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	***ICOS No:* 20/58405/01**
Judgment: approved by the court for handing down (subject to editorial corrections)	***Delivered:* 02/10/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between:

DEBORAH BROWN

Plaintiff

and

DR STERNE, DR I HADDEN, DR B LYNCH FORMERLY PRACTISING AS THE COUNTRY MEDICAL PRACTICE

and

First, Second and Third Defendants

NORTHERN HEALTH AND SOCIAL CARE TRUST

Fourth Defendant

Mr Sinton (instructed by Higgins Hollywood Deazley Solicitors) on behalf of the plaintiff.
Mr Millar (instructed by Tughans Solicitors) on behalf of the first defendant.

MASTER HARVEY

Introduction

[1] In this clinical negligence action, the plaintiff is seeking access to a statement by the first defendant Dr Sterne ("the defendant") which was sent to the liability expert instructed by the defendant's solicitor. The defendant has refused to share this on the grounds of privilege.

[2] Proceedings were issued by writ of summons dated 24 August 2020. The plaintiff alleges negligence in the conduct of a cervical smear examination in which

she allegedly suffered an injury. She further makes allegations in relation to the treatment of that injury as well as a separate condition.

The application

[3] The plaintiff has applied for an order pursuant to Order 24 rule 14 of the Rules of Court of Judicature (Northern Ireland) 1980 ("the Rules") and/or the inherent jurisdiction of the court:

> "that the first defendant shall disclose to the plaintiff the statement of the first defendant dated 13 September 2021 and referred to within the report of Dr Alan Middleton."

[4] I have considered all the documentation before me, including the affidavit evidence, and the helpful bundle of authorities lodged with the court. Counsel both made helpful and concise oral submissions. For the sake of completeness, I would add that I have also taken into consideration the late submission of a reference to the "White Book" Supreme Court Practice 1999, by the defendant's counsel which ought to have been made to the court at hearing, not two days later.

The court rules

[5] The court has power under Order 24 rule 14 to order a party, at any stage of the proceedings, to produce to the court any document in its possession, custody or power relating to any matter in question in the cause or matter. The court may deal with the document in such manner as it thinks fit. In effect, this means the court can order its disclosure to the other party. This rule is subject to Order 24 rule 15 which states that no such order shall be made unless the court is of the opinion the order is necessary either for disposing fairly of the cause or matter or for saving costs. Where privilege is claimed, the court may inspect the document for the purpose of deciding whether such an objection is valid.

[6] I must therefore firstly determine whether the document relates to any matter in question in the action and secondly whether disclosure is necessary either for disposing fairly of the matter or for saving costs. Thirdly, as privilege is claimed, I must determine if that is a valid objection and may inspect the document if necessary. The parties cited various authorities in relation to these issues, all of which I have considered even if not expressly referred to.

Relevance and reference

[7] Counsel for the defendant accepts the statement of Dr Sterne, who is a defendant in this action, is relevant to the matters in dispute. The statement was sent

to their liability expert, Dr Middleton. He refers to it in para 1.02 of his report (my emphasis added):

> "In preparing this report I have had the opportunity to review the following documentation:
>
> 1. GP notes and records.
> 2. Causeway Hospital Records
> 3. North West Independent Hospital records.
> 4. ***Statement of Dr Sterne, 13th September 2021.***
> 5. Amended Statement of Claim, 25.03.22,
> 6. Updated GP notes and records.
> 7. Updated Causeway Hospital records.
> 8. Chronology, dated 30th March 2022."

Reliance

[8] The dispute in this application is a disagreement between the parties as to whether the expert relied upon the statement. I will return to whether this is the actual test to be applied by the court shortly.

Privilege

[9] There is a legitimate interest on behalf of a party not to disclose certain material in order to preserve legal professional privilege. There is also a legitimate interest on behalf of a party to know what history and documentation the other party's experts replied upon and all the sources of such material. See Lord Woolf page 446 in the case of *B & Ors v John Wath & Bros Ltd & Anor* [1992] 1 All ER 443.

[10] This was affirmed by Gillen J in O*rr v Crowe Building Contractors* [2009] NIQB 17, albeit in that case it was the defendant seeking access to an expert report obtained by the plaintiff:

> "...it is still necessary to reconcile the requirements of a defendant to know the medical history replied upon by the plaintiff's doctor so that the defendant can assess its validity with the equally legitimate interests of a plaintiff to preserve his legal professional privilege."

[11] When considering whether privilege has been waived in circumstances such as this case, the authorities state that there must be reference to the contents of the document at issue and reliance upon it. See *Marubeni Corp v Alafouzos* [1986] CA

Transcript 996. This mirrors the test adopted by Gillen J in the *Orr* case above and was also applied by Aldous J in *Bournes Inc v Raychem Corp & Anor* [1999] 3 All ER 154, namely that mere reference to a document does not waive privilege in that document as there must be reliance. At para 13 of *Orr* the learned judge references para 12.19 of Matthew and Malek, Disclosure 3rd edition, stating that:

> "the test is whether the contents of the document are being relied on, rather than its effect."

Gillen J further goes on to state at paragraph 16 (quoting paragraph 12.22 of the Matthew and Malek textbook) that:

> "references to privileged material …will amount to waiver of that privilege if they amount to a "deployment" of such material."

[12] I will now consider the expert report to determine whether there has been reliance on the statement**.**

The expert report

[13] In the body of his report, Dr Middleton states variously as follows (relevant paragraphs from the report in brackets):

> "The papers I have reviewed indicate that Dr Sterne was a GP working…at the Country Medical Centre…My instructions are to consider the papers and prepare a report considering the issues of breach of duty alleged against Dr Sterne." (opening para)
>
> "I have had the opportunity to review the following documentation…" (including Dr Sterne's statement) (1.02)
>
> "…having reviewed the documentation…" (1.03)
>
> "…having…considered the papers in this case" (4.02).

[14] As stated, there are eight categories of documents referred to by Dr Middleton. Five of these are medical notes. The other three are the statement of Dr Sterne, an amended statement of claim and a chronology. I pause to note that during exchanges at hearing, it emerged this chronology was prepared by the defendant's solicitor. The plaintiff has not sought access to this although it appears to the court it was both referred to by the expert and the content was relied upon by him. Arguably it would prove discoverable as it appears privilege has been waived, see para 3.07 (my emphasis added):

> "The ***chronology*** then goes on with so many extensive consultations relating to gynaecological outpatient attendances."

[15] When discussing the medical records, the expert uses phrases such as:

"Review of the medical records suggest that…" (3.01)

"The records indicate.." (3.05)

"…the medical records that I have reviewed…" and "I have reviewed the blood results…" (3.09)

"the next relevant note…"

"…there are several entries in the records…" (3.13)

"Further GP records show that…" (3.19).

[16] There are many such references and in each one the expert identifies he is referring to, and appears to be relying on, the plaintiff's medical records. At other points in the report, he simply refers to the "documentation" or "papers". Other than the records, there were only three other documents provided to him.

[17] There are also references to his "instructions":

"…my instructions in this case are that..." (3.12)

"My instructions are that…" (5.11).

[18] The plaintiff's counsel argues this is further evidence the expert relied on the statement as this must form part of his instructions. The defendant's asserts the natural meaning of such words was that the instructions came from the solicitor. As with the chronology, the plaintiff does not seek access to the letter of instruction.

[19] I note further references in the report such as (my emphasis added):

"***There is some evidence*** that the plaintiff was reluctant to attend for routine blood tests…" (5.11 page 17)

and…

"It is very important, when considering the issues in this case, to note that there was an ***apparent*** reluctance on the part of the plaintiff to respond to requests to have thyroid function tests monitored." (3.13)

[20] The expert uses the highlighted words when discussing attempts to have the plaintiff attend for blood tests. The expert does not state the source of this evidence or apparent reluctance on the part of the plaintiff. This may be the subject of a factual dispute and therefore a liability issue at trial.

[21] When discussing what explanation was given to the plaintiff in relation to her overactive thyroid, Dr Middleton states at para 1.03:

> "I am unable to opine on this allegation as I have seen no statement from any of the defendants as to what explanation was given."

[22] Dr Middleton has signed the expert's declaration which can be found at the end of his report. This is in line with Annex A of the Expert Evidence Practice Direction (PD 02/2021). It states at para 6, "I have shown the sources of all information I have used." This can be cross referenced to the eight categories of documents he confirms he reviewed and are listed in para 1.02 of his report. There is no indication in Dr Middleton's report that the contents of Dr Sterne's statement were anything other than one of the eight sources of information he used in forming his opinion on the allegations against the defendant.

Submissions from the parties

[23] In summary, defence counsel states that his client never actually saw the plaintiff and contends that any ambiguity regarding the expert's reliance on the statement should be determined in the defendant's favour. He argued that the burden of proof is on the plaintiff in this application and they cannot satisfy the court the expert relied on the statement. He further asserts that the balance favours his client given that privilege is such a fundamental legal principle. The plaintiff highlights various passages from the report which they say demonstrate reliance on the contents of the statement. The plaintiff also submits that the statement was bound to influence the opinion of the expert given it was from a fellow clinician and in the context of a clinical negligence action. Moreover, the plaintiff claims that this issue is delaying the meeting between the independent medical experts in the case.

Consideration

[24] Having read Dr Middleton's report, I am of the view that if he considered the statement of Dr Sterne to be unhelpful or irrelevant, he certainly did not indicate as much. He could either have said so expressly or returned it to the solicitor. If he had taken either option, it is then arguable whether it would breach legal privilege to disclose such material.

[25] The expert was not only provided with the statement, but he was also instructed to consider it along with everything else. At the outset of the report, he states:

> "my instructions are to consider the papers and prepare a report considering the issues of breach of duty alleged against Dr Sterne."

[26] The defendant argues the reference in the report at para 1.03 to Dr Middleton having not seen any statement from the defendants (see para 21 above), supports their stance that the expert did not rely on Dr Sterne's statement. In my judgment, taken in its proper context, that reference was only in relation to an allegation regarding the thyroid issue. I consider the expert both reviewed and relied on the contents of the statement. In the context of a liability report where this expert has been asked to comment on whether the Doctor concerned was negligent, I consider that words such as "having reviewed the documentation" or "having considered the papers", lead me to conclude he has relied on all the material, including the statement obtained from the very person who is one of those being sued in this case.

[27] In the *Orr* case, the learned judge determined the report in question should not be disclosed and that the safety net for the losing party in such an application was that their expert could take an independent history and explore matters the other expert did not. I consider this distinguishable from the current case, in which the statement is from the defendant himself and the report which refers to it is a clinical negligence liability report. It does not relate to a quantum issue in a personal injury case as in *Orr*, and the plaintiff's expert here will not be able to take a history from the GP defendant. In *Orr*, the report at the centre of the dispute was by an Orthopaedic Surgeon on behalf of the plaintiff which was then sent to the plaintiff's Chronic Pain expert but not disclosed to the defendant. The judge determined that the pain expert did not refer to or rely upon it. Gillen J further stated that at hearing, the expert could be questioned on the issue. If it turned out he relied on the privileged material, the case could be adjourned, and cost penalties would arise.

[28] As with the other authorities cited, the circumstances in *Orr* were very different from the present case. The defence solicitor has seen fit to send the expert a statement from the defendant. In my view it can be readily inferred that the solicitor felt this was an important document and relevant to the matters at issue in the case, otherwise it is reasonable to expect he would not have done so. The expert reached conclusions in relation to liability having reviewed all the documents, including the statement in question.

[29] On balance, I find it difficult to conclude the expert simply put the statement to the back of his mind or did not rely on it in any way. I further do not consider it an appropriate safeguard for the plaintiff that all these issues can simply be left to cross examination of the expert at trial, if it gets that far. By then, significant time and expense will have been spent on this case and the meeting between the liability experts, which fortunately occur in virtually all clinical negligence cases in this jurisdiction, will surely be undermined by one expert having had access to material which his counterpart has not seen. The current dispute has also delayed this

expert's meeting, which is undesirable as it simply adds to delay and acts as a potential barrier to earlier resolution of the action.

