UNAPPROVED

THE COURT OF APPEAL
CIVIL

Appeal Number No.: 2023/34

High Court Record Number: 2020/ 2693 P
Neutral Citation Number [2023] IECA 240

Ní Raifeartaigh J.
Binchy J.
Butler J.

BETWEEN/

JAMES EGAN

PLAINTIFF/APPELLANT

- AND -

CASTLEREA CO-OPERATIVE LIVESTOCK MART LIMITED

DEFENDANT/RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 9th day of October , 2023

Introduction

1. This is an appeal against an order for discovery in personal injury proceedings made by Twomey J. on 24 January 2023. The order directs the plaintiff to make discovery of two categories of documents namely documentation in respect of treatment received for back or leg pain from 1 January 2012 (i.e., his pre-accident medical records) and documentation in respect of treatment received for five months after the date of the accident (i.e. his post-accident medical records). Although the plaintiff did not initially agree to make any

discovery, prior to the hearing of the motion in the High Court he consented to an order for discovery of his pre-accident medical records for a period of five years prior to the accident, and also his post-accident records to the limited extent of his initial attendance for medical treatment immediately after the accident. The order as drawn up does not precisely reflect this, but the parties are agreed as to the amendment necessary to properly encapsulate the consent order. The issue between them concerns whether, in addition to the agreed discovery, the defendant is entitled to discovery of the plaintiff's post-accident medical records.

Background – Plaintiff's Case as Pleaded

2. The underlying proceedings concern an accident which occurred on 13 November 2017 at the defendant's premises, a livestock mart, on which, unsurprisingly, animals were present. The plaintiff claims to have been standing in a designated safe area when a bullock collided with his left leg and caused him an injury. The defendant disputes the plaintiff's claim in its entirety, denies vicarious liability for the actions of a bullock owned by a third party and pleads contributory negligence on the basis that the plaintiff failed to remain in the safety pens and was standing in a part of the mart where animals were kept and through which they were moved. The discovery sought does not relate to the circumstances of the accident but rather to the injury allegedly sustained by the plaintiff as a result of the accident.

3. The plaintiff issued a personal injury summons on 15 April 2020, some two and a half years after the accident. The particulars of personal injury pleaded suggest that he sustained a soft tissue injury to his left leg which was swollen and bruised in the aftermath of the accident. It is also pleaded that he continued to suffer pain and had difficulty standing, climbing stairs and walking. The particulars state that the plaintiff sought a specialist's referral in March 2018 but do not give any detail as to whether that referral was made and,

if so, to whom. The latest date given for attendance at his general practitioner is July 2018, at which stage the plaintiff continued to complain of ongoing leg pain.

4. On 1 March 2021, the defendant raised a notice for particulars. Most of the queries related to the circumstances of the accident but a few sought further information as to the plaintiff's injury and the medical treatment he had received. At particular no. 16, the defendant sought the identity of the plaintiff's medical attendants, the dates of his attendances and the treatment received and at no. 19, the defendant sought details of any injury of any nature prior or subsequent to the accident the subject of the proceedings. These particulars were replied to nearly a year later on 9 February 2022. The plaintiff declined to answer no. 16 on the basis that the information sought was a matter for evidence. In respect of no. 19, the plaintiff disclosed two matters. The first was that in 1999 he had been involved in a road traffic accident and sustained injuries for which he had received compensation. The second, and more significant, was that he had a history of back pain and a L4/L5 disc bulge. He had undergone spinal surgery in the 1980s.

5. On the same date, more than four years after the date of the accident, the plaintiff delivered updated particulars of personal injury. These gave details of his attendance at and the opinion of a consultant orthopaedic surgeon. The consultant had carried out investigations of the plaintiff's left lower limb pain, including an MRI scan of his lumbar spine. This showed a compression of the left L5 nerve root which led the consultant to conclude *"a dual pathology as the most likely source of the ongoing pain"* and that each was contributing equally to the plaintiff's lower leg pain. Despite the plaintiff's historic back issues, it is pleaded that he was not having any major difficulties and was moving well – presumably before the accident. Further, it is pleaded that as of March 2020 (co-incidentally prior to the issuing of the personal injury summons) the plaintiff's general practitioner was of the view that the L5 nerve root may have been aggravated by the trauma received in

November 2017 and the ongoing leg pain is described as *"referred pain from the L5 nerve root compression"*. There is a reference to the plaintiff attending a consultant spinal surgeon in October 2020 and it is unclear if this is the same person as the consultant orthopaedic surgeon. Fairly widespread pain and functional impairment affecting the lumbar spine, left hip and left knee in addition to the lower leg was identified and treated with analgesics and *"activity modification"*.

6. These updated particulars of personal injury radically altered the case the defendant understood it was meeting. The proceedings in 2020 suggested the plaintiff had sustained a fairly standard soft tissue injury to his left lower leg and that the contest between the parties would centre around where the plaintiff was standing and whether the defendant was vicariously liable for the bullock. The 2022 particulars suggested the plaintiff had suffered a far more complex injury and that his ongoing complaints were due to a combination of his leg injury and his pre-existing back problem which may or may not have been re-activated by the accident itself. Unsurprisingly, the defendant wished to investigate this aspect of the case in some more detail.

