[2013] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 158/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**NATALIA DIXON (MOTHER AND NEXT FRIEND OF LINCOLN STERLING JR)**	**APPELLANT**
AND	**UNIVERSITY HOSPITAL OF THE WEST INDIES**	**1ST RESPONDENT**
AND	**WESTERN REGIONAL HEALTH AUTHORITY (BOARD OF MANAGEMENT FOR CORNWALL REGIONAL HOSPITAL)**	**2nd RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD RESPONDENT**

Miss Tavia Dunn, Miss Michelle Phillips and Miss Stephanie Forte instructed by Nunes, Scholefield, Deleon & Co for the appellant

Christopher Kelman instructed by Myers Fletcher & Gordon for the 1st respondent

Harrington McDermott instructed by the Director of State Proceedings for the 2nd and 3rd respondents

14 February and 3 May 2013

PANTON P

[1] I have read in draft the judgment of my learned sister Phillips JA and appreciate the comprehensive manner in which she has dealt with the issues. I agree with the

conclusion at which she has arrived, and would urge the appellant to accept the offer to view the relevant records.

DUKHARAN JA

[2] I too have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion. There is nothing that I can usefully add.

PHILLIPS JA

[3] This appeal arises from the judgment of Marsh J given on 9 December 2011 wherein he dismissed the notice of application for court orders filed by the appellant, requesting an order directing the respondents to deliver up to the appellant all documents and records in the respondents' possession, custody or control, relating to the respondents' care and treatment of Lincoln Sterling Jr from December 2007. The learned judge ordered costs to the respondents to be taxed if not agreed.

[4] That application had been made pursuant to rules 11.12; 17.1(c)(i) and (ii); 17.2; 25.1; and 28.6 of the Civil Procedure Rules, 2002 (CPR). The grounds stated by the appellant indicated that the said disclosure was sought in order to determine, whether a cause of action lay in respect of the treatment Lincoln Sterling Jr received by the respondents in or around December 2007, as a result of which he has permanent brain injury, and also in order to ascertain who was the proper party against whom a suit should be brought. Further grounds in support of the application were that:

"3. It is highly likely that the Applicant will commence proceedings against the Respondents in respect of the injury, loss and damage sustained by the said Lincoln Sterling Jr. but this will depend on an assessment of the treatment received from the Respondents by the appropriate medical experts.

4. Advance disclosure is desirable to dispose of the anticipated proceedings fairly and may obviate the need to commence proceedings against either the Respondents at all, thereby saving costs.

5. The Respondents have or [have] had documents in their possession, custody or control which are or were relevant to the nature of the injury sustained by Lincoln Sterling Jr. the Respondents' treatment of the said injury and the issue of liability for the injury, loss and damage sustained by the said Lincoln Sterling Jr.

6. The Applicant has no means of accessing the records of the Respondents except through an order of this Honourable Court, as the 1st Respondent has refused to comply with a request by the Applicant's Attorneys-at-Law for copies of the relevant documents, and the 2nd Respondent has not responded to the Applicant's Attorneys- at-Law's request for the documents at all."

[5] The appellant deposed in an affidavit sworn to on 25 November 2010, in support of the application for disclosure that she was the mother of Lincoln Sterling Jr and that he, having been born on 5 March 2007, was at the time she deposed to her affidavit three years old. She stated that she and her spouse had noticed one evening that Lincoln was experiencing shortness of breath, so they took him to the 2nd respondent (Cornwall Regional Hospital) where he was admitted and treated for asthma. He was nebulised several times, but as he was still having difficulty breathing, a decision was taken to transfer him by helicopter to another hospital, namely the 1st respondent, University Hospital of the West Indies (UHWI). At that time, Miss Dixon said that,

although experiencing shortness of breath, Lincoln was still responsive to her, her spouse, and the staff at the Cornwall Regional Hospital. To undertake this journey into Kingston, Lincoln was placed on a stretcher attached to an oxygen tank with, she stated, one Dr Gilbert (although she was unsure of the name), sitting beside him on the stretcher.

[6] Miss Dixon further deposed that while in the process of achieving that transfer to the UHWI, Dr Gilbert got up off the stretcher, the oxygen tank fell to the ground and the "top and bottom parts of the tank broke away from each other, and the oxygen stopped flowing to Lincoln". The doctor she said tried to use a hand-held pump on Lincoln, and directed a security guard with some urgency to call a number for assistance. Thereafter, she deposed, several persons arrived and tried to assist Lincoln by pumping his chest. Lincoln was taken on the stretcher to the elevator and into a room, by which time seven minutes had elapsed since the oxygen tank had broken. He remained, she said, in that room for about five minutes, and then he was taken back to the third floor of the hospital and, from there his stretcher was taken into the helicopter for travel to Kingston. Miss Dixon stated that, although unable to go with Lincoln into the elevator and the room on the upper floor, she did accompany him on the helicopter.

[7] On arrival at the UHWI, Lincoln, she stated, was placed in the intensive care unit and he received oxygen from a new oxygen tank. He was given several tests and Miss Dixon was advised that the results were all negative in respect of seizure, asthma, sickle cell and HIV. However, as his blood count was low, he was advised to undertake the Electroencephalogram (EEG) and MRI examinations, the results of which revealed,

she was informed, that Lincoln had had an infection to the brain and his lungs. She indicated that "the doctors explained that the infection to the brain could have been caused by loss of oxygen, during the period that the oxygen tank had fallen while we were at Cornwall Regional Hospital".

[8] Miss Dixon indicated that, after a stay at the UHWI for a period of nine days, she was advised that Lincoln would be permanently affected by the brain infection. Her belief was that as a result, he was mentally retarded.

