APPROVED **[2024] IEHC 179**

THE HIGH COURT

2022 1883 P

BETWEEN

DANA POP

PLAINTIFF

AND

DAMIAN FORISTAL
J. RYAN HAULAGE LTD

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 March 2024

INTRODUCTION

1. This judgment is delivered in respect of an application for the discovery of documents. The underlying proceedings take the form of a personal injuries action arising out of a road traffic accident. The defendants have conceded liability and the only outstanding issue is in relation to the assessment of damages. The defendants have sought discovery of the plaintiff's medical records, including records in respect of cognitive behavioural therapy and counselling received by the plaintiff post-accident.

2. The resolution of the dispute on discovery turns on the application of the principles identified by the Court of Appeal in *Egan v. Castlerea Co-operative Livestock Mart Ltd* [2023] IECA 240.

PROCEDURAL HISTORY

3. The within proceedings were instituted by way of a personal injury summons on 16 May 2022. The proceedings arise out of a road traffic accident which occurred on 27 June 2019. The particulars of the injuries which the plaintiff is said to have suffered, as a result of the road traffic accident, are set out comprehensively in the personal injury summons. These particulars were supplemented by notice dated 22 July 2022. The latter particulars appear to have been prepared following an assessment of the plaintiff by Dr. Denis Murphy, consultant psychiatrist, on 22 June 2022.

4. In brief, the two principal injuries pleaded are as follows. First, physical injury to the plaintiff's cervical and dorsal spine (with root and disc compression at L5/S1). Secondly, psychological injury including post-traumatic stress disorder ("*PTSD*").

5. The following pleas in respect of the plaintiff's treatment by her general practitioner are germane to the disputed discovery:

> "The Plaintiff also came under the care of Dr. Alin Marga, General Practitioner. He felt the Plaintiff had suffered post traumatic stress disorder with subsequent persistent anxiety and depression symptoms. The Plaintiff's investigations were noted. Dr. Marga referred the Plaintiff for CBT/counselling with the HSE. He prescribed Xanax, Amitriptyline, Ibuprofen as well as Vimovo. He noted the numerous sessions of physiotherapy.
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> The Plaintiff continues to have cervical and dorsal spine area pain radiating to the left side. The Plaintiff had low mood and anxiety. When examined by Dr. Marga the Plaintiff

> appeared tired and anxious. There was difficulty mobilising the cervical and dorsal spine area most likely due to local pain. There was pain on manual examination of the cervical and dorsal spine area. Abducting the left arm was difficult due to cervical pain. The Plaintiff remained tearful and anxious about her personal and work related future. Post traumatic stress disorder was diagnosed as well as an adjustment disorder apart from the physical injuries.
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> […]
>
> The Plaintiff was advised that she required both pharmacological and psychological treatment. She required a trial of anti-depressant medication on an optimum dose for an optimum period of time which could be up to twelve months. In addition to anti-depressant medication she required psychological therapy in the form of trauma focused CBT or eye movement desensitisation reprocessing. She would need about ten to twelve sessions but each session would cost up to €120.00."

6. The particulars disclose that the plaintiff had taken an overdose in 2020. This had been reported to her general practitioner at the time. It is disclosed that the plaintiff's relationship with her husband deteriorated and ultimately broke up in March 2021. It is said that this was preceded by an assault by her husband. It is also disclosed that, following the road traffic accident, the plaintiff had five sessions of remote psychotherapy with a Romanian Psychologist and a further fifteen sessions in Ireland. (The plaintiff is originally from Romania).

7. The defendants delivered their defence on 21 July 2022. Liability is conceded, but it is denied that the plaintiff sustained the alleged or any personal injuries, loss and damage and each and every particular of same is denied. The terse and uninformative nature of the defence in the present case compares unfavourably with that in the leading case of *Egan v. Castlerea Co-operative Livestock Mart Ltd* [2023] IECA 240. In that case, the defence had put the plaintiff on proof that the injuries complained of were 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. The failure by the defendants in the present case to explain the basis of their defence to the proceedings meant that any request for voluntary discovery would have to be more comprehensive than might otherwise have been the position. The request for voluntary discovery would have to make up for the perfunctory pleading in the defence by identifying the specific issues likely to arise at trial in respect of which discovery would be relevant and necessary.

