THE HIGH COURT

[2025] IEHC 130

[Record No. 2022 3294 P]

BETWEEN

DENISE MULHALL

PLAINTIFF

AND

ALLERGAN LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 4th day of March 2025

1. This is the defendant's application to dismiss the plaintiff's proceedings pursuant to O. 19, r. 28 of the Rules of the Superior Courts, for failing to disclose a reasonable cause of action and pursuant to the court's inherent jurisdiction on the grounds that the plaintiff's claim is bound to fail or, alternatively, an order directing the plaintiff to deliver updated pleadings and an amended indorsement of claim. I approach this application on the basis of O. 19, r. 28, as amended, rather than the court's inherent jurisdiction that the defendant seeks to invoke, as the rule expressly provides for dismissal of a claim that is bound to fail.

2. Given the emphasis placed by the defendant on the plaintiff's drafting, as well as the court's entitlement to rely on, *inter alia*, the pleadings as per O. 19, r. 28(3), I will consider the background to the claim and the pleadings. I will then examine the law, including the rule and, insofar as is relevant, the pre-amendment jurisdiction.

Background and the plaintiff's pleadings

3. On 3 February 2010, the plaintiff underwent breast augmentation surgery and implants manufactured by the defendant were inserted in both breasts. In 2014, she experienced pain and swelling in her left breast and a rupture of the left implant was confirmed. The right and left implants were removed in surgery carried out on 24 July 2014,

and the plaintiff pleads that when the capsule of the ruptured left implant was opened by her surgeon, sticky silicone gel emanated and a large flap rupture was found. She issued a Circuit Court personal injuries summons in May 2016 which refers to the left implant having ruptured.

4. In January 2017, she experienced further pain and swelling in her left breast and a rupture in the new left implant was diagnosed. That implant was removed in further surgery in February 2017. Further surgery was necessary in March to remove serosanguinous fluid. The plaintiff issued a High Court personal injuries summons in August 2019 in which she refers to the capsule of that implant showing an obvious rupture of the circumferential edge. The Circuit Court proceedings were later transferred to the High Court and both proceedings were consolidated.

5. The plaintiff claimed that following both surgeries, the plaintiff's surgeon sent the ruptured implants to the defendant. The defendant's counsel observed in his oral submissions that this was not on affidavit but, as will be seen further below, the defendant's 2016 notice raising particulars on the Circuit Court personal injuries summons, seems to acknowledge that the defendant had possession of the ruptured implant from the plaintiff's first surgery. More recently, on 17 September 2024, the plaintiff's solicitor sought confirmation that the defendant retained possession of the implants that were sent to the defendant in July 2014 and March 2017. No response was received. The plaintiff's solicitor had to write again on 30 September 2024. A holding response was sent by the defendant's solicitor on 1 October 2024. The plaintiff's solicitor wrote again on 9 October, 29 October and 30 October. As of 6 November 2024, when the plaintiff's solicitors swore a replying affidavit in relation to the within motion, they had received no further response. Correspondence was made available to the court dated 15 January 2025 (after this motion was issued) in which the defendant's solicitors finally confirmed that the defendant was in possession of three implants and that they would be happy to arrange inspection of them "*in due course and under appropriate conditions*". They said there was no record of the fourth implant referred to in the plaintiff's correspondence having ever been returned to them and that that implant was not in the defendant's possession.

6. The defendant's counsel was critical of the plaintiff for not having sought access to the implants in the defendant's possession until September 2024. However it had been the plaintiff's reasonable understanding from the letters of 29 September and 10 November

2023 from the defendant's solicitors, that the defendant was going to file a defence. It was not until the plaintiff's solicitors received no response to their letter of 2 February 2024 seeking the defence, that it looked like the plaintiff would have to motion the defendant for their defence. The plaintiff's counsel argued that was why they did not seek inspection of the subject implants until September 2024 as they had previously proceeded on the basis that they would have the opportunity to see the defence before seeking any such inspection, and that the contents of the defence might have obviated the need for any such inspection.

7. Despite the defendant eventually confirming in January 2025 that they were in possession of three of the subject implants, they had previously asked the plaintiff at para. 9 of their Circuit Court notice for particulars of 2 June 2016 to confirm "*whether the relevant device/devices have been retained and if so, please advise of their whereabouts and confirm that they will be available for inspection by the Defendant.*". In the same notice for particulars, the defendant stated at para. 5 that it "*has analysed the device in question and has concluded that the root cause of this incident was contact with a sharp instrument*". They went on to ask the plaintiff at para. 7 to explain what "*inherent defect*" the device contained and at para. 8 whether the plaintiff had received *"supportive expert opinion to the effect that the incident and/or the injuries complained of were caused by a defect in the device rather than by contact with a sharp instrument".* The plaintiff sought to furnish replies to those particulars in August 2016 and said in relation to para. 5 that it was "*a matter for independent medical expert evidence and discovery*", although the plaintiff did confirm that she had not had sight of any independent evidence arriving at the conclusion that the cause of the incident was contact with a sharp instrument. In relation to the defendant's query at para. 9 about whether the plaintiff had retained the subject implant, the plaintiff replied that "*[o]n the 24th July, 2014, the defendant/its/servants or agents took possession of the both implants and remains in possession of same*". The defendant did not take issue with the plaintiff's replies to those particulars at that time or subsequently.

8. The defendant later raised particulars on the plaintiff's High Court personal injuries summons by way of a notice for particulars dated 24 August 2021, some two years after the personal injuries summons had been delivered. The plaintiff replied in April 2022. In relation to the defendant's request for particulars of the plaintiff's allegation that the implants were defective, the plaintiff replied that "*[t]his is a matter for independent expert opinion and evidence and not a proper matter for particulars.*" The defendant then sought further and

better particulars by way of a letter dated 12 April 2022 in which they repeated their requests for particulars at para. 4(a) to (i). It does not appear that those further and better particulars were ever responded to by the plaintiff.

9. The defendant's solicitor averred in his affidavit grounding the within motion to dismiss that the purpose of seeking those further particulars "*was to establish in what way the products are alleged to be defective, what the nature of the alleged defect is together with details of the alleged mechanism of failure and what testing it is alleged the Defendant was required to undertake and the failings allegedly had therein*", none of which he said had been pleaded. However the defendant did not bring a motion to compel the plaintiff to reply to the further and better particulars it had raised on 12 April 2022.

10. I move then to the plaintiff's efforts to get the defendant to file their defence. On 7 September 2023 the plaintiff's solicitor wrote a letter seeking the defendant's defence and allowing a further 28 days for it to be filed. The defendant's solicitors replied by letter dated 29 September 2023 and asked for time. By letter dated 10 November 2023, they sought further time and committed to filing their defence "*as soon as possible*". The plaintiff's solicitor wrote again on 2 February 2024 allowing a further 28 days and, eventually, on 18 April 2024, issued a motion for judgment in default of defence, which is also before this Court and which I address further below. The defendant's solicitors responded by letter dated 19 June 2024 which said the defendant could not deliver the defence as the plaintiff had not provided replies to the notice for further and better particulars of 12 April 2022 and that the defendant needed those particulars in order to carry out investigations. The letter asked the plaintiff whether she had received supportive independent expert report from a suitably qualified expert on the alleged defective implants of 2010 and 2014 identifying and providing details of each of the alleged defective products. The letter also asked the plaintiff to "*please confirm that the alleged defective implants of 2010 and 2014 are both available for inspection by our expert which we require in order to draft our Defence once the plaintiff has appropriately particularised her claim and served an amended Summons.*" The letter ended by asking the plaintiff to note that if the defendant was forced to deliver its defence prematurely before it had completed its investigations, that the correspondence would be relied on to seek the costs of any application they may make at a later date to amend their client's defence.

11. The defendant's solicitor swore the affidavit grounding the motion to dismiss the plaintiff's proceedings and averred that the plaintiff's pleadings are deficient, do not disclose a reasonable cause of action and that the defendant is at a disadvantage in being unaware of the claim they are to meet at trial. Because the plaintiff asserts a breach of the 1991 Liability for Defective Products Act (hereinafter referred to as "the 1991 Act"), they say they are entitled to know the extent of the plaintiff's case and to know how the plaintiff claims the subject implants were defective. The plaintiff says the facts as pleaded, and in particular the fact of the subject implants having ruptured, which the plaintiff asserts was in itself a defect, adequately put the defendant on notice of the case they have to meet.

