[2021] JMSC CIV. 131

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV00812

BETWEEN	**NATHAN ADDIMAN**	**1ST APPLICANT/1ST DEFENDANT**
AND	**RYAN WIGGAN**	**2ND APPLICANT/2ND DEFENDANT**
AND	**URIAH GARDENER**	**RESPONDENT/ CLAIMANT**

IN CHAMBERS

Georgia Hamilton and Tia Blake instructed by Georgia Hamilton and Associates for the Applicants

Trishia Griffiths for the Respondent

March 18, 26 and May 21 and 25, 2021

Expert Witness - Rule 32.2 of the Civil Procedure Rules (CPR) – Case Management Powers - Parts 25 and 26 of the CPR - Application for Stay of Proceedings pending examination by an expert - Whether the Applicants' request is reasonable - Whether the Respondent's refusal is unreasonable – The risk of prejudice to either party should the stay be granted or refused.

I. REID (AG)

I gave my decision in this matter and promised to provide a written judgment and so I now move to honour that commitment. The delay in doing so is regretted.

BACKGROUND

[1] On April 10, 2017, Mr Uriah Gardener (the Respondent) was involved in an accident which resulted in several injuries including whiplash, soft tissue injury, reduced mobility and a 10 cm wound to his right ankle. He visited the Kingston Public Hospital (KPH) and Dr. Sandra Nesbeth at SMN Medical Centre (SMN Medical) located in Linstead in the parish of St. Catherine. He filed a claim against Mr Nathan Addiman and Mr Ryan Wiggan to recover damages for negligence arising out of the motor vehicle accident.

[2] The references to various dates stated in the Respondent's statement of case contradicted the dates cited in a medical report provided by SMN Medical. The date of the accident was confirmed as April 10, 2017. In the report dated February 4, 2019, Dr. Nesbeth stated that the Respondent visited her office on April 14, 2017, for injuries sustained in a motor vehicle accident that occurred on April 20, 2017. This impossibility was later clarified in the Respondent's witness statement filed May 29, 2020, and the affidavit of Trishia Griffiths in support of the notice of application for the appointment of expert witnesses filed July 8, 2020. The Respondent visited SMN Medical Centre from April 14, 2017, until June 30, 2018.

[3] The Applicants filed a defence to the claim on July 17, 2019, that was limited to quantum only. They stated at paragraphs 6 and 7:

> *"That in response to the Particulars of Injuries alleged, these [Applicants] deny that the [Respondent] sustained the following, as a result of the abovementioned motor vehicle accident:*
>
> *A. Whiplash to the neck and back;*
>
> *B. Soft tissue injury to the shoulder scapula and hip; and*
>
> *C. Reduced mobility to the upper limb*
>
> *That in response to the said Particulars of Injury, these [Applicants] will say that:*
>
> *A. The [Respondent], on his own case, was injured in a motor vehicle accident on 20 April 2017….and it is this second and*

> *subsequent motor vehicle accident that is the cause of the injuries/effects that are denied in the immediately preceding paragraph; and*
>
> *B. The injuries and effects listed in the immediately preceding paragraph are not supported on the medical report of Dr. R. Webber from the Kingston Public Hospital, which is the place where the [Respondent] was first seen and treated for his injuries sustained in the motor vehicle accident that forms the subject of this claim and were, on the [Respondent's] own case, he continued to receive treatment until 20 June 2017."*

[4] The Applicants concluded that based on the Respondents statement of case, there seems to have been another accident, as the KPH mentioned only injuries to his right leg.

[5] The Respondent filed a Notice of Application on May 26, 2020 requesting Dr. R. Webber and Dr. Sandra-Marie Nesbeth be accepted as experts. This was amended in an application filed on November 26, 2020. The amended application included terms to allow the Applicants to pose questions to the proposed experts and if these experts had failed to provide answers, then they sought an order requiring their attendance at the assessment hearing for cross-examination. The court ordered on December 3, 2020, that the Respondent's doctors be accepted as experts.

[6] On February 26, 2021, the Applicants filed an urgent notice of application for court orders, requesting that the matter be stayed pending the Respondent's evaluation by Dr. Derrick McDowell, Consultant Orthopaedic Surgeon, or such other specialist. They also requested that the Respondent provide diagnostic film/ report and all physiotherapy reports pertaining to his injuries. The hearing for assessment was scheduled for March 23, 2021.

