THE HIGH COURT

[2023] IEHC 16

Record No. 2020/2693P

BETWEEN

JAMES EGAN

PLAINTIFF

AND

CASTLEREA CO-OPERATIVE LIVESTOCK MART LTD

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 17th day of January, 2023

SUMMARY

1. 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? In this case, the plaintiff claims that he is entitled to restrict the defendant to having sight of the Medical Report, upon which the plaintiff is relying to support his claim for damages, and not have sight of all his post-accident medical records.

2. As noted by Clarke C.J. in *Tobin v. Minister for Defence* [2020] 1 I.R. 211 at para. 7.3 '*discovery can also play a role in keeping parties honest'.* In *Tobin*, the discovery was being sought against a defendant, here it is a plaintiff. Thus, the issue in this case is whether the courts should order discovery of post-accident medical records (rather than just the Medical Report which the plaintiff wishes to rely upon) in order to keep the plaintiff 'honest' in pursuing his claim for personal injuries?

3. The case itself concerns a claim by the plaintiff ("Mr. Egan") against the defendant (the "Mart") for personal injuries, arising from damage to the shin of his left leg sustained from a bullock on the 13th November, 2017. Although seeking damages from the Mart for these injuries, Mr. Egan claims that he does not have to provide all his medical records from *after* the accident (even though these medical records should evidence the injury for which he claims damages). Rather he claims that the Mart is only entitled to have a copy of the Medical Report from the consultant, which he proposes to rely upon to support his claim for damages.

4. Since discovery of documents is ordered on the basis of the *relevance* of the documents, it is difficult to see why, applying general principles, a plaintiff, who is seeking damages for injuries caused by the defendant, would not be happy to disclose to the defendant all his medical records, which *evidence* those injuries. However, while Mr. Egan is willing to disclose his *pre-accident* medical records, he is refusing to disclose his *post-accident* medical records. This is despite the fact that it is clear that his post-accident medical records are *more likely to be relevant* to the proceedings than pre-accident records. This is because the records from *after* the accident should evidence the injuries sustained in the accident, while those from *before* the accident clearly will not. Nonetheless, Mr. Egan is only willing to disclose his pre-accident medical records and hence the need for this pre-trial application for him to disclose his post-accident medical records.

5. Counsel for Mr. Egan did not argue that the post-accident medical records are not relevant, but he argued that it was *not necessary* to disclose them to the defendant. He claimed that it was not necessary for a plaintiff such as Mr. Egan to disclose all his post-accident medical records because of the obligation upon a plaintiff to provide the defendant with copies of the Medical Reports of any expert, who the plaintiff intended to call to give evidence in support of his claim for damages. He also supported his view, that it was *not necessary* to

disclose all the plaintiff's medical records, by the fact the defendant could cross-examine the medical expert on the contents of his Medical Report.

6. For the reasons set out below, this Court does not believe that the fact that a plaintiff will provide a defendant with a Medical Report from the consultant he *chooses* to rely upon for his claim for damages, is sufficient reason for a defendant to be deprived of all the other medical records of the plaintiff. These medical records will provide the best evidence regarding the medical condition of the plaintiff after the accident and they will also deal with the key issue in many personal injury cases, i.e. which of the plaintiff's complaints are related to the accident and which relate to other medical issues, whether pre-accident or post-accident. In addition, as noted by Clarke C.J., the disclosure of a plaintiff's medical records has a role in keeping that party honest in the claim for damages. This is particularly relevant in personal injury claims, since 97% of those claims settle and such settlements will invariably be on the basis of discovery and so without there being any cross examination of medical experts.

BACKGROUND

7. Mr. Egan sustained injuries to the shin of his left leg from a bullock at the Mart and a subsequent x-ray revealed swelling and bruising to his leg. In his Personal Injuries Summons dated 15th April, 2020, he claims damages for *'ongoing leg pain'*. In his updated Particulars of Personal Injuries dated 9th February, 2022, Mr. Egan refers to ongoing lower back pain resulting from the accident. In the Notice for Particulars dated 1st March, 2021, the Mart asked Mr. Egan:

> "Please confirm if the plaintiff has ever suffered any injury of any nature howsoever arising either prior to or subsequent to the incident the subject matter of these proceedings regardless as to whether a claim was pursued."

