

**APPROVED**

**[2022] IEHC 659**



THE HIGH COURT

2020 No. 874 P

BETWEEN

A.F.

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND)

PLAINTIFF

AND

PATRICK FEENEY  
JANICE REDMOND

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 1 December 2022**

**INTRODUCTION**

1. This judgment is delivered in respect of two related applications for leave to amend pleadings. Each of the two defendants has brought an application for leave to amend their respective defence. In each instance, the motion seeking leave to amend was issued out of the Central Office of the High Court less than seven days prior to the specially fixed date for the hearing of the action. The motion on behalf of the first defendant was issued this week on 28 November 2022, and the motion on behalf of the second defendant was issued last Friday, 25 November 2022. Both motions were heard on the opening day of the action, 30 November 2022.

2. The position adopted on behalf of the plaintiff is that he is not consenting to either motion. In each instance, a replying affidavit has been filed in response to the motion setting out various reasons as to why it is said that leave to amend should not be granted. Counsel on behalf of the plaintiff did not press these objections strenuously at the hearing before me yesterday (30 November 2022). For completeness, however, I will address the reasons put forward on affidavit.
3. The proceedings take the form of a medical negligence action. It is alleged that the plaintiff, who is a minor, has suffered personal injuries as a result of the negligent provision of medical services to his mother while she was pregnant with him. For ease of exposition, the plaintiff will be referred to simply as “*the injured child*” and the plaintiff’s mother will be referred to as “*the mother*”. It should be noted that the injured child is the sole plaintiff named in the proceedings, and that his mother, acting as his “*next friend*” or “*litigation friend*”, is providing instructions on his behalf to his legal team.
4. The mother has a long-standing diagnosis of epilepsy. The first defendant is a medical general practitioner and the mother had been a patient of his during the relevant period. The second defendant is a consultant neurologist. The mother had attended the consultant neurologist on five or six occasions up to the year 2000.
5. In brief, it is alleged that the medication which was prescribed for the purposes of managing the mother’s epilepsy was inappropriate in circumstances where, or so it is alleged, both defendants were aware that the mother intended to have another child. It is also alleged that the mother was not properly advised as to the risks associated with a pregnancy were she to continue on the medication then prescribed.

6. One focus of the proceedings will be on events which occurred in the fifteen months prior to the injured child's birth. It is pleaded that the mother had sought medical advice from the consultant neurologist towards the end of April 2005. As of that date, the mother had been pregnant with another child. Sadly, this particular pregnancy resulted in a miscarriage. A number of months thereafter, the mother conceived again and ultimately gave birth to a baby boy, the plaintiff, on 1 August 2006. As explained presently, one of the amendments sought to be made relates to the nature and extent of the communications between the mother, the consultant neurologist and the general practitioner during the period from April/May 2005 to the birth of the injured child.
7. The only other introductory matter which need be referred to is the attitude of the plaintiff's side to a possible adjournment of the proceedings. As appears from the discussion of the case law below, one of the principal factors to be considered by the court on an application to amend is whether any potential prejudice to the other side might be avoided by the granting of an adjournment of the proceedings. At the conclusion of the hearing of the two motions to amend in the present case, I asked counsel on behalf of the plaintiff whether, in the event that the amendments were to be allowed, his side would be seeking an adjournment. I emphasised that in the event that a short adjournment were to be sought, I would retain seisin of the proceedings. It would not be necessary, therefore, for the case to go back into a queue for hearing dates, with the risk that a hearing date might not be available for many months. I specifically canvassed the possibility of a short adjournment, with the case resuming this term or at the start of the new term in January.

8. Counsel on behalf of the plaintiff, having been afforded an opportunity to take instructions, confirmed to the court that his client's instructions were that the hearing of the proceedings should continue this week, even if the proposed amendments are to be allowed.

### **HISTORY OF THE PROCEEDINGS**

9. These proceedings were instituted on 4 February 2020. The personal injuries summons was then amended on 21 July 2021. Relevantly, the events of April/May 2005 are pleaded as follows:

“On or about April 2005 the Plaintiff's mother, who was pregnant, contacted the Second Defendant seeking advice in respect of medication during gestation. On or about 10 May 2005 the Second Defendant wrote to the First Defendant stating that she had not advised the Plaintiff's mother in respect of her medication during pregnancy in her previous pregnancies, requesting that the First Defendant contact the Second Defendant and that the Plaintiff's mother needed to be advised of the possibility of teratogenesis.”