[9] Miss Dixon contended that the infection had been contracted as a result of the treatment that Lincoln had received at the UHWI and Cornwall Regional Hospital, and she was desirous of obtaining the medical records from the respondents in order for them to be assessed by medical experts. She attached letters sent by her attorneys-at-law to the two institutions in order to obtain the records, and the reply she received from UHWI. The Cornwall Regional Hospital did not favour her with a reply. She asked the court to order that the respondents deliver up the documents in their possession, without which, she stated, she would be unable to assess which institution should be held liable for the injuries received by her son.

[10] The response which Miss Dixon's attorney-at-law received from the UHWI was as follows:

> "May 11, 2010
>
> Nunes Scholefield DeLeon & Co.
> 6A Holborn Road

P.O. Box 95
Kingston 10

Dear Sirs:
Re: Lincoln Sterling Jr. – Reg # 1227122

We are in receipt of your correspondence dated April 14, 2010, with regards to the captioned.

Please be advised however, that we are unable to accede to your request for copies of Lincoln's medical records. We generally do not provide copies of patients' records. We will however, allow the patient, or the patient's duly authorized representative to view the docket at the hospital in the presence of the hospital staff.

With regards to your request for a medical report, please be advised that we have requested the same from the relevant doctor and this will be forwarded to you through our attorneys at the earliest possible date.

Sincerely,

Janet Powell (Mrs.)
Director – Patient Affairs"

[11] The response from the appellant to the above letter was to file the notice of application for court orders referred to in paragraph [3] herein. We were told that to date no inspection has taken place by the appellant or any authorized representative of hers, and no report has been submitted by the UHWI, although it may have been prepared.

[12] There was no response from the respondents to the affidavit in support of the appellant's application, so Marsh J dealt with it on the basis of the matters deposed to in the appellant's affidavit.

The ruling of Marsh J

[13] In his ruling the learned judge made it clear that the appellant's first hurdle was to satisfy him that he had the jurisdiction to grant pre-claim discovery of medical records. Also, did the appellant have the right to the documents, he posited, at the cost of the respondents? He concluded that rule 17.2 of the CPR permitted him to make interim orders at any time, including before a claim has been made and after judgment has been given, within the limits set out in the rule.

[14] The learned judge opined that although the appellant had indicated that it had relied on parts 17 and 28 of the CPR, the former part did relate to pre-action applications for interim relief, but the latter part related to "Disclosure and Inspection of Documents", and rule 28.4 to which the appellant had specifically referred related to documents which he stated were, "directly relevant to matters in question in the proceedings", (emphasis supplied). In the learned judge's view the appellant, having submitted that there was no need to establish "urgency" to justify the application before proceedings had been started, had not sought to rely on any evidence or ground of urgency. He found that there was no evidence that the documents being sought by the appellant fell within the definition of part 17.1(2) of the CPR. He accepted the submissions of counsel for the 2nd and 3rd respondents that the appellant did not need the medical records to commence a claim in medical negligence. In his view the disclosure process in part 28 of the CPR could be employed at the appropriate stage of the proceedings.

[15] In conclusion the learned judge stated;

> "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."

The appeal

[16] In the notice and grounds of appeal filed on 29 December 2011, the appellant challenged Marsh J's ruling on several grounds (eight in all) as follows:

> "(a) The learned judge erred as a matter of fact and law in coming to this Decision.
>
> (b) The learned judge exercised his discretion on a wrong and/or restricted principle of law.
>
> (c) The learned judge while appreciating that this was an application for pre-action disclosure, failed to have any regard to the established legal principles on this area.
>
> (d) The learned judge failed to give any or any sufficient weight or consideration to the fact that:
>
> (i) the applicant is seeking copies of his own medical records
>
> (ii) there is no claim by the respondents to "confidentiality" or doctor/patient privilege, in respect of these records
>
> (iii) no prejudice, embarrassment, or adverse effect would be occasioned to the Respondents by a granting of the application.
>
> (iv) the records are required by the applicant for a legitimate purpose, to wit, the assessment by the applicants expert of the quality of the

treatment which was administered by the Respondents to the Applicant, and, whether this cause[d] the infection and resulting brain damage.

(v) Medical negligence matters do not fall within the category of ordinary matters filed in the courts.

(e) That the decision **is otherwise inconsistent with the overriding objective of the rules**, which is to save the time, expense and resources which would be utilized by a party embarking on a claim against a party which is of no merit.

(f) The learned judge failed to exercise his discretion judicially in that he omitted to apply the guiding principles in an application for pre action disclosure and in failing to have any regard to all relevant factors and conditions.

(g) The Order of the learned Judge was accordingly unreasonable having regard to the factors before Him [sic].

(h) The learned judge misdirected Himself [sic] in law and on the weight given to the facts before him."

[17] The issues on appeal appeared to me to be able to be summarized thus:

(i) the learned judge erred in his understanding and application of the law with regard to pre-action disclosure, particularly as it relates to medical records, and specifically as there was no claim for confidentiality, or doctor/patient privilege, or prejudice, or embarrassment, adverse to the respondents so as to prevent the disclosure required;

(ii) the medical records were those of the appellant and were required for a legitimate purpose; and medical negligence matters fell within a special category in respect of matters filed in the courts and;

(iii) the decision of the learned judge was inconsistent with the overriding objective, particularly that of saving time, costs, and expense, especially if a party is considering whether or not to embark on a claim which may be without merit.

The submissions

[18] Counsel for the appellant canvassed what she referred to as the undisputed facts which had been set out in the appellant's affidavit. She pointed out that the medical records had been compiled and existed at both respondent hospitals, and were required so that they could be submitted to independent medical experts for advice as to whether there was medical negligence by one or both of the respondents in their treatment of Lincoln Sterling. This disclosure, it was submitted, could avoid legal proceedings being made against one or both of the institutions. Additionally, it was important for this exercise that the appellant could take copies of the records, and the appellant complained that there was no allegation from the respondents that they were short staffed, or overburdened, or that the request for the copies was draconian or that copies of the records were in any way difficult to supply. Indeed the 2nd respondent had not said anything at all.

