Tuckshop Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. R.048/1991

BETWEEN	MELBOURNE RATTIGAN	PLAINTIFF
AND	WARREN KONG	DEFENDANT

Mr. Ainsworth Campbell for Plaintiff.

Mr. Dennis Goffe Q.C. and Mr. Norman Davis for Defendant instructed by Myers, Fletcher & Gordon.

Heard: June 21, 1993

October 8, 1993

LANGRIN, J.

In an action by the plaintiff claiming damages for personal injury against the defendant which was filed in June, 1988, the particulars of injuries in the original Statement of Claim in so far as it related to any alleged head injuries suffered by the plaintiff stated merely "head injuries with concussion".

On the 27th April, 1993 the plaintiff's summons to amend the Statement of Claim was heard and it was ordered that the Statement of Claim be extensively amended to include allegation of injuries/ disabilities mainly neurological in nature. There were in fact nineteen additional particulars relating to head and brain damage.

By letter dated April 19, 1993 the defendant's Attorney wrote to the plaintiff's Attorney as under:-

> "We have received your application to amend the Statement of Claim and affidavit in support. Please let us have a copy of the medical report of Dr. John Hall. Please also let us know urgently whether you will consent to the plaintiff being examined by a Doctor of our choice. We need to know this by Thursday of this week so that we know whether to apply to the Court for an Order that the Plaintiff be examined by a Doctor of our choice."

On the 29th April, 1993 Mr. Campbell, Attorney-at-Law for the plaintiff replied as under:

> "Thanks for your Mr. Davis' letter of the 19th April, 1993 received in these the 28th inst. The practice and the cases show that the defendant

> is entitled to have the plaintiff examined by an independent doctor. should you send me a roster of doctors and I know there are several Neurologists in Jamaica, I should be pleased to advise my client to cooperate by attending one of these doctors."

Subsequently, plaintiff's Attorney was asked directly in a telephone conversation whether he would consent to have the plaintiff examined by Dr. Randolph Cheeks, Consultant Neurosurgeon, the Doctor of our choice. He indicated that he would not consent to this and hence an application for an order to allow medical examination came before me.

By a summons dated 3rd June, 1993, an application was made by Defendant seeking an order as follows:-

> "That the plaintiff be examined by Dr. Randolph Cheeks, Consultant Neurosurgeon with regard to the alleged neurological injuries/ disabilities set out in items (vi) - (xxiv) under the heading "Particulars of injuries" in paragraph 3 of the plaintiff's Amended Statement of Claim ....., failing which the proceedings herein be stayed."

Mr. Dennis Goffe, learned Queens Counsel for the defendant skilfully submitted that the request of the defendant was perfectly reasonable since they were faced with new and broader allegations which had not been made in the Statement of Claim. The defendant ought to have an opportunity of being advised on the change. This would be necessary in order to assess the amount to pay into court so as to dispose of the whole matter without it coming to trial. Additionally, if defendant has a limited insurance he may need to know the extent of his person liability. It is, he submitted, particularly important that the defendant be able to choose his own expert witness.

The question which I have to decide is whether the plaintiff was entitled to refuse to be examined by a particular doctor.

It is now clearly established that if the defendant in a personal injury case makes a reasonable request for the plaintiff

to be medically examined by a doctor whom the defendant has chosen, then the plaintiff should accede to such a request, unless he has reasonable ground for objecting to that particular doctor. This was decided in the case of Edmeades v. Thames Board Miles Limited (1969) 2 AER 127 where the following principles with respect to a stay of proceedings emerged. In the judgment by the United Kingdom Court of Appeal presided over by Denning MR, the headnote reads as follows:-

> "The plaintiff brought an action for injuries received at his work. There was no contest as to liability. The only question was damages. The statement of claim described his injuries but made no suggestion of osteoarthritis. The order giving directions said there should be one medical witness on each side and the plaintiff was accordingly examined. Medical reports were exchanged. The defendants noticed that the plaintiff's Doctor raised a new complaint, viz., that he suffered from osteoarthritis caused or aggravated by the accident. The defendants' solicitors realised that the plaintiff's solicitors would apply to amend the statement of claim accordingly. The defendants' solicitors wished to have the plaintiff examined on their own behalf and they wrote suggesting six possible doctors. The plaintiff's solicitors replied that they would allow examination by the original doctor but not by any of the six suggested. The defendants applied to the master for the action to be stayed unless the plaintiff submitted to examination by one of the six doctors. The master refused the application. Held The appeal would be allowed because the Court had jurisdiction to grant a stay whenever it was just and reasonable to do so as where the conduct of the plaintiff in refusing a reasonable request to have a medical examination was such as to prevent the just determination of the cause."

It is to be observed that the focus is not only to the reasonableness of the request for the examination made by the defendant but also to the conduct of the plaintiff and the test clearly is whether the plaintiff's conduct is such as to prevent the just

determination of the cause.

Following this case is Starr v. National Coal Board (1977) 1AER 243 in which the United Kingdom Court of Appeal was dealing with the refusal by a plaintiff to submit himself to a medical examination on behalf of the defendant by a doctor as reasonably required by the defendant.

