THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2020] IECA 282
Court of Appeal Record No. 2020/90
High Court Record No. 2016/594

Whelan J.
Murray J.
Binchy J.

BETWEEN:

CIARA MICKS-WALLACE (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND, ANN MICKS)

PLAINTIFF/RESPONDENT

- AND -

GABRIELLE DUNNE

APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 19th day of October 2020

Background

1. This appeal against the judgment and order of Cross J. of March 16 2020 refusing discovery of certain medical records of the plaintiff arises in an action for damages for personal injuries allegedly sustained in a road traffic accident in 2013. On December 27 of that year the plaintiff (then twelve years of age) was travelling as a passenger in a motor vehicle being driven near Dublin Airport by her father when the defendant's car collided with the rear of their vehicle. The accident itself does not appear to have been a particularly serious one – the damage to the rear of the vehicle in which the plaintiff was travelling was not significant, and the air bags in that vehicle were not deployed as a result of the collision. The plaintiff did not require medical attention immediately after the accident, first seeking treatment on January 6 2014. For some time it appeared that she had suffered relatively straightforward soft tissue injuries to her neck, shoulders and upper back.

2. An authorisation having been issued by the Personal Injuries Assessment Board in July 2015, these proceedings were instituted in January 2016. A defence was duly filed in December of that year, liability not being contested. In the meantime, in August 2016, the defendant requested voluntary discovery of the plaintiff's medical records for a period

of three years prior to the accident and in November 2016 these were duly discovered. This discovery was sought in a context where it was pleaded in the personal injury summons that as a result of the accident the plaintiff suffered soft tissue injuries to her neck, back and shoulders. Pain in her shoulders, upper back and neck regions identified after the accident was said to be still manifesting itself eighteen months later through stiffness in her neck and shoulder region, lower back pain and limitation of movement.

The HEDS diagnosis

3. The application for discovery giving rise to this appeal follows from a particular claim made in the summons that in April 2015 the plaintiff was diagnosed with Hypermobile Eher's Danlos Syndrome. Eher's Danlos Syndromes ('EDS') comprises a group of rare genetic connective tissue disorders, of which Hypermobile EDS ('HEDS') is one. It presents itself in patients whose collagen tissue is abnormal, and it can cause musculoskeletal problems, pain and fatigue. In her personal injury summons, the plaintiff pleaded that the HEDS '*may be responsible*' for her joint pains, and that as a consequence of it her prognosis was uncertain. It was said that with this diagnosis she might be prone to flare ups of soft tissue pains in her neck, shoulder and scapular regions in the future, and that the HEDS was a '*contributory factor to her recovery process*'. When discovery of pre-accident records was sought from the plaintiff in August 2016, one of the stated reasons for the request included the claim that it was necessary to allow the defendant and her medical experts to determine the extent to which the plaintiff's ongoing complaints related to the accident which is the subject of the proceedings or to the plaintiff's subsequent diagnosis of EDS.

4. While the proceedings as issued did not in terms directly allege that the plaintiff's HEDS was either attributable to the accident or that it was exacerbated by it, detailed and lengthy particulars delivered on April 27 2018 presented a different picture.

5. In those particulars the plaintiff asserted that patients with EDS are more prone to soft tissue injury and have a heightened awareness of pain with injuries taking longer to heal than those with normal collagen tissue. It was further pleaded that HEDS can be progressive and exacerbations can last many months and years and can involve other organ systems that had previously been asymptomatic. It was alleged that traumatic incidents could cause a generalised flare up in EDS symptoms and that both of these had occurred with the plaintiff. Further, it was pleaded that the accident appeared to have triggered a worsening of the plaintiff's general symptoms. The particulars proceeded to outline the plaintiff's diagnosis. It was alleged that three systemic complications of EDS – chronic pain, gastro intestinal involvement and postural tachycardia syndrome had all developed in the wake of the subject accident. This, it was alleged, is a frequent pattern in patients with EDS who are subject to trauma. The particulars proceeded to identify the attendance by the plaintiff with a range of specialists. One (her rheumatologist) was recorded as having advised, following a review in April 2017, that the plaintiff had developed symptoms in her neck and lower back following the accident as well as dysfunction of her bowel and autonomic nervous system which was probably triggered as a consequence of the physical and psychological trauma sustained as a result of the

accident. Other injuries were identified including anxiety and sleep difficulties, problems in swallowing, loss of weight and inability to attend school because of the nature and extent of her medical needs. It alleged that the plaintiff continued to experience chronic pain, autonomic disfunction, restriction in her range of normal everyday activities, chronic fatigue, anxiety and low mood to the point of deliberate self-harm.

6. It was further pleaded that a neurosurgeon/spine surgeon to whom the patient was referred had opined that the plaintiff had an occult tethered cord and hypermobility at six different levels of her spine which would give rise to a significant spinal cord compromise at any stage. The particulars recorded that he advised that the plaintiff had no option but to undergo surgical fusion of some or all of the cervical vertebrae to prevent this occurring. The plaintiff, it was pleaded, underwent spinal surgery in Barcelona on March 18 2018. This was conducted by under the supervision of Dr. Gilete Garcia. It was explained that a medical report was awaited in relation to that surgery.

