THE HIGH COURT

[2024] IEHC 33
Record No. 2020/1765P

BETWEEN:

BRIAN O'DONOVAN

Plaintiff

AND

CORK COUNTY COUNCIL

Defendant

Ex Tempore Judgment of Mr Justice David Holland, delivered on 16 January 2024.

Contents

Introduction

1. While the Defendant's notice of motion was not phrased in precisely these terms, this is in substance a motion in which the Defendant seeks to stay the Plaintiff's personal injury proceedings pending the Plaintiff's submission to medical examination by a second orthopaedic surgeon retained by the Defendant. The Plaintiff resists the motion on the basis that to require him to submit to such an examination, when he has already submitted to examination by the Defendant's first orthopaedic surgeon, would be unfair. The case is listed for trial today and this motion was argued yesterday.

2. The Plaintiff is a computer technician. He was born on the 9th of May 1970. On the 25th of August 2018 he fell and was injured. The Defendant admits liability for the fall.

3. The Plaintiff's primary and initial injury was an avulsion fracture of the tip of the lateral malleolus of his left ankle. Afterwards, he developed bilateral multiple pulmonary emboli, for which he was treated. That injury is of little significance for the purpose of this motion.

4. A major issue in the case is whether he also developed chronic regional pain syndrome ("CRPS") and, if so, whether it was caused by the fall. The Plaintiff's medical experts make the diagnosis and attribute it to the accident. Dr MacSullivan, an anaesthetist and pain management expert, who examined the Plaintiff for the Defendant in May 2022, says,

- CRPS "*is a collection of symptoms and signs believed to be caused by malfunction of the central and peripheral nervous system. The main characteristics are prolonged pain, changes in colour and temperature, skin changes with associated swelling and in severe cases diffuse atrophy".* It may also involve nerve damage.
- she saw no sign of CRPS.

In contrast, Mr Mulcahy, orthopaedic surgeon, who also examined the Plaintiff for the Defendant, in his earlier reports made no finding of CRPS but, in a report postdating Dr MacSullivan's, did in July 2023 find evidence of CRPS.

5. Of note:
   - It is common case that avulsion fracture of the tip of the lateral malleolus is a relatively minor injury compared to others which come before these courts.
   - It is common case that while CRPS is an unusual sequela to such a fracture, it can occur.
   - The alleged CRPS is the basis for a considerable claim for past and future care – the total special damages claim is now €352,521.98.

6. The Defendant intends to make the case, if it can, that absent a diagnosis of CRPS the claim for care falls away, substantially if not entirely. I have no view on whether that case will be made out. The question is whether the Defendant must be permitted to take steps to show, if it can, that the Plaintiff's experts' diagnosis of CRPS and its causation is mistaken.

7. The Defendant put its position quite straightforwardly. It says that it is put in a practical difficulty by the conflicting views of Dr MacSullivan and Mr Mulcahy given it requires them both as witnesses. It requires the evidence of Dr MacSullivan to counter the allegation of CRPS and requires Mr Mulcahy to address, from the point of view of his expertise, what is primarily an orthopaedic injury. But Mr Mulcahy will contradict Dr MacSullivan on the issue of CRPS. Accordingly, it wants to have another orthopaedic surgeon, Professor Harty, examine the Plaintiff and report. However, the Defendant makes clear that its position does not reflect any dissatisfaction with, or lack of confidence in, Mr Mulcahy or his expertise. Its purpose is merely to try, if it can, to resolve an internal and entirely proper disagreement as between its present experts.

8. The Defendant accepts that:

- It will call only one orthopaedic surgical witness – in accordance with the rules in that regard. It did not suggest any difference between the expertises of Mr Mulcahy and Professor Harty.

- Professor Harty may or may not confirm the diagnosis of CRPS and attribute it to the accident.

- Professor Harty should see the Plaintiff on foot of a "Harrington undertaking"[1] by the Defendant that he will not be given the Plaintiff's expert reports before he reports.

- If Professor Harty confirms the diagnosis of CRPS and attributes it to the accident, the Defendant will be in essentially the same bind as it is in now. But it accepts that it will not be in a position to take the matter any further in terms of further orthopaedic opinion. It will simply have to decide which medical experts to call.

- If Professor Harty disputes the diagnosis of CRPS, and the Defendant calls him to testify, the Defendant, having withdrawn its disclosure of Mr Mulcahy's reports, will nonetheless waive its privilege as to those reports so their content can be put to Professor Harty and Dr MacSullivan and, indeed, any other witness.