In his Replies to Particulars dated 9th February, 2022, Mr. Egan stated:

"This particular is so broad as to be oppressive on the Plaintiff. Notwithstanding this, the Plaintiff would say he was involved in a road traffic accident in October 1999. He was in a parked van when he was struck from behind by another vehicle. He brought personal injuries proceedings which were compromised in or about 2003/2004.

The plaintiff has a history of back pain and L4/L5 disc bulge. He underwent spinal surgery in the 1980s."

In the Mart's discovery motion before this Court, the Mart sought:

"All documentation in respect of treatment received for any back or leg pain or symptom from the 1st January 2012".

After the issue of the motion, but prior to the hearing, Mr. Egan agreed to provide this documentation up to the date of the accident. Accordingly, this Court is only concerned with discovery of post-accident medical records, i.e. after 13th November, 2017.

Post-accident medical records

8. In relation to post-accident medical records, in its discovery motion the Mart seeks:

"All documentation in respect of treatment received since the date of the accident, the subject matter of these proceedings".

At the hearing, Mr. Egan confirmed his refusal to provide this discovery, although he indicated that he would provide details of *'initial medical attendances'*.

9. In its letter seeking voluntary discovery dated 14th February, 2022, the Mart outlined the reasons it needed the pre-accident and the post-accident discovery. It referred to the updated Particulars of Personal Injuries, dated 9th February, 2022, received from Mr. Egan outlining details of his ongoing back pain, allegedly caused by the accident. The letter for voluntary discovery refers to these updated particulars and notes that Mr. Egan attended a consultant

orthopaedic surgeon and had an MRI of his lumbar spine demonstrating compression of his L5 nerve root. According to the Mart's letter seeking discovery, this led to Mr. Egan's consultant concluding:

> "[A] dual pathology as the most likely source of the ongoing pain, the sequalae of the soft tissue injury sustained November 2017 and referred pain from the compression of the left L5 nerve root."

This letter also states that in March 2020, Mr. Egan's GP was:

> "[O]f the view that the L5 nerve root have been aggravated by the trauma received in November 2017".

In addition, the Mart states in this letter that it wants discovery of Mr. Egan's post-accident and pre-accident medical records because it regards it as vital to understand the nature and extent of the difficulties experienced by Mr. Egan in his left leg due to the L5 nerve root compression prior to the accident.

10. The Mart also points out in this letter that the discovery will allow them to cross reference Mr. Egan's pleading with his medical treatment and examine to what extent there is an overlap of complaint of the previous medical history and the alleged injuries. At the hearing, counsel for the Mart re-iterated that it wished to have the post-accident medical records in order to determine which of Mr. Egan's complaints are attributable to the accident and which are not, and the extent of the overlap between the pre-accident and post-accident injuries.

Are post-accident medical records relevant?

11. The key factor in determining whether the post-accident medical records are discoverable is whether they are relevant and necessary for the fair disposal of the matter.

12. At the level of principle, where a defendant is being sued by a plaintiff claiming damages for his injuries, the starting point must be what could be more relevant than the

plaintiff's medical records of those injuries from *after* the accident? After all, these medical records relate to the injuries which are the subject of the claim and so those medical records *should* clearly show the extent of the injuries for which a plaintiff is claiming damages (the 'accident injuries'). Those medical records, namely contemporaneous hospital admission notes, GP notes, x-rays, MRIs, consultant's notes *etc*, would seem to be the best evidence of those injuries.

13. In addition, at the level of principle, those post-accident medical records may also show other medical issues/injuries, which arose after the accident ('post-accident injuries'), which overlap with the accident injuries, but which have no connection with the accident. The extent to which the accident injuries and post-accident injuries (if any) overlap, and the extent to which they may assist the defendant in resisting a claim for damages, can only be determined when those post-accident medical records are considered by a defendant's legal team in light of the alleged accident injuries.

14. For example, all of a plaintiff's post-accident medical records might evidence a subsequent accident in relation to the same part of the body as the accident injuries. Clearly these records would be relevant to establishing the degree to which the defendant is liable for the complaints of the plaintiff and the degree to which the other accident is the cause of those complaints.

