

Neutral Citation no. [2002] NIQB 69

Ref:	WEAD 3256
------	-----------

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered:	13/12/02
------------	----------

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER:

STEELE

Plaintiff

-v-

HARLAND & WOLFF PLC & SHORT BROTHERS

Defendants

WEATHERUP J

[1] This is the defendants' appeal against an Order of Master Wilson of 14th November 2002. The application was made by the plaintiff under Order 24 Rule 14 for the disclosure of a surveillance report. The Order was made under Order 24 Rule 7 and required the defendant within fourteen days to file an affidavit specifying particular documents, namely the surveillance report referred to by Dr Hynd in his letter to the defendants' solicitors of 10th April 2002.

[2] The plaintiff's claim arises out of his employment with the defendants as a result of which he was exposed to asbestos and developed

related diseases. Medical evidence has been furnished on behalf of the plaintiff from Dr McMahon, Consultant Physician who has produced two reports, one dated 19th January 2001 and another dated 13th August 2001. In those reports it is Dr McMahon's assessment that the extent of the plaintiff's disability is 60%. The defendants have produced medical evidence from a Consultant Physician, Dr Hynd. He reported on 22nd June 2001 that the extent of the plaintiff's disability related to asbestos was 30% and in respect of a chronic obstructive airways disease an additional 10%. He then furnished a letter dated 10th April 2002, in which he referred to having received surveillance reports relating to the plaintiff. He expressed the view that the respiratory disability was 30% rather than the 60% suggested by Dr McMahon. He then produced, on 18th September 2002, a further report referring to an investigation report and confirming his original assessment that the overall respiratory disability was most probably of the order of 30% rather than 40%. I am informed by Counsel that the plaintiff accepts that if the contents of the surveillance reports are correct, namely, that the plaintiff was able to walk 100 metres carrying shopping without any apparent difficulty, then that would appear to confirm the assessment of 30% asbestos disability.

[3] After receiving the medical reports from Dr Hynd the plaintiff sought a copy of the surveillance report or reports. The application was made under Order 24 Rule 14 by which the court may order production to the court of any document in the possession, custody or power of a party relating to any

matter in question in the cause or matter. It is provided by Rule 15 that such production should only be made where it is necessary either for disposing fairly of the cause or matter or for saving costs. Rule 15(2) provides that where such an application is made and the question of privilege arises then the Court may inspect the documents for the purposes of determining whether the claim or objection based on privilege is valid.

[4] Mr Cush on behalf of the Plaintiff applied for leave to introduce an additional ground of application under Order 24 Rule 11, which provides for the inspection of documents referred to in pleadings and affidavits and Mr Maxwell for the Defendants did not object to that amendment. Order 24 Rule 11 provides that any party may serve a notice on the other party, in whose pleadings or affidavits a reference is made to any document, requiring him to produce that document for inspection. No such notice has been furnished. There is no reference in the pleadings and there is no reference in an affidavit to the document which is the subject matter of this dispute. Order 24 Rule 11 does not add anything to the application and the matter can be dealt with on its merits under Order 24 Rule 14. The equivalent English rule is Order 24 Rule 10 and that rule includes documents referred to in witness statements but that is not included in the Northern Ireland rule.

[5] The defendants object to the production of the surveillance report on the ground that it is privileged. The plaintiff contends that the reference to the surveillance report in the medical report that has been disclosed to the plaintiff amounts to a waiver of such privilege as would have applied to the

document. The plaintiff relied on Clough v Tyneside Health Authority [1998] 2 All ER 971. A report had been obtained by solicitors and furnished to a psychiatrist for the purpose of enabling him to prepare a medical report on the Plaintiff. The psychiatrist's report referred to the first report and the issue arose as to whether or not privilege attaching to the first report had been waived. Bracewell J held that the privilege was waived and that the first report should be disclosed. The application in Clough was made under the English Order 24 Rule 10 but there is no difference in relation to the issues that arise. The Judge referred to the Supreme Court Practice (1997) where it was stated that the mere service of a witness statement did not waive privilege and such privilege continues until the statement has been put in evidence at the trial. That position was said to apply to the statement itself and to any connected documents and in support that proposition reliance was placed on Balkanbank v Taher [1995] 2 All ER 904. Bracewell J considered that decision and did not find a basis on which it supported the proposition. I find that the report does not support that proposition.

