



[2022] JMSC Civ 41

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV04013

BETWEEN	SHEREE RILEY	CLAIMANT
AND	KVG HIREAGE LTD	1ST DEFENDANT
AND	PAUL ANTHONY ROBERTS	2ND DEFENDANT

IN CHAMBERS

Mr Richard Reitzin instructed by Reitzin and Hernandez for the Applicant/Claimant

Mr Miguel Palmer for the 1st Defendant/Respondent

Heard: February 22nd, 2022, March 7th, 2022 and April 5th, 2022 – addendum delivered April 8th, 2022

Application to for 3rd further amended particulars of claimant – application for further supplemental witness statement – limitation period – primary considerations – is the amendment a new cause of action or arising from same facts – what is a disability – injuries should be sufficiently pleaded – prolix pleadings – expert report – factors for compliance

HUTCHINSON, J

ADDENDUM TO JUDGMENT

[1] The judgment in relation to the substantive issue having already been delivered, this addendum treats exclusively with the application by the Claimant for the following orders;

1. The claimant be permitted, pursuant to rule 32.6(1) of the Civil Procedure Rules, 2002, to call Dr. Wendel Abel, MB, BS, DM-Psychiatry, MPH as an expert witness.
2. The claimant be permitted, pursuant to rule 32.6(1) of the Civil Procedure Rules, 2002, to put in medical reports prepared by Dr. Wendel Abel.
3. The claimant shall serve the medical report by such date as this Honourable Court directs in accordance with rule 32.6(5).
4. The costs of this application shall be costs in the claim.
5. Such further or other order or orders as this Honourable Court deems fit.

The grounds upon which the claimant is seeking these orders are as follows —

- a. Dr. Wendel Abel holds the degrees of Bachelor of Medicine, Bachelor of Surgery (sic), Doctor of Medicine in Psychiatry and Master of Public Health.
 - b. Dr. Abel is a Consultant Psychiatrist and is the Head of the Department of Psychiatry at the University Hospital of the West Indies.
 - c. The nature of his expertise is that of a Consultant Psychiatrist.
- [2]** On the 5th of April 2022 when the judgment was delivered, the attorneys were informed by the Court that the written and oral submissions previously made on this point would be considered. Enquiries were also made if there were any additional submissions on this narrow point. It was also pointed out that the Court would not be hearing any submissions outside the scope of this issue and the application relevant affidavits and reports were to be considered, as such no further submissions were made by either Counsel.

[3] As previously noted, an affidavit in support of this application was filed on the 8th of December 2021 (first affidavit) which was sworn to by Mr Reitzin, who is Counsel with conduct of this matter. The qualifications of Dr Abel were laid out in the grounds stated in the notice and the effect of the first affidavit was to request that the application be dealt with urgently. On the 8th of February 2022, another affidavit was filed, this affidavit was also sworn to by Counsel with conduct and the evidence at paragraphs 4 and 5 is highlighted as follows;

4. I spoke by telephone with Professor Wendel Abel at about 1 :20 p.m. on 7 February, 2022. I was then reliably informed by Professor Abel and, I believe it to be true, that when he was preparing his report dated 8 December, 2021, he referred to the date of Dr. Kpormego's initial medical report which was 7 February, 201 1 and that it was that date which he accidentally transcribed into his report dated December, 2021 as being the date of the accident in which the claimant was injured.

5. Further, I am reliably informed by the claimant, and I believe it to be true, that no accident befell her on 7 February, 201 1 nor on any date other than 23 September, 2010 which was the date of the accident which is the subject of these proceedings.

[4] It should be noted that there have been 2 medical reports prepared by Dr Abel in this matter. Each report outlines that the Claimant was seen by him on the 8th of December 2021, which was two days after the assessment of damages hearing was vacated as a result of the late filing of application for the 2nd Further Amended Particulars of Claim by the Claimant. The report which it is accepted was the first in time, contain assertions at paragraphs 1 and 5 that the Claimant had been involved in a motor vehicle accident on the 7th of February 2011. In fact, the words used at paragraph 5 state as follows;

Miss Riley reported that she was involved in motor vehicle on February 7, 2011.

[5] A second report was subsequently generated in which it is stated that the accident reported actually occurred on the 23rd of September 2010. There is no indication in the second report that the date stated in the previous version was an error. Neither is there any explanation provided as to the circumstances in which it was recorded that the Claimant 'reported' being in an accident on two different dates.

There is also no affidavit provided by Dr Abel in which he seeks to explain this situation. What the Court was faced with instead was an affidavit from Counsel which contained the paragraphs which have been set out above.

- [6] Apart from the fact that this affidavit had been filed after the deadline fixed for filing of documents by both sides, the document itself contains clear hearsay on this point as these assertions/corrections should have been made in an affidavit sworn to by Dr Abel himself or outlined in what should have been termed his 'amended report'. In submissions filed on behalf of the Defendant and amplified on the 7th of March 2022, Mr Palmer raised concerns in respect of the reliability of this report as well as its relevance given its reference to the 7th of February 2011 as reported by the Claimant. Concern was also raised in respect of the 'amended report' and the affidavit of the 8th of February 2022, both were described as being generated solely to undermine the concern raised by him in his submissions.
- [7] In his response, Mr Reitzin stated that he had sent a copy of this report along with the affidavit to Mr Palmer in advance of the date and the issue of what he termed an 'error' should not trouble the Court further. He asked that focus be placed instead on Part 32 of the Rules and whether this report satisfied the requirements laid down therein which he asserted it did. While the form and contents of the reports themselves are generally compliant with the requirements of 32.13(1) and (2) there were no instructions attached in respect of the original or amended (supplemental) report as required by 32.13(3). I also noted that outside of the clinical assessment, the doctor commented on physical impairment and financial impact suffered by the Claimant among additional areas.
- [8] Having given careful consideration to the matter, I am prepared to accept that Dr Abel is a qualified individual in the field of psychiatry and can be appointed as an expert by the Court in this regard. I am also prepared to rule that his report be accepted as an expert's report for the purpose of this trial but it is my opinion that both reports should be so admitted to be considered by the Court. It is also my ruling that Dr Abel should attend at the trial for the purpose of cross examination.

I am satisfied that this ruling should not affect the contents of the particulars in any significant regard, save and except for item (xxxiv – major depression-moderate) which the Claimant had been ordered to remove. In light of the diagnosis outlined in this report, which was provided to the Court on the 6th of April 2022, that item can remain.

CONCLUSION

[9] In conclusion, it is my ruling as follows;

- a. the Claimant is to file and serve their 3rd further amended particulars of claim within 30 days of today's date.
- b. The further supplemental witness statement is also to be filed and served within the same timeframe.
- c. The medical reports are to be filed and served by or before the 20th of April 2022.
- d. Dr Abel is appointed as an expert and his reports are permitted to stand as expert reports. He is also required to be in attendance at Court for cross examination.
- e. Costs to be costs in the claim.
- f. Claimant's Attorneys to prepare, file and serve formal order herein.