NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
CLAIM NO. C.L. R 079 OF 2002

BETWEEN	SHANTALA ROXBOROUGH (A minor, who sues by her mother And next friend, Juliet Blythe)	CLAIMANT
AND	DR. RAMA DEVI NANGARAVI	1ST DEFENDANT
AND	SAVANNA-LA-MAR PUBLIC GENERAL HOSPITAL	2ND DEFENDANT
AND	WESTERN REGIONAL HEALTH AUTHORITY	3RD DEFENDANT
AND	THE ATTORNEY GENERAL	4TH DEFENDANT

IN COURT

Antoinette Haughton Cardenas instructed by Haughton and Associates for the claimant
Thalia Francis instructed by the Director of State Proceedings for all the defendants

October 7, 8 2008 and March 6, 2009

APPLICATION TO STRIKE OUT STATEMENT OF CASE FOR NON-COMPLIANCE WITH ORDER FOR DISCLOSURE

SYKES J.

1. This is an application by the claimant to strike out the defendants' statement of case on the ground that they have not complied with an order for specific disclosure made on October 6, 2003. The

application was dismissed on October 8, 2008. These are the written reasons.

2. The order which it is alleged that the defendants failed to comply with was an order for specific disclosure. The context of this order is a claim in negligence against the defendants arising out of treatment administered by medical staff at the Savanna-la-mar Public General Hospital. The case came on for case management before McCalla J. (as she then was) on October 6, 2003. Her Ladyship made the usual standard disclosure order as well as an order for specific disclosure in these terms:

> *Specific Disclosure (sic) by the Defendants (sic) of all the Medical Records (sic) in relation to the Claimant (sic), Shantala Roxborough on or before 5th December 2003.*

3. After submissions on the application to strike out the statement of case of the defendants, the issues between the claimant and the defendants are very circumscribed. It became clear that claimant's case rested on the resolution of the following: (i) whether the site of the location of the cannula on the body of Miss Shantala Roxborough was appropriate; (ii) whether the rate of infusion of the drug dilantin, was done negligently; (iii) assuming (i) and (ii) or (i) or (ii) was negligently done, whether this alleged negligence caused the left arm of Miss Roxborough to become cyanosed with the result that it was amputated below the elbow. If the claimant failed on any of the above, she hung her claim on another limb which is this: that the medical staff at the Savanna-la-mar hospital can be held liable in negligence on the basis that the treatment administered after the left arm became cyanosed did not meet the standard of reasonably competent medical personnel. If I am correct in identifying the real issues in dispute then it necessarily follows that the alleged non-disclosure has to be examined in light of what the real issues are.

4. From what has been said, it is clear that there is no issue that (a) Miss Roxborough was a patient at the Savanna-la-mar hospital; (b) a cannula was placed on her left arm; (c) the drug dilantin was

administered; (d) the claimant developed cyanosis which eventually became what is known as "Purple Glove Syndrome"; (e) Purple Glove Syndrome is a possible side effect of dilantin and (f) there was an amputation below the left elbow.

The submissions

5. Mrs. Haugton Cardenas took the view that the defendants had not complied with the order for specific disclosure of the medical records and this omission would prejudice her ability to present the claimant's case effectively. According to her, she would not be able to secure sound expert advice because the information was not disclosed. She added that since the records are in the possession of the defendants and they have failed to comply with the order then their case should be struck out. For this position she relied on rule 28.14 (1) and (2) of the Civil Procedure Rules ("CPR"). The provision reads:

> *(1) A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at trial.*
>
> *(2) A party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out.*

6. There is, therefore, a legal basis for the application. Counsel is seeking to enforce the specific disclosure order of McCalla J. The remaining question is whether the factual circumstances amount to failure to give disclosure within the meaning of the rules.

7. Miss Francis, for her part, while conceding that in the past the disclosure was not as fulsome as required by the order, the position at trial now is that the defendants have produced all the records they have been able to find. In the past, she conceded, the records were not fully disclosed not because the defendants were flouting the orders but because there was difficulty in locating all the records. In

this regard, she referred to the affidavit of Mrs. Susan Reid-Jones who explained the problems in relation to locating the records.

8. I have looked at the records. They show that Miss Roxborough's in-patient care in the health care system began at approximately 9:55 p.m. on May 4, 2001, at Savanna-la-mar, in the western end of the island and ended at the Bustamante Hospital for Children in Kingston, in the east, on June 19, 2001, when she was discharged. She was transferred to the Bustamante Hospital on May 5, 2001. Thus two sets of records were generated in relation to the claimant. This, apparently, explains the difficulty in putting them all together.

9. In support of her submission Miss Francis cited rules 28.1 (2), 28.2, 28.6 (1) (a) and (b), 28.8 (2) - (5), 28. 12 (1) (a), 28.14 of the CPR. According to Miss Francis, the effect of all these rules is that the defendant is not required to do the impossible. She continued by submitting that while a party is under an obligation to disclose documents which are or were under its control the rules, quite sensibly, appreciate that there may be circumstances in which the document cannot be produced. For example, the documents may be destroyed or are no longer in the possession of the litigant. The rules permit the litigant to explain what has become of the documents in the event that they are no longer under the litigant's control. If the explanation is true and there is nothing to suggest that the litigant is dissembling, then he has fulfilled the disclosure requirement. I agree with these points made by Miss Francis.