[19] Counsel maintained that the learned judge erred in not granting the order as the rules permit the grant of pre-action disclosure and include the taking of copies. Counsel submitted that medical negligence matters were not "run of the mill" matters, and that orders for pre-action disclosure are therefore more likely to be granted in such matters.

[20] Counsel relied on the oft-cited dictum of Lord Diplock in **Hadmor Productions Ltd v Hamilton & Ors** [1982] 1 All ER 1042, for the principles that this court will interfere with the exercise of the judge's discretion if, inter alia, his decision is based on a misunderstanding of law or of the evidence before him, or upon an inference that the facts existed or did not exist; or that the decision was so aberrant that no reasonable judge mindful of his duty to act judicially could have reached it.

[21] Counsel submitted further that the legal principles governing the court's approach to an application for pre-action disclosure was that it will grant the application where there is a potential claim against the respondent, and she relied on the case of **Mediserve Pty Ltd v Minister for Health** (WA) [2005] WADC 149, for that proposition, or in order to ascertain who is the proper party against whom a suit should be brought, for which principle she relied on **Norwich Pharmacal Co. and others v Commissioners of Customs and Excise** [1973] 2 All ER, 943. Counsel submitted that these principles had been endorsed by Brooks J (as he then was) in **William Clarke v The Bank of Nova Scotia Limited et al** Claim No. 2009 HCV 05137 delivered 23 February 2010. Counsel also submitted that in the latter case, Brooks J in arriving at his decision that the court had the jurisdiction to grant pre-action disclosure, and the basis on which it could do so, considered part 8.1(5), and part 28 of the CPR.

Counsel also drew the court's attention to parts 11.1; 11.5(3), 11.12 and 27.9 of the CPR in order to persuade the court that pre-action application and disclosure, were not confined to part 17 of the CPR solely.

[22] Counsel submitted that the court had the power to grant the relief of pre-action disclosure and discovery at common law and that that power had been preserved through the Judicature (Supreme Court) Act.

[23] Counsel complained that the learned judge had failed to address his mind to all the relevant principles on pre-action disclosure and had restricted himself in the exercise of his discretion, as to whether the application was urgent, and whether it was desirable and in the interests of justice for the application to be granted, which issues she stated, the learned judge viewed conjunctively, in error. Counsel also submitted that the judge had not addressed the fact that there was a potential claim by the appellant in respect of the injuries suffered by Lincoln Sterling, nor had he addressed the issue as to whether one or both of the respondents should be sued, which she argued was a legitimate issue.

[24] It was counsel's contention that there was no question as to whether the medical records existed, and contained information concerning the treatment of Lincoln Sterling, so there could be no claim that the application was merely a "fishing expedition", and not made for a lawful purpose, especially when the respondents could not legitimately maintain, as there was no evidence before the court to substantiate it, that they had any claim for privilege, prejudice, confidentiality or embarrassment. Any

balancing exercise therefore properly conducted by the learned judge, which counsel stated the learned judge had not done, would have had to have resulted in a conclusion in the appellant's favour, in the interests of justice. Especially, counsel argued, as the matter becomes statute barred in 2013, even if the court was of the opinion that part 17 alone was applicable, based on that specific urgency and the arguments outlined above, the judge's discretion ought to have been exercised in the appellant's favour.

[25] Counsel submitted that the court ought to have been guided by the principles so clearly enunciated in **Mediserve** and **Norwich**, as well as in **Dufault v Stevens** 6 BCLR 199; **Kap v Sands** (1980) 22 CPC 32 and **Cook v IP et al** 5 CPC (2nd) 81, in which, she further submitted, in the main, the order for pre-action disclosure was made, as against the authorities relied on by the respondents, namely **Breen v Williams** (1996) 186 CLR 71 and **R v Mid Glamorgan Family Health Services Authority and another, ex parte Martin** [1995] 1 All ER 356, in which the order was refused, as they were clearly distinguishable and inapplicable.

[26] Counsel for the UHWI, Mr Kelman, submitted that grounds (a), (b), (c), (g) and (h), (see paragraph [16] herein) did not amount to "proper and/or legally recognized grounds at all", as they were too vague, general and meaningless. In addressing grounds (d) and (e) however, he stated that with regard to the submission that the learned judge had not given sufficient weight to the fact that the appellant was only seeking copies of his <u>own</u> medical records, counsel referred to **Breen** and **R v Mid Glamorgan** to submit that that submission had no merit, as medical records are the property of the health care provider who had generated them and not the patient's. He

referred to the fact that in England, statute had conferred on the patient the right of access to his medical records, namely the Access to Health Records Act, which facility did not exist in Jamaica as there was no comparable statute.

[27] Counsel argued that, in any event, from the applicant's own evidence, she had been given access to the records as she had been permitted to attend the UHWI to view the docket of Lincoln Sterling, but she had not availed herself of that opportunity. Counsel also argued that the appellant had not indicated that it was inconvenient or burdensome for her to do so, and had she attended on the UHWI, it would have assisted her in the decision as to who to sue, and thereafter once the action had been commenced, she would have been able to obtain full disclosure in the proceedings, pursuant to the rules. The appellant, he submitted, should not be permitted to obtain pre action remedies unless exceptional circumstances existed as in the **William Clarke** case, which he submitted did not exist in the case at bar.

[28] Counsel further submitted that there was no need for the respondents to show any confidentiality or prejudice as the burden was on the appellant to show that the application ought to have been granted and in any event the criteria under part 17 did not require any consideration to that effect. Additionally, counsel argued, as there was no right to view the records then if the appellant could not apply for such an order pursuant to part 17 of the CPR to obtain her claim for interim relief, then suit ought to have been filed and standard and or specific disclosure applied for in the normal way.

