THE HIGH COURT

[2022] IEHC 525
2017/6259p

Between

VERA WEGNER

Plaintiff

And

MICHELLE MURPHY

Defendant

JUDGMENT OF MR JUSTICE HOLLAND DELIVERED 23 SEPTEMBER 2022

Contents

INTRODUCTION

1. This is my judgment in a discovery motion by the Defendants in this medical negligence action which is listed for trial on 26 October 2022. The Defendant, by Notice of Motion dated 14 September 2022 seeks, under Order 31 Rule 12 RSC[1], discovery of the Plaintiff's medical notes to date, categorised as follows:

1. Notes of any General Practitioner (to include any Out-of-Hours General Practitioner Service) attended by the Plaintiff since August 2015.

2. Notes of any Consultant Dermatologist attended by the Plaintiff since August 2015.

3. Notes of any Consultant Plastic Surgeon attended by the Plaintiff since August 2015.

4. The Plaintiff's counselling, psychology and psychiatry records since 2010.

2. Ordinarily, one would expect the resolution of such a motion to be simple, but the sequence of events in this case has served to complicate the matter considerably. Accordingly, it is necessary to set out the chronological sequence of events at some length. The Defendant seeks discovery for reasons identified in the Chronology below. The Plaintiff resists discovery on various bases reflected below, inter alia in the notes to the Chronology.

CHRONOLOGY

Date	Event	Notes
August 2010	The Plaintiff says she first attended the Defendant, a dermatologist, for review of multiple moles and was under her care thereafter. She says the Defendant diagnosed the moles as benign and treated them accordingly.	
April/May 2015	The Plaintiff says she attended Professor Powell, also a dermatologist. He arranged a biopsy which resulted in a mole on the Plaintiff's right cheek being deemed pre-cancerous[2]/ Bowens Disease.	Counsel for the Plaintiff indicated at the hearing her understanding that Professors Powell and Earley have since retired.

[1] Rules of the Superior Court

[2] This is not a technical description of the diagnosis but suffices for present purposes.

Date	Event	Notes
August 2015	The Plaintiff says Professor Earley, a Consultant Plastic Surgeon, excised the lesion by excising an ellipse of skin measuring over 4 x 3.2 cm and performed a cheek rotation flap repair which, the Plaintiff says, has left a large and unsightly scar on her face which is intermittently itchy and painful. The largest dimension of the scar is alleged to be 10 cm.	
July 2017	The Plaintiff issued the present proceedings alleging medical negligence. Particulars of injury allege, inter alia, that the Plaintiff was upset and attended counselling, initially weekly, later monthly.	
September 2018	Particulars of negligence in essence allege failure over time to correctly diagnose the lesion, thereby depriving the Plaintiff of earlier treatment which would have avoided the injury of which she complains.	• These particulars were volunteered. • The Defendant did not at any point before these particulars or thereafter serve a letter for particulars. • Specifically, the Defendant never sought particulars of any relevant injuries or illnesses prior to the surgery of August 2015 or, more specifically, psychological or psychiatric injury or treatment prior to the surgery of August 2015.
	Particulars of injury allege that • earlier treatment would have been substantially less invasive and resulted in a much better cosmetic outcome. • the injuries and their effects are continuing.	
16 November 2018	The Defendant sought a complete set of medical records relevant to liability - specifically the records of Professors Powell and Earley.	
20 February 2019	The Plaintiff sent the Defendant the records of Professors Powell and Earley.	On my inquiry, counsel for the Plaintiff indicated at the hearing of the motion that she was not aware that the Plaintiff had, since February 2019, attended Professor Powell or Professor Earley. She was inclined to think the Plaintiff had not, but had been unable, in the time available, to get clear instructions.

Date	Event	Notes
3 September 2019	The Defendant sought *"up to date GP records along with any counselling records"* as she had arranged review of the Plaintiff by a psychiatrist who had requested the psychology records. The request intimates the Defendant's intention to revert "shortly" with an appointment date for that review.	I am not told that any such appointment was ever arranged or that the Plaintiff has been examined by a psychologist or psychiatrist for the Defendant.
14 November 2019	The Defendant delivered a defence admitting that the Defendant treated the Plaintiff to May 2014 and denying all other allegations.	While there is a general denial of causation of injury, there is no plea that the Plaintiff's injuries and/or sequelae were caused by identified events other than by the events of which she complains.
28 February 2020	The Plaintiff served Notice of Trial and set the matter down for trial.	
18 May 2020	The Defendant sought voluntary discovery of • 1 – The Plaintiff's General Practitioner's records in relation to the matter the subject of these proceedings to date. • 2 – The Plaintiff's records in relation to any attendances with a counsellor or psychologist in relation to the matter the subject of these proceedings.	I take category 2 to have in substance referred to the records of the counsellor or psychologist and that seems to be how the parties understood it.
10 December 2020	The Plaintiff agreed to discover the records sought in May 2020, up to September 2019, and enclosed an affidavit of discovery accordingly.	As is common and helpful, by attaching the documents to be discovered to the affidavit of discovery, the Plaintiff in effect amalgamated the discovery and inspection processes. The "GP note dated 19th February 2016" consisted of a single page which I infer to be a print-out from the GP's electronic records. The entry dated 19th February 2016 relates to removal of stitches. The remainder of the page – by far the most of it - consists of entirely redacted entries in the GP's record. I infer that these relate to about 14 attendances by the GP on the
	Affidavit of Discovery of the Plaintiff, Vera Wegner • This assumed agreement in terms of the discovery proffered in the letter of 10 December 2020. • It discovered, by way of discovery of GP notes from 14 August 2015 to 3 September 2019, a single attached page described as "*GP note dated 19th February 2016*".	

