

APPROVED

[2022] IEHC 712



THE HIGH COURT

2019 No. 3596 P

BETWEEN

GILLIAN KIERNAN

PLAINTIFF

AND

M.D.
S.J.

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 December 2022

INTRODUCTION

1. This judgment is delivered in respect of an application for the discovery of documents. The application is made in the context of proceedings which seek to recover damages against the defendants in respect of a fire which occurred at their dwelling house. The proceedings are taken by the next-door neighbour.
2. In brief, it is alleged that the defendants wrongfully caused or permitted an outbreak of fire to occur at their dwelling house; that this fire then spread to the plaintiff's dwelling house; and that the plaintiff has suffered financial loss as a result of damage to her dwelling house and the contents thereof.

NO REDACTION REQUIRED

3. The defendants have pleaded the provisions of the Accidental Fires Act 1943. It is apparent, therefore, that one of the principal issues for determination at the trial of the action will be whether the fire was caused by negligence on the part of the defendants. See, generally, *Nugent v. Fogarty* [2015] IEHC 523.

AGREED CATEGORIES OF DOCUMENTS

4. The defendants have, belatedly, agreed to make discovery in terms of the first two categories in the notice of motion. In brief, category one consists of all documents relating to the investigation of the occurrence and causes of the fire; and category two consists of a list of all damaged electrical items which were inspected, retrieved or retained following the fire. There is also an application for the inspection of these items. It seems sensible to defer making an order in this regard until the affidavit of discovery has been filed. Once the items have been identified, the plaintiff can renew her application for inspection if the defendants refuse to allow access to same.

DISPUTED CATEGORIES OF DOCUMENTS

(i). Medical records

5. The first disputed category of documents consists of the medical records of the defendants' five-year-old daughter. This category is described as including all attendance records and notes in respect of all medical, behavioural and conduct management treatment sought.
6. Relevance is determined by reference to the pleadings. This is because the pleadings delimit the dispute between the parties. The pleadings allow for the identification of the contested factual issues which will arise for determination

at the trial of the action. It is in respect of these contested factual issues that the discovery of documentation may assist the court in being able to get at the truth.

7. It is submitted on behalf of the plaintiff that the medical records of the defendants' daughter are relevant to the following pleas in the statement of claim. It is alleged, variously, that the defendants failed to exercise proper or adequate supervision over their daughter; failed in their custodial responsibilities; failed to avoid the risk of their daughter causing fire damage; and failed to ensure that an electric fan, an iron and plug board were free from potential interference by their daughter.
8. These allegations are, seemingly, predicated on certain comments contained in an engineer's report. This report had been obtained by the defendants' insurers and extracts from same have since been shared with the plaintiff's solicitor. The report records the second defendant as having said that her daughter had the "*free run of the house*" and that it was possible, therefore, that the daughter may have switched back on an electrical fan in the master bedroom. The report goes on to say that it is also possible that, some time thereafter, the fan may have malfunctioned or jammed and set fire to the bed.
9. The report contains the following statement:

"The house was full of personal belongings and I got the impression that both the Insured and her husband may have had difficulty coping with their autistic daughter; therefore I could see no reason for them to deliberately set the fire. In my opinion the fire was of accidental origin."
10. Medical records are properly regarded as sensitive and confidential. This is especially so where the medical records are those of a child who is not a party to the proceedings.

11. The fact that a document may be confidential is something which goes to the question of whether an order for discovery is necessary. Where an application for an order for discovery is made in respect of confidential documentation, the court should only order discovery 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 (*Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211 (at paragraph 42)). A court will adopt 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 (*ibid*, at paragraph 44).
12. The approach to be taken to an application for the discovery of confidential documents has recently been considered by the Court of Appeal in *Ryan v. Dengrove DAC* [2022] IECA 155 and in *A.B. v. Children’s Health Ireland (CHI) At Crumlin* [2022] IECA 211.
13. These judgments emphasise that the court must engage in a balancing exercise as follows (*Ryan v. Dengrove DAC* at paragraph 67(7)):

“In that context, a balance has to be struck between the likely materiality of any given document to the issues likely to arise in the proceedings and the degree of confidentiality attaching to it. A confidential document (and particularly one that is highly confidential) should not be directed to be discovered unless the court is satisfied that there is a real basis on which it is likely to be relevant at the hearing. The more material the document appears to be — the greater the likelihood that the document will have ‘*some meaningful bearing on the proceedings*’ — the more clearly the balance will be in favour of disclosure. Such an assessment necessarily requires the court to look beyond the threshold test of *Peruvian Guano* relevance. The ‘*nature and potential strength of the relevance*’, and the degree to which the document is likely to advance the case of the requester, or damage the case of the requested party, are appropriate considerations in this context.”