12. In his replying affidavit, the plaintiff's solicitor also refers to a recall of products by the defendant and to the efforts by the plaintiff's solicitor to get the defendant to confirm that they had possession of the subject implants and their current location (as set out at para. 5 above). In his oral submissions, counsel for the plaintiff said they would need to get inspection of the subject implants and discovery. Those applications are more commonly addressed when the pleadings are closed, although not always. Counsel said the defendant needed to file their defence, as they had previously committed to doing in their solicitors' letters of September and November 2023. Counsel accepted that the defendant may be entitled to further particulars of the defects, but once the plaintiff had established *prima facie* defects, as counsel says the plaintiff has done in referring to the ruptured subject implants, then it was for the defendant to file its defence. He said he could not seek discovery or inspection until the defence was filed as it might be that the defects would not be denied, thereby obviating the need for any such inspection or discovery.

The timing of the defendant's motion to dismiss

13. Counsel for the plaintiff described the defendant's application as, in reality, an application for further and better particulars, a description which the Court views as having some merit. The defendant had raised further and better particulars but rather than pursuing that by way of a motion to compel replies, has chosen to proceed by way of motion to dismiss the proceedings and, in parallel, by opposing the plaintiff's motion for judgment in default of defence.

14. In January 2025 the defendant admits to having been in possession of three of the subject implants and in June 2016 the defendant raised particulars on the then Circuit Court proceedings, saying that it had analysed the implants and was able to identify what it said

was the "*root cause of this incident*", namely contact with a sharp instrument. Nevertheless, the defendant asked the plaintiff to confirm whether they had retained the implants and to advise of their whereabouts and confirm that they would be available for inspection by the defendant. The defendant then failed to respond to the plaintiff's solicitor's request of 17 September 2024 for confirmation that the defendant retained possession of the implants and where they were until January 2025, well after this and the related motion for judgment in default of defence had been issued.

15. In summary, it is clear that the defendant has had possession of and has inspected one of the implants relating to the Circuit Court proceedings, as confirmed by the defendant in its 2016 notice for particulars. The defendant has retained possession of three of the implants since then and to date, as it confirmed in correspondence of January 2025. Nevertheless, in 2016 the defendant asked the plaintiff to advise where the implants were, to make them available for inspection and to confirm whether the plaintiff had received supportive expert opinion to the effect that the incident and/or injuries complained of were caused by a defect in the device rather than by contact with a sharp instrument.

16. The defendant is clearly unhappy with the level of particulars furnished by the plaintiff in her pleadings but has not sought to compel her to furnish the replies they have sought. Neither has the defendant filed its defence. The plaintiff has not yet sought discovery either on a voluntary basis or by way of a court application and she did not seek inspection of the subject implants until September 2024. I do not criticise the plaintiff for this as those options would usually await the closure of the pleadings, at which stage the parameters of inspection and/or discovery to be directed by the court, should that prove necessary, will be informed by the pleadings including the defendant's defence. The plaintiff did seek voluntary inspection in September 2024 and her delay in doing so is justified by the approach that had been adopted by the defendant up November 2023 to committing to filing its defence.

The law

17. Order 19, rule 28, as amended by SI 456/2023, now provides:-

> *"28. (1) The Court may, on an application by motion on notice, strike out any claim or part of a claim which:*
>
> *i. discloses no reasonable cause of action, or*
>
> *ii. amounts to an abuse of the process of the Court, or*

iii. is bound to fail, or

iv. has no reasonable chance of succeeding.

(2) The Court may, on an application by motion on notice, strike out any defence or part of a defence which:

i. discloses no reasonable defence to the action, or

ii. amounts to an abuse of the process of the Court, or

iii. is bound to fail, or

iv. has no reasonable chance of succeeding.

(3) The Court may, in considering an application under sub-rule (1) or (2), have regard to the pleadings and, if appropriate, to evidence in any affidavit filed in support of, or in opposition to, the application.

(4) Where the Court makes an order under sub-rule (1), it may order the action to be stayed or dismissed, as may be just, and may make an order providing for the costs of the application and the proceedings accordingly."

18. Prior to the 2023 amendment, the rule was focused on the pleadings, but the court could consider the underlying merits of a claim pursuant to its inherent jurisdiction. The amendments combine the previous jurisdiction with some adaptation. I do not consider that the amendment serves, or was intended to serve, to significantly dilute the previous jurisdiction, including the principle that an application to dismiss as being bound to fail "*is not a means for inviting the court to resolve issues on a summary basis… that the jurisdiction is to be sparingly exercised… rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law*" (*Keohane v. Hynes* [2014] IESC 66 at paras. 6.5 and 6.6).

19. The court must, as per the previous case law, accept the facts as asserted in the plaintiff's claim. If those facts would have, if proven, given rise to a cause of action, then "*the proceedings do disclose a potentially valid claim*" (at para. 3.12 *Salthill Properties Ltd. v. Royal Bank of Scotland* [2009] IEHC 207).

20. As observed by Clarke J. (as he was then) in *Salthill Properties*:-

> *"There have been many cases where the crucial evidence which allowed a plaintiff to succeed only emerged in the course of the proceedings. At the level of principle, this is likely to be particularly so in cases alleging fraud or other similar wrongdoing which is likely to be clandestine, if present, and where a plaintiff may only be able*

to come across admissible evidence sufficient to prove his case by virtue of the use of procedural devices such as discovery and interrogatories" (at para. 3.13).

In that case, Clarke J. set out the following conclusion:-

"7.1 For the reasons which I have sought to analyse it follows that it does not seem to me to be appropriate to dismiss these proceedings at the current stage. It follows from that, that Salthill and Mr. Cunningham will be entitled to proceed and to take advantage, in whatever way the rules may permit, of whatever procedural measures may be open to them. It should, however, be emphasised that I remain of the view that the evidence currently available would not be sufficient to establish a prima facie case at trial.

7.2 It follows that, in the absence of a different picture emerging by the time that discovery has been completed and witness statements exchanged, it might very well be difficult for Salthill and Mr. Cunningham to survive an application to dismiss these proceedings on the opening. It is important to emphasise that my reason for not dismissing these proceedings at this stage is because I cannot have the necessary high level of confidence that things might not look different at that stage, sufficient so as to dismiss the proceedings now."

21. Significantly, that decision, on which the plaintiff relies, was an application to dismiss. In contrast, none of the authorities relied on by the defendant were applications to dismiss. Two of the authorities in the defendant's booklet of authorities concerned claims that replies to particulars were inadequate (*ASI Sugar Ltd v. Greencore Group Plc* [2003] IEHC 131 and *Harvey v. DePuy* [2016] IEHC 382), as was a further authority cited by the defendant's counsel in oral argument, *Murphy v. DePuy* [2016] IECA 15, decision of Finlay Geoghegan J. One concerned motions compelling particulars of a contributory negligence plea (*Mahon v. Celbridge Spinning Company Ltd* [1967] IR 1). The other two decisions in the defendant's booklet of authorities, *Morgan v. ESB* [2021] IECA 29, [2022] 1 IR 187 and *McGeoghan v. Kelly & ors* [2021] IECA 123 were decisions of the Court of Appeal overturning the High Court for determining an issue at trial on a basis that had not been pleaded by the plaintiff.

22. The context of findings made by a previous court is important, in particular in relation to the plaintiff's obligations in pleading a breach of the 1991 Act and the plaintiff's more

general obligations in personal injuries pleadings, as per the Civil Liability and Courts Act 2004. Observations such as those made by Barr J. in *Harvey* in relation to the 1991 Act must be assessed by reference to the context in which they arose. The context of that decision was an application to compel replies where the defence had already been filed. Barr J. stated, at para. 51:-

> *"It seems to me that in a product liability case, the plaintiff must establish that there was a defect in the product and this must be done with sufficient particularity, so as to allow the defendants to know exactly what are the alleged defects in the product. For this reason, I have directed that the plaintiff must furnish further particulars in respect of a number of specific issues raised by the defendants in their notice for particulars."*

23. Undoubtedly those comments would be both relevant and persuasive (if not binding) in an application to compel replies to particulars where the defence had already been filed. That context is very different to an application to dismiss, the jurisprudence for which acknowledges that the court's jurisdiction is one to be exercised sparingly. I do not consider the decision in *Harvey* requires this Court to dismiss these proceedings for any lack of sufficient particularity, although I should also make it clear that I make no such finding.

24. For the purpose of this application, I am asked to determine that the plaintiff has failed to disclose a reasonable cause of action and/or her claim is bound to fail, having particular regard to the breaches of statutory duty under the 1991 Act which she claims in her pleadings. The plaintiff's pleadings around the defective nature of the implant could not be described as extensive or detailed. Essentially, she relies on the fact that the implant ruptured, something that has not yet been directly challenged by the defendant in its affidavits or in the correspondence exhibited thereto.

25. The defendant contends that the plaintiff conceded in her written submissions to this Court that every implant carries a risk of rupture. Given the emphasis the plaintiff places on the ruptures having occurred within three to four years of being implanted, I do not consider that detracts so significantly from the plaintiff's case that the rupture was a defect, such as to dismiss her proceedings at this point in time for failing to disclose a reasonable cause of action and/or for being bound to fail.

26. The plaintiff pleads that the implants ruptured having been in place only for three to four years, and that this in itself is a defect. The plaintiff submits that she needs inspection and discovery.

27. It may be that there will be a point at which orders to compel replies similar to those sought and granted in *Harvey* might be successfully sought by the plaintiff or the defendant, or both, but this case is not at that stage yet. For that reason, I do not consider this to be an appropriate case in which to direct the plaintiff to deliver updated pleadings and/or an amended indorsement of claim, something which, in any event, she effectively says she cannot do without inspection, expert evidence and possibly discovery. Again, I make no finding validating her views in that regard, but simply point to the difficulties for the plaintiff to put her case about what she says were defects in the subject implants any further than she has done to date from her own knowledge and from her medical records about what her surgeon saw when the subject implants were removed. The defendant may be entitled to further particulars of the defects as currently pleaded in brief terms, but when that entitlement arises is a question of timing and sequencing. All that can be said at this stage is that that point has not yet arisen in these proceedings.

28. For the moment, and in the particular circumstance of this case where at least three of the subject implants are in the defendant's possession apparently since the plaintiff's surgeon sent them to the defendant after the surgeries and before proceedings were issued, the plaintiff has pleaded sufficiently to require the defendant to file their defence. The defendant may, at some stage, be entitled to further particulars of the defects along the lines set out by Barr J. in *Harvey*, but there are other steps which require to be taken before any such entitlement can be properly assessed.

29. For the moment, the high bar required for this Court to exercise its jurisdiction to dismiss, pursuant to O. 19, r. 28, which is to be used sparingly, has not been reached here. Similar to *Salthill Properties*, that does not preclude a further application to dismiss after the plaintiff has taken whatever procedural steps may be open to them, but that will be for the defendant to assess at a later stage in the proceedings and for a court to determine at that point in the litigation.

30. I, therefore, refuse the defendant's application to dismiss the proceedings at this stage. It follows from my decision, including my views on the inappropriateness of directing the plaintiff to deliver updated pleadings and an amended indorsement of claim, that the

plaintiff is entitled to require the defendant to file its defence. For the avoidance of doubt, the defendant will be entitled to plead additional points of defence if, at some stage, the plaintiff furnishes further particulars of her claim, whether by reference to her claims of negligence or breach of duty, including breach of statutory duty.

31. For the further avoidance of doubt, I should say that I do not consider this to be a case, as per O. 19, r. 7(3), in which the court finds it is necessary for the plaintiff to reply to particulars raised to enable the defendant to plead its defence.

Indicative view on costs

32. As the plaintiff has succeeded in the defendant's application to dismiss and in its application for judgment in default of defence, my indicative view on costs in accordance with s. 169 of the Legal Services Regulation Act 2015 is that the plaintiff is entitled to her costs of both motions to be adjudicated upon in default of agreement. I will put the matter in for mention before me at 10.00am on 18 March and, in the meantime, I invite the parties to explore whether agreement can be reached in relation to directions the Court might give in order to progress and/or case manage this litigation which has now been in being for some considerable time.

Counsel for the plaintiff: Barney Quirke SC, Pat Purcell BL

Counsel for the defendant: Alan Keating SC, Sarah Reid BL