9. Counsel for both sides were content to leave to trial a determination whether the Defendant would be entitled to call expert witnesses to give conflicting evidence: i.e. whether any possibility arises of its calling both Mr Mulcahy and Dr MacSullivan. This question may arise given that the premise of tendering evidence is that the court is invited to accept it as truthful, accurate and worthy of acceptance. That is the reason, for example, why ordinarily one may not cross-examine one's own witness.

10. At the heart of this dispute lies a simple question. It is surprising that there seems to be no direct authority in point. It is the question whether, as to a single type of medical expertise,

- a defendant is entitled to canvass a second opinion and to that end, in effect,
- to require a plaintiff to subject himself to examination by a second expert in that speciality.

11. The parties agreed that the essential test is one of fairness – of the interests of justice – having regard to all the circumstances.

Chronology

12. While the account given above suffices to identify the issue, the parties swore affidavits addressing the sequence of events in considerably greater detail. However, there is, in reality, little enough dispute on the facts – though their significance and the resultant requirements of fairness are disputed. Accordingly, I set out below a chronology on which I make certain comments. I will omit reference to expert disclosure schedules but note that many expert disciplines, beyond those mentioned here, are represented on both sides. I should also say that I have concentrated on the Defendant's medical reports of Mr Mulcahy and Dr MacSullivan as they are the focus of the present motion. But the chronology should not be read as doubting that the Plaintiff's expert reports are

[1] Harrington v Cork City Council and Anor. [2015] 1 IR 1.

supportive of his assertions as to his symptoms and diagnose CRPS as resulting from them. I should add that the chronology contains only a very limited account of what was clearly voluminous and fractious correspondence as to many issues of disclosure of expert reports which ranged far beyond those relevant to the motion before me.

Date	**Event**	**Comment**
9th May 1970	The Plaintiff's date of birth	
25th August 2018	Date of the Accident	
21st November 2018	The Plaintiff developed a pulmonary embolism, which required a prolonged stay in hospital.	
January 2019	The Plaintiff returned to work. He has been full-time in work since.	
10th & 15th October 2019	Mr. Mulcahy first saw the Plaintiff and reported to the Injuries Board an almost full recovery from the ankle fracture and the pulmonary embolism, with mild residual symptoms expected to fully recover over a few months. He did not mention CRPS.	
18th November 2019	Mr. Mulcahy reported to the Injuries Board on the radiology. His opinion had not changed.	
17th December 2019	Mr. Mulcahy wrote to the Injuries Board confirming that the pulmonary embolism was due to the accident.	
4 March 2020	The Personal Injury Summons issued. • Inter alia, it identifies that the Plaintiff "*was suspected*" to have developed CRPS.	It is clear that CRPS was pleaded from the start of the case.
11th June 2020	Mr. Mulcahy saw the Plaintiff for the Defendant and reported on the Plaintiff's ongoing complaints, the absence of significant signs on examination and, essentially, that his own opinion had not changed.	He did not mention CRPS. It is unclear why, given it had been pleaded. This is an odd aspect of the matter, but I do not think I can draw any conclusions from it.
6th October 2020	The Plaintiff delivered particulars of special damage in a total of €5,466.28.	
9th July 2021	The Plaintiff disclosed to the Defendant a report of Mr Guerin,	

Date	Event	Comment
	orthopaedic surgeon, dated October 2020. It referred to the Plaintiff's "*diagnosis of complex regional pain syndrome*".	
5th May 2022	Dr MacSullivan saw the Plaintiff for the Defendant and reported her view that she saw no evidence of CRPS. *"So either it has palliated overtime and has burned itself out …"*	Dr MacSullivan does not state the alternative hypothesis indicated by the word "either". But the main point is the absence of evidence of CRPS.
23rd May 2022	The Plaintiff served Particulars of Injury. These acknowledged that his orthopaedic injury was relatively minor and asserted • a diagnosis of CRPS. This caused persistent and debilitating neuropathic pain. • that he would need regular radiofrequency lesioning, over three to five years, to help to manage his symptoms. • that he had had a depressive episode, had seen a psychiatrist and was getting CBT.[2] • that his prognosis was poor. • that by reason of the foregoing his employment prospects were limited.	
24th May 2022	The Plaintiff delivered particulars of special damage in a total of €10,655.83. He asserted ongoing CBT and further psychotherapy requirements.	
25th May 2022	The case was adjourned from the Cork Personal Injury Sessions as not reached.	I do not consider that I need to interrogate the detailed reasons for the adjournment as disclosed in the parties' respective affidavits.
14th February 2023	The Plaintiff served particulars of injury. He asserted that • his symptoms persisted.	

