THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 272
Court of Appeal Record No. 2021/48

Faherty J.
Binchy J.
Barniville J.

BETWEEN/

CATHERINE (TINA) MCCORMACK

PLAINTIFF/
APPELLANT

- AND –

HEALTH SERVICES EXECUTIVE

DEFENDANT/
RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 19th day of October 2021

1. By personal injuries summons dated 1st July 2016, the appellant, who is a psychiatric nurse in the employment of the respondent, issued proceedings against the respondent claiming damages for personal injuries allegedly occasioned to the appellant in the course of her work. In brief, the appellant is employed as a health care worker by the respondent at its facility at Ferndale Community Residence, Dooradoyle, Limerick ("Ferndale"). In the personal injuries summons this is described as being a "high support residence". The appellant claims that from 2013 onwards, the respondent began to admit patients who were unsuitable to the facilities available at Ferndale, on account of their violent and aggressive

behaviour which constituted a danger to the health and safety of the staff of the unit, including the appellant, as well as other patients.

2. The appellant refers to two specific incidents which she alleges occurred as a result of the admission of such persons to Ferndale and which she says have had a "profound effect" on her. She claims that on 31st December 2013 she discovered the suicide of a patient in her care. She further claims that on 27th February 2014, she was present in the immediate aftermath of a suicide attempt by a colleague who she claims was unable to cope with the difficulties being experienced by staff at Ferndale. The appellant further claims that she has been continuously exposed to the risk of injury and does not feel safe at work. The appellant does not particularise any incidents of violence or aggression in the workplace.

3. It is appropriate to set out the express terms of the pleadings relevant to the application:

(a) During the year 2013, the said facility operated by the defendant known as Ferndale High Support Residence began to admit patients who were unsuitable for the facilities available, insofar as they exhibited violent and aggressive behaviour and constituted a danger to the health and safety of staff and other patients.

(b) As a result of the admission of such persons at Ferndale, two incidents have occurred which have had a profound effect on the plaintiff as follows:

(i) On or about 31st December 2013, the plaintiff discovered the suicide of a patient in her care.

(ii) On or about 27th February 2014, the plaintiff was present at the immediate aftermath of a suicide attempt by a colleague of hers who was apparently unable to cope with the difficulties being experienced by staff at Ferndale.

(c) The plaintiff has been exposed to continual risk of injury in the course of her employment and does not feel safe at work.

(d) The plaintiff, in consequence of the foregoing, was caused to sustain severe personal injuries, loss and damage.

(e) The said severe personal injuries loss and damage were caused by the negligence and breach of duty, (to include breach of statutory duty) of the defendant, its servants or agents.

Particulars of negligence and breach of duty

(To include breach of statutory duty)

(a) Caused or permitted Ferndale High Support Residence to admit persons unsuitable for the facility;

(b) Failed to provide any or any adequate training for staff;

(c) Failed to provided adequate staff;

(d) Failed to provide or procure adequate supervision of patients;

(e) Failed to have any or any adequate regard to an increase in incidents concerning patients, and/or failed to take corrective action or advise staff on foot of the escalation in incidents;

(f) Failed to have any or any adequate regard to the risk of violence or aggression occurring;

(g) Failed to provide staff with any or any adequate means or permission to restrain patients whose behaviour constituted a risk to themselves or to others;

(h) Failed to conduct any or any adequate risk assessment of patients;

(i) Failed to provide a safe system of work;

(j) Failed to implement any or any adequate system for managing volatile patients;

(k) Failed to manage or conduct a system of work such that the plaintiff would not be exposed to the risk of injury;

(l) Failed to have any or any adequate regard to the safety of the plaintiff;

(m) Caused, procured and/or permitted the plaintiff to be exposed to workplace stress in the course of her employment;

(n) Failed to take any or any adequate measures to prevent or limit occasions of stress in the course of the plaintiff's employment;

(o) Caused, procured and/or permitted the plaintiff to work in an environment which constituted a hazard to her health and wellbeing;

(p) Exposed the plaintiff to a risk of which it was aware or ought to have been aware;

(q) Failed to comply with the provisions of the Safety, Health and Welfare at Work Act 2005 and/or regulations made and/or preserved thereunder.