[29] Counsel was adamant that medical negligence matters do not fall in any special category and to suggest that they were "not run of the mill" matters, was, he said, "meaningless". There was no authority cited in support of that concept, and he stated "such a category of case is in any event unknown to law".

[30] Counsel argued further that the judge had guided himself properly as to the exercise of his discretion under part 17 of the rules, which he submitted, was the only part in the rules which permitted him to grant interim relief, and the order made was therefore consistent with the overriding objective. The judge had, he said, considered that the offer to view the records and to provide a report was inconsistent with an order for pre-action disclosure. Counsel submitted that the appellant had completely misunderstood the meaning of saving expense in the concept of the overriding objective, as it was not to assist a potential litigant in a fishing expedition.

[31] Counsel also maintained that the appellant had equally misunderstood the principle coming from the **Norwich** case as the identity of the respondents was well known and on the appellant's own case, she was endeavouring to ascertain if there should be any suit at all, which was not in keeping with the ratio decidendi of that case. He also submitted that the facts of the **William Clarke** case were so substantially different from the case at bar, that no analogy could be drawn from that case in favour of the case for the appellant.

[32] Counsel therefore submitted that the reasoning of the judge was sound. He had exercised his discretion judicially, and had not misdirected himself on the law or on the evidence and as a consequence there was no basis on which to disturb his order.

[33] Counsel for the 2nd and 3rd respondents, Mr McDermott, put forward the position that it was clear that the learned judge understood that while other portions of the CPR dealt with disclosure generally, as the appellant was seeking an interim remedy before a claim had been filed, the appellant was obliged to demonstrate that the application fell within the criteria set out in rule 17.2 (2) (b), which required the appellant to show that the matter was urgent, or that it was otherwise desirable to grant the remedy sought in the interest of justice.

[34] Counsel submitted that the appellant had not even attempted to show urgency, and her counsel had argued that there was no need to establish urgency based on the **William Clarke** case. Counsel also submitted that the appellant claimed that the learned judge had viewed the criteria set out in rule 17.2 as conjunctive, which he stated was wrong, and he endeavoured to demonstrate by reference to the reasons for judgment of Marsh J that it was not so. It was counsel's further contention that having not advanced that the matter was urgent below, the appellant could not attempt to do so before this court.

[35] Counsel argued in support of submissions already made on behalf of the UHWI, that the **Norwich** case was inapplicable, the **Mediserve** case distinguishable, and the fact that the authorities of **Dufault v Stevens**, **Kap v Sands**, and **Cook v IP et al**

were all dealing with disclosure in relation to a trial, which meant issues relative to existing claims, the considerations in relation thereto were completely different and therefore not applicable to the case at bar. Counsel submitted that **Breen v Williams** was much more relevant to the issues on appeal as the principles enunciated in that case related to whether a patient has a general right of access to his/her medical records, whether an application for discovery to gain access to them is taken out pre-action or not. Counsel insisted that there was no evidence adduced by the appellant in the court below which could have properly supported the grant of the application and it was quite correctly refused.

Analysis

[36] The modern starting point in any analysis is the case of **Norwich**, the essence of which was to allow a claimant to seek disclosure from a third party who was inadvertently or perhaps innocently involved in wrongdoing, but who had information enabling the claimant to identify a wrongdoer, so as to be in a position to bring an action against the wrongdoer, where otherwise he would not have been able to do so. Lord Reid stated thus with great clarity:

> "…if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action in his part or because it was his duty to do what he did. It may be that if

> this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

Of course the disclosure may take several different forms, namely the production of documents, affidavits, or oral evidence.

[37] **Norwich** was a case involving the owner and exclusive licensee of a patent for a chemical compound entitled furazolidone. Between 1960 and 1970 unlicensed shipments of the chemical were imported into the United Kingdom, which consignments therefore involved a tortious infringement of the patent. Norwich tried to discover the identity of the importers in order to bring actions against them but were unable to do so. The Commissioners of Customs and Excise held information that would identify the importers but would not disclose the same, claiming that they had no authority to give such information and treated the information, in any event, as confidential. The House of Lords made the order (Norwich Pharmacal order) for the identification of the importers to be disclosed. It was held that the applicant must demonstrate:

(i) a reasonable basis to allege that a wrong has actually been committed;

(ii) that the disclosure of documents or information from the third party is needed to enable action against the wrongdoer;

(iii) that the respondent is not a "mere witness", but is sufficiently mixed up in the wrongdoing so as to have facilitated it, even if

innocently, and therefore be in a position to provide the information; and

(iv) the order is necessary in the interests of justice on the facts of the case.

[38] Over the years the application of the **Norwich Pharmacal** principle has been extended and, as stated by Lightman J in **Mitsui & Co Ltd v Nexen Petroleum UK Ltd** [2005] EWHC 625 (Ch), the jurisdiction is no longer confined to circumstances involving tortuous wrongdoing but is now also available where there has been contractual wrongdoing: **P v T Limited** [1997] 4 All ER 200; **Carlton Film Distributors Ltd v VCI plc** [2003] EWHC 616. However, Lightman J continued, even greater importantly, the principle is:

> "not limited to cases where the identity of the wrongdoer is unknown. Relief can be ordered where the identity of the claimant is known, but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw: .. Further the third party from whom the information is sought need not be an innocent third party: he may be a wrongdoer himself:."

[39] Lightman J also referred to the statement of Lord Woolf CJ in **Ashworth Hospital Authority v MGN Ltd** [2002] UKHL 29 at [57], which went thus:

> "New situations are inevitably going to arise where it will be appropriate for the [Norwich Pharmacal] jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be

> allowed to stultify its use now that it has become a valuable and mature remedy."