8. The defendants made a request for voluntary discovery by letter dated 31 January 2023. To avoid unnecessary duplication, the terms of the request for voluntary discovery are not set out here but will, instead, be addressed in the detailed discussion which follows below.

9. By letter dated 13 July 2023, the plaintiff refused to make discovery. In brief, this letter asserts that discovery is not necessary and that the plaintiff would, instead, adequately plead the position by way of further particulars of injuries. To date, no such further particulars have been delivered. (The particulars of 22 July 2022 predate the request for voluntary discovery).

10. The defendants issued a motion seeking discovery on 21 July 2023. There was no replying affidavit filed in response to that motion. The Deputy Master made an order, on 22 November 2023, directing discovery in the terms sought by the defendants. An application to discharge the Deputy Master's order came on for hearing before me on 22 March 2024 and judgment was reserved until today's date.

DISCOVERY OF MEDICAL RECORDS: GOVERNING PRINCIPLES

11. The authoritative statement of the principles governing applications for discovery in relation to medical records is to be found in the judgment of the Court of Appeal in *Egan v. Castlerea Co-operative Livestock Mart Ltd* [2023] IECA 240 (Butler J., Ní Raifeartaigh and Binchy JJ concurring).

12. Insofar as germane to the present application, the principles might be summarised as follows:

    (A). There is 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. In the event that point is reached, it would more properly be the subject of a claim of privilege, to be asserted in an affidavit of discovery, rather than a reason for refusing discovery.

    (B). 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 every case. Rather, the criteria of "*relevance*" and "*necessity*" must be considered by reference to the reasons stated in the request for voluntary discovery.

    (C). 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.

(D). Whilst issues frequently arise in personal injury cases as to whether the injuries, the subject of the proceedings, overlap with the plaintiff's 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.

(E). Whilst the bringing of personal injuries proceedings must necessarily entail a waiver of the privacy which the plaintiff would otherwise enjoy as regards his or her 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. This consideration may well impact the standard of proof and reduce the threshold that the party resisting discovery must meet in order for the court, in its discretion, to refuse discovery of otherwise relevant material.

(F). A party who wishes to rely on the availability of other, alternative 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. For example, it may not be realistic for a defendant to suggest that it would provide information by way of replies to interrogatories if that party has previously declined to provide the same information by way of replies to particulars.

DISCUSSION AND DECISION

13. The three categories of discovery are addressed, in turn, under separate headings below.

First category

14. The first category of documents sought is in the following terms:

> "(a) The Plaintiff's medical records relating to the Plaintiff's attendance with Dr Alin Marga from the date of the Plaintiff's accident, 27th of June 2019, up to and including June 2021."

15. Having set out a summary of the pleadings, the reason given for seeking this category of documents then states as follows:

> "The Plaintiff advised Prof Damian Mohan, Professor in psychiatry, that in November 2023 (*recte*, 2020), she took an overdose, hoping that she would not wake up. The Plaintiff reported to Prof Mohan that she did not attend any of the services after her alleged overdose. The Plaintiff advised, Dr Ul Haq, consultant psychiatrist, that she was sent by her GP to the A&E and she was seen by a mental health specialist, but there was no follow-up. The Plaintiff also advised Prof Mohan that she was assaulted by her husband in March 2021 and left the family home and was placed in a women's shelter.
>
> Therefore, the medical records sought and the duration required are both relevant and necessary, firstly to determine the onset of the alleged deterioration in her psychological sequelae, the treatment afforded to the Plaintiff during this time and any referrals made by the Plaintiff's general practitioner for psychiatric/psychological treatment. The medical records and the duration of same are further relevant and necessary given the information provided to Prof Mohan during his medical examination."