4. At para. 4 of the personal injuries summons, under the heading "injuries to the plaintiff", the appellant claims that she attended her GP following the incident of December 2013 with stress and difficulty in sleeping and was prescribed Xanax and certified as unfit for work. It is further pleaded that she was again certified as being unfit for work following the incident in February 2014, and that the appellant's prognosis is guarded.

5. A notice for particulars was raised on behalf of the respondent on 2nd August 2016, and replies were delivered on 6th September 2017. In this notice for particulars (at para. 13), the appellant was requested to furnish full particulars in relation to the increase in incidents involving patients. In her replies (at para. 13) she stated that the incidents included violent outbursts, agitated behaviour and damage to property and furniture, but no specific incidents were identified. At para. 5, the appellant was asked to explain the alleged linkage between the alleged admission of patients with violent and aggressive behaviour from 2013 and the suicide and attempted suicide incidents referred to by her. The appellant replied that the patients were not adequately managed or treated, that that resulted in the suicide of one "such patient" and that, by reason of the stress and danger to which staff were allegedly exposed, one of the appellant's colleagues attempted suicide.

6. A full defence to the proceedings, placing all matters in issue, was filed on behalf of the respondent on 1st December 2017.

7. By letter dated 1st November 2018, the solicitors for the appellant wrote seeking discovery of six categories of documentation, (a)-(f) as follows:

(a) Any or all documentation consisting of incident report forms arising from incidents of patient violence and/or aggression at the defendant's facility from 1st January 2010 to 31st December 2014;

(b) Any and all documentation consisting of incident report forms arising from the incidents pleaded in the personal injuries summons to have occurred on or about 31st December 2013 and 27th February 2014;

(c) Any and all documentation consisting of assessments and/or evaluations conducted at the time of admission of patients who were admitted to the defendant's facility from 1st January 2010 to 31st December 2014 together with any documentation considered in the course of any such assessments and/or evaluation;

(d) Any and all documentation arising from the monitoring or evaluation of patient behaviour by the defendant, its servant or agents at the defendant's facility from 1st January 2010 to 31st December 2014;

(e) Any and all documentation evidencing the nature or content of training or support provided to the plaintiff with regard to the management of violent or aggressive patients;

(f) Any documentation evidencing steps taken by the defendant to ensure the health and safety of the plaintiff in so far as violent or aggressive patients at its facility were concerned.

8. The respondent declined to make discovery in the terms requested. A motion for discovery duly issued on 18th September 2020 and was heard by the High Court (Heslin J.) on 8th February 2021. On that date, the respondent agreed to make discovery in the terms of category (b) above, but resisted the application for discovery of documentation in the remaining categories.

9. In an *ex tempore* decision handed down following on the hearing of the motion, Heslin J. declined to make discovery in respect of any of the disputed categories. The Court has the benefit of an agreed note of counsel as to the decision of Heslin J. That note records that in the opinion of the trial judge, the discovery sought in the remaining categories was not relevant to the claim since the appellant had not herself been physically injured by a violent patient. The trial judge further expressed the view that to make orders for discovery in the terms sought would be disproportionate in circumstances where it would require discovery of third party medical records, and that safety records were not relevant to the particular claims made with regard to the incidents of 31st December 2013 and 27th February 2014.

10. During the course of the hearing of this appeal, in light of the fact that counsel for the appellant stated in opening the appeal that the appellant's case was that the essential wrong committed by the respondent was the admission, whether by virtue of a deliberate change of policy or otherwise, of violent and aggressive patients from 2013 on, the Court inquired as to whether or not there had been any discussion between the parties as regards the making of discovery of documents relating to the respondent's policy for admission to Ferndale, any changes to that policy and any changes in the profile of patients being admitted from 2013 on. The parties replied that this had not been discussed. Counsel for the appellant submitted that the issue is broader than just one of policy - for example, it could be that patients unsuited to Ferndale were admitted there simply because of over-crowding at other facilities, or because there was nowhere else to accommodate them. Nonetheless, the Court

encouraged the parties to explore the possibility of reaching agreement for discovery of such documentation. Following upon the conclusion of the hearing, the Court was informed that such an agreement had been reached, but that the agreement did not resolve the appeal, or any element of the appeal. I address this issue in more detail below.

