



ORAL JUDGMENT

[2016] JMSC Civ. 98

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV00497

BETWEEN BRYAN FOSTER CLAIMANT
AND VANGUARD SECURITY COMPANY LIMITED DEFENDANT

Ms. Treshia Griffiths instructed by Treshia Griffiths & Co. for claimant.

Ms. Sharon Usim and Mr. Anthony Williams instructed by Usim Williams & Co. for Defendant.

Heard: 31st May and 8th June 2016

Application to Amend Statement of Case - Rule 20.4 Civil Procedure Rules (CPR) as Amended 2006 - Guidelines for discretion of the court.

STRAW J

Applications

[1] There are two applications which are being heard simultaneously by the court in regard to the above matter:

- Notice of Application filed by the defendant on 18th May 2015 requesting that the 2nd Further Amended Particulars of Claim filed by the claimant on 29th April 2015 be struck out as no permission was granted by the court to file the same.
- Amended Notice of Application filed by the claimant on 11th November 2015 requesting, inter alia, that the 2nd Further Amended Particulars of Claim filed on the 29th April 2015, Amended witness statement of the

claimant, Bryan Foster and 2nd Amended Supplemental List of Documents filed on the 11th November 2015 respectively be allowed to stand as filed. It is to be noted that all these documents were filed without the permission of the court as required by Rule 20.4 (2) of the Civil Procedure Rules (CPR) amended [2006] as they were filed subsequent to the case management conference.

- [2] Mr. Anthony Williams made submissions on behalf of the defendant and Ms. Treshia Griffiths on behalf of the claimant. Mr. Williams relied on the authorities of **Gloria Moo Young & Anor. vs Geoffrey Chung & Anors. S.C.C.A No 117/99** [delivered March 23, 2000]; **National Housing Trust v Y P Seaton & Associates Co. Limited, claim No 2009 HCV 05733** [delivered on 31st March 2009]. Ms. Griffiths also relied on the above as well as the following:

Shaquille Forbes (an infant who sues by his mother and next friend, Kadina Lewis) v Ralston Baker & Anors., Claim No. 2006 HCV 02938 [delivered on 10th March 2011]

Peter Salmon v Master Blends Feeds Limited Claim No. 1991/S163 [delivered on 26th October 2007]

Leeman Anderson v The Attorney General & Christopher Burton, Claim No. 2002/A017 [delivered on 16th July 2004]

Jamaica Public Service Co Limited V Rose Marie Samuels, JMCA 23/2010 [delivered on 26th November 2010]

Merlene Murray Brown v Dunstan Harper & Winston Harper, JMCA 1/2010 [delivered on 1st February 2010]

- [3] The major issue in the applications is whether the claimant should be allowed to amend the above described documents at this stage of the proceedings as the relevant rule of the CPR only allows amendments after the case management conference with the permission of the court.

- [4] There are no factors set out in the CPR to guide the use of the court's discretion. As pointed out by the court in **Cobbald v London Borough of Greenwich**

[Unreported August 9,1999] [United Kingdom] Civil Procedure 2009 [the White book] volume 1at 17.3.5, per Peter Gibson LJ, the overriding objective (rules 1.1 and 2 are the relevant sections of the Jamaican CPR) is therefore relevant to any such determination:

The overriding objective is that the court should deal with cases justly. This includes so far as practicable, ensuring each case is dealt with not only expeditiously but fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs and the public interest in the efficient administration of justice is not significantly harmed.

[5] An examination of the several authorities listed above reveals certain factors to assist or guide the court in its determination of the issues. Some of these factors are listed below:

- If permission to amend is sought close to the trial date, will the amendment put the parties on an unequal footing or place an excessive burden on the respondent to prepare for trial so as to jeopardize the trial date? Will it therefore cause a postponement of the trial? **Blackstone's Civil Practice 2008, para. 31.4.** quoting the court in **Charlesworth vs Relay Roads Ltd, [2000]** 1 WLR 230. In **Charlesworth**, Neuberger J highlighted the two competing interests to be considered in assisting the determination of the court:

However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs.

