

High Court stays Personal Injury Proceedings to Allow a Medical Examination by a Second Orthopaedic Surgeon for the Defendant

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In *O'Donovan v Cork County Council [2024] IEHC 33*, the High Court agreed to stay personal injury proceedings on foot of an application by the defendant that the plaintiff undergo a medical examination by a second orthopaedic surgeon. The application was made the day before the listed hearing date and was resisted by the plaintiff on the basis he had previously undergone examination by the defendant's first orthopaedic surgeon and the application was designed to facilitate 'expert shopping'.

Background

The defendant to the action admits liability for a fall sustained

by the plaintiff in which he injured his ankle and later developed a pulmonary embolism. It is common case between the parties that the ankle injury is relatively minor in the context of personal injury actions. However, the plaintiff's case also includes a considerable claim for past and future care on the basis he developed chronic regional pain syndrome ('CRPS') on account of the accident, with the claim for special damages totalling €352,521.98. The defendant argues that the claim for care falls away if it is evidenced that there is no CRPS injury and it sought an adjournment to allow it take steps to show, if it can, that the plaintiff's experts' diagnosis of CRPS and its causation is a mistake.

Examination of the Plaintiff

An anaesthetist and pain management expert examined the plaintiff for the defendant in May 2022 and found no evidence of CRPS. However, an orthopaedic surgeon, who examined





the plaintiff for the defendant, did find evidence of CRPS in July 2023. The defendant argued both experts are required as witnesses and so it needs another orthopaedic surgeon to examine the plaintiff to try and resolve an internal and entirely proper disagreement between its experts. The defendant accepts that it will only call one orthopaedic surgical witness in accordance with the Rules of the Superior Courts ('RSC').

The Court's Approach

The question before the court was whether a defendant is entitled to canvass a second opinion and to that end, require a plaintiff to subject himself to examination by a second expert. The court noted that Order 39 Rule 58(3) RSC, which prohibits the calling of more than one expert in a given speciality, deals with the admission of evidence and not the delivery of expert reports.

The court noted that the practice of successively and excessively engaging experts until one gets the opinion which suits the case being made has been deprecated by the courts, but questions of degree arise and there is no rule that a party is bound irrevocably by the opinion of the first expert consulted. The court indicated that the defendant has a genuine difficulty arising from its experts' contrasting views and in the interests of justice, it did not think it would be unreasonable or unfair to ask the plaintiff to submit to examination by one additional expert.

In reaching this decision, the court noted that if the defendant expert who did not find evidence of CRPS was withdrawn as a witness, the plaintiff would be able at trial to mobilise the opinion of that expert, including putting it to other witnesses on cross examination.

While the significant increase in the special damages claimed on account of the CRPS claim could not affect the medical diagnosis, it did, in the court's view, make it more important that the diagnosis be correct and could render investigations

to verify the diagnosis proportionate.

In terms of balancing the rights of the parties, the court noted that a plaintiff, by prosecuting personal injury proceedings, waives certain of his or her rights of privacy as to his or her medical condition. That waiver is, however, limited by the scope of the reasonable requirements of the defendant. What is reasonable depends on all the circumstances assessed in the context of the defendant's constitutional rights as to its conduct of the litigation. In terms of the plaintiff's exercise of his constitutional right to litigation now being dependent on submitting to a medical examination to which he objects, the court noted that the burden of the proposed examination does not come close to being unreasonable or an abuse of process.

Conclusion

The High Court noted there is no definition of, or black letter rule against, expert-shopping. The parties were unable to cite any Irish cases explicitly addressing the phrase and the court, in explicitly noting that questions of degree arise, considered what might be reasonable in all of the circumstances. The court, in particular, did reference the significant increase in the special damages claimed on foot of the CRPS injury. As such, it seems clear that a similar decision may not be reached in other personal injury cases if the particular facts of the case do not merit such an approach.

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