COURT OF APPEAL

UNAPPROVED
Record Number: 2023/59
High Court Record Number: 2020/4684P

Costello J. **Neutral Citation Number [2023] IECA 165**

Noonan J.

Binchy J.

BETWEEN/

ASHLING O'SULLIVAN (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND GRACE O'SULLIVAN

PLAINTIFF/APPELLANT

-AND-

MICHAEL O'RIORDAN AND MERCY UNIVERSITY HOSPITAL CORK

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 26th day of June, 2023

1. This appeal is brought by the plaintiff from the judgment and order of the High Court (Phelan J.) whereby the court gave liberty to the plaintiff to deliver 8 interrogatories and refused liberty to deliver 21 others which had been sought by the plaintiff.

2. The case concerns a clinical negligence claim by the plaintiff in relation to her treatment at the second defendant hospital while under the care of the first defendant, a consultant surgeon. In her personal injuries summons, the plaintiff pleads that on the 8th June, 2018, when she was 14 years of age, she was referred by her general practitioner to the Accident and Emergency Department in the hospital with signs and symptoms of

appendicitis. On the following day, she underwent an appendicectomy which is alleged to have been carried out by Mr. Meshkat, a surgical registrar. It is alleged that subsequent to the surgery, the plaintiff developed complications related to sepsis which ultimately transpired to have been caused by an intestinal leak at the caecal pole. She spent almost six months in hospital until her final discharge on the 30th November, 2018. She identifies what she says are the various shortcomings in her treatment arising from these alleged facts.

3. In paragraphs 1 – 12 of the indorsement of claim, the plaintiff pleads various matters including identifying the parties, the duties allegedly due by the defendants to the plaintiff, that she was referred by her GP to the A&E Department with right sided abdominal pain and that on admission, the first defendant met with the plaintiff and her parents and recommended a laparoscopy and if appropriate, laparoscopic appendicectomy.

4. A personal injuries defence was delivered jointly by the defendants putting the plaintiff on proof of both negligence and injury. Of relevance to the application before the High Court, the defendants pleaded as follows at para. 1(c) of the defence:

> *"The defendants do not require proof of the contents of paragraphs 1 – 12 of the indorsement of claim limited to that as set out in the plaintiff's medical records from the defendant hospital."*

5. The effect of this plea appears to be that the defendants admit paragraphs 1 – 12 of the indorsement of claim only insofar as the matters pleaded therein coincide with the plaintiff's medical records from the hospital.

6. The motion before the High Court was grounded on the affidavit of the plaintiff's solicitor, Mr. Denis O'Sullivan. He refers to the pleadings and the fact that after the delivery of the defence, a notice to admit facts was served on the defendants seeking admissions of

the 29 matters that became the interrogatories herein. He then sets out the facts of the matter as pleaded in the personal injuries summons. As well as the particular matters alleged to constitute negligence, the plaintiff also pleads that the defendants failed to obtain the informed consent of the plaintiff or her parents prior to the surgery.

7. Mr. O'Sullivan avers that the defendants delivered a "blanket defence" and have denied the entire narrative as pleaded despite the fact that most, if not all, ought to be non-controversial. He complains therefore that the defendants are seeking to impose unnecessary expense and delay in the conduct of the trial. Accordingly, Mr. O'Sullivan says that in those circumstances, senior counsel advised the service of a notice to admit facts, which was served on 9th August, 2021 but did not elicit a response before the within motion issued on 9th March, 2022. It was only on 25th March, 2022, that the defendants responded, stating simply that it did not comply with the RSC, did not allow yes or no responses and the defendants were not willing to "enter into evidence". In the same letter, the defendants offered to admit the plaintiff's hospital records. The interrogatories the subject of this application were sought by the within motion in identical terms to the notice to admit facts. Mr. O'Sullivan concludes with an averment that the interrogatories are necessary for disposing fairly of the case and for saving costs.

