

SUPREME COURT

**Supreme Court No. 2016/125
High Court Record No. 2013/9104P
Court of Appeal No 2016/47**

BETWEEN

**ANTHONY MCGRATH (a person of unsound mind not so found suing by his wife and next friend
Angela McGrath)**

Plaintiff/Appellant

AND

BRIAN P WHOOLEY AND BON SECOURS HOSPITAL-BON SECOURS HEALTH SYSTEM

Defendants/Respondents

FIRST NAMED RESPONDENT'S NOTICE

Supreme Court record number	2016/125
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Anthony McGrath (a person of unsound mind not so found suing by his wife and next friend Angela McGrath)	V	Brian P Whooley & Bons Secours Hospital, Bon Secours Health System
High Court Record No: 2013/9104P		Court of Appeal Record No: 2016/47

Date of filing	18 November 2016
Name of respondent	Brian P Whooley
Respondent's solicitors	Hayes Solicitors Lavery House Earlsfort Terrace Dublin 2
Name of appellant	Anthony McGrath (a person of unsound mind not so found suing by his wife and next friend Angela McGrath)
Appellant's solicitors	Denis O'Sullivan & Co 24/26 Upper Ormond Quay Dublin 7 and St. Patrick's Building, 64 Patrick Street, Cork

1. Respondent's Details.

Respondent's full name	Brian P Whooley
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The first named Respondent was served with the application for leave to appeal and notice of appeal on date

The filed notice was served on 2 November 2016
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The respondent intends :

<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
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<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
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<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
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<input type="checkbox"/>	not to oppose the application for leave to appeal
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<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
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<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
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<input type="checkbox"/>	Other (please specify)
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If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal.
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Respondent's Representation.

Solicitor			
Name of firm	Hayes Solicitors		
Email	cororke@hayes-solicitors.ie or mwilson@hayes-solicitors.ie		
Address	Lavery House,	Telephone no.	(01)6624747

	Earlsfort Terrace, Dublin 2	Document Exchange no.	175
Postcode	D02T625	Ref.	COR/MW
How would you prefer us to communicate with you?			
<input checked="" type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Sarah Corcoran BL		
Email	scorcoran@lawlibrary.ie		
Address	Law Library Four Courts Dublin 7	Telephone no.	01-8177338
		Document Exchange no.	811023
Postcode			
Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following.

Current postal address – N/A
Telephone no. – N/A
e-mail address – N/A

How would you prefer us to communicate with you?			
<input checked="" type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time.

<i>If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused – N/A</i>

3. **Information about the decision that it is sought to appeal - Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute.**

INTRODUCTION

The replies to particulars furnished by the first named Respondent to the Plaintiff pursuant to Order of the High Court dated 20 July 2015, and deemed adequate by the High Court on the 7 March 2016 and the Court of Appeal on 17 October 2016, do not reserve the right on the part of the first named Respondent “... *in the course of his oral evidence at the trial to go outside the parameters of his Defence as pleaded in the particulars furnished*”. The Replies are without prejudice to the oral evidence that will be adduced at the hearing of the action i.e. the particulars are not evidence. The first named Respondent does not insist on a right to make a new and different case in the course of his oral evidence. The first named Respondent simply asserts that oral evidence will be given.

THE APPELLANT’S CASE

The Appellant issued proceedings on 23 August 2013 by way of Personal Injuries Summons and claims that he accepted the advice of the first named Respondent to undergo colonoscopy for the purpose of cancer surveillance. It is alleged that during the course of the colonoscopy, on the 18 day of September 2012, the Appellant’s bowel was perforated. The Appellant claims the Respondents, their servants or agents, failed to, inter alia, warn the Appellant of the risk of perforation of the bowel from undergoing the colonoscopy and of the importance of urgently returning to hospital for investigation if he felt unwell in the days following the said colonoscopy.

A full Defence was delivered on behalf of the first named Respondent, dated 7 November 2014.

FURTHER AND BETTER PARTICULARS

By letter dated 20 November 2014 the Appellant sought further and better particulars of certain matters, predominantly relating to the issue of consent, arising out of the first named Respondent’s Defence.

