THE HIGH COURT

[2016 No. 5751 P.]

BETWEEN

MARSHA MCGREGOR

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 26th day of July, 2017

Introduction

1. In this action, the plaintiff seeks damages for injuries allegedly suffered by her, due to the allegedly negligent treatment furnished to her by servants or agents of the defendant when she attended at Mallow General Hospital and Cork University Hospital in August 2015, and subsequent thereto, for treatment of an avulsion fracture of the talus bone in her right ankle.

2. In this application, the plaintiff seeks an order pursuant to O. 31 of the Rules of the Superior Courts giving her liberty to serve interrogatories on the defendant. The defendant resists the application on the basis that the interrogatories posed, are unnecessary to enable the plaintiff to bring her case properly before the court and are unlikely to lead to any significant saving of costs. In addition, they claim that the questions as phrased, are inappropriate, insofar as they are questions relating to opinions, statements or the conduct of the servants or agents of the defendant. Furthermore, the defendant states that the questions should not be allowed, due to the fact that they effectively ask the defendant to admit that it was negligent in and about the care given to the plaintiff in the weeks and months following August 2015.

Background

3. In order to properly understand the context in which the plaintiff seeks leave to put the interrogatories to the defendant, it is necessary to set out briefly the core of the plaintiff's claim against the defendant and the progress of the pleadings to date.

4. The plaintiff is 38 years of age and is a married lady with young children. The narrative of the events giving rise to her action against the defendant was set out in the following terms at para. 5 of the personal injury summons issued by the plaintiff on 29th June, 2016:-

> *"On or about 19th August, 2015, the plaintiff was accepted for treatment at the said Mallow General Hospital in respect of an avulsion fracture of her right talus bone. Her injured right ankle and foot were placed into a half plaster. Later that evening of the same date she received a telephone call from Cork University Hospital advising her that she should attend the hospital at 10pm that night. At the Cork University Hospital she was told that she was already booked into theatre for 7am on the following morning for internal fixation of the fracture as the fracture was bad and required this treatment. She was retained as an in-patient at the said hospital and was operated upon on 24th August, 2015. After the said surgery, her right lower limb was placed in plaster to below the knee. On or about 28th August, 2015, the plaintiff returned to the said hospital as her leg was very swollen whereupon the plaster was loosened around her toes. On or about 7th September, 2015, a new plaster cast was applied at the said Hospital which extended to just below her right knee. The plaintiff, by approximately one week later, had developed severe cramp and severe pain with difficulty in sleeping. She experienced cramping and burning, tingling, hopping, pulling pain sensation which began to extend into her hip. She could not put her right foot on the ground. Since her initial presentation at Mallow General Hospital the plaintiff had been prescribed analgesia which was increased on an ongoing basis with the passage of time and the increasing intensity of the symptoms. On or about 14th September, 2015, the plaintiff again attended the Cork University Hospital Accident and Emergency Department, because of the extreme severity of her symptoms. She was advised by the doctor, who saw her on that occasion, that the symptoms which she was experiencing, were only what were to be expected in the aftermath of said surgery. She was further advised that the plaster cast could not be removed, as this would destroy the effect of the operation and she was discharged with a further prescription of analgesics. On the following day, she was referred to Mallow General Hospital by her general practitioner, but they refused to assess her and referred her to Cork University Hospital which she attended on the same day, when she was again told at the last mentioned hospital that her symptoms were only what were to be expected in the aftermath of the surgery which she had undergone and that the right lower limb would not be x-rayed and that the plaster cast would not be removed. She was discharged home with yet a further prescription for Diazepan and a morphine-based tablet. Her symptoms persisted unabated. She was unable to sleep and vomited frequently. On or about 5th November, 2015, (sic) she attended at Cork University Hospital and was x-rayed and seen by Ms. Sinead Boran, a consultant orthopaedic surgeon, who advised her that the plaster cast had been inappropriately applied to her right lower limb and caused the cast to be removed. She further referred the plaintiff for physiotherapy and prescribed exercises and a special boot for use on the injured foot. The plaintiff's symptoms continued and she remained on analgesics. On or about 12th October, 2015, the plaintiff was re-assessed and further physiotherapy was prescribed at Mallow General Hospital. The physiotherapy was wholly ineffective and the plaintiff's symptoms persisted. On or about 2nd November, 2015, Ms. Boran told the plaintiff that she should submit to Botox injections and an operation to release her Achilles tendon. On or about 13th November, 2015, the plaintiff underwent surgery for an Achilles tendon release and subsequently a cast was applied. She was also treated with Botox injections. On or about 23rd December, 2016, (sic) the cast was removed but she was left with tightness in her Achilles tendon. She was using crutches and a boot for several weeks. In January 2016, she commenced a course of physiotherapy and stretching exercises, but her condition failed to improve. She continues to have serious difficulty when walking. She is dragging her foot. Her ankle is swollen by night-time. During the day she experiences soreness and ache but pain develops before night-time. She has to rest to relieve the swelling. She requires ongoing paracetamol and is also on Vimovo. The plaintiff is a busy housewife and mother and has severe difficulty in doing heavy household work and coping with her duties as a wife and mother."*

