



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2011 HCV 00163**

**BETWEEN**

**NATALIA DIXON  
(Mother and Next Friend of Lincoln  
Sterling Jnr.)**

**APPLICANT**

**AND**

**UNIVERSITY HOSPITAL OF THE WEST  
INDIES**

**1<sup>ST</sup>  
RESPONDENT**

**AND**

**WESTERN REGIONAL HEALTH  
AUTHORITY  
(Board of Management for  
Cornwall Regional Hospital)**

**2<sup>ND</sup>  
RESPONDENT**

**AND**

**THE ATTORNEY GENERAL OF JAMAICA**

**3<sup>RD</sup>  
RESPONDENT**

**Miss Katherine Minto and Miss Arlene Williams instructed by Nunes, Scholefield and Deleon and Company for the Applicant.**

**Mr. C. Kelman instructed by Myers, Fletcher and Gordon for the 1<sup>st</sup> Respondent.**

**Mr. Harrington A. McDermott instructed by the Director of State Proceeding for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

**Civil Practice – Application for pretrial remedy - Discovery of documents- Medical records- Court's jurisdiction to grant – whether a right to one's medical report exists.**

**Held:           16<sup>th</sup> February, 2011  
                  6<sup>th</sup> April, 2011  
                  16<sup>th</sup> May, 2011  
                  9<sup>th</sup> December, 2011**

**IN CHAMBERS**

**MARSH J**

[1] Lincoln Sterling Jnr. was born on March 5, 2007 but on or about December 2007, he began to experience "shortness of breath" which made it necessary for him to be admitted to the Cornwall Regional Hospital for treatment.

[2] His condition remained and on the 30<sup>th</sup> December, 2007 arrangements were made for him to be transferred to the University Hospital of the West Indies and he was transferred by helicopter on the same day. Prior to this, Lincoln was placed on a stretcher with a portable oxygen tank attached to him. A Dr. Gilbert sat on the stretcher and got up. When he did so the oxygen tank fell to the ground, the top separating from the bottom section. The oxygen stopped flowing to Lincoln. This is essentially the events which trigger the applicant's application.

[3] The Amended Notice of Application for Court Orders sought of this Court the following orders.

- (i) An order directing the Respondent to deliver up to the Applicant all documents and records in the Respondents' possession, custody or control, relating to the Respondents' case and treatment of Lincoln Sterling Jr. From December 2007;
- (ii) An order that the Respondent shall bear the costs of the application jointly and separately.
- (iii) Further relief as the Court deemed first just was also sought.

#### **THE APPLICANT'S SUBMISSIONS:**

[4] The Applicant urged that Rule 17.2.1 (a) of the Civil Procedure Rules 2002 (C.P.R) empowers the Court to make an order for interim remedy at anytime before a claim has been made. Rule 11.1 referred to applications for Court Orders made before, during and after the course of proceedings. Rule 28.1 sets out rules which concern the disclosure and inspection of documents. Rule 28.2 relates to the duty of disclosure limited to documents which are or have been in the party's control. Rule 28.12.2 sets out the need for the party wishing to inspect the documents to make a written notice to that party who served the list of his wish to inspect the documents on the list. Rule 28.12 (4) provides that where the party giving the notice undertakes

the “reasonable cost of copying,” the party who served the list must supply the other with a copy of each document requested within seven days after the date on which the notice was received.

[5] The Applicant submitted that the above mentioned provisions in the Civil Procedure Rules indicate that she is entitled to the grant of the orders sought as the court is possessed of such a jurisdiction. She further submitted that the documents sought are required for the independent assessment and opinion of her own medical experts, as to the quality and case of the treatment and care of Lincoln Sterling Jr. and opinion of the cause of the child’s permanent brain impairment, while in the Respondents care and treatment.

[6] It is also the contention of the Applicant that in any claim being made for medical negligence on the child, it will be necessary that there be consideration of the care and treatment extended by the hospital being sued. Clinical notes made by doctors and nurses during treatment are critical to any determination as to whether the Applicant can or is likely to proceed against the Respondents.