SUBMISSIONS

For the Applicants

[7] The Applicants maintained that although they had objected to the Respondent's treatment providers, the medical doctors who saw the Respondent were certified as experts in December 2020.

[8] They have also stated that they made attempts to find a doctor willing to assist in the preparation of their defence between July 3, 2020 (when the Respondent's attorney had provided a letter indicating that the medical report provided by Dr. Nesbeth had an error with regard to the date and attached the corrected report to the said letter) and February 23, 2021. They explained that because of the effects of the pandemic they experienced difficulties securing a doctor to examine the Respondent. They made arrangements to have the Respondent evaluated by Dr. Derrick McDowell on 26 February 2021, but he refused.

[9] The Applicants argued that the Respondent was being unreasonable as an evaluation by an expert at this stage did not solely relate to his current condition but the period commencing from the date of the injury to the present. They also took issue with the Respondent having been treated at multiple facilities; referring to an accident which occurred 20 April 2017; claiming injuries to his neck, back, shoulder; and the '*apparent excessive nature of the treatment administered by Dr. Sandra Nesbeth*". They stressed that posing questions to the currently accepted experts would not suffice as the Respondent's treatment extended to persons and institutions other than said experts. An expert is therefore necessary to ascertain whether the Respondent's alleged injuries are consistent with the mechanism of the accident and whether the course of treatment is reasonable.

[10] The Applicants relied on **Starr v National Coal Board** [1977] 1 W.L.R. 63 for support that the claim should be stayed until the Respondent agrees to submit to medical examination by his named expert.

For the Respondent

[11] The Respondent contended that the Applicants did not object to his medical reports nor expressed a need for the doctors to attend court. He stated that they did not set out in their defence that they wished to have the Respondent examined by an independent expert of their choice. Furthermore, they had withdrawn their opposition to having the doctors admitted as experts and had made no application to have their expert.

[12] The Respondent emphasized that all relevant dates have been corrected. There was no accident on April 20, 2017. The injuries outlined by the doctor are consistent with the mechanism of the accident on April 10, 2017.

[13] The Respondent asserted that an evaluation by a doctor, at this stage, is futile as he has fully recovered from his injuries. Any report based on such evaluation would not be necessary for the Applicants to mount their defence and will have little weight in the just resolution of this matter. The Applicants, he contended, were cognizant of the requirements to prove their defence since July 17, 2019. Their conduct, therefore, is questionable, and indicates the Applicants' application for a stay of proceedings is simply a delay tactic being used to further "put [the Respondent] out of judgment sums owing".

[14] The Respondents sought to distinguish the case of **Starr v National Coal Board** by arguing that the plaintiff in **Starr** admitted that the defendant would need the assistance of the neurologist. The Respondent indicated that he has never accepted that another expert would be necessary. Rather, the case of **London Borough of Croydon v Y** [2016] EWCA Civ 398 bears more similarities as counsel for the Respondent indicated in paragraph 2 of her written submissions, filed March 29, 2021, that the Court of Appeal had:

> *"…refused Croydon's application, saying that it was 'most unfortunate' that Y's representatives would not co-operate, but that it would be 'too draconian' to stay or strike out the proceedings. The judge said that Starr did not apply, first because (unlike Mr. Starr) Y had not conceded that*

Croydon's assessments were necessary; and second, because this was public rather than private law litigation."

[15] The court was urged to consider the impact of the pandemic. The KPH has stated that it cannot accommodate requests for medical reports due to the pandemic. As a result, Mr. Gardner would have difficulty obtaining his records to present to an expert. Additionally, the pandemic has led to doctors being exhausted. There was no evidence presented by the Applicants that Dr McDowell could have seen Mr. Gardner and would have found the time to prepare a report. It is, therefore, not advisable for the court to order a stay with such uncertainties being unresolved.

[16] Counsel for the Respondent also submitted that an order granting a stay of proceedings is of such a serious nature that it will infringe on the Respondent's constitutional rights to a fair assessment hearing within a reasonable time. Ordering a stay at this time would be a draconian act, not a good exercise of the court's case management powers and will not lead to the fair and efficient disposal of this matter.

