Neutral Citation: [2016] IEHC 390

THE HIGH COURT

[2015No.3682P]

BETWEEN

ROSEMARY POWER

PLAINTIFF

AND

TESCO IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2016.

Part 1

Introduction

1. While working as a general retail assistant with Tesco Ireland Limited, Ms Power injured herself in July, 2014 when she fell over shopping crates that had been placed in her way. She has since commenced these personal injuries proceedings. Tesco concedes that the accident occurred but denies that Ms Power suffered the various injuries that she claims; and it requires that Ms Power prove the causal link between the accident and the injuries that Ms Power claims to have suffered.

2. Pursuant to O.31, r.12 of the Rules of the Superior Courts 1986, as amended, Tesco now comes to court seeking discovery of various categories of medical records. The full categories, as stated in the notice of motion, are identified later below. In its solicitor's affidavit offering the different rationales for each of the categories of documentation of which discovery is sought, there appears the additional statement that "Sight of the said medical records is also sought by way of disclosure in accordance with the decision of the Supreme Court in the case ofMcGroryv. ESB [2003] 3 I.R. 407." And during the hearing of the within application, the court was referred in passing to the decision in McGrory. Notably, however, no order has been sought by Tesco under O.39, r.47, by reference to some alleged want of disclosure by Ms Power.

Part 2

Disclosure and Discovery

3. Personal injury proceedings are a sub-category of civil litigation with their own particular concerns when it comes to issues of disclosure and discovery. The most significant distinguishing feature of personal injuries cases is of course the disclosure requirements extant under the Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998(S.I. 391 of 1998) which added a new series of rules (rules 45-51) to Order 39 of the Rules of the Superior Courts that formalised and amplified upon the judicially approved arrangements as to disclosure that had previously pertained.

4. Order 39, rule 45(1)(a) of the Rules of the Superior Courts, 1998 provides that the disclosure rules apply to "any claim for damages in respect of any personal injuries to a person howsoever caused". This is a form of wording which suggests that there must be some connection or relation between a plaintiff's claim and the personal injuries s/he has sustained, and this in itself frames rules 45 to 51.

5. Order 39, rule 46(1) and (2) require parties to disclose two categories of information. In summary, these are (1) schedules listing all reports from expert witnesses intended to be called, and (2) statements detailing certain prescribed information such as the names and addresses of witnesses intended to be called and a full statement of all items of special damage. Disclosure between the parties should generally be contemporaneous. As to (1), only expert reports prepared by an expert whom it is intended to call to give evidence need be disclosed; if, at any time prior to disclosure, an expert ceases to be an expert whom it is intended to call to give evidence, her or his expert report need not be disclosed.

6. Notably, a party to litigation is required only to disclose reports prepared by experts. Order 39, rule 46(1)(e) gives some guidance as to who might be considered an expert; however, it is not a definitive listing of who constitutes an expert. For example, it does not mention psychotherapists who are undoubtedly experts in their professional field. To allow for the evolution of new expert disciplines in the ever-expanding domain of science, this Court would tend to be guided by the reference in s.2 of the Civil Liability and Courts Act 2004 to expert evidence being "evidence of fact or opinion given by a person who would not be competent to give such evidence unless he or she had a special skill or expertise". So when, for example, a solicitor is deciding if a particular report is an expert report, the question s/he needs to pose to herself or himself is whether the author of that report is a person who would not be competent to offer the opinions contained in that report unless s/he had a special skill or expertise arising.

7. Order 39, rule 45(1)(e) defines what is meant by a report. Although it does not prescribe a form of report, if an expert is to serve the purpose for which a report is called, any opinion disclosed by an expert in her or his report ought to touch upon the factual matrix on which that opinion is based. An expert need not commit to writing every opinion that s/he holds; however, the effect of Payne v. Shovlin [2006] I.E.S.C. 5, a case not opened to the court but well known to practitioners in the field of personal injuries, appears to be that any expert opinion committed to written form, favourable or adverse, ought to be disclosed.