8. No replying affidavit was delivered on behalf of the defendants and thus no issue was taken with any of Mr. O'Sullivan's averments. In particular, the defendants have adduced no evidence to suggest that they either do not understand any of the proposed interrogatories or would have any particular difficulty in answering them.

9. In her judgment, the trial judge referred to some of the leading authorities on interrogatories and the principles to be derived from them and there is no real disagreement between the parties as to the correctness of the legal principles identified by the judge. She

placed particular reliance on the judgment of the High Court (Barr J.) in *McGregor v HSE* [2017] IEHC 504. In that case, the court noted that in most personal injury actions and particularly medical negligence actions, a plaintiff's hospital and medical records are usually admitted in evidence without formal proof. The court was of the view that in the normal way this would obviate the necessity for the vast bulk of interrogatories which might otherwise be necessary. Phelan J. was similarly of the view in the present case that the defendants' offer to admit the plaintiff's hospital records would go in large measure to addressing the need for interrogatories which might otherwise arise.

10. Applying the approach of Barr J. in *McGregor*, the court allowed 8 of the 29 interrogatories but in most cases, significantly reformulated. In refusing 21 of the interrogatories, the judge relied on a range of reasons including that the questions were multifaceted with several components, not amenable to a yes or no answer, related to advice given or invited an admission of negligence.

11. In delivering the judgment of this court in *McCabe v Irish Life Assurance Plc* [2015] 1 I.R. 346, Kelly J. (as he then was) placed particular emphasis on the fact that the delivery of interrogatories is a pre-trial disclosure procedure which is greatly underutilised despite strong encouragement from the Supreme Court as far back as the judgment of Walsh J. in *J. and L.S. Goodbody Limited v The Clyde Shipping Company Limited* (Unreported, Supreme Court, 9th May, 1967). He pointed to the fact that in the Commercial Division of the High Court, interrogatories may be delivered without leave of the court and this has had beneficial effects. He cited with approval the judgment of the High Court (Shanley J.) in *Woodfab Limited v Coillte Teo* [2000] 1 IR 20 where the court said:

> *"... 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."

12. It is clear from O. 31 of the RSC that the delivery of interrogatories may be permitted in any case where it is shown that they are relevant and necessary for the fair disposal of the cause or matter or for saving costs. The scope of interrogatories was commented upon by Costello J. (as he then was) in *Mercantile Credit Company of Ireland v Heelan* [1994] 2 IR 105 where he approved the *dicta* of Lord Esher M.R. in *Mariott v Chamberlain* (1886) 17 QBD 154 (at 163):

"The law with regard to interrogatories is now very sweeping. ... I think we may go so far as to say that it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts in dispute. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue."

13. Before turning to examine the particular interrogatories arising here, there are some points of relevance that are particular to the facts of this case which should be mentioned. The first is that counsel for the plaintiff places particular reliance on the fact that the plaintiff's solicitor has sworn in the grounding affidavit to this motion that the interrogatories are necessary for disposing fairly of the case and also for saving costs. Since this has not been contradicted on affidavit by the defendants, counsel argues that the court is in effect obliged to accept this as being the factual position here. I do not think that this is necessarily

correct. Whether the interrogatories are necessary for disposing fairly of the case or saving costs is ultimately a matter for the court's determination, taking the evidence, the pleadings and all relevant matters into account and cannot be ruled by what is, in effect, a fairly formulaic assertion in an affidavit.

14. As with discovery, the tests of relevance and necessity are governed in significant measure by the terms of the pleaded case which of course define the issues between the parties. In that respect, it seems to me that the manner in which the defendants have chosen to plead their case here has particular significance in the context of this application for interrogatories. The defence is described in Mr. O'Sullivan's affidavit, and counsel's submissions, as a "blanket denial", which I think is not an unfair characterisation. Para. 1(c) appears on its face to make admissions, and indeed this is what the trial judge initially thought in giving her first ruling, before counsel for the defendants pointed the error out to her, pleading that the defendants are prepared to admit paras. 1 – 12 of the indorsement of claim *"limited to that as set out in the plaintiff's medical records from the defendant hospital"*.