Date	Event	Notes
	• It discovered, by way of discovery of "Counselling Notes", a record of Tony Hegarty, Counsellor. It is a single attached page headed "Tony Hegarty, Psychotherapist" and dated 24/09/2019. • It seems, from the papers before me that, though not formally exhibited to the Affidavit, copies of the two discovered documents were in fact attached to the affidavit of discovery.	Plaintiff. The Plaintiff's affidavit does not mention, much less attempt to justify, the redactions. At the hearing of the present motion the Plaintiff said the redactions were of irrelevant content. The Hegarty note contains 11 brief entries as to attendances dated 8/11/15 to 26/04/16, two of which refer to appointments cancelled. The last reads *"A bit calmed today. Learning to live with it. Back at work."* Redactions aside, the Defendant got the discovery she sought and she did not • again seek discovery until 1½ years later on 28 June 2022. • complain of the discovery made, or specifically of the redactions, in December 2020 until Professor Mohan does so in his report of 12 September 2022.
8 June 2021	The Defendant's present solicitors came on record, replacing their predecessors.	
27 January 2022	The Plaintiff's SI 398/1998 disclosure notice identified as expert witnesses a surgeon[3], whose report is dated 13 June 2018 and Tony Hegarty, Psychotherapist, whose report is dated 24 September 2019	
	The Plaintiff's Schedule of Special Damages	I do not have this Schedule but the Defendant's voluntary discovery request of 28 June 2022 describes it as asserting that the Plaintiff had attended Tony Hegarty, Psychotherapist on 40 occasions.
February 2022	On the Plaintiff's application, the case was assigned a trial date specially fixed for 6 days from 26 October 2022.	The Plaintiff now cites Order 31 Rule 12(9) to the effect that • (9) An application for discovery … shall be made not later than twenty-eight

[3] Not Professor Earley.

Date	Event	Notes
		days after the action has been set down or in matters which are not set down, twenty-eight days after it has been listed for trial provided that the Court may order or the party requested may agree, to extend the time for the application for discovery in any case in which it appears just and reasonable to do so.
12 May 2022	The Defendant's SI 398/1998 disclosure notice identified as expert witnesses a plastic surgeon, whose report is dated 30 June 2020 and a dermatologist whose report is dated 13 March 2019.	No psychologist/psychiatrist or similar witness is disclosed. In notable contrast with the position as to psychological/psychiatric injury[4], the reports of the Defendant's plastic surgeon and dermatologist have not been called in aid by the Defendant to support any assertion that fair disposal of the proceedings requires discovery of plastic surgical or dermatological records beyond those provided to the Defendant in February 2019. In fact I have seen no expert reports other than that of Professor Mohan[5].
	The Defendants queried the assertion that the Plaintiff had attended Tony Hegarty, psychotherapist on 40 occasions.	I do not have this letter but the Plaintiff's letter dated 31 May 2022 refers to it.
	The Plaintiff's Amended Schedule of Special Damages.	I do not have this Schedule but the Defendant's voluntary discovery request of 28 June 2022 describes it as asserting that the Plaintiff had attended Tony Hegarty, psychotherapist on 11 occasions.
	The Plaintiff's letter covering the Amended Schedule of Special Damages • confirmed that "the Counselling Sessions with Mr Hegarty	The phrasing of this letter • is open to the interpretation that the Plaintiff had counselling sessions with Mr Hegarty other than those referable to this case.

[4] See below.
[5] See below.

Date	Event	Notes
	referable to this case was 11 sessions". • apologised for the confusion "as there were some crossed wires with Mr Hegarty".	• is euphemistic, and hence unclear, as to the nature of the miscommunication with Mr Hegarty.
Undated But apparently 28 June 2022[6]	The Defendant sought voluntary discovery of: • 1 – 3[7] - GP's, Dermatologist's and Plastic Surgeon's records – in each case o From "August 2015 to date", o framed to capture all records on the clinicians' files, o "*in order to fully investigate the Plaintiff's current condition and prognosis*". • 4 – "Counselling, psychology and psychiatry records" o From "August 2010 to date", o Framed to capture all records on the clinicians' files, o "*to fully investigate the Plaintiff's current condition and prognosis*". o It is also stated that "*our expert also requires access to these records in advance of his assessment of the Plaintiff*".	• The request as to GP records and as it relates to the period 14 August 2015 to 3 September 2019, is in substance a request for inspection of the un-redacted document already discovered in redacted form, not a request for discovery. • To any extent it could be considered as seeking discovery of any GP records in that period, other than the redacted document already discovered, it is a request for further and better discovery. • But the request does not o identify the request as made for inspection or for further and better discovery, o assert deficiency in the discovery made in December 2020, o complain of the redactions in the GP records discovered in December 2020. • This request, as to GPs records and as it relates to the period from 3 September 2019 to date, is a request for additional discovery. • This request, as to Dermatologist's and Plastic Surgeon's records, o does not acknowledge that the Defendant had had the records of Professors Powell and Earley since February 2019,

[6] This date for the request is stated in the Notice of Motion for discovery dated 14 September 2022 and the Affidavit of Ciara FitzPatrick sworn 12 September 2022.
[7] i.e., 3 categories of discovery

Date	Event	Notes
		○ does not assert any basis for a belief that any other such documents may exist – even though the earlier disclosure notice of 12 May 2022 records that the Defendant had had the advice of a surgeon and a dermatologist. ○ is in substance a request for additional discovery. • This request, as to counselling, psychology and psychiatry records ○ as it relates to the period from August 2010 to August 2015, is ▪ a request for additional discovery, ▪ the first request for discovery in respect of a period preceding the surgery of August 2015. ○ as it relates to the period from to 14 August 2015 to 3 September 2019, seeks again the discovery of such records already discovered in December 2020. In effect this is a request for further and better discovery. ○ asserts no deficiency in the discovery of such records already made in December 2020. ○ as it relates to the period from 3 September 2019 to date, is a request for additional discovery. ○ does not identify the "expert" referred to. While such identification is not of itself necessary, it is unclear whether it was Professor Mohan. • As to all of the foregoing, this request briefly cites the Plaintiff's affidavit of discovery December 2020 but does not ○ assert deficiency in that Affidavit ○ acknowledge that the Defendant seeks in substance seeks orders for ▪ inspection ▪ further and better discovery, ▪ additional discovery.