[30] The context of this case is important, involving a type of litigation which by its nature is complex and highly sensitive. The Clinical Negligence Protocol of 1 October 2021 is a statement of best practice in this field and "should normally be adhered to in all cases" (para 5). Importantly, it states that one of the objectives is:

> "(vi) the promotion of an overall "cards on the table" approach to litigation…consistent with the requirement that the issues be resolved in accordance with the accepted standards of fairness and justice for both parties."

[31] A liability expert instructed in clinical negligence cases is tasked with providing an independent and objective view on the allegations of negligence. To assist in this task, one would expect the expert to be ordinarily sent the relevant medical notes and records, associated documentation and pleadings in the action (and at a later stage, the other expert reports). This is arguably all they should be provided with when undertaking such an important role where their duty is to help the court and this overrides any obligation to the party who has engaged them. It has at the very least the potential to taint the process if they are given purportedly privileged statements, not shared with the other party, of unknown length and detail (in this case from one of the defendants). Such statements may have been prepared contemporaneously or many years after the cause of action with the benefit of a consultation with a lawyer. It would be unrealistic to suggest this does not influence the expert's opinion in some way. By extension, how can it be just that the independent expert on behalf of the other party does not get to see it. I would question how such a practice is in keeping with the promotion of a cards on the table approach to clinical negligence litigation.

[32] It cannot be said to be fair or just that one party, in this case a healthcare provider, holds a card which they are content to show their expert when he is giving an opinion on liability but are otherwise keeping it in their pocket. They have not disclosed it to the plaintiff so that her expert may form a view on the same material and it undermines the meeting between the parties' independent experts.

[33] All the authorities cited in this application relate to other types of litigation. Since the *Orr* case was decided in 2009, there have been two further iterations of the Clinical Negligence Protocol and over time, a clear emphasis has been placed on greater transparency and fairness in the conduct of such litigation.

[34] The issue of openness was addressed at page 96 of the Report of the Inquiry into Hyponatraemia related Deaths in January 2018, when O'Hara J made the following recommendations in relation to clinical negligence litigation:

> "***Culture and Litigation***
>
> 94. The interests of patient safety must prevail over the interests engaged in clinical negligence litigation. Such litigation can become an obstacle to openness…
>
> 95. Given that the public is entitled to expect appropriate transparency from a publicly funded service, the Department should bring forward protocol governing how and when legal privilege entitlement might properly be asserted by Trusts."

Following this, the Department of Health then consulted on proposals to enact a statutory Duty of Candour in Northern Ireland, in 2021 as part of the Hyponatraemia Implementation Programme.

[35] Counsel sought to distinguish this defendant from the obligations and duties imposed on Health Trusts, as his client is a General Practitioner, but given that both GPs and Trusts are publicly funded services, one would question such an assertion. While undoubtedly there has been a culture shift in clinical negligence and a move toward greater transparency, nevertheless, at the heart of this case lies the principle of legal professional privilege and the court's assessment of whether there has been waiver in all the circumstances.

[36] The court must give effect to the overriding objective contained in Order 1 rule 1a of the Rules, when exercising any power given to it by the Rules or when it interprets any rule. This provides that in order to deal with cases justly, the court must ensure the parties are on an equal footing and the matter is dealt with fairly. It cannot be said to be fair or just to conceal relevant material on the basis of privilege when the ability to assert such a right has in my judgment been lost in the circumstances of this case.

[37] Legal professional privilege is a fundamental legal principle. Nothing in this decision interferes with such an important tenet. If the defendant in this case wanted to maintain privilege they could have done so. By sending the statement to their expert they deployed it, and by virtue of the fact he reviewed it, referred to it and on balance, relied on its contents in the way he did, they waived privilege.

Conclusion

[38] Turning to the task of this court set out at para 6 of this judgment. Firstly, I determine that the statement relates to the issues in the case. Secondly, disclosure of the document is in my view necessary for disposing fairly of this matter. Thirdly, for the reasons set out in this judgment, I consider that privilege has been waived. The court may order production of the document to the court to deal with as it sees fit. I consider that unnecessary and that the proper course here is that it is simply disclosed to the plaintiff within seven days of the date of this judgment.

[39] I grant the plaintiff's application and award costs to the plaintiff, including counsel, such costs to be taxed in default of agreement.