8. The most elementary form of disclosure in personal injuries proceedings is when a plaintiff tenders herself or himself for examination by a physician retained by the defendant. This has happened in the within proceedings. The uneasy balance between a plaintiff's constitutional right to privacy and the constitutional demands as to fairness of proceedings which any such examination presents is pragmatically reconciled by the courts through their being willing to grant a stay pending a plaintiff's attendance for medical examination. This practice has received the sanction of the Supreme Court in McGrory v. ESB [2003] 3 I.R. 407 (considered below).

And that sanction removes any doubt which might perhaps otherwise have presented as to whether, by granting such a stay, the courts were compromising to some extent a plaintiff's right to privacy.

9. McGrory imposes a general duty of cooperation on plaintiffs in personal injury cases, especially as regards a plaintiff's attending for examination with a defendant's doctor. Stated briefly, it seems to this Court that the following principles can properly be identified from the judgment of Keane C.J. for the Supreme Court in that case.

I. Promotion of Settlements.
[1] The interests of justice are served by the promotion of settlements rather than the prolongation of litigation and by the possibility of early, complete preparation for both parties to a trial rather than by obliging one party to delay its full preparation until after the trial has started. (McGrory, 412 (by reference to O'Sullivan v. Herdmans Ltd. [1987] 1 W.L.R. 1047, 1056)).

II. Granting a Stay.
[2] The court has ample (inherent) jurisdiction to grant a stay whenever it is just and reasonable so to do. (McGrory, 411 (by reference to Edmeades v. Thames Board Mills [1969] 2 Q.B. 67)).

[Keane C.J. later identifies, at 415, three instances where this inherent jurisdiction "should be exercised", viz. where a plaintiff (a) (i) refuses to submit to medical examination or (ii) refuses to disclose his medical records to the defendant, or (b) refuses to permit the defendant to interview his treating doctors. Given Keane C.J.'s separate endorsement, in McGrory, of the judgment of the Court of Appeal of England and Wales in Dunn v. British Coal Corporation [1993] I.C.R. 591, it appears that the reference to non-disclosure of medical records is to relevant medical records relating to injuries which are the subject of the action.]

III. Interviewing Opponent's Witnesses.
[3] There is no property in a witness of fact. (McGrory, 412 (by reference to Harmony Shipping Co. v. Saudi Europe [1979] 1 W.L.R. 1380, 1384)).

[4] The court, vested with the primary duty of ascertaining the truth, has a right to every man's evidence. (McGrory, 413 (by reference to Harmony)).

[5] No side to proceedings can debar the court from ascertaining the truth by seeing a witness of fact before trial or by purchasing his evidence or by making communication to him. (McGrory, 413 (by reference to Harmony)).

[6] No side to proceedings can prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena. (McGrory, 413 (by reference to Harmony)).

[7] While many communications between a solicitor and an expert witness will be protected by legal professional privilege, the preceding points under this heading apply also to expert witnesses. (McGrory, 413 (by reference to Harmony)).

IV. Patient Confidentiality.
[8] The right of the patient to confidentiality ceases when he puts his health in issue by claiming damages in a lawsuit. This is because the right to confidentiality is eclipsed by the right of those facing the action to know the basis and scope of the claim being advanced. (McGrory, 413 (by reference to Hay v. University of Alb Hospital (1991) 2 Med. L.R. 204, Nur v. John Wyeth & Brother Ltd. (1996) 7 Med. L.R. 300); see also McGrory, 414).

[9] A plaintiff who seeks to bring an action but, by his own conduct, prevents material evidence being obtained by the other side and placed before the court is impeding the process of law. (McGrory, 413 (by reference to Shaw v. Skeet (1996) 7 Med. L.R. 371); see also McGrory, 414).