Indeed Lightman J confirmed this development of the application of the principle by endorsing the relief ordered by McGonigal J in **Aoot Kalmneft v Denton Wilde Sapte (a firm)** [2002] 1 Lloyd's Rep 417 , where the learned judge said at paragraphs 17 and 20:

> "17.. In Norwich Pharmacal the information required was the identity of the wrongdoer (the applicant knew what wrong had been done but not who had done it) but I see no reason why the principle is limited to disclosure of the identity of an unknown wrongdoer and does not extend to information showing that he has committed the wrong..
>
> 20…. The potential advantages to [the applicant] of seeing this part of the jigsaw and the potential disadvantages of it being denied a sight of that part outweigh, in my view, any detriment to [the respondent]."

[40] In **Carlton Film Distributors Ltd v VDC Ltd** [2003] All ER (b) 290, Jacob J in the Chancery Division confirmed the extension of the doctrine, as in that case the claimant had suspicions that the respondent had assisted in the overproduction of certain videograms over a certain period by virtue of a licence with the claimant and another party, so the claimant knew who the wrongdoer was and had grounds of suspecting that the licensee had breached the terms of the licence agreement but had not got enough evidence to commence its action. Jacob J said;

> "In its time, the Norwich Pharmacal case was groundbreaking, and it was argued then that it was a very special and unique case. Since then, things had moved on

> and the jurisdiction of equity to assist in obtaining justice had been seen to apply to other kinds of case too. Therefore, similar orders were now being made pursuant to the jurisdiction established in other cases. It followed that the application of the Norwich Pharmacal order was not limited to finding out the name of a wrongdoer, and further extended to cases where there was an indication of wrongdoing but not every aspect of the claimant's proposed pleadings was in place."

[41] Additionally, Lord Fraser of Tullybelton in the House of Lords case of **British Steel Corporation v Granada Television Ltd** [1981] 1 All ER 417, made it clear that it was not essential for the order to be obtained for the claimant to show that the discovery was required for the purpose of bringing a suit against the informant.

[42] In my view, it is clear therefore that the fact that the appellant in the instant case has already identified the wrongdoers, that is, that it is either one or both of the respondents who are potentially responsible for the permanent brain damage suffered by her son, does not defeat the application of the **Norwich Pharmacal** principle. However, the issue of whether the discovery is needed in this particular case, and whether in the exercise of the courts discretion it ultimately serves the interests of justice is still a relevant consideration.

[43] In the **William Clarke** case, which concerned the creation of a false profile of the claimant on "Facebook," a social networking website on the internet, an application was made to have the court order inter alia, discovery, preservation and inspection of information relevant to the use of the profile. One of the issues in the case was whether the court had jurisdiction to order the above against certain companies, prior

to an action being filed against those entities, namely the claimant's former employer, and other companies by virtue of their internet service provider, and in the case of Cable and Wireless Jamaica Ltd, an entity having the assigned internet protocol. All entities having actually accessed the "Facebook" site, Brooks J, (as he then was) found, and I am entirely in agreement with him, that pursuant to sections 48 and 49 of the Judicature (Supreme Court) Act the court had the power to exercise the authority once belonging to the Court of Chancery, and in particular to grant equitable relief founded on legal rights and to grant injunctions and similar types of relief without any restrictions as to time, which would therefore permit the grant of orders prior to actions having been filed. Equally, the learned judge also stated that pursuant to such cases as **Anton Piller KG v Manufacturing Processes Ltd and Others** [1976] 1 Ch 55, the court does have an inherent jurisdiction to order entry and inspection of a party's premises. The learned judge also found, as set out previously, that the **Norwich Pharmacal** principle was not only applicable to third parties, but that the discovery remedy was applicable to and obtainable from the alleged wrongdoers themselves. The order was not, he said, obtainable against a "mere witness", but could be brought in an effort to ascertain who was the proper party against whom the action should be brought.

[44] Having concluded that the court had the inherent power to grant the relief prayed, Brooks J examined the relevant provisions of the CPR. His analysis, in my view, cannot be faulted and I will deal with the provisions in the CPR in detail later in this judgment. Suffice it to say, the learned judge found that parts 8, 11, 25, 27 and 28 are

all applicable to the application for discovery prior to the claim having been filed, and he also concluded that part 28 of the CPR did not exclude pre-claim discovery. He also found that part 17.1 of the CPR authorised the inspection, detention and preservation of relevant property by way of interim remedy. In respect of part 17.2, he found that pre-claim orders could be made in respect of inspection, detention and preservation of relevant property but the question of the urgency and the desirability of the order are the criteria to be met to determine if the order may be granted. The obligation to show whether those criteria have been met fell, he said, on the applicant. In fine, he ultimately made the orders as prayed.

[45] The case of **Mediserve** was somewhat helpful as it was actually dealing with an application for pre-action discovery and the criteria for the same, and the discovery related to medical records of a hospital. It had been alleged in an affidavit that a patient in the hospital had assaulted an employee of the plaintiff who was injured as a result thereof. The employee thus had a potential claim against the hospital, in circumstances where the patient had allegedly assaulted another nurse previously. The court found that it would be unreasonable to require the plaintiff to commence an action without having the knowledge of whether the patient had been violent to staff and other members of the hospital, and whether any precautions had been put in place to prevent a repetition of an earlier assault. The issues of confidentiality of patient information, especially since the patient had died, and public interest immunity were discussed as being pertinent, but ultimately on a balance of all the relevant interests, the court found in favour of pre-action discovery in respect of the plaintiff. The court

stated that "the interest in seeing that a claim be properly investigated and then in the event that it is brought, that it be determined on all relevant evidence, is stronger than the non-disclosure of the medical records and other materials of this particular deceased patient".

[46] However, although in relation to the instant case, the appellant appeared to be saying that access to the records was required in order to ascertain whether action should be filed and against whom, and there was no evidence that the records disclosed a potential claim with regard to the UHWI, indeed the evidence was that the appellant was unsure if a potential claim existed at all. Nonetheless, there was evidence that Lincoln Sterling had received treatment at both respondent hospitals, and at the end of the day, had suffered some permanent injury, which could suggest, on balancing all relevant interests, that some pre-action discovery would have been applicable.