Initially, the first named Respondent furnished Replies dated 17 April 2015 asserting that the particulars raised were matters for evidence but that without prejudice the Appellant had furnished informed consent. The Appellant was not satisfied with said Replies and sought by way of Notice of motion dated June 2015 to compel the first named Respondent to provide further and better particulars. Following hearing submission from both parties Barr J. made an Order dated 20 July 2015 directing the first named Respondent to provide fuller replies to the Appellant’s Notice for

Particulars dated 20 November 2014.

In December 2015 the Appellant issued a motion against the first named Respondent seeking an Order striking out the first named Respondent's Defence for failure to deliver Replies pursuant to the Order dated 20 July 2015. This motion was returnable before the High Court on 18 January 2016. On 15 January 2016, the first named Respondent's solicitor served detailed Replies, the replies in issue in this application for leave to appeal, and the motion was adjourned on consent to enable the Appellant to consider the Replies.

The first named Respondent's Replies dated 15 January 2016 identified the advice and information given to the Appellant in connection with the colonoscopy performed on 18 September 2012. Detailed reference was made to information leaflets provided to the Appellant including an information sheet containing a paragraph entitled "*Are there any risks involved in having a colonoscopy?*" and a brochure on colonoscopies from the American College of Surgeons. The Appellant also received this information as part of the discovery process during these proceedings. Further, the Replies set out that the Appellant's hospital education record showed that in advance of the procedure that by way of "discussion" and "written material/handout", "intervention taught" included "*pre and post endoscopic procedure,*" "*pain assessment,*" and "*day case follow up instructions*" and that literature was provided namely "*colonoscopy leaflet,*" "*pain rating scale leaflet,*" "*falls prevention leaflet*" and "*day case follow up instructions*". The Replies highlighted the entries in the Appellant's medical records relating to the risks associated with colonoscopies and the circumstances in which medical assistance should be sought afterwards.

The Appellant's solicitor notified the first named Respondent's solicitors that the Appellant's Counsel did not regard the Replies dated 15 January 2016 as adequate and accordingly the Appellant's motion came before the High Court on 7 March 2016 and was heard by Barr J., the same judge that had made the original Order dated 20 July 2015. The motion was opened before the Court and after hearing submissions on behalf of both parties and considering the first named Respondent's Replies the Barr J. concluded that the first named Respondent had gone far enough with his Replies and refused the relief sought in the Notice of Motion.

The Appellant appealed the decision of Barr J to the Court of Appeal. On 17 October 2016 the Court unanimously dismissed the Appellant's appeal. The first named Respondent relies on the ex-tempore judgment of the Court of Appeal dated 17 October 2016.

4. Respondent's reasons for opposing leave to appeal - If leave to appeal is being contested, set out concisely here the respondent's reasons why.

- a) The Appellant has not set out grounds to establish that the decision in respect of which leave to appeal is sought involves a matter of general public importance or that an appeal to the Supreme Court is necessary in the interests of justice.
- b) The first named Respondent contends that the Judgment in respect of which leave to appeal is sought does not involve a matter of general public importance. Further it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court.
- c) The first named Respondent relies on the decision of the High Court, dated 7 March 2016, of Barr J. as recorded in Counsels Note and the further Judgment of the Court of Appeal dated 17 October 2016.
- d) The Court of Appeal did not make any error of law or of fact to require that, in the interests of justice, there should be an appeal to the Supreme Court.
- e) Further, the Appellant incorrectly states the preface to the first named Respondent's replies. The first named Respondent does not reserve the right in the course of his oral evidence at the trial to go outside the parameters of his defence as pleaded in the particulars furnished in relation to the colonoscopy performed on 18 September 2012. The first named Respondent furnished the replies without "... prejudice to the oral evidence that will be adduced at the hearing of this action..." As per the President of the Court of Appeal "Inevitably, in the course of oral evidence, there will be some further expansion; it is quite unrealistic to think otherwise."
- f) The reasons proffered do not raise a matter of general public importance nor do they warrant a second appeal, in the interests of justice.