[10] The court must be able to ensure that the defendant has access to any relevant medical records and to obtain from the treating doctors any information they may have relevant to the plaintiff's medical condition. (However, the plaintiff cannot be required to disclose medical reports in respect of which he is entitled to claim legal professional privilege). (McGrory, 414).

V. Discovery as an Alternative.
[11] There is no room in properly conducted litigation for an approach which denies one side access to relevant material which will be available at a later stage of the proceedings by discovery or through disclosure of reports and statements. (McGrory, 414).

[12] A plaintiff is not entitled to impede access to relevant material by withholding his consent to a treating doctor giving information as to his condition when that information will in any event be available at a later stage. (McGrory, 414).

VI. Seeking Medical Examination.
[13] There is a right on the part of a defendant in an action where the plaintiff claims damages for personal injuries (a) to have the plaintiff medically examined, (b) to have access to (à la Dunn) relevant medical records, and (c) to interview his treating doctors. This right is not dependant on the pleadings having closed because, absent agreement on quantum, damages are always in issue. (McGrory, 414).

[14] Once proceedings have been instituted, (a) a medical examination of the plaintiff, (b) full access to relevant medical records, and (c) interviews with his medical advisors, are of assistance in enabling a defendant to form a view as to (i) the amount of damages which the plaintiff is likely to recover and (ii) any lodgement which they should prudently make in court with their defence. (McGrory, 415).

[15] Whether or not liability is a live issue in a case, making the material just referred to at an early stage of litigation, instead of withholding it until the action itself when it will have to be produced, can only facilitate earlier settlement of actions. (McGrory, 415).

10. At first glance, McGrory might seem to open up a brave new world of disclosure, but in truth it is difficult to see that it has done anything to change the obligations that otherwise arise for parties to personal injuries proceedings pursuant to their discovery obligations under O.31, r.12 of the Rules of the Superior Courts. This is because McGrory is concerned with relevant medical records, the critical test for discovery is relevance and necessity, and, when it comes to necessity, as Murray J. observed in Framus v. CRH plc [2004] 2 I.R. 20, 38, "[T]he primary test is whether the documents are relevant to the issues between the parties", but, as Murray J. went on to note, "Once that [relevance] is established it will follow in most cases that…discovery is necessary for the fair

disposal of those issues." Proportionality has its role to play in this.But the first focus is on relevance (with necessity generally tagging along and proportionality feeding in).

11. One question that does arise, and which is not answered by McGrory, nor it seems more generally is where the outlying borderline lies between medical records that are 'relevant and necessary' and those that are not. Given Keane C.J.'s favourable reference to Dunn in McGrory – albeit in a particular regard –it might be considered that the decision of the Court of Appeal of England and Wales in that case provides a useful starting-point in seeking to answer this question. It offers the proposition that general discovery of a plaintiff's entire pre-medical history ought to be allowable. However, this is but a starting-point: discovery, were it always or even widely to be ordered on this basis, would almost invariably be disproportionate (oppressive). Hence it would seem to this Court that 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 (with the usual right of the court, as acknowledged in McGrory, to grant a stay), 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.

12. In this last regard, the court notes that there is, it seems, a not uncommon practice on the part of the courts when ordering discovery of a plaintiff's prior medical history to confine that discovery generally to a three-year period in a bid to ensure proportionality and avoid oppression in the discovery process. Be that as it may, there is no presumption that three years is good, with anything shorter being untypical and anything longer verboten: a shorter or longer period, stretching in theory at least to a plaintiff's entire medical history (though it is difficult to conceive that many circumstances would present in which this would be appropriate) may be merited in the particular circumstances presenting in any one case.

13. Armed with the foregoing principles, what discovery ought to be ordered in this case?

Part 3

Discovery to be Ordered
14. The court identifies hereafter the detailed categories of documentation of which discovery is sought by Tesco, the rationale offered for the discovery of each category, and what, if any, order the court will make in respect of each category of discovery sought.