15. Equally, the medical records might show a subsequent accident in relation to a different part of his body, but which might well impact upon the plaintiff's inability to do certain activities (which he is claiming is caused/contributing to by the accident injuries). For example, if the accident injury was damage to a plaintiff's leg and he claimed that this impacted upon his ability to do household chores or affected his quality of life, it might be relevant that the plaintiff suffered a post-accident injury to his arm, since this may also impact upon his ability to do household chores or affect his quality of life. The post-accident medical records may, for

this reason, assist the defendant in establishing the degree to which he is liable for the plaintiff's complaints arising after the accident.

16. Similarly, if a plaintiff was claiming that the physical injuries caused by the accident affected his ability to get up in the morning or do certain tasks/affected his quality of life, it might be relevant that the plaintiff, after the accident, had treatment for a mental health condition, for reasons unrelated to the accident, but which also affected his quality of life/his ability to do certain tasks. This might enable a defendant to claim that he is not liable for all the plaintiff's complaints after the accident.

17. In all of this, it is of course the case that there is a significant breach of privacy involved in a plaintiff having to disclose very personal medical records relating to his physical or mental health, when claiming damages from a defendant. However, it is clear from *McGrory v. ESB* [2003] 3 I.R. 407 at p. 414 that a plaintiff who decides to seek damages from a defendant for personal injuries waives his right to privacy in relation to his medical condition.

18. For all these reasons therefore, as a general principle, it seems to this Court that post-accident medical records are not only relevant but invariably crucial to every personal injuries claim.

19. Furthermore, in this particular case, there are additional reasons why Mr. Egan should disclose his post-accident medical records. This is because Mr. Egan in his Replies to Particulars disclosed spinal surgery and a history of back pain. In this regard, he has agreed to provide discovery of his *pre-accident* medical records and so the defendant will be provided with details of the condition of his back prior to the accident. It seems clear that there is a possible overlap between Mr. Egan's back and leg complaints arising from the accident and his pre-accident history of L5 issues in his back. Accordingly, the post-accident medical records are particularly relevant in this case to enable the Mart to see the overlap, after the accident, of Mr. Egan's previous back problems with the alleged injuries from the accident.

This is because the *post-accident* medical records (i.e. *all* GP, hospital and consultant records and not just the report of the consultant who Mr. Egan wishes to rely upon) will enable the Mart to consider how this alleged overlap was dealt with by medical practitioners and thus how many of Mr. Egan's complaints are due to the accident and how many are due to other matters (whether pre-accident injuries or indeed post-accident injuries, if any).

Are post-accident medical records necessary?

20. Counsel for Mr. Egan resisted the discovery application on the basis that it was not necessary to grant discovery of *post-accident* medical records. Since, it appeared to this Court that there could hardly be anything more relevant to a claim for an injury, than the medical records evidencing that injury, this Court adjourned the motion to enable counsel to provide this Court with case law which supported the view that post-accident medical records are not discoverable.

21. At the adjourned hearing, the only case law relied upon was *McCorry v. McCorry* [2021] IEHC 104. Counsel for the plaintiff in *McCorry* suggested that there might be a rule or practice that post-accident medical records will not be discovered. However, Simons J. made clear that there was no basis for the purported '*rule that post-accident discovery will not be granted'* (at para. 20). This is because he made clear that the guiding principle in relation to all discovery is whether the documents are relevant and necessary and, as previously noted, there is unlikely to be anything more relevant, to a claim for damages for injuries arising from an accident, than post-accident medical records.

22. While Mr. Egan's counsel did not seek to claim that discovery of the post-accident medical records was not relevant, he claimed it was *not necessary*. He did so on the basis that the need for Mr. Egan's medical records is obviated by the fact that the Mart will have sight of any medical reports, which Mr. Egan *chooses to rely upon* to support his claim for damages and the fact that this consultant may be cross-examined on *the contents of this report* by the

Mart, as well as the fact that the Mart is entitled to have Mr. Egan assessed by their own consultant.

'Keeping parties honest' in litigation

23. However, it seems to this Court that these matters will not make the discovery unnecessary, particularly as regards the key issue in many personal injury cases (as it is in this claim), i.e. which of the plaintiff's complaints are related to the accident and which relate to other medical issues, whether pre-accident or post-accident. They will not make discovery unnecessary because the plaintiff remains in complete control of the specialties and the consultant(s) which he chooses to see in order to support his claim for damages. The plaintiff is also in complete control of the medical records and/or the medical history that he provides to that consultant. Indeed, there is nothing to stop a plaintiff from going to more than one consultant in the same speciality and deciding only to rely on one of them. In this regard, as noted by Clarke C.J. in *Tobin v. Minister for Defence* [2020] 1 I.R. 211 at para. 7.3:

> **"[D]iscovery can also play a role in keeping parties honest**, for it cannot be ruled out that some parties might succumb to the temptation to present a less-than-full picture of events to the court, were it not for the fact that they know that any attempt to do so may be significantly impaired if there is a documentary record which shows their account either to be inaccurate or materially incomplete." (Emphasis added)

In that case, it was the defendant in a personal injuries case which was contesting its obligation to make discovery. However, it is clear that this principle that discovery keeps litigants honest also applies to a plaintiff in a personal injuries case. In this regard, if a plaintiff is required to disclose all his medical records (rather than just the medical report he seeks to rely on to support his claim), then he will be less likely to succumb to the temptation of presenting a less-than-full picture regarding the claim he makes (to use Clarke C.J.'s wording).

24. In this application, if the Mart only gets the initial medical attendances, rather than all Mr. Egan's medical records, it is at a disadvantage as it will not have all GP, hospital and consultant records *etc* which are in the possession of Mr. Egan or within his procurement. To put the matter another way, *if* the Mart is limited to obtaining only details of the post-accident medical condition of the plaintiff, based on consultant reports *chosen by Mr. Egan*, the defendant could well be denied medical records post-accident that are relevant to the plaintiff's claim. For example, this might occur if the plaintiff sought a Medical Report from a doctor (i.e. a 'reporting' doctor who was not his 'treating' doctor) and he failed to provide her with his relevant post-accident medical history and records.

25. For this reason, this Court will order the discovery of the pre-accident medical records in this case. It is to be noted that this is consistent with the position taken in *McCorry v. McCorry*, since Simons J. not only denied the existence of a general rule that post-accident medical records are not discoverable, but he granted discovery of post-accident records for the period which was sought by the defendant in that case.

26. Finally, in this regard, it is to be noted that one of the reasons that Mr. Egan claimed that it was not *necessary* for him to disclose his post-accident medical records is because the defendant could cross examine the medical expert on the contents of the Medical Report relied upon by Mr. Egan. This does not appear to this Court to be a particularly compelling reason. This is because 97% of personal injury cases settle (see the statement of the President of the High Court dated 10th July, 2020). Accordingly, the reality is that in the vast majority of cases, there will be no cross-examination of a medical expert, because reliance is placed on documents, and not oral evidence and cross-examination, to reach a resolution of a claim. This illustrates the importance of ensuring that documents that are plainly relevant to the plaintiff's claim, i.e. the post-accident medical records, are provided to the defendant.

Other reasons why post-accident medical records should be disclosed

27. While not directly relevant to Mr. Egan's claim, there is another reason why, as a general principle, a defendant in a personal injury case should not be restricted to seeing only those medical records which a plaintiff chooses to disclose to him, i.e. those the plaintiff chooses to rely upon. It is the fact that in certain instances solicitors, rather than GPs, refer their clients to consultants, even though this is in direct contravention of *Dardis v. Poplovka* (No. 1) [2017] IEHC 149. That judgment of Barr J., which was not appealed and therefore represents current law, provides that it is *'inappropriate'* for solicitors to refer their clients to consultants. While it seems clear that the majority of solicitors do not contravene this judgment (e.g. in *Cahill v. Forristal* [2022] IEHC 705, only one of the solicitors referred one of the two plaintiffs, who were separately represented, to a consultant), it is evident that *some* solicitors continue to contravene the judgment in *Dardis*, for example see the cases of

- *Harty v. Nestor* [2022] IEHC 108,
- *Hardy v MIBI* [2021] IEHC 614;
- *Hennessy v Bible* [2021] IEHC 614;
- *Cahill v. Forristal* [2022] IEHC 705,
- *O'Connell v. Martin* [2019] IEHC 571
- *Ali v. Martin* [2019] IEHC 571
- *Fogarty v. Cox* [2017] IECA 309.

28. In Mr. Egan's case there was no evidence before the Court to suggest that his solicitor, rather than his GP, had referred him to the orthopaedic consultant. Accordingly, the reasoning in the cases of *Dardis* and, in particular, *Harty*, which hold that such solicitor-referrals are *'inappropriate'*, is not relevant to his application.

29. However, when considering the question of whether in general post-accident medical records should be disclosed, the reasons, given by Barr J. in *Harty* for his decision that solicitor-referrals are inappropriate, are relevant. At para. 25, he stated:

> "The disadvantages of proceeding with the evidence of a reporting doctor, rather than a treating doctor, is evident from the present case. **Dr Henry operated on the basis of what she had been told by the plaintiff in relation to no previous neck injury, or complaints. Had she been treating the plaintiff as a patient on a referral from his GP, she would have received the normal referral letter from the GP, which would have set out the salient medical history of the patient being referred**. **This would have prevented Dr Henry operating on the mistaken understanding that the plaintiff's neck had been asymptomatic** prior to the 2017 accident. Furthermore, **Dr Henry did not have sight of the plaintiff's GP medical records**. In this regard she was operating at a considerable disadvantage. **Her evidence, while given *bona fide*, was based on incorrect information** as to the plaintiff's premorbid condition." (Emphasis added)

30. Barr J.'s reasoning highlights that if a defendant is denied all of a plaintiff's medical records by being restricted to the consultant's report that the plaintiff is relying upon for his claim, the defendant is at risk of being denied relevant medical information regarding the claim. This is more likely to occur if the plaintiff was referred by his solicitor to a consultant (who may not be the plaintiff's treating doctor) and as a result the consultant may not have '*sight of the plaintiff's GP medical records'* and so may have '*incorrect information'* (as occurred in *Harty*). The *Harty* case illustrates the importance of a defendant having access to all of a plaintiff's post-accident medical records and not just the Medical Reports chosen by the plaintiff.

31. Of course, even where the plaintiff is referred by his GP to a consultant, the fact that a defendant is entitled to all his medical records, and not just the Medical Report the plaintiff

relies upon, has the potential to keep the plaintiff honest (in the words of Clarke C.J.). A good example of this is provided by the case of *Moore v. Carroll* [2017] IEHC 731. In that case, the plaintiff's consultant rheumatologist, in his Medical Report, stated that it was '*quite likely'* that the plaintiff's hip injury was caused by a car accident (which involved the most minimal of impact between two cars). This statement in the Medical Report was made by the consultant despite the fact that only weeks prior to giving this Medical Report, the consultant had received a letter from the plaintiff's GP stating that the plaintiff had experienced chronic left hip pain going back many years prior to the alleged car accident. As noted at para. 21 of that judgment, it is possible that the consultant had reached his conclusion based on evidence provided to him by the patient, who might not have mentioned any history of hip problems. It seems clear that were it not for the discovery of the earlier letter from the GP to the consultant (which clearly contradicted the consultant's conclusion), this Medical Report might have led to an award of damages in the *Moore* case. This case is therefore a further reason why, as a general rule, a defendant should not be restricted to discovery of those medical records upon which a plaintiff proposes to rely in his claim for damages.

Time span for the discovery of post-accident medical records?

32. As regards the time-span for post-accident medical records, in *Power v. Tesco Ireland Ltd.* [2016] IEHC 390 at para. 12, in the context of discovery of pre-accident medical records, Barrett J. observed that, in general, pre-accident discovery is confined to a three-year period '*in a bid to ensure proportionality and avoid oppression in the discovery process'*, *albeit* that in the particular circumstances of each case this time limit may have to be shorter or longer than three years.

33. However, as noted above, medical records from *after* the accident are clearly more relevant to litigation concerning injuries *caused by* the accident, than medical records from *before* the accident. For this reason, there would appear to be logic, in applying the same

general time limit for post-accident medical records, as pre-accident medical records, again subject to the particular circumstances of each case.

34. In this case, the Mart was initially seeking discovery with no time-limit, which this Court would regard as disproportionate in a case with such a (relatively) minor injury. However, at the hearing it sought a period of 5 months. In these circumstances, this Court has no hesitation in granting discovery of the post-accident medical records for a period of five months from the date of the accident, since it is well below the three-year period that the High Court has applied to pre-accident medical records.

35. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention a week from the date of delivery of this judgment at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).