APPROVED **[2021] IEHC 104**

THE HIGH COURT

2019 No. 3435 P

BETWEEN

DERMOT McCORRY

PLAINTIFF

AND

MARGARET McCORRY

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 February 2021

INTRODUCTION

1. This matter comes before the High Court by way of an application for the discovery of documents in personal injuries proceedings. The proceedings arise out of a road traffic accident. Liability has been admitted by the defendant, through her insurers who have carriage of the proceedings, and the case now proceeds as an assessment of damages only.
2. The defendant has sought discovery of two broad categories of medical records as follows. The first category comprises the plaintiff's medical records for an eight year period prior to the accident. The second category comprises the plaintiff's medical records for a three-month period post-accident. (The precise wording of the motion is addressed towards the end of this judgment).

PROCEDURAL HISTORY

3. Insofar as relevant to the discovery application, the procedural history is as follows. The claim for damages arises out of a road traffic accident on 7 March 2018. As appears from the personal injuries summons, the plaintiff had been a passenger in a motor vehicle being driven by the defendant (his wife). It appears that the vehicle skidded on black ice; left the road and went down into a ditch; and turned over onto its side.

4. It is pleaded that, at the scene of the accident, the plaintiff was aware of pain affecting both of his shoulders, the front of his chest, his back and abdomen. The plaintiff was treated at Cavan General Hospital.

5. Following a further examination on 5 April 2018 (that is, some four weeks after the date of the accident), the plaintiff's consultant medical advisor is reported as having confirmed that the plaintiff suffered and sustained soft tissue musculoskeletal injuries to his spine, chest, both shoulders and abdomen due to the road traffic accident. The plaintiff also suffered and sustained abrasions to his right shin.

6. It is next pleaded that the plaintiff developed progressive right pelvic pain subsequent to the accident. The plaintiff ultimately elected to proceed with surgery involving the total replacement of his right hip. The procedure was carried out on 29 June 2018, that is, some three months after the date of the accident.

7. The personal injuries summons discloses that the plaintiff has a very complex medical history. The plaintiff suffers from Parkinson's disease. The plaintiff had also suffered from prostate cancer, and the treatment for this (radiotherapy) has resulted in a softening of the bones in his lower back and pelvis. He also had a history of left inguinal hernia repair (approximately seven years prior to the accident). At the time of the accident, the plaintiff had had a supra pubic catheter inserted.

8. The defendant served a notice for further and better particulars on 24 August 2020. The plaintiff was specifically asked to confirm that his hip replacement in June 2018 was not a sequela of the accident on 7 March 2018. The plaintiff was also asked to confirm that his treatment in Cavan General Hospital, in the aftermath of the accident, did not include any treatment for right hip injury or pain.

9. The plaintiff's solicitors replied to the notice for further and better particulars on 23 November 2020. In response to the queries raised in respect of the plaintiff's hip replacement, it was stated as follows.

> "The queries posed in this paragraph stray significantly beyond the scope of a notice (i)- (vi) for particulars and the legal position as we have recorded it in the objection above. Questions of this nature can be posed in the form of cross examination at the trial of the action. For the avoidance of any doubt the plaintiff will make the case that the road traffic accident which is the subject matter of these proceedings amounted to a contributory/precipitating factor in relation to the subsequent hip operation. The plaintiff began to experience symptoms affecting his hip within a relatively short period post the accident. The plaintiff was admitted to the Mater Hospital on the 25 May 2018 (2 months post-accident). He had a hip operation carried out on the 29 June 2018. Moreover, the plaintiff's mobility was considerably worse since the accident."

10. As appears, the plaintiff's case is that the road traffic accident amounted to a contributory or precipitating factor in relation to his subsequent hip operation. This is so notwithstanding that there does not appear to have been any complaint made in respect of his hip in the initial weeks after the accident.

11. The solicitors acting on behalf of the defendant's insurers sought voluntary discovery by letter dated 5 December 2019. Following an exchange of correspondence, a motion seeking discovery was issued on 27 February 2020. The plaintiff has since sworn a limited affidavit of discovery confined primarily to (i) his medical records for a period of five years prior to the date of the accident, and (ii) the initial attendance records from Cavan General Hospital on the day of the accident.

12. The hearing of the discovery motion was delayed as a result of the restrictions on court sittings imposed as part of the public health measures in response to the coronavirus pandemic. The motion ultimately came on for hearing before me on 15 February 2021.

MEDICAL EXAMINATION AND REPORT

13. The plaintiff had been examined on 14 January 2020 by a consultant in emergency medicine, Mr. Aidan Gleeson, nominated by the defendant's insurers. Mr. Gleeson subsequently prepared a report dated 23 January 2020. The report had been compiled by reference to a standard form which contains certain headings and queries.

14. The focus of much of the submissions on the application for discovery were directed to the content of this report. It is necessary, therefore, to set out the key findings of the report in full, as follows.