7. The defendant issued a rejoinder to the plaintiff's reply to its notice for particulars on 11 February 2022 which had not been replied to at the time this appeal was heard. Notwithstanding this, the defendant filed a defence on 14 February 2022. The defence is a complete denial of the plaintiff's claim with a plea of contributory negligence and a plea that the defendant is not vicariously liable for the third party's bullock. The defence also puts causation in issue and requires the plaintiff to prove that the injuries complained of are attributable, either solely or at all, to the accident and not caused by any prior accident or medical condition that the plaintiff had before the accident.

Discovery Application

8. On the same day the defence was filed, the defendant sought voluntary discovery of the plaintiff's medical records by way of letter dated 14 February 2022. The two categories of discovery requested are set out in the first paragraph of this judgment, i.e. five years pre-accident records and five months post-accident records. The letter proffers a single, albeit detailed, reason justifying both categories of discovery. After summarising the plaintiff's injuries as pleaded in both the personal injuries summons and in the updated particulars, the letter notes the view of the plaintiff's consultant orthopaedic surgeon that the leg pain is due both to the trauma of the accident and the nerve root compression at L5 and identifies a need for the defendant and the court to be aware of the nature and extent of the difficulties the plaintiff experienced due to the nerve root compression in the years before the accident. It continues that the discovery requested will allow the defendant to cross-reference the pleadings with the medical treatment and to *"examine to what extent, if any, there was an overlap of complaint from the previous medical history and the injuries allegedly suffered in the index accident"*. It also contends that the availability of these medical records will allow *"a comprehensive independent medical examination of the plaintiff"*. Finally, it contends that the documents will establish the extent to which the plaintiff's injuries and on-going treatment as a result of the accident overlap with any pre-existing or subsequent injuries. All of this, it is claimed, will minimise the issues between the parties and potentially save costs. Whilst the first reason advanced is clearly referable only to the plaintiff's pre-accident medical records, the others appear to apply equally to both categories.

9. The papers before the court do not include any reply to the request for voluntary recovery so I assume that none was received. In any event, the defendant issued a motion for discovery on 14 September 2022. The plaintiff then agreed to the first category of discovery ("*all documentation in respect of treatment for any back or leg pain or symptom*

from 1 January 2012") subject to the qualification that this category would include the plaintiff's initial medical attendance post-accident but nothing thereafter. Consequently, the motion proceeded before the High Court as one relating to the plaintiff's post-accident treatment records only.

High Court Judgment

10. Twomey J. delivered judgment allowing the discovery sought on 17 January 2023 [2023] IEHC 16. The plaintiff takes issue with the way in which the trial judge framed the issue before the court and indeed with much of the tenor of the judgment. Whilst the first paragraph of the judgment frames the issue relatively neutrally (*"Should a plaintiff in a personal injuries case be entitled to deny a defendant sight of his post-accident medical records, even though these are the best evidence of the alleged injuries?"*), the second paragraph asks whether such discovery should be allowed rather than limiting the defendant's access to just the medical reports on which the plaintiff wishes to rely *"in order to keep the plaintiff "honest" in pursuing his claim for personal injuries"*. The reference to discovery keeping the parties honest is taken from *Tobin v. Minister for Defence* [2020] 1 IR 211, a judgment to which I shall return.

11. The judgment then observes the distinction drawn by the plaintiff between his pre-accident medical records which he was prepared to discover and his post-accident medical records, which he was not. The trial judge expresses the view that the post-accident records are *"more likely to be relevant to the proceedings"* because they evidence the injury sustained in the accident whereas the pre-accident records clearly will not do so. He then deals with the plaintiff's argument that discovery of the post-accident records is not necessary because the plaintiff will, at a later point in the proceedings, be obliged to provide the defendant with copies of the medical reports of any doctor whom the plaintiff proposes

to call as a witness at trial. The trial judge rejected this argument essentially because he regarded the post-accident medical records as the *"best evidence"* of the plaintiff's medical condition and also because they deal with what he regarded as a key issue in many personal injury cases, namely the extent to which a plaintiff's complaints are related to the accident rather than to any pre-existing or subsequently arising medical issue. Thus, he regarded discovery of those records as both relevant and necessary.

12. The plaintiff complains that much of the justification proffered by the trial judge for this conclusion is speculative and has no relevance to the facts of this case. Insofar as the trial judge discusses other medical issues arising after an accident or other post-accident injuries (at paras. 13-16 inclusive), this is undoubtedly correct. This is not a case in which there is a concern about an overlapping post-accident injury. Rather, it is one in which the defendant wishes to examine the extent to which the injuries allegedly sustained in the accident overlap with an acknowledged pre-existing medical condition which has been disclosed by the plaintiff and to explore the allegation that the trauma of the accident aggravated or reactivated the pre-existing condition. These are, no doubt, serious issues but they are different to the issues considered by the trial judge at this part of his judgment.

13. At para. 18 of his judgment the trial judge concludes that the post-accident medical records are not just relevant but *"invariably crucial to every personal injuries claim"*. However, he then proceeds in para. 19 to identify additional reasons why, in the particular case, discovery should be made of the post-accident records. These centre on the possible overlap between the complaints of leg pain arising from the accident and the pre-accident history of issues with the plaintiff's back which, in the trial judge's view, made the records *"particularly relevant"* in this case.

14. Finally, the trial judge considered a series of cases addressing whether it is appropriate for a plaintiff to be referred to a medical specialist by his solicitor as opposed to all such

referrals being made by the plaintiff's general practitioner. The defendant has not suggested that the plaintiff was referred to his consultant (or consultants) by his solicitor, so this issue was not canvassed further by the parties save to query its relevance to the issues in this appeal. As conflicting views have been expressed by different High Court judges on this topic (which may yet come before this court), I do not propose to address it further in this judgment.