Date	Event	Notes
		○ state reasons seeking to justify, specifically, such orders. ○ Attempt to justify the request by reference to criteria beyond the relevance of the documents sought and the necessity of their discovery.
20 July 2022	The Plaintiff replied asserting that • it had twice previously provided discovery – in 2019 and by formal discovery process in 2020, • there was no basis for further discovery.	• I take the reference to previous discovery ○ in 2019 as referring to the provision of the records of Professors Powell and Earley. ○ in 2020 as referring to the affidavit of discovery of 10 December 2020. • I omit certain correspondence from 18 July 2022 to 31 August 2022 as not adding to the picture. It essentially consists of: ○ the Defendant intimating a motion for discovery but giving no reasons additional to those in its request of 28 June 2022, and ○ the Plaintiff repeating its position.
9 September 2022	The Defendant instructed Professor Damien Mohan, psychiatrist to examine the Plaintiff and report.	• I do not have this letter. It is referred to in Professor Mohan's report of 12 September 2022. • It appears that Professor Mohan's instructions post-dated the voluntary discovery request of 28 June 2022. However as that request refers to an "expert", it may be that Professor Mohan was first instructed earlier.
	Professor Mohan sent an email to the Defendant's solicitors.	• This is essentially a brief preview of Professor Mohan's report of 12 September 2022.
12 September 2022	Report of Professor Damien Mohan, psychiatrist to the Defendant. This records that Professor Mohan • had read the pleadings and medical records provided,	• While he may have been, it is not apparent from his report that Professor Mohan had been informed of the voluntary discovery request of 28 June 2022 or that formal discovery had been made in consequence and by agreement.

Date	Event	Notes
	• considered the discovery inadequate to allow psychiatric examination in accordance with accepted clinical standards as o he had no GP records predating the index event o those provided were heavily redacted and provide no useful clinical information, • considered provision of such records "*imperative*" as o otherwise "*an exacerbation of a pre-existing disorder may appear to be a new onset disorder*" and "*result in the false attribution of the symptoms to the event under litigation*". o the examining/reporting doctor/expert is obligated to rule out possible alternative causes of the alleged psychiatric injury. • requested that discovery be sought of the Plaintiff's GP records and *"psychiatric reports/ outpatient letters (if any)"* from 5 years pre-accident to date.	• While he records having read the medical records, which I infer included those of Tony Hegarty, psychotherapist, Professor Mohan's reasoning in seeking records for 5 years pre-accident, (which coincides with the terms of the voluntary discovery request of 28 June 2022), does not appear to me to be grounded in those records or in the specifics of this Plaintiff's case. • Rather his reasoning appears to be generic to psychological/psychiatric injury claims generally. That is not of itself to suggest that his report does not represent standard good practice in psychiatric examination and there is no evidence to the contrary. • Though the Defendant clearly had access to expert psychology/psychiatry advice when issuing her discovery request of 28 June 2022, the reasons given by Professor Mohan were not set out in that discovery request and were not communicated to the Plaintiff until the exhibition of Professor Mohan's report by Ms FitzPatrick. • Counsel for the Defendant fairly and properly informed me that there is no evidence or particular reason to believe, specific to this Plaintiff, that she suffered from any psychological/ psychiatric complaint or sought psychological/psychiatric treatment prior to August 2015.
	Affidavit of Ciara FitzPatrick, solicitor – sworn for the Defendant and seeking discovery. This is notable for	In asserting that the Plaintiff "*failed to provide a copy of the Plaintiff's updated medical records, as requested within this request for voluntary discovery",* the Defendant was necessarily referring to the only discovery request described to that

Date	Event	Notes
	• reciting the events leading to the Plaintiff's affidavit of discovery of 10 December 2020. • asserting that the Plaintiff "failed to provide a copy of the Plaintiff's updated medical records, as requested within this request for voluntary discovery". • reciting the request for voluntary discovery made on 28 June 2022 and the correspondence thereafter. • exhibiting the report of Professor Mohan dated the same date as the affidavit was sworn.	point in the affidavit of Ciara FitzPatrick – that is the request of 18 May 2020. The Affidavit proffers no basis for the allegation of "*failure*" as to "*updated*" records. The affidavit records the voluntary discovery request made on 28 June 2022 in context as if it were a response to the alleged "*failure*". However, ○ any such failure had occurred in the Discovery Affidavit of December 2020, 1½ years before the discovery request of 28 June 2022 ○ No such failure is asserted in the discovery request of 28 June 2022.
14 September 2022	The Defendant issued its Notice of Motion for discovery, returnable 19 September 2022.	This is in terms consistent with the request for voluntary discovery of 28 June 2022.
19 September 2022	The discovery motion was argued before me.	The Plaintiff did not seek to adjourn to swear a replying affidavit.
10 October 2022	Date nominated by the Defendant for Professor Mohan's examination of the Plaintiff.	
26 October 2022	The trial is specially fixed to commence on this date, to run for 6 days.	

3. Counsel for the Plaintiff advised me of her instructions that the Plaintiff had not attended a GP for these injuries since September 2019 and had not attended a psychologist/ psychiatrist /counsellor for any reason since September 2019. She was unsure whether, but had the impression that, the Plaintiff had not attended Professors Powell or Earley since February 2019. Counsel for the Defendant argued that the Plaintiff should be required to put these matters on affidavit.

