THE COURT OF APPEAL

[2016, No. 37]

Finlay Geoghegan J.
Irvine J.
Hogan J.

BETWEEN

RICHARD MURPHY

PLAINTIFF/RESPONDENT

AND

DEPUY ORTHOPAEDICS INC., DEPUY INTERNATIONAL LIMITED,

DEPUY FRANCE AND THE HEALTH SERVICE EXECUTIVE

DEFENDANTS/APPELLANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 3rd. day of February 2016

1. This is an appeal by the second and third named defendants (to whom I will refer as "the defendants") from an order made by the High Court (Barr J.) on 26th January 2016, in which he directed those defendants to reply to particulars Nos. 2 and 3 in the plaintiff's request for particulars dated 21st December 2015.

Background
2. The plaintiff claims damages for personal injuries following the insertion of an allegedly defective artificial hip device. The hip replacement device was a product manufactured, supplied, distributed and/or produced by the defendants.

3. The plaintiff gave particulars of the alleged defects in the hip replacement device in a letter dated 7th February 2014 at para. 1(a) to (i) inclusive. The plaintiff, *inter alia*, makes a claim pursuant to the provisions of the Liability for Defective Products Act 1991.

4. The defendants, in the initial defence delivered, denied that they were liable to the plaintiff pursuant to the 1991 Act.

5. By an order of the High Court (Binchy J.) of 14th December 2015, they were permitted to amend their defence so as to plead:

> "3(e) Without prejudice to the generality of the foregoing denial, it is denied that the second and third named defendants breached the provisions of section 2 of the Liability for Defective Products Act 1991 by manufacturing, producing, marketing, distributing and/or supplying a 'defective product' within the meaning of section 5 of the Liability for Defective Products Act 1991 or at all.
>
> (f) Further, and without prejudice to the denial that the product was defective within the meaning of the Liability for Defective Products Act 1991, the second and third named defendants will rely on section 6(e) of the Liability for Defective Products Act 1991."

Further particulars were sought on 21 December 2014 in relation that amendment which included:

> "(2) What are the defects in the plaintiff's hip which could not be discovered on the date on which the plaintiff's hip product was put into circulation.
>
> (3) What was the state of scientific and technical knowledge at that time?"

The responses given were:

> "(2) The second and third named defendants deny any alleged defects in the product. This is explicitly pleaded in the defence.
>
> (3) This is a matter for evidence."

6. Rejoinders were raised and the replies repeated.

7. The action was listed for hearing in the week beginning 1st February. A motion was issued on 19th January seeking to compel replies to the particulars which was heard and determined by Barr J. on 26th January 2016. An appeal was immediately lodged and the hearing put back for a week.

8. At the time of the motion to compel replies in the High Court and before this Court, all expert reports had been exchanged pursuant to the disclosure rules. .

9. The parties, in advance of the hearing of the appeal, exchanged position papers. The dispute in relation to particular No. 2 was resolved in the course of the hearing. The defendants had maintained that the plaintiff was, in effect, seeking to have them concede the existence of defects or liability. The plaintiff disputed this and contended that the particular sought asked the defendants to specify in relation to which of the **alleged** defects the defence based upon s. 6(e) of the 1991 Act arises. Counsel for the defendants confirmed that they proposed, if necessary, maintaining the defence in reliance upon s. 6(e) in respect of each of the alleged defects

set out at para. 1 of the replies to particulars of 7th February 2014. That response answers the clarified particular 2 and it no longer remained in issue at the appeal hearing.

10. The live dispute at the end of the hearing relates to the particulars sought at paragraph 3.

1991 Act
11. The defendants, as producer of the hip replacement product, are liable pursuant to s. 2 for damages in tort "for damage caused wholly or partly by a defect in his product". Pursuant to s. 4, the onus is on the injured person to prove the damage, defect and causal relationship between defect and damage. However, s. 6 provides:

> "A producer shall not be liable under this Act if he proves –
>
> . . .
>
> (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered or
>
> . . ."

12. It was in this statutory framework and having regard to the amendment made to the defence in December 2015 that particulars were sought on behalf of the plaintiff in terms "what was the state of scientific and technical knowledge at that time?" It is clear, that the time referred to, from particular No. 1, was the date upon which the hip product inserted into the plaintiff was put into circulation. In the course of the hearing of the appeal, it was also accepted that what was being sought was particulars of "the state of scientific and technical knowledge relevant to the alleged defects in the hip replacement product inserted into the plaintiff at the date it was put into circulation". The defendants, in the replies to particulars, had identified the dates between which three elements of the product were put into circulation which range from March 2005 to November 2005.

13. The plaintiff contends that the state of scientific and technical knowledge relevant to the alleged defects at the time when the product was put into circulation are facts relevant to the amended plea in the defence in respect of which the defendant is obliged to plead or give on request full and detailed particulars. Counsel for the plaintiff relies upon on s. 13(1)(b) of the Civil Liability and Courts Act 2004 which provides:

> "13(1) All pleadings in a personal injuries action shall –
>
> (a) . . .
>
> (b) in the case of a pleading served by the defendant or a third party contain full and detailed particulars of each denial or traverse, and of each allegation, assertion or plea, comprising his or her defence."

14. Counsel for the plaintiff also drew attention to the obligation on a defendant pursuant to s. 14(2) where a defendant delivers a pleading containing assertions or allegations to "swear an affidavit verifying those assertions or allegations". This had been done on the application to amend the defence.