Positions of the Parties on the Appeal

15. The position adopted by the parties on the appeal was consistent with that taken by them throughout the discovery process. The plaintiff maintained that as a matter of general principle, discovery of post-accident medical records should not be required. Although initially the relevance of the post-accident records appeared to be queried by the plaintiff, it was accepted that relevance had been conceded by the plaintiff in the High Court such that the central issue on the appeal was necessity.

16. The plaintiff argued that generally post-accident medical records were not necessary unless there was an issue as to the plaintiff's credibility, which did not arise in this case. In those circumstances, the basic confidentiality of the plaintiff's medical records should be respected. Further, the defendant has the right to have the plaintiff medically examined and will have sight of the medical reports prepared by the plaintiff's medical witnesses and the right to cross examine those experts at trial. It was also suggested that the requirement to discover this category of document could be disproportionate and oppressive as the records might be voluminous and an onus might be placed on the doctors concerned to redact the non-relevant parts of the records for disclosure.

17. Strikingly, the defendant did not seek to assert that post-accident medical records were or should be generally discoverable. Rather it contended that, exceptionally, there were good

reasons to order discovery in this case. The marked turn taken by the case on the service of the updated particulars of personal injury made it necessary for the defendant to get discovery in order to ascertain the complaints as initially made by the plaintiff, how they were interpreted by the treating doctors and the treatment received for them as, if the pre-existing back condition was material to the injury, it should have manifested itself within a short period of time after the accident. In the defendant's submission, the late notification of the possible link to the plaintiff's pre-existing back condition was a crucial – and exceptional - feature.

Preliminary Observations

18. The argument in this appeal is somewhat clouded by the objection taken by the plaintiff's lawyers to the views expressed by the trial judge regarding the need to keep the plaintiff in a personal injuries case *"honest"*. These comments were perhaps unhelpful in circumstances where no issue has been raised as to this plaintiff's credibility or general honesty. Indeed, the factor which has prompted the defendant's application for discovery (i.e., the plaintiff's pre-existing back condition and its potential interaction with the injury sustained in the accident) is one which was disclosed to the defendant by the plaintiff in his replies to particulars. In *Tobin v. Minister for Defence (above)* Clarke C.J. notes the important role that discovery can play in ensuring that a party does not present a case to court which is inconsistent with documents in their possession but withheld from the other side and thus in keeping the parties to litigation honest. However, it does not follow from this that a court should approach all applications for discovery on the assumption that the parties are fundamentally dishonest. Needless to say, personal injuries cases do not form a sub-set of litigation in which the parties, much less in which plaintiffs especially, are inherently disposed to being dishonest and therefore are in particular need of being kept honest. Other

equally important purposes served by discovery are identified by Murray J in *Micks-Wallace (a minor) v Dunne* [2020] IECA 282. These include assisting the parties in the proper ascertainment of the facts, in cross-examining opposing witnesses and in enabling them to fully and properly instruct expert witnesses as to the subject matter of their evidence (para. 31). Consequently, and without in any way questioning Clarke CJ's perceptive observations, I do not think it either necessary or appropriate to approach this case on the basis that the defendant's entitlement to discovery should be decided by reference to a need to keep this plaintiff honest.

19. The other general issue which I feel it appropriate to address at the outset is the understanding, apparently shared by both sides, that discovery should not generally be required of post-accident medical records. No legal authority was advanced to support this proposition although I note that the trial judge specifically invited the parties to address him on it. In a similar manner, the parties did not provide any authority to support a distinction between the treatment of pre-accident and post-accident medical records for the purposes of discovery.

20. I appreciate that once a plaintiff has had an accident and litigation is contemplated or has been instituted then legal professional privilege will attach to medical reports prepared for the purposes of the litigation, subject of course to the disclosure obligations under S.I. 391 of 1998 (Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements)). However, there is a distinction between records of the medical treatment afforded to a plaintiff – particularly in the immediate aftermath of an accident or injury - and medical reports prepared with the litigation in mind and reflecting the views of medical practitioners on the likely causes of a particular injury or medical condition, its susceptibility to treatment and the likely prognosis for a plaintiff's recovery. Whilst the latter are clearly covered by legal professional privilege, the treatment records upon which the medical experts may base

their views are not covered by such privilege. Those records were not prepared in contemplation of the litigation but as part of the medical profession's standard record-keeping obligations. In any event, it was not suggested that the non-disclosure of post-accident medical records was based on any privilege going beyond the confidentiality which normally attaches to such medical records.

21. It is now well established that the right to privacy which a plaintiff would normally be entitled to assert over their own medical records is necessarily waived when they sue for damages for personal injuries (*per* Keane CJ in *McGrory v. ESB* [2003] 3 IR 407 at p. 414). Interestingly, *McGrory* was not a discovery case but rather concerned the entitlement of a defendant not just to have the plaintiff medically examined but to be provided with the names of the plaintiff's medical advisors so that the plaintiff's case could be discussed between the defendant's and the plaintiff's medical experts. In holding that the plaintiff was obliged to disclose his medical records to the defendant, the Supreme Court relied on the decision of the Court of Appeal in *Dunn v. British Coal Corporation* [1993] ICR 601 which had held that a defendant's medical examiner was entitled to examine the plaintiff's hospital records and GP notes to determine if there was any pre-existing problem. Although the defendant would be entitled to secure production of those records at trial by issuing a *subpoena duces tecum*, disclosure at an earlier stage would facilitate early and complete preparation for trial by both parties and thus would serve the interests of justice by promoting the possibility of early settlement rather than the prolongation of litigation. The Supreme Court observed:

> *"The law must be in a position to ensure that he does not unfairly and unreasonably impede the defendant in the preparation of his defence by refusing to consent to a medical examination. Similarly, the court must be able to ensure that the defendant has access to any relevant medical records and to obtain from the treating doctors any information they may have relevant to the plaintiff's medical condition, although the*

plaintiff cannot be required to disclose medical reports in respect of which he is entitled to claim legal professional privilege."