7. That procedure and its consequence was explained in further particulars delivered on May 30 2018. These referred to the plaintiff's admission to Teknon Hospital in Barcelona, and to the surgical procedure she underwent there, including occipito cervical posterior fusion with intraoperative reduction and C2-C3 laminectomy with occipital screws, mass screws, translaminar screws and bilateral bars, combined with bone grafts taken from her ribs along with the insertion of cable wire for mobilisation and fixation. It was explained that following discharge she developed a severe thoracic pain limiting comfortable breathing, and that she was thereafter diagnosed by a pain specialist as suffering from Post-thoracotomy Neuralgic Syndrome resulting from inflammation of the intercostal nerves due to an extraction. The particulars further outlined that the plaintiff had been measured for a motorised wheelchair and the consequent expenses were identified. Immediately following those replies, on May 31, the plaintiff proceeded to serve a Notice of Trial.

The second request for discovery

8. After the delivery of these additional particulars, the solicitors for the defendant made - on August 29 2018 - a second request for discovery of the solicitors for the plaintiff. That letter framed the request as being presented pursuant to O.31, r.12 of the Rules of the Superior Courts. The documents of which discovery was thereby sought, were described as follows:

> *"Discovery of all medical records in the power, possession or procurement of the plaintiff, including but not limited to Accident and Emergency records, hospital records, ambulance records, GP records, x-rays, MRI scans and other radiological scans, from 27 December 2013, being the accident, the subject matter of proceedings, to date."*

9. The reasons for that request were referenced to the EDS diagnosis. It was stated that discovery of the plaintiff's medical records would allow the defendant's medical experts to examine the plaintiff post-accident condition and assess the extent of any overlapping injuries or conditions along with determining matters of causation between the alleged

accident the subject of the proceedings, and the injuries pleaded. The letter not having been responded to, the request was repeated in a letter dated November 19, and again on December 10. The letter of August 28 was re-sent to the plaintiff's solicitors on December 17 2018, it having emerged in the course of correspondence sent by the solicitors for the defendant pursing the request, that the plaintiff's solicitors did not have it on file.

10. On January 4 2019, the plaintiff's solicitors substantively responded to the discovery request, noting that discovery had been made by the plaintiff on November 16 2016, that the case was set down for hearing on May 31 2018 and that in those circumstances the request for discovery was not well founded. On January 15 2019, the defendant's solicitors reiterated the imperative nature (as they described it) of the discovery they sought and repeated their request. On January 28 2019, the plaintiff's solicitors wrote to the defendant's solicitors suggesting mediation and advising of their intention to apply for a hearing date in October 2019. Not having received any response, they pursued this on February 4 2019. On 12 February 2019, the defendant's solicitors indicated that they could not take instructions on the request for mediation or agreement to fix a hearing date until the outstanding discovery issue was dealt with. After receiving a holding letter, on April 4 the plaintiff's solicitors responded stating that discovery had already been made, the terms having been agreed and implemented. On April 5 2019 the defendant's solicitors responded asserting that it was premature to seek a date for trial in the absence of *inter alia* the discovery request being agreed.

11. On April 8 2019 the defendant issued a motion seeking discovery of the documents that had been referred to in their letter of August 29 2018. The rationale for the request as set forth in the letter preceding the application was repeated in the affidavit of the defendant's solicitor grounding the application. On May 22 a supplemental affidavit was sworn by the defendant's solicitor advising that as a consequence of the medical issues which had arisen in the case he had engaged Mr. Darach Crimmins of the Neurosurgery Department of Temple Street Childrens' University Hospital to provide an opinion and medical legal report. This solicitor recorded in his affidavit that he had been advised by Mr. Crimmins that in order for him to prepare such a report he would require six categories of records – all correspondence and reports from Dr. Brian Mulcahy, Dr. Rodney Grahame, Dr. Frances Smith, Dr. Gilete Garcia, from the neurosurgeon who undertook the lumber fusion and '*untethering*' and all imaging performed in Ireland, London and Spain before and after the accident and before and after the surgeries the plaintiff underwent. An e-mail from Mr. Crimmins dated May 20 2019 was exhibited in affidavit. That e-mail makes it clear that Mr. Crimmins had only received the papers in the matter that day. He referred to the plaintiff having been diagnosed with EDS by persons in Ireland and in London who were '*outside the medical establishment*'. Mr. Crimmins referred to the specific documentation he required (which he described as 'the very least' he would need to prepare a report), also stating:

> *'It may become apparent that there are other reports and scans out there after I have reviewed these.'*

12. At the time the defendant sent the papers to Mr. Crimmins the defendant had known for over a year that a claim was being made that the HEDS diagnosis was relevant to the proceedings. The request for discovery of documents arising from that diagnosis had been then pending for nine months.

The hearing before Murphy J.

13. The matter came before Murphy J. on May 27 2019. The hearing was brief. Counsel for the defendant did not expressly limit his application for discovery to those documents referred to by Mr. Crimmins. Instead, he presented the application to the Court as being for all of the records sought in the notice of motion. He said *'the category of documents sought are essentially the plaintiff's post accident medical records from the date of the accident … to date'*. Having explained the background to the matter, he then referred to and focussed on the supplemental affidavit grounding the application and the e-mail from Mr. Crimmins (which he described as requiring '*essentially, the post accident records*'). He concluded his submission by submitting that '*the post accident records are necessary and relevant*'.

14. Counsel for the plaintiff objected to the application on three grounds – (i) that the defendant had sought discovery previously, that this had been agreed and that she could not comeback for '*another bite of the cherry*', (ii) that no basis had been set out for departing from what was described as '*the usual practice of the court*' in respect of post-accident discovery that the defendant was entitled only to examine the plaintiff and liaise with the treating doctors, and (iii) that the defendant was looking for '*everything after the date of the accident*'. He emphasised the latter point throughout, opening the terms of the notice of motion to the Court and, it seems, differentiating that from the request of Mr. Crimmins. He also at one point, it appears, urged the Court to grant '*the category*' (being, I am inferring, the specific documents identified by Mr. Crimmins) as opposed to '*the very, very broad discovery that's being sought from the date of the accident to date*'.

15. Murphy J. did not accede to the application as set forth in the notice of motion. Instead, she granted an order for discovery of the specific categories of documents identified by Mr. Crimmins in his e-mail. She said the following:

> *'It seems to me that the clearest way of formulating the order for discovery is to refer it to Mr. Crimmins' statement as to what he needs and that seems to be set out in the bullet points in the email of the 20th May 2019 …'*

16. She continued (seemingly addressing counsel for the plaintiff):

> *'you're on notice that depending on what emerges there may be an application for further and better discovery. Clearly, there's no issue on liability here, the only issue is causation. The defence is entitled to have the relevant information and the Court is satisfied it's necessary, they should have discovery so that they can assess properly the issue of causation and perhaps it will be to the plaintiff's favour in the end.'*

17. There was some difference between the parties as to what had been sought and decided at this hearing. Mr. Walsh SC for the defendant presented the matter on the basis that the defendant had limited her application to the documents identified in Mr. Crimmins' e-mail. He did not say that the application was presented as a request for interim discovery but suggested that this was implicit in the proviso in Mr. Crimmins' mail. Mr. Counihan SC for the plaintiff was emphatic that there was no question of the application having turned into an interim application. Neither Mr. Walsh SC nor Mr. Counihan SC were involved in the application in the High Court, and in fairness to those that were, the motion was heard and determined in the course of the normal Monday morning list one and a half years ago. The hearing was thus necessarily short and focussed, with both the parties and the Court seeking to efficiently address the core question between the parties as it then appeared.

18. Reviewing the DAR (which was not available to counsel at the time of the hearing of this appeal) I think the reality is that while formally the defendant sought before the Court all post-accident records, her representatives adopted a pragmatic approach and focussed their application on the material sought in Mr. Crimmins' e-mail. I think it is clear that Murphy J. adopted an equally practical approach to the application in that she (a) responded to and granted the application as thus presented, (b) did not adjudicate one way or the other on the question of whether discovery of all medical records as sought in the notice of motion should be granted or refused and (c) made it clear that the defendant might come again to bring a further application for discovery. For reasons to which I will return later, had the defendant moved the application for all of the records identified in the notice of motion before the Court in May 2019 and had the Court adjudicated in any way on the balance of that application, I would have refused this appeal on that ground alone.

The third request for discovery

19. An affidavit for discovery was sworn by the plaintiff's next friend on foot of the order of Murphy J. on 23 July 2019. It is important to note that there she discovered not merely the correspondence from Drs. Mulcahy, Grahame and Smith, but also their reports. The plaintiff then delivered additional particulars on October 8. These referred to the plaintiff undergoing investigations in October 2018 which verified the presence of lumbar instability at L2-L3. It records that she underwent an XLIF and 2/L3 discectomy and interbody fusion with cage and plant on the 4 October 2018, and to her experiencing regular seizures following her return from Barcelona. It recorded her as experiencing up to six seizures a day by December 2018. It then said the following:

> *'The Plaintiff will require care day and night for the remainder of her life. She will have further ongoing, lifelong needs in respect of accommodation, transport, physiotherapy and psychological supports. Her vocational loss is complete and permanent. Actuarial evidence will be introduced at the trial of this action to assist the Court in calculating the capital value of these items.'*

20. In October 2019 the plaintiff's solicitors served their expert reports in compliance with SI 391/1998, Rules of the Superior Courts (No. 6) (Disclosure of Reports and

Statements)1998. These included all medical reports of Dr. Mulcahy and Dr. Grahame together with reports from a number of other experts. On January 8 2020, the defendants sent a letter pursuant to Order 31 Rule 12 Rules of the Superior Courts, seeking voluntary discovery of a wide range of medical records relating to the plaintiff, each of which was defined by reference to a specific medical centre, hospital or practitioner. The eight categories sought were as follows:

(i) A copy of the complete medical records from Dooradoyle Medical Centre relating to the plaintiff;

(ii) A copy of the complete medical records from University Hospital Limerick relating to the plaintiff;

(iii) the clinical records of Dr. Brian Mulcahy relating to the plaintiff;

(iv) the clinical records of Professor Rodney Grahame relating to the plaintiff;

(v) the complete medical records from Barrington's Hospital Limerick relating to the plaintiff;

(vi) the medical records from Our Lady's Children Hospital, the Children's University Hospital, the Central Remedial Clinic Clontarf and Limerick, the National Rehabilitation Hospital, Dun Laoighre relating to the plaintiff;

(vii) the medical records held by the Child and Adolescent Mental Health Services relating to the plaintiff.

21. The reason given for these categories of discovery was that the defendant's experts had advised that it was essential to *'review all of the Plaintiff's medical records in order to provide a complete and comprehensive opinion in relation to the claim and for the purpose of supporting the contention of the Defendant that the Plaintiff's ongoing very serious complaints and disability are not related to the accident the subject of the proceedings herein*'.

22. Three points should be made at this juncture. First, the request for discovery appears to be substantially a reformulation (rather than refinement) of the previous request which had been before Murphy J.. This follows from the reason given for it. Second, some documentation in these categories had already been discovered or otherwise provided to the defendant. Apart from the pre-accident discovery made in November 2016 all correspondence and reports from Dr. Mulcahy and Dr. Grahame up to the date of the second affidavit of discovery had been discovered. The schedule of Medical Reports delivered on 8 October 2019 referred to reports from *inter alia* the plaintiff's general practitioner, Dr. Mulcahy, and Professor Grahame. None of this is acknowledged in the letter. Third, the request is conspicuously unbounded by any time period. To that extent it seeks discovery of documents which were not even applied for before Murphy J. The letter proffered no explanation for this.

23. The plaintiff's solicitors issued their substantive response on 14 February. They described the discovery demand as '*oppressive*' and '*unnecessary*' and emphasised that the discovery process was '*now complete*'. They indicated their intention to seek a date for trial. Addressing each category of discovery sought they complained that it was effectively an abuse of process to put an impecunious plaintiff to the expense of obtaining medical records from a range of medical institutions and practitioners, that the discovery sought was unnecessary having regard to the discovery already made and the fact that the plaintiff had served its medical reports, that aspects of the request constituted a '*fishing expedition*' and stressing the need to have the case brought to early trial. They also stated that the defendant's medical experts were welcome to consult with the Plaintiff's doctors in order to answer any questions they may have. The final point they made in their letter (which was not replied to by the defendant) was as follows:

> *'As you are aware, the Plaintiff, who is a young woman, is in very poor health and is totally reliant on her mother for her care. She is not receiving the level of the care she requires due to financial constraints caused by the cost of her medical treatment to date and her mother's inability to work outside the home due to the Plaintiff's requirement for round the clock care. Given the fragility of the Plaintiff's health and the limitations of the care which she is currently able to afford we cannot consent to further delay in bringing these proceedings on for hearing. Notice of Trial was served by the Plaintiff on 31 May 2018; following the rounds of Discovery and the examinations of the Plaintiff which she has complied with so far as she is able, the action is now ready for hearing.*

24. On 8 April 2020 a Notice of Motion was issued by the defendant seeking discovery of the documents referred to in the letter of January 8. The application was grounded on an affidavit of the defendant's solicitor. He explained that on 17 October 2019 Dr. Keegan, consultant physician and specialist in rehabilitation medicine, attended on behalf of the defendant at the plaintiff's home and consulted with her in order to prepare a report. He said that he had been advised by Dr. Keegan that for him to prepare a report it was '*essentia*l' that he have the records from Dooradoyle Medical Centre, University Hospital Limerick, Dr. Mulcahy and Professor Grahame. He further said that the remainder of the records identified in the notice of motion were required by Mr. Crimmins in order to '*provide a final opinion*'. The defendant's solicitor averred as follows:

> *'I was advised by Mr. Crimmins that he did not believe that the Plaintiff's present state of disability has anything to do with the road traffic accident, the subject matter of the proceedings. He has further concluded that the Plaintiff's present condition is largely down to her healthcare management and he is particularly concerned that the Plaintiff has undergone what he would describe as 'several dangerous and morbid operative procedures with no plausible indication in Barcelona.''*

25. The defendant's solicitor averred that these documents were '*absolutely essential*' in order for the experts to provide an informed opinion in relation to the complex medical issues

arising in the case. He exhibited a letter from Mr. Crimmins of 23 January 2020, written after he examined the plaintiff on 23 January 2020. Having referred to the plaintiff's attendance for treatment at University Hospital Limerick, Barrington's Hospital Limerick, with a rheumatologist at Blackrock Clinic in Dublin and her assessment by a haematologist at Our Lady's Children's Hospital in Crumlin, he said:

> *'Prior to preparing my report and in order for it to hold any professional weight, it is absolutely essential that I have access to medical records from all of these hospitals (but particularly the University Hospital Limerick) as well as letters or correspondence pertaining to Ciara's initial consultations with Dr. Brian Mulcahy, a private rheumatologist in Cork. I need to establish how he arrived at a diagnosis of Elher's Danlos syndrome: thus leading her down what I consider to be a slippery path that culminated in morbid surgery in Spain.*

26. Mr. Crimmins re-iterated that without documents in these various categories his report '*would be ill informed at best*'. The issues identified in the plaintiff's solicitors letter replying to the original request for discovery, were not substantively addressed in the defendant's affidavit.

27. The plaintiff's solicitor swore a replying affidavit in which he complained of the failure of the defendant to exhibit any letter from Dr. Keegan recording the opinion attributed to him in the grounding affidavit as to the necessity of obtaining the discovery in question. It was noted that all correspondence and reports from Dr. Mulcahy and Dr. Grahame from the date of the accident to 29 August 2018 had already been furnished on foot of the order of Murphy J., and that all of their medical reports had been furnished in October 2019 in compliance with SI 391/1998. It was stressed that the order of Murphy J. refusing the general discovery sought in May 2019 had not been appealed. It was stated that insofar as the other requested categories were concerned, all hospital records in existence as of the date of the Order for discovery made by Murphy J. had been declined by her and all correspondence and reports from Dr. Mulcahy had already been furnished to the defendant on foot of that order or in compliance with SI 391/1998.

The ruling of Cross J.

28. This application came for hearing from Cross J. on 13 March 2020. In the course of his decision Cross J. explained that normally in cases such as this he took the view that post-accident discovery is not necessary for the very settled reason that the doctors can discuss with one another - and they do - and that therefore the documents that discovery of which discovery was sought was not necessary. Cross J. then identified the question in the application before him as being whether the fact that Mr. Crimmins had formed a view without the documents and the suggestion that it would be impractical for him to discuss them with the person responsible for the alleged errors in treatment rendered the discovery necessary in this case. Cross J. said as follows:

> *'I think certainly that consultation with that doctor would not be practical given the fact of the opinion that Dr. Crimmins had taken. The question then is whether it is necessary because the judgment has already been made by Dr. Crimmins and in*

this regard the requirements that they must be necessary to have the issues properly before the Court and so the Court makes a decision. The necessity is not to be found in the bolstering of a witness's views who has already come to those views and…in those circumstances I do not believe that the defendant established that the making of discovery is sought as necessary and in those circumstances I am going to reject the application for a further matter of discovery'.

Mr. Crimmins' report

29. In the course of the hearing of this appeal, counsel for the plaintiff requested liberty to refer to a report from Mr. Crimmins dated November 18 2019 which was not before Cross J.. In circumstances in which the report reflects averments in the affidavits of the defendant's solicitor which were before the High Court and in which the defendant did not object to this material being provided to the Court, I believe it appropriate to have regard to it. There Mr. Crimmins notes the material he has had available to him, and the material he has not seen (some of which is the subject of this application). Nonetheless, the views expressed by him in this report are clear. He says:

'it is my firm conviction that this girl's present state of disability has nothing to do with the road traffic accident referred to above but entirely due to be [sic.] her inappropriate management since.'

'The records provided thus far show no evidence for organic pathology in my view because of:

- *Consistently normal clinical examination with no demonstrable hard signs*
- *Plethora of varied and unrelated vague symptoms, which can be present in any non-organic condition. These have worsened over time in direct proportion to the consultations, investigations and interventions by certain medical professionals;*
- *The use of invalidated symptom and severity scales by the same medical professionals;*
- *Normal spinal imaging.'*

'In particular I see no real evidence that the plaintiff has a connective tissue disorder. She may be 'hypermobile' but so are a large contingent of heathy teenage girls especially those that are fit and healthily active. Her diagnosis of HEDS is made by combining this normal variation in a girl's joint flexibility with multiple other complaints that may well be functional.'

'Lastly this girl has undergone several dangerous and morbid operative procedures with no plausible indication in Barcelona. It is likely that the effects of this surgery are severe and permanent.'

'In summary, I believe her present condition is largely down to her healthcare management. It is unrelated to the trivial road traffic accident in December 2013.'

Repeated requests for discovery

30. The first issue that arises is whether, having regard to the procedural history of the case, the fact that the application giving rise to this appeal arises from the defendant's third request of the plaintiff for discovery (and second application to Court on foot of such a request), and the late stage in the action in which the request was made, the Court should have refused the application *in limine*, as contended by the plaintiff. In this regard, a number of considerations are relevant.

31. Discovery presents an important mechanism by which the parties to litigation can properly arm themselves to advance their claims and counter the case of their opponent. In many cases it is indispensable to the proper ascertainment of the facts, in some it may be critical to cross examination, and in others it may (at least in theory) contribute to the more efficient disposition of the trial by ensuring that experts are fully and properly instructed as to the subject matter of their evidence. It also, as Clarke CJ observed in the course of his judgment in *Tobin v. Minister for Defence* [2019] IESC 57, serves the function of '*keeping parties honest'* (at para. 7.3) and indeed it may promote the early resolution of proceedings. However, and at the same time, discovery is sometimes expensive, often time consuming, always intrusive and, if the subject of repeated applications to Court, has the capacity to delay and obstruct a party in the fair and efficient disposition of its case. Noting that the defendant in this action has offered to bear the cost of making the discovery it seeks, the latter consideration is, in my view, important in all cases having regard to the obligation of the court to impose some discipline on the parties in the timely advance of interlocutory applications. It is critical in a context such as the present case where the parties do not bring the same resources to the litigation and in which for one party there is a genuine necessity to have the case brought to early resolution.

32. The Rules of the Superior Courts and decisions of the courts interpreting them seek to balance these various factors by defining the basis on which discovery will be allowed, by adding to the traditional requirement of '*relevance*' a criteria of '*necessity*', by obligating a party seeking discovery to identify the documents the subject of their request by category, and to justify those categories, and by building in to the applicable legal test for the directing of discovery requirements of proportionality.

33. They also condition the entitlement of a party who has obtained discovery by either agreement or by Court order, to come and seek additional discovery. The relevant provisions appear in Order 31 Rule 12(11) and (12) RSC. As explained in *Hireservices E and Hireservices Limited v. An Post* [2020] IECA 120 at paras. 19 and 20, where a party seeks to revisit discovery that has been agreed or ordered by the Court, it must comply with the procedure outlined in that Rule involving the making of a formal request (supported by reasons) for the proposed variation and it must show good reason why the discovery was not originally sought.

34. The reasons that will justify permitting a party to seek to expand discovery that has already been agreed or ordered by the court will, obviously, depend on the particular circumstances of the case but, in particular, on whether the party had previously made application to the court for the discovery it now seeks. Where such an application has been made and refused, the circumstances in which that party will be permitted to come and seek that same category again will be wholly exceptional and must normally require the identification of new information or a change in circumstances which merits the Court in revisiting an application which has already been refused (see *Bank of Ireland v. Gormley* [2020] IECA 102 at para. 27). This, I should say, is not because the determination of an application for discovery gives rise to any form of *res judicata* as the parties' submissions suggest. Clearly as an interlocutory order it does not. Instead, the requirement derives from the general power of the court to prevent its processes being abused by repeated applications for the same relief a principle which, while sharing its rationale with *res judicata*, is distinct and more flexible.

35. Where such an original request for discovery has been agreed and thus not the subject of an application to the court, in deciding whether good reason has been made out for not seeking the additional discovery originally, the court must have regard to two potentially competing factors. On the one hand, it is clearly in the interests of the efficient disposition of proceedings that parties are encouraged to seek discovery promptly. At the same time, parties should be discouraged from seeking (and the Court should strive to avoid directing) more discovery than is strictly required to address the case as formulated at the time of such application. It follows that a party who can point to developments in a case since the making of discovery will often have good grounds for seeking to vary the discovery as originally agreed or ordered.

36. Similarly, where an application has been made to the Court for an order for discovery, a Court when faced with an application for discovery should, albeit exceptionally, be free in an appropriate case to direct more limited discovery than sought on the basis that the applicant for the order may return to court should it emerge that further documents within the category originally sought are required. However, where this occurs a party availing of that facility to return to seek more discovery must explain why the documents are in fact required and must explain why that rationale was not put before the court the first time the application for that discovery was made.

The multiple applications for discovery made in this case

37. In this case, as I have observed, the plaintiff's original proceedings although referring to the plaintiff's diagnosis of HEDS did not in clear terms posit that that diagnosis was caused or exacerbated by the accident. It was both reasonable for the defendant to limit its first request for discovery as it did, and as the particulars in the action developed, it had good reason for seeking discovery germane to that diagnosis.

38. When the defendant brought an application for additional discovery of all the plaintiff's post-accident medical records because of that diagnosis, Mr. Walsh's submission to this Court and the DAR suggest that her counsel made a decision not to press that application and instead to focus on the categories of documents identified by Mr. Crimmins. One can

see how, strategically, that approach might have felt justified. The Court was significantly more likely to accede to a narrow application than a broad application for post-accident medical records, not least of all in circumstances in which the narrow formulation was backed by the evidence of an expert. Murphy J. in granting discovery only of the specific documents identified by Mr. Crimmins and in seemingly not adjudicating upon the broader application made it clear she was doing so on the basis that the defendant might, and therefore could, come again. As I have explained already,

39. However, if the defendant was to come back to court and make for a second time a discovery application which it could have, but did not, agitate in full in May 2019 and if she was to do so at a point when the trial was looming, it was necessary for her to do more than simply establish that the documents were relevant. It was incumbent on her to refine the request to the greatest extent reasonably possible, to explain with particularity why she required those documents at such a late stage in the trial process, to satisfy the Court why the information she had already obtained on foot of the discovery that had been made by the plaintiff and the disclosure she had obtained were not sufficient for her purposes, and to provide some explanation why the rationale for the discovery now presented to the Court was not advanced sooner and, in particular, at the time of the first application for post-accident records.

40. These requirements follow from the related considerations that in any case the making of an order for discovery is discretionary, that in this case what is sought is a third round of discovery and second variant of an application for discovery of post-accident records, and from the over-riding requirement that a party seeking additional discovery establish their entitlement to that relief. In that regard it will be noted that O.31 R.12(11) expressly requires that a party coming back to vary agreed or directed discovery bears the burden of establishing that the additional discovery now sought *'is necessary for disposing fairly of the case or for saving costs*'. Given that '*necessity*' is a requirement of *any* discovery, it is hard to avoid the conclusion that the Rule envisages some additional burden for the party seeking the variation.

41. The Court's discretion in granting or refusing discovery is not open ended but it is 'broad' (*Ryanair plc v. Aer Rianta cpt* [2003] 4 IR 264, at p. 277 per Fennelly J.). Through the requirement of 'n*ecessity*' the Court is empowered to take account of all relevant circumstances including (but not limited to) the burden, scale and cost of the discovery sought (id.).While *Tobin* makes it clear that on a first application for discovery once relevance has been established, the burden effectively shifts to the requested party to establish that the discovery is not necessary, the fact that a party seeks discovery for a third time and makes a second application to that end at a point that is close to the trial date, with the inevitability that that date will be lost and proceedings further protracted if discovery is directed as sought, is clearly a circumstance relevant to the exercise of the Court's general discretion: *'[t]he public interest in the proper administration of justice is not confined to the relentless search for the perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy*' (*Ryanair plc v. Aer Rianta cpt* at p.277).

42. That factor is particularly pressing in a case such as the present in which the plaintiff is suffering from a very significant disability, aspects of which were alleged to have been exacerbated by the accident the subject of the claim in which, as is uncontradicted, she is impecunious and in which it was said at the hearing of this appeal that the making and consideration of additional discovery could put the trial back a further six months. In considering whether these factors tip the balance against granting discovery that would otherwise be ordered, the court must have regard not only to the reason the discovery is sought at a late stage but also to just how important the documents sought have been shown to be to the disposition and efficient presentation of the case.

Decision

43. In applying these considerations to this application, I have concluded the bulk of the late discovery sought by the defendant should be refused. I have reached this view having regard to the combined effect of the following.

44. First, as I have explained above, in the particular circumstances which presented themselves here it was incumbent upon the defendant – if it were to avail of the exceptional facility to make a second application to Court overlapping with an earlier request for discovery it made – to carefully refine and circumscribe its request. That this did not happen is clear from the fact that, when all of the categories of documents now sought are added together, the motion now before the Court is substantially a replication of the earlier motion considered by Murphy J. That this is so is evident, if nothing else, from the fact that the defendant has sought discovery of documents some of which were the subject of the Order for discovery made by Murphy J. and have thus already been discovered.

45. Second, at no point has the defendant offered any explanation why the justification now proffered for the requested discovery was not and could not have been tendered to the Court at the time of the application for discovery in May 2019. The defendant does not explain why Mr. Crimmins only realised that he would require this documentation in late 2019, or when Dr. Keegan was first retained to prepare the report for which he contends the documents are necessary.

46. Third, having issued a motion seeking discovery of pre-accident records in May 2019, and having essentially parked that application it was incumbent on the defendant in bringing a second motion for essentially the same documents to explain why the material obtained on foot of the order of Murphy J. and the documents furnished by the plaintiff by way of disclosure were not sufficient to meet the requirements of Mr. Crimmins and Dr. Keegan. Not only is no such explanation advanced by the defendant, not only is that discovery and disclosure material not referred to at all but, as I have noted, the discovery that has been sought seeks some of that same material again.

47. Fourth, it was incumbent on the defendant in bringing this late replication of its earlier motion to clearly identify the exact basis on which it was proper for the court to exercise its discretion to direct the making of discovery at this point in time. Save in two respects, the defendant has not met this burden. The justification for the documents sought by

reference to Dr. Keegan is solely referenced to his reported opinion that he needs them, and the related contention urged at the hearing of this application that experts would be criticised if their reports are based on incomplete information. It is not explained *why* having regard to the information already available to the defendant production of these records is 'essential' to the evidence he will give as an expert in rehabilitation medicine.

48. From there, in relation to other records, reliance is placed on the opinion of Mr. Crimmins. In relation to one of these categories, Mr. Crimmins explains why he needs the documents: he says that letters or correspondence pertaining to the plaintiff's initial consultations with Dr. Mulcahy are required to establish how he arrived at a diagnosis of EDS. He refers to four hospitals – Barrington's Hospital Limerick, Blackrock Clinic, Our Lady's Hospital Crumlin and University Hospital Limerick. In relation to the latter, he says that from the history he has taken from the plaintiff and her mother it is clear that she has had extensive interaction with various consultants across multiple departments at that institution. He says that it is '*absolutely essential*' that he has access to medical records from all of these hospitals, but says that this is particularly the case in relation to University Hospital Limerick. He says that without recourse to this information his report would be '*ill informed at best*'. However, that is the extent of the justification proffered.

49. Of course, the fact that a professional expert witness says that he or she requires documentation to properly present his or her report is a very important consideration to which a Court will have regard in determining whether to direct additional discovery. However, it is not always sufficient to simply record the expression of that view by the expert. It is the Court, not the expert, that decides whether documentation is relevant and necessary for the purposes of Order 31. Many experts if asked what documentation they require to prepare their report are likely to express their requirements as broadly as they can. That is both entirely proper and understandable. However, the Court must be told more than that the expert says he believes he requires particular categories of documents. The concept of '*relevance*' and of '*necessity*' required by law will depend on the circumstances and may not accord with the subjective view of an expert of what is necessary. The Court must be given sufficient information to form its own judgment as to why the material sought is required to address these issues and, from there, to reach its own adjudication as to whether discovery should be directed. Obviously, the amount of information it requires to this end will depend on the case: frequently the necessity of the documents will be so obvious as to require little elaboration. In most cases, the relevance of all medical records may be self-evident where there is an issue as to whether a condition was caused by the accident in issue. However, here the defendant had to do more. This was her second run at this discovery, and she was presenting it in a context where the first time around it had not been granted. In those circumstances it was incumbent upon her to go beyond a simple invocation of the opinion of the experts. At this late stage she ought to have differentiated this application from its earlier one by explaining what she believes each set of records are likely to add to the sum of knowledge and why these are truly necessary. She failed to do this save in relation to Dr. Mulcahy's documents and, perhaps, those sought from University Hospital Limerick. Mr. Crimmins (and indeed Dr. Keegan) may well say that in tendering expert evidence they

must have sight of all medical records so that they can be confident that their professional opinion as tendered to the Court is complete. In an ideal world that may be so. However, there is nothing ideal about a last-minute application for discovery of this kind and in my view in that circumstance they have to advance a more compelling and focussed justification for seeking the material. They will, of course, be entitled to present their opinion at trial with any consequent qualification and it is hard to see how the plaintiff (who has chosen to oppose the application for discovery) can criticise them for so doing

50. Fifth and finally, it is impossible to consider the appropriateness of this third request for discovery without having regard to the fact that the medical expert to whose evidence it might be most obviously relevant has been in a position to express trenchant views without sight of the material in question. That fact alone required the defendant to explain why Mr. Crimmins was both in a position to express those views and at the same time contend that all the documents were required for the purposes of the proceedings. She did not do this.

51. Notwithstanding the first, second, third and fifth points above and having regard to the fact that Mr. Crimmins has provided a specific explanation for seeking records from Dr. Mulcahy and having regard to the particular emphasis he has placed on obtaining documents from University Hospital Limerick and the reason I have inferred for this, I would direct discovery of those documents, but only to the extent that they have not been already disclosed by way of discovery or disclosure and, in respect of the documents sought from the University of Limerick, to such documents as post date the accident.

52. In these circumstances, I would propose making an order for discovery of the documents sought at paragraphs (ii) (with a modification) and (iii) of the Notice of Motion, being a copy of the complete medical records from University Hospital Limerick relating to the plaintiff post dating the accident the subject hereof and the clinical records of Dr. Brian Mulcahy relating to the plaintiff, save that the plaintiff shall not be required to discover again any material already discovered by her or provided by way of disclosure. Otherwise this application is refused. The defendant shall discharge any expenses incurred by the plaintiff in making such discovery, as she has offered to do.

Some further issues

53. A number of other points were made in the course of written and oral submissions to which I should refer. First, it was suggested that the defendant had failed to comply with the requirements of Order 31 Rule 12(11) that a request be made for a variation of the discovery order and time allowed to the plaintiff to respond to that. These requirements are, as noted in the *Hireservices* decision, mandatory. In my view the letter seeking additional discovery delivered on January 8 complies with the requirements of the rule. It identified the documents sought and allowed the defendant time to respond. While it was not framed by reference to the specific rule in issue and presented itself as a request for discovery rather than a variation of the existing order, these do not affect the substance of what it sought.

54. Second, the plaintiff objected to the discovery sought on the basis that there was no claim pleaded of *novus actus interveniens* or of a lack of causation. I do not believe this objection to be well placed. The requirement of proof of the particulars of personal injury and plea that the defendant did not admit that the plaintiff suffered the alleged or any injury do not abandon the right of the defendant to require the plaintiff to prove causation: in point of fact the '*particulars of personal injury*' of which the defendant thus required proof contain the only plea of causation in the personal injury summons. If causation is an issue in the case, the defendant is entitled to advance the case that the injuries attributed to the accident were not in fact caused by it and that necessarily entails the right to adduce evidence in support of that claim establishing that they were caused by something else.

55. Third, the conclusion I have reached differs from that reached by the trial Judge only in respect of two categories of the documents sought. In this regard I am conscious that this Court should be slow to interfere with the exercise by the High Court of its discretion in connection with the grant or refusal of an application for discovery. The bar for an appellant in this regard may have been raised by the recent decision in *Waterford Credit Union v. J&E Davy* [2020] IESC 9. There, Clarke CJ said (at para. 6.3):

> *'In my view, when a first instance court exercises a judgment of that type, it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court. Clearly, if the appellate court takes the view that documents whose discovery had been ordered were not relevant at all, then it should have little difficulty in overturning an order which directed that they be discovered. A similar approach should be adopted where clearly relevant and necessary documents were refused. However, the fact that the appellate court takes a somewhat different view from the trial court as to the degree of relevance should not lead to the overturning of the decision of the trial court unless the appellate court considers that the trial judge's assessment of the weight to be attached to relevance was clearly wrong and, as a result, he or she made an order which was outside the range of any order which could reasonably have been made.'*

56. As previously noted, the trial Judge's decision was based on his view that Mr. Crimmins did not need the documents as he had already formed his view on the issues in question. This Court has had the benefit of seeing Mr. Crimmins' report, which was not available to Cross J.. While the views he expresses are clear and trenchant, he is careful to emphasise that he has not seen certain materials (including documents of which discovery is sought) and in making it clear that at least in part his opinion is based upon what he has seen ('*the records provided thus far show no evidence for ..*'). Accordingly in itself the fact of that opinion having been expressed is not, alone, a reason for refusing any discovery – although as I have noted it undermines the case for necessity of those documents which it has not been established are likely to contain such evidence.

Costs

57. It is the provisional view of the Court that the defendant having succeeded in obtaining only two of the eight categories of discovery sought and having been refused the others, that the fairest order in the circumstances is to make an Order that the plaintiff recover from the defendant 50 % of its costs of this application in the High Court and in this Court. In fixing on this proportion I have had regard to the fact that the plaintiff was not successful in the contention that the defendant was, by reason of the earlier application for discovery, precluded from seeking any further discovery. If either party wishes to dispute this they should communicate that objection with four days of the date of this judgment to the Court of Appeal Office, whereupon a remote oral hearing will be convened to address the issue of costs.

58. Whelan J. and Binchy J. are in agreement with this judgment and the Order I propose.