Neutral Citation No. [2005] NIQB 79 | *Ref:* **DEEC5429**

Judgment: approved by the Court for handing down | *Delivered:* **9/12/05**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

EAMONN FINN (A MINOR BY HIS MOTHER AND NEXT FRIEND FRANCES FINN)

Plaintiff;

and

ALBERT McKEE

DEENY J

[1] The defendant in this action sought an order pursuant to Section 32(1) of the Administration of Justice Act 1970 and Order 24 of the Rules of the Supreme Court (NI) 1980 requiring the Belfast Education and Library Board to disclose and produce to the defendant's solicitors all medical and psychological records held by the aforementioned Board in relation to M. This application was rejected by Master Wilson QC on 9 August 2005 and came before me on appeal on 25 November 2005.

[2] The application arose in this way. The plaintiff, who was born on 20 March 1993, was injured in a road traffic accident which occurred on 16 November 1997. It is not disputed that he sustained a serious head injury on that occasion. The defendant retained Dr Brian Lynch, Consultant Paediatric Neurologist on his behalf. His report was exhibited to the affidavit supporting the summons brought herein and was summarised in the skeleton argument of Mr Cush who appeared for the defendant. Mr Cahalane appeared for the plaintiff. Dr Lynch comments on two social worker reports which he has seen relating to a close relative of the plaintiff to whom I shall refer as M. It appears M has serious behavioural problems which have brought him before the courts on occasions. It is alleged that he has been violent towards his siblings, including the plaintiff, and has threatened at least one of them with a knife on occasions.

[3] Dr Lynch has formed the view that the plaintiff has not had any significant impact on his cognitive ability as a result of his head injury. However he has certainly developed a pattern of aggressive behaviour. A

difficulty arises in that the first record referring to that is some five months after the head injury. He identifies the aggressive behaviour of M as a possible contributor to the plaintiff's behaviour and says: "It would require a more detailed knowledge of the family's circumstances and timing of the above problems to assess how much this has been a factor in Eamonn's current behaviour. Overall it is likely the head injury made some significant contribution to his change in behaviour." On foot of this the defendants therefore sought the records relating to M.

[4] Mr Cush referred to the judgment of Girvan J in Irwin v Donaghy [1995] NI 178 at 185. In that decision the judge set out in a helpful summary the state of the law in light of the decisions of the House of Lords in McIvor v Southern Health & Social Services Board [1978] NI 1; 1978 2 All ER 625, and in O'Sullivan v Herdmans Limited [1987] 3 All ER 129. Mr Cush sought to argue that the test to be applied on an application under Section 32 and Order 24 rule 8 was lower than the test on an application for discovery under Order 24 rule 9. He submitted that he did not have to show that it was "necessary" for the defendant to obtain these documents. I am not convinced that that was the law. Lord Diplock in McIvor at p627 said that the power to order production "of documents by a person who is not a party to the proceedings is discretionary in the sense that the court can decline to make the order if it is of the opinion that the order is unnecessary or oppressive or would not be in the interests of justice or would be injurious to the public interest in some other way."

[5] Furthermore Order 24 rule 9 of the Rules of the Supreme Court provide that -

> "On the hearing of an application for an order under rule 3, 7 or 8 the court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

It can be seen therefore that the "necessary" test applies to applications under rule 8 which governs Section 32 of the Administration of Justice Act as well as normal discovery applications. Indeed as I pointed out it would be paradoxical if it was easier for a party to litigation to obtain documents from a non party than it is from the opposing party who is under a duty to discover relevant documents.

[6] I accept that the disclosure of these records to the defendant herein may well yield material which would be relevant to ascertaining the extent to which the plaintiff's current behavioural difficulties might be the result of the aggressive behaviour of his close relative M. But I would need to be satisfied that it was also necessary for the defendant to see these records. That view has been reinforced by developments in the law since the two decisions of the House of Lords and that in Irwin. Mr Cahalane for the plaintiff pointed out that the definition of "sensitive personal data" in Section 2 of the Data Protection Act 1998, included personal data consisting of information as to "physical or mental health or condition". For such information to be processed Schedule 3 paragraph 7 of the Act required that "the processing is necessary – (a) for the administration of justice …". Therefore the same test of necessity is reiterated.

[7] The court also has to take into account since the commencement of the Human Rights Act the provisions of the European Convention on Human Rights. I had to consider the effect of those provisions in regard to an application for discovery, not dissimilar to this situation, in Pauline McKimm v South and East Belfast Health and Social Services Trust [2005] NIQB 32. I concluded in the light of my consideration of the provisions of Article 6 and 8 of the European Convention and the authorities that it was not necessary for a party in the position of the defendant to show that the interference with Article 8 rights as here was "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." I concluded, however that a party, the plaintiff in that case, had to show "a pressing need" for that material to be disclosed.