[2] Cognitive Behavioural Therapy.

Date	Event	Comment
	• he was employed on a 3-year contract. If it was not renewed, his unresolved ankle pain and restriction, which affected his mobility, could diminish his ability to get similar work on the open market.	
26th May 2023	The Plaintiff served particulars of Injury. He asserted that a nursing care consultant had advised 2 hours per week of domestic assistance.	
6th July 2023	The Plaintiff served particulars of special damage in a total, including for past care, of €76,409.23. It also intimated that future care was required.	
7th July 2023	Mr. Mulcahy saw the Plaintiff for the Defendant. He reported, inter alia, as follows: • Present state: ○ He states that there has been no improvement ... and, if anything, the pain around his ankle is worse. His walking distance is limited. He states that he finds it difficult to "get his head around the condition of CRPS" and that this is impacting on his mental health. • Examination Findings: ○ There was a definite difference in skin colour between the left and right ankles. The left ankle was colder to touch. He was very apprehensive about allowing contact with the outer aspect of his ankle and describes a general sensitivity. • Summary and prognosis ○ …. He continues to attend pain management. His ankle remains quite symptomatic and clinically	This is Mr Mulcahy's first mention of CRPS. Despite disclosure of his earlier reports to the Plaintiff, and repeated requests by the Plaintiff, this report was not disclosed until exhibited by affidavit on 9th January 2024.

Date	Event	Comment
	he does have symptoms of a chronic regional pain syndrome. His current level of symptoms and disability may persist.	
20th July 2023	The Defendant sought an appointment from a Consultant Neurosurgeon to see the Plaintiff to clarify the CRPS diagnosis, but he advised that he was not the appropriate expert.	
16th August 2023	The Defendant sought an appointment from Professor Harty to see the Plaintiff to clarify the CRPS diagnosis	
19th September & 20th October 2023	The Plaintiff served Particulars of Injury. He asserted that, • an occupational therapist had advised removal of the bath and shower in the family bathroom, on the risk of falls risks, as to grocery shopping and as to changing car. • a physiotherapist had advised future treatment.	
23rd November 2023	Professor Harty wrote to the Defendant proffering an appointment on 12 December 2023.	On receipt of reminders from the Defendant.
	The Defendant asked the Plaintiff to attend Professor Harty on 12 December 2023 "*in order to have your client examined for an updated medical report*."	The Defendant's letter gave no further explanation as to the need for a report from Professor Harty – as opposed to Mr Mulcahy.
30th November 2023	The Plaintiff wrote[3] to the Defendant. He, • noted that he had not received Mr Mulcahy's most recent report despite pressing for its disclosure and had had no explanation for its non-disclosure. • enquired why he was asked to see Professor Harty when the Defendant could call only one orthopaedic surgeon to testify.	

[3] Two letters were written.

Date	Event	Comment
	The Plaintiff served particulars of special damage in a total of €352,521.98, including: • Past special damages, including past care - €78,902.03 • Future costs, including care, occupational therapy, and modification to the family home, actuarialised at €276,112.75.	
1st December 2023	The Defendant replied • that it was entitled to have the Plaintiff examined by whatever medical expert it deemed fit. • that the particulars of injury had been repeatedly updated.	
5th December 2023	The Plaintiff replied in turn • complaining again of the non-disclosure of by Mr Mulcahy's last report. • requiring explanation of the request to attend a different orthopaedic surgeon.	
	The Defendant replied simply repeating the requirement to attend Professor Harty and its assertion that it was entitled to have the Plaintiff examined by whatever medical expert it deemed fit and that it considered his retainer "appropriate" given the "complexities" of the case.	
7th December 2023	The Defendant advised the Plaintiff that it had cancelled the appointment Professor Harty on 12 December 2023 and asked to hear as to the Plaintiff's willingness to attend Professor Harty so the appointment could be rescheduled.	
18th December 2023	The Defendant asked the Plaintiff to attend Professor Harty on 2 January 2024.	The Defendant's letters gave no additional explanation as to it need for or entitlement to a report from Professor Harty – as opposed to Mr Mulcahy.
	The Plaintiff replied expressing surprise at the request and asserting that "*as*	