[47] The facts in **Dufault v Stevens** were somewhat different, the applicant/plaintiff was requiring the hospital in which he received treatment in respect of injuries received due to the negligent driving of a motor vehicle owned and driven by the Stevens/defendants to produce a copy of his medical records. The real issue in the case, however, was whether production, inspection and preparation of copies of hospital records given to the plaintiff should also be given to the defendant. The interpretation of rule 26(11) in the Supreme Court Rules, 1976, in Canada were integral to the decision. The court found that once the document related to a matter in issue then there must be compelling reasons, such as privilege or embarrassment of the party adversely affected by an order of production, why any party to the action entitled

to production and inspection and copies thereof, should not have an order to that effect. The rules suggest in this case, the existence of a claim, proof that the application was not in the nature of a fishing expedition, and that the applicant should show that the document reasonably contains information that may directly or indirectly enable the applicant either to advance his own case or damage the case of his adversary.

[48] But, in the instant case, no action exists, so the issue of whether the appellant was on a fishing expedition looms large in the circumstances. There have been no pleadings so that one could ascertain whether the documents contained information relating to the matters in issue or may directly or indirectly affect the parties' cases positively or adversely. Further in the cited case, the plaintiff had received an order for discovery and the real issue was whether the defendant should not be the beneficiary of a similar order. That is not the difficulty presented in the case before us, and therefore the cited case is not very helpful for the determination of this appeal.

[49] Equally, I do not see how the case of **Kap v Sands** is helpful to this discussion The applications for discovery were dismissed having been filed under the rule relating to the production of records from third parties, that is strangers to the action, rather than a rule which utilized the machinery of an affidavit on production to be sworn and filed by the plaintiff in which all documents in the parties' possession custody or power must be disclosed. The case made it clear that documents of the hospital are not in the control of a plaintiff and so the plaintiff had proceeded in error. In **Cook v IP,** the issues were also very different from the instant case as firstly the matter was in trial,

the plaintiff had authorised the defendant to obtain his claim cards which were in the possession of O.H.I.P relating to treatment and diagnosis by the plaintiff's doctor of the injuries allegedly sustained. O.H.I.P. held the only copies of the records but refused to produce them. The master refused the defendant's application but the Court of Appeal allowed the appeal. The court found that:

> "it was in the public interest that all relevant evidence was available to the court and wherever damages were claimed for injuries suffered, the production of medical records was of fundamental importance to the Court's determination of the nature, extent and effect of the injuries and the appropriate measure of damages flowing therefrom. While the privacy and confidentiality of medical records were important, the plaintiff himself had raised the issue of his medical condition before and after the accident, and in such circumstances there could no longer be any privacy or confidentiality attaching to the plaintiff's medical records."

In my view that was the only clear approach that the court could have taken. Apart from anything else, the matter was in trial and full disclosure in personal injury matters is usually required. Additionally, in this case, the plaintiff had authorised production of the documents, so any objection to do so, was without any lawful basis and was correctly rejected.

[50] Two of the cases relied on heavily by the UHWI, namely **R v Mid Glamorgan** and **Breen v Williams** require more comment. In **R v Mid Glamorgan** the question in the case seemed to be whether a patient had an unconditional right of access at common law to his medical records, or as Nourse LJ put it, whether as the doctor/health authority was the owner of the patient's medical records, was he entitled

to deny him access to them on the ground that their disclosure would be detrimental to him? In this case a psychiatric patient wished to obtain his medical records in the possession of the respondents two health authorities pertaining to two particular incidents which had occurred in 1966 and 1969. The matter went to court by way of judicial review and the learned judge refused the applications. The records were created prior to the promulgation of the Access to Health Records Act 1990 in England so the applicant was obliged to show his entitlement to the records pursuant to the common law.

[51] The doctors/health authorities [respondents] being concerned that some of the information could prove detrimental to the health of the applicant, offered through their solicitors, by letter, to disclose the records to a medical advisor nominated by the plaintiff, but this offer was refused. Nurse LJ found in answer to the issue as posited by him that a doctor/health authority as the owner of the patient's records, "may deny the patient access to them if it is in his best interests to do so, for example, if their disclosure would be detrimental to his health". He found therefore that the letter from the solicitors offering disclosure to the patient of his medical records, was a complete answer to the applicant's application. He stated that the health authority was to act at all times in the best interest of the patient, and would usually require that a patient's records not be disclosed to third parties, conversely, however, they should usually be handed on by one doctor to another or made available to the patient's legal advisers if they are reasonably required for the purposes of legal proceedings in which he is involved.

[52] Evans LJ confirmed that view, and stated that a right to the medical records does exist, especially if the records were required to be disclosed to medical advisers or the patient himself or his legal advisers in connection with a later claim, but indicated also that that right was qualified to the extent that disclosure may cause the patient harm. Sir Roger Parker stated with some force, that the proposition that at common law a doctor or his health authority had an absolute property in medical records of a patient, to the extent that that meant that they could make what use of them that they chose was untenable. The information, he said, was given in confidence and any absolute property rights would have to be qualified accordingly. Equally, he did not hold the view that the patient had any unfettered right of access to his records at all times and in any circumstances. In his opinion, the circumstances in which a patient may be entitled to demand access to his records will be, "infinitely various, and it is neither desirable nor possible for this or any court to attempt to set out the scope of the duty to afford access or, its obverse, the scope of the patient's rights to demand access. Each case must depend on its own facts".

[53] Indeed, he amplified the situations in which he thought access to the records, even if only partial, would be reasonable. He said:

> "There can, I think, be no doubt, for example, that a doctor should, if requested by the patient, or perhaps by a patient's doctor for the time being, afford access to such doctor but not necessarily to the entire contents of the records. There may, however, be circumstances when direct access to the records or some part of them should be given to the patient himself. If, for example, he is about to emigrate and his condition is such that he might need treatment before he can nominate a successor doctor, it would, it seems to me,

> be probable that the doctor with the records would be obliged either to give access to the records or to provide his departing patient with a letter giving the information necessary to enable a doctor, faced with his collapse, for example on board ship, to treat him properly."