[7] The further contention of the Applicant that the provisions of the Civil Procedure Rules early mentioned have clothed the Court with jurisdiction. Strong reliance is also placed on the dicta of Brooks J in the case ***William Clarke v the Bank of Nova Scotia Jamaica Ltd. et al*** (Supreme Court 2009 HCV 05137. Here Justice Brooks had relied on the provisions of the Civil Procedure Rules 2002 (cited earlier) to arrive at the following conclusion, which he expressed in this way “... **it seems plain that pre claim orders may be made in respect of matters of the inspection, detention and preservation of the relevant property.**” “**Property referred to in the context of Part 17 of the Civil Procedure Rules is wide enough to include “documents.”**”

[8] A further contention is that based on the provisions expressed in part 28, “Inspection” includes a right to take copies. The Applicant took further comfort in the expressed views of Brooks J, relying on the case of ***Norwich Pharmacal v Customs and Excise Commissioners*** (1971), that pre action discovery would be ordered

where it is necessary “to ascertain who is the proper party against whom a suit should be brought.”

[9] The Applicant maintained that several authorities have established the jurisdiction of the Court to order disclosure of hospital and medical records, to the patient, and even to third parties. In the case **Mediserve Pty Limited v Minister of Health [2005] WADC 149** (26 July 2005), the Court ordered pre-action disclosure of medical records to a third party (a stranger to the hospital/ patient relationship). The criterion for making this order was “whether there was a “potential claim” against the hospital. **Dufault v. Stevens and Stevens** 1978 Carswell B.C. 55 a case from the British Columbia Court of Appeal in Canada and related to their Court Rules 1976 **Kap v Sands**(1980) 22 C.P.C. 32 at 61 and **Cook v Ip** 1985 Carswell Ontario 586.

[10] Disclosure of documents was ordered as the medical records were necessary and relevant to the issues between the parties as being fundamental to the Court’s determination of the nature, extent and effect and the appropriate measure of damages flowing there from.

[11] Further, the grant of the orders sought, is in keeping with the overriding objective of the Court as at Part 1.1 of the Civil Procedure Rules 2002; that cases should be dealt with justly and that it should be ensured that all are on an equal footing.

[12] Miss Minto for the Applicant submitted that in light of the law and the specific facts of this situation, the Applicant had achieved the legal standard for pre-action disclosure of the medical records (of Lincoln Sterling Jnr.) as these records are relevant as to the issues between the parties relating to who may be liable in negligence consequent on the brain damage to the child; whether it was as a result of negligent treatment or management in any of the Respondent Hospitals.

[13] The Applicant, referring to the orders sought, indicated that granting them, may obviate the necessity to begin proceedings against either the Respondent hospitals or make proceedings unnecessary as any anticipated proceedings may be disposed of by way of a settlement. If the orders sought are not granted, the Applicant may proceed blindly to institute legal action, without first being satisfied

that a cause of action exists against the Respondents, only to have the action failing or summarily dismissed.

## **RESPONDENTS SUBMISSIONS**

### **1<sup>ST</sup> RESPONDENT'S**

[14] Mr. Christopher Kelman for the 1<sup>st</sup> Respondent robustly responded to the applicant's submissions and described the application as "wholly misconceived and "devoid of merit." He pointed out that the Applicant is relying on part 17.2 of the Civil Procedure Rules 2002 – that the court may grant an interim remedy before claim has been made only if the matter is urgent or if it is otherwise desirable to do so in the interest of justice.

[15] He contended that the Applicant has not enunciated "urgency" as a ground, therefore it must be shown that it is desirable the order is granted "in the interests of justice." The specific order sought as interim relief is not known to law. The Applicant is clear that she is relying on the specific remedies at Part 17.1 (1) (c) (i) and (ii) of the CPR. The remedy here is for the grant of interim remedies for the detention, custody or preservation of relevant property; for the inspection of relevant property. However, Mr. Kelman pointed out that the definition of relevant property at Part 17.2 means property which is the subject of a claim or as to which any question may arise on a claim.

[16] He further contended that the medical records of the 1<sup>st</sup> Respondent , will not be the subject matter to which any question may arise in a claim. Subject should be read to mean "subject matter," much the same as an equivalent section in the United Kingdom Supreme Court Act 1981 S 33(1) – This section reads property which appear to the Court to be property which become the subject matter of subsequent proceedings. In the instant application, it is submitted, "property" must be read as meaning "property" which forms the corpus of the particular claim.