DISCUSSION

Introduction

4. Counsel for the Defendant cited the summary of well-known principles as to discovery set out in **BAM v NTMA**[8]. In **Chubb v Perrigo**[9] the principles listed in **BAM** were amalgamated with those stated in **Red Flag**[10] and supplemented by those set out in **Ryanair**[11], and in **Tobin**[12] as follows:

> *"The Court of Appeal in **BAM** and in **Red Flag** reviewed the caselaw and helpfully summarised applicable principles as follows – I have amalgamated slightly different wordings from both cases:*
>
> *1. The crucial question is whether discovery is necessary for "disposing fairly of the cause or matter."[13] The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties.[14] It is not enough that they relate to the dispute that gave rise to the litigation.*
>
> *2. Relevance is determined by reference to the pleadings. O.31, r.1215 specifies discovery of documents relating to any matter in question in the case.[16]*
>
> *3. There is nothing in the Peruvian Guano test which is intended to qualify the principles that documents sought on discovery must be relevant, directly or indirectly to the matter in issue between the parties in the proceedings.*
>
> *4. An applicant for discovery must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information.[17]*
>
> *5. An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments.[18]*
>
> *6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim.[19]*

[8] BAM PPP PGGM Infrastructure Cooperative UA v National Treasury Management Agency [2015] IECA 246.
[9] Chubb European Group SE [Formerly Ace European] v. Perrigo Company Plc [2022] IEHC 444 (High Court (General), Holland J, 19 July 2022)
[10] O'Brien v Red Flag Consulting Ltd & Ors [2017] IECA 258. The principles listed in Red Flag have been repeatedly cited since – for example in Dunnes Stores & Almonte v McCann [2018] IEHC 123, Mustardside v Tracre [2018] IEHC 124 and O'Donnell v Ryan et al [2022] IECA 76.
[11] Ryanair plc v Aer Rianta cpt [2003] 4 IR 264.
[12] Tobin v Minister for Defence [2019] IESC 5.
[13] Citing Fennelly J. in Ryanair plc v Aer Rianta cpt [2003] 4 IR 264.
[14] Citing Stafford v Revenue Commissioners; Supreme Court (ex-tempore) O'Flaherty J 27 March, 1996.
[15] Order 31 Rule 12 of the Rules of the Superior Courts.
[16] Citing Hannon v Commissioners of Public Works [2001] IEHC 59 §2.
[17] Citing Peruvian Guano.
[18] Citing Framus Ltd v CRH plc [2004] 2 I.R. 20, pp. 34 – 35. In BAM the court said that discovery may not be permitted for the purpose of exploring for possible relevant material or for merely testing averments. However the word "merely" may be important here as BAM cites, as authority Ó Caoimh J in Shortt v Dublin County Council [2003] 2 I.R. 69, who disapproves of discovery to test averments ".. in the absence of material suggesting that the averments in the affidavits filed on behalf of the respondent are untrue .."
[19] Citing Hartside Ltd v Heineken Ireland Ltd, §5.9.

7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases[20] that their discovery is necessary for the fair disposal of those issues, the question of whether discovery is necessary for 'disposing fairly of the cause or matter' cannot be ignored[21].

8. The court should consider the necessity of the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought[22]. (I observe that this principle links proportionality to necessity.)

9. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial.[23] (I observe that this principle links proportionality to both degree of relevance and fair disposal of the action.)

10. In certain circumstances, a too–wide ranging order for discovery may be an obstacle to the fair disposal of proceedings.[24]

11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties.[25]

12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly.

*To the foregoing list and at risk of some duplication, I would respectfully add the observations in the Supreme Court by Fennelly J. in **Ryanair**, and Clarke CJ in **Tobin**, that:*

i. The decision whether to grant or refuse discovery requires the exercise of a "broad discretion".

ii. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.

[20] In Tobin, Clarke CJ says that "the default position should be that a document whose relevance has been established should be considered to be one whose production is necessary".
[21] Citing Cooper Flynn v Radio Telefis Eireann [2000] 3 IR 344.
[22] Citing Ryanair plc v Aer Rianta cpt [2003] 4 IR 264.
[23] Citing Framus Ltd v CRH plc [2004] 2 IR 20, p38.
[24] Citing Independent Newspapers (Ireland) Ltd v Murphy [2006] 3 I.R. 566, p. 572.
[25] Citing Hannon v Commissioners of Public Works [2001] IEHC 59 §4.

iii. The establishment of relevance will prima facie also establish necessity.

iv. "Necessity" means that the disclosure of the documents may be necessary for the fair and just resolution of the proceedings and potentially for saving costs. An applicant for discovery must show such necessity and there has recently been much greater scrutiny of the issue of necessity. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. Nonetheless, an applicant for discovery "need not prove that they are in any sense absolutely necessary."

However, I observe that as "relevance will prima facie also establish necessity" the reality of the onus as to necessity may be on the party opposing discovery – that is the view Collins J took in Ryan v Dengrove[26].

v. Where there are other equally effectual means of establishing the truth and thus providing for a fair trial then discovery may not be "necessary". It is for the party resisting discovery to, at least initially, identify such means. I observe that this principle also shifts at least part of the burden as to proof/disproof of necessity to the party opposing discovery.

vi. The proportionality test can be seen as a refinement of the concept of "necessity". I observe that on this view at least part of the burden as to proof/disproof of necessity lies on the party opposing discovery.

vii. While he was not convinced it was wise to introduce a new term of art, nonetheless Fennelly J considered the notion of "litigious advantage" useful. Discovery of a document should generally be refused of a document where a party is merely curious about its content and would suffer no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. Fennelly J does not record the corollary, but it would seem to follow that, at least generally and ceteris paribus, a document should be discovered where the applicant for discovery would suffer litigious disadvantage by not seeing it or would gain litigious advantage by seeing it.

And, whatever Fennelly J's doubts, the phrase "litigious advantage" has in the years since become irremovably lodged in the lexicon of the law of discovery."

5. Counsel for the Defendant did not elaborate on the application of those principles to the present case, save to say that the documents sought were relevant and that their discovery was therefore necessary for disposing fairly of the cause or matter. I agree that relevance ordinarily has that implication as *".. where documents are relevant, they are prima facie necessary .."* **- Ryanair v Besancon**[27].

[26] Ryan v Dengrove [2022] IECA 155 §47.
[27] Ryanair DAC v. Besancon [2021] IECA 110 (Court of Appeal (civil), Haughton J, 15 April 2021).