[54] The High Court of Australia in **Breen v Williams** had a slightly different view on the common law obligations with regard to the right of the patient to access her medical records. In this case the appellant had had a bilateral augmentation mammoplasty which involved the insertion of a silicone implant in each of her breasts. Subsequently, she developed bilateral breast capsules. She later consulted the respondent, a plastic surgeon who had not effected the implants, who advised that the capsules should be compressed, and he performed that operation. She experienced further pain and discomfort and the respondent operated and performed a bilateral capsulotomy. The appellant experienced other difficulties and as a result had had other operations not performed by the respondent which included a partial mastectomy and replacement of the implant in the right breast. The matter before the High Court arose out of her interest in litigation in the United States, in a class action against the manufacturer of the breast implants claiming that they were defective. The appellant had an opportunity to "opt in" to a settlement in that action approved by the courts if she had done so by a certain date, but she did not avail herself of that option. Instead she filed an action in the Supreme Court of Australia for a declaration that she was entitled to access to the medical records kept by the respondent in relation to herself. She lost in the Supreme Court and appealed.

[55] On appeal to the High Court she based her entitlement to access to the medical records on three limbs, namely: (i) a patient's proprietary right and interest in the information contained in the records; (ii) an implied term of the contract between patient and doctor; and (iii) a fiduciary relationship between patient and doctor. The court accepted as correct the concession by the appellant that the actual documents comprising her actual records were the property of the respondent. There were no x-ray photographs or pathology reports, for example, in this case which she may otherwise have been able to claim. The court found that none of the above bases gave any support to the appellant's claim. The court, in fact, did not accept that the doctor owed a duty to act in the best interests of the patient. The primary duty that the doctor owed the patient, the court stated, was the duty to "exercise reasonable care and skill in the provision of professional advice and treatment".

[56] In this case the doctor had willingly offered to release the medical records to the appellant on the condition that she release him from any claim which might arise in relation to his treatment of her. The appellant declined the offer. However, in the course of the trial, the respondent offered a report to the appellant in writing concerning the contents of her medical records, and encompassing the history taken by him, his physical examination findings, investigation, results, diagnosis, proposed management plan, treatment and advice. The offer was not accepted but was not withdrawn. The court at first instance took the view that he did not have to consider whether that report satisfied any contractual duty which could be imposed on the respondent.

[57] The court ultimately held:

(1) That in the absence of a formal contract between doctor and patient there is no implied term in the contractual relationship which entitles the patient to inspect or obtain his or her medical records. (**Hawkins v Clayton** (1988) 164 CLR 539 at 573 582 – 586).

(2) That the duty of a doctor to advise and treat a patient with reasonable care and skill does not impose a general duty to grant access to medical records relating to the patient.

(3) That a patient has no proprietary interest in the documents comprising his or her medical records or in the information contained in those documents. (**Leicestershire County Council v Michael Faraday & Partners Ltd** [1994] 2 KB 205 at 216)

(4) That there is no common law principle in Australia of a patient's "right to know' the contents of his or her medical records. (**Rogers v Whitaker** (1992) 175 CLR 479

Hence a patient has no general right to access his or her medical records in the possession of a doctor.

(5) In the circumstances of this case, the obligation of the surgeon to his patient had been fulfilled by the open offer that he had made to provide a written report to the patient comprising the full extent of his treatment of her.

(6) In some situations there may be a duty to provide to the patient or his or her nominee information the doctor has acquired in the course of, or for the purpose of, advising or treating the patient. Information must be provided on request when (a) refusal to make the disclosure might prejudice the general health of a patient; (b) the request for disclosure is reasonable having regard to all the circumstances; and (c) reasonable reward for the service of disclosure is tendered or assured. (Per Brennan CJ)

(7) The duty of a doctor to provide information can be, and in some circumstances ought to be, discharged without allowing the patient to see the doctor's records. (Per Brennan CJ)

(8) If the patient had not elected not to rely upon the law of discovery, it would have been within the inherent jurisdiction of the Supreme Court of New South Wales, as a court of equity, to make an order for particular discovery. (Per Gommon J)

(9) If all the patient sought to imply in the contractual relationship was a right to be informed by her doctor, on a reasonable request, of relevant factual material contained in her medical records the existence of such a term might be accepted. (Per Gummon J)

(10) The relationship between a doctor and a patient who seeks skilled and confidential advice and treatment is a fiduciary one. (Per Gummon J)

[58] What can be gleaned from these two cases is that the court views the right to information in respect of the contents in the medical reports differently from the access to the medical records per se. The right to access information exists but is circumscribed by the particular circumstances, including the reasonableness of the request, whether the provision of the information may cause harm, and the fact that each case should be considered on its own particular facts. The Australian court however, has stated clearly that as a general rule the patient has no right either to information contained in the records or the medical records themselves. The English courts seem to suggest that the information should be produced save as stated.

[59] What is absolutely clear is that the offer made by the doctor/health authority for the patient and or his representative to inspect the records and also to be provided with a report of the advice given and treatment rendered would more than satisfy any common law duty owed by the medical practitioner to the patient.

[60] It is of importance that even in **Mediserve**, there was evidence on affidavit of a clear potential claim, which as stated is not necessarily so in the instant case, or certainly not specifically against either of the respondents. In **Breen,** the matter in issue relating to the alleged defective implants was the subject of a class action in the United States, and the medical records were required to further the appellant's position if not as a part of the class action, then as part of her claim for compensation relative to her pain and discomfort over the years. The issue was therefore already in litigation.