[6] Bracewell J referred to Phipson on Evidence (14th Edition) which drew a distinction between an expert identifying documents on which he had relied in making his report as opposed to referring to another document in passing. Phipson stated that in the former case where there was reliance there would be waiver but in the latter case where there was reference only there would not be waiver. Bracewell J did not accept that distinction and she went on to state (at page 976 f) that the fact that the expert writing the substantive

report may have found the first report unhelpful or even irrelevant did not bear on the matter and she concluded that where a document had been considered and referred to the privilege was waived.

[7] Bracewell J went on to consider whether to exercise her discretion in favour of disclosure in any event and she decided to order disclosure in the interests of openness. The Civil Procedure Rules in England and Wales have been amended and now make particular provision for material furnished to experts under the new rules. The old rules continue to apply in Northern Ireland. I have been referred to the 15th edition of Phipson at paragraph 22-15 where a footnote referring to Clough states that the decision was criticised in Bourns v Raychem [1999] 1 All ER 908. I do not find that the comments in Bourns amount to a criticism of Clough. Laddie J stated that even accepting the wider proposition in Clough that mere reference to a document was sufficient to involve waiver did not have a bearing on the issue that he had to decide. However I recognise that Clough is controversial to the extent that it advances the position that waiver may extend to connected documents that have been referred to but have not been relied on.

[8] Waiver extends to connected documents relied on and I consider whether or not in this particular case there has been reliance on the surveillance report. 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. In the present case there are two references made by Dr Hynd to surveillance reports. First in his

letter of 10th April 2002 he refers to surveillance reports and that they disclose that the plaintiff was walking without difficulty for 100 metres and Dr Hynd states:- “In my view this equates with a respiratory disability of the order of 30%”.

It is apparent that he is relying on the surveillance report to reach the stated conclusion. That is equally apparent from the substantive report where he notes that he received a surveillance report dated 11th December 2000 setting out the matters he had previously described and he states:- “However, in my view the information contained within the surveillance report 2000 indicates that this mans overall respiratory disability is most probably of the order 30% rather than 40%.”

It is apparent that the author of the letter and the report relied upon the surveillance report or reports in order to reach the conclusion that he did as to the degree of disability. Accordingly, on that basis there has been waiver in relation to the connected documents. It is not necessary to decide whether a passing reference to a connected document amounts to a waiver. In this case there has been waiver because there has been reliance on the connected documents.

[9] If privilege does not attach to the surveillance reports, Order 24 rule 14 provides that two matters be established. First the documents in question must be relevant. It is apparent that the documents are relevant as they concern material that is in issue in the case namely, the extent of disability of the plaintiff. Secondly disclosure of the documents must be

necessary in the interests of fairness or for the saving of costs. The basis on which an expert has formed his opinion is a matter that it is necessary to consider in the interests of fairness and openness.

[10] The defendant advance a subsidiary argument namely, that if there has been waiver and there is to be disclosure that it should be limited to contents concerning the extent to which the plaintiff was walking. Privilege applies to the document as a whole and waiver extends to the document as a whole. Accordingly, where there has been waiver the whole of the document will be required to be produced subject to the requirement of relevance and necessity. If the document is partly relevant that, in general, does not prevent disclosure of the whole of the document unless there can be severance on the basis that the subject matter of a part of the document is wholly distinct from the matter which is relevant. That may or may not be this case. Further it may be that disclosure of a part of the document would not be necessary in the interest of fairness or in the interest of saving costs because that part is of some wholly distinct character.

[11] Order 24 rule 14 does not require an affidavit but requires that the document be produced to the Court. I order that the surveillance report (or reports) relied on by Dr Hynd be produced to the Court and in that event the Court may deal with the document when produced in such manner as it thinks fit. What I am proposing to do, the document having been produced to the Court, will be to order disclosure to the plaintiff of all that is produced, subject to the issues of relevance and necessity as to any part of the document.

I will hear submissions on the disclosure to the plaintiff of the whole of the report or reports on the basis that a distinct part is not relevant, or that disclosure of a distinct part is not necessary.