LAW

[17] The primary duty of the court is to achieve the overriding objective and deal with cases justly. As explained by Rule 1.1 of the CPR, this includes saving expense; dealing with matters expeditiously and fairly; allotting appropriate share of the court's resources; and considering each parties' financial position, the amount of money involved, the importance of the case and the complexity of the issues. Rule 25.1 of the CPR also mandates that the court, in furthering the overriding objective, should actively manage cases. This includes considering whether the likely benefits of taking a particular step will justify the cost of taking it (Rule 25.1(h)).

[18] An additional feature of the court's case management powers is to order a stay of proceedings (Rule 26.1(2)(e) of CPR). This, however, is done under strict judicial discretion as any prejudice arising from such an order must be considered**.** In **Omar Guyah v The Commissioner of Customs & others** [2015] JMCA Civ 16, McDonald-Bishop JA explains at paragraphs [48] and [49] that:

> *"[48] I would repeat and adopt an extract taken from the Barbadian case of the **Bank of Nova Scotia v Kevin Cadogan and Kirk White**, in which the learned judge in a quote taken from the 2000 decision of the Court of Appeal of Washington in **King v Olympic Pipeline Company LLC** 104 WN App 338 (2000) noted:*
>
> > *'Civil Plaintiffs have a substantial interest in expeditious conduct of their litigation. That interest, and any potential prejudice from delay, must be carefully considered. Delayed resolution of the civil claims is, by itself, usually a detriment. In addition, delay carries with it the possibility of lost memories, and missing witnesses.'*
>
> ***The nature and effect of a stay of proceedings***
>
> *[49] In considering the question whether the learned judge exercised her discretion appropriately in granting the stay in the instant case, it is prudent to have due regard to the nature and effect of a stay of proceedings. An extract taken from the White Book 2010 at paragraph 9A-180, is quite instructive on this point. It reads:*
>
> > *'When, for whatever reason, proceedings are stayed, in effect the court is declining to exercise its jurisdiction. That is a strong thing (**Shackleton v Swift** [1913] 2 KB 304 CA, at 312 per Vaughn Williams L.J.). Obviously, jurisdiction should not be declined except for very good reason. In **Abraham v Thompson** [1997] 4 All E.R. 363, CA, Potter L.J. said (at p.374) that, "where a stay is sought in circumstances which are not provided for by statute or rules of court, the starting point, is the fundamental rule that an individual who is not under a disability, a bankrupt or a vexatious litigant, is entitled to untrammelled access to a court of first instance in respect of a bona fide claim based on a properly pleaded cause of action.'"*

[19] The general rule relating to experts is found in Rule 32.2 of the CPR and states that:

> *"Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly."*

[20] It is expected that an application to call a witness or rely on the report of an expert witness is to be heard at a case management conference (Rule 32.6(2) of the CPR). This does not mean, however, that an application cannot be made at any time, depending on the circumstances of the case, as the court should be seized of all relevant evidence to make an informed decision (**Joan Allen & another v**

Rowan Mullings [2013] JMCA App 22). As such, the court's case management powers continue up to the end of the trial, thus allowing the court to make any order that will lead to the just determination of the case (**Jamaica Redevelopment Foundation, INC v Clive Banton and Sadie Banton** [2019] JMCA Civ 12.

[21] Personal injury matters possess certain unique features. They are heavily reliant on expert evidence. In addition to the general rules regarding experts, it is expected that the Applicants ought to comply with Rule 10.6(3) of CPR which stipulates that:

> *"Where-*
>
> > *(a) the defendant intends to rely on a report from a medical practitioner to dispute any part of the Respondent's claim for personal injuries; and*
> >
> > *(b) the defendant has obtained such a report, the defendant must attach that report to the defence."*

[22] A corollary of this is that a Defendant in a personal injury matter has the right to request that the Claimant consults with an expert of his choice. This is based on the common law right of a defendant to defend himself including the freedom to choose the witnesses, particularly expert witnesses, which he would call in his defence (**London Borough of Croydon v Y**). On the other hand, a Claimant may refuse to accede to such a request, which is a valid exercise of his right to personal liberty (**Starr v National Coal Board**).

[23] If a Claimant refuses to accede to a Defendant's request to be examined by an expert of his choice, then the Defendant is at liberty to apply to the court for an order to have the matter stayed until the claimant accedes. The courts have acknowledged that any such order in favour of the Defendant is coercive in nature albeit indirectly (**Liane Dorrington v Basildon and Thurrock University Hospitals NHS Foundation Trust** 2016 QB 602).