Category 1.
Documentation Sought: All medical notes/records to include (but not limited to) all admission and all discharge notes/records, medical reports, scans and other documentation and materials pertaining to the Plaintiff's attendance at the Accident & Emergency Department of South Tipperary General Hospital, on the 22nd of July, 2014, and any subsequent attendance at South Tipperary General Hospital, including any diagnosis of, or investigation and treatment prescribed in respect of the same, in the possession, power or procurement of the Plaintiff, including all notes, memoranda, supporting documentation and correspondence.

Rationale Offered for Discovery Sought: Ms Power alleges that on 22nd July, 2014, she sustained injuries to her face, nose, knees, right forearm, right wrist and hands, as a result of falling over shopping crates at the Defendant's premises. The Defendant has joined issue with the Plaintiff in this regard, and the Plaintiff's medical records will clearly be of significance to the Judge's consideration of the relationship between the personal injuries allegedly sustained and the accident complained of. The aforementioned discovery is therefore necessary for fairly disposing of the issues between the parties and for the saving of costs. Sight of the said medical records is also sought by way of disclosure in accordance with the decision of the Supreme Court in McGrory.

Ms Power's Response: Disclosure by way of medical examination has already occurred through examination of Ms Power by a physician appointed by the defendant and that physician is free to liaise with Ms Power's doctors and consult their notes and records. Moreover, absent proof that these documents are necessary as opposed to desirable, discovery is declined.

Decision: These documents are relevant and necessary to a proper disposal of the proceedings. The court will order this category of discovery as sought. Having ordered discovery, it does not appear necessary for the court to consider the issue of disclosure further at this time.

Category 2.
Documentation Sought: All medical notes/records/scans and other memoranda compiled by Dr Stephanie Dowling GP in respect of Ms Power for a period of twelve months immediately subsequent to the accident of 22nd July, 2014.

Rationale Offered for Discovery Sought: The discovery sought is, Tesco claims, necessary for the purpose of establishing the precise circumstances giving rise to the injuries complained of and the nature and extent of Ms Power's subsequent out-patient treatment with a view to mitigating her loss. This discovery, Tesco claims, is necessary for fairly disposing of the cause or matter between the parties. Sight of the said medical records is also sought by way of disclosure in accordance with the decision of the Supreme Court in McGrory.

Ms Power's Response: Disclosure by way of medical examination has already occurred through examination of Ms Power by a physician appointed by the defendant and that physician is free to liaise with Ms Power's doctors and consult their notes and records. Moreover, absent proof that these documents are necessary as opposed to desirable, discovery is declined.

Decision: These documents are relevant and necessary to a proper disposal of the proceedings. The court will order this category of discovery as sought. Having ordered discovery, it does not appear necessary for the court to consider the issue of disclosure further at this time.

Category 3.
Documentation Sought: All medical notes/records/scans of the Plaintiff from all treating physicians, general practitioners, consultants or other specialists, physiotherapists whatsoever with whom the Plaintiff attended for a period of five years up to and including the date of the alleged accident, the subject matter of the within proceedings, including any diagnosis, investigation and prescribed

treatment, in the possession, power or procurement of Ms Power, including all notes, memoranda, supporting documentation and correspondence.

Rationale Offered for Discovery Sought: The discovery sought is, Tesco claims, necessary for the purpose of establishing the precise circumstances giving rise to the injuries complained of, and to ascertain what role Ms Power's pre-accident history plated in respect of Ms Power's alleged personal injuries on foot of the accident the subject matter of the within proceedings. Ms Power maintains that she has suffered diminished functional capacity, together with substantial and persistent pain and suffering as a consequence of the accident complained of. Notwithstanding the extensive nature of the Plaintiff's complaints, X-rays and scans performed following the accident complained of did not disclose any obvious abnormalities, and the aforementioned discovery sought will clearly be of significance to the injuries already sustained and the accident contended for. The discovery therefore is, Tesco claims, necessary for fairly disposing of the issues between the parties and for the saving of costs. Sight of the said medical records is also sought by way of disclosure in accordance with the decision of the Supreme Court in McGrory.