Submissions of the Appellant

11. It is the appellant's case that the trial judge erred in fact and in law in finding that the lack of physical injury to the appellant should be determinative of the scope of discovery, and that the trial judge further erred in fact and in law in finding that the categories refused were disproportionate insofar as the categories concerned would involve discovery of third party medical records.

12. The appellant's pleaded case is that from some time in 2013 onwards, the respondent began to admit patients to Ferndale who were unsuited to that facility owing to violent or aggressive tendencies, exhibited by violent and aggressive behaviour such as to constitute a danger to staff and other patients. The appellant does not claim that this was necessarily owing to any change in policy on the part of the respondent. In the pleadings she simply claims that this occurred, and, as noted earlier, in submissions to this Court the point was made that it may well have occurred, for example, because of overcrowding in other facilities or for some other reason, including a change in policy. It is further pleaded that, as a result of these unsuitable admissions, the appellant was exposed to a continuing risk of injury in the course of her employment. Accordingly, the appellant contends that the lack of physical injury should not have been determinative of the relevance and necessity of the documents sought by the appellant, and the trial judge erred in so holding.

13. The appellant submits that the discovery sought is relevant and necessary for the proper determination of the proceedings in the light of the denial by the respondent (in its defence) that the appellant has been exposed to a continual risk of injury in her workplace

and its further denial that the incidents referred to by the appellant were caused or contributed to by any act, default neglect or omission of the respondent.

14. As regard third party medical records, the appellant argues that it is possible to mitigate most if not all of the difficulties surrounding the confidentiality enjoyed by third parties in their records by appropriate redaction of documents. The appellant further submits that it is clear from established jurisprudence that third party confidentiality cannot be relied upon to resist discovery that is necessary for a proper determination of the issues. The appellant relies upon the decisions of Clarke J. (as he then was) in *Independent Newspapers v. Murphy* [2006] 3 IR 566 and *Yap v. Children's University Hospital Temple Street Ltd* [2006] 4 IR 298. In the latter case, Clarke J. stated, *inter alia,* that if the documents are relevant then confidentiality does not of itself provide a barrier to their disclosure.

Submissions of the Respondent

15. The respondent emphasises the requirement that relevance, for the purposes of discovery, is determined by the issues in the pleadings. They rely upon the decision of the Supreme Court in *Tobin v. Minister for Defence* [2019] IESC 57 and the following passage from Clarke C.J. in that case:

> "Relevance is, as has been pointed out, determined by reference to the pleadings. Importantly, therefore, the scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to plead their case. A plaintiff can hardly be heard to complain that they are required to make overbroad discovery if the reason for the scope of the discovery sought is because of a 'kitchen sink' approach to pleading the case. Likewise, defendants have to accept that, if they deny all elements of the plaintiff's case or place the plaintiff on proof about even relatively uncontroversial elements of the plaintiff's claim, then, inevitably the scope of the

> issues which will arise for trial will be expanded and the potential for documents being relevant to issues which remain alive will be greatly increased."

16. As regard the pleadings, the respondent criticises the personal injuries summons and the replies to particulars for lack of specificity of the kind required by ss. 10 and 13 of the Civil Liability and Courts Act 2004, an issue which was the subject of comment by this Court (Collins J.) in *Morgan v. Electricity Supply Board* [2021] IECA 29. The written submissions of the respondent quote extensively from that judgment which emphasises the requirement, in the light of the 2004 Act, for personal injury claims to be pleaded clearly and precisely. The respondent points out that the incidents relied upon by the appellant in the personal injury summons, i.e. the incidents of 31st December 2013 and 27th February 2014, are not expressed to be by way of examples of the respondent admitting patients to the Ferndale facility who were not suitable for accommodation there.