[24] If the Applicants do not exercise their right to call an expert, then they may apply to pose questions to the Respondent's expert or have the expert present at court

for cross-examination. Only questions in the nature of 'clarification' are permissible pursuant to Rule 32.8(2)(b) of CPR. This means that questions will not be allowed if they require an expert to carry out new investigations or tests, expand significantly on his/her report, or conduct a form of cross-examination by post (**Perrie Daley v Attorney General** [2015] JMCA Civ 11).

ISSUES:

[25] As a result, the court is tasked with weighing all the circumstances in order to do justice between the parties and to determine whether the expert evidence could enhance the prospects of success of the Applicants' defence. In making such a determination, regard must be had to whether:

1. the Applicants' request was reasonable;
2. the Respondent's refusal was unreasonable; and
3. the prejudice which may occur to either part should a stay of proceedings be granted.

ANALYSIS

Issue #1: Whether Applicants' request was reasonable

[26] As aforementioned, the court is heavily reliant on experts in personal injury matters. Presently, two experts had treated the Respondent and provided detailed reports. Although the Applicants indicated a desire to rely on "their own expert", it should be noted that an expert is independent of either party and acts only for the court. As such, the primary question is whether a third expert is necessary.

[27] The Applicants believe that an additional expert is needed, not only to provide a comprehensive outline of the Respondent's treatment but to determine whether:

- the said treatment was reasonable; and
- the mechanism of the accident could have caused the injuries alleged.

[28] The question, therefore, arises as to whether the current experts have provided this information? There are two responses to that question. Firstly, Dr. Webber of the KPH, treated the Respondent at KPH for a short duration and as such, a comprehensive outline of his treatment is not possible. Dr. Webber seemed to have relied on the Respondent's own words to state the cause of injury and so the reasonableness of treatment he had given may be subjective. Secondly, Dr. Nesbeth of SMN Medical outlined the treatment of the Respondent at both KPH and SMN. If there are other facilities where he was treated (for example, the Linstead Hospital), this was not disclosed in the report. A single sentence was dedicated to whether the mechanism of the accident could have resulted in the Respondent's injuries, without more. The reasonableness of her treatment may also therefore be subjective.

[29] From the above, it can be concluded, that additional expert evidence is necessary in order to assist the court in resolving the matter justly. Although such a report will not be contemporaneous with treatment/injuries of the Respondent (and is an issue of weight), an expert, being apprised of all relevant material, will be able to provide the court with a comprehensive outline of the Respondent's treatment (not limited to KPH or SMN), objectively. That expert will also be able to assess whether the treatment given to the Respondent was reasonable and may also be able to provide further details as to the possibility of injuries occurring in the manner claimed by the Respondent as a result of the accident on 10 April 2017.

[30] Even if the Applicants were only granted an opportunity to pose questions to the experts regarding their report, that may not, in my view, address the aforementioned issues. The Applicants do not have sufficient information to properly question the experts. They are restricted in their interactions with the current experts and cannot seek information beyond what is written in the reports. This means, therefore, that the Applicants require the assistance of another expert to properly understand the claims with which they are faced, to address the issues posed above and to mount their defence. Based on the above analysis, an additional expert may be reasonably required.

[31] A determination must now be made as to whether the Applicants' request was reasonable, that is, whether the Respondent is required to provide relevant documents and be evaluated by Dr. Derrick McDowell. As the matter stands, the Applicants have put forward several issues in their defence limited to quantum that they have no evidence to support. They have a common law right to choose their witnesses. The court has a duty to put the Respondent in the position he would have been in had the accident not occurred. Having the Applicants obtain relevant evidence will assist the court in fulfilling its duty while asserting the Applicants' rights. I therefore find that the Applicants' requests, in that regard, were reasonable.

Issue #2: Whether Respondent's refusal was unreasonable

[32] The Respondent presented four arguments for refusing to submit to an evaluation: he is healed, the inconsistent dates were corrected, he will have difficulties obtaining his medical records; and this is a delay tactic being employed by the Applicants to prevent him from obtaining his just monies from the judgment.

[33] The fact that the Respondent is fully healed does not preclude an expert from conducting an evaluation with the assistance of pertinent medical records/history. A contemporaneous report may, in some circumstances, carry much weight but a comprehensive report of a patient's history also has the potential to significantly assist the court in justly dealing with this matter. This reason is not sufficient.