[17] A further submission on behalf of the 1<sup>st</sup> Respondent is that the **William Clarke** case earlier mentioned, on which the Applicant places great reliance demonstrates the point effectively. The nature of the proceedings contemplated in that case, is altogether different from that in this application. The litigation

anticipated in the Clarke case would have been “defamation” peculiarly occurring in “cyberspace” or computers and other data sources. These peculiar circumstances are explanatory of the prelitigation relief having been granted, since the nature of the relevant property was a very relevant consideration; the property being computer generated, could be easily removed, deleted or spirited away unless it was specifically prescribed and inspected. The property in which the preclaim discovery was being sought would themselves be the subject matter of the proposed claim. It was easily evident from the affidavit evidence why “urgency” was being specifically relied on.

[18] There is no evidence in this application that the Applicant entertained any fears that the medical records must not be available at any future time, this was so in the **William Clarke** case.

[19] Further it is contended that the Applicant has only baldly stated that justice requires the grant as she has sought, but there is nothing evidencing why this is so.

[20] It is also submitted that the Applicant is seeking to claim or have established a substantive right of access to the medical records (of Lincoln Sterling Jnr.), a right which has never existed or been recognized in Jamaica. It is doubtful that any such right existed at common law. If one looks at the long title of the **United Kingdom Access to Health Records Act** 1990, which reads “An Act to establish a right of access to health records by the individuals to whom they relate and other persons...” This Act for the first time conferred a right on patients in the United Kingdom to access their medical records. There is no equivalent statute in Jamaica and it is only parliament that could establish such a right.

[21] Mr. Kelman for the 1<sup>st</sup> Respondent in further submissions indicated that in the case **R v Mid Glamorgan Family Health Services Authority and another** (earlier mentioned), the Court of Appeal (UK) considered whether the right existed independently of Statute. This was some four years after the Health Records Act had come into force. The majority seemed to have recognized a limited right of patients to access their health records, apparently at variance with the long title to the Health Records Act 1990. Sir Roger Parker at Page 366, was careful to note

that the common law right to access, such as it was, is not unfettered. A better view is that expressed in the decision High Court of Australia (Australia's ultimate Court) **Breen v Williams** (1996) 186 CLR 1. Here, after exhaustively examining whether a patient has a right to inspect and or obtain copies of his or her medical records, held by the person's doctors, decided resoundingly in the negative. Brennan CJ opined that:

**“the doctor's duty to provide information not only can be discharged, but in some instances ought to be discharged without allowing the patient to see the doctor's records where that duty can be performed without giving the patient access to the doctors records there is no foundation for implying any allegation to give that access”.**

[22] Dawson and Toohery JJ were agreed in holding that change should come from the legislature not the Court. The cases relied on by the Applicant and cited by her, relevant to pretrial discovery were decided by Federal Australian and Canadian Courts. Courts which are inferior to the High Court of Australia which decided the case of **Breen**. The reasoning in **Breen's** case should therefore be preferred as it emanated from a superior court.

[23] The 1<sup>st</sup> Respondent also submitted that it had cooperated with the Applicant's request for information and has not denied the Applicant reasonable access to medical records (See letter dated May 11, 2010) while permitting a course that is least disruptive to its operation.

## **2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS**

[24] Mr. McDermott for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents adopted the submissions made on behalf of the 1<sup>st</sup> Respondent in so far as they were applicable to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. In his written submissions, he referred to Rule 17.2 (1) (a) of the Civil Procedure Rules and agreed that this Rule empowers the Court to make an order for interim remedy before a claim has been made. He noted that the Applicant grounded her application under Rule 17.1 (c) (i) and (ii) that under these rules the

Court can grant an order either for the detention, custody or preservation of relevant property or for the inspection of relevant property.

