



[2020] JMSC Civ 105

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2008 HCV 03892**

<b>BETWEEN</b>	<b>GREGORY GRIZZLE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>RIU JAMAICOTEL LIMITED</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>RADCLIFFE HILTON</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

Remone Foster for the instructed by Lightbourne and Hamilton for Claimant/Applicant

Emile Leiba and Nickardo Lawson instructed by Dunn Cox Defendant/Respondent

Heard: January 29, 2020 and April 3, 2020

**Interlocutory Application - Amendment to particulars of claim after end of relevant limitation period**

**T. HUTCHINSON, J (Ag.)**

**INTRODUCTION**

[1] The matter before me is a Relisted Notice of Application for Court Orders filed on the 23rd of July 2018 which was supported by the affidavit of Dorothy C Lightbourne filed November 22nd, 2017. In this application 7 orders have been sought the most relevant for the purpose of this application are set out at items 1 to 5. These are;

1. An order for a report dated 20th September 2017 which prepared by Dr. Franz Pencle to be tendered into evidence for the purpose of this trial.
2. The appointment of this doctor as an expert witness for the purpose of the trial.
3. An order permitting the Claimant to have him called as a witness.
4. An order that the Claimant be permitted to further amend his Particulars of Claim to reflect the contents of Dr. Pencle's report.
5. The final order that all documents filed out of time be permitted to stand.

**[2]** In relation to this application objection has been raised by the Defendant to orders 1 through to 4.

## **BACKGROUND**

**[3]** On the 3rd of August 2007, the Claimant was employed as a carpenter at the property of the 1st Defendant located in Mahoe Bay, Ironshore, St. James. It is alleged that while he was at work that day engaged in the process of erecting columns an employee of the 1st Defendant lost control of a piece of lumber which fell and struck the Claimant resulting in him suffering a number of injuries. On the 11th of August 2008, a claim was filed on his behalf in which damages were sought against the 1st and 2nd Defendant in respect of the injuries sustained and resulting loss to the Claimant.

**[4]** A Draft Amended Particulars of Claim was subsequently filed on the 17th of February 2014 in which the Claimant sought permission to include a number of other injuries as well as to expand on the injuries previously pleaded. The Notice of Application and Affidavit in Support of same was not filed until the 20th of April 2016.

**[5]** The matter was heard by Laing J and on the 8th of July 2016 he delivered his ruling in which a number of the amendments sought were refused on the basis that they

related to new injuries which the Claimant was now seeking to include after the limitation period had run. The minute of order of the Hon Mr Justice Laing for the hearing on the 8th of July 2016 and a draft formal order in respect of the same date which were presented to this Court made specific reference to the injuries which were to be removed. The learned judge also made an order for an amended particulars of claim to be filed which reflected the Courts' ruling. This was done on the 14th of July 2016.

- [6] The Relisted Application, Affidavit in Support, Draft Further Amended Particulars and Report from Dr Pencle were subsequently filed and are the subject of this application.

## LAW

- [7] Part 20 of the **Civil Procedure Rules** (CPR) makes provision for amendments to statements of case. It allows a party to amend their statement of case at any time before the case management conference without permission unless the amendment is one to which either rule 19.4 or 20.6 applies.
- [8] Rule 20.6 allows parties, with the permission of the court, to amend their statement of case after the relevant limitation period. That rule specifically provides that the amendment is to be granted to correct a mistake as to the name of a party, but only in circumstances where the mistake was genuine, and not one which would cause uncertainty as to the identity of the party in question
- [9] There have however been a number of decided cases in which amendments to statements of case after the limitation period have been allowed in certain other circumstances. In **Judith Godmar v Ciboney Group Limited** SCCA 144 of 2001, a decision of the Court of Appeal which was delivered on July 03, 2003 the Claimant had made an application for amendment to include a claim for post-traumatic stress disorder as well as to add additional expenses under the heading of special damages in refusing the application to add the injury on the basis that it

was an entirely new injury which the party now sought to include but allowing the claim in respect of the special damages, Smith JA stated as follows;

*“It is my view having read the cases cited among others, that the limitation period does not apply to the claim for additional special damages. Such additional claims as Mr. Morrison, Q.C. submitted, are consistent with the ongoing treatment of the appellant in respect of the injuries pleaded in the amended Statement of Claim. Furthermore, these additional claims represent expenses incurred during the limitation period...*

*...they are merely additional expenses in respect of injuries already pleaded in the Statement of Claim and paid within the limitation period to substantially the same doctors and therapists already listed in the particulars of special damages...”*

- [10] An application for amendment after the limitation period was also considered in ***Peter Salmon v Master Blend Feeds Limited*** Suit No C.L. 1999/S163, a judgment of Sykes J which was delivered on October 26, 2007. In that matter Sykes J analysed the decision in ***Godmar*** and made the following observation at paragraph 10 of the judgment:

*“In **Godmar**, the claimant applied to amend her statement of claim by adding further sums as special damages. She also wished to include a new claim for post-traumatic stress disorder. Specifically, Miss Godmar alleged that the post-traumatic stress disorder was an additional injury attributable to the defendant’s negligence. The court allowed the additional special damages but disallowed the claim for post-traumatic stress disorder. **The court held that the additional sums for special damages were merely the cost of further treatment for injuries pleaded during the limitation period whereas the claim for post-traumatic stress was a claim for a new injury that was being made after the limitation period had passed.**”*

- [11] In ***George Hutchinson v Everett O’Sullivan [2017] JMSC Civ 91*** a decision of V. Harris J, which has been cited by Counsel for the Defendant, the original claim was filed on the 10th of January 2013 for a motor vehicle accident which occurred on the 20th of March 2009. The particulars of injury made reference to a fractured phalanx to right little finger. On the 19th of July 2016 an application was filed seeking to amend the particulars of injury to include head injuries, injuries to the lower back, additional details on the fractured phalanx, lacerations to the upper and lower limbs, whiplash injury and a sprained left ankle. The amendment was

refused save for the additional details provided in respect of the fractured phalanx of the right little finger. The reasoning of the learned judge was while this was nothing more than additional details of an injury pleaded before the limitation period, the other amendments appeared to be an attempt to claim for entirely new injuries after the limitation period.

[12] At paragraph 27 of her judgment, V. Harris J helpfully noted the relevant considerations as follows;

*I have gleaned the following principles from the Godmar and Peter Salmon cases:*

*i) The question of amendment of pleadings is a matter for the discretion of the first instance judge.*

*ii) Rule 20.4 of the CPR also gives the court the power to amend statements of case after the limitation period without the qualifications that are found in rules 19.4 and 20.6.*

*iii) The court in interpreting and applying that rule must give effect to the overriding objective of the CPR which is to deal with cases justly and by taking a multi-dimensional (or liberal), as distinct from a narrow, approach.*

*iv) Dealing with cases justly in an application of this nature, also incorporates the principles that an amendment may be allowed where it is necessary to decide*

*the real issues in controversy; it will not create any prejudice to the other party (such as presenting a new case) and is fair in the circumstances.*

*v) There is a distinction between amendments to disclose greater details or particulars about an injury pleaded during the limitation period and making a claim for an injury that was not pleaded during the said period. The former may be allowed while the latter will not be.*

*vi) The limitation period does not apply to a claim for additional special damages where they relate to the cost of ongoing or further treatment for any injury or injuries pleaded during the limitation period and where they represent expenses incurred and paid during the limitation period.*

[13] In examining the relevant factors to be taken into account at this stage, I have also noted the dicta of Neuberger J in **Charlesworth vs Relay Road Ltd** [2000] 1WLR 230 where he stated as follows;

*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.*

## **ANALYSIS/DISCUSSION**

**[14]** In respect of this application, I have been provided with detailed submissions as well as a number of authorities by Counsel on both sides a number of which have been examined above. These have all been reviewed along with a number of other authorities which I found helpful and the relevant principles have been extracted and applied to my reasoning in arriving at my decision.

**[15]** I have also reviewed the documents which have been agreed between the Parties as being relevant to this application and these were:

- I. the Particulars of Claim filed on the 11th of August 2008,
- II. the Draft Amended Particulars of Claim filed on the 17th of February 2014
- III. The Notice of Application and Affidavit in Support of same filed the 20th of April 2016.
- IV. The minute of order of the Hon Mr Justice Laing for the hearing on the 8th of July 2016 and a draft formal order in respect of the same date.
- V. The amended POC filed pursuant to the Court's ruling on the 14th of July 2016.
- VI. The Relisted Application as well as the Affidavit in Support to which the Draft Further Amended Particulars and Report from Dr Pencle are attached.
- VII. The Affidavit of Kristopher Brown in response with draft formal order attached.

- [16]** The issues for consideration have been identified as follows;
1. whether the report of Dr. Pencle should be admitted into evidence.
  2. Whether the Claimant should be permitted to call him as an expert given the circumstances in which his report has been prepared.
  3. Whether the amendments sought as a result of Dr. Pencle's report ought to be granted.
- [17]** In relation to these issues, Counsel for the Applicant has submitted that this report from Dr. Pencle had been obtained as it provided a complete record of the endorsements made on the Claimant's docket at the time when he was first treated by a doctor at Cornwall Regional Hospital as opposed to the summary which had been filed in 2008.
- [18]** In outlining the basis of their objection Counsel for the Defendant noted that this report was nothing more than an attempt to get around the order made by Laing J in which much of the material outlined in this report had already been considered having been provided in 3 subsequent reports and orders made for it to be struck out as being pleaded after the limitation period.
- [19]** It is settled practice that in circumstances in which a medical report is required for the purpose of Court proceedings, reports prepared by another physician have been admitted into evidence in circumstances where the original physician is no longer available once the relevant procedure has been followed. The report however should only be a reproduction of actual notes of the attending physician and the providing of an opinion on any of these findings would not be permitted.
- [20]** In respect of this report, the Claimant must overcome certain evidential challenges. This arises from the fact that he now wishes to rely on certain observations which it is said were recorded on the docket at the time he was seen but which had not been included in the medical summary which had been provided. It is clear from a review of the doctor's report that the information in respect of the injuries sustained

had always been available. At paragraph 8 of the affidavit of Ms. Lightbourne it is accepted that contact had been made with personnel at the Cornwall Regional Hospital for a more detailed report but due to an oversight there was no follow up in order to obtain same.

