Neutral Citation no. [2005] NIQB 29 | *Ref:* **DEEC5240**

Judgment: approved by the Court for handing down | *Delivered:* **12/04/05**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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MARTINE CONWAY

Plaintiff;

-v-

CHARLES KELLY

First Defendant;

and

THE NORTHERN IRELAND AMBULANCE SERVICE

Second Defendant.

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DEENY J

[1] The plaintiff herein was born 27 January 1965. On 12 February 2002 she issued a writ against the defendants alleging assault, battery and trespass to the person by the first defendant while acting as the servant and agent of the second defendant. Her claim is that she developed a post-traumatic stress disorder as a result of his conduct. The conduct is alleged to have taken place at her home. She had attended hospital earlier in the evening of 18 February 1999 with a friend. The first defendant ascertained her address and called at her home later that evening where he behaved in a way that was described by her counsel, Miss Mary Higgins, as entirely inappropriate. Mr O'Hara appeared for the first defendant.

[2] A statement of claim was served on 24 February 2004, although there are references in my papers to the service of statements of claim on 14 April

2004 and on 30 June 2003. The confusion about dates does not appear material to this application. The plaintiff's solicitors did not serve a medical report with the statement of claim at any stage. Under Order 25 r.2 of the Rules of the Supreme Court it is provided that:

> "The plaintiff shall serve with his statement of claim medical evidence substantiating all the personal injuries alleged in the statement of claim."

[3] When this was not done the defendants' solicitors, Messes McCartan, Turkington and Breen, wrote requesting the same and on 7 June 2004 wrote saying that they would issue a summons to strike out the claim if medical evidence was not served by return.

On 10 June 2004 Pauline Wright and Company, solicitors for the plaintiff, wrote in response. I quote:

> "Given the delicate nature of this case and in particular given that your client is the alleged perpetrator of a sexual assault on our client, our client has a right to privacy regarding medical matters. We would be prepared to release the psychiatric report compiled for the purposes of these proceedings on the strict condition it is for sight by legal advisers only and not for the direct sight by your client."

[4] The first defendant's solicitors declined to accept that position and by summons issued 13 August 2004 sought an order pursuant to Order 25 of the Supreme Court Rules requiring the plaintiff to disclose her medical evidence.

In response the plaintiff swore on affidavit for the application.

I quote from paras. 3 and 4 of that affidavit:

> "3. I am a very private person and do not wish my personal and medical history to be disclosed except where this is absolutely necessary. There are some things in my past which I still find difficult to think or talk about. It would upset me considerably if I thought that my life could become a matter of discussion for others – or even if others knew of some aspects of my past history – and I believe it would have an adverse effect upon my health and well-being. I would also resent the intrusion of my privacy.

> 4. Specifically when I learnt that the first defendant might be allowed to read my psychiatric report I was very frustrated and angry that he would have access to such private and personal information about me. He has already abusively intruded into my private life and opened deep wounds. I feel that if he read my psychiatric report it would give him some sort of power over me again. I feel that I have already been through enough because of him. I see no reason why the first defendant should see my medical report."

[5] I have been given the medical report dated 21 January 2003 of Dr E. McKeown, consultant psychiatrist. Among other things it does indeed deal with a highly confidential aspect of the plaintiff's earlier medical history as well of course as with the events of this alleged incident and of her reactions to it.

[6] Order 25 r.9(2) provides as follows:

> "On the ex parte application of any party bound to serve or disclose any medical report under this Order the court may give him leave –
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> (i) to adduce at the trial the evidence contained in any report without serving or disclosing the report; or
> (ii) to omit or amend any part of any report when serving or disclosing the report.

For some reason that was not before the court the plaintiff had not made such an application in this case. It is nevertheless relevant that the court has an express power not to enforce the principal obligation under Order 25. See also A Health Authority v X and Others [2002] 2 All ER 780. Counsel for the first defendant, Mr O'Hare, sought to argue that the provisions of Order 25 govern the hearing of the action but this rule shows that the disclosure of medical reports is ancillary to the hearing of the action. Any decision in this regard does not bind the trial judge.

[7] Mr O'Hare contended before me that the court should not interfere with the conduct of the action by the legal advisers to the defendant. As a general principle that would undoubtedly be correct but it does seem to me that from time to time such limitations are placed on counsel. For example I note that under the Code of Conduct for the Bar of Northern Ireland adopted by the Bar in general meeting on 6 March 2003, at 16.26, counsel for the defence in a criminal matter is prohibited save "in very exceptional circumstances and with the permission of the judge" to inform the client of

any conversation that has passed between counsel and the trial judge. No doubt other examples could be given of such restrictions, such as the imparting of information from opposing counsel on a confidential basis that may assist in the resolution of an action but which is either not to be disclosed to the opposing party at all or not immediately. Lawyers, like doctors, sometimes legitimately filter the information they share with their clients or patients.

[8] Mr O'Hare draws attention to the fact that not only is his client denying the allegations made but the second defendant says that if they are substantiated they clearly were not in the course of his employment and they are not liable. Therefore the first defendant, who is an ambulance driver, is or may be in the position of being an uninsured defendant meeting a substantial claim. I consider that, while legitimate, it does not prevent counsel and solicitors, having seen the medical report giving proper and informed advice to the first defendant as to the course they recommend to him in the light of all the circumstances. They may say she was unusually vulnerable to an incident of this kind because of her history, without going into the history. I make it expressly clear that it is a matter for the trial judge to decide whether the first defendant is present while the medical evidence is given on behalf of the plaintiff. It may be quite impossible to edit that in a way that the plaintiff would wish or on the other hand it may be found that that can be done. But that is a matter for the conduct of the trial. I am only dealing with this as pre-trial disclosure.

[9] Counsel for the plaintiff in a careful and thorough written argument invited the court to conclude that Articles 3 and 8 of the European Convention on Human Rights were here engaged. If the court concluded that there was an interference with either of those rights she contended that "the legitimate aim of a fair trial is not secured by disclosure of the details of the incidents which created the plaintiff's vulnerability to the first defendant".

[10] It was suggested that Article 3 of the Convention which prohibits "torture" and "inhuman or degrading treatment or punishment" was engaged. Reference was made to leading authorities on this point including Keenan v The United Kingdom [2001] 33 EHRR 913, Quitty v The United Kingdom [2002] 35 EHRR 1 and Price v The United Kingdom [2001] 34 EHRR 1285. One must bear in mind that the issue here is not whether the first defendant's original conduct amounted to an interference with Article 3 but whether the disclosure of a medical report setting out a painful episode in the plaintiff's past could amount to torture or inhuman or degrading treatment. It seems to me that it would be a distortion of language to so hold and I reject that submission.

[11] Ms Higgins is on sounder ground in relying on Article 8 of the Convention which provides that everyone has the right to respect for his

private and family life, his home and his correspondence. Clearly the disclosure of a highly confidential aspect of earlier history, even if it is known to some people already to some degree, is something that would constitute an interference with one's right to private life. The information is confidential. The plaintiff is prepared to share it with the defendants' legal and medical advisors but not with the first defendant himself. The first defendant is known to her. He operates in the same overall field of health care. She is apprehensive that he would share this information in a mischievous way with other persons. I do not, of course, conclude that he would do anything of the kind but it does seem to me that there is an interference here with a right to privacy. I am reinforced in that view by Bensaid v The United Kingdom [2001] 30 EHRR 205 at para 47 where the court held that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. See also R (Razgar) v Secretary of State for the Home Department [2004] 3 All ER 821.

[12] Article 8(2) of the Convention reads as follows:

> "There shall be no interference by a public authority with the exercise of this right accept such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

It seems to me that the question that the court must ask itself is whether the disclosure of this medical report to the first defendant personally is "necessary" for the protection of the first defendant's rights and freedoms ie under Article 6 of the Convention for a fair trial. Having considered the crux of this matter and the relevant authorities referred to by both counsel in their helpful submissions I conclude that it is not necessary for such disclosure to be made at this time. I believe that a fair trial is not compromised by the disclosure being limited to the legal and medical advisers of the defendants at this stage. The discussion of these issues in MS v Sweden [1997] 28 EHRR 313 is particularly helpful.

[13] In reaching my conclusion I differ to some extent from Master McCorry. I acknowledge his helpful and careful judgment with regard to this. I respectfully agree with the view expressed by him at p.6 that the aspect of the matter which troubles the plaintiff is such an intrinsic part of Dr McKeown's conclusions that "an editing exercise would not be useful or practicable in this instance." I order that the costs of this appeal and the application before Master McCorry be costs in the cause of the action.