[8] The plaintiff's counsel also relied on the decision of A v X, B (non party) [2004] EWHC 447, [2004] WL 960823. In that case Morland J was faced with an application for the medical records of B who was the brother of A who had sustained a significant head injury. It was suggested that the medical records of B would assist the defendant in proving that the problems of A were to be identified with a family history of schizophrenia rather than with the head injury. The judge sets out extensive quotations from the medical experts in that case and concluded from those that in fact the defendant had a considerable amount of material already in its possession to deal with this. He refused the application. He thought it was without precedent.

[9] I observe that in the case before me of Finn it is alleged that M has actually assaulted the plaintiff. In that regard he was similar to J in the case of McKimm v South and East Belfast Health and Social Services Trust in that J, it was said, had assaulted the plaintiff. In A v X the brother was not alleged to have been in any way the cause of A's distress, merely to be a sufferer in a similar way. That is a significant ground of distinction.

The learned judge did consider ways of mitigating the breach of the rights under Article 8 but was not satisfied they would be effective in the circumstances.

[10] It seems to me that, without expressly ruling on the issue of whether or not the defendant had shown a pressing need, he is unable to succeed in any event. In the McKimm case counsel for the Trust, Miss Sarah Walkingshaw had very helpfully analysed a considerable body of records relating to J in the possession of the Trust. She had reduced these to a number of documents, not insubstantial, which were potentially relevant. I then considered those documents, with the consent of the plaintiff's counsel, in turn and redacted them further to those documents which I considered were particularly relevant and for which the plaintiff had a pressing need. However no such course is available to me here. The South and East Belfast Health and Social Services Trust was asked for the records and replied, quite properly, that it was their practice not to disclose them without an order of the court. They were made a notice party to this application but did not appear. I should say that M was also served with notice of the appeal from Master Wilson QC, on the directions of Mr Cush, as he told me, but has not sought to be represented either. While that might indicate some acquiescence in this application it does not seem to me to amount to a waiver of the rights of M. No mechanism is presented to me to minimise the interference with those rights by ensuring that confidential documents about him which are extraneous to the issues in the action remain confidential and are not shown to either the defendant himself, who is technically the applicant in the Section 32 application, his counsel, solicitors, doctors or insurers.

[11] The defendant and applicant here encounters the barrier, insuperable it seems to me, of the decision of the House of Lords in McIvor v Southern Health and Social Services Board op cit. The House of Lords held in that case that -

> "Where a party to any proceedings in which a claim is made in respect of a person's personal injuries or death applies under Section 32(1) of the Administration of Justice Act 1970 for an order that a person who is not a party to the action produce to the 'applicant' documents in his possession, custody or power which are relevant to an issue arising out of that claim, then, having regard to the unequivocal words used in Section 32(1), if the court considers that it is a proper case to exercise its discretion to make an order, the court making the order must order the documents to be produced to the applicant, and may not order

> the documents to be produced to some other person on the applicant's behalf on condition that the documents are not disclosed to the applicant himself."

See Lord Diplock pages 627 and 628. It seems to me that this is indisputably the ratio of the decision. It seems to me in such emphatic terms that I should be slow to depart from it despite the subsequent enactment of the Human Rights Act.

[12] Taking these various factors together I have therefore concluded, in the exercise of my discretion, that I should refuse to accede to the appeal from the decision of Master Wilson QC.

[13] For completeness it seems to me likely that the defendant could establish a pressing need to see any documents in the possession of the Board which showed that M had, while living with the plaintiff, suffered episodes of particularly turbulent or violent behaviour, so as to ascertain whether there was a temporal link with the plaintiff's behaviour difficulties. This might be done by an official of the Board attending on subpoena ad duces tecum, having previously been furnished with this decision and details of the time span involved, to bring with him any such documents, redacted by him if appropriate. If something is to be done before trial the defendant must devise a suitable mechanism for so doing, bringing this case within one of the very rare exceptions envisaged by Lord Diplock.

[14] At the hearing of the matter Mr Cush initially queried the standing of Mr Cahalane at this application. He contended that this did not really concern the plaintiff and he need not and should not be there. Mr Cahalane made the simple point that not only was he a party to the proceedings but he had been served as a notice party to the summons. Mr Cush then replied that he had no objection to Mr Cahalane assisting the court on these issues. However when Mr Cahalane asked for costs at the end of my judgment Mr Cush raised this point again. I consider it is misconceived. Order 24 Rule 8(2) under which the defendant was applying expressly says that the summons in question "must be served on that person and on every party to the proceedings other than the applicant". This summons in common with any other summons does begin "let all parties concerned at tend the Master in Chambers at the Royal Courts of Justice …". It seems to me that the Rules of the Supreme Court clearly do confer standing on the plaintiff in the circumstances. In any event as is apparent from above, counsel's submissions were of assistance to the court. I make an order that the defendant pay the plaintiff's costs above and below.