[61] It seems clear to me on the basis of all of the above, that the common law does recognize access to information comprised in medical records, and also access to medical records, as specifically circumscribed, and depending on the facts of each particular case.

[62] It is important therefore for the court to examine the rules of procedure to assess how such an application to access medical information/records can be achieved within the rules and to ascertain whether there are any restrictions in respect of the procedures outlined therein.

[63] Rule 8.1(5) of the CPR recognizes that any person seeking a remedy may do so before proceedings have started. Rule 11.5(3) states that an application made before a claim has been issued must be filed in the registry where the claim to which it relates will be filed. Rule 11.12(4) makes it clear that on any application to the court for orders, the court can exercise any power which it can exercise at a case management

conference. As a general rule, at a case management conference the court must consider whether to give directions in respect of standard disclosure and inspections (rule 27.9 (1) (a)). By virtue of rule 28.6 (2) and (3), the court may make an order for specific disclosure on or without an application, and the application for specific disclosure may be made at a case management conference without notice. Pursuant to its duty to actively manage cases, the court must ensure that no party gains an unfair advantage by failure to give full disclosure (rule 25.1 (m)).

[64] On examination of these rules, I agree with and accept as enunciated by Brooks J in **William Clarke**, that when considered in their context, these rules cumulatively "give jurisdiction to this court to make orders for discovery even before a claim is filed", and that although part 28 suggests discovery between parties in proceedings, it "does not exclude pre-claim discovery", I therefore conclude that the learned judge erred when he found that part 28 had no applicability to the application before him, and that the only relevant part of the CPR was part 17, as the application was asking for interim relief.

[65] Rule 17.1 of the CPR sets out the bases on which the court may grant interim remedies. The court may make an order for the detention, custody or preservation of relevant property (17.1 (1) (c) (i)) or for the inspection of relevant property (rule 17.1(1) (c) (ii)). "Relevant property" in respect of rule 17.1(1)(c) means, "property which is the subject of a claim or as to which any question may arise on a claim". The appellant in this case made the application for the order of the court to direct the respondents to deliver to her all documents and records in their possession, custody or

control relating to the treatment and care of Lincoln Sterling under the above provisions in the rules. I agree with the submissions of the respondents, which found favour with the learned trial judge, that there was no evidence that the documents being sought by the appellant fell within the definition of rule 17.1(2) viz, relevant property, and an order for the delivery up of documents was distinctly different from an order for their detention, custody or preservation. In my opinion, rule 17.1 of the CPR could not avail the appellant.

[66] The appellant however also relied on rule 17.2(1)(a) and (b) of the CPR, which provides inter alia that the court may make an interim order at any time including before a claim has been made, and after judgment has been given. However, the rule states that the court may grant an interim remedy before a claim has been made only if the matter is urgent or it is desirable to do so in the interests of justice (rule 17.2(2)(b)(i) and (ii)). The learned trial judge dealt with the matter disjunctively, contrary to the submissions made on behalf of the appellant, and found that the appellant had failed to provide evidence of any urgency, or that it was in the interests of justice to permit the application to succeed.

[67] I agree with the learned trial judge that on perusal of the documentation before him there was no evidence of urgency. However the learned judge in assessing the issue of whether it was desirable in the interests of justice to grant the application only seemed to be reviewing certain rules contained in part 17 of the CPR and not any of the other rules mentioned previously which rules, I view as important to the disposal of this appeal. Additionally, it is clearly set out in rule 1.2 of the CPR that in interpreting or

exercising any power under the rules, the court must seek to give effect to the overriding objective of the rules, which is to enable the court to deal with cases justly. Set out in rule 1.1(2) are several factors which are to be borne in mind by the court in construing the rules and exercising any power under them.

[68] In the circumstances of this case, in my view, it would be difficult to see how it would not be just bearing in mind the dicta in the several authorities cited, for the appellant not to have access to the information in the medical records at the respondent hospitals pertaining to the treatment of her son, particularly as the information is reasonably required to be examined and reviewed by medical and legal professionals in order to ascertain if she ought to proceed in a claim for medical negligence against either or both of the respondent hospitals in respect of the permanent injury suffered by her son. However that is not the end of the matter for, as indicated, the principles enunciated in **Mediserve** and **Breen** state that permitting the appellant or her duly authorized representative to view the docket at the hospital in the presence of the hospital staff, and the provision of a medical report (see letter from the UHWI paragraph 10 herein), fully satisfied the duty owed by the respondent, save that the report promised was not submitted. In my opinion, the offer made by the UHWI ought to be pursued, namely inspection of the docket permitted and the report submitted, and the 2nd and 3rd respondents should facilitate the same accommodation, and submit a report of the treatment and advice given to Lincoln Sterling.

Conclusion

[69] The learned judge approached the law and the rules relative to pre-action disclosure in a very limited way, and as a consequence his reasoning was flawed, and he also failed to give full effect to the overriding objective when interpreting and applying the relevant rules. However, he concluded correctly that the appellant was not entitled to the delivery up of the documents, and records in the respondents' possession, custody or control relating to the care and treatment of Lincoln Sterling Jr.

[70] The medical records are those of the respondents and the information contained therein could be accessed by the appellant on a reasonable request, without all the records being disclosed, and any duty owed by the respondents would be satisfied by permitting inspection of the patient's docket, and the provision of a medical report in respect of the treatment meted out to the patient, Lincoln Sterling.

Medical negligence matters were not of any special category.

[71] I would therefore dismiss the appeal and make no order as to costs.

PANTON P

ORDER

1. The appeal is dismissed.
2. The appellant is permitted to inspect the dockets at the UHWI and the Cornwall Regional Hospital relating to the treatment of Lincoln Sterling Jr.

3. The respondents shall each provide a medical report in writing to the appellant as to the contents of the documents which are comprised in the medical records of Lincoln Sterling Jr held by them relating to his treatment and advice.
4. No order as to costs.