16. There is no explanation provided, in either the letter seeking voluntary discovery or the affidavit grounding the application for discovery, as to how the two consultant psychiatrists referred to came to examine the plaintiff. Still less has the court been provided with a copy of the respective reports prepared by the consultant psychiatrists. Counsel on behalf of the defendants sought to explain,

on her feet, that Professor Mohan is the independent medical expert whom the defendants had nominated to examine the plaintiff on their behalf; and that Doctor Haq is the consultant psychiatrist who had been retained by the Personal Injuries Assessment Board ("*PIAB*") to examine the plaintiff.

17. With respect, the approach taken by the defendants in this regard is unsatisfactory. If and insofar as a party seeking discovery wishes to rely on the content of medical reports in its own possession to ground an application for the discovery of the injured party's medical records, that party is obliged to exhibit those medical reports on affidavit. It may be, for example, that the fact that the injured party had a *pre-existing* medical condition might only have been disclosed, for the first time, in the context of the examination of the injured party by an independent medical expert nominated by the other side. This disclosure might prompt an application for the discovery of the injured party's medical records. It is essential, however, that the independent medical expert's report be put before the court. This is because the court cannot properly consider the criteria of relevance and necessity without knowledge of the content of the report. It is simply not possible to understand the significance, if any, of the examination of the plaintiff by the two consultant psychiatrists without sight of their respective reports.

18. Counsel on behalf of the defendants sought to submit that the alleged assault of the plaintiff, which has, seemingly, been referenced in Professor Mohan's report, might represent a *novus actus interveniens*, i.e. an event which breaks the chain of causation between the road traffic accident and the plaintiff's current psychological presentation. With respect, this submission calls for the court to *speculate* as to the content of Professor Mohan's report. If and insofar as the

defendants wished to advance the hypothesis that the breakdown of the plaintiff's marriage is a cause of, rather than a symptom of, her current psychological presentation, and that this hypothesis is supported by the medical report, then they should have exhibited same. For completeness, it should be recalled that the alleged assault had already been disclosed to the defendants by the plaintiff in her updated particulars of personal injury of 22 July 2022. Yet the defendants have not sought to amend their defence to include a plea of *novus actus interveniens*.

19. More generally, there is a disconnect between the discovery sought and the information which it is said is relevant and necessary to ascertain. The stated reason for seeking discovery identifies three matters: (i) the onset of the deterioration in the plaintiff's psychological sequalae; (ii) the treatment afforded; and (iii) the referrals made by the general practitioner. Each of these matters is already set out in detail in the personal injury summons and the updated particulars of personal injury. See paragraphs 4 to 6 above. If and insofar as the defendants wish to pursue these issues further, they should raise a request for further and better particulars.

20. In summary, the defendants have failed to establish that discovery of the medical records held by the general practitioner is necessary.

Second category

21. The second category of documents sought is in the following terms:

> "(b) The medical records of any treating therapist/counsellor who has treated the Plaintiff in respect of cognitive behavioural therapy/counselling from the date of the accident, the 27th of June 2019, up to and including June 2021."

22. The stated reason for seeking discovery of this category is as follows:

> "The Plaintiff pleads, through her medical advisors, that she has suffered with post-traumatic stress disorder and depression. The Plaintiff was referred by her GP, Doctor Marga, for cognitive behavioural therapy/counselling with the HSE. The Defendant is not aware as to when this referral was made, what therapist/counsellors treated the Plaintiff and what form of medical treatment was provided to the Plaintiff. In order for the Defendant to properly assess the Plaintiff's ongoing psychological sequelae, these medical records and the duration of the records are relevant and necessary to establish when the Plaintiff was referred to such counsellor/therapist, when the Plaintiff actually attended and what treatment was afforded to the Plaintiff."

23. This category of documents is, self-evidently, sensitive. The relationship between a therapist and patient is highly confidential. It is an essential element of same that the patient be able to make full and frank disclosure to the therapist. The patient is entitled to expect that his or her sessions will be treated as confidential. This is, of course, subject to exceptions. There are, for example, mandatory reporting obligations in relation to disclosures which involve allegations of child sexual abuse. Moreover, the imperative of the administration of justice may mean that documents which are confidential, albeit not privileged, must be made available by way of discovery.

24. 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)). The Court of Appeal, in *Ryan v. Dengrove DAC* [2022] IECA 155 (at paragraph 67(6)), held that 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 (*ibid*).