- Amendments can be made at trial and after evidence heard at trial even after evidence has been concluded depending on the circumstances. In

Shaquille Forbes, my brother Fraser J, having examined the relevant authorities allowed an amendment to the claimant's statement of case to correct a clerical or administrative error. This was done after evidence and submissions were completed. (See also judgement of my brother, Jones J [Ag.] [as he then was] in **Rohan Collins & Sonia Collins V Wilbert Bretton [on behalf of Claudette Davis Bonnick]** E227 of 2002 [May 26, 2003] cited in **Shaquille Forbes** at para. 57).

- Amendments at trials may only be granted when no injustice will be caused. (See judgement of Fraser J at para. 23 in **National Housing Trust** quoting Langrin JA [Ag.] in **The Attorney General v Maurice Francis**, Unreported SCCA 13/95 [March 26, 1999].
- A distinction is made between amendments after the limitation period has ended [Rules 19.4 [1] and 20.6 [1] of the CPR] and before the limitation period has expired. [Rule 20.4 (2)] **Judith Godmar v Ciboney Group Ltd. SCCA 144/2001** relied on by my brother Sykes J in **Peter Salmon**. In **Godmar**, the claimant was allowed to amend her statement of case by adding further sums as special damage. However her application to add post traumatic stress disorder as an additional injury was refused. The court held that the additional sums for special damages were merely the cost of further treatment for injuries pleaded during the limitation period. However the claim for post traumatic stress disorder was held to be a claim for a new injury after the end of the limitation period. It is to be noted that this is not an issue affecting the determination of the case at bar as the relevant limitation period still exists.
- Is the amendment done in good faith? Sykes J examined this issue which arose in **Gloria Moo Young** in his judgement in **Peter Salmon**. In **Gloria Moo Young**, the court of appeal found that the amendments to the defence which had been allowed by the trial judge were 'less than bona

fide”[per Harrison JA at page 10.] and presented an entirely new case and were not made in good faith [per Downer JA at page 49.]

- The court is also to consider where the greater harm lies and whether there is an arguable claim raised in the amendment, Fraser J at para. 23 in **National Housing Trust**; See also **Blackstone’s Civil Procedure, 2008** para. 31.6.

Circumstances giving Rise to the applications

[6] This matter is set for trial on the 25th and 26th of July 2016. The parties are making the submissions before this court at an adjourned pre-trial review hearing date. The history of the matter has been extensively set out in the written submissions of counsel, Ms. Griffiths and I will not be attempting to repeat this save as is necessary for my determination.

[7] It appears that the claimant was of the view that he had been treated by Dr. C. A. Reid at the Kingston Public Hospital (KPH) on the 7th July 2012, the date of the incident where he had presented himself for treatment. The Further Amended Particulars of Claim and his witness statement dated 28th April 2014 speaks to this. Based on these pleadings, Dr. Reid would have been the 1st doctor to treat the Claimant. In fact, at a previous pre-trial review held on 20th March 2015, an order had been made permitting the defendant to put questions to the said doctor pursuant to the rules. This was to be done by 29th May 2015, however no such questions were in fact put.

On the 29th April 2015, the claimant proceeded to file a 2nd Further Amended Particulars of Claim. This amendment related to injuries seen and treated, not by Dr. Reid, but by Dr. Yadanar Ei Thwe at KPH on the 9th July 2012. The amended document also includes questions posed by the claimant’s attorney to the said Dr. Thwe and answers given by him.