6. Counsel for the Defendant did not address the principles applicable to applications for inspection, further and better discovery or for additional discovery – which this application is in substance, though not in form.

Types of Discovery Order

7. Counsel for the Plaintiff resisted discovery citing, in effect, the differences between orders for:

- Discovery
- Further and better discovery – that is to say, further and better discovery, within categories of discovery already made, on the basis of deficiency in such discovery already made.
- Additional discovery - that is to say:
  - "updating" discovery by extending the applicable time period up to date in respect of categories of discovery already made or
  - discovery of categories of discovery not included in already-made discovery.

8. In my view this categorisation of the types of discovery order is correct. The first, what might for convenience here be called "ordinary" discovery, needs no further explanation. But, though that is what the Defendant's motion purports to seek, none of the orders sought are in substance orders for "ordinary" discovery, as that had already been made.

9. Further and better discovery and additional discovery have in common that they arise after "ordinary" discovery has been made – as is the case here. However, and while not all cases and texts accurately reflect the distinction, **Daly v Ardstone**[28] confirms that further and better discovery and additional discovery are not the same. Murray J stated:

> *"… further and better discovery will only be directed where it has been shown that there are documents which the party that has made discovery was required to discover but has not discovered and/or that the person making the affidavit of discovery has misunderstood the issues in the action and/or that his view as to whether documents are outside his discovery obligation was wrong .. That means establishing that the party alleged to be in default has, but has not discovered, documents within the scope of the agreed or directed categories … Documents that are relevant but which fall outside the categories, fall to be addressed by reference to a different procedure, and different principles."*
>
> *" …. it is necessary to differentiate between an application for further and better discovery …… and application for additional discovery. An application for further and better*

[28] Daly v. Ardstone Capital Ltd [2020] IEHC 200 (High Court (General), Ireland - High Court, 30 April 2020)

discovery is addressed to the enforcement of categories of discovery which have been agreed or directed. An application for additional discovery outside those categories after they have been agreed or directed now falls to be determined in accordance with Order 31 Rule 12(11) RSC. That enables application to the court so as to vary the terms of a discovery order or agreement."

The Redactions

10. Counsel for the Plaintiff explained the redactions in the GP record by observing that the request for discovery in May 2018 had been for GP Records *"in relation to the matter the subject of these proceedings to date"* and that the redacted records did not relate to that matter. While to a certain degree understandable, that response fails to reflect the fact that discovery is of documents containing relevant content, not of information[29]. In the ordinary way, any document containing such relevant matter must discovered and provided for inspection in its entirety, whether or not some of its content is irrelevant.

11. The difficulty with redactions is that they excite suspicion – perhaps entirely unjustified - and so the court should be vigilant to stop the abuse of redactions. Unfortunately, and as a general observation, "*suspicion, resentment, and justification have absorbed considerable court time*" in cases involving redaction of discovered documents - **Courtney v OCM Emru**[30]. Thus it is incumbent on the party intending redactions to take simple steps to avoid controversy if possible. Redaction should not be made as of course and the process should be supervised by the solicitor for the party making discovery – **Farrell v Everyday**[31]. Redaction for irrelevance should be kept to an absolute minimum - **Little v IBRC**[32] and **Word Perfect v Minister For Public Expenditure**[33]. If there is reason to seek to redact, and while leave of the Court to redact does not seem to be required, the intention to redact must be intimated before discovery is ordered or agreed and precisely justified in the affidavit of discovery - **Farrell v Everyday** and **Courtney v OCM Emru.** Otherwise an estoppel from seeking to justify the redactions may arise - **Ryanair v Besancon**[34] and **Little v IBRC**. As the Court of Appeal said in **Ryanair v Besancon:**

"If parties to proceedings routinely agreed to discover documentation with the intention of extensive or material redaction and later contesting relevance at the point where inspection/production is sought, this would indeed undermine the system of agreed/ voluntary discovery."

[29] Though occasionally orders can be framed that way.
[30] Courtney v OCM Emru Debtco DAC [2019] IEHC 160, [2019] 2 ILRM.
[31] Farrell v. Everyday Finance DAC [2022] IEHC 303 (High Court (General), Stack J, 24 May 2022).
[32] Shane Little and Nicola Little v Irish Bank Resolution Corporation Limited (in special liquidation) and Launceston Property Finance Limited - [2020] 2 IR 699.
[33] Word Perfect Translation Services Ltd v Minister For Public Expenditure [2021] IESC 19 (Supreme Court, Clarke CJ, 24 March 2021).
[34] Ryanair DAC v. Besancon [2021] IECA 110 (Court of Appeal (civil), Haughton J, 15 April 2021).

12. Here, unhelpfully, the Plaintiff presented the very extensive redactions to the GP record as an unheralded, un-agreed and unexplained fait accompli - when a prior intimation of the intention to redact and explanatory averment in the affidavit of discovery of the reasons for redaction may, to the Plaintiff's benefit, have cast the burden onto the Defendant to upset the redactions – **Farrell v Everyday**[35]. That said, and taking a practical view, the inference that the Plaintiff considered the redacted elements irrelevant is not difficult to draw.

13. On the other side of the coin, the fact remains that the Defendant forbore to complain of the redactions until well-over 1½ years later and a considerable period after the action had been specially fixed for trial. In those circumstances, and *ceteris paribus*, I am inclined to say that the Defendant will have to make do with the assurances, belatedly given, that the redacted content is irrelevant.

14. In that regard, a further consideration is that the Defendant, for reasons not explained, did not raise particulars at all in this case. Whatever the primary obligation on the Plaintiff to plead all relevant matter, it is a commonplace of personal injuries litigation that a Defendant will seek particulars of all other illnesses or injuries relevant to the injuries of which complaint is made, whether such other illnesses or injuries preceded or post-dated the accident at issue. Similar questions can also be asked pursuant to S.11 of the Civil Liability and Courts Act 2004. Such questions are routinely answered by Plaintiffs, who are held to them at trial. True, they are not answered on oath and the system depends on trust and integrity on the Plaintiff's side but then, discovery depends on trust also - **Ryanair v Channel 4 #2**[36]. The role of particulars in reducing the need for discovery has recently been recognised in **National Truck Rental v Man Importers**[37].