It was held 'that the Court has jurisdiction to grant a stay if the defendant's request for a medical examination was reasonable and the plaintiff's refusal of it was unreasonable. The plaintiff was acting unreasonably if his conduct in refusing the defendant's reasonable request was such as to prevent the just determination of the cause. In exercising its discretion whether or not to grant a stay the Court should balance, among other factors, the plaintiff's right to personal liberty against the equality fundamental right of the the defendant to defend himself in the litigation as he and his advisers thought fit, which included the freedom to choose his own expert witnesses. There was duty on each party to expose the reasons for his action and to provide the Court with the necessary material known to him as that the Court will be fully informed before it exercises its discretion but at the end of the day it was for him who sought the stay to show that, in the discretion of the Court it should be imposed.'

Scarman L.J. as he then was in delivering the judgment after a review of all the cases on the subject had this to say at p.249.

> "So what is the principle of the matter to be gleaned from those cases? In my judgment the Court can order a stay if, in the words of Lord Denning M.R. in Edmeades case, the conduct of the plaintiff in refusing a reasonable request for medical examination is such as to prevent the just determination of the cause. I think that those words contain the principle of the matter. We are, of course, in the realm of discretion. It is a matter for the discretion of the judge, exercised judically on the facts of the case, whether or not a stay should be ordered."

So in the exercise of the discretion in this case the judge will have to balance two competing fundamental rights which are protected by the constitution. First there is the plaintiff's right to personal liberty. Secondly, there is an equally fundamental right, the defendant's right to defend himself in the litigation which includes the freedom to choose the witness that he will call.

How then does one balance these competing fundamental rights? The Court must look at the defendant's request and ask the question. Is it a reasonable request? The defendant is not to be regarded as making an unreasonable request merely because he wishes to have the plaintiff examined by a doctor unacceptable to the plaintiff. The decisive factor is that of the interest of justice or of the just determination of the particular case. Accordingly, it is only the interest of justice that can require one or other of the parties to have to accept an infringment of a fundamental human right. The plaintiff can only be compelled to an infringement of his personal liberty if justice requires it. Likewise the defendant can only be compelled to forgo the expert witness of his choice if justice requires it.

In every case, the particular facts of the case on which the discretion has to be exercised must be stated as well as the reasons for the action so that the Court can exercise its discretion properly.

Mr. Ainsworth Campbell, learned counsel for the plaintiff in his brief but candid submissions stated that to accede to the defendant's request would cause an invasion of the plaintiff's privacy since the doctor was one whom he had no reason to trust. Further, he submits - the medical assessment should be carried out by a Neurologist rather than a Neurosurgeon and preferably from a list submitted by the defendant.

Is it sufficient for the plaintiff to say that he would prefer to be examined by a Neurologist, rather than a Nurosurgeon? I think

not. There is no evidence before me indicating that a Neurosurgeon lacks the competency to carry out the examination. Similarly it would not be sufficient for the plaintiff to say there are other experts available in that particular field of medicine and therefore there is no necessity for him to be examined by the nominated doctor of the defendant. Provided the doctor is properly qualified the defendant is entitled to insist on the examination unless it can be shown that such a course would be unfair or unreasonable from the point of view of the plaintiff. What is regarded as such will necessarily depend on the facts of each individual case.

In any event it would be serious to say of any properly qualified and experienced doctor that it would be unreasonable for him to conduct a medical examination unless the ground of objection is personal to the particular plaintiff. If, on other than personal grounds, the medical examination is unfairly unfavourable that is a matter which can be dealt with at the hearing by cross-examination and comment. Besides, an objection to the doctor's skill or probity or his anticipated behaviour at the examination may constitute a bar to that doctor examining any other person and thereby producing a serious disincentive to doctors generally in carrying out examination for litigation purposes.

It was decided in the case of Hall v. Avon Area Health Authority (Teaching) (1980) 1 AER 517 C.A. that 'where there was a reasonable request for medical examination of a plaintiff by the defendant's nominated doctor, the Court had to have good and substantial reasons put before it, either by counsel on instructions or where appropriate on affidavit before it was entitled to impose a condition that the plaintiff's doctor should be present at the examination.'

The United Kingdom Court of Appeal in the judgment delivered by Stephenson L.J. suggested strongly that such a condition should be imposed sparingly and not allowed to become a general rule of practice. Any widespread adoption of this practice will inevitably cause delay, injustice and extra expense. The Learned judge also

referred to the principle of reciprocity which he says must not be infringed.

In my view, if there is to be reciprocity then it would be an unreasonable condition to ask the defendant to send a list of doctors from which the plaintiff will choose. It seems quite impracticable for the plaintiff in the original examination to have been examined by a doctor taken from a list of names submitted by the defendant. Yet in the instant case the condition imposed by the plaintiff required the defendant to submit a roster of doctors from which the plaintiff will select the doctor of his choice to be examined.

I do not accept Mr. Campbell's submissions since they ignore the established principles. Applying those principles to the instant case I think that the request of the defendant was perfectly reasonable. In the circumstances of the present case it is quite unreasonable for the plaintiff or his attorney to refuse to allow the plaintiff to be examined by the doctor of the defendant's choice in order that the defendant may have a second opinion in the light of the aggravated injuries which it is now alleged were suffered by the plaintiff.

The Court can exercise this result by granting a stay of the proceedings unless and until the plaintiff submits himself to such a medical examination.

Accordingly, there is order in terms of the summons with a certificate for one counsel.