10. Although the personal injuries summons identifies this communication, it does not form part of the particulars of negligence and/or breach of duty pleaded in the amended summons.
11. As is often the case in medical negligence proceedings, the claim as originally set out in the personal injuries summons has been clarified and/or elaborated upon in subsequent particulars. Updated particulars of negligence were provided on 3 November 2022, that is, shortly before the specially fixed hearing date.
12. Relevantly, the claim made was elaborated upon to include express particulars in relation to the appropriateness of the medication provided to the mother. For example, it is now stated that Epilim is not an appropriate and/or effective treatment for partial lobe epilepsy. The dosage of Epilim and/or Lamictal is

criticised, saying that there was a failure to prescribe the mother with the minimum effective dosage. It is also said that there was a failure to counsel the mother in respect of the increased risks of developmental delay and autism. It is said on behalf of the defendants that the previously pleaded case had focused on the risk of physical, rather than mental, defects.

### **POSITION OF THE FIRST DEFENDANT**

13. The first defendant is a general practitioner who is said to have treated the mother in or around the time of her pregnancy. The first defendant delivered his defence on 12 July 2021. The defence can best be described, charitably, as being in short form, and consists largely of a traverse. Counsel on behalf of the first defendant submitted that the purpose of the proposed amendments is to comply with the more recent jurisprudence wherein a defendant is expected to set out its stall, rather than the “*old school*” style of pleading wherein a bare denial of negligence and breach of duty was considered to be sufficient.
14. The replying affidavit, in opposition to the amendment, is relatively short. The principal objections made are to the effect that the application to amend has been issued with very little prior notice to the plaintiff; and, secondly, that all of the proposed amendments appear to arise from information which was fully available to the first defendant since the initiation of the proceedings. Complaint is also made that the first defendant now seeks to rely on a letter which had not been disclosed to the plaintiff in response to a request for her medical records under the data protection legislation but has only been provided in discovery.

## **POSITION OF THE SECOND DEFENDANT**

15. The nature and extent of the amendments sought on behalf of the second defendant are more significant. The principal explanation put forward for the need to amend is that there was a potential conflict of interest on the part of the consultant neurologist from whom the solicitors previously on record had obtained an expert report. There was a subsequent change in legal representation, which followed upon a change in the manner in which professional negligence claims are indemnified following the introduction of the Clinical Indemnity Scheme.
16. It is said that, since 18 July 2022, the new firm of solicitors had attempted to obtain a further expert report. It is averred that the solicitors approached eight neurologists: six of these are described as having been unable to assist or as unresponsive. A report was obtained from Prof. Leach, and then a further report from Prof. Koepp. The first report was regarded as lacking the degree of detail and specificity required to adequately assist the court to adjudicate on the issues arising. The second report is dated 21 November 2022.
17. There is a separate and distinct set of amendments sought which relates to a factual matter as follows. As noted previously, part of the claim focuses on communications between the mother and the consultant neurologist in April/May 2005. The proposed amendments address this issue as follows:
  - “ix. The Plaintiff’s next friend contacted the second named Defendant by telephone in or about the 4<sup>th</sup> May 2005.
  - x. The second named Defendant asked the Plaintiff’s next friend to come to her clinic soon to be reviewed and to have another discussion about anticonvulsant use in pregnancy.
  - xi. The Plaintiff’s next friend declined the second named Defendant’s invitation and said that she would attend her General Practitioner.