<u>Additional Discovery - No Continuing Obligation of Discovery</u>

15. The Defendant argues that "updating" discovery of medical records is a commonplace of personal injuries litigation. As a reflection of actual practice, I tend to agree. In a claim alleging ongoing sequelae and need for medical treatment, updating discovery of medical records will often be to the Plaintiff's advantage. But where, as here, the Plaintiff declines to update discovery of medical records and stands on the relevant law, the matter must be decided in accordance with that law.

16. The Plaintiff relies on **Delany & McGrath on Practice & Procedure**[38], for the following:

- A party who has made discovery is not obliged to make discovery of documents that come into existence after the affidavit of discovery is sworn.

[35] Farrell v. Everyday Finance DAC [2022] IEHC 303 (High Court (General), Stack J, 24 May 2022)
[36] Ryanair Ltd V Channel 4 Television Corporation (No.2) [2017] IEHC 744 (High Court, Meenan J, 9 November 2017)
[37] National Truck Rental Company Ltd v. Man Importers Ireland Ltd [2022] IEHC 404 (High Court (General), Barrett J, 5 July 2022)
[38] 4th Ed'n 2018 §§10-212 – 215

- The jurisdiction to order discovery of such documents will be exercised only very sparingly and in accordance with certain "*very limited and restricted*" conditions and the Courts will generally refuse to do so - **Murphy v Times Newspapers. Ltd**[39] and **Bula Ltd v Tara Mines Ltd (No.5)**[40].
- In Bula, Finlay CJ was satisfied, inter alia, that
  - such an application would succeed only in rare circumstances.
  - a party seeking such discovery must
    - specify documents, and not merely indicate the possibility of a type or range of document.
    - prove not only a general probability of relevance but a significant importance of a specified or identifiable kind.
  - the court should not make such an order where not satisfied that the party seeking has not already obtained a copy of it from other sources or by other means. (In this case that applies to the surgical and dermatological notes).

17. The Plaintiff relies also on **Donegal Investment v Danbywiske**[41] in which it was held, inter alia on the authority of **Bula v Tara #5**, and **Moorview v First Active**[42], that

- A party is under no obligation to disclose any documents coming into existence after the date of discovery, although there remains a clear obligation on a party to remedy any failure to make proper discovery in the first place.

- The jurisdiction to direct discovery of documents arising after the original discovery process was complete must be exercised sparingly and only in the most exceptional circumstances and should involve only documents which are likely to be important (rather than tangentially relevant) to the case and which can be readily identified.

- the applicant must prove that the documents have a significant and important relevance of a specified and identifiable kind.

18. But Clarke J in **Moorview** considered that in some types of case such orders might be more readily made:

> *"Clearly in many cases the question of the precise entitlements of a plaintiff (should he or she succeed) will continue to evolve up to the time of trial. Special or calculatable damages will normally change as time passes. Events may occur which may have the effect of either mitigating or exacerbating loss. Where a significant or material alteration occurs in the factual basis upon which the court might reasonably be expected to approach the question of the remedy should the plaintiff succeed, and where such alteration occurs at a time after discovery has been made, then it seems likely that the court would ordinarily be persuaded to make a discovery order in respect of*

[39] [1998] IEHC 205.
[40] [1994] 1 IR 487.
[41] Donegal Investment Group Plc Danbywiske [2017] IEHC 479 (High Court, McGovern J, 21 July 2017)
[42] Moorview Developments Ltd. v. First Active plc. [2009] 2 I.R. 788

documentation relating to such alteration because it would, of course, be necessary for the court, in any event, to have the relevant information in order to assess properly damages or decide the appropriate remedy."

I accept, at least in general terms, that a similar rationale will often apply in cases of alleged continuing personal injury. I have already agreed above with the Defendant that "updating" discovery of medical records is a commonplace of personal injuries litigation. However, in this case the Defendant adduces nothing beyond speculation as to the existence of relevant pre-accident medical records and the Plaintiff denies attending her GP or Psychotherapist for the relevant injuries since discovery was made in December 2020. Indeed, I do not think I am impermissibly entering the lists in foreseeing that the Defendant at trial may – whether or not successfully - try to make something of that very fact.

Additional Discovery - O.31 R.12

19. The Plaintiff relies on Order 31 Rule 12(11) RSC[43] and, by necessary implication, on Order 31 Rule 12(12), without reference to which Rule 12(11) cannot be applied. They read as follows:

(11) Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that:

(i) further discovery is necessary for disposing fairly of the case or for saving costs, or

(ii) the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery.

(12) An order under sub-rule (11) shall not be made unless:

(a) the applicant for same shall have previously applied by letter in writing to the other

party specifying the variations sought to the order, furnishing the reasons why each variation is sought and requesting that party's agreement to the variations sought, and

(b) a reasonable period of time for agreement has been allowed, and

(c) the party or person requested has failed, refused or neglected to agree to such variation or has ignored such request.

9. These rules were considered in **Brahami v. Kelleher**[44] in which the caselaw[45] was reviewed, to the effect that:

[43] Rules of the Superior Courts

[44] Brahami and Brahami v. Kelleher Chartered Surveyors Limited [2021] IEHC 611

[45] Hireservices (E) Ltd & Anor v. An Post [2020] IECA 120; Micks-Wallace v. Dunne [2020] IECA 282

- These rules have replaced the inherent jurisdiction to order additional discovery and now exhaustively define the circumstances in which additional discovery can be directed after orders for discovery have been agreed or made.[46]
- The court may order additional discovery if satisfied that an injustice would be done otherwise.
- Such discovery orders are the exception not the norm. The default position is that the discovery is as agreed or directed, and that some good reason must be given for revisiting that agreement or order.
- The interests of all in the efficient disposition of proceedings requires that a party has one chance to seek discovery and having agreed to an order for discovery must "*have good reason for coming again*", such as a material change in circumstances.
- "Critically", such discovery will not be granted simply because the documents are relevant and necessary.
- A party seeking additional discovery must "show good reason why the discovery was not originally sought".