5. Arising out of this narrative, the plaintiff alleged that the defendant, its servants or agents, in both Mallow General Hospital and Cork University Hospital, had been negligent in and about the treatment given to her from the time that she first presented on or about 19th August, 2015, until in or about the time when surgery was carried out to release the achilles tendon on or about 13th November, 2015. In her personal injury summons the plaintiff set out twenty particulars of negligence and breach of duty against the

defendant. It is not necessary to set out these allegations *in extenso*. Her case in negligence is effectively contained within the following general areas:-

> (a) failure to obtain informed consent from the plaintiff for the operation where there was internal fixation of the fracture to the talus bone;
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> (b) performing the internal fixation procedure, when it was unnecessary to do so;
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> (c) applying the plaster cast in an inappropriate and substandard manner and in particular in such a way as to cause injury to the plaintiff's achilles tendon;
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> (d) ignoring the plaintiff's complaints of severe pain and disability, caused by the plaster cast which had been applied on 7th September, 2015;
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> (e) treating the plaintiff with inappropriate amounts of analgesia;
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> (f) allowing the plaster cast to remain in place notwithstanding the plaintiff's symptoms and complaints; and
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> (g) failing to provide appropriate remedial treatment in a timely manner, in respect of the condition caused by the application of the plaster cast on 7th September, 2015.

6. On 13th January, 2017, a defence was filed on behalf of the defendant. In the defence, it was made clear that it was being delivered prior to the receipt of all necessary independent expert medical opinion by the defendant. In those circumstances it was indicated that the defence was, of necessity, preliminary in nature. The defendant reserved the right to amend its defence on completion of investigations and, in particular, on receipt of the independent expert medical opinion. With the exception of admissions made in respect of the preliminary matters pleaded at paras. 1 and 2 of the personal injury summons, the remainder of the defence put all matters in issue.

7. In response thereto, on 1st February, 2017, the plaintiff's solicitor sent a notice to admit facts to the defendant. It is not necessary to set out the content of that document in full. Effectively, the defendant was called on to admit the factual narrative as set out by the plaintiff in her personal injury summons (items 1 – 19). The defendant was also called upon to admit the plaintiff's ongoing difficulties as set out in the summons (items 20 – 22) and finally, the defendant was effectively called upon to admit that it had been negligent (items 23 – 28). Perhaps not surprisingly, the defendant did not issue any response to this notice.

8. On 22nd May, 2017, the plaintiff issued a notice of motion seeking liberty to serve interrogatories on the defendant. This was based on an affidavit sworn by her solicitor on 19th May, 2017. In that affidavit, he stated that in view of the fact that the defendant had filed a blanket defence, which put every fact in issue, including facts concerning the dates on which she attended at the various hospitals and was given treatment thereat, the plaintiff was advised by her senior counsel that a notice to admit facts should be issued calling on the defendant to make certain admissions. When there was no response forthcoming from the defendant in relation to that notice, senior counsel further directed that interrogatories should be served on the defendant. Mr. O'Sullivan stated in the affidavit that the interrogatories were the same as the notice to admit facts, save that they omitted several requests for admissions made in relation to the plaintiff's post incident condition. Nor did they seek admissions with regard to the issue of vicarious liability of the defendant for their medical and other hospital staff, due to the fact that the defendants had conceded the existence of such vicarious liability by letter.