10. I give the reasons for agreeing with Miss Francis. Rule 28.1 (3) states that a party discloses a document, by revealing that it exists, or had existed. The past tense is significant because it accepts that a document may no longer exist, and if it does not then clearly it cannot be actually produced, though its prior existence must be disclosed. One of the significant consequences if it is shown that the document no longer exists is that by the law of evidence secondary evidence is admissible, because the original is no longer available. This is not the only consequence.

11. Rule 28.2 limits the duty of disclosure to documents that were in the disclosing party's control but that limitation is not a narrow one. Documents under a party's control, according to the rule, extends to (a) documents that are or, were in the physical possession of the party; (b) documents which that party has or had a right to possession, and (c) documents which that party has, or had a right to inspect or take copies. The past tense is noted.

12. Rule 28.6 (1) (a) or (b) speaks to specific disclosure. Here one sees a pragmatic approach to the issue of disclosure. Where an order for specific disclosure is made then the party affected by the order is to disclose the documents or class of documents referred to in the order, or search for them. When this obligation is linked to rule 28.1 (3) then clearly, as Miss Francis submits, the disclosure obligation cannot be said to be flouted, if, for example, the affected party truthfully discloses that the document no longer exists, or cannot be found, assuming, of course, that the party had *control* of the document within the meaning of *control* as defined in rule 28.2 (2).

13. Finally, when one examines the procedure for disclosure (rule 28.8 (2) - (5), and what follows after the disclosure is made, (rule 28.12 (1) (a)), there is recognition that the document may not be available for inspection and copying, despite the best efforts of the disclosing party. The fact that a document is disclosed, without more, does not mean that it must be inspected. Some documents are protected from inspection even if they are disclosed. The protection may arise because of legal professional privilege. In relation to litigation involving the state, the inspection may be prohibited by a claim to public interest immunity. In these situations, the disclosing party would have complied with the order for disclosure. It can also be that the document may no longer exist. Hence rule 28.8 requires the disclosing party to indicate which documents are no longer under his control, what has happened to the documents no longer under his control, and where such documents are, to the best of the disclosing party's knowledge, information or belief.

14. The reasoning so far is supported by rule 28.12 (1) (a), which circumscribes the right of the person who receives disclosure. The

party who receives the disclosure has right to inspect any document disclosed, except (a) those which are no longer in the physical possession of the disclosing party, or (b) those to which a right to withhold has been claimed.

15. It would seem that if the party under the obligation to disclose complies with the rules, that is to say, identifies the documents under his control that exists or had existed, and, in accordance with the rules, provides an explanation for those over which he no longer has control, then he has met his obligation. Once the party, on the face of it, has fulfilled his obligation, then the burden shifts to those who contend that this is not the case. Merely, to say the document was not produced is insufficient. If the threshold was as low as this, then there would be no point in making provision for explanations where the document is not in the possession of the disclosing party, since any explanation could never overcome the bald fact, that the document was not produced. It has to be shown that the party has failed to meet the standards set by the rules, that is, the party has failed to disclose and provided no explanation or acceptable explanation, since it must be recognised that some explanations may be so preposterous, that it amounts to no explanation. It is only when it is demonstrated that the disclosing party has failed to meet the CPR standard, that the possibility of imposing a sanction can arise.

16. I am not to be taken as encouraging a lax approach to disclosure. Far from that being the case. The CPR itself highlights the great importance of proper disclosure, by providing that a remedy open to a party enforcing a disclosure order, is a striking out of the offending party's entire statement of case or a part of it (see rule 28.14 (2)). The reason for this approach is obvious. In the new culture of open litigation, where establishing the truth is the primary objective, a party who refuses to disclose documents may distort the litigation process, and secure a judgment in his favour by suppressing vital information that may have undermined his case. This is not to be permitted. This is why the duty of disclosure is ongoing, and does not cease until the proceedings are concluded (see rule 28.13 (1)). Without defining the limits of the expression "proceedings are concluded", the expression must necessarily cover the period between judgment and

perfection of the formal order, if not in the Court of Appeal, but certainly in the trial court. Thus non-disclosure can attract very serious consequences

Resolution

17. In this particular case, and I suggest in all cases where there is an issue of whether there has been a failure to comply with a disclosure order and such failure may trigger a striking out, the court has to proceed in a careful and systematic manner.

18. This careful and systematic approach requires the court to determine (a) what are the real issues in the case? (b) whether there was in fact a breach of the disclosure order; (c) how the breach came about?; (d) the impact of the breach on the other parties in the specific case; (e) the impact of the breach on the case generally, such as whether the trial date may be lost; (f) the impact on the resources of the court if time is required to remedy the breach and (g) the impact on other litigants waiting to avail themselves of the courts' resources. These seven points do not represent all the matters to be considