Neutral Citation No [2012] NIQB 29

Ref:	**McCL8474**

Judgment: approved by the Court for handing down

Delivered:	**02/05/2012 & 05/06/2012**

*(subject to editorial corrections)**

FINAL

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISON

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BETWEEN:

NIGEL SANDS

Plaintiff:

and

RONALD GARDINER

Defendant:

_____

McCLOSKEY J

[1] On 12th January 2012, the Master ordered –

> *"… that the Plaintiff do disclose to the Defendant … the report and photographs by Denis Woods Associates dated 23rd March 2011 referred to by Mr. Thompson FRCS in his report dated 3rd May 2011".*

The Plaintiff appeals to this court against said order.

[2] The Plaintiff claims damages against the Defendant for personal injuries and financial loss alleged to have been sustained by him arising out of a road traffic

accident which occurred on 14th October 2009. In his Statement of Claim, the Plaintiff makes the case that, while driving on his motorcycle on the M1 Motorway, he was thrown on to the adjoining grass verge. Thereupon the Defendant's vehicle, which had been travelling in the offside lane, drove on to the same grass verge, allegedly to avoid colliding with the preceding vehicle, where his vehicle struck the Plaintiff, propelled him along the verge and trapped him against the central crash barrier. The Plaintiff's injuries, as pleaded, are unquestionably serious and there is a substantial claim for financial loss. The court was informed that while the Defence will deny liability, it has not yet been served by reason of the contentious issue raised by this contested interlocutory application. I take this opportunity to observe that the new provisions of Order 18, Rule 15A of the Rules of the Court of Judicature ("*the RCC*") are tailor made for a case of this nature, in which one can anticipate that the Defendant, duly armed with expert and other evidence, will make a positive case regarding the subject accident and the causation and aetiology of the Plaintiff's alleged personal injuries. Having regard to the issues thrown up by the Defendant's interlocutory application and ensuing appeal to this court, it would have been preferable for the Defence to be served in advance thereof.

[3] By summons dated 12th October 2011, the Defendant sought the following order:

> "*An order under the inherent jurisdiction of the court staying this action unless or until the Plaintiff discloses the report from Denis Wood Associates dated 23rd March 2011 and the copy photographs as sent to Mr. Thompson FRCS*".

This was the stimulus for the order now under appeal to this court. In the grounding affidavit, the Defendant's solicitor avers that there are substantial issues of liability and causation. I observe that this averment takes no colour from any pleading since the Defence has not yet been served. Exhibited to the affidavit is a medical report prepared by Mr. Thompson FRCS, a consultant orthopaedic surgeon, dated 26th February 2010 and a letter dated 3rd May 2011 from Mr. Thompson to the Plaintiff's solicitors (which I shall describe hereinafter as "*the supplementary medical report*"). Both were served by the Plaintiff's solicitors under RCC Order 25, accompanying the Statement of Claim. The supplementary medical report commences with an acknowledgement of receipt of a report from Denis Woods Associates dated 23rd March 2011 (which I shall describe hereinafter as "*the contentious engineer's report*"). The text of the supplementary medical report discloses that Mr. Thompson was also furnished with certain witness statements, a report detailing the damage to the Plaintiff's motor cycle and certain photographs. The context can be readily inferred: Mr. Thompson was evidently asked by the Plaintiff's solicitors to express an opinion on the aetiology of the Plaintiff's injuries. This is unsurprising, having regard to the unusual circumstances in which the subject accident unfolded. Having conducted this exercise, Mr. Thompson expressed the following opinion in his supplementary medical report:

> "*Having reviewed the report of Denis Woods Associates Consulting Forensic Engineers, it is clear that the instantaneous direct trauma sustained to* [the Plaintiff] *involved his right side … As noted by the report of Denis Woods*, [the Plaintiff] *was travelling at moderate speed. I would also note that a Harley Davidson motorbike is a very heavy bike. I think that it is possible that his left arm could have been wrenched in an abducted and externally rotated position as he parted company with the bike and that this could have caused the dislocation of his left shoulder… It is possible that the direct trauma sustained … as he was pinned against the barrier by the* [Defendant's vehicle] *could also have potentially caused a dislocation of his left shoulder …*
>
> *At this stage I think it would* [sic] *extremely important to determine whether or not* [the Plaintiff] *had sustained an anterior or posterior dislocation of his left shoulder as this is likely to further inform my opinion regarding which element of this gentleman's accident caused the dislocation of his left shoulder*".

I would add that, per the Statement of Claim, most of the Plaintiff's injuries are left sided. It is clear that Mr. Thompson FRCS was not purporting to express a concluded opinion on the issue of causation/aetiology referred to him. It would appear that no further medical evidence has been served by the Plaintiff's solicitors subsequently.

[4] Mr. Lavery, the principal solicitor in the firm representing the Plaintiff, has sworn an affidavit in which he describes Mr. Thompson's letter of 3rd May 2011 as "*a liability report*" and wherein he avers that this was provided to the Defendant's solicitors in error at the time when the Statement of Claim was served. Referring to certain *inter-partes* correspondence, the affidavit continues:

> "*… I indicated that this firm was content to release the* [engineer's report] *provided that there was mutual reciprocation by the Defendant …*
>
> *This … was not reciprocated by the Defendant…*
>
> *If the Defendant fails to return* [the supplementary medical report] *it will be a clear attempt to capitalise on the mistake of the Plaintiff's solicitor …*
>
> *The photographs … were served on 18th November 2011.*"

In the exhibited correspondence, the Defendant's solicitors do not appear to have made any response to the Plaintiff's "reciprocity" proposal. It would clearly have been preferable that a reasoned response to this proposal be made.

[5] In contemporary personal injury litigation, the service of medical evidence is governed by Order 25 RCC. I draw attention to the definition of "*medical evidence*" which is, per Rule 1(2):

> "*(a) The evidence contained in any medical report or other accompanying or supplemental document as specified in Rule 10 and includes surgical and radiological evidence and any ancillary expert or technical evidence; and*
>
> *(b) Any other evidence of a medical, surgical or radiological nature which a party proposes to adduce at the trial by means of oral testimony*".

Rule 10(1), under the rubric "Mode of Disclosure" provides:

> *"10.—(1) A party serving or disclosing medical evidence under this Part of this Order shall do so by furnishing copies of any relevant medical report or reports, together with any documents emanating from the maker of the report which are intended by him to accompany or supplement any such report, or a document or documents containing a sufficient record of any such evidence as is referred to in the definition of medical evidence in rule 1(2). All such reports or other documents shall be signed and dated by the relevant medical expert and shall specify his professional qualifications.*"

I would also highlight Rule 7 which, under the banner "Disclosure of Medical Evidence", provides (in substance):

> "*Where a party proposes to adduce at the trial* ***medical evidence obtained from any medical expert,*** *he shall disclose* ***all relevant medical evidence obtained at any time from that medical expert*** *…* ".

[My emphasis].

[6] The argument developed by Mr. Maxwell (of counsel) on behalf of the Defendant formulated the issue as one of waiver of privilege. This argument acknowledged that the report of the Plaintiff's consulting engineers is *prima facie* privileged, but entailed the proposition that a waiver of such privilege has occurred. On behalf of the Plaintiff, Mr. Gilmore (of counsel) submitted, *inter alia,* that Mr. Thompson's letter of 3rd May 2011 is properly to be viewed as a so-called "*liability report*" which is not embraced by the provisions of, and thus does not fall to be

served under, Order 25. As appears from paragraphs [1] and [3] above, the Master declined to determine this application by reference to the framework under which it was brought viz. a quest to secure an order staying the proceedings pending disclosure of the contentious report. Rather, his preferred course was to apply the framework of Order 24 RCC to the matter in dispute between the parties. For reasons upon which I shall elaborate, I consider that, in principle, this was the correct approach.

[7] While, upon the hearing of this appeal, the submissions on behalf of the Plaintiff focussed mainly on certain provisions of Order 25, I consider that this regime is of peripheral relevance only to the issues raised by the Defendant's application. In short, the Plaintiff has purported to act in compliance with Order 25 and the Defendant does not make the case that there has been any infringement of the provisions of that regime. Properly analysed, the relevance of Order 25 is confined to providing the context within which the matter in dispute between the parties has arisen. I would, however, take the opportunity to reject as misconceived the Plaintiff's contention that the Defendant's application should be dismissed on the ground that the supplementary report of Mr. Thompson FRCS is to be classified "*a liability report*". True it is that this report addresses and comments upon issues bearing on the question of the Defendant's alleged liability to compensate the Plaintiff in negligence. However, I consider that this characteristic does not impel to the conclusion that the supplementary report does not constitute "*medical evidence*" within the Order 25 regime. There are two fundamental reasons for this conclusion. The first is that the second of Mr. Thompson's reports plainly "*supplements*" his first report and, therefore, is embraced by Rule 10(1): it is of this character as it is additional, or ancillary, to the author's preceding report. The second is that the evidence contained in Mr. Thompson's supplementary report – and such further related evidence as may be contained in later reports or given by him at the trial – plainly falls within the domain of a medical expert competent to express opinion evidence on questions relating to the causation and aetiology of the Plaintiff's multiple injuries. Insofar as the Plaintiff's arguments rested on the contention that this is not medical evidence and, further, that "*medical evidence*" within the framework of the Order 25 regime is confined to evidence bearing on matters of a clinical, diagnostic and prognostic nature (in general terms) this is in my view misconceived. Such an argument finds no support in the provisions of Order 25, is antithetical to the Order 25 regime and, finally, either misunderstands or overlooks the breadth of the legitimate role of a medical expert in cases of this kind.

[8] The decision in ***Clough –v- Tameside Health Authority*** [1998] 2 All ER 971 featured, as it routinely does in disputed interlocutory applications of this kind, in the Defendants' arguments particularly. In that case, the Defendants disclosed a psychiatric report in which reference was made to a medical report which had not been disclosed. The Plaintiff sought discovery of this latter report and its disclosure was ordered by the court. The Defendants' appeal was unsuccessful. The *ratio decidendi* of this decision emerges clearly in the following passage from the judgment of Bracewell J (at p. 976):

> "… *I can appreciate a clear distinction between material supplied to an expert by an instructing solicitor as part of the background documentation in the case upon which an expert opinion is sought and, on the other hand, communications between solicitor and expert which fall outside that category. In the first instance, I am satisfied that the privilege is waived and in the instant case the supply to Dr. Hay of a medical report of Dr. Pandy could only be in order for Dr. Hay to consider it as part of the background information in formulating his opinion. The mere fact that Dr. Hay may have found it unhelpful or even irrelevant, if that was the case, does not alter the status of the material supplied as part of his instructions and background material in coming to his independent opinion. A statement was supplied to Dr. Hay to consider and the resulting report was served on the other side …*
>
> *In those circumstances, I hold that the privilege was waived …*".

The learned judge further held that, in any event, the court would without hesitation exercise its discretion in favour of disclosure. As the above passage makes clear, the judge did not confine the material to be disclosed by reference to any requirement (or principle) of *reliance*.

[9] In considering the decision in ***Clough***, I am alert to three factors. The first is that this is a first instance decision emanating from the jurisdiction of England and Wales which is not binding on this court. The second is that, in my opinion, it is not an "authority" properly so-called. It is, rather, a decision purporting to apply established principles to its particular factual matrix. The third is that it is not entirely harmonious with two earlier decisions of the English Court of Appeal, namely ***B –v- Wath Limited*** [1992] 1 All ER 443, and ***Bourns –v- Raychem Corporation*** [1999] 3 All ER 154 (per Aldous LJ at p. 166 especially). By virtue of the doctrine of precedent, these decisions (which, on the face of the report, were not cited in argument) were binding on Bracewell J. This omission was noted by Aldous LJ in ***Bourns*** (at p. 189) who recorded that a series of relevant decisions, including that of the Court of Appeal in ***Maruveni Corporation –v- Alafouzos*** [unreported – 1986 CA Transcript 996] had not been cited to the court in ***Clough***. Aldous LJ emphasized that waiver of privilege does not occur by the mere fact of referring to a privileged document in a witness statement. Rather -

> "… *there must at least be reference to the contents and reliance*".

[At p. 167A].

[10] The decision in ***Clough*** has been considered in this jurisdiction in ***Steele –v- Harland & Wolff*** [unreported, 13th December 2002], where the Plaintiff made an application under Order 24, Rule 14 for the disclosure of a surveillance report identified in a supplementary medical report of the Defendant's expert, apparently served under RCC Order 25. In his judgment, Weatherup J identified two elements. The first is that of waiver. The second is what the learned judge described as "*connected documents relied on*": see paragraph [8]. He then observed:

> "*In practice it may be difficult to decide in a particular case whether or not the expert whose report has been furnished has actually relied on or merely referred to a connected document*".

Weatherup J noted the conclusion expressed by the medical expert concerned and continued:

> "*It is apparent that he is relying on the surveillance report to reach the stated conclusion … as to the degree of disability …*
>
> *Accordingly, on that basis there has been waiver in relation to the connected documents … because there has been reliance on the connected documents*".

The learned judge then gave consideration to the twin requirements of Order 24, Rule 14 namely that the document sought must be relevant and disclosure thereof must be necessary in the interests of fairness or saving costs. The judge resolved the appeal by giving effect to the requirement enshrined in the Rule that the disputed document be produced to the court, following which the court would receive argument on the issues of relevance and necessity in order to determine whether full or partial disclosure should ensue. I observe further that in both ***Steele*** (*supra*) and ***Orr –v- Crowe*** [2009] NIQB 17 – per Gillen J, at paragraphs [11] and [12] – the courts in this jurisdiction have espoused the reliance principle. This is the approach which I adopt in determining the present appeal.

[11] I consider that in resolving this interlocutory dispute the court must also be alert to two further principles the importance whereof in contemporary litigation is unmistakable. The first is the overriding objective enshrined in Order 1, Rule 1A which espouses the overarching principle that in its exercise of any power contained in, or when interpreting, any rule of court, the court must deal with the individual case justly. The terms of Rule 1A(2) make clear that what follows is *not* an exhaustive menu. The second is the "litigation cards face up" principle. This, in my view, is properly viewed as a freestanding principle, which complements and fortifies the over-riding objective. This principle is neither novel nor radical, being clearly identifiable in the decision of the House of Lords in ***O'Sullivan –v- Herdmans*** [1987] 1 WLR 1047 (per Lord Mackay, at p. 136), decided some twenty-

five years ago. It also features strongly in two reported Northern Ireland decisions which may not have received sufficient emphasis and exposure in practice, mainly ***Mark –v- Flexibox Limited*** [1988] NI 58 (per MacDermott LJ, at p. 91) and ***Hughes – v- Law and Ulsterbus*** [1988] 12 NIJB 30 (per O'Donnell LJ, at pp. 36-37).

Conclusion

[12] This interlocutory application has undergone a certain metamorphosis in two respects in particular. Firstly, the contentious photographs have now been served by the Plaintiff's solicitors. Secondly, while the summons seeks an order staying proceedings pending production of the report prepared by the Plaintiff's consulting engineers, the Master, effectively, converted this into a discovery application and made his order accordingly: see paragraph [1], *supra*. In agreement with the Master, I consider it preferable to resolve contentious issues of this kind by reference to the Order 24 regime, in preference to ordering a stay, for four reasons. The first is that a stay is a relatively blunt instrument. I recognise, of course, that in the present context one is dealing with a limited, rather than permanent, stay. However, I consider that having regard particularly to the emphasis on expedition and avoidable delay in contemporary litigation, the court will always give anxious consideration to the question of whether a stay should be ordered. The second is that a stay is not guaranteed to finally resolve the discrete matter in dispute between the parties. The third is that a stay could disproportionately infringe a litigant's right of access to the court protected by both Article 6 ECHR and the common law, a right described, in terms, as a common law right of constitutional stature in ***R –v- Lord Chancellor, ex parte Witham*** [1998] QB 575 (at p. 585, per Laws LJ). Fourthly and finally, the remedy of a stay is undesirable since in many cases it will circumvent and nullify the reliance principle, whereas, in contrast, an order for production of the disputed material to the court will ensure that this principle is respected in full. To this one adds the incontestable observation that the contested issue between the parties is one of *discovery/disclosure of documents*. The Order 24 regime makes no provision for the remedy of a stay, which lies within the inherent jurisdiction of the High Court. In its extensive provisions, including Rule 10, it provides mechanisms for the resolution of disputes of this kind. Thus resort to the court's inherent jurisdiction is unnecessary. For this combination of reasons, it is, in my view, preferable to view disputes of this kind through the prism of Order 24.

[13] The effect of this approach is as follows. The contentious engineer's report does not fall within any of the specific provisions of Rules 10 and 11 viz. inspection of documents referred to in the Plaintiff's List of Documents or inspection of documents identified in pleadings or affidavits. Rule 14 is, however, engaged. This provides:

> *"At any stage of the proceedings in any cause or matter the court may, subject to Rule 15(1), order any party to produce to the court any document in his possession, custody or power relating to any matter in question in the cause or*

> *matter* ***and the court may deal with the document when produced in such manner as it thinks fit***".

Rule 15 makes the following twofold provision:

> *"15. – (1) No order for the production of any documents for inspection or to the court or for the supply of a copy of any document shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*
>
> *(2) Where, on an application under this Order for production of any document for inspection, or to the Court or for the supply of a copy of any document privilege from such production or supply is claimed or objection is made to such production or supply on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid"*

I take into account the limited evidential framework before the court which, of necessity, does not include the disputed consulting engineer's report. I have regard also to the distinct possibility that this report addresses a range of issues and contains material remote from the opinion expressed by Mr. Thompson in his supplementary medical report. Applying the template of Rules 14 and 15, I conclude:

(i) Having regard to the issues joined between the parties and the clear purpose underpinning the commissioning and compilation of Mr. Thompson's supplementary report, I am satisfied that production of the contentious engineer's report to the court is necessary for disposing fairly of this action. Equally, it is necessary for saving costs, since maximum disclosure is likely to illuminate and, in consequence, reduce the main contentious issues between the parties.

(ii) The power thereby conferred on the court to deal with the contentious engineer's report "*in such manner as it thinks fit*" will be informed by the Court's assessment of the document giving effect to the principle of reliance. The mechanism of production to the court will also enable the court to make a fully informed assessment, per Rule 15(2), of the evidently tenuous claim that privilege attaches to the entirety of the report.

Production of the report to the court will be accompanied by a letter from the Plaintiff's solicitors making such representations as they see fit. The Defendant's solicitors will have an opportunity to respond. If appropriate, there will then be an

opportunity for further argument on behalf of both parties. Thereafter, the discovery issue will be determined finally by the court.

[14] In this narrow respect and to this limited extent, I differ from the broader order made by the Master, which entailed discovery of the entire report to the Defendant, without reference to the principle of reliance as I have expounded this above.

Postscript

[15] Having now considered the contentious consulting engineer's report and the parties 'further representations:

(i) Giving effect to the principle of reliance, I order that the report be discovered to the Defendant's solicitors by, at latest, close of business on 5th June 2012.

(ii) The costs of the hearing unnecessarily convened on 1st June 2012 will be borne by the Plaintiff's solicitors.

(iii) I dismiss the appeal, awarding the costs thereof and at first instance to the Defendant.