15. Counsel for the defendants disputes that what is sought is properly particulars of a plea to which the plaintiff is entitled, but rather, what is being sought is the evidence intended to be given by the defendants. He also relies upon the fact that the reports and witness statements of the experts have already been exchanged which identifies the relevant scientific articles to be referred to in evidence. He also, to a lesser extent, relies upon the volume of information and the nature of the information which the defendants contend an answer to the particular requires. He referred to an affidavit of Mr. Hurley, solicitor, a partner in McCann FitzGerald, solicitors for the defendants in which he set out these matters.

Conclusion
16. The defendants decided, albeit at a late stage, to plead as an alternative defence (which obviously only arises if the hip replacement product is found to be defective), that they "will rely on section 6(e) of the Liability for Defective Products Act 1991". Having regard to the terms of that section, this alternative plea is to the effect that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of (any defect found by the court to exist) to be discovered.

17. I agree with the submission of counsel for the plaintiff that the question as to what was the state of scientific and technical knowledge at the relevant time, relevant to the alleged defect or, ultimately, any defect found, is a question of fact to be determined by the Court. The onus will be on the defendants to establish, firstly, what was the state of scientific and technical knowledge at the time and, secondly, that such knowledge was not such as to enable the defect in question to be discovered.

18. It cannot be in dispute that the defendants, pursuant to s. 13(1)(b) of the 2004 Act, are obliged to plead or give full and detailed particulars of this assertion or plea in the defence.

19. In accordance with the long-standing authorities of *Mahon v. Celbridge Spinning Company Ltd*. [1967] I.R. 1, and *Cooney v. Browne* [1985] I.R. 185, the object and purpose of particulars is that the other party would know in advance "in broad outline the case he will have to meet at trial". These authorities have been cited with approval since the passing of the 2004 Act: see *Armstrong v. Moffatt & Ors.* [2013] IEHC 148, [2013] 1 I.R. 417.

20. Specifically, in relation to the obligation of a party to give particulars of facts upon which he proposes to rely for making a defence, *Cooney v. Browne* is of assistance. That case concerned an action for damages for libel. The judgment of Henchy J. records that the defendants had pleaded the then so-called rolled up plea "insofar as the words complained of consist of statements or act (sic) they are true in substance and in fact and insofar as they consist of expressions of opinion they are fair comment made in good faith and without malice on the said facts which are a matter of public interest". The plaintiffs had required the defendants to state:

> (a) which of the words complained of are facts of the truth of which they will be proved and which are correct;
>
> (b) what facts are to be relied upon as supporting the factual statements made."

21. Having referred to the purpose of particulars, Henchy J. at p. 192 concluded:

> "It would, of course, be unfair to require the defendants to make a detailed disclosure of their evidence in advance, but all they are asked to do is to identify the matters in the article which they claim to be matters of fact and to state the facts which they intend to prove at the trial for the purpose of supporting those factual statements in the article. Such disclosure is, in my view, not unfair and indeed highly desirable, if not necessary, in the interests of a fair trial".

It appears to me similarly, having regard to the defence now pleaded and the terms of s. 6(e) of the 1991 Act, that what the defendants are being asked to do in this case is to state the facts, i.e., the state of scientific and technical knowledge at the time of circulation relevant to any of the alleged defects pleaded by the plaintiff and upon which they intend to rely for the purpose of advancing any defence they might wish to pursue pursuant to s. 6(e).

22. The plaintiff is entitled to know, in broad outline, the facts upon which the defendants propose relying in pursuing the alternative defence pleaded pursuant to s. 6(e) of the 1991 Act.

23. Insofar as the defendants seek to rely upon the expert reports already delivered, in general, expert reports delivered pursuant to S.I. 391 (which are intended evidence) cannot fulfil an obligation to deliver particulars of fact in a pleading. Their potential use arose on the facts of this appeal by reason of the lateness of the amendment of the defence and the dispute in relation to the particulars raised thereon. Apart from the objection in principle, counsel on their behalf accepted that none of the reports set out clearly the facts which the defendants contend constitute the relevant state of scientific and technical knowledge at the date the product (or relevant parts thereof) was put into circulation. Thus, they cannot constitute the delivery of the particulars to which I have concluded the plaintiff is entitled.

24. Insofar as the defendants rely on the extent of such scientific and technical knowledge and the proximity of the trial, it does not appear to me that it is a good reason for which the plaintiff should not be given particulars to which he is otherwise entitled. Firstly, it was the defendants who applied so close to the trial to amend their defence to plead reliance on s.6 (e) of 1991 Act. Secondly, at the time of application for amendment, an affidavit of verification was sworn by Mr. Christopher Laurence, a senior ASR programme manager employed by the second or third named defendants in which, having referred to the amended defence, he deposed:

> "The assertions, allegations and information contained in the said amended defence which are within my knowledge are true. I honestly believe that the assertions, allegations and information contained in the amended defence which are not within my own knowledge are also true".

25. That affidavit could or should not have been sworn in those terms without the defendants having identified what they consider to be the state of scientific and technical knowledge at the time of circulation relevant to the alleged defects. Unless such information was identified and considered, a view could not have been formed that there was at least an arguable defence pursuant to s. 6(e) of the 1991 Act in respect of each of the alleged defects.

26. Accordingly, I would uphold the decision of the High Court judge to make an order, in substance in terms for the particulars sought. Nevertheless, for the reasons already stated, I would vary the order of the High Court so as now to require a reply to a single particular in substance in the following terms: "the state of scientific and technical knowledge relevant to the alleged defects at the date the hip replacement product inserted into the plaintiff was put into circulation". I note from the replies to particulars that different parts were put into circulation on different dates but all of which were in 2005. I would hear counsel as to any refinement on the wording required to take account of that.