Ms Power's Response: This category of discovery represents a 'fishing' exercise.

Decision: Given the discordance between the injuries claimed and the X-ray and scan results, it appears to the court that discovery of this category of documentation is relevant and necessary and thus it will order this category of discovery as sought. The court is entitled to have regard to proportionality and will therefore limit discovery of all of this category of documentation to a three-year period before the accident. Having ordered discovery, it does not appear necessary for the court to consider the issue of disclosure further at this time.

Category 4.
Documentation Sought: All records/notes/scans from all treating physiotherapists and psychotherapists for a period of twelve months immediately subsequent to the date of the accident, the subject matter of the within proceedings, including any diagnosis, investigation and prescribed treatment, in the possession, power or procurement of Ms Power, including all notes, memoranda, supporting documentation and correspondence.

Rationale Offered for Discovery Sought: Ms Power has maintained that she has suffered diminished functional capacity following the accident complained of. She maintains that she has also been rendered hypervigilant of tripping hazards on foot of the accident complained of. Tesco has joined issue with Ms Power in this regard. The discovery, Tesco claims, is therefore necessary for the purpose of establishing the steps taken by Ms Power to mitigate the alleged symptoms and to establish precise circumstances giving rise to the injuries complained of. Sight of the said medical records is also sought by way of disclosure in accordance with the decision of the Supreme Court in McGrory.

Ms Power's Response: Disclosure by way of medical examination has already occurred through examination of Ms Power by a physician appointed by the defendant and that physician is free to liaise with Ms Power's doctors and consult their notes and records. Moreover, absent proof that these documents are necessary as opposed to desirable, discovery is declined.

Decision: These documents are relevant and necessary to a proper disposal of the proceedings. The court will order this category of discovery. Having ordered discovery, it does not appear necessary for the court to consider the issue of disclosure further at this time.

Category 5.
Documentation Sought: All medical notes/records/scans to include (but not limited to) admission and discharge records from any hospital attended by Ms Power or from any hospital from which treatment was received for a period of five years up to and including the dates of the accident, the subject matter of the within proceedings.

Rationale Offered for Discovery Sought: The discovery sought is, Tesco claims, necessary for the purpose of establishing the precise circumstances giving rise to the injuries complained of, and to ascertain what role Ms Power's pre-accident history played in respect of her alleged personal injuries on foot of the accident the subject-matter of the within proceedings. This discovery is therefore, Tesco claims, necessary for fairly disposing of the issues between the parties and for the saving of costs. Sight of the said medical records is also sought by way of disclosure in accordance with the decision of the Supreme Court in McGrory.

Ms Power's Response: This category of discovery largely duplicates Category 3. And, as with Category 3, this category of discovery represents a 'fishing' exercise.

Decision: Except as regards the hospital admission and discharge records, this category of discovery largely duplicates Category 3. It appears to the court that discovery of the admission and discharge records to which reference is made is relevant and necessary for a fair disposal of the proceedings. The court will therefore order discovery of the said hospital admission and discharge records; to avoid unnecessary duplication the balance of this category is refused. The court is entitled to have regard to proportionality and will therefore limit discovery of this category of documentation to a three-year period before the accident. Having ordered discovery, it does not appear necessary for the court to consider the issue of disclosure further at this time.

15. The court notes that so far as discovery of the above documentation is concerned the usual arrangements apply: the party making discovery (Ms Power) is obliged to inform her opponent (Tesco) if documentation clothed by the order of discovery is privileged. Thereafter privilege can be relied upon by Ms Power to prevent Tesco from inspecting the documentation so clothed.

16. Finally, if some deficiency (unidentified thus far to the court) is contended by Tesco to present by reference to such disclosure as has hitherto occurred in these proceedings, it is open to Tesco to make suitable application under O.39, r.47 of the Rules of the Superior Courts.