Date	Event	Comment
	previously stated our client is not in a position to attend the appointment with Prof Harty".	
	The Defendant repeated its request that the Plaintiff to attend Professor Harty on 2 January 2024 and asserted the Plaintiff's refusal to do so was "unacceptable. It asserted its entitlement to retain a second orthopaedic opinion.	
19th December 2023	The Plaintiff replied in similar terms to its previous letters.	
	The Defendant threatened the present motion.	
	Subsequent correspondence on the issue was merely repetitive and related to multiple rescheduled appointments with Professor Harty, all of which the Plaintiff declined to attend.	
	At the Callover the Defendant's Adjournment application did not relate to the issue of examination by Dr Harty. It was refused.	
21st December 2023	The Defendant sent the Plaintiff an advance copy of the present motion which it had sent for issuing.	
	The affidavit grounding the motion gave no further explanation as to the need for a report from Professor Harty – as opposed to Mr Mulcahy. It again merely asserted the Defendant's entitlement to a second orthopaedic opinion.	
9th January 2024	The Defendant's supplemental affidavit considerably expanded on its grounding affidavit. Inter alia it • reveals for the first time that Mr Mulcahy had seen "*signs of CRPS but does not specifically connect that condition to the subject*	While it is a matter for the trial judge if the issue arises, and may require reconsideration at that point in light of all the evidence adduced, as matters stand, it does not seem to me that this is a fair reading of Mr Mulcahy's report. He might perhaps have been clearer (and in that regard I am not critical of him as I think it a marginal complaint)

Date	Event	Comment
	accident" and it exhibits his report of 7th July 2023. • Rests its entitlement to have the Plaintiff seen by Professor Harty on the scale of the care claim.	but he says, in a single sentence, *"His ankle remains quite symptomatic and clinically he does have symptoms of a chronic regional pain syndrome."* His objective findings informing that clinical opinion, as recorded by him, clearly relate to the ankle: *"There was a definite difference in skin colour between the left and right ankles. The left ankle was colder to touch …"*
12th January 2024	The Plaintiff's replying affidavit • Asserts that The Defendant's request that the Plaintiff be seen by Dr Harty was unreasonable and his refusal to do so was reasonable. Observes that • CRPS was pleaded in the Summons issued in March 2020 and recorded in the Guerin report sent to the Defendants in July 2021. • the Defendant has not had Dr MacSullivan's report updated. • the Defendant could simply ask Mr Mulcahy whether he connects the CRPS to the accident. • Professor Harty was sent unidentified reports of Mr Mulcahy such that Professor Harty's report, if given, may contain hearsay and be inadmissible. • It would be unfair to allow withdrawal of Mr Mulcahy's reports as they have informed the views of others of the Defendant's witnesses.	I see nothing in the submission, made in this affidavit, that as Professor Harty was sent unidentified reports of Mr Mulcahy, Professor Harty's report, if given, may contain hearsay and may be inadmissible. That is an issue for the trial judge if it arises and the Plaintiff can cross-examine Professor Harty in that regard. Indeed, medical reports are not evidence unless admitted by agreement as such. If the Plaintiff has a concern he can object to the judge seeing the report. It is Dr Harty's oral evidence that will count. As to the submission, made in this affidavit, that withdrawal of Mr Mulcahy's reports would be unfair it seems to me that the right to withdraw reports from disclosure is well-established. A party cannot force his opponent to call a witness and reports are disclosed subject to privilege – see Order 39 Rule 46(6) RSC.[4] It will be for the trial judge to consider any submissions that unfairness has ensued from such withdrawal.

[4] (6) 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 does not now intend to call the author of such report or statement or such witness to give evidence in the action. In such event the same privilege (if any) which existed in relation to such report or statement shall be deemed to have always applied to it notwithstanding any exchange or delivery which may have taken place.