- [8]** It is to be noted also that there are amendments that speak to further details from Dr. Guyan Arscott, a cosmetic and reconstructive surgeon seen by the claimant on 26 2 15. It is also noted that the claimant filed a Further Supplemental Notice of Intention to tender an amended medical certificate of Dr. Arscott dated 26 2 15 into evidence by virtue of section 31 E of the Evidence [Amendment] Act. No objection to this notice was filed by the defendant and there is no apparent objection in relation to this aspect of the 2nd Further Amended Particulars of Claim. Dr. Arscott was one of 3 doctors seen by the claimant after his initial treatment at KPH.
- [9]** The Amended Witness Statement of the claimant and Amended Supplemental List of Documents filed on 11th November 2015 all relate to the issue of the treatment of the claimant by Dr. Thwe and related documentation.
- [10]** Counsel for the claimant explained to the court that the claimant had requested medical reports from all the doctors including the one who treated Mr. Foster at KPH. She stated that It was KPH who sent them the report of Dr. Reid on 9th September 2013 as the relevant doctor and that this was the reason those particulars were incorporated in the Further Amended Particulars of Claim. This was based on the erroneous belief that he was seen by Dr. Reid.
- [11]** She further stated that it was after the pre-trial review date of 20th March 2015, when the claimant sent a request for a detailed report from Dr. Reid and attempted to put certain questions to her that the administration at KPH disclosed there had been an error. There is a letter dated 27th October 2015 from KPH signed by one Kristoff Moore [medico-legal officer] that was exhibited attached to the affidavit of the claimant filed in support of the application.
- [12]** In summary, the letter states that an error had been made and that it was discovered that there were 2 patients on the KPH data base with the same name "Bryan Foster". One presented on the 7th July 2012 and the other on the 8th July. One was seen by Dr. Reid and the other by Dr. Thwe. The writer, Mr Moore

describes the issue as an administrative error on the part of the hospital and states the following in the penultimate paragraph:

Bryan St George Foster was not seen or treated by Dr Carol Reid; but was instead registered and treated by Dr. Yadanar Thwe.

Submissions of Claimant

- [13] Based on the above circumstances, Ms Griffiths has requested that the claimant's application be granted. She has submitted that there was no bad faith on the part of the claimant and that he was not attempting to change the facts to the disadvantage of the defendant. She also asserted that there is no prejudice to the defendant as appropriate orders can be made in time for the trial to proceed. She submitted that it is just that the real dispute between the parties ought to be adjudicated and stated that there is no dispute that the claimant's leg was injured in a motor vehicle accident involving a vehicle driven by the defendant's agent on the 7th July 2012.

Submissions of Defendant

- [14] Mr. Williams submitted on behalf of the defendant that the claimant had no permission to amend the relevant documents as required pursuant to rule 20.4. He stated that the objection is to the particulars set out in the 2nd Further Amended Particulars of Claim in relation to the report of Dr. Thwe. He also submitted that there is also an objection to questions posed to the doctor and answers given by him to the claimant's attorney being set out in the above document.
- [15] He also ask the court to bear in mind that no leave has yet been granted to have Dr. Thwe certified as an expert and that the defendant was never served with the questions and answers. In all these circumstances, he submitted it was most improper to have included those on the amended pleadings
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Counsel also asked the court to consider whether the claimant has acted in good faith and has not taken advantage of the defendant bearing in mind the following issues:

- The fact that the injuries noted by Dr. Thwe shows different injuries than that of Dr. Reid.
- The internal inconsistency in what is being presented as Dr. Thwe speaks to seeing the claimant on the 9th July 2012 and Dr. Reid on the 7th July 2012.
- The affidavit of the claimant filed on 29th October 2015 rehearsing hearsay evidence that Dr. Reid did not treat him but an individual with the same name and similar injuries. However his witness statement filed on 28th April 2014 spoke to being seen by Dr. Reid on the 7th July. The Amended witness statement is now asserting that he was seen by an Asian doctor who he later learnt was Dr. Thwe.

[16] It is the submission of Mr. Williams that all of the above is just too convenient and the conduct of the claimant is not in good faith. He distinguishes these circumstances from those that existed in the **Shaquille Forbes** case where two genuine amendments were being sought.