17. The respondent also submits that the particulars of negligence alleged are unspecific and in boiler plate form, without any particulars of the incidents of violence that are alleged to have occurred. Nor are any particulars of lack of supervision or appropriate measures not taken particularised. Nor are particulars of dates, locations, identities of parties involved or details of the events relied upon by the appellant provided. In short, the respondent submits that the appellant's case has been pleaded only in the most general of terms. Most significantly, the appellant has not claimed that any specific incident or incidents of patient violence or aggression has given rise to her injuries. The respondent relies upon the decision of this Court in *Promontoria (Aran) v. Sheehy* [2020] IECA 104 in which it is stated at para. 32:

> "In *Keating v RTE* [2013] IESC 22 the Supreme Court confirmed that the moving party 'must disclose some information upon which the plea is based.' It is well established that it is not permissible to make an unsubstantiated assertion and then

call for discovery of documents hoping that this will unearth documents which would provide a basis for a case – a principle made clear in *Carlow/Kilkenny Radio Limited v Broadcasting Commission* [2004] 1 ILRM 161."

18. The respondent submits that if this Court considers that the pleaded case gives rise to an entitlement for a broad order for discovery, i.e. that the documents sought are relevant, then the Court must consider questions of necessity and proportionality. While the respondent is not making the case that compliance with the discovery, if ordered, would be burdensome, it does make the case that in considering whether or not to make an order, the Court should have regard to the proportionality of any order, in the context of the *pleaded* case.

19. The respondent submits that of the categories sought, discovery in the case of categories (a), (c) and (d) is disproportionate. In the case of category (a), it would apply to every patient who was at the facility in the four-year period between 1st January 2010 and 31st December 2014, whether or not they had any contact with the appellant. While the category is limited by reference to incidents of patient violence and/or aggression, this concept is not defined or narrowed in any way so as to apply to any particular act or person.

20. As regards categories (c) and (d), it is submitted that discovery of these categories, taken together, is so broad as to encompass just about any document relating to a patient, regardless as to whether or not the patient had any connection at all to the appellant or was involved in any incidents of violence or aggression.

21. Therefore, the respondent says, discovery of the kind sought in categories (a), (c) and (d) would, if granted, amount to a vast and disproportionate intrusion on the privacy, confidentiality and data rights of numerous vulnerable patients, and the trial judge was entitled to weigh up the intrusion into the patients' rights against the materiality of the documents sought, and to conclude that the discovery sought was disproportionate.

22. This is particularly so in view of the fact that the documentation sought concerns patients who are not parties to the proceedings and who enjoy rights under the GDPR Regulation and the Data Protection Act 2018. These rights, it is submitted, must be considered independently of any redactions which might be made. The respondent argues that the case of *Cooper Flynn v. RTE* [2000] 3 IR 344 (relied upon by the appellant) pertained to confidentiality between a banker and a client and as such did not concern a special category of personal data, as is the case here. The respondent does not argue that the Court should refuse discovery on the grounds of the confidentiality enjoyed by the patients in their records, but submits that any interference with the rights of patients should be to the minimum extent necessary, consistent with ensuring that there be no risk of impairment of a fair hearing - *Independent Newspapers (Ireland) Limited v. Murphy.* The respondent also refers to the decision of Clarke J. in *Telefonica O2 Ireland Limited v. Commission for Communications Regulation* [2011] IEHC 265 in which case Clarke J. addressed the right to discovery of relevant documents on the one hand, and the right of third parties to confidentiality on the other. At para. 3.4 thereof, Clarke J. observed:

> "At a general level, it seems likely that confidence will only come into play where there is a disproportion between the level of confidence which would be breached and a very limited potential relevance of the material concerned. Highly confidential information, which would only have a very tangential relevance to proceedings, might legitimately not be disclosed."

23. As regards categories (e) and (f), it is submitted that since the appellant does not claim to have suffered any injury as a result of violence or aggression, these categories, which are addressed to training or other steps taken to address the violent or aggressive behaviour of patients, are of no relevance. Moreover, it is impossible to relate the allegations of deficiencies in the appellant's training to any pleaded incident, patient, event or injury.

24. Finally, the respondent also submits that a heavy burden rests on the appellant to demonstrate that the trial judge erred in the exercise of his discretion such that this Court can interfere with his decision on appeal. The respondent relies upon the decision of this Court (Murray J.) in the case of *Micks-Wallace (A Minor) v. Dunne* [2020] IECA 282 and also the decision of Clarke C.J. in *Tobin v. Minister for Defence* as authority for this proposition.