[25] The order sought by the Applicant, he indicated, was for the Respondents to be ordered “to deliver up” the medical records – this order clearly does not fall into either of the categories mentioned in Rule 17.1 (1) ( c ) (i) or (ii)

[26] The order being sought by the Applicant is an interim remedy before a claim has been filed. This may be granted by the Court Pursuant to Part 17.2 (b) only if the matter is urgent or if it is desirable to do so in the interests of justice. The Applicant has placed nothing before the Court to demonstrate that this is a case of urgency. It is therefore an obligation of the Applicant to show that the case falls within the limit which requires that the Applicant shows that it is desirable In the interest of justice that the order be made.

[27] There is no evidence in the affidavit of the applicant, which demonstrated that it is in the interests of justice to grant the order sought. She merely stated that she required the delivery up of the Respondents’ medical records so she would be able to assess whether either institution should be liable for her son’s injuries and that it would be unlikely she could do so unless the documents are provided. This he submitted amounted to a “fishing expedition” to ascertain whether she has a cause of action; that there was no legal authority that supports a submission that a hospital’s medical records are required to commence a claim in medical negligence. He further contended that it is not in the interests of justice that every person who believes he has a claim in medical negligence can obtain a hospital’s medical records. This would seriously hamper the hospital’s ability to discharge its functions.

[28] This court, in determining whether the applicant should succeed must have regard to how the Courts have treated the issue of access to medical records. The Applicant relied on the case of ***Mediserve Pty Limited v Minister of Health [2005]*** WADC 149 (26 July 2005) to make the point that pre-action disclosure of medical record where there is a potential claim against a hospital. However, unlike the instant case, in that case there was affidavit evidence before the Court which demonstrated that the medical records contained information which gave rise to a

potential claim. There was evidence from someone who had viewed the medical records and had deponed to information giving rise to issues which satisfied the court that these would support a claim. There was no speculation there, as to whether those medical records could inform the Applicant of the possibility of a cause of action.

[29] The remainder of the authorities, he contested, relied on by the Applicant speak to situations where the Court made orders for the production of medical records which were relevant and were reasonably required to determine matters or advance the case of parties in the interest of justice. In the case ***Dufault v Stevens*** (1978) Carswell B.C. 55 the Application was made under Rule 26 (11) of the Supreme Court Rules of British Columbia, which especially empowered the Court, on notice to a person or a party, in possession or control of a document, to order production and inspection of the document or preparation of a certified copy which may be used instead of the original. An Applicant here must show that he or she "is not on a fishing expedition" (See the head note) and document in the person's possession relates to a matter in issue in the action.

[30] Mr. McDermot pointed out that there are points to note concerning the said ***Dufault v Stevens*** Case –

- (i) there must have been an action subsisting at the time;
- (ii) the party was in possession or control of a document that related to an issue in the action;
- (iii) that the application was not merely a fishing expedition and
- (iv) that the Applicant has a burden to show that the document reasonably contains information which would directly or indirectly enable the Applicant either to advance his own case or damage the case of his adversary.

The instant application does not fall under any of these.

[31] None of the authorities that the Applicant relied on are decisions binding on this Court, concerned claims that already existed at the time of the application and related to medical record for the purposes of trial. (***Kap v Sands and Cook v Ip***

*etal*). The better view, Mr. McDermott urged, was that expressed in **Breen v Williams** (1996) 186 CLR 71. Guidance as to whether a patient has a general right to access to his medical records, preaction or not is to be found here. This was a decision of the Australian High Court which held that in the absence of a formal contract between doctor and patient, there is no implied term in the relationship which entitled a patient to inspect or obtain his or her medical records. It was further held that the duty of a doctor to advise and treat a patient did not impose a general duty to grant access to medical record relating to the patient.

[32] Mr. McDermott concluded that in the instant application the Applicant had failed to show that the relief sought is permitted under the Civil Procedure Rules; she has failed to show urgency or to show that the order should be made in the interests of justice. No legal authority has been produced in support of the relief sought.

## **CONCLUSIONS**

[33] The Applicant's request on the notice of application for Court orders is as described in paragraph 1 of her submissions "that the Respondents produce "deliver up" his own medical records" pertaining to the case and treatment which ...(the minor) received at the University Hospital of the West Indies and Cornwall Regional Hospital from December 2007. The minor is Lincoln Sterling Jnr. The Applicant is his mother and next friend. These records are required for independent assessment and opinion of the Applicant's own Medical Expert, as to the quality of the case and the treatment received while the minor was patient in both hospitals. They have been particularly identified as "clinical notes of the doctors and nurses who administered the treatment." They would be relevant (a) to the issues between the parties...as to whether the Applicant can or "is likely to proceed" against the Respondents.