15. It sems to me that it is really impossible to understand what is meant by this or how it can be considered as an admission of anything. It presumably calls for some form of reconciliation between what is pleaded, and what is contained in the plaintiff's medical records, but on its face, leaves the court entirely in the dark as to what is actually being conceded here. Indeed, it seems to me that the only positive assertion which appears in the defence is that the complications which befell the plaintiff are known and recognised complications of appendicectomy. Again this is not hugely informative and probably little more than a suggestion that *res ipsa loquitur* does not apply merely by virtue of the occurrence of these complications.

16. This form of pleading has attracted some criticism from this Court in several recent judgments, in particular the judgment of Collins J., then a member of this Court, in *Crean v Harty* [2020] IECA 364. That was also a clinical negligence claim where the plaintiff pleaded that the defendant had failed to obtain her informed consent to the impugned surgery. In his defence, the defendant denied that he had failed to obtain the plaintiff's informed consent. So, the defendant was in effect pleading that he had obtained consent and was asked for particulars of how he did so. He refused to furnish particulars on the basis that the defence consisted of a straight denial and it was not permissible to raise particulars upon a denial.

17. Collins J. disagreed and considered the requirements of s. 13(1)(b) of the Civil Liability and Courts Act 2004 which mandates a defendant in a personal injuries action to give full and detailed particulars of each denial or traverse, and of each allegation, assertion, or pleas, comprising his or her defence. He noted that s. 12 likewise requires a defendant to specify *"the grounds upon which the defendant claims that he or she is not liable for any injuries suffered by the plaintiff".* Referring to these sections, Collins J said they *"are clearly intended to ensure that parties (including defendants) plead with greater precision and particularity so that, in advance of trial, the actual issues between the parties will be clearly identified."* – at para 25. He went on to observe that *"a straight denial"* could not be regarded as complying with the requirements of the Act.

18. The same theme was revisited by Collins J., speaking for this Court in *Morgan v ESB* [2021] IECA 29 when, having referred to *Crean v Harty*, he went on to say that *"Plaintiffs and defendants are required to state clearly and specifically what their claim (or defence) is and identify the basis for it in their pleading and must then verify that claim (or that defence) on affidavit"* – at para 8.

19. In the present case, the point is, not unreasonably, made by counsel for the plaintiff that it took over a year for the defendants to deliver a defence which really admits nothing and gives little insight as to what case will actually be made by the defendants at trial. The observations of Collins J. to which I have referred are apposite in this respect.

20. It seems to me that faced with such an uninformative defence, it is largely unsurprising that the plaintiff would seek to avail to the fullest extent possible of interrogatories. The delivery of interrogatories is clearly of particular relevance in clinical negligence cases where, more often than not, the plaintiff will have little or no knowledge of what befell them while under the care of the defendant(s).

21. It is not in my view always an answer to an application for interrogatories in such claims for a defendant to say that the plaintiff's hospital records will be made available. Though not on affidavit, counsel for the plaintiff in submissions stated that because of the allegedly very poor quality of the hospital records in this case, the plaintiff's experts in effect had to piece together the case largely from the nursing notes obtained on foot of a freedom of information request. Of course, that may or may not be so but nonetheless it does highlight the fact that it cannot always be an automatic answer to an application for interrogatories that the hospital records will be made available.

22. Counsel for the plaintiff submits that while hospital records which are admitted by the defendants may be regarded as evidence of the truth of their contents as against the defendants, the same does not follow insofar as the plaintiff is concerned. In that respect, they remain hearsay. Accordingly, if a particular note from a doctor or nurse were to record that the plaintiff said X or Y, and that is denied by the plaintiff, the defendant is bound by the plaintiff's evidence unless the author of the note is called to prove that the plaintiff did in fact say X or Y – see *Moloney v Jury's Hotel Plc.* [1999] IESC 75.