22. A similar argument to the effect that there was a general prohibition on granting discovery of post-accident medical records save in exceptional cases was advanced in *McCorry v. McCorry* [2021] IEHC 104. Simons J. described the argument made to him as one based on the judgment of Barrett J. in *Power v. Tesco Ireland Limited* [2016] IEHC 390 to the effect that there was an evidential rule that post-accident discovery would not be granted except in circumstances where it was supported by the opinion of a medical expert that such discovery was necessary.

23. The categories of discovery sought in *Power v. Tesco* covered both pre- and post-accident medical records and it does not appear that any particular distinction was drawn between them. Barret J. allowed discovery of both categories subject to certain limitations imposed to ensure that the obligation to provide discovery was proportionate and not oppressive. In considering where the boundary lay between medical records which were relevant and necessary and those which were not, Barrett J. suggested that there should be a medical examination of the plaintiff by a doctor on behalf of the defendant prior to any request for discovery being made and that it was only when the medical examiner formed the view that there was a pre-existing condition or there was some other *"evidential indicator"* that the plaintiff's pre-accident history was relevant, that discovery should be ordered. The judgment does not set out how the trial judge regarded those pre-conditions as being satisfied on the facts of the particular case (which are not recorded in the judgment), but as the discovery was ordered, presumably he concluded that they were.

24. Simons J. in *McCorry v. McCorry* did not read this judgment as requiring in all cases that a medical examination have been carried out on behalf of the defendant in which issues were raised as to the plaintiff's pre-accident condition, merely that there be an *"evidential*

indicator" that discovery was both relevant and necessary. He noted that the Court of Appeal had rejected the notion that the relevance and necessity of discovery of source material could only be determined by reference to the views of a professional expert (see Murray J. in *Micks-Wallace (a minor) v. Dunne* [2020] IECA 282). Simons J. cites a passage from that judgment in which the Court of Appeal observes that *"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…"*. On the facts of the case before him, Simons J. concluded that it was reasonable to assume discovery of post-accident medical records would assist in demonstrating which of the plaintiff's complaints were related to the accident and which related to other pre-existing medical issues. He observed the necessity of making discovery of post-accident records might have been avoided if the plaintiff had provided a fuller response to a request for further and better particulars but, having declined to answer the queries, the defendant was entitled to the discovery sought.

25. I do not think that either *Power v. Tesco* or *McCorry v. McCorry* provides support for the proposition that discovery of post-accident medical records should, as a matter of general principle, be refused save in exceptional cases. Indeed, Simons J. in *McCorry v McCorry* appears to expressly reject this proposition and certainly does so insofar as it is purportedly based on *Power v. Tesco*. The observations of Barrett J. regarding the need for a medical examination of the plaintiff prior to a request for discovery of medical records and for the request to be based on the views of a medical expert, were clearly incorrect in light of the subsequent judgment of this court in *Micks-Wallace (a minor)*. At their height, these cases go no further than establish the need that there be some evidential indicator that discovery of the plaintiff's medical records is required for the purposes of the litigation before the court should order disclosure of what is otherwise confidential material. There is no sound

distinction to be drawn between pre- and post-accident medical records based on the case law in this regard.

26. Of course, it does not follow from the fact that there is no general prohibition on the court ordering discovery of post-accident medical records that such an order should be made in this case, much less in every case. The observation at para. 18 of the High Court judgment that post-accident medical records *"are not only relevant but invariably crucial to every personal injuries claim"* is an over-generalisation. In my view, it does not take proper account of the requirements of O.31, r.12 evident in particular in sub-rules 1(a) and 2(a) that it be positively shown that the discovery requested is necessary for disposing fairly of the cause or matter or for saving costs and that the court may refuse or adjourn the application if satisfied that the discovery is not necessary or not necessary at that stage of the litigation. Obviously, the necessity referred to falls to be considered by reference to the reasons set out by the party seeking discovery in the request for voluntary discovery which is required as a pre-condition to the bringing of a motion under O.31, r.12(6). As the categories of discovery must be precisely identified and reasons must be provided for each category, it follows that the consideration the court must give to "*necessity*" is required to be particular to each individual case. There is no category of documentation that is invariably crucial in every case within a particular area of litigation. It may well be that grounds can readily be made out for the disclosure of particular categories of document in many cases falling within a particular type of litigation but there is nonetheless an obligation in each individual case to rationalise the need for those documents to be discovered.

27. I will now turn to address whether the trial judge was correct in regarding the material of which discovery was sought in this case to be necessary either for disposing fairly of the court case or for saving costs.

