THE HIGH COURT

[2016 No. 1332P]

BETWEEN

FAYE WALSH
(A MINOR, SUING BY HER MOTHER AND NEXT FRIEND MARTINA MAHON WALSH)

PLAINTIFF

AND
THE HEALTH SERVICE EXECUTIVE,
UNA CONWAY AND DECLAN EGAN

DEFENDANTS

Ex tempore Judgment of Mr Justice David Keane delivered on the 22nd January 2019

Introduction
1. A procedural issue has been raised during the trial of this personal injuries action in which the infant plaintiff claims damages for the catastrophic injuries that she sustained in the course of her delivery at University Hospital Galway in the early hours of Monday, 15 August 2011. The first defendant ('the HSE') acknowledges that, as the operator of that hospital, it owed the plaintiff a duty of care in the management of her mother's labour and her delivery there but denies any breach of that duty. The second defendant is the consultant obstetrician and gynaecologist who was providing obstetric services to the infant plaintiff's mother privately at the material time. The third defendant is a consultant obstetrician and gynaecologist who was in private medical practice in partnership with the second defendant and had some interaction with the plaintiff's mother in that capacity. While neither the second nor third defendant was present at the delivery, the infant plaintiff claims against each for negligence and breach of contract in the provision of pre-natal obstetric care. Each denies those claims.

The application
2. On behalf of the HSE, Mr Hanratty S.C. applies to me for a direction that the plaintiff should make the appropriate application under Order 39, rule 58(3) of the Rules of the Superior Courts ('RSC') for permission to offer evidence from an additional independent expert obstetrician, in light of the HSE's understanding that, in addition to the testimony of Dr Mark Waterstone, consultant obstetrician, who is at present in the course of giving evidence, the plaintiff intends to call Dr Paul Wood, another consultant obstetrician. On behalf of the second and third defendants, Ms Egan S.C. supports Mr Hanratty's application for an appropriate direction. On behalf of the plaintiff, Mr O'Brolchain submits that no such direction is necessary or appropriate, as O. 39, r. 58(3) does not apply either in law or in fact to the circumstances presented. In the alternative, Mr O'Brolchain submits that, if the rule in question does apply to those circumstances, then the plaintiff should be given the necessary permission to call Dr Wood in addition to Dr Waterstone.

Some procedural history
3. A personal injuries summons issued on 12th February 2016. Appearances were entered on behalf of the defendants between April and July of that year. The second and third defendants each delivered a defence in April 2017 and the HSE delivered its defence in December of that year. The case was set down, and a notice of trial served, in February 2017.

4. The plaintiff's most recent updated schedule of witnesses, including the names of both Dr Waterstone and Dr Wood, is dated 4 January 2019. The HSE's most recent updated schedule of witnesses is dated 14 January 2019. Beyond the consultant obstetricians identified as witnesses of fact (*i.e.* the second and third defendants and the two consultant obstetricians who were present at the birth of the plaintiff), the HSE identifies two independent expert consultant obstetricians in that schedule as its witnesses. The second and third defendants' most recent updated schedule of witnesses is also dated 14 January 2019. It also identifies two further independent expert consultant obstetricians as witnesses.

5. The trial of the action commenced before me on Tuesday, 15 January 2019. It is estimated to take between 6 and 7 weeks. The present application was made on Friday, 18 January 2019 and I reserved my ruling on it to this morning.

The law
6. Order 39, rule 58(1) of the RSC, as inserted by the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016), introduces a new basic principle that 'expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings.' The new O. 39, r. 58(3) of the RSC provides:

> 'Save where the Court for special reason so permits, each party may offer evidence from one expert only in a particular field of expertise on a particular issue. Such permission shall not be granted unless the Court is satisfied that the evidence of an additional expert is unavoidable in order to do justice between the parties.'

The arguments
7. The plaintiff's legal representatives acknowledge that, in making the plaintiff's case, they propose to call Dr Wood in addition to Dr Waterstone.