- [21]** In the absence of this detailed report however, additional reports were obtained from Doctors Aiken, Irons and St Clair Morgan between the 28<sup>th</sup> of September 2010 and the 22<sup>nd</sup> of August 2011 and a review of these reports reveal observations in respect of the Claimant's injuries which were very similar to those contained in Dr. Pencle's report. It appears that these reports were the source of the additional particulars of injury which the Claimant sought to have included in his claim in 2016 and in his ruling on the 8<sup>th</sup> of July 2016 the Learned Judge had them struck out on the basis that they were being pleaded out of time.
- [22]** In order to ensure that the Claimant is not deprived of the opportunity to provide additional details of injuries which have already been pleaded, I have carefully compared the draft amended particulars of February 2014 and the draft further amended particulars. In doing so, I note that in respect of 7(A) (i) to (x), which are the particulars of injury seen in the report of Dr. Pencle, the injuries stated are actually a combination of new injuries along with the particulars of injury which had been struck out and those which had been approved.
- [23]** In relation to the newly included heading 'effects of these injuries on the social, domestic, leisure and work of the Claimant', it is noted that reference is made to the Claimant being at risk of bladder infections, an assertion which had already been struck out by Laing J. In relation to the other observations outlined by Dr Pencle as to the likely effects/impact of these injuries on the Claimant's life there are questions as to whether this information can properly be included in his report by this doctor. In the absence of the Claimant having been examined by him or any record of follow up visits at the institution where these further findings had been made there has been no evidence provided which would lay the foundation for this opinion. As such, the Doctor's statement to this effect is speculative at best



and would be inadmissible. In addition, it is my view that it would be unsafe for a trial court to rely on this assertion without more in coming to a finding on the issues joined between the parties.

- [24] In relation to the Heading 'Effect of Injuries on Claimant's Activities of Daily Living' while it acknowledged that a party can amend a claim to include details of the injury which has previously been pleaded it is noted that the items outlined at 1 through to 13 had previously been adjudicated on by Mr. Justice Laing and had been excluded on the basis that they were new injuries and not details of injuries previously pleaded.
- [25] The Court having previously concluded that these items ought not to be included, I endorse the submission of Counsel for the Defendant that the attempt to have it included under another head could very well be an abuse of process. It had been open to the Claimant to have this ruling adjudicated upon if there had been disagreement with this ruling. What this Court cannot be asked to do at this point is to reconsider an issue which had already been judicially considered by a Court of co-ordinate jurisdiction, a position which was made abundantly clear in ***Leymon Strachan v The Gleaner Company Limited and Stokes (Motion No 12/1999, judgment delivered 6 December 1999.***
- [26] I have considered whether the amendments sought would be nothing more than the 'fleshing out of the summary and the provision of a more expansive opinion of the Claimant's injuries' as was argued by Mr Foster but in light of my finding that much of the information was a re-introduction of injuries previously struck out as well as injuries which would be entirely new, I am unable to agree with this submission. This concern is exacerbated by the proximity of this application to the trial date in November 2020 and the challenge that any such amendment would pose to the opposing party in meeting same.
- [27] In keeping with the overriding objectives and the guidance provided in decided cases, a balance has to be struck between the parties in ruling on this application

as justice must be to all the litigants and not simply for one party. This is especially important where a last minute amendment is sought with the consequences that if it were allowed a party would be deprived of a defence. In these circumstances the Claimant must provide cogent reasons why this amendment should be allowed. Having reviewed the submissions which have been advanced in this regard I was not persuaded that this requirement has been met.

**[28]** In light of the foregoing it is my finding that the report of Dr. Pencle is not admissible on the basis that it is speculative in part, contains material which has already been the subject of a ruling by another Court and contains new material on which the Claimant would not now be permitted to rely in light of the limitation period. Accordingly, the Claimant's application for him to be appointed as an expert for the purpose of this trial is also denied neither will the Claimant be permitted to call him as a witness.

**[29]** In respect of Item 4, the Claimant's application to further amend his particulars of claim is also denied. His application to have his documents filed out of time permitted to stand is granted.

## **ORDERS**

1. Orders sought at paragraphs 1 to 4 of Claimant's Relisted Application for Court Orders filed on the 23<sup>rd</sup> of July 2018 are refused.
2. Order made in terms of paragraph 5 of Relisted Application.
3. Costs to be costs in the claim.
4. Pre-Trial Review is adjourned to 23<sup>rd</sup> of July 2020 at 12 noon for 1 hour.
5. Claimant's Attorney to prepare file and serve order herein.