Necessity for the Discovery of Medical Records

28. The criteria by reference to which applications for discovery fall to be determined – i.e., the relevance of the documents sought to the issues pleaded in the proceedings and the necessity of discovery of those documents for the fair disposal of the case or for the saving of costs – are not disputed between the parties. The relevance of the plaintiff's medical records to the issues in the proceedings was conceded by the plaintiff in the High Court. This was, no doubt, because the updated particulars of personal injury belatedly raised an issue as to the extent to which the ongoing pain complained of by the plaintiff was due to his pre-existing back condition - in response to which the defendant filed a defence disputing causation of the plaintiff's ongoing complaints. I mention this because it means that the pleadings themselves establish that there is an issue as to the overlap between the injuries sustained by the plaintiff in the accident and his pre-existing medical condition. Whilst issues frequently arise in personal injury cases as to whether the injuries, the subject of the proceedings, overlap with the previous or subsequent medical conditions, they certainly do not arise in all cases such as to make the plaintiff's medical records invariably relevant for this reason.

29. The longstanding test for relevance in discovery is that articulated by Brett L.J. in *Peruvian Guano* (1882) 11 QBD 55 namely documents which *"It is reasonable to suppose contain information which may – not which must – either directly or indirectly enable the party…to advance his own case or to damage the case of his adversary".* This is recognised as setting a low threshold. Collins J. in *Ryan v. Dengrove DAC* [2022] IECA 155 describes this as an *"extravagant conception of relevance"* and notes that notwithstanding the introduction of *"necessity"* as an express requirement in O.31, r.12 through amendment in 1999 (S.I. 233/1999) this has not had a significant impact on the burden or cost of discovery. Whilst changes may be anticipated and indeed have been recommended in the 2020 Review

of the Administration of Civil Justice Report (the Kelly report), this case must be decided by reference to the law as it currently stands.

30. The courts have applied O.31, r.12 in a manner such that, although relevance and necessity are acknowledged to be discrete and cumulative requirements, once it has been established that documents are relevant to the issues in the litigation it is presumed that their discovery is also necessary. It was put thus by Collins J. in *Ryan v. Dengrove DAC* (above) at para. 41 of his judgment:

> *"Necessity has, in this context, been given a rather attenuated meaning and is presumed to follow from the fact that a document or category of documents is relevant (though that presumption may be displaced)."*

31. The fact that establishing relevance gives rise to a rebuttable presumption of necessity was recognised by Clarke C.J. in *Tobin v. Minister for Justice* (above) as follows:

> *"[53] While the initial burden of establishing both relevance and necessity must lie on the requesting party, it can, for the reasons which I have sought to analyse, be taken that the establishment of relevance will prima facie also establish necessity. Where it is sought to suggest that the discovery of documents whose relevance has been established is not necessary, the burden will lie on the requested party to put forward reasons as to why the test of necessity has not been met. Those reasons should initially be addressed in the response of the requested party to the letter seeking discovery. In the event of a court being required to adjudicate on such matters, then, to the extent that the reasons for suggesting that discovery of any particular category of document is not "necessary" is dependent on facts, it is for the requested party to place evidence before the courts to establish the relevant facts. To the extent that the opposition to discovery may be based on legal argument, then it is for the requested party to put forward its reasons as to why production is not necessary.*

[54] Thus the overall approach, both in letters of request and responses thereto and in applications before the court, should be that it is for the requesting party to establish the relevance of the documents whose discovery is sought but it is for the requested party to establish, whether by facts or argument, that discovery is not necessary even though the documents sought have been shown to be relevant."

32. To a certain extent these comments run counter to earlier observations made by Clarke C.J. in the same judgment. For example, although one of the issues in that case was overly burdensome discovery, Clarke C.J. felt that analogous considerations arose when a court was asked to order discovery of confidential documentation and stated that the court should only order discovery of confidential documentation *"in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made"*. This led him to conclude:

"[44] Those measures exist, of course, against the backdrop of the fact that confidentiality (as opposed to privilege) does not provide a legitimate basis for refusing to require disclosure of documents should they prove necessary to the proper administration of justice. But they do provide a warrant for the court adopting appropriate measures to respect the importance of confidentiality by ensuring that it is only displaced when the production of confidential documentation proves truly necessary to the just resolution of proceedings."

This seems to allow for a more nuanced approach towards confidential material, such as medical records, than that suggested by Keane C.J. in *McGrory v. ESB* (above). Thus, whilst the bringing of personal injuries proceedings must necessarily entail a waiver of the privacy which the plaintiff would otherwise enjoy as regards his medical condition, there is nonetheless an obligation on the court to respect, insofar as it is consistent with the fair

conduct of the litigation, the fact that medical records are *prima facie* confidential. Presumably this does not alter the fact that the presumption that discovery is necessary where relevance has been established shifts the onus of proving the discovery is not necessary to the party resisting the making of the order. However, it may well impact the standard of proof and reduce the threshold that such party must meet in order for the court, in its discretion, to refuse discovery of otherwise relevant material.

33. Clarke C.J.'s analysis identifies a number of different approaches towards necessity that can be adopted by a party resisting discovery. The first is to establish that *"there are other equally effectual means of establishing the truth and thus providing for a fair trial"* (para. 45). If material is otherwise available to a plaintiff, then it should not be necessary for the defendant to formally discover it. However, the mere existence of an alternative means of establishing something in issue in the proceedings will not be sufficient in all cases to avoid the need for discovery. Other factors such as the efficacy of the alternate means proposed and the comparative cost of utilizing it also have to be considered.