8. On behalf of the plaintiff, Mr O'Brolchain argues that O. 39, r. 58(3) does not apply because it is limited in its application to those situations captured by O. 39, r. 58(2) and this is not one. O. 39, r. 58(2) empowers a judge (of his or her own motion or on the application on notice of one of the parties) to make one or more of the following orders or directions: (i) requiring each party proposing to offer expert evidence to identify the field of expertise concerned and the name of the proposed expert; (ii) determining the field or fields of expertise in which, or the proposed experts by whom, evidence may be given; (iii) timetabling the exchange of expert reports; (iv) directing that evidence be given by single joint expert where appropriate; (v) arranging for the selection of a single joint expert in the absence of agreement between the parties; or (vi) stipulating the manner in which a single joint expert is to be remunerated.

9. The defendants submit that O. 39, r. 58(3) is a free-standing rule that applies to all High Court proceedings in which it is proposed to adduce expert evidence and not simply to those in which the Court makes an order or gives a direction under O. 39, r. 58(2).

10. Second, the plaintiff argues that, while Dr Waterstone and Dr Wood share a field of expertise in obstetrics and gynaecology, the evidence of each will speak to a different issue or issues, bringing it outside the scope of rule 58(3). The defendants, who have already been furnished with the reports of Dr Waterstone and Dr Wood in accordance with the requirements of the Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998 (S.I. 391 of 1998), submit that those two experts address the

same issues.

11. Third, the plaintiff argues in the alternative that the Court should be satisfied that the evidence of Dr Wood on one or more of the same issues as those addressed by Dr Waterstone should be permitted in any event as unavoidable to do justice between the parties for the special reason either that the plaintiff was wrongly induced to believe that the defendants had no objection to such a course because they have each scheduled two independent expert obstetricians as witnesses in their own cause or that the HSE breached the spirit, if not the letter, of O. 39, r. 46 of the RSC in furnishing an updated schedule of expert witnesses on the eve of trial, 14 January 2019, identifying a consultant neonatologist, Professor Wyatt, as an additional expert witness on its behalf, together with a copy of Professor Wyatt's report.

Analysis

12. On the plaintiff's first argument, I can see no basis to find that the application of O. 39, r. 58(3) is limited to cases in which the Court has already made an order or issued a direction under O. 39, r. 58(2). In commenting on the 'important restriction' represented by rule 58(3), the authors of Mills and Mulligan, *Medical Law in Ireland*, 3rd edn. (Dublin, 2017) conclude (at para. 10.30) that it is likely to curtail to some extent the practice whereby parties call multiple experts to deal with the essential questions of liability in clinical negligence cases, with the result that parties must now elect to put their "best foot forward" in the selection of an expert, before acknowledging that there may be many nuances or aspects of such cases that would justify the presentation of the evidence of two or more experts in the same field of expertise on the same questions.

13. On the second issue, I do not accept that it would be appropriate to purport to adjudicate at this stage of the proceedings on the issue or issues that will be addressed in evidence by Dr Wood, based solely upon a comparison between the contents of his report and the evidence so far given by Dr Waterstone, bearing in mind - as Irvine J observed in *O'Driscoll v Hurley* [2015] IECA 158 (Court of Appeal, Unreported, 8 July, 2015) - that the issues in the case may alter as the evidence develops. However, should the trial proceed in the absence of an application on behalf of the plaintiff under O. 39, r. 58(3), the effect of that rule on the presentation of Dr Wood's evidence will have to be considered as that evidence is given, calling into question the prudence of any reticence in that regard on the part of the plaintiff's legal representatives.

14. On the third issue, I am not persuaded that it would be appropriate to permit an application to be brought on behalf of the plaintiff under O. 39, r. 58(3) without notice to the defendants or that it would be right to accede to any such application on either of the grounds so far advanced as constituting a special reason to permit the presentation of the evidence of Dr Wood on any of the same issues as those addressed in the evidence of Dr Waterstone.