[34] The application is founded on Part 17.2 of the Civil Procedures Rules 2002, inter alia in the amended Application for Court Orders. The grounds indicate that the application is made pursuant to Rules 11.2, 17.1 (i), 17.2., 25.1 and 28.6 of the Civil Procedure Rules 2002.

The Applicant seeks to

[35] (a) determine whether a cause of action lies in respect of the treatment of Lincoln Sterling Jnr. by the respondents in or around December 2007 as a consequence of which he now suffers permanent brain injury. Also the Applicant seeks to ascertain who is the proper party against whom a suit should be brought.

[36] Before the Applicant can succeed in her request, she will have to satisfy this Court that the Court has the jurisdiction to make the orders sought by her, ie. orders made by way of interim remedy prior to a claim being filed. Does the Applicant have any right to have the document and records which she seeks to have the Respondent "deliver up" to her and should she succeed, an order that the Respondent be responsible to pay the cost of the application?

[37] It is not contested that this court is empowered by Rule 17.2 of the Civil Procedure Rules 2002 to make interim orders. Part 17.2 (1) is declaratory of the Courts jurisdiction. It states that an order for an interim remedy may be made at any time, including, before a claim has been made and after judgment has been given.

Part 17.2 (2) limits when the Court may grant an interim remedy before a claim has been made. The matter must be urgent or it is otherwise desirable to do so on the interests of justice. The Applicant has relied inter alia, upon the provisions and part 28 of Part 17.2 of the Civil Procedure Rules 2002. It is necessary to state that part 17.2 and Part 28 each relate to different aspects of the proceedings. Part 17.2 relates to the preaction application for interim remedy, while part 28 relates to Disclosure and Inspection of Document.

[38] Part 28.4 of the Civil Procedure Rules 2002 points out that the documents that any party is required by any direction of the Court to give standard disclosure of must be documents which are "directly relevant to matters in question in the proceedings."

[39] The Applicant has in her written reply to Authorities, at paragraph 11, stated the following "... There is no need to establish 'urgency' to justify application before discovery before proceedings are started and no such requirement was set out on the decision of **Clarke v Bank of Nova Scotia Jamaica Limited.**" This is certainly not so as Brooks J at page 9 expressed the following..." The urgency and or

desirability of the order are criteria to be met to determine if the order may be granted.” The obligation to meet these criteria is obviously placed on the Applicant. The Applicant has not sought to rely on any evidence or ground of urgency.

[40] I have not found any evidence that the documents being sought by the Applicant fall within the definition at Part 17.1 (2) of the CPR as being the subject matter of a claim or as to which any question may arise on a claim. I agree with the submissions of Mr. Kelman that the documents which the Applicant seeks to have the Court order “detention, custody or preservation” do not qualify as “relevant property.” The 1<sup>st</sup> Respondent seems, from the letter to the Applicant, dated May 11, 2010 to contain an offer to the Applicant’s Attorney to allow the patient or the patient’s duly authorized representative to view the docket at the hospital in the presence of the hospital staff. A medical report may also be provided.

[41] It seems that from the Applicant’s affidavit, as Mr. McDermott submitted orally, that the Applicant would not need the 2<sup>nd</sup> Respondent’s medical records to commence a claim in medical negligence. This submission is of some attraction as the Applicant has deponed to a doctor at Cornwall Regional Hospital causing a portable oxygen tank to become separated from the child after the doctor had sat on a stretcher and this caused the oxygen to stop flowing to Lincoln. “The disclosure process” contemplated by part 28 of the Civil Procedure Rules 2002 could then be employed at the appropriate stage of the proceedings.

[42] The Applicant has failed to provide this court with any evidence of urgency or that it is desirable in the interests of justice to grant the order sought of an interim remedy before a claim has been made. The application is therefore refused.

[43] Costs of the application are to be the Respondents’ to be agreed or if not to be taxed.

[44] Leave to appeal granted.