Discussion

13. The Defendant says, first, that the Plaintiff confuses the general prohibition by Order 39 Rule 58(3) RSC on calling more than one expert of a given speciality ("the one-expert rule" - though exceptions can be made)[5] with the process of disclosure of reports and, indeed, the question whether a party is entitled to retain multiple experts in a given discipline to investigate the case before deciding which if any of them to call as a witness. That seems to me to be a generally sound submission by the Defendant. There is no reason, for example, why a defendant should not retain multiple engineers to inspect a locus of an accident and decide ultimately which of them if any to call as a witness. Indeed, the Defendant makes a reasonable point that, as a plaintiff is not dependent upon the defendant's cooperation in that regard, a plaintiff can bespeak reports from various doctors – even of the same specialty – before deciding which of them to disclose and thereafter to call as witnesses.

14. I agree with the Defendant's reliance on **Defender**[6] in which the Defendant objected to the delivery of multiple reports by the Plaintiff. Twomey J accepted the Plaintiff's argument that the "one-expert" rule deals with the admission of evidence and not the delivery of expert reports. It cannot prevent the delivery of additional expert reports, since they are not being admitted in evidence. The Defendant says it is entitled to await Professor Harty 's report before making a decision as to what evidence to adduce.

15. What makes the position as to doctors, as opposed to other experts, different is that the Defendant's examination is dependent upon the Plaintiff's cooperation so the Plaintiff is in a position to object. A plaintiff, by prosecuting personal injuries proceedings, waives certain of his or her rights of privacy as to his or her medical condition. That is so at least inasmuch as, while the court will not direct that the Plaintiff subject himself or herself to medical examination, the court will stay the proceedings if the plaintiff unreasonably refuses a reasonable request to undergo examination - **McGrory v. ESB**.[7] That waiver is however, limited by the scope of the reasonable requirements of the Defendant. What is reasonable depends on all the circumstances assessed in the context of the Defendants' constitutional rights as to its conduct of the litigation. While it would probably take an extreme and unlikely case to cause a problem, I accept entirely, in the context of the Plaintiff's waiver of her constitutional rights that a stage could be reached – for example by oppressively repeated and multiple examinations – at which further medical examination would amount to abuse of process.

[5] Order 39 Rule 58(3) RSC reads: 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.
[6] Defender Limited v HSBC Institutional Trust Services (Ireland) Ltd. [2018] IEHC 543.
[7] [2003] 3 IR 407.

16. The Defendant relies on the following views of Collins J in the Court of Appeal in **Sweeney**[8] as to what he saw as the clear overlap between the constitutional right of access to justice and the right to choose one's expert witness:

> *"While the courts play an increasingly significant role in the management of court proceedings - including an important role in determining the extent to which expert evidence should be permitted and the manner in which such evidence is presented, the entitlement of a party involved in litigation to select and engage the expert of its choice is nonetheless an important constituent element of the right to litigate and the right of access to the courts, rights that in this jurisdiction enjoy constitutional status and protection."*

He held that both Plaintiffs' and Defendants' interests in having the services of an expert of their choice reflected constitutional values and derived from their "*Constitutional rights to litigate and to have access to the courts, and to engage and rely on expert witnesses in that context".*

O'Donnell J, in the Supreme Court in **Sweeney**[9] agreed with Collins J and observed that *"while a Court has jurisdiction to make orders in relation to whether a person can act as an expert witness in a case, it is a jurisdiction to be sparingly and cautiously exercised".*

17. The Plaintiff objects to the Defendant's motion as designed to facilitate "expert-shopping". Though it is colloquially, and with good reason, deprecated in a general way as to be discouraged, there is no definition of, or black letter rule in terms against, expert-shopping. The parties were unable to cite any Irish cases explicitly addressing the phrase. My understanding of it is that it describes the practice of recourse successively and excessively to multiple experts as to a particular issue, discarding disadvantageous expert opinions until one gets the opinion which suits one's case. It is also known sub. nom. the "hired gun syndrome" which is a wider concept which encompasses the attitude of the experts as well as the hopes of the retaining party and has been authoritatively deprecated in cases such as Duffy[10]. While it is to be deprecated, questions of degree arise. There is no rule that a party, plaintiff or defendant, in investigating a case is bound irrevocably by the opinion of the first expert consulted. Litigation is adversarial and, within bounds, legitimately tactical. To say that a proposed course of action is driven only by tactical considerations is not to say, necessarily, that it is forbidden. Though Sweeney does not put it quite that way, it seems to me that these observations are consistent with the freedom of a litigant to make choices upheld in Sweeney. Indeed, one may justly describe the Plaintiff's opposition to being seen by Professor Harty as also tactical.