14. Applying these principles to the circumstances of the present case, the balance comes down against an order for discovery. The gravamen of the plaintiff's case is that the defendants failed to exercise proper or adequate supervision over their daughter and that this (alleged) lack of supervision resulted in the child being able to switch on an electrical device (possibly a fan or an iron). It is difficult to understand how the child's medical records could have any relevance to this issue, still less a "*meaningful bearing*" on the outcome of the proceedings.
15. The engineer's report relied upon by the plaintiff goes no further than implying that the child may have switched on an electrical device. There is no suggestion that the child had interfered with the device or damaged it, still less that the child had deliberately caused the fire.
16. If and insofar as the plaintiff wishes to contend at the hearing that the (alleged) failure of a parent to exercise a high level of supervision in respect of a child constitutes actionable negligence, she will be able to pursue the issue in cross-examination. The extract from the engineer's report can be put to the defendants in cross-examination.
17. In deciding to refuse discovery of this category, I have had regard to the other documentation which will be available. The plaintiff will, presumably, have the benefit of the documents relating to the investigations carried out into the fire by the defendants and/or their insurers. The defendants have agreed to make discovery of this documentation and have already disclosed extracts from some of the documentation in the course of correspondence. Whereas some of this correspondence is labelled "*without prejudice*", no objection was raised at the hearing before me to this material having been exhibited on affidavit nor to counsel relying on same in his submissions. This category of documentation is

much more likely to be of assistance to the plaintiff in pursuing her claim than are the medical records of the defendants' daughter.

18. Counsel for the plaintiff voiced a concern that the defendants might seek to withhold production of the category one documents on the grounds of litigation privilege. If this were to happen, and if the claim of privilege were to be upheld, it would be open, in principle, to the plaintiff to make an application for additional discovery.

(ii). Insurance policy documentation

19. The second disputed category of documents comprises proposal forms, policy schedules and claims documentation for the three years prior to the date of the fire and thereafter without time-limit. I propose to direct discovery of a modified version of this category. The temporal limit will be three years either side of the date of the fire.
20. This category of documents is relevant. An insured party is under a duty of utmost good faith in dealings with their insurers. Depending on the precise wording of the questions asked on the proposal forms, the defendants may have been obliged to disclose the existence of any special risk to their insurers. The defendants will almost certainly have had to disclose any history of previous claims. Accordingly, the content of this category of documents may be of assistance to the plaintiff in advancing her case in negligence. The content of the documents might, for example, reveal that there had been previous fires or near-misses.

CONCLUSION AND PROPOSED FORM OF ORDER

21. The defendants will be directed to make discovery of the first, second and fourth categories of documents as described in the notice of motion of 24 November 2021. The fourth category is modified by the imposition of a temporal limitation: the discovery is confined to documents created within three years either side of the date of the fire on 18 July 2013.
22. The application to have the defendants make discovery of their daughter's medical records is refused (category three).
23. As to costs, my provisional view is that the plaintiff is entitled to recover her costs of the application for discovery in full. The plaintiff succeeded in obtaining an order in respect of three of the four categories which she sought. The defendants failed to engage with the request for voluntary discovery and failed to file an affidavit in response to the motion. The hearing could have been shortened had the defendants complied with the requirements of the Rules of the Superior Courts in this regard. If the defendants wish to contend for a different form of costs order, they may do so on 11 January 2023 at 10.45 o'clock.
24. Finally, these proceedings are subject to limited reporting restrictions as follows. An order is made prohibiting the publication or broadcast of the identity of the defendants' minor daughter who has a diagnosis of autism. The defendants' names have been redacted for the purpose of this judgment to avoid indirectly disclosing their daughter's identity.

Appearances

Paul McMorrow for the plaintiff instructed by Morgan McManus Solicitors
Niamh Ní Leathlobhair for the defendants instructed by Dillon Eustace Solicitors

Approved
Gemma S. Mans