> "Opinion/Comment/Latest Prognosis
>
> Are the injuries consistent with the accident?
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> The history is of this gentleman sustaining soft tissue injuries of his cervical spine, lumbar spine, right shoulder, chest and right shin in the index accident. It is not consistent with him suffering a definite fracture of the neck of his right femur and I say that for the following reasons:
>
> 1. The mechanism of injury is not consistent with that which would normally cause a right neck of femur fracture. Such fractures are normally seen after falls, but can be seen, although, infrequently in road traffic accident. In the latter case, the mechanism of injury would be if there was a high impact frontal collision, causing the dash/engine to impact on the knee and with that force being transmitted up to the femoral neck, but that is not what happened here. The vehicle this gentleman was in skidded across the road and ended up partially on its side in a dyke, with the passenger side lower most. He was restrained in his seat by his seatbelt. A traumatic neck of femur fracture should not have been caused by such a mechanism.
>
> 2. According to Mr Butt's report, there is no record of Mr McCorry complaining of right hip pain when he was assessed

in the Emergency Department, either on the day of the accident or the following day when he returned with issues relating to his suprapubic catheter. Had he an undisplaced fracture of the hip at that time, pain would have been expected.

3. When Mr McCorry attended with Mr Butt for a medico legal report and review on 05/04/2018, which was four weeks after the index accident, there is no record of him complaining of right hip pain either at that time or before it. I note further that when he was examined by Mr Butt he was able to stand and bend forward, bringing his fingertips to the level of the upper tibia on both sides and he had normal rotation of his lumbosacral spine. If he had a fracture of the neck of femur at that time, even if it was undisplaced, he would have had pain in the right hip and difficulty mobilising, which was not the case.

Are further investigations required?

No.

Is a full recovery expected?

He has made a full recovery from the accident related injuries described above.

Please state the expected time period to full recovery

…

Are late complications expected?

No.

Are further Specialist reports recommended?

I recommend you obtain the opinion of a hip Orthopaedic Surgeon in this case.

> General Comments and Observations
>
> In my opinion, there is insufficient evidence that this gentleman sustained a traumatic intracapsular neck of femur fracture in the index accident and for the reasons described above. It appears more likely that there was another pathological process at play and a further opinion in that regard is recommended from a hip Orthopaedic Surgeon."

DISCUSSION

15. There was some debate at the hearing before me as to whether special rules govern an application for discovery of *post-accident* medical records. The position adopted on behalf of the plaintiff, in the solicitor's replying affidavit and in counsel's oral submission, is that a court will rarely direct discovery of post-accident records, and will only do so in circumstances where there exists a proper evidential basis. Counsel cited the following passages from the judgment of the High Court (Barrett J.) in *Power v. Tesco Ireland Ltd* [2016] IEHC 390 (at paragraphs 11 and 12).

> "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.
>
> 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."
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> * *McGrory v. Electricity Supply Board* [2003] 3 I.R. 407

16. Counsel submitted that no proper evidential basis had been laid for the post-accident discovery in the present case. Emphasis was placed on the fact that, in response to the query on the standard form report "*Are further investigations required?*", Mr. Gleeson had responded "*No*".

17. In reply, counsel on behalf of the defendant submitted that the report had to be read in full, and drew attention to the detailed response to the query "*Are the injuries consistent with the accident?*" (set out in full at paragraph 14 above). More generally, counsel submitted that one of the issues which will have to be resolved at the trial of the action is whether there is a causal connection between the accident and the subsequent hip replacement operation. The position adopted by the plaintiff is that the accident is a contributory or precipitating factor. The emergency consultant's report, however, suggests that another pathological process is at play, and he recommends that a further opinion be obtained from a hip orthopaedic surgeon.

DECISION

18. The guiding principle in any application for discovery is whether the category of documents sought are relevant and necessary. There are, of course, obvious sensitivities

attendant on the disclosure of medical records, and a court must ensure that the nature and extent of the discovery sought is not oppressive. Nevertheless, as explained by the Supreme Court in *McGrory v. Electricity Supply Board* [2003] 3 I.R. 407 (at page 414), an individual who pursues a claim for personal injuries waives the right of privacy which he would otherwise enjoy in relation to his medical condition.

> "Those principles, which have been adopted by courts in other common law jurisdictions, should also, in my view, be adopted in our jurisdiction. The plaintiff who sues for damages for personal injuries by implication necessarily waives the right of privacy which he would otherwise enjoy in relation to his medical condition. The law must be in a position to ensure that he does not unfairly and unreasonably impede the defendant in the preparation of his defence by refusing to consent to a medical examination. Similarly, 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, although the plaintiff cannot be required to disclose medical reports in respect of which he is entitled to claim legal professional privilege."

19. The facts of the present case are such that more extensive discovery is justified than would be the position in many personal injuries proceedings. As is apparent from the personal injuries summons, the plaintiff has a complex medical history. The defendant's insurers are entitled to advance an argument that his current health conditions are attributable to factors other than the accident in March 2018. This is not mere speculation on their part: a report by a consultant in emergency medicine has been exhibited as part of the application for discovery. (The relevant extracts of the report have been set out at paragraph 14 above).