Decision

25. As I mentioned at para. 10 above following upon the hearing of this appeal, the parties reached agreement that the respondent would make discovery of documents regarding the respondent's policy for admission to Ferndale. This agreement is in the following terms:

> "Documents evidencing the Admissions Policy or changes thereto for the Ferndale facility for 2012 to 2014 together with any risk assessment concerning violence or aggression during that period."

26. This agreement does not, however, satisfy the appellant, who regards the discovery of this category of documents as additional to those sought by her motion, and not in substitution for any of the categories sought. In my opinion, having due regard to the pleadings, this agreement for discovery is adequate to meet the purposes for which discovery is sought of the documents described in categories (a), (c) and (d) of the appellant's motion. Although para. 3(a) of the personal injuries summons does not mention the admissions policy relating to Ferndale, it is clearly implied in that paragraph that the respondent has changed that policy (whether by deliberate decision or simply by admitting patients of a different nature and profile to those admitted prior to 2013), and that it is this change that has resulted in the admission of patients who, by reason of being of a more aggressive disposition, are unsuited for admission to Ferndale. In turn, the remainder of the summons makes it clear that it is this that has resulted in the appellant's alleged condition. If, as the appellant claims, it was previously the case that such persons were deliberately not admitted

to Ferndale, their admission from 2013 onwards as likely as not involved a decision being taken to permit such admissions (whether on foot of a deliberate change of policy or otherwise). Whether or not this is so, discovery of documents concerning the respondent's policy for admission to Ferndale for 2012 to 2014 and any risk assessment concerning violence and aggression (of patients being admitted) reasonably arises out of the pleadings, and is more directly addressed to this issue than the discovery sought in categories (a), (c) and (d) of the appellant's motion, which, for the reasons that follow, I consider do not arise out of the pleadings.

27. Dealing first with the standard of review, it is well established that an appellate court should be slow to interfere with the exercise by the High Court of its discretion in connection with the grant or refusal of an application for discovery. One need look no further than the passage recited in the submissions of the respondent from the decision of Murray J. in this Court in *Micks-Wallace (A Minor) v. Dunne*:

> "55. In this regard I am conscious that this Court should be slow to interfere with the exercise by the High Court of its discretion in connection with the grant or refusal of an application for discovery. The bar for an appellant in this regard may have been raised by the recent decision in *Waterford Credit Union v. J&E Davy* [2020] IESC 9. There, Clarke CJ said (at para. 6.3):
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> *'In my view, when a first instance court exercises a judgment of that type, it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court. Clearly, if the appellate court takes the view that documents whose discovery had been ordered were not relevant at all, then it should have little difficulty in overturning an order which directed that they be discovered. A similar approach should be adopted where clearly relevant and*

necessary documents were refused. However, the fact that the appellate court takes a somewhat different view from the trial court as to the degree of relevance should not lead to the overturning of the decision of the trial court unless the appellate court considers that the trial judge's assessment of the weight to be attached to relevance was clearly wrong and, as a result, he or she made an order which was outside the range of any order which could reasonably have been made.""

28. In this case, the trial judge refused to make an order for the disputed categories of discovery on the grounds that firstly, it was not relevant because the appellant was not claiming to have been physically injured herself by a violent patient and, secondly, discovery would be disproportionate in circumstances where it would have required discovery of third party medical records and, thirdly, safety records were not relevant to the particular claims with regard to the incidents of 31st December 2013 and 27th February 2014.

