APPROVED **[2023] IEHC 272**

THE HIGH COURT

2019 No. 1721 P

BETWEEN

MARTINA MOORE

PLAINTIFF

AND

ST. JOHN OF GOD COMMUNITY SERVICES COMPANY CLG
HEALTH SERVICE EXECUTIVE

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 May 2023

INTRODUCTION

1. This judgment is delivered in respect of a contested application for the discovery of documents. The application is made in the context of a personal injuries action arising out of an incident whereby the plaintiff, a care assistant employed by St. John of Gods, alleges that she was physically assaulted twice by a service user. The alleged assaults are said to have occurred on a single date in November 2017 while the plaintiff was attending upon the service user at the accident and emergency department of Connolly Hospital Blanchardstown.

2. The plaintiff has sought discovery of categories of documents including, *inter alia*, records in respect of any previous assaults by the service user on staff members; any risk assessments completed in respect of the service user; and documents in respect of management and care plans applicable to the service user, including any positive behavioural support plan.

3. The plaintiff contends that discovery of these categories of documents is necessary and relevant in order to prove her claim for personal injuries and states that these categories have been specifically requested by her expert. In particular, it is said that the pre-existing propensities of the service user for aggressive outbursts and/or violent behaviour—and the defendants' level of knowledge of same—will be of clear relevance to the issue of liability.

4. The application for discovery is opposed by the defendants on two broad grounds as follows. First, it is said that the application is speculative in circumstances where there is no plea that the service user has previously assaulted staff members. Secondly, it is said that the plaintiff should have joined the service user as a defendant to the personal injuries action: had this been done, then discovery of confidential material relating to the service user could have been sought from the service user directly, rather than indirectly via the defendants.

RELEVANCE

5. The question of whether a category of documents is relevant falls to be determined by reference to the pleadings. The scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to

plead their case (*Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211 (at paragraph 57)).

6. The position has been put as follows by the Court of Appeal in *O'Brien v. Red Flag Consulting Ltd* (at paragraph 27):

> "[…] A document is relevant if it may reasonably form the basis of a line of enquiry which may lead to the discovery of information that will advance the case of the seeker and/or weaken that of the party against whom it is sought. It is sufficient that a document may contain such information. It is not necessary to prove that it will. Relevance is determined on the basis of the pleadings and not the evidence. A plea must be taken at its high watermark and it is generally not the role of the court to embark on an enquiry as to the strength of the case or the probability of proving a pleaded fact. However, it is not open to a party to submit a bare and unparticularised plea in the hope of using discovery to obtain evidence in support of a claim that is not particularised. In particular, a document cannot be sought for the purposes of demonstrating the existence of a claim where there is no other evidence to suggest that one exists. Discovery may be permitted for the purposes of evidencing a sparsely particularised claim where the impugned activity is alleged to have been committed in a surreptitious and clandestine fashion."

7. Here, the defendants have chosen, in the defence delivered on their behalf, to resist the claim against them on the grounds, *inter alia*, that the alleged assault was not reasonably foreseeable and that there were no reasonably practicable steps which the defendants could have taken to avoid or halt the alleged incidents. As part of this plea, it is expressly pleaded that the plaintiff had been trained for the task assigned to her, including in respect of the management of "*challenging behaviour*"; that the service user had been "*appropriately assessed*"; that the management of the service user had been "*appropriately resourced*"; and that the plaintiff had been made aware of "*the appropriate information*" in relation to the service user.

8. The clear import of these pleas is that the risk of challenging behaviour on the part of the service user had been appropriately assessed and that the appropriate information had been communicated to the plaintiff in her capacity as his care assistant. Having pleaded that an appropriate assessment has been performed, the defendants cannot now object to being required to make discovery of the documentation which evidences that assessment. In light of the pleadings, one of the principal issues which will have to be addressed by the trial judge is whether an assault by the service user was reasonably foreseeable. A previous pattern of aggressive behaviour is, logically, relevant to this issue.

9. Counsel on behalf of the defendants submits that there is no positive plea on the part of the plaintiff to the effect that the service user has previously assaulted staff members. It is further submitted that the case, *as pleaded by the plaintiff*, is confined to the two alleged assaults both of which took place on the same day. With respect, this submission fails to consider the pleadings in the round and overlooks the positive case which has been pleaded on behalf of the defendants themselves.

