitted that the first named defendant's psychiatric records from either institution, were not relevant to the issues which would arise at the trial of the action.

21. As a further submission, but without in any way diminishing his primary objection to the ordering of discovery of the medical records, counsel submitted that the order for discovery should be limited to the first named defendant's psychiatric records only from St. John of God's Hospital and from the Granada Institute and should not contain any records relating to any physical injuries or complaints he may have had. He further submitted that if the court were minded to direct the discovery sought, it should be limited to the period after the assault and up to the date of the criminal trial i.e. from 1st January, 2008 to 15th April, 2010.

22. In relation to discovery of the conveyancing files, counsel stated that if the court thought that these were necessary and relevant having regard to the issues raised on the pleadings, then if the court were to direct the discovery as sought, there may be issues of privilege in relation to certain documents appearing on those files, but that could be raised in the ordinary way in the affidavit of discovery.

### **Conclusions**

23. It is very common for the court to make orders for discovery against plaintiffs directing them to make discovery of their medical and psychiatric records. The main reason why such orders are permissible, is due to the fact that in seeking damages for personal injuries, the plaintiff has specifically put in issue the level of injuries, both physical and psychiatric suffered by him or her. In order to enable the defendant to properly evaluate what injuries may have arisen from the accident, it is often necessary for the defendant to have sight of the plaintiff's pre-accident medical and psychiatric records. In certain circumstances, the court will also direct discovery of the plaintiff's post-accident medical records. However, the reason why these two categories of medical records may be made the subject of an order for discovery is due to the fact that the plaintiff has specifically put in issue the level of personal injuries suffered by him or her. When they first consult their solicitor in advance of the issue of proceedings, they are presumably advised that in instituting such proceedings, they are opening themselves to the possibility that the court may order that they make discovery of either their pre-accident or post-accident medical records. Accordingly, the plaintiff embarks on the litigation, knowing that such an outcome is, at least, a possibility.

24. This is the first occasion on which this Court has heard an application on behalf of a plaintiff for discovery of a defendant's medical records. Unlike a plaintiff in civil proceedings, the defendant does not voluntarily come into the proceedings, but is brought into the proceedings at the suit of the plaintiff. Merely because they are sued by a plaintiff in respect of an alleged tort, does not mean that the mere institution of proceedings by the plaintiff, thereby opens up the defendant to the possibility of having to reveal his confidential medical records.

25. Medical records in general, and in particular psychiatric records, are of a highly confidential nature. People who seek the help of a psychiatrist, a psychologist, or a counsellor, should, in the ordinary course of events, be able to consult with them safe in the knowledge that their communications with such persons are privileged from production to third parties, whether in the course of litigation, or otherwise. However, this is not an inflexible rule. It seems to me that while the court must approach any such application with great care and circumspection, if the court is satisfied that it is necessary in the interests of doing justice between the parties in the action before it, the court can direct that a defendant make discovery of his medical records.

26. The case sighted at the Bar of *O'R. v. L.*, is an example of an occasion where a defendant, or in that case a respondent, was ordered to make discovery of her confidential psychiatric records, due to the fact that the issue of her mental and emotional capacity, was specifically at issue in the proceedings.

27. The decision in *O'R. v. L.* was considered by O'Neill J. in *F.P. v. S.P. (Medical Examiner: Discovery)* [2002] 4 I.R. 280. That case concerned a nullity action in which Goarke J. had made an order in the Circuit Court directing that discovery of all relevant medical/psychiatric records in respect of the respondent should be made available to the court appointed medical examiner. The respondent appealed against that order, primarily on the basis that the order provided that the medical examiner would reach his opinion on the basis of hearsay evidence furnished by means of documents furnished by third parties. In the course of his judgment, O'Neill J. looked at the decision in *O'R. v. L.* and came to the conclusion that that case established that in appropriate circumstances, a party may be entitled to access to the opposing party's medical records. He stated as follows at p. 288:-

"Applying the principle thus stated to this case would seem to me to lead to a conclusion that the applicant was entitled to discovery of the material encompassed in the order of the Circuit Court Judge, but without the kind of restriction imposed, so that he could himself use this material either to advance his own case or damage the case of the of the respondent...

In my view the Circuit Court Judge may have leaned excessively on the side of decorum in restricting the discovery ordered to the medical examiner."