34. Barniville J. observed in *Dunnes Stores v. McCann* [2018] IEHC 123, that to date there are a relatively small number of cases in which the courts have accepted that discovery should not be ordered because an alternative means of obtaining the information is available. He stated (at para. 36 of his judgment):

> *"36.…If it can be shown that there are alternative means of establishing the issues in respect of which the discovery is sought other than by discovery, then the party seeking discovery may have a difficulty in discharging the onus of showing that the discovery sought is necessary in that sense. It is true that this will not arise in most cases and the cases in which it has arisen such as PJ Carroll & Co (No.3), Linfen Ltd v. Rocca [2009] 2 ILRM 504 and Hansfield Developments v. Irish Asphalt Ltd [2009] IESC 4, probably represent the relatively small number of cases in which this issue will arise,*

and in which discovery although relevant may nonetheless be found not to be necessary for the fair disposal of the case or for saving costs. However, where an alternative means of proving the relevant issue is available or where some alternative means of getting at that information such as by way of interrogatories exists, as in Browne and McCabe, the court should be scrupulous to ensure that the discovery sought is really needed and to refuse such discovery where interrogatories would be more appropriate or where an alternative means of proof is available to the applicant for discovery."

35. As transparency and accountability have become increasingly important principles not just in public administration but in areas of life where businesses or other organisations interact with the public, there are now a range of statutory mechanisms through which people can access information which may be of relevance to intended litigation. A freedom of information request may provide as much, if not more, information as a request for discovery and material so obtained will not be subject to the implied undertaking limiting the use to which discovered documents may be put. A data access request can provide an individual litigant with access to records kept by any data controller in respect of the individual themselves. Where the litigant would be statutorily entitled to access the information through these means, then, assuming the information can and will be made available in a timely manner, the need to make discovery of the same material will be commensurately reduced. Equally, where a body is required to make its files available for public inspection, as, for example, planning authorities are under s.38 of the Planning and Development Act 2000 (as amended), then there should not generally be any need for formal discovery to be ordered of the same files.

36. However, the position may be somewhat different where the alternative means pointed to is some procedure available under the Rules of Court in the context of the litigation itself.

The entitlement to make an application for something which may be opposed by the other side, and which may or may not be allowed by a court is, in my view, an entitlement of a lesser order than the statutory entitlements discussed in the preceding paragraph. For example, in both this case and in *McCorry v. McCorry* information sought by way of notice for particulars was refused by the other side. Had the plaintiff chosen to answer particular no. 16 differently and provided the defendant with full details of his medical attendants, dates of such attendances and the treatment afforded to him then the arguments to be made as to the need for the defendant to be provided with the records of such attendances might be different. Of course, it is not possible to say definitively that discovery would not have been necessary if the particulars had been answered more fully. Nonetheless, I think that a party who wishes to rely on the availability of other procedural mechanisms within the litigation to avoid the need to make discovery cannot simultaneously decline to engage with or consistently oppose their opponent's attempts to use those mechanisms. Is it realistic for the defendant to suggest that it would provide information by way of replies to interrogatories which it has declined to provide by way of replies to the particulars already raised?

37. A second approach is to ask whether the cost and, more generally, the burden in terms of the administrative time and effort required to prepare the discovery sought is proportionate to the likely benefit of the documents being made available to the other side and, by extension, to the court. As the volume of information kept by organisations has increased exponentially with the digitalisation of businesses and public services, the potential burden posed by the requirement to make discovery is a real issue in many cases particularly when compared with the likely benefit (or lack thereof) to the other party. The court must also be cognisant of the fact that the resources of the parties to bear such a burden may not be equal. Some analyses go so far as to treat proportionality as a separate, third criterion that must be

satisfied before a court should make an order for discovery. I tend to agree with the views of Collins J. in *Ryan v. Dengrove DAC* (above) that nothing in this case really turns on whether proportionality is treated as an aspect of necessity or as a standalone requirement.

38. Given the vast volume of documents routinely created in the commercial and administrative spheres, the proportionality of an overly broad request for discovery is undoubtedly something that will require consideration in many cases. However, it is possible for a requesting party to address these concerns from the outset and to build limits into the requests which will enable a court to be satisfied that the request is proportionate. Those limits may restrict the subject matter of the documentation sought or the parties whose communications are sought or, as here, comprise a time limit so that a fixed outer point is placed on the obligation of the other party to search for relevant records.

39. The Court of Appeal (Ryan P.) summarised the relevant principles relating to discovery by reference to a significant body of case law in *O'Brien v. Red Flag Consulting Limited* [2017] IECA 258. Having identified necessity as a separate criterion to relevance, the court then set out the principles applicable to that criterion as follows:

> *"8. The court should consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. [Ryanair plc v. Aer Rianta cpt [2003] 4 IR 264.*
>
> *9. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial. [Framus, page 38].*

10. In certain circumstances, a too-wide ranging order for discovery may be an obstacle to the fair disposal of proceedings. [Independent Newspapers (Ireland) Ltd v. Murphy [2006] 3 IR 566, p. 572].

11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties. [Hannon, para.4]."

Application of Principles

40. Accepting that these are the relevant principles, how do they apply to the facts of this case and did the trial judge apply them correctly?

41. The starting point for this analysis is that as the relevance of the plaintiff's post-accident medical records was conceded, this raised a presumption that their discovery was necessary for the fair conduct of the proceedings or for saving costs. The presumption is not absolute, but the onus lies on the plaintiff to rebut it. Such rebuttal may be by evidence or by legal argument.