18. The Defendant cites the recent English case of **Avantage**.[11] In proceedings as to fire damage to a building and in the context of rules (we have no precise equivalent) which required that a party

[8] Sweeney v VHI [2020] IECA 150.
[9] Sweeney v VHI [2021] IESC 58.
[10] Duffy v McGee [2022] IECA 254.
[11] Avantage (Cheshire) Ltd and others v GB Building Solutions [2023] EWHC 802 (TCC) 208 ConLR 37.

have the court's permission to replace an expert, the Plaintiff sought to replace its fire engineer - a Mr Wise. The Defendant opposed the application on the basis that:

- there was no suggestion that he could not continue to act as an expert.
- No proper explanation had been provided for the proposed substitution and it is expert-shopping.

Avantage is not on all fours with this case but is of some assistance. The Plaintiff confessed to reluctance to explain its reasons in detail for fear the application might fail and it would have to persist with the incumbent expert. But, to some degree relevantly to this case, the Plaintiff pointed to potential conflict of evidence as between the incumbent and other experts retained by the Plaintiff. O'Farrell J described the basis for the application as "opaque" and, in effect, as amounting to little more than lack of faith in the incumbent. He said: *"there is no suggestion of any culpable behaviour on the part of the claimants or their experts; they are simply unhappy with Mr Wise as an expert."* He described the concerns as to expert-shopping as "legitimate" and all but agreed with the description. He described the incumbent expert as "*qualified and available to give evidence at trial on the issues he has been asked to address and he has carried out substantive expert work on the case*". But O'Farrell J continued:

> *"Despite those concerns, I am satisfied that this is an appropriate case in which to allow the claimants to rely on the expert evidence of Dr Ketchell instead of Mr Wise. Although the reasons for the proposed change were unclear initially, Mr Hext has been frank with the court that the claimants are not happy with Mr Wise as an expert. It is in the interests of justice that the claimants should have permission to rely on an expert in whom they have confidence. The adjournment of the trial date and the revised timetable for expert evidence means that no prejudice will be suffered by the other experts as a result of the proposed change."*

O'Farrell J permitted the replacement – but on terms that Mr Wise's reports be disclosed. In doing so, he noted the general principles applicable to the exercise of his discretion to allow replacement of expert witnesses as including,

- That the general discretion should be exercised having regard to all the material circumstances of the case and in accordance with the overriding objective.
- The usual rule is that the court should not refuse a party permission to rely on a new expert in substitution for an existing expert.
- The justification for imposing a condition that the original expert's reports should be disclosed includes (a) prevention of expert-shopping and (b) ensuring that the expert's contribution is available to the court and all parties, regardless of the instructing party.

The reference to the "overriding objective" is to that set by the CPR[12] to deal with cases justly and at proportionate cost. That includes:

- ensuring that the parties are on an equal footing;
- saving expense;
- dealing with the case in ways which are proportionate to
  - the amount of money involved;

[12] Civil Procedure Rules 1998.

- the importance of the case;
- the complexity of the issues;
- the financial position of each party;

- ensuring that it is dealt with expeditiously and fairly;
- allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
- enforcing compliance with rules, practice directions and orders.

Whether and in what degree the overriding objective is coterminous with our concept of the interest of justice is not for decision here and would require further argument. However, broad correlations can be seen – not least those as to just disposition of proceedings, "equal footing", avoidance of unnecessary delay and dealing with the case in ways proportionate to the amount of money involved, the importance of the case and the complexity of the issues.

19. The Plaintiff submitted that a stay to permit the Defendant to change horses in the aftermath of considerable inter partes disclosure of expert reports would be destructive of the system of contemporaneous exchange, described by Noonan J in **O'Flynn**.[13] However, the rationale of contemporaneous exchange is to prevent one side from leveraging the other side's disclosure by commissioning expert reports informed by that disclosure or by deciding, on foot of that information, whether to disclose its own reports. In practice, much of those risks is addressed by a Harrington undertaking in terms appropriate to the circumstances. In any event, and more importantly, neither risk arises here. I respectfully reject as overblown and perfectionist an allied submission that permitting the Defendant to retain an additional expert would fundamentally undermine and render unreliable proper reliance, by recipients, on such disclosure.