- xii. The advice and actions of the second named Defendant on foot of the Plaintiff's next friend's telephone call to her were appropriate.
  - xiii. The second named Defendant dictated a letter to the Plaintiff's next friend's General Practitioner on 4<sup>th</sup> May 2005. This letter was printed and sent on 10<sup>th</sup> May 2005.
  - xiv. The second named Defendant wrote to the first named Defendant with appropriate advice.
  - xv. The second named Defendant advised the first named Defendant, inter alia, that the Plaintiff's next friend needed to know about the risk of teratogenesis."
18. The replying affidavit makes a number of objections to the proposed amendments as follows. First, the delay in making the application is severely criticised. The point is made that there was no effort to seek expert reports from March 2020 when the summons was served first. It is said that of the three neurologists who did provide reports, only one of these is supportive of the case as pleaded in either the defence or the proposed draft amended defence. It is said that it is not open to a party to "*shop around*" at the last minute before a trial for an expert report to support their case. It is also alleged that the report of Dr. Koepp "*contains fundamental omissions*". It should be observed, however, that this last criticism is made not by an expert witness but rather by one of the solicitors in the firm acting on behalf of the plaintiff.
19. Turning to the proposed amendments in relation to the communications between the neurologist and the mother in or about April/May 2005, the replying affidavit raises the following objections. It is said that the events of this time must have been within the knowledge of the second defendant. Moreover, it is said that, having regard to the fact that reference is made to this communication in the

report of Dr. Koepp, it must have been contained in the second defendant's statement of July 2022 at the latest.

### **CASE LAW IN RELATION TO APPLICATION TO AMEND**

20. Order 28, rule 1 of the Rules of the Superior Courts provides as follows:

“The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”

21. The principles governing an application to amend pleadings are well established.

The modern approach commences with the judgment of the Supreme Court in *Croke v. Waterford Crystal Ltd* [2004] IESC 97; [2005] 2 I.R. 383 (“*Croke*”).

Geoghegan J., delivering the unanimous judgment of the Supreme Court, held that the primary consideration in an application for leave to amend must be whether the amendments are necessary for the purpose of determining the real questions of controversy in the litigation. Geoghegan J. observed that there had been an overemphasis in the earlier case law on an obligation to give good reason for having to amend the pleadings. As to delay in the making of an application to amend, Geoghegan J. accepted that an application to amend might properly be refused if made at a very late stage of the proceedings; for example, if made shortly before the date scheduled for the hearing of the action. A court should, however, consider whether any prejudice to the other party could be addressed instead by an adjournment and an appropriate costs order.

22. More recently, the Supreme Court, *per* MacMenamin J., stated the general principle as follows in *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21 (at paragraph 42):



“It is clear, of course, that courts do have a discretion to amend. That discretion must be exercised judicially. Where an amendment may be made without prejudice to the other party, to enable the real issues to be tried, it should be allowed. A court must consider whether prejudice can be overcome by an adjournment. If so, that amendment should be made, and an adjournment, if necessary, granted, to overcome any possible prejudice. If the amendment puts another party to extra expense that can be regulated by a suitable order as to costs, or by the imposition of a condition that the amending party shall indemnify the other party against such expenses [...]. A court will, *inter alia*, consider an applicant’s conduct in the proceedings, and any question of delay. It is now long established that the function of courts is to decide the rights and duties of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. [...]”.

23. An authoritative statement of the principles governing an application to amend is to be found in the recent judgment of the Court of Appeal in *Stafford v. Rice* [2022] IECA 47.

## **DISCUSSION AND DECISION**

24. For the reasons which follow, I have concluded that the proposed amendments are necessary for the purpose of determining the real questions in controversy between the parties. As appears from the history of the proceedings, the precise nature of the plaintiff’s claim, and the defendants’ response thereto, has evolved over the course of the years since the proceedings were first instituted. For example, the further particulars provided by the plaintiff’s side now squarely raise an issue as to the appropriateness of the medication and dosage prescribed for the mother. The defendants’ response has also evolved, especially that of the second defendant. This evolution arises, in part, from the receipt of a second and third expert report.

25. The proposed amendments bring a level of precision to the pleadings which had been lacking. Same will be of great assistance to me, as the trial judge, in identifying the specific issues which arise for determination in the proceedings. The proposed amendments bring the pleadings in line with the more focused type of pleadings envisaged by the Civil Liability and Courts Act 2004.
26. The principal objection made to the amendment applications is in respect of the eleventh-hour nature of same. The motions were each issued less than seven days prior to the hearing date of 30 November 2022. The lateness of the applications has to be seen in the context of a complex case which was specially fixed for a six-week hearing, with the hearing date having been allocated as long ago as March 2022. It is unsatisfactory that an application to amend be made at the eleventh hour. However, as emphasised in the case law discussed above, the principal function of courts is to decide the rights and duties of parties, and not to punish them for mistakes they make in the conduct of their cases. Rather, the court must lean in favour of allowing an amendment unless to do so would cause irreparable prejudice to the other side. Put otherwise, the court must ask whether the prejudice, which would otherwise arise, can be remedied by an adjournment of the proceedings and the making of appropriate orders in respect of costs. The court should bear in mind that the very act of adjourning proceedings has the potential, in some cases, to cause prejudice. A lengthy adjournment could result in a claimant, with a winning case, being out of pocket for a significant period of time.
27. In the present case, this court is in a position to offer a short adjournment to allow the plaintiff's side time to prepare to meet the amended defences should such adjournment be required. This is not a situation, therefore, whereby a claimant