9. Mr. O'Sullivan stated that in light of the defendant's complete refusal to engage in any way with the notice to admit facts, it was in the interests of the proper conduct of the litigation, that the plaintiff should be granted leave to serve the interrogatories, which were exhibited to his affidavit. He further stated that the delivery of such interrogatories was necessary for disposing fairly of the case and that they would also lead to the saving of costs. On this basis, he submitted that the plaintiff ought to be granted the order sought in the notice of motion.

Submissions of Counsel

10. At the hearing of the application, Mr. Regan B.L., counsel for the plaintiff, submitted that in view of the fact that the defendant had put absolutely all matters in issue in its defence, and had not otherwise made any admissions or concessions, even in relation to the dates upon which treatment had been afforded to the plaintiff at the various hospitals, this placed a huge burden on the plaintiff to prove every occasion on which she attended at the hospitals and every single occasion on which she received operative or other treatment at the hospitals. He submitted that if the plaintiff had to undertake this burden of proof, it would lead to a huge increase in the length of the hearing of the action and also considerable additional expense, in having the plaintiff prove simple facts, which should never in reality be in dispute between the parties, such as the dates on which she actually attended at the hospitals, which dates would be set out in the hospital records and the nature of the treatment given to her, in particular in relation to the two operations which she underwent, which would also be clearly evident from the hospital records. Counsel submitted that in these circumstances, it was entirely reasonable that the plaintiff should be given liberty to issue the interrogatories which had been exhibited to Mr. O'Sullivan's affidavit.

11. In response, Ms. Graydon, B.L., for the defendant submitted that a large number of the matters raised in the interrogatories, were inappropriate to be raised in such fashion, due to the fact that they effectively called on the defendant to admit that its servants or agents had been negligent in and about the treatment which they had provided to the plaintiff in the period from August to December 2015. This criticism applied with particular relevance to questions 18 – 23 inclusive.

12. She further submitted that other questions were objectionable, because they required the defendant to effectively agree to the content of various conversations, which the plaintiff maintained that she had had with various servants or agents of the defendant. For example, in question 8, the defendant was asked to confirm that on 14th September, 2015, the plaintiff had attended at the Accident and Emergency Department of Cork University Hospital, due to the "*extreme severity of her symptoms*" and that she was there advised by an unnamed doctor, who saw her on that occasion, that the symptoms which she was experiencing were only what were to be expected in the aftermath of surgery. The defendant was also asked to confirm that the unidentified doctor had informed her that the plaster cast could not be removed, as that would destroy the effect of the operation. The defendant was further asked to confirm that the plaintiff was discharged on that occasion with a further prescription of analgesics. Similarly, in question 10, the defendant was asked to confirm that on 15th September, 2015, when she attended at Cork University Hospital, she was again told by some unidentified person that her symptoms were only what were to be expected in the aftermath of the surgery which she had undergone. She was further allegedly told that the right lower limb would not be x-rayed and that the plaster cast would not be removed. Counsel submitted that it was unreasonable to expect a defendant to give a sworn answer to the effect that these things

had either been said, or had not been said, to the plaintiff on the specific occasions identified by the plaintiff, particularly in light of the fact that the persons who had allegedly made those statements had not been identified.

13. Counsel stated that a similar criticism applied to question 12, wherein the defendant was asked to confirm that on 5th November, 2015, when the plaintiff had attended at Cork University Hospital, she was told by Ms. Sinead Boran, Consultant Orthopaedic Surgeon, that the plaster cast had been inappropriately applied to her right lower limb and that that doctor had caused the cast to be removed and had referred the plaintiff for physiotherapy and prescribed exercises and a special boot for use on the injured foot. The defendant was also asked to confirm that after 5th November, 2015, the plaintiff's symptoms continued and she remained on analgesics. Counsel stated that it was inappropriate that the defendant should be asked to confirm, or deny, subjective statements made by the plaintiff as to her symptoms at any given time. Counsel further pointed out that as the questions had been phrased in a format whereby there were, in effect, a number of questions rolled up into a single question, it was almost impossible for the defendant to give a yes or no answer to such questions.

14. Counsel submitted that a number of the questions were subjective and vague, such as question 13 referred to above, which asked the defendant to confirm that after 5th November, 2015, the plaintiff's symptoms continued and she remained on analgesics. Similarly, question 17 asked the defendant to confirm that on or about 23rd December, 2016, (sic) the cast was removed, but the plaintiff was left with tightness in her achilles tendon and she was using a crutch and a boot for several weeks. Counsel stated that these questions involved assertions as to how the plaintiff felt at various stages, which was not something that the defendant could either accept or deny.