29. The trial judge was of course correct in stating that the appellant does not claim to have been physically injured by a violent patient, although that in itself is not determinative of the relevance of the documents sought which must be assessed by reference to the pleadings as a whole. Rather, the appellant claims that she has been caused to suffer from a stress related condition by reason of an increased exposure to violent or aggressive behaviour of patients, which she claims followed upon a change in practice on the part of the respondent as regards the suitability of patients for admission to Ferndale, which is an open facility, and, by implication one whose patients suffer from milder conditions than those in "lock-up" facilities. The personal injuries summons, para. 3(a), refers to patients exhibiting violent and aggressive behaviour such as to constitute a danger to patients and staff. On this basis, but without providing any particulars of any incidents of violent or aggressive behaviour, the appellant brought this application for discovery by which, as is apparent, she seeks orders

for discovery of a very broad kind and directly relating to the patients themselves, rather than discovery of the policy of the respondent for admission of patients to Ferndale, or any changes to that policy. While during the course of the hearing of this appeal, counsel for the appellant said that it is not necessarily the case that there has been any policy change as regards admission of patients (it could, for example, be that patients of a more violent disposition have been admitted there simply owing to there being nowhere else available to accept them), nonetheless he himself submitted in opening the appeal that the central issue in the case was whether or not the respondent changed its policy for admission to Ferndale in 2013.

30. In any case the appellant has not provided, either in the personal injuries summons, or in replies to particulars, in response to a specific request to do so, any details of incidents of violence or aggression at any time during the period in respect of which she seeks discovery. Since the appellant is, in effect, claiming that she does not feel safe at work on account of an increase in the violent and aggressive behaviour of patients, it is somewhat surprising that she has not provided some particulars of such incidents in support her application for discovery. While, as counsel for the respondent said at the hearing of this appeal, one would not necessarily expect the appellant to recall dates and times of incidents, the failure to provide any particulars at all of even one such incident gives the impression that this application for discovery, across all categories (save category (b)) is in the nature of a fishing exercise rather than one arising out of specific pleadings.

31. This frailty attaches, in varying degrees, to all of the categories of discovery sought. So far as category (a) is concerned, the appellant seeks discovery of incident report forms arising from incidents of violence and aggression from 1st January 2010 to 31st December 2014. Leaving to one side the duration of that period, at first glance this request might appear reasonable having regard to the claims pleaded at paras. 3(a) and (c) of the summons, until

one reflects on the fact that no information at all is provided about *any* of the incidents in respect of which discovery is sought. It really cannot be gainsaid that this is contrary to the principles referred to by this Court in *Promontoria (Aran) v. Sheehy* (see para. 17 above) and before that by the Supreme Court in *Keating*, referred to in the passage quoted above. While the appellant claims to have been profoundly affected by two specific incidents, these are not incidents of violence or aggression on the part of patients, and one of them did not involve a patient at all.

32. The requests for discovery of categories (c) and (d), taken together, could hardly be more broad, both as to the nature of the documents discovery of which is sought, and the number of patients likely to be affected. It is not unreasonable to assume that if discovery of these categories is ordered, such order would result in discovery of documents concerning the vast majority of the patients admitted to Ferndale during the relevant period. Discovery of these categories is resisted on several grounds, including the generality of the pleadings relied upon, and also that such discovery would disproportionately violate the entitlement of the patients at Ferndale to confidentiality of such sensitive records, as well as being in breach of their data privacy rights. While the privacy and data protection arguments advanced were of some substance on the facts of this case - and the right to confidentiality of patients in their records was one of the grounds relied upon by the trial judge to refuse the application - I do not consider it necessary to address these grounds of opposition in circumstances where the appellant has failed to plead her case in sufficient detail to get to the point where such arguments require consideration. These categories must be refused simply because the appellant is seeking discovery of patients' records without having provided any information in her pleadings, other than of the most general kind, which would link her claim to the conduct of patients. On that basis, the appellant has not established that the documents are relevant to the pleaded case.

33. As far as categories (e) and (f) are concerned, these are, in substance, the same. It is difficult to see the relevance and necessity of the discovery sought in these categories in circumstances where the appellant is not making any claim that she herself was the subject of any violent or aggressive act, or even that she saw others subjected to such treatment. While it is pleaded, again in a very general way that the appellant did not receive adequate training, no information is provided as to how it is claimed her training was inadequate, or what training should have been provided so as to eliminate or mitigate the risk to the appellant of the injuries which she claims were caused to her by the respondent.

34. It follows from the above that the decision of the trial judge to refuse to order discovery of the disputed categories of documentation was one that was well within his margin of appreciation on the application and that this appeal should be dismissed.