10. The Plaintiff correctly observes that, as to the additional discovery sought, the Defendant has ignored these requirements. She has done exactly what Brahami deems insufficient for her purpose – relied simply on relevance and necessity of the documents. She has given no good reason why the discovery was not originally sought. The need for pre-accident discovery should have been apparent, if it was needed, from particulars sought in the ordinary, and in a timely, way and, if needs be, based on expert advice, before the original request for discovery. Reliance for this purpose on a report bespoken over 1½ years later, and only briefly before a trial already specially fixed, does not suffice as a material change of circumstances. That is especially so when the reasoning of that report is generic and not at all specific to the Plaintiff's case. Nor does it explain at all – at least in the necessary sense of excuse or good reason - why the discovery in question was not sought originally.

Timing of the Application

11. I have adverted in general terms to the delay in bringing this application. As was said in the Court of Appeal in **Victoria Hall**[47] in dismissing the appeal: "*The courts, for good reason, frown heavily upon late applications for discovery …*" – though I hasten to say that the circumstances of delay by the Defendant in this case are not even nearly as acute as those pertaining by the time of the appeal in Victoria Hall. But in the High Court in Victoria Hall Barniville J, in considering the application late, gave some weight to the fact that trial was only 6 months away. Here the motion issued little more than a month before trial and was brought on in vacation. Of course, degrees of lateness and their practical effects on the justice of the case will vary from case to case and the view taken in a given case will be necessarily fact sensitive. And no question arises here – or at least the Plaintiff has canvassed none - that the discovery now sought would be burdensome, difficult or impossible to

[46] This is more explicitly set out in Hireservices

[47] Victoria Hall Management Ltd V. Patrick Cox [2020] IECA79 (Court Of Appeal (Civil), Ní Raifeartaigh J, 2 April 2020); See Also Micks-Wallace (A Minor) V. Dunne [2020] IECA 282 (Court Of Appeal (Civil), Murray J (Brian), 19 October 2020).

make between now and the impending trial or that a very large number of documents would be involved and/or that extensive search would be required. But it can at least be said that some weight can properly be given to the delay in bringing this motion such that it is now heard shortly before a specially fixed medical negligence trial.

12. More specifically, the Plaintiff relies on Order 31 Rule 12(9) which provides that

> *"(9) An application for discovery whether under sub-rule (1) or (6) shall be made not later than twenty-eight days after the action has been set down or in matters which are not set down, twenty-eight days after it has been listed for trial provided that the Court may order or the party requested may agree, to extend the time for the application for discovery in any case in which it appears just and reasonable to do so."*

13. The Defendant's notice of motion does not specify under which sub-rule of Rule 12 the motion is brought. Ordinarily, that would in practice suggest Rule 12(1) and the Defendant did not invoke any other sub-rule. Properly, the additional discovery sought should rely on Rule 12(11). While it would have been at least desirable that the motion specify that what was sought was in fact inspection, further and better discovery and additional discovery, I leave to another case a decision whether relief might be denied on that account.

14. It does seem to me that, as concerns this application for additional discovery, necessarily under Order 12(11), Order 31 Rule 12(9) does not apply. The jurisdiction to order further and better discovery, according to Delany & McGrath[48], is inherent. No specific rule provides for it. But I consider that, more generally, I can take the Defendant's unexplained and significant delay in seeking inspection, additional discovery and further and better discovery into account in deciding whether to grant the orders it seeks.

Alternative Orders

15. **Ardstone** is authority that the "*court can stop short of directing further and better discovery and instead direct the swearing by the respondent of affidavits to address one or more of the specific concerns raised in the application with a view inter alia to ensuring that the party against whom such an order is made confirms that the process of making discovery has been correctly undertaken. This occurs frequently in practice*". **Victoria Hall**[49] is cited as an example. In that case, the Respondent was directed to swear an affidavit explaining redactions and the method used searching for documents in order to make discovery. As will be seen, that is a jurisdiction which I will exercise in this case.

[48] Practice & Procedure, 4th Ed'n 2018, §10-204.

[49] Victoria Hall Management Limited and ors v. Cox and ors [2019] IEHC 639 – upheld on appeal, [2020] IECA 79; Kelland Homes Limited v. Ballytherm Limited and ors [2019] IEHC 46 is cited as an example.

Prior Medical History

16. **McCorry**[50] was a personal injury action in which discovery of pre-accident and post-accident medical records was sought and ordered. Simons J cited **McGrory v. ESB**[51] for the general proposition that a personal injuries plaintiff waives the right medical privacy which he would otherwise enjoy as to medical records relevant and necessary to the fair disposal of the action. Nonetheless, it seems to me that the right to medical privacy subsists at least to the extent that the Court must, indeed, be satisfied of such relevance and necessity and that discovery of pre-accident medical history is not ordered as of course – hence the reference to oppression in the next extract cited below. To put it another way, the right medical privacy is waived only to the extent necessary to a fair trial. That is not to say, of course, that circumstances requiring such discovery are in practice uncommon. Personal injuries law practitioners are well familiar with the phenomena, for example, of prior spinal symptoms and spinal degeneration of which medical records will be discoverable in cases of alleged back injury. But that such discovery is in practice relatively commonly required and may, in a given case, not be difficult to obtain, does not imply that its necessity in a given case need not be demonstrated. Simons J cited **Power v. Tesco**[52] inter alia, for the following:

> *" …. the correct position as a matter of law, when it comes to disclosure/discovery in personal injuries proceedings, is that*
>
> *(a) there should be a medical examination of the plaintiff by the defendant's doctor … and*
>
> *(b) (i) if that examining doctor forms the opinion that there is some pre-existing condition, and/or*
>
> *(ii) there is some other evidential indicator to which the defendant can point that suggests a plaintiff's prior medical history to be relevant,*
>
> *then and in that instance access to prior medical history will typically be ordered, subject to any such time constraint as appears appropriate in the particular circumstances arising so as to ensure that only that which is relevant and necessary is discovered and oppression avoided."*

17. Though not precisely analogous, the foregoing seems to me generally consistent with the view recently noted in **Chubb v Perrigo** that, in balancing procedural justice, the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. As recorded above, "*An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments."*

18. In the present case, the requirements of the foregoing passage from **Power v. Tesco** have not been satisfied: the Defendants did not seek particulars of pre-accident relevant medical history, Professor Mohan has not examined the Plaintiff, he has not formed the opinion that there is some

[50] McCorry v McCorry [2021] IEHC 104 (High Court (General), Simons J, 19 February 2021)
[51] [2003] 3 I.R. 407 (at page 414)
[52] Power v. Tesco Ireland Ltd [2016] IEHC 390

pre-existing condition and the Defendant's counsel, very properly in my view, accepted that there is no other evidential indicator that suggests the Plaintiff's prior medical history to be relevant.

19. As to Professor Mohan's view of the necessity of discovery, and as recorded in **Power v. Tesco** and emphasised by the Court of Appeal in **Micks-Wallace v. Dunne**[53], it is the court, not an expert witness, that decides whether documents are relevant and necessary:

> *"Of course, the fact that a professional expert witness says that he or she requires documentation to properly present his or her report is a very important consideration to which a Court will have regard in determining whether to direct additional discovery. However, it is not always sufficient to simply record the expression of that view by the expert. It is the Court, not the expert, that decides whether documentation is relevant and necessary for the purposes of Order 31. Many experts if asked what documentation they require to prepare their report are likely to express their requirements as broadly as they can. That is both entirely proper and understandable. However, the Court must be told more than that the expert says he believes he requires particular categories of documents. The concept of 'relevance' and of 'necessity' required by law will depend on the circumstances and may not accord with the subjective view of an expert of what is necessary. The Court must be given sufficient information to form its own judgment as to why the material sought is required to address these issues and, from there, to reach its own adjudication as to whether discovery should be directed."*[54]

In light of the foregoing passage and in my view, Professor Mohan's report does not provide sufficient information, particular to this case and this Plaintiff, to allow me to form the requisite judgment in the Defendant's favour on an issue on which the Defendant bears the onus of proof.

JUSTICE

20. It is important to stand back from the detailed principles and take an overview of the question of the necessity of the documents sought to the fair disposal of the proceedings and the justice of the case more generally.

21. As to the surgical and dermatological notes, there is no reason to infer, nor has the Defendant pointed to any, that the Defendant will be at any litigious disadvantage by being confined to the records of Professors Powell and Earley which they already have or that any other such records exist. And, as I have said, it seems notable that the Defendants' own surgeon and dermatologist are not relied upon by the Defendant as suggesting such a litigious disadvantage.

[53] Micks-Wallace (A Minor) v. Dunne [2020] IECA 282
[54] Micks-Wallace §49

22. Though no order is sought of me in that regard and I make none, it remains open to the Defendant to belatedly seek particulars of other relevant medical history – both prior to and after the surgery. Doubtless, she will hold the Plaintiff to her answers. Professor Mohan will, doubtless and properly, take a full psychological/psychiatric history from the Plaintiff and will be alert to any question of error or omission in that history. At present, there is no evidential indicator suggesting the Plaintiff's prior medical history to be relevant. In due course, the Plaintiff will be cross-examined at trial, if considered appropriate on behalf of the Defendant, as to any particulars she may by then have furnished, the outcome of Professor Mohan's examination and his opinion on foot of it, and as to her counsel's intimation in this application that, as relates to her injuries of which she complains in these proceedings, she has not seen her GP since the one occasion in 2016 disclosed in her discovery and has not seen her psychotherapist since 2016 – the latter perhaps apart, I infer, from any medico-legal consultation which may have informed the disclosed psychotherapist's report of 2019.

23. As recorded above, the public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy – this motion is late and costly. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation.

24. In all the circumstances described above, I do not see that any substantial injustice will be done by refusing the Defendant the relief she now seeks.

CONCLUSION

25. In all the foregoing circumstances – perhaps notably the Defendant's failure to articulate, and so address the legal principles relating to, the true nature of the present application as being for inspection, further and better discovery and additional discovery, as opposed to "ordinary" discovery and also the absence of any factual basis for inferring the likely existence of any discoverable documents beyond those already in the Defendant's possession or any relevant pre-accident medical history, and hence the failure to identify that specific documents are likely to exist which documents would have a significant and important relevance of a specified and identifiable kind, I refuse the Defendant's application in all respects - save for one matter.

26. Given the unsatisfactory explanation by the Plaintiff of the "*crossed lines*" with Mr Hegarty as to the number of the Plaintiff's attendances with him, I will, in lieu of discovery, direct that an affidavit be sworn by her explaining the error in the provision of particulars and confirming the correct position as to her attendances with Mr Hegarty . I leave open the possibility of the Defendant seeking directions from the trial judge in light of such affidavit.

27. Rather than list this matter again before me, I invite the parties to agree a deadline for the swearing of that affidavit and to inform the registrar accordingly for purposes of perfection of the resultant order. In case of such agreement I direct that the order be perfected accordingly. In default of agreement, there will be liberty to apply to me for directions in that regard.

28. I am provisionally of the view that, as the Defendant has failed in this application save in respect of one matter which did not add appreciably to the duration of the application, the Plaintiff should have the costs of this motion. Failing intimation to the Court, within 14 days hereof, of disagreement with that proposed order, I direct that the order be perfected accordingly. In default of agreement, there will be liberty to apply to me for orders as to costs.

David Holland
23 September 2022