[34] The dates may have been corrected but the Applicants have not solely relied on the inconsistent dates. They wish to obtain a detailed analysis of the mechanism of the accident leading to the claimed injuries. The current expert reports are lacking in this regard. As such, this reason is also insufficient.

[35] The impact of the current pandemic cannot be ignored. Health care facilities are short-staffed and severely overburdened. It is accepted that the Respondent will have difficulty obtaining his medical record. The court, however, has to weigh the fact that it needs all relevant evidence before it in order to arrive at a just decision.

Refusing to stay the matter due to difficulties in obtaining a file may not lead to a fair disposal of the matter. If needs be, the court may, upon the requisite application being made by the Respondent, make the necessary orders to have the KPH produce the records in a reasonable time.

[36] It is reasonable to argue that the Applicants' actions amount to a delay tactic. The Applicants made their request a month before the scheduled hearing for assessment of damages. This, however, does not negate the fact that the court needs all relevant evidence to be placed before it so as to deal with the case justly.

[37] I should highlight that I do not share the Respondent's interpretation of **London Borough of Croydon v Y**. The Court of Appeal had applied **Starr v National Coal Board** in allowing the local authority's appeal. It was emphasized that there was a common law right for a Defendant to defend himself whether in private or public law. As a result, a Defendant had the freedom to call any witness, including an expert witness. It was said that the court has to determine whether the Defendant's request is reasonably necessary for the proper conduct of the defence and whether the Respondent's refusal is unreasonable. The Respondent's response filed March 29, 2021, particularly paragraph 2, is not accurate in regard to the Court of Appeal's decision and reasoning in **London Borough of Croydon v Y**.

[38] In those circumstances, I find the Respondents reasons for his refusal to submit to applicants' requests are without merit and therefore unreasonable.

Issue #3: Whether prejudice arises should a stay in proceedings be granted.

[39] To assess prejudice, it is necessary to explore the impact an order for stay of proceedings would have on both parties.

[40] The Respondent has a right for his matter to be heard expeditiously and fairly. His case is significant, being a personal injury matter. It is imperative that he is compensated for the injuries he had sustained. This means that a stay of proceedings should only be granted in extreme circumstances. The Respondent

has seemingly given one instance of prejudice, that is, he is being kept from obtaining his money. Granting the stay until the Respondent accedes to the evaluation, leaves the period of the stay solely up to the Respondent. He has a right to be heard when a certain event takes place. He will also be compensated with interest and costs.

[41] The Applicants, on the other hand, have much to lose should the stay not be granted, and the Respondent not accede to the evaluation. Their defence will be futile. The case at bar is sufficiently complex and the amount of money is significant. The Applicants have admitted liability and by so doing did not waste the court's time. As such, they should, as is their right, be allowed to properly prepare their defence as to quantum with the assistance of an expert.

[42] As a consequence, I find, that the Applicants will face far greater prejudice should a stay not be granted than that which would occur to the Respondent.

CONCLUSION

[43] In all the circumstances, therefore, the Applicants' request was reasonable and the Respondent's refusal to accede to the Applicant's request was unreasonable. The evidence of the expert would provide assistance to the court in determining the issue of quantum. It may also enhance the prospects of success of the Applicants' defence on that issue, and they would suffer far greater prejudice than the Respondent should the stay be refused. It is therefore just and in keeping with the overriding objective to have the matter stayed until the Respondent is evaluated by a specialist.

ORDERS:

1. The claim herein against the Applicants be stayed pending the Respondent's submission to be seen and evaluated by Dr. Derrick McDowell, Consultant Orthopaedic Surgeon.

2. The Respondent is to submit to Dr. Derrick McDowell the diagnostic films and or reports in relation to all diagnostic tests as well as physiotherapy reports in relation to physiotherapy, which he has undergone relating to the injuries at the Kingston Public Hospital, which injuries form the subject matter of this claim.

3. The Applicants are to pay all the costs associated with the medical and other reasonable transportation expenses in respect of Orders # 1 and 2.

4. Dr. Derrick McDowell shall prepare, file and serve his report within one month of receipt of the documents listed at Order # 2.

5. The Respondent is permitted to obtain a *subpoena duces tacum* for the records from the Kingston Public Hospital.

6. Costs for two days to the Applicants to be agreed or taxed.

7. Applicants' Attorneys-at-Law to prepare, file and serve these orders herein.