Neutral Citation No. [2005] NIQB 32 | *Ref:* **DEEF5245**

Judgment: approved by the Court for handing down | *Delivered:* **14/04/2005**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

PAULINE McKIMM

-v-

SOUTH AND EAST BELFAST HEALTH AND SOCIAL SERVICES TRUST

DEENY J

[1] The plaintiff/appellant herein is an employee of the defendant at a care home in Belfast. Her claim arises from an alleged assault upon her by a minor resident at the home, whom I shall refer to as J.

[2] As part of her claim in the Recorder's Court she sought disclosure of J's confidential medical file. This was sought by her advisers because they allege that the defendants failed to carry out any proper risk assessment, as is appropriate in modern conditions, and failed to take proper steps while knowing of the violent history of this boy in care, so as to protect the plaintiff and other staff from him.

[3] The Trust were reluctant to disclose the confidential file which they hold with regard to this minor in their care. Their reluctance was increased by the refusal of the minor's parents to consent to the disclosure of this material.

[4] On that issue Miss Sarah Walkingshaw, who appeared for the respondent, pointed out that the plaintiff's rights under the European Convention with regard to family life did not disappear merely because he was in the care of the social service authorities. I accept that that is the case but the extent of the rights of the parents in this regard must be seen in the context that they have not, I was informed, had the care and custody of the child themselves for some five years.

[5] However, it is indisputable that the child has a right to privacy under Article 8 of the European Convention which required to be protected. In any event there is a right to confidentiality at common law with regard to

confidential personal documents of this kind. Under the Convention the court must ask itself whether the infringement of J's rights by disclosure of confidential documents to the plaintiff and her advisers is "necessary" for one of the reasons listed in Article 8. In this particular case that is for the protection of the plaintiff's rights to a fair trial under Article 6.

[6] It is happily the case, whether by coincidence or otherwise, that that test is to a significant extent the appropriate test at common law under Order 24 Rule 9 of the Rules of the Supreme Court. Under that rule the court will only order discovery if satisfied that the discovery in its opinion is necessary for disposing fairly of the cause or matter or for saving costs.

[7] Mr John O'Hare who appears for the plaintiff/appellant contends that it would be either very difficult or impossible for the plaintiff to establish her case that the defendant was in breach of its duty unless she can in fact obtain documents so as to enable her to establish that there was a history of violence on the part of this boy and the Trust had failed to take appropriate measures in the light of that.

[8] Miss Walkingshaw had very helpfully considered a considerable volume of documentation held by the Trust with regard to the long term care of J. She had then extracted, but not shown to Mr O'Hare, a number of documents which were potentially relevant. It was agreed between them that I would consider whether any or all of those documents would be necessary under Article 8 or Order 24 and ought to be discovered by the defendant to the plaintiff. Mr O'Hare was agreeable to redaction of the documents by me, if necessary.

[9] It would be right to say that the word 'necessary' would not have precisely the same import in Article 8 as in Order 24. Equally well I do not feel able to accept Miss Walkingshaw submission, in her very full and helpful written argument, that necessary means that it is "the only way of protecting the plaintiff's right to effective access to the courts". She relied on the authority of Perotti v Collyer-Bristow (a firm) [2003] EWCA Civ 1521 as authority for that proposition. In that case the Court of Appeal in England was considering whether they should assist a legally unrepresented party before them to obtain legal aid. Legal aid was not a matter for the court but for the Legal Services Commission but a strong recommendation from the court would carry weight. The court concluded that the test was not whether it would be helpful to the court but whether "the court could not do justice in the case because it had no confidence in its ability to grasp the facts and principles of the matter on which it had to decide." I do not find a broad statement of principle that no interference with Article 8 rights can be permitted unless it is the only way of protecting the rights of other persons. Such a conclusion would tend to lean against the balancing and proportionate approach to matters of this kind.

[10] Counsel suggested that the plaintiff might pursue the matter by way of interrogatories or by calling witnesses. I observe that if those methods were successful they would nevertheless lead to the disclosure of the very information to be found in the documents. However those suggestions would offend against Order 24 inasmuch they would be likely to increase the cost of the action rather than saving costs. Furthermore framing interrogatories might be a very difficult and uncertain method for the plaintiff to adopt, in contrast with asking a defendant to hand over any documents which are relevant. Doing so would accord with the modern principle that civil justice should be administered in as open a way as possible with the long established right to discovery of relevant documents where necessary. It is not a satisfactory substitute for the plaintiff to subpoena officials of the Trust without knowing what they are going to say in the witness box. That makes any resolution of the action much less likely and wastes public time and money.

[11] I have indicated some of the factors that seem to me relevant here. I am very conscious of the fact that confidential information about a minor in care should not be in the public domain. But documents released by way of discovery may only be used by a party and its advisers for the purposes of the action and are not in the public domain. Furthermore, I have to take into account that the plaintiff's case is that it was J himself who had assaulted her. It is not that she is trying to drag in some wholly unconnected third party. In that respect it is a very different case from A v X [2004] All ER (D) 517 where a defendant was seeking to reduce the quantum of a plaintiff's claim by showing a propensity towards mental illness ran in the plaintiff's family. They then sought discovery of the plaintiff's brother's medical notes and records to try and bolster that case. It is quite understandable that that application was refused in the circumstances.

[12] As invited by counsel I have considered the documents which Miss Walkingshaw had extracted from the defendant's records relating to J. I found that some parts of them are indeed highly relevant to the issues in the action and in my opinion necessary and indeed essential for the fair disposal of the plaintiff's claim. I have concluded therefore that the plaintiff/appellant should have discovery of such pages of the documents as I have marked and such parts of other pages as I have underlined and initialled. I consider that there is indeed a "pressing need" for that material to be disclosed. As the plaintiff is herself a care worker employed by the Trust it is reasonable that she should have sight of these documents as well as her professional advisers. It will be for the court which hears this matter to consider the effects of the documents, when and as they are proved, indicating any failure on the part of the defendant to take reasonable care for its employees in the light of J's history.