42. The plaintiff in this case did not reply to the defendant's request for voluntary discovery. Equally the plaintiff did not file an affidavit in response to the defendant's motion. Therefore, some of the arguments made by the plaintiff were made without any evidential foundation. Whilst a court can take judicial notice of some matters such as the existence of various procedural mechanisms within the Rules of Court and perhaps even the efficacy of those mechanisms, it is difficult to see how the court could form a conclusion as to the burden posed by a particular request for discovery without evidence of the likely difficulties the plaintiff would experience complying with it. Thus, arguments made by the plaintiff as to the difficulty medical practitioners might have in redacting medical records so that only relevant material was disclosed cannot really be afforded any weight in the absence of

evidence as to the volume of records involved, the number of doctors or medical institutions holding those records, the likelihood of those records including non-relevant material and what steps might have to be taken and by whom to redact the material in question. Arguments of that nature might well succeed in another case, but in my view a clear evidential basis establishing the burdensome nature of the requirement would have to be established before a court could decline to order discovery of admittedly relevant and presumably necessary material on that ground.

43. That said, the plaintiff raised three discrete legal arguments regarding the necessity of the discovery sought by the defendant. Firstly, it was contended that the reasons advanced in the letter seeking voluntary discovery were vague and general and did not provide a basis upon which the court could find that the discovery of post-accident medical records was necessary. This argument can be disposed of fairly easily for two reasons. Most obviously, it ignores the presumption that it is necessary to discover those documents raised by the admission that they are relevant to the issues pleaded in the case. The effect of a presumption is to shift the burden of proof. Thus, at this point the onus lies on the plaintiff to show that the discovery of these relevant documents is not necessary rather than on the defendant to show that it is.

44. In any event, the letter seeking voluntary discovery does, in my view, establish a sufficient basis for the court to be satisfied that the discovery of these relevant medical records is, in all of the circumstances, necessary. As counsel for the defendant argued, the significant alteration in the plaintiff's pleaded case apparent from the updated particulars of personal injury provides the *"evidential indicator"* that the records are necessary. The reasons for this were set out in the letter and relate to the defendant's need to establish the extent of the overlap, if any, between the injuries sustained in the accident and the plaintiff's pre-existing medical condition as well as facilitating a comprehensive medical examination

of the plaintiff on behalf of the defendant. I note that the latter was regarded as essential by the Supreme Court in *McGrory v. ESB.*

45. I have already rejected the proposition set out in *Power v. Tesco* that the necessity for discovery of medical records needs to be based on the view of a medical expert. The availability of discovered material is to facilitate a party in preparing for trial. Thus, the need for that material is more properly identified by a lawyer than by a medical expert and must in any event be determined by the court, although, of course, the views of medical experts can offer significant guidance to both the parties' solicitors and to the court. I am satisfied that the reasons for seeking discovery have been properly set out in the correspondence prepared by the defendant's solicitor and in the affidavit in which he formally adopted that correspondence for the purposes of the motion.

46. Secondly, the plaintiff argued that the defendant will be provided with the medical reports to be relied on by the plaintiff in advance of the trial and will be entitled to cross examine the plaintiff's medical witnesses. Further, the defendant is entitled to have the plaintiff independently medically examined. Thus, it is contended that the issues to which the discovery is directed are matters for medical evidence rather than discovery. I note that discovery of post-accident medical records had been refused in the High Court in *Micks-Wallace (a minor) (above)* on the basis that the doctor conducting such an examination on behalf of the defendant would be entitled to discuss the case with the plaintiff's doctors and consequently that discovery would only be necessary if such consultations would not be practical. The Court of Appeal over-turned the decision of the High Court in part which would implicitly suggest that this rationale was not regarded as sufficient to justify refusal of discovery in the circumstances. However, the focus of the judgment is on the burden facing a party making a second or subsequent application for discovery which over-laps with an application in which discovery was previously directed.

47. The fact that an issue may be the subject of expert evidence at trial does not, in my view, preclude the possibility that discovery of documents relevant to the issue may be properly sought in advance of the trial. The interaction between the plaintiff's pre-existing medical condition and the injury sustained in the accident is now a significant issue in the litigation. The plaintiff has effectively conceded that his medical records are relevant to this issue and has consented to the discovery of five years of his pre-accident medical records. There is, in my view, no distinction in principle between pre- and post-accident medical records unless and until a point is reached where the records of the plaintiff's medical treatment overlap with legally privileged – as opposed to merely confidential - medical material. It is not contended that that point is reached here and, in any event, if it were, it would more properly be the subject of a claim of privilege in an affidavit of discovery rather than a reason for refusing discovery. Consequently, the fact that there will be medical evidence if the case proceeds to trial and that medical evidence can be called by both sides does not preclude discovery of the records in issue being necessary at this stage.

48. That said, I might observe that I do not share the trial judge's two-fold concern that the plaintiff may not choose to call (and therefore supply medical reports from) the doctors who treated him in the months after the accident and that the vast majority of personal injury cases settle. The plaintiff is entitled to choose which witnesses he wishes to call, as indeed is the defendant. It is understood by both parties, and by the court, that in an adversarial legal system the plaintiff will call those witnesses most favourable to his case and, likewise, so will the defendant. Neither party is obliged to call a witness just because that witness has *prima facie* relevant evidence to offer. But, of course, neither party can prevent the other from calling such a witness either. There may undoubtedly be occasions when a court is frustrated at the absence of a witness from whom the court would like to hear evidence. Indeed, there may be occasions when the absence of such a witness will impact on the ability

of one or other of the parties to discharge such burden of proof as lies upon them. This is however a feature of adversarial legal systems in which the parties frame the case which they wish the court to determine.