5. Respondent's reasons for opposing appeal if leave to appeal is granted.

The Appellant has failed to set out any reason in fact or law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court.

Without prejudice to the foregoing, the first named Respondent will rely on the first named Respondent's replies, decision of the High Court of Barr J. and the further Judgment of the Court of Appeal at the hearing of the application for leave to appeal.

Response to Ground of Appeal 1 and 2

The first named Respondent does not reserve the right in the course of his oral evidence at the trial to go outside the parameters of his defence as pleaded in the particulars furnished, in relation to the colonoscopy performed on 18 September 2012. The first named Respondent furnished the replies without "... prejudice to the oral evidence that will be adduced at the hearing of this action..." As per the President "*Inevitably, in the course of oral evidence, there will be some further expansion; it is quite unrealistic to think otherwise.*"

The first named Respondent submits that on a reading of the first named Respondent's replies, Counsels Note of the decision of Barr J and the Judgment of the Court of Appeal there is no basis in fact or law to support the Appellant's assertion that the Court of Appeal erred.

Per Hanna J: "*It is entirely proper and appropriate for a defendant to reserve their provision with regard to the extensiveness of the detail which they give in reply particulars... Notwithstanding any attempts by the parties to reserve their position, the function of the trial judge, assisted by learned Counsel, is to find a way through all of this in order to do achieve justice between the parties.*"

Response to Ground of Appeal 3

The first named Respondent submits that on a reading of the first named Respondent's replies, Counsels Note of the decision of Barr J and the Judgment of the Court of Appeal there is no basis to assert the Court of Appeal failed to secure the circumstances necessary for a fair trial.

It is respectfully submitted the Judgment of the Court of Appeal was correctly formulated. The Court of Appeal gave due regard to the issues arising and deemed the first named Respondent's replies adequate while at the same time highlighting the function of the trial judge to ensure fairness as the trial progresses.

Per the President: "*Inevitably, in the course of oral evidence, there will be some further expansion; it is quite unrealistic to think otherwise. However, there is a fundamental obligation of fairness that the rules seeks to achieve, and moreover, it is the function and the duty of the trial judge to ensure that this as the trial progresses.*"

It seems to me that the particulars, as given, provide ample information as to the case that each of these defendants is going to make. I do not think it would be appropriate for this Court to make an order of the kind sought by Dr. White because that would be unfair on the defendants and would exclude them from giving evidence other than what they had specified in the course of oral evidence. I am reassured about this by the realization that elements of surprise ought to be foreign to the process of litigation. I am quite sure that the trial judge will be conscious of that obligation."

Response to Ground of Appeal 4

The ruling of the Court of Appeal is not inconsistent with the legislative provisions of the Civil Liability and Courts Act 2004. This is evident on an examination of the first named Respondent's replies and the judgment of the Court of Appeal.

Per the President: *"It seems to me that the particulars, as given, provide ample information as to the case that each of these defendants is going to make."*

Per Irvine J: *"...I am satisfied that the Defendants have, fully and meaningfully, engaged with the plaintiff in the terms of the particulars which have been sought with the result that I am quite satisfied that the plaintiff knows the case that is to be made by each of the defendants regarding the informed consent issue..."*

Response to Ground of Appeal 5

The Court of Appeal did not err in dismissing the Appellant's appeal. There was no merit to the Appellant's appeal before the Court of Appeal and there is further no merit to the Appellant's application for leave to appeal herein.

Sarah Corcoran BL

6. Additional grounds on which decision should be affirmed.

The first named Respondent will rely on the agreed note of the decision of the High Court Judgment of Barr J. together with the (ex tempore) judgments of the President, Irvine J. and Hanna J. in the Court of Appeal at the hearing of the application for leave to appeal and at the hearing of the substantive appeal in the event that leave is granted.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing? Yes No

If Yes, please give reasons below:



Signed: _____
Hayes Solicitors
Solicitors for the first named Respondent
Lavery House
Earlsfort Terrace
Dublin 2

Please submit your completed form to:

The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.