28. However, O'Neill J. went on to state that as the applicant was content with the order for discovery made in the Circuit Court, he would not alter the terms of the discovery directed to be made by the respondent. He merely affirmed the Circuit Court order.

29. A similar decision was reached by White J. in *P. v. Q.* [2012] IEHC 593, where the court had regard to the decisions in *O'R. v. L.* and in *F.P. v. S.P. (Medical Examiner: Discovery)* and directed that discovery be made by the respondent of certain emails and mobile phone accounts, as there was an issue in the case as to whether she had been accessing inappropriate websites and engaging in inappropriate email contact with persons on the internet and had engaged in sexual conduct with such persons and had posted videos

of such conduct on the internet, which it was alleged should be made available to the applicant and to the court, to enable the court to reach a decision as to whether the respondent was a fit person to have custody of the fourteen year old child of the marriage. Applying the *dicta* in the above mentioned cases, White J. directed that the discovery sought should be made by the respondent.

30. Turning to the facts of this case, there was considerable weight in the submission made by Mr. Boyle-Harper, B.L., to the effect that the issue of the first named defendant's perception or appreciation of the wrongfulness, or gravity of his admitted acts towards his granddaughter, are not relevant to either the issue of liability or quantum in a civil action for damages for assault and battery, and on that account, discovery should be refused. However, if the court were to adopt that argument, the court would, in effect, be making a finding, or a ruling, in relation to an issue which will have to be determined at the trial of the action. In other words, it is not appropriate for this Court on hearing a motion for discovery of documents at the pre-trial stage, to rule on the adequacy or efficacy of any defence raised by a defendant in his pleadings.

31. Having considered the matter carefully, the court prefers the submission made by Mr. Keys, B.L., on behalf of the plaintiff. While in an ordinary civil action for damages for assault and battery, the defendant's medical records would not generally be available, the court accepts the submission that once the first named defendant chose to specifically put in issue his mental state and level of insight at the time of the admitted acts, he thereby opened himself to an application for discovery of his psychiatric records, as these would tend to establish what was, in fact, his mental state at the time that he obtained counselling and other psychiatric treatment from St. John of God's Hospital and from the Granada Institute. Whether or not the issue of the first named defendant's mental state, will be relevant to the issues to be determined at the trial of the action, is a matter for the trial judge. I am satisfied that as the first named defendant has specifically put his mental state and his perception of the particular acts in issue in paras. 3 and 4 of his defence, it is appropriate to order the discovery sought at para. 1 of the notice of motion.

32. The court is further satisfied that having regard to the claim for exemplary damages as set out in the plaintiff's reply, discovery of the first named defendant's psychiatric records is necessary and relevant to this aspect of the plaintiff's action.

33. In relation to the submission made by Mr. Boyle-Harper, B.L., that the order for discovery in respect of the records held by St. John of God's Hospital and the Granada Institute, should be limited to psychiatric records, so as to exclude any records in relation to physical complaints, I do not think that such limitation is warranted, due to the fact that these two institutions are exclusively dealing with psychiatric matters. They are not general hospitals, wherein the plaintiff may have obtained treatment for other unrelated conditions. Accordingly, I do not think that it is necessary to put in the suggested limitation in this regard. In relation to the temporal limitation, there was no objection made by the plaintiff's counsel on this aspect. Accordingly, I direct that the first named defendant is to make discovery in the terms of paras. 1(a) and (b) of the notice of motion for the period 1st January, 2008 to 15th April, 2010. The first named defendant is to swear his own affidavit of discovery. I will allow a period of eight weeks from today's date for him to do so.

34. In relation to the discovery sought at para. 2 of the notice of motion, in relation to the files concerning the transfers or transactions concerning the lands comprised in the two specified folios and at the third address given, it seems to me that having regard to the matters raised on the pleadings, these documents are relevant and necessary to enable the plaintiff to properly prosecute her claim for relief pursuant to s. 74 of the Land and Conveyancing Law Reform Act 2009. Accordingly, I direct that both defendants are to make discovery in the terms of para. 2 of the notice of motion for the period 1st January, 2008 to 1st January, 2011. I have allowed a slightly longer period under this heading, due to the fact that there may be documentation which came into existence some months after the conclusion of the criminal proceedings, which may be relevant to this issue. Each of the defendants are to swear an affidavit of discovery under this heading within a period of eight weeks from today's date.