is faced with the unenviable choice of having to press on immediately with their case, notwithstanding the amendments, or of having to face a delay of many months in having the case resumed.

28. As noted earlier, I expressly canvassed with counsel the possibility of a short adjournment of the proceedings. In particular, I indicated that I would be in a position to take up the hearing either this term (following a short one or two week adjournment) or in the first week of the new term in January.
29. Having availed of the opportunity to take instructions on the point, counsel on behalf of the plaintiff confirmed that his client wished to continue the case this week, even in the event that the amendments were to be allowed.
30. I am satisfied that there is no prejudice caused to the plaintiff by the making of the amendments. The amendments are properly characterised as an evolution of the existing defences, rather than the introduction of a new or unanticipated line of defence. The amendments mirror, in part, an evolution in the plaintiff's own case.
31. The hearing of these proceedings is scheduled to take six weeks and will inevitably straddle the Christmas holiday period. It will be possible, therefore, to arrange the scheduling of witnesses in such a way as to ensure that the plaintiff's expert witnesses have sufficient time to consider and respond to the amended defences.
32. For completeness, I should record that I am not satisfied that the suggestion that there has been an element of "*shopping around*" for expert witnesses is well founded. The background leading up to the decision to seek a second, and a third, expert report has been explained carefully on affidavit. It has its genesis in the changeover of legal representation arising as a result of the change in the

procedures for indemnification for medical negligence proceedings. It was entirely proper for the new firm of solicitors to review the medical report which had been obtained by the previous law firm in order to satisfy themselves that the report was appropriate. The necessity for the second and third report has been explained and is accepted by the court.

33. It is not the position that the second defendant has had the benefit of eight expert reports and has selected the most favourable. Rather, as appears from the grounding affidavit, six of the experts approached were either not in a position to act or did not respond at all.
34. If and insofar as there are any inconsistencies between the three reports actually obtained, the plaintiff's side will have an opportunity to put those inconsistencies in cross-examination. The court can be invited to draw inferences from those (alleged) inconsistencies.
35. Similarly, if, as alleged by the solicitor swearing the replying affidavit, even the third report does not support the amended defence, then this is a matter for evidence and submission. It is not something which can properly be adjudicated upon on a procedural application to amend the pleadings.
36. Finally, insofar as the amendments in respect of the events of April/May 2005 are concerned, the plaintiff will have an opportunity to cross-examine the defendants as to why certain details of their recollection of these events have only been disclosed now and did not feature as part of the defences as originally pleaded. The court can be asked to draw inferences from all of this.

**CONCLUSION AND PROPOSED FORM OF ORDER**

37. The defendants are each granted leave, pursuant to Order 28, rule 1, to amend their respective defence as *per* the drafts exhibited in the affidavits grounding their motions.
38. As to costs, my provisional view is that the plaintiff is entitled to recover his costs of the two motions as against the defendants. Whereas the plaintiff did not succeed in his opposition to the motions, he was justified in drawing the court's attention to the eleventh-hour nature of the applications. My provisional view is that it might be appropriate to mark the court's disapproval of the lateness of the applications by awarding costs against the defendants. If either defendant wishes to contend for a different costs order, they will be afforded an opportunity to address the court.

*Appearances*

Aongus O'Brolchain SC, Declan Doyle SC and Aoife Nolan for the plaintiff instructed by Michael Boylan Litigation Law Firm

Declan Buckley SC and Paul Twomey for the first defendant instructed by Comyn Kelleher Tobin Solicitors

Patrick Hanratty SC, Sarah Corcoran and Medb Mc Donagh for the second named defendant instructed by Hayes Solicitors