49. In any event if discovery of medical records is necessary, the fact that a plaintiff may call relevant medical witnesses and provide some or all of the relevant records and reports does not obviate that necessity. Discovery is intended to aid the opposing party's preparation for trial. The fact that some or all of the discovered material will be provided at trial does not assist a defendant for example in instructing his medical experts prior to the trial taking place.

50. The fact that a large number of personal injury cases settle without going to trial is generally regarded as a positive rather than a negative factor. The burden on the court system of hearing all personal injury cases listed for trial would be very significant and would likely lead to lengthy delays and increased costs for litigants. The procedures available under the Rules of Court, including discovery, are designed to enable parties to equip themselves for trial and, in doing so, to make timely and cost-effective decisions as to whether individual cases should be settled. It is a fact of legal life that cases quite often settle precisely because one or both parties decide not to take the risk of subjecting their evidence to cross-examination. Settlement is not an acknowledgment by either side that the claims made in the personal injury summons or the defence, as the case may be, are either unmeritorious or false. Rather settlement reflects a practical decision taken on a commercial basis having regard to the level of risk inherent in the case. There is nothing untoward in that. Much as the party is entitled to put forward their best case at trial, they are equally entitled to put forward their best case for the purposes of settlement and the fact that one or other party might have chosen not to settle the case, or not to settle it for that particular sum, if they had known the weaknesses of the other side's case is immaterial.

51. Thirdly, the plaintiff contended that there are alternative procedural mechanisms available to the defendant which, if utilised, would make discovery unnecessary. In particular, the plaintiff suggested that the defendant could seek information as to the plaintiff's pre-existing medical condition through the use of interrogatories. It is undoubtedly correct that on occasion the courts have declined to order discovery because the delivery of interrogatories under O.31, r.1 would enable the party seeking discovery to obtain the same information in a less expensive or less burdensome way. However, as noted by Barniville J. in *Dunnes Stores v. McCann* (quoted at para.34 above) the number of cases in which that has actually happened is still fairly small.

52. The difficulty with this argument is that interrogatories should be framed as leading questions which require a "yes" or "no" answer. They are of particular value where a party with exclusive knowledge of some fact has formally denied that fact in their pleadings thereby placing the onus of proving the fact on the other party who has no first-hand knowledge of it. An interrogatory can require a party to confirm on oath facts which the other party might not otherwise be able to prove. This may enable significant savings to be made, for example, by obviating the need for witnesses to be called to formally prove documents at trial. However, interrogatories do not permit questions that require a narrative answer nor can they require a party to provide evidence of matters more properly the subject of oral evidence at trial.

53. The plaintiff suggests an interrogatory in the form of a simple question as to whether the plaintiff received treatment for his back in the five months after the accident. It is, in my view, difficult to see how a 'yes' or 'no' answer to that question could provide the defendant with the more nuanced information sought by way of discovery of the plaintiff's medical records. This is both because the records will themselves be more detailed but also because, if the plaintiff is the person nominated to answer the interrogatory, he may or may not

appreciate the significance of the contents of his medical records. This is not to suggest any dishonesty on the part of the plaintiff, merely to observe that he is somebody without medical knowledge who may not appreciate the full significance of his interactions with medical practitioners in the aftermath of his accident. The defendant cannot nominate any of the plaintiff's treating doctors to answer the interrogatory (even if it were appropriate to identify only one such doctor) since the plaintiff has refused to identify the doctors who afforded him medical treatment after the accident in his replies to particulars.

54. As can be seen from the above, I do not accept the legal arguments advanced by the plaintiff to suggest that discovery of post-accident medical records, which he has admitted are relevant to the proceedings, should be refused on the grounds that they are not necessary. The only other argument made related to proportionality. I note that there is no evidence before the court to suggest that the discovery sought would be overly burdensome and the defendant has limited the period for which discovery is sought to five months after the date of the accident. I am conscious that the court should exercise a certain degree of caution in the discovery of medical records which are *prima facie* confidential, but nothing has been put before the court to suggest that the records involved deal with anything other than the plaintiff's leg injury and perhaps his pre-existing back condition both of which fall at the less sensitive end of the spectrum in terms of medical confidentiality. Different considerations might apply if there were reason to believe that the records in question were particularly extensive or touched on more sensitive matters.

55. Based on this analysis, I think that the trial judge was fundamentally correct in his decision to allow discovery of the documentation sought at para. B of the defendant's Notice of Motion. In this regard, I endorse the reasons advanced regarding the need for discovery of post-accident medical records in this particular case as set out at para. 19 of the High Court judgment. Consequently, I will dismiss this appeal.

56. In circumstances where the plaintiff has not succeeded in his appeal my provisional view is that the defendant should be entitled to an order for the costs of the appeal. I note that Twomey J. made a similar order in respect of the costs of the motion in the High Court and stayed that order pending the final determination of the proceedings. In the event that an order is to be made in terms provisionally suggested, I would propose that a stay in the same terms should be imposed on that order. If the plaintiff wishes to contend for an alternative order, he has liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the defendant will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made in the terms suggested above.

57. As this judgment is being delivered electronically, Ní Raifeartaigh and Binchy JJ. have indicated their agreement with it and the orders I have proposed.