10. Moreover, it would be unreasonable to oblige the plaintiff to provide evidence of previous assaults as a precondition to seeking discovery. Whether or not there have been previous assaults is a matter within the peculiar knowledge of the defendants. The plaintiff has alleged in her pleadings that she had been assaulted by the service user and has verified this plea on affidavit as required under the Civil Liability and Courts Act 2004. It is neither speculative nor a fishing expedition for the plaintiff to seek discovery on the grounds that there may well have been previous assaults on staff and that same will have been documented.

11. The defendants' reliance on the judgment in *McCormack v. Health Service Executive* [2021] IECA 272 is misplaced. There, the claimant in a personal injuries action had pleaded that she had been continuously exposed to the risk of injury during the course of her work as a health care worker in a "*high support*" residential facility. Crucially, however, the claimant did not particularise any incidents of violence or aggression in the workplace. Notwithstanding this, the claimant had sought discovery of assessments and/or evaluations conducted in respect of all patients admitted at the relevant facility for a four year period. The Court of Appeal refused to order discovery in circumstances where the claimant had failed to provide any information in her pleadings, other than of the most general kind, which would link her claim to the conduct of the patients. The Court of Appeal held that the failure of the claimant to provide any particulars at all of even one incident of violent and aggressive behaviour on the part of the patients gave the impression that the application for discovery was in the nature of a fishing exercise rather than one arising out of specific pleadings.

12. By contrast, in the present proceedings, the plaintiff seeks limited records in respect of a single service user in circumstances where her personal injuries action is predicated on her having been assaulted by that service user, and where the defendants have pleaded that the service user had been appropriately assessed and that such an assault was not reasonably foreseeable.

NECESSITY

13. Medical records are properly regarded as sensitive and confidential. This is especially so where the medical records are those of a vulnerable person, a service user, who is not a party to the proceedings.

14. The fact that a document may be confidential is something which goes to the question of whether an order for discovery is necessary. Where an application for an order for discovery is made in respect of confidential documentation, the court should only order discovery in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made (*Tobin v. Minister for Defence* [2019] IESC 57, [2020] 1 I.R. 211 (at paragraph 42)). A court will adopt appropriate measures to respect the importance of confidentiality by ensuring that it is only displaced when the production of confidential documentation proves truly necessary to the just resolution of proceedings (*ibid*, at paragraph 44).

15. The approach to be taken to an application for the discovery of confidential documents has recently been considered by the Court of Appeal in *Ryan v. Dengrove DAC* [2022] IECA 155 and in *A.B. v. Children's Health Ireland (CHI) At Crumlin* [2022] IECA 211.

16. These judgments emphasise that the court must engage in a balancing exercise as follows (*Ryan v. Dengrove DAC* at paragraph 67(7)):

> "In that context, a balance has to be struck between the likely materiality of any given document to the issues likely to arise in the proceedings and the degree of confidentiality attaching to it. A confidential document (and particularly one that is highly confidential) should not be directed to be discovered unless the court is satisfied that there is a real basis on which it is likely to be relevant at the hearing. The more material the document appears to be — the greater the likelihood that the document will have '*some meaningful bearing on the proceedings*' — the more clearly the balance will be in favour of disclosure. Such an assessment necessarily requires the court to look beyond the threshold test of *Peruvian Guano* relevance. The '*nature and potential strength of the relevance*', and the degree to which the document is likely to advance the case of the requester, or damage the case of the requested party, are appropriate considerations in this context."

17. Applying these principles to the circumstances of the present case, the balance comes down in favour of granting discovery. The categories of documents have been narrowly drawn. It is not sought to obtain the medical records of the service user *simpliciter*. Rather, the documents fall into three sorts. The first comprises documents which evidence previous assaults on staff members. The second, documents in respect of risk assessments relating to previous assaults. The third, documents in respect of the support plans, care plans and medication for the service user. This last tranche is the most confidential.

18. Discovery of this documentation is necessary to the just resolution of these proceedings. The trial judge will be unable to adjudicate properly on the issue of liability without knowing, first, whether a pattern of previous assaults by this service user made it reasonably foreseeable that a care worker might be injured; secondly, whether the defendants had carried out an appropriate assessment of the risk of injury to care workers; and, thirdly, whether the defendants were complying with the recommended care plans and providing the recommended medication. The documents sought will have a meaningful bearing on all of these issues.