15. On the first ground, I do not accept that the plaintiff was wrongly induced to believe that the defendants had no objection to such a course because they each scheduled two other independent expert obstetricians as witnesses on their behalf. That is because O. 39, r. 46(6) of the RSC provides that any party who has previously delivered any report or statement or details of a witness may withdraw reliance on such by confirming by letter in writing that he or she does not now intend to call that witness to give evidence at trial, whereupon the contents of any such report or statement are deemed to reacquire any pre-existing privilege against disclosure. Thus, the identification in a party's schedule of witnesses of two expert witnesses with the same expertise and the disclosure of a report of each addressing the same issues cannot be said to amount to an irrevocable assurance that both such witnesses will be called. Nor could such an assurance be given in any event without first obtaining the permission of the Court under O. 39, r. 58(3), as it does not seem to me that the rule can be disapplied by agreement between the parties, either express or implied.

16. Rather, it seems to me that the identification of two expert witnesses in the same field in a party's witness schedule and the disclosure by that party of expert reports in which they each purport to address the same issue or issues, implies that the party concerned will either be obliged to make an election as to which of those experts to call to present evidence at trial, under O. 39, r. 58(3), and which to withdraw from that party's witness schedule, under O. 38, r. 46(6), or to make an application, under O. 39, r. 58(3) for permission to call both experts.

17. On the second ground, I do not think that the late identification by the HSE of another expert (Professor Wyatt) in a different field of expertise (neonatology) is capable of constituting a special reason to permit the plaintiff to call more than one expert witness in the field of obstetrics on the same issue or issues. On the limited evidence and argument advanced for the purpose of the present application, I cannot know whether the HSE only identified Professor Wyatt as an appropriate expert after the initial delivery of its schedule of witnesses in accordance with the timetable stipulated under O. 39, r. 46(1), and whether it then delivered his report forthwith, in compliance with O. 39, r. 46(4) of the RSC, . Even assuming (without concluding) that it did not, that would only bring me on to a consideration of the effect of non-compliance with the rules as stipulated under O. 39, r. 48.

18. Order 39, r. 48 of the RSC provides:

> 'If at any stage of the hearing of an action it appears to the court that there has been non-compliance with any provision of [s. 45 of the Courts and Courts Officers Act 1995] or these rules, the court may, having heard any such evidence as may be adduced by the parties in relation to such non-compliance, make such order as it deems fit including an order prohibiting the adducing of evidence in relation to which such non-compliance relates or may adjourn the action to permit compliance with the provisions of the section or these rules (as the case may be) and on such terms and conditions as seem appropriate and may make such order as to costs as appears justified in the circumstances.'

19. If the plaintiff's legal representatives wish to bring an application under that rule in respect of the proposed evidence of Professor Wyatt, they are at liberty to do so.

20. The terms in which O. 39, r. 48 is couched illustrate the principle that all such procedural rules are the servant of justice and not its master. The relevant tension is that identified by Clarke J in *Moorview v First Active* [2008] IEHC 274 in the closely analogous situation of non-compliance with a case-management direction, rather than a rule of court, whereby the indulgence of non-compliance renders the relevant case management direction or rule of court meaningless, whereas an overly rigid or inflexible policy in the enforcement of the strict letter of a rule or direction may put justice to the hazard, particularly in the absence of any prejudice to the other party resulting from the failure of the party concerned to comply with it.

21. Bearing that principle in mind, insofar as the plaintiff's legal representatives may wish to argue that there is any nuance or aspect of this case that would justify the presentation of the evidence of Dr Waterstone and Dr Wood on the same issue or issues (beyond the two specific arguments that I have just rejected), I would be disposed to permit the plaintiff's legal representatives a reasonable opportunity to bring the necessary application under O. 39, r. 58(3) of the RSC on notice to the defendants. Conversely, if no such application is brought and the plaintiff calls Dr Wood as an independent expert consultant obstetrician in addition to Dr Waterstone,

the application of the rule will have to be considered then by reference to whatever issue or issues the plaintiff seeks to have Dr Wood address. But it does not seem to me to be appropriate to direct the plaintiff to bring any such application and I do not propose to do so.