20. Counsel on behalf of the plaintiff appears to elevate the judgment in *Power v. Tesco Ireland Ltd* into an evidential rule that post-accident discovery will not be granted save in circumstances where there is an opinion of a medical expert to the effect that such discovery is necessary. With respect, this is to read too much into the judgment in *Power*. As appears from the passages cited earlier, the judgment goes no further than saying that

a defendant must be able to point to an "evidential indicator" which suggests that the plaintiff's prior medical history may be relevant. It should also be noted that the judgment does not appear to draw any principled distinction between pre- and post-accident medical records.

21. As emphasised by the Court of Appeal in *Micks-Wallace (A Minor) v. Dunne* [2020] IECA 282 (at paragraph 49), it is the court, not an expert witness, that decides whether documentation is relevant and necessary for the purposes of discovery.

> "Of course, the fact that a professional expert witness says that he or she requires documentation to properly present his or her report is a very important consideration to which a Court will have regard in determining whether to direct additional discovery. However, it is not always sufficient to simply record the expression of that view by the expert. It is the Court, not the expert, that decides whether documentation is relevant and necessary for the purposes of Order 31. Many experts if asked what documentation they require to prepare their report are likely to express their requirements as broadly as they can. That is both entirely proper and understandable. However, the Court must be told more than that the expert says he believes he requires particular categories of documents. The concept of '*relevance*' and of '*necessity*' required by law will depend on the circumstances and may not accord with the subjective view of an expert of what is necessary. The Court must be given sufficient information to form its own judgment as to why the material sought is required to address these issues and, from there, to reach its own adjudication as to whether discovery should be directed. Obviously, the amount of information it requires to this end will depend on the case: frequently the necessity of the documents will be so obvious as to require little elaboration. In most cases, the relevance of all medical records may be self-evident where there is an issue as to whether a condition was caused by the accident in issue. […]"

22. The judgment goes on then to explain that further requirements apply where a defendant comes a second or third time and seeks *additional* discovery. This is not a consideration here.

23. I am satisfied that, in the particular circumstances of the present case, discovery of medical records for a three month period post-accident is relevant and necessary for the fair disposal of the case. It is apparent from the pleadings that one of the principal issues

which will have to be resolved by the trial judge is the extent, if any, to which the injuries suffered in the road traffic accident contributed towards the necessity of the hip replacement surgery some three months later. The defendant has exhibited a medical report which opines that it is more likely that there was another pathological process at play. It does not appear from the pleadings that any complaint had been made in respect of hip pain in the initial weeks after the accident. It is reasonable to assume that discovery of the post-accident medical records will assist in demonstrating which complaints were related to the accident and which related to other pre-existing medical issues. The time-limit of three months ensures that the discovery sought is proportionate and not oppressive. This is a short time-limit, and is justified as it coincides with the period between the date of the accident and the date of the hip replacement surgery.

24. The necessity of making discovery of post-accident medical reports might, perhaps, have been avoided had the plaintiff made a fuller response to the request for further and better particulars. At all events, the plaintiff having declined to answer the queries raised, the defendant is entitled to the discovery sought.

25. I am also satisfied that pre-accident medical reports should be provided for an eight year period, and not merely for five years as contended for by the plaintiff. This is because, as pleaded in the personal injuries summons, the plaintiff has a very complex medical history. The plaintiff had suffered from prostate cancer, and it is pleaded that the radiotherapy treatment for this has resulted in a softening of the bones in his lower back and pelvis. Discovery of the plaintiff's medical records are relevant and necessary to the question of the extent, if any, to which the accident contributed to the need for the hip replacement surgery. The medical records are likely to contain details of the ongoing surveillance of the plaintiff's hip condition. The extended period of eight years will

ensure that all records in respect of the diagnosis of, and subsequent treatment of, the plaintiff's prostate cancer will be included.

CONCLUSION AND FORM OF ORDER

26. For the reasons set out herein, the defendant is entitled to discovery of the plaintiff's medical records for the period of eight years prior to the road traffic accident, and to his post-accident medical records for a period of three months from the date of the accident.

27. The attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

28. The parties are requested to correspond with each other on the question of the precise form of the order, and, in particular, should confirm that the second part of the order should refer to "medical records" rather than simply "hospital records". There is some overlap between the two categories identified in the notice of motion, in that the first category includes both pre- and post-accident medical records, but without express reference to the three month time-limit in the case of the latter. The second category specifies the three month time-limit but refers to "hospital records" only. In the event that the parties are unable to reach agreement, short written submissions should be filed within two weeks of today's date.

29. As to the costs of the motion, Order 99, rule 2(3) provides that the High Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order. One of the factors to which regard may be had in the exercise of this discretion is the conduct of the litigation.

30. The starting position, therefore, is that the defendant is *prima facie* entitled to the costs of the motion in that she has been entirely successful. My provisional view is that an order of costs should be made in her favour, with a stay on adjudication and execution pending the determination of the proceedings. If the plaintiff wishes to contend for a different form of costs order, he should notify the defendant's solicitor accordingly; and both sides should then file written legal submissions within two weeks of today's date. Such submissions are not to exceed 2,000 words.

Appearances

Elizabeth-Anne Kirwan for the plaintiff instructed by Garrett J. Fortune Solicitors
Claire Hogan for the defendant instructed by AXA Legal Services Solicitors

Approved
Garrett Simons