INVESTIGATION OF INCIDENT

19. There is a subsidiary dispute between the parties in respect of documents relating to the incident the subject-matter of the proceedings. The category is described as follows in the notice of motion:

> "The incident report form relating to the incident on the 19th of November 2017 together with any statements taken or investigations taken in relation thereto".

20. The defendants object to having to make discovery of any documents in respect of any "*investigations*" of the incident. This objection is predicated on the argument that documents relating to such an investigation are likely to be privileged. This is not a good ground for resisting discovery of documents which are clearly relevant. Rather, the proper approach is to file an affidavit of discovery, and, if thought appropriate to do so, to assert privilege over the documents. The basis for asserting the privilege should be explained on affidavit. A bald assertion to the effect that documents were prepared "*in contemplation of legal proceedings*" would be unacceptable and would not discharge the burden of proof in respect of a claim of litigation privilege (*Colston v. Dunnes Stores* [2019] IECA 59).

JOINDER OF SERVICE USER

21. The submission that the plaintiff should join the service user as an additional defendant so as to obtain discovery against him directly is not well founded. The categories of documents sought are all ones which are within the possession of the defendants. They consist, in the main, of records held by the defendants in respect of their care of the service user. It is not apparent that copies of this documentation would be held by the service user himself. Such documents would, of course, be within the *procurement* of the service user, i.e. he would have a right to obtain, from the defendants, medical records and other records relating to his care. It would, however, be unnecessarily cumbersome and costly to require the plaintiff to join the service user so as to obtain documents held by the defendants. This is to say nothing of the propriety of a health care provider inviting a plaintiff to sue one of its own patients.

PROPOSED FORM OF ORDER

22. For the reasons explained herein, an order will be made directing discovery of the categories of documents set out in the notice of motion, subject to the following modifications.

23. There is some duplication between the categories as described in the notice of motion as categories (1), (4) and (9). Accordingly, I propose to direct that discovery be made instead in respect of an omnibus category as follows:

> "All documentation which records either (a) violent behaviour by the service user towards a staff member or (b) an assault against a staff member by the service user, during the three year period prior to 19 November 2017."

24. There is also some duplication between categories (2) and (5). Accordingly, I propose to direct that discovery be made in respect of an omnibus category as follows:

> "All reports prepared by a psychiatrist, psychologist or behavioural specialist which either (a) indicated or advised a positive behavioural support plan for the service user or (b) indicated or discussed whether PRN medication was annotated for illness or episodes of aggression.
>
> This category also includes any records in respect of the administration of PRN medication to the service user on or about 19 November 2017".

25. Category (13) will be modified to read as follows:

> "All management and care plans applicable to the service user, including any positive behavioural support plan, in place during the three year period prior to 19 November 2017."

26. Discovery is refused in respect of category (7). This category, which seeks documentation concerning or evidencing "*medical regimes*" relating to the service user, is overbroad. It is sufficient, for the present, that discovery has

been directed of the management and care plans for the service user for a period of three years (category (13) as modified). The plaintiff is also to have discovery of records in respect of PRN medication.

27. The parties have agreed to a modified version of category (11) as follows:

> "The policies, protocols, or procedures in operation or in force on 19th November 2017 at Blanchardstown Hospital and at St. John of Gods relating to assaults or acts of violence or aggression on members of staff by service users."

28. As to the costs of the motion, my provisional view is that the plaintiff is entitled to recover her costs as against the defendants. This provisional view is informed by the following two factors. First, the plaintiff has succeeded in obtaining an order for discovery in substantially the same terms as sought in her notice of motion. Secondly, the defendants failed to respond to the request for voluntary discovery and failed to file a replying affidavit prior to the (initial) hearing date. This resulted in delay which might otherwise have been avoided. If the defendants wish to contend for a different form of costs order than that provisionally indicated, they will have an opportunity to address the court on the next listing.

29. This matter will be listed before me, physically, on Monday 12 June 2023 at 10.30 o'clock to finalise the form of order.

Appearances

Sheila Reidy for the plaintiff instructed by Hamilton Sheahan & Co
Ciarán Lawlor for the defendants instructed by Clyde & Co (Ireland) LLP

Approved Garrett Simons