20. My attention was also drawn to **McLoughlin**[14] in which Ferriter J refused to fault a solicitor for a plaintiff who directly retained a medical specialist as a medico-legal expert and to whom the plaintiff's GP had not referred him. I am glad of the opportunity to respectfully agree, albeit obiter, with Ferriter J. He noted that in Noonan J in **Duffy**[15] had deprecated the "hired gun syndrome" whereby litigants shop around for an expert opinion until they find one favourable to their case. Otherwise, it seems to me that Ferriter J's concerns, as to the independence and objectivity of expert evidence, do not much inform my present decision.

[13] O'Flynn v. Health Service Executives [2022] IECA 83.
[14] McLaughlin v Dealey [2023] IEHC 106.
[15] Duffy v McGee [2022] IECA 254.

Decision

21. The parties agree that the interests of justice in all the circumstances should be the touchstone for my decision. As noted earlier they agree that while CRPS is an unusual sequela to a relatively minor fracture such as an avulsion of the lateral malleolus, it can occur. While there is some dispute as to the extent to which the diagnosis turns on subjective, as opposed to objective, factors, I accept that the allegation of CRPS lends some complexity to the case. While the significant increase in the special damages claimed cannot affect the medical diagnosis, it does, it seems to me, make it more important that the diagnosis be correct. Thereby it may render proportionate investigations seeking to verify the diagnostic position which might be disproportionate in another case. While a stay would involve some delay in the case, I think that, if I grant a stay, delay can be dealt with adequately by an appropriate form of order.

22. I bear in mind that a stay would make the Plaintiff's exercise of his constitutional right to litigate dependant on his submitting to a medical examination to which he objects and, in that degree, exceeding his view of the proper extent of his waiver of his right to privacy. However, what is at issue, in truth, imposes little, if any, additional burden on the Plaintiff. I think he likely faced the reality of an updating pre-trial orthopaedic examination in any event and I don't see that, as to his rights of privacy and to litigate, anything turns on the identity of the examining orthopaedic surgeon. The relatively routine examination envisaged by the Defendant would likely have had to occur anyway by way of updating and from the Plaintiffs' point of view, and in considerable degree, as well one orthopaedic surgeon as another. Even if the proposed examination can be regarded as additional to those which would otherwise have occurred, I do not see that the burden thereby imposed comes close to being unreasonable or an abuse of process.

23. The strongest argument against the Defendant's application is that it is expert-shopping. I consider that the Defendant has a genuine difficulty arising from its experts' contrasting views. As matters stand on the expert reports available to it, the Defendant, at least tactically and arguably as a matter of law, is put in the position of having to decide whether to dispute the CRPS or the orthopaedic situation despite having discrete expert opinions entitling it to dispute both. That may be the position in which it ultimately finds itself - depending on the view taken by Professor Harty. But, perfect justice being impossible (as was said in a different procedural context[16]), on balance and in the interests of justice, and whether or not one calls it expert-shopping, I do not think it is unreasonable or unfair to ask the Plaintiff to submit to examination by one additional expert – Professor Harty.

24. At least that is so where the Plaintiff will be able at trial to mobilise any conflicting opinion of Mr Mulcahy. I consider that any degree of unfairness in staying the proceedings can be appreciably, though I accept not perfectly, ameliorated by the Defendant's waiver of privilege as to the reports of Mr Mulcahy if he is withdrawn as a witness, such that his reports, not least as to CRPS, can be put in

[16] Ryanair plc. v. Aer Rianta c.p.t. [2003] IESC 62, [2003] 4 I.R. 264; Tobin v. Minister for Defence [2019] IESC 57.

cross-examination to such medics as the Defendant does tender in evidence and, indeed, any other witness. In this regard I adopt the objective of O’Farrell J - of ensuring that Mr Mulcahy's contribution is available to the court and all parties.

25. I will therefore stay the Plaintiff’s proceedings pending his examination by Professor Harty.

26. I will hear the parties as to the detail of my order and as to costs. As to the latter, while I express no provisional view as to the proper form of order, I do consider it relevant that the Defendant persistently failed to respond to the Plaintiff’s requests for an explanation of the necessity for its recourse to Professor Harty. There may have been good tactical reasons for revealing that explanation only as late as the Defendant’s supplemental affidavit. But tactical decisions may come at a price. While one might respond that, on receipt of that supplemental affidavit, the Plaintiff could have conceded the motion, it seems to me that this may be a somewhat narrow way of looking at all the circumstances of the matter.

DAVID HOLLAND
16/1/24