25. Applying these principles to the facts of the present case, it cannot be said that discovery of this category is either relevant or necessary. As to relevance, it is the fact that the plaintiff has been diagnosed by her general practitioner as suffering from post-traumatic stress disorder and has been referred to cognitive behavioural therapy ("*CBT*") which is germane to the assessment of damages. The *content* of the session notes or other medical records prepared by the mental health practitioner is of no direct relevance. Put shortly, it is the making of the diagnosis which is relevant, not the detail of the implementation of the treatment thereafter.

26. As to necessity, it is salutary to have regard to the *purpose* for which the discovery has been sought. It appears from the stated reason that the defendants seek to learn (i) the date upon which the plaintiff was referred for therapy/counselling; (ii) the dates upon which she actually attended; and (iii) the treatment which was afforded to her. These are all matters of fact which can be readily ascertained by way of a request for further and better particulars. In this regard, the plaintiff here has been forthcoming in relation to particulars of her personal injuries. Not only is the case pleaded in detail in the personal injury summons, a comprehensive notice of additional particulars of personal injuries has since been served. There is nothing in the conduct of the plaintiff in the present case which suggests that she would attempt to obfuscate or avoid any properly made request for particulars. This is not a case where, for example, a

plaintiff who has resisted providing information by other procedural routes then attempts to point to such routes to avoid making discovery.

Third category

27. The third category of documents sought is in the following terms:

> "(c) Any and all medical records to include any letters of referral directing the Plaintiff to undergo spinal surgery in Romania."

28. The stated reason for seeking discovery of this category is as follows:

> "It is pleaded in the Personal Injuries Summons that the Plaintiff attended for neurosurgical consultation. Investigations revealed L5/S1 with root compression on the left disc. The purpose of surgery would be to decompress the nerve, thus reducing the symptomology. The Plaintiff advised Prof Mohan that she had been accepted to undergo spinal surgery in Romania. Therefore any and all medical records and/or letters of referral are both necessary and relevant, given the specific pleas by the Plaintiff."

29. Again, the stated reason does not support the making of an order for discovery of this category. The stated reason does not identify any issue in the pleadings in respect of which discovery is necessary or relevant. It is not suggested, for example, that the plaintiff has acted unreasonably, and has failed to mitigate her loss, by not availing of an opportunity to undergo spinal surgery in Romania.

CONCLUSION AND PROPOSED FORM OF ORDER

30. There is an obligation upon a party who seeks the disclosure of medical records to demonstrate that discovery of same is "*relevant*" and "*necessary*". The rationale for seeking discovery of the medical records should be adequately explained in the request for voluntary discovery which is a pre-condition to the bringing of a motion under Order 31, rule 12(6). The request for voluntary discovery should identify the specific issues in the pleadings in respect of which the discovery is said to be relevant. If and insofar as a party seeking discovery

wishes to rely on the content of medical reports in its own possession to ground an application for the discovery of the injured party's medical records, that party is obliged to exhibit those medical reports on affidavit.

31. On the facts of the present case, the request for voluntary discovery made on 31 January 2023 fails to articulate a convincing basis for directing discovery of any of the three categories of documents. The defendants, as moving parties, have failed to demonstrate that discovery of the medical records sought is "*relevant*" and "*necessary*". Accordingly, the order of the Deputy Master of 22 November 2023 will be discharged.

32. As to legal costs, my *provisional* view is that the plaintiff is entitled to recover the costs of the motion as against the defendants. Such costs to be adjudicated in default of agreement. The plaintiff has been entirely successful in resisting the motion. This court is in as good a position as the court of trial to allocate the costs of the motion. The outcome of the motion turned upon the principles governing discovery and not upon any issue which will be revisited by the court of trial. (See, by analogy, *ACC Bank v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1 (at paragraph 8)). If either party wishes to contend for a different form of costs order than that proposed, they should serve and file written legal submissions by 19 April 2024.

Appearances

Karen Kilraine for the plaintiff instructed by Kent Carty Solicitors LLP
Antoinette T. Reilly for the defendants instructed by Hayes McGrath LLP