Analysis by the Court

[17] What is before this court is clear and cogent evidence of an administrative error on the part of KPH. This court is not examining the evidence to determine whether the evidence is 'convenient'. There is clear documentation from the hospital indicating the error. Dr. Thwe's report speaks to the fact the he had the docket of Mr Foster on the 7th July 2012; however when he was ready to see him, Mr. Foster did not answer. He stated that Mr. Foster presented himself 2 days later on the 9th when he treated him. Mr. Foster's affidavit indicates that he was treated by a nurse on the 7th, then left the hospital and returned on the 9th when he was seen and treated by an Asian doctor. Although his witness

statement filed on the 28th April 2014 speaks to being seen on the 7th by Dr Reid, it is neither incomprehensible nor improbable that the witness statement would have been prepared with the assistance of the medical report sent by KPH.

[18] Similarly, the amended witness statement would now refer to the treatment by Dr. Thwe. Although Dr. Thwe's report does speak to more serious injury, it cannot be a surprise to the defendant as Mr Foster saw Dr. Jeffrey Davis on the 16th July 2012 who treated him on 11 occasions at UHWI. Dr. Davis described him as having extensive degloving injury to left leg, inter alia. His report, dated the 15th January 2013, is also being relied on by the claimant as well as the medical certificates of Dr. Sandra Bennett and Dr. Guyon Arscott.

[19] Dr. Bennett treated Mr Foster between 7th November 2012 and 6th March 2013. She speaks to him as having a crush injury to left leg. Dr. Arscott, a plastic surgeon would have been the last doctor to treat Mr. Foster.

[20] The justice of the cause would require that the claimant be allowed to amend the pleadings to correct what appears to be an administrative error on the part of KPH, a public institution. Ms. Griffiths has also requested that summons be prepared for Dr. Reid, Dr. Thwe and Mr. Moore to attend the trial to answer any pressing questions that the defendant might have on this issue.

Issue of the Questions and Answers

[21] Before completing my consideration of the applications, it is important to determine whether the claimant can properly include questions and answers in relation to Dr. Thwe on the 2nd Further Amended Particulars of Claim. The ability to put written questions to an expert witness is governed by rule 32.8 of the CPR. This speaks to questions being put to the expert by another party or jointly. Assuming that there is no impediment to the party relying on the expert seeking clarification from its own expert, it would have to comply with rule 32.8 [3] .This rule states that the expert witness's answer to questions is to be treated as part of his report.

[22] It is to be noted also that permission has to be obtained from the court to call an expert witness or put in an expert witness's report. The notice of application filed by the claimant is also requesting that the medical report of Dr. Thwe dated 10th April 2015 be put into evidence and that he be accepted as an expert witness. However, this has not yet been done. I also note that these questions and answers are already included in the addendum to his report. Bearing in mind that some of the answers go beyond what can be listed as particulars of injury, I would agree on the whole that it is improper to include such in the pleadings.

The Issue of Costs

[23] Mr Williams has submitted that in any event, since an award of costs is the 'healing medicine' in the words of Bowen LJ in *Cropper v Smith*, [1884] 26 Ch. 700 at page 710 for the grant of any amendment, the court should so order in favour of the defendant. Ms Griffiths has stated that no costs should be awarded bearing in mind that the applications were heard at an adjourned pre-trial review hearing and that the application was not due to any fault of the claimant.

[24] These are two compelling reasons for no such cost order to be made. However, I do bear in mind that the defendant felt it necessary to make an application based on the fact that the claimant had filed the 2nd Further Amended Particulars of Claim from as far back as the 29th April 2015 without the permission of the court. The Amended Notice for permission to have the documents stand was only filed in November 2015. In those circumstances I will be granting the defendant half costs of the application to be agreed or taxed.

Conclusion and Disposal

[25] Notice of application filed by the claimant on 11th November 2015 is granted in terms of para. 1 as amended to exclude particulars listed at para. 12 vii, 1-15. The notice of application is also granted in terms of paras. 2, 3, 4, 5, 6, 7, 8, and para. 9 as amended so as to remove reference to the defendant.

Notice of application of the defendant filed on 14th May 2015 is granted in relation to para. 1 as amended i.e. that the particulars referring to the questions and answers in relation to Dr. Thwe contained at para. 12 vii-i-15 of the 2nd Further Amended Particulars of Claim, be struck out.

Half costs of the application granted to the defendant to be agreed or taxed.