1981 No. 8139P 2503

BETWEEN/

JOHN PATRICK McSWEENEY PLAINTIFF

AND

DANIEL JOSEPH KAVANAGH
AND THE TRUSTEES AND
BOARD OF MANAGEMENT OF
THE NORTH INFIRMARY, CORK DEFENDANTS

Judgment of Mr. Justice Hamilton delivered the 5th day of March 1984.

The Plaintiff in this case resides at 7529 Susan Court, Fort Worth, Texas in the United States of America.

These proceedings arise as a result of an accident which occurred within this jurisdiction on the 25th day of July, 1978.

The Plaintiff was travelling as a passenger in a motor vehicle, the property of the first named Defendant, when it allegedly crashed into a ditch and the Plaintiff suffered personal injury.

Subsequent to the said accident, the Plaintiff was removed to the North Infirmary, Cork where he was treated for the injuries alleged to have been sustained by him in the said accident.

He now claims to be entitled to recover damages in respect of the said injuries suffered by him and which he alleges were

caused by the negligence of the first named Defendant in the driving of his motor vehicle and the negligence and breach of contract of the second named Defendants in the treatment of the Plaintiff for the said injuries.

The first named Defendant, in his defence, does not deny that he was guilty of negligence on the occasion in question but denies that the Plaintiff suffered the alleged or any personal injuries, loss and damages as a result of such negligence.

He further alleges that the personal injuries complained of by the Plaintiff in these proceedings pre-existed entirely, or in large part pre-existed the accident, the subject matter of these proceedings and that they were caused, or caused in major degree, or were contributed to, by the negligence and breach of duty of the second-named Defendants while undergoing treatment in the said Hospital.

The second-named Defendants in their Defence, deny that the Plaintiff was placed under their care, deny that they were guilty of negligence and deny that he suffered further severe personal injury while in their care.

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As will be seen from the foregoing brief outline of the pleadings, a number of issues will have to be determined at the hearing of the action and these will include, (a) the pre-existing condition of the Plaintiff, (b) the nature of the injuries sustained by the Plaintiff when the first-named Defendants motor-vehicle crashed into the ditch, (c) the effect (if any) that these injuries had on the pre-existing condition of the Plaintiff, (d) whether the Plaintiffs present condition is due in any way to the injuries sustained by him in the accident or whether it is due solely to the pre-existing condition, (e) whether the second-named Defendants were guilty of negligence in their treatment of the Plaintiff and if so, whether he suffered additional injury as a result of such treatment.

These are but some of the issues which will arise for determination during the course of the hearing of the Plaintiffs claim for damages against both Defendants.

This Matter came before me by way of an application brought by the second-named Defendants, and by the first-named Defendant

for an Order discharging an Order made by the Master of the High Court on the 17th day of January, 1984.

I have not seen a copy of the said Order made by the Master of the High Court but am informed by Counsel that, on the application of the Plaintiff, it provided for the examination in Texas of the 33 witnesses referred to in Mr. Flemings affidavit sworn herein on the 6th day of January, 1984.

It is perfectly obvious that the examination and cross-examination of 33 witnesses in the State of Texas by the parties to these proceedings would be an extremely expensive proceeding and should be permitted only if it is necessary for the proper determination of the issues between the parties.

Order 39 R1 of the Rules of the Superior Court provides that:-

"In the absence of any agreement in writing between the solicitors of all parties, and subject to these Rules, the witnesses at the trial of any action, or at any assessment of damages, shall be examined viva voce and in open court ...."

Order 39 R4 provides that:-

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"The Court may, in any cause or matter where it shall appear necessary, make any order for the examination upon oath before the Court, or any officer of the Court, or any other person, and at any place of any witness, and may allow the deposition of such witness to be adduced in evidence on such terms (if any) as the Court may direct".

Before departing from the procedure laid down in Order 39 R 1 with regard to the examination of witness at the trial of any action or at any assessment of damages and making an order pursuant to the provisions of Order 39 Rule 4 a Court must be satisfied that it is necessary for the proper determination of the issues between the parties and it would appear to me that the onus of so satisfying the Court rests on the party seeking such order.

It appears from the affidavit of Mr. Fleming sworn herein on the 6th day of January 1984 that "Senior Counsel has advised that the following witnesses who live out of the jurisdiction in the United States of America should be available to give evidence on behalf of the Plaintiff at the hearing and where not available

"their evidence should be otherwise produced subject to the discretion of the Master of the High Court and the obtaining of the appropriate order from the Master of the High Court. namely:"

And the names and addresses of fifteen medical practitioners resident in the State of Texas are therein set forth.

The affidavit further provides that:

"In addition, Counsel has advised that the following witnesses will be required to give evidence in relation to special damages and it is respectfully suggested that it would be far cheaper and convenient to take their evidence on Commission in the United States (if the Order for the taking of evidence on Commission is granted) rather than the bringing of such persons to this country. The following are the names and addresses of the said persons:"

The Defendant then proceeds to give the names and addresses of the persons sought to be examined.

As the attendance of the foregoing witnesses has been advised by Senior Counsel I must and do accept that their

evidence is necessary for the proper presentation of the Plaintiffs claim herein but is it necessary that they be examined on oath in respect of such evidence?

Order 32 R 4 of the Rules of the Superior Courts provides that:

"Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit same within six days after service of such notice, or within such further time as may be allowed by the Court, the cost of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing the Court shall certify that the refusal to admit was reasonable or unless the Court shall at any time otherwise order or direct."

It seems to me that in so far as the eighteen witnesses relating to the item of special damages are concerned, the

procedure provided for in Order 32 R4 should be followed by the Plaintiff before any decision can be reached by a Court that it is necessary to have the witnesses necessary to prove these specific items examined on oath.

While in no way attempting to inhibit or restrict in any way the proper prosecution of any party's case in Court, there seems to me to be an obligation on the Court and the parties to ensure that no unnecessary costs or expenses are incurred.

Very considerable expense will be incurred if it is considered necessary to have the fifteen medical witnesses examined be it in Ireland or in the United States of America and if it is considered necessary to have them examined, it would appear to me to be more convenient and less expensive to have them examined in Fort Worth or Dallas Texas.

Before any decision can be made on the crucial question as to whether it is necessary that they be examined on oath, I consider it necessary that the Plaintiff should obtain from each of the said doctors a medical report as proof of the evidence intended to be given by each of them, that such

medical reports or proofs of evidence be submitted to the Defendants for their consideration, that the Defendants should then indicate to the Plaintiff whether they are prepared to admit them in evidence, whether they are prepared to admit the findings and conclusion therein contained or whether they intend challenging the findings and conclusions therein contained and if the latter, submit to the Plaintiffs the proof of evidence of their medical witnesses with regard thereto.

When these proofs of evidence have been exchanged between the parties, it will be possible to ascertain what witnesses if any need to be examined on oath and whether it is necessary to have them examined on commission.

Meanwhile I will discharge the order made by the Master of the High Court and adjourn generally the Plaintiffs motion with liberty to re-enter.