[2020] IEHC 83

THE HIGH COURT

[2019 No. 834 P]

BETWEEN

ORLA VAN DER ZAAN

PLAINTIFF

– AND –

THE NATIONAL MATERNITY HOSPITAL

DEFENDANT

JUDGMENT of Mr. Justice Max Barrett delivered on 24th February 2020.

1. This is a motion for judgment in default of defence in medical negligence proceedings arising out of an ectopic pregnancy. The following elements of the statement of claim are worth noting at the outset:

4 May 2017	Plaintiff undergoes salpingectomy at defendant hospital.
5 May 2017.	Plaintiff discharged.
6 May 2017.	Plaintiff re-attends at defendant hospital in pain and distress.
9 May 2017.	Results of tests confirm a benign paratubal serous cyst.
16 May 2017.	Plaintiff attends at Tallaght Hospital and undergoes further salpingectomy.

2. The plaintiff's case is that the defendant failed to perform a full salpingectomy, failed to record that only a partial salpingectomy was performed, and failed to make sufficient efforts to contact the plaintiff to apprise her of certain test results. The following chronology is pertinent to the within application:

1 February 2019	Personal injuries summons issues.
12 February 2019	Appearance entered.
7 March 2019	State Claims Agency asks plaintiff's solicitor to provide a copy of the plaintiff's medical records.
22 March 2019	Plaintiff's solicitor refuses to provide documentation but states that once defence issues, discovery process will be engaged with.
1 April 2019	Plaintiff's solicitor sends affidavit of verification and requests immediate delivery of defence.
10 April 2019	Notice for particulars and request for information raised. State Claims Agency indicates that defence will be delivered within eight weeks and seeks Tallaght Hospital records.
11 April 2019	Plaintiff's solicitor issues 21-day warning letter with regard to defence (crosses in post with correspondence of 10 April).

7 May 2019	Plaintiff's solicitor writes indicating that defendant had been served with a detailed personal injury summons, that it had access to its own hospital records and that once a defence was delivered it would be entitled to seek discovery.
1 July 2019	Defendant indicates that "original chart" has been mislaid, that it understands the plaintiff to have a copy of same and requests copy.
15 November 2019	Replies delivered for plaintiff. Plaintiff's solicitor raises concerns that the chart has been mislaid and reiterates that he will reply to discovery requests at appropriate point.
26 November 2019	Letter issues calling for delivery of defence.
8 January 2020	Within motion issues.
17 January 2020	Notice of motion served.
29 January 2020	Voluntary discovery letter issues. Defendant also issues letter complaining that all relevant documentation not exhibited to motion grounding affidavit, stating, inter alia:

> *"In particular our letter to you dated 1 July 2019 wherein we explained that the hospital has misplaced the original chart in respect of the plaintiff's care. We asked you to provide us with a copy of the chart provided to you by the hospital in August 2017. The defendant is not in a position to investigate the plaintiff's claim, to include obtaining independent expert evidence [in] respect of liability and causation, without access to the original hospital chart or the copy in your possession. We repeat our request for a copy of all medical records released to you by the defendant referable to her cause of action."*

6 February 2020	Letter from plaintiff's solicitor indicating, *inter alia*, that there was no basis to depart from ordinary rule whereby a discovery request issues following the closing of pleadings.

3. The court notes in passing that: -

(i) no formal request for discovery issued prior to the motion now under consideration, when the formal request did issue it came weeks after the issuance of the motion now under consideration and months after the plaintiff had first stated that it would only respond to requests for discovery after the pleadings closed;

(ii) at all times since the defendant's letter of 1 July 2019 was received, the plaintiff has known that the hospital does not hold its own chart or, more exactly, that the chart has been mislaid by the hospital;

(iii) because the plaintiff was provided with a copy of the mislaid chart in 2017, the only person(s) now in possession of same are the plaintiff and/or her solicitors;

(iv) no meaningful response has issued to the defendant concerning how to proceed given the facts referred to at (ii)-(iii).

4. It seems to the court that the answer to how it ought now to proceed is to be found in the decision of the Supreme Court in *McGrory v. ESB* [2003] 3 IR 407. The facts of that case are usefully summarised as follows in the headnote to the reported judgment:

> *"The plaintiff sued for damages for personal injuries allegedly sustained while working for the defendant. The solicitor for the defendant wrote twice to the solicitors for the plaintiff stating that they wished to have him examined by a consultant neurosurgeon and seeking the names of the plaintiff's medical advisors with whom the defendant's consultant could discuss the case. The plaintiff's solicitor replied confirming that they had no objection to the plaintiff being medically examined but stating that they did not have instructions to consent to his case being discussed between doctors. The defendants issued a notice of motion seeking an order staying the proceeding until such time as the plaintiff consented to allow his medical advisors consult with the defendant's medical advisors. No defence was delivered. The High Court...refused the application and the defendants appealed to the Supreme Court [which allowed the appeal]."*

5. In his judgment for the Supreme Court, Keane CJ observes, *inter alia*, as follows, at pp. 414-5:

> *"The right of the defendant in an action where the plaintiff claims damages for personal injuries to have the plaintiff medically examined, to have access to his medical records and to interview his treating doctors is not dependant on the pleadings having been closed. In such proceedings, damages are always in issue, unless the parties at some stage come to an agreement on quantum….Once proceedings have been instituted, such an examination and full access to the plaintiff's medical records and interviews with his medical advisors are of assistance in enabling the defendants to form a view as to the amount of damages which the plaintiff is likely to recover and of any lodgement which they should prudently make in court with their defence. Whether or not liability is a live issue in the case, making such material available to the defendant at an early stage of the litigation, instead of withholding it until the action itself when it will have to be produced, can only facilitate the earlier settlement of actions."*

6. The foregoing seems to have especial resonance in the context of the within proceedings where the plaintiff has known since receipt of the letter of 1 July 2019 that the defendant does not hold the mislaid chart, a copy of which is needed by the defendant to engage one or more experts to produce one or more expert reports. Indeed, without such expert report/s the defendant is, to use a colloquialism, 'hamstrung' in terms of investigating matters and having an expert look at the issues of breach of duty and causation.

7. Given all the foregoing, the court, having due regard to the decision of the Supreme Court in *McGrory*, will: (1) direct that the plaintiff provide back to the defendant a copy of the mislaid chart that she now has in her possession so that, in the interests of all the parties, these proceedings can progress with due expedition to whatever conclusion is ultimately arrived at; (2) order that a defence to the within proceedings be entered within 12 weeks of the receipt, by the defendant from the plaintiff, of the said mislaid chart.