15. Counsel stated that a number of the questions fell foul of the dictum of Shanley J. in *Woodfab Limited v. Coillte Teoranta* [2000] 1 I.R. 20, wherein at p. 30, he endorsed the view given by Lynch J. in *Bula Limited v. Tara Mines Limited (No. 7)* [1995] 1 ILRM 401, that questions as to opinions, the meaning or effect of documents, or as to statements, or conduct should not be permitted.

16. Counsel submitted that in the *Woodfab* case, Shanley J. had made it clear that interrogatories should only be directed where some necessity existed which would warrant their delivery. In particular, she cited the following passage from the judgment of Shanley J. at p. 28:-

> *"Apart from the provisions of O. 31, r. 2 various authorities which have been opened to me indicating that a plaintiff will not be permitted as of right to deliver interrogatories but will have to satisfy the court either that a special exigency or some necessity exists which warrants the delivery and answering of interrogatories. All of the cases to which I have been referred identify the delivery and answering of interrogatories as an unusual step in an action commenced by way of plenary summons."*

17. Counsel also referred to the following portion of the judgment at p. 29:-

> *"However it does appear that once the party seeking to deliver interrogatories satisfies the court that such delivery would serve a clear litigious purpose by saving costs or promoting the fair and efficient conduct of the action in question then the court should be prepared to allow the delivery of the interrogatories unless it is satisfied that the delivery and answering of the interrogatories would work an injustice upon the party interrogated. What I have just said is, I believe, simply another way of restating what is said in O. 31, r. 2 of the Rules of the Superior Courts namely that leave shall be given to serve interrogatories where it is considered 'necessary either for disposing fairly of the cause or matter or for saving costs'. The court must of course look at each and every interrogatory for the purposes of determining whether or not it is necessary to be answered for the purpose of disposing fairly of the cause or matter or for saving costs."*

18. In the course of her submissions, Ms. Graydon, B.L., accepted that some of the dicta in the *Woodfab* case would perhaps not represent the current attitude of the courts towards interrogatories. The more modern approach had been set out by the Court of Appeal in its judgment in *Joseph McCabe v. Irish Life Assurance plc* [2015] 1 I.R. 346, where Kelly J. delivering the judgment of the court stated as follows:-

> *"It is almost 50 years since the Supreme Court, in an unreported judgment of the 9th May, 1967, in the case of J. & L.S. Goodbody Ltd. v. The Clyde Shipping Company Ltd. (Unreported, Supreme Court, 9th May, 1967), encouraged a greater use of interrogatories in High Court litigation. Walsh J., speaking for the court, said this at p. 9:-*
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> > *'I would also like to express my agreement with the view expressed by the learned High Court judge that interrogatories ought to be used more than they are. This procedure and all other pre-trial procedures which are available should be encouraged because anything which tends to narrow the issues which have to be tried by the Court and which will reduce the area of proof must result in considerable saving of time and money which cannot but be beneficial to the parties and to the administration of justice in general.'*
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> > *That judgment of the Supreme Court is largely forgotten and the exhortation contained in it is for the most part ignored.*
> >
> > *Often the delivery of interrogatories can obviate the necessity for expensive and time consuming discovery, can dispose of issues prior to trial, can lessen the number of witnesses and result in an overall shortening of trials. In many cases which lend themselves to the delivery of interrogatories the procedure is simply ignored."*

19. Counsel noted that Kelly J. went on in the course of his judgment to observe that since the decision of the Supreme Court in the J. & L.S. *Goodbody* case, litigation had increased enormously in quantity, complexity and cost. He stated that it was high time for the exhortation of the Supreme Court of 1967 to be acted upon. He went on to note that in that case, the Supreme Court made the following clear at p. 3 of the judgment:-

> *"…one of the purposes of interrogatories is to sustain the plaintiffs' case as well as destroy the defendants' case … and that interrogatories need not be confined to facts directly in issue but may extend to any facts, the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. Furthermore, the interrogatories sought need not be shown to be conclusive on the questions in issue but it is sufficient if the interrogatories sought should have some bearing on the question and that the interrogatory might form a step in establishing the liability. It is not necessary for the person seeking leave to deliver the interrogatory to show that it is in respect of something he does not already know."*