23. Turning now to a consideration of the individual interrogatories by reference to the same numbering system utilised in the judgment of the High Court:

(I) *Admit that on or about the 8th June, 2018, the minor plaintiff was referred by her general medical practitioner to the Accident and Emergency Department of the second named defendant's hospital with a short history of right sided abdominal pain.*

This was initially refused by the trial judge on the basis that this was admitted in the defence, which as I have noted, was not the case and the judge was so informed. I think this may have led the judge into error in refusing to allow this interrogatory which I would allow subject to the following reformulation:

Was the minor plaintiff referred by her general medical practitioner to the Accident and Emergency Department of the second named defendant's hospital with a short history of right sided abdominal pain on the 8th June, 2018?

(II) *Admit that on 8th June, 2018, the plaintiff was admitted to the second defendant's hospital as a private fee paying patient.*

Again, I would allow this for the same reasons subject to slight amendment:

Was the plaintiff admitted to the second named defendant's hospital as a private fee paying patient on the 8th June, 2018?

(IV) *Admit that on admission to the second named defendant's said hospital, the first named defendants met with the plaintiff and her parents and discussed her condition with them, and offered reassurance that he would be caring for the plaintiff as her consultant surgeon and recommended that she should undergo laparoscopy and, if appropriate, laparoscopic appendicectomy.*

This is one of the "multi-faceted" interrogatories not admitting of a clear yes or no, but could I think be allowed in the following terms:

(a) On admission to the second named defendant's said hospital, did the first named defendant meet with the plaintiff and her parents and discuss her condition with them?

(b) Did the first named defendant advise the plaintiff and her parents that he would be caring for the plaintiff as her consultant surgeon?

(c) Did the first named defendant recommend that the plaintiff should undergo laparoscopy and, if appropriate, laparoscopic appendicectomy?

(VI) Admit that the operation note recorded no difficulty in relation to the surgery.

I agree with the trial judge that this is not shown to be necessary in circumstances where the operation note speaks for itself.

(VIII) Admit that on 10th June, 2018, the plaintiff was reviewed by the said Mr. Belak Meshkat at approximately 10am who raised no concerns and scheduled her to be discharged that same afternoon.

I would allow this subject to the following reformulation:

(a) **Did Mr. Belak Meshkat review the plaintiff at approximately 10am on the 10th June, 2018?**

(b) **Did Mr. Meshkat schedule the plaintiff to be discharged that same afternoon?**

(X) Admit that at 16:00hrs on 10th June, 2018, the plaintiff spiked a temperature of 38.5 degrees C despite completing the course of Augmentin prescribed and a decision was made not to discharge the plaintiff from the second named defendant's hospital.

This was disallowed by the judge as being multifaceted and containing an inappropriate subjective element concerning the plaintiff "spiked" a temperature. In my view it is a proper matter for interrogatories if refined in the following way:

(a) Did the plaintiff have an elevated temperature of 38.5 degrees C at 16:00hrs on the 10th June, 2018?

(b) Had the plaintiff at that time completed a course of Augmentin?

(c) Was a decision made not to discharge the plaintiff from the second named defendant's hospital at that time?

(XI) Admit that after 10th June, 2018 the plaintiff became increasingly unwell and nauseated and that no explanation for her deteriorating condition was offered to the plaintiff's parents who had requested same.

In my view this is too vague and subjective. It is in any event not amenable to a clear yes or no answer and I agree with the trial judge that it should not be permitted.

(XII) Admit that it was only on 15th June, 2018 that an ultrasound of the abdomen was performed on the plaintiff for the first time and that a collection of fluid was discovered to be present in the abdomen but no action was taken after the discovery of the presence of fluid to identify where it was coming from.

I agree that not all of this is permissible on the basis that it, as the judge suggested, seeks in effect an admission of negligence but I would allow it in the following terms:

(a) **Was an ultrasound of the plaintiff's abdomen performed for the first time on the 15th June, 2018?**

(b) **Was a collection of fluid discovered to be present in the abdomen at that time?**

(XIV) *Admit that following the said ultrasound scan, the plaintiff continued to spike temperatures of 39 degrees and was increasingly unwell but still there was no clinical consultant review, no advice was obtained from bacteriology about changes to medication and that the plaintiff was still allowed to eat and drink, although taking very little and complaining of nausea and vomiting.*

I agree with the trial judge that this is far too convoluted, subjective and unclear to be permitted as a valid interrogatory. It invites an admission of negligence.

(XV) *Admit that on 16th June, 2018, the on-call doctor asked for a review of the plaintiff by his consultant, Mr. Adrian O'Sullivan, who advised a CT Scan with contrast.*

The judge disallowed this as being multifaceted and not amenable to a simple yes or no answer, but I think that can be dealt with by reformulating it slightly. She also refused it because this would be obvious from the medical records but that has not been shown to be the case by any evidence:

(a) **Did the on-call doctor ask for a review of the plaintiff by his consultant, Mr. Adrian O'Sullivan, on the 16th June, 2018?**

(b) **Did Mr. Adrian O'Sullivan advise a CT Scan with contrast on 16 June, 2018?**

(XVII) *Admit that on 17th June, 2018, Mr. A. O'Sullivan advised radiological drainage of the pelvic collection but no contrast leakage was identified at this time.*

This was disallowed by the judge as being multifaceted and seeking confirmation of advice but I see no reason why advice per se cannot be the subject of an interrogatory so would allow it in the following terms:

(a) **Did Mr. A. O'Sullivan advise radiological drainage of the pelvic collection on the 17th June, 2018?**

(b) **Was contrast leakage identified at this time?**

(XIX) Admit that after the operation, the first named defendant had never discussed her case with the plaintiff or parents prior to 18th June, 2018.

The judge refused this as inviting agreement to an implication of negligence but I think it can be reasonably couched in neutral terms as follows:

Did the first named defendant discuss the plaintiff's case with the plaintiff or her parents prior to the 18th June, 2018?

(XX) Admit that it was only on the twelfth post-operative day that the diagnosis of "lap appendix complicated by pelvis abscess" appeared in the patient's hospital records for the first time.

The judge felt that this invited agreement with or denial of criticism as well as being evident from the records. I have already dealt with the latter point and as regards the former, I think it can be acceptably rephrased to avoid an implicit criticism or imputation of negligence by putting it as follows:

Was there any entry, in the plaintiff's hospital records, of a diagnosis of "lap appendix complicated by pelvis abscess" prior to the 21st, June, 2018?

(XXI) Admit that it was only on the twelfth post-operative day that the dieticians and microbiologists were asked for advice in the context of sepsis.

Again, this was disallowed on the basis that it constituted advice but as above, I do not think this is a valid reason for refusing it. Accordingly, I would allow it as follows:

Were the dieticians and microbiologists asked for advice in the context of sepsis for the first time on the 21st June, 2018

(XXII) Admit that thereafter IV feeding, either by a peripheral long line or a central line, was supervised by the dieticians, and the plaintiff's oral intake was reduced.

Again, the judge refused this on the basis that it was not amenable to yes or no, which I deal with in the following terms, and also because it should appear in the medical records, again which I have covered.

Was IV feeding, either by a peripheral long line or a central line, supervised by the dieticians, and the plaintiff's oral intake reduced, after the 21st June, 2018?

(XXIII) Admit that an ultrasound guided aspiration of fluid in the right flank was carried out but further imaging by MRI scans on the following day showed a rapid re-accumulation of fluid at which stage the gastroenterologists were asked for an opinion and a decision was taken to do a CT Scan and insert drainage tubes.

This was disallowed as being multifaceted and not amenable to yes/no which is understandable given that it comprises a multiplicity of questions which I think can be properly asked as follows:

(a) Was an ultrasound guided aspiration of fluid in the right flank carried out?

(b) **Did further imaging by MRI scans on the 22nd June, 2018 show a re-accumulation of fluid?**

(c) **Were the gastroenterologists then asked for an opinion?**

(d) **Was a decision taken to do a CT Scan and insert drainage tubes?**

(XXIV) Admit that there was a failure to identify where the leakage of fluid was coming from until on 21st August, 2018, a CT Scan with contrast showed a small defect at the caecal pole, but no extravasation.

I agree with the judge that this is clearly couched in terms which seeks an admission of negligence and should not be permitted.

(XXV) Admit that a sinogram was performed 22nd August, 2018 where dye was put in through the drainage tube, and it passed freely into the caecal pole and into the ascending colon.

The judge refused this again on the basis of the medical records being available, and for the same reason I would allow it subject to the following reformulation:

(a) Was a sinogram performed on the 22nd August, 2018 during which dye was put in through the drainage tube?

(b) Did the dye pass freely into the caecal pole and into the ascending colon?

(XXVI) Admit that the regime of reduced fluids and regular flushing of the drainage tube continued, but the communication persisted and that an attempt to clip the hole in the caecum by means of colonoscopy was made on the 26th October, 2018.

This was refused by the judge for similar reasons to the foregoing, but I think can be permitted in the following terms:

(a) Did the regime of reduced fluids and regular flushing of the drainage tube continue from the 22nd August, 2018 to discharge?

(b) Did the communication identified between the caecal pole and the ascending colon persist?

(c) Was a colonoscopy carried out on the 26th October, 2018 which attempted to clip the hole in the caecum?

(XXVII) Admit that it was only on the 19th November, 2018 that the remaining drain was removed.

This was refused by the judge as being phrased in terms of culpability but I think is allowable as follows:

Was the final drain removed on the 19th November, 2018?

(XXVIII) Admit that the ileocaecal resection, which was scheduled to be performed on 24th November, 2018, as a definitive treatment, was cancelled.

The judge disallowed this as inviting agreement with subjective opinion and not admitting of a simple yes or no answer. It can however I think be acceptably rephrased to read:

(a) Was an ileocaecal resection scheduled to be performed on the 24th November, 2018?

(b) Was the procedure cancelled?

20. In making these amendments to the interrogatories sought, I would wish to emphasise that it is not in general the function of the court to redraft interrogatories which are not properly phrased in the first instance. I have however adopted this approach in circumstances where the trial judge undertook this exercise and I believe it is appropriate for this Court to do likewise to avoid the necessity for a possible further motion to deal with it. This is an appeal from an interlocutory discretionary order of the High Court and it is by now well settled that an appellate court will afford a significant margin of appreciation to the High Court in making such orders, even where the appellate court might have been inclined to make a different order – see *Lawless v Aer Lingus* [2016] IECA 235 at paras 22-23. Once the order is one which is within the range of judgment calls open to the trial court, this Court will therefore not normally interfere. However, where error is demonstrated and/or an injustice arises, it may be necessary to intervene and the court retains the discretion to do so in an appropriate case – see *Betty Martin v EBS* [2019] IECA 327 at para 39. I am satisfied from an analysis of the interrogatories above that the trial judge was in error in refusing them for the reasons explained and that it is thus necessary and appropriate for this Court to make a different order.

21. To the foregoing extent therefore, I would allow this appeal. With regard to the question of costs, while I accept that the plaintiff has not been entirely successful with regard to all the interrogatories sought, she has succeeded in relation to the bulk of them and given that the additional consideration of the unsuccessful interrogatories has not added anything of significance to the duration or complexity of the appeal, it seems to me that the fairest outcome is that the plaintiff should have the costs of the appeal and the hearing in the High Court. If the defendants wish to contend for a different order, they will have liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the plaintiff will have a similar period to respond likewise. In default of receipt of such submissions, an order in the terms proposed will be made.

22. As this judgment is delivered electronically, Costello and Binchy J.J. have authorised me to record their agreement with it.