20. In the course of his judgment, Kelly J. also approved of the following dicta of O'Sullivan J. in *Money Markets International Limited*

v. Fanning [2000] 3 I.R. 215, at p. 235:-

> *"The purpose of exhibiting interrogatories is to seek admissions which will become evidence to be relied upon by the interrogating party. They will not prove the entire of that party's case but will lighten the burden of so doing to the extent that certain elements required to be proved will be established in the replies. I am unable to see, therefore, how admissions about facts 'cannot be used as a means to prove the interrogating party's case'."*

21. Counsel submitted that in the McCabe case, which involved an allegation by the defendant that it did not have to pay out under a policy of life assurance, due to the fact that the deceased (the wife of the first named plaintiff and mother of the second named plaintiff), had not disclosed her prior medical conditions, at the time that she filled out the proposal form for the life assurance contract. The judge pointed out that the facts which had been pleaded by the defence on this aspect related to medical attention given by a minimum of four doctors, over a period of in excess of twenty years, in four separate medical facilities. In these circumstances, the Court of Appeal was satisfied that the delivery of the interrogatories by the defendant was necessary for disposing fairly of the cause and for saving costs. Ms. Graydon B.L. submitted that in the present case, the furnishing of answers to the interrogatories by the defendant, was not necessary either for disposing fairly of the cause or matter or for saving costs. Furthermore, as she had stated earlier in her submissions, she reiterated that given the format of the questions posed, the defendant was being asked to effectively confirm the narrative of events as given by the plaintiff and to admit that it had been negligent in the manner set out by the plaintiff in her personal injury summons. She stated that if the defendant simply answered these matters "*No*", then the plaintiff was no further along the road towards establishing her case, than she had been when she received the defendant's defence, which put all matters in issue. Accordingly, it was submitted that it would be futile to direct delivery of the interrogatories as currently drafted.

Conclusions

22. Order 31, rule 2 of the Rules of the Superior Courts sets out the circumstances in which a party may be given leave to deliver interrogatories, to which the opposing party must furnish sworn replies, which will be admitted as evidence at the trial of the action. The salient part of the applicable rule is in the following terms:-

> *"Leave shall be given as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs."*

23. The rules also provide that in deciding upon such application, the court shall take into account any offer which may have been made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents, relating to any matter in question. Thus, the attitude and response of the party sought to be interrogated prior to the time of the application for leave to serve interrogatories, is a relevant consideration. In the *McCabe* case, the Court of Appeal noted that, somewhat similar to the defendant in this case, the plaintiffs had refused to entertain the notice to admit facts and had not engaged with the defendants.

24. In this case, I have considerable sympathy for the position that the plaintiff finds herself in. It is her case that she attended at the two hospitals on various dates, as set out in her personal injury summons. She further alleges that she was given various treatments and advices on the occasions that she attended at the hospitals. While there may well be considerable dispute as to whether any of the treatment actually provided, was done negligently, or as to what was actually said to her by various doctors or nurses, it is unquestionably the case that there should be a large amount of agreement as to what treatment she actually received. If it has not been done already, both parties will in due course have a copy of the plaintiff's medical files and records in both hospitals. In such circumstances, it seems to me that without admitting any negligence in the treatment that was given to the plaintiff, the defendant could accept that the plaintiff received the various forms of treatment as set out in those records, on the dates given therein. Usually, this would be done by both parties agreeing to the admission of the plaintiff's hospital and medical records at the trial of the action without formal proof. It is not clear whether any letter has been written by the plaintiff's solicitors seeking such agreement from the defendant. I suspect that such a request has not yet been made, because there is no reference to the making of any such request, or of any response thereto, in the affidavit sworn by the plaintiff's solicitor, Mr. O'Sullivan. The plaintiff's case in seeking liberty to issue interrogatories, would have been considerably strengthened, if she were in a position to show that the defendant had not agreed to the admission of the medical records without formal proof at the trial of the action.

25. However, I must deal with the application as it is presented to the court at this stage of the proceedings. The approach which the court should adopt in relation to such an application has been set out clearly by the Court of Appeal in its decision in *McCabe v. Irish Life Assurance plc* [2015] 1 I.R. 346. From that judgment, it is clear that some of the dicta of Shanley J. in *Woodfab Limited v. Coillte Teoranta* [2000] 1 I.R. 20, to the effect that there must be some special exigency or some necessity which would warrant the delivery and answering of interrogatories and that the delivery and answering of interrogatories should be seen as an unusual step in an action commenced by way of plenary summons, do not have the same force as they did when that judgment was delivered in December 1997, having regard to the advantages which interrogatories have in relation to confining the issues that must be determined at a hearing and in reducing the level of costs, as set out in the judgment of Kelly J. in the McCabe case.

26. It seems to me that the essential ratio of both cases remains the same; namely that once the party seeking to deliver interrogatories satisfies the court that such delivery would serve a clear litigious purpose by saving costs or promoting the fair and efficient conduct of the action, then the court should be prepared to allow the delivery of the interrogatories, unless the court is satisfied that the delivery and answering of the interrogatories would work an injustice upon the party interrogated.

27. Bearing those considerations in mind, I now propose to go through the interrogatories and give my ruling in respect of each one in turn:-

> "(1) Confirm that on or about 17th August, 2015, the plaintiff was accepted for treatment at Mallow General Hospital in respect of an avulsion fracture of her right talus bone where her injured right ankle and foot were placed into a half plaster."

Ms. Graydon, B.L., objected to having to answer this question with a yes or no answer, as the admission records stated "quere avulsion fracture", and as such the defendant could neither confirm, nor deny the presence of a fracture on that date. I think that the defendant is being overly sensitive in relation to this question. However, taking account of their objection, I will allow the question if it is amended such that after the words "in respect of", the following words are inserted "an actual or suspected", so that that portion of the question will read, "in respect of an actual or suspected avulsion fracture of her right talus bone". Accordingly, I will allow that question as amended.

> *(2) Confirm that later in the evening of 17th August, 2015, the plaintiff received a telephone call from Cork University*

Hospital advising her that that she should attend the hospital at 10pm that night and that at Cork University Hospital she was told that she was already booked into theatre for 7am on the following morning for internal fixation of the fracture."

I think that this question is reasonable. It merely asks the defendant to confirm a portion of the factual narrative, which is probably readily ascertainable from the medical records and which does not contain any imputation of negligence or wrongdoing on the part of the defendant. Accordingly, I will allow this question.

"(3) Confirm that the plaintiff was retained as an in-patient at Cork University Hospital and was operated upon on 24th August, 2015, when an internal fixation of the fracture was performed under general anaesthesia and that after the said surgery, her right lower limb was placed in plaster cast to below the knee."

Again, this question merely asks the defendant to confirm or deny a portion of the narrative, which the defendant will easily be able to ascertain from the hospital records. According, I will allow this question.

"(4) Confirm that on or about 28th August, 2015, the plaintiff returned to the said Cork University Hospital as her leg was very swollen whereupon the plaster was loosened around her toes."

I am not going to allow this question as it involves a subjective element on the part of the plaintiff, being her opinion that her leg was very swollen. I do not think that the defendant should be called upon to accept or deny the plaintiff's subjective assessment of the condition of her leg at that time. I disallow this question.

"(5) Confirm that on or about 7th September, 2015, a new plaster cast was applied at the Cork University Hospital which extended to just below her right knee."

This appears to relate to a pure question of fact, as to whether or not a below the knee plaster cast was applied on 7th September, 2015. It does not contain any explicit or implicit criticism of the defendant. Accordingly, I will allow this question.

"(6) Confirm that by approximately one week later, the plaintiff had developed severe cramp and severe pain with difficulty in sleeping."

This question is based totally upon the plaintiff's subjective opinion as to her general condition and difficulty in sleeping at the relevant time. It is not appropriate that the defendant should be asked to either confirm or deny the existence of such facts. This is part of the plaintiff's case and she can prove it in the ordinary way by oral testimony at the trial of the action. Accordingly, I disallow this question.

"(7) Confirm that since her initial presentation at Mallow General Hospital the plaintiff had been prescribed analgesia which was increased on an ongoing basis with the passage of time and the increasing intensity of her symptoms."

While the question of the prescription of analgesia over a given period of time, should be readily apparent from the hospital records, as the plaintiff's case is that she was prescribed an inappropriate quantity of analgesia, it is not appropriate that the defendant should be asked to answer such a vague and unspecific question. I will disallow this question.

"(8) Confirm that on or about 14th September, 2015, the plaintiff again attended the Cork University Hospital Accident and Emergency Department because of the extreme severity of her symptoms and that she was there advised by the doctor who saw her on that occasion that the symptoms she was experiencing were only what were to be expected in the aftermath of said surgery and, further, that she was also advised by said doctor that the plaster cast could not be removed as this would destroy the effect of the operation and that she was discharged with a further prescription of analgesics."

This question is totally inappropriate. In effect, it contains a number of sub-questions or statements of fact. One of these involves an assertion that the plaintiff returned to the hospital due to the "*extreme severity of her symptoms*". That is a subjective assessment by the plaintiff of her condition at that time. It is not appropriate that the defendant should have to accept or deny that assertion of fact. This interrogatory goes on to ask the defendant to confirm certain statements that were allegedly made by various unidentified people, while she was at the hospital. I accept the objections taken by Mr. Graydon, B.L., to this interrogatory, that it offends the dicta of Shanley J. in the *Woodfab* case at p. 30, to the effect that questions as to opinions, statements or conduct should not be permitted. Accordingly, I disallow this question.

"(9) Confirm that on 15th September, 2015, the plaintiff was referred to Mallow General Hospital by her general practitioner but they refused to assess her at Mallow General Hospital and referred her to Cork University Hospital which she attended on the same day."

While it may be a matter readily ascertainable from the records, as to whether the plaintiff was in fact referred to Mallow General Hospital by her general practitioner on the date in question, the interrogatory goes on to ask the defendant to confirm that '*they refused to assess her at Mallow General Hospital*'. It may be that the defendants will say that when she presented at Mallow General Hospital, having regard to the fact that she had received operative treatment at Cork University Hospital, they felt it more appropriate that she should be treated at that hospital. Thus it is too simplistic to state that they '*refused*' to assess her on that occasion. The question posed does not admit of a simple yes or no answer. Accordingly, I will disallow this question.

"(10) Confirm that the plaintiff was told at Cork University Hospital when she attended on 15th September, 2015, that her symptoms were only what were to be expected in the aftermath of the surgery which she had undergone, that the right lower limb would not be x-rayed and that the plaster cast would not be removed."

Again, this would appear to fall foul of the dictum mentioned above of Shanley J. in the *Woodfab* case. It is not appropriate to ask the defendant to confirm or deny statements allegedly made to the plaintiff by unidentified personnel at Cork University Hospital. The defendant can be asked factual questions, such as whether or not a specific treatment was given to the plaintiff on a specific date, but they cannot be asked to confirm or deny statements made by unidentified people. I will disallow this question.

"(11) Confirm that the plaintiff was discharged home from Cork University Hospital on 15th September, 2015, with a further prescription for Diazipan and a morphine-based tablet."

This question refers to a pure question of fact, which should be readily ascertainable from the medical records. Accordingly, I will

allow this question.

> *"(12) Confirm that on or about 5th November, 2015, the plaintiff attended at Cork University Hospital and was x-rayed and seen by Ms. Sinead Boran, a consultant orthopaedic surgeon, who advised her that the plaster cast had been inappropriately applied to her right lower limb and caused the cast to be removed and further referred the plaintiff for physiotherapy and prescribed exercises and a special boot for use on the injured foot."*

This question asks whether a particular statement was made by a particular consultant. In effect, it is seeking an admission that a senior doctor at Cork University Hospital stated to the plaintiff that the plaster cast had been inappropriately applied to her right lower limb. It is not appropriate that the defendant should be asked to confirm or deny the plaintiff's account of statements allegedly made by the defendant's servants or agents. I will disallow this question.

> *"(13) Confirm that after 5th November, 2015, the plaintiff's symptoms continued and she remained on analgesics."*

This question is too vague and is based upon the plaintiff's subjective opinion that her symptoms continued and that she continued taking analgesic medication. I will disallow this question.

> *"(14) Confirm that on or about 12th October, 2015, the plaintiff was re-assessed and further physiotherapy was prescribed at Mallow General Hospital."*

This question relates to a pure question of fact as to whether the plaintiff was reviewed on the date stated and whether physiotherapy was prescribed. It seems to me that this should be readily ascertainable from the medical records. I will allow this question.

> *"(15) Confirm that on or about on or about 2nd November, 2015, Ms. Boran told the plaintiff that she should submit to botox injections and an operation to release her achilles tendon."*

This question relates to statements allegedly made by Ms. Boran to the plaintiff. For the reasons already stated, they are not appropriate matters for interrogatories. I disallow this question.

> *"(16) Confirm that on or about 13th November, 2016, [sic] the plaintiff underwent surgery for an achilles tendon release and subsequently a cast was applied. She was also treated with Botox injections."*

Subject to the amendment of the date to read "13th November, 2015", it would appear that this is a purely factual matter which the defendant should be in a position to answer. I will allow this question.

> "(17) Confirm that on or about 23rd December, 2016, [sic] the cast was removed but she was left with tightness in her achilles tendon and she was using a crutch and a boot for several weeks."

Firstly, this interrogatory should be amended to read "23rd December, 2015", however, even with the amendment, the question involves a subjective assessment by the plaintiff that she had "*tightness in her achilles tendon*". It is not appropriate that the defendant should be called upon to accept or deny such a subjective assessment or opinion on the part of the plaintiff. I disallow this question.

The remaining questions can be taken together. They are in the following form:-

> *"(18) Confirm that performing the internal fixation of the fracture was unnecessary."*
>
> *"(19) Confirm that the plaintiff was not advised of the options with regard to treatment of the fracture."*
>
> *"(20) Confirm that the plaster cast was applied in an inappropriate and substandard manner."*
>
> *"(21) Confirm that the plaster cast was applied in a manner which brought inappropriate pressure on the foot and ankle."*
>
> *"(22) Confirm that the plaster cast was applied in a manner which was likely to damage the underlying tissue, including injury to the Achilles tendon and to nerves (as in fact occurred)."*
>
> *"(23) Confirm that the plaintiff's cast was allowed to remain in situ notwithstanding the repeated complaints of pain by the plaintiff as a result of the same and when it ought to have been removed."*

Each of these questions asks the defendant to admit negligence or wrongdoing on the part of its servants or agents. These allegations represent the core of the plaintiff's case against the defendant. As liability has been put in issue by the defendant in its defence, it is pointless giving the plaintiff liberty to issue these interrogatories, as the defendant will presumably just answer "No" to each of the questions posed, unless the defendant has decided to concede liability in respect of some or all of these matters. If it has reached such a conclusion, then it will have to amend its defence, or make formal concessions by way of open correspondence. It seems to me that it is both pointless and inappropriate to ask the defendant by way of interrogatories to admit that it, or its servants or agents, were negligent or in breach of duty in the manner set out in these interrogatories. Accordingly, I will disallow questions (18) – (23) inclusive.

28. In most personal injury actions and particularly in medical negligence actions, a plaintiff's hospital and medical records are usually admitted in evidence without formal proof. This is entirely sensible, due to the fact that in the vast majority of cases, there is not a great dispute as to the fact that the plaintiff was present in the hospital on the dates recorded, nor that certain operative or other treatment was given to the plaintiff as recorded in the notes. The issue usually centres upon whether the doctor who performed the particular treatment in question, did so in a careful and professional manner. The admission of the hospital and medical records into evidence without formal proof, means that the case can be dealt with in a sensible and cost effective way, due to the fact that the plaintiff is not put to the trouble or expense of proving simple facts that are not really in dispute between the parties, such as the dates on which he or she attended at the hospital for treatment and generally, as to the nature of the treatment or tests that were carried out on each occasion. If a defendant has an objection to the content of any part of the medical records, or to any particular document therein, they can always admit the records generally, but reserve their position in respect of certain identified documents.

29. It seems to me that in this case, if the defendant is asked to admit into evidence without formal proof the records from Mallow General Hospital and Cork University Hospital, this will obviate the need for the vast bulk of the interrogatories which the plaintiff sought to serve and will lead to a great reduction in both costs and the use of court time. I have to say that in my experience the defendant and the State Claims Agency and their legal advisors, have usually taken a reasonable and pragmatic approach to the administration of hospital records into evidence without formal proof. The attitude of both a plaintiff and a defendant at the pre-trial stage, are matters which can be taken into account when determining costs at the conclusion of the action.

30. For the reasons set out in this judgment, the Court gives the plaintiff leave to serve on the defendant the interrogatories bearing numbers 1, 2, 3, 5, 11, 14 and 16 in the draft notice exhibited in Mr. O'Sullivan's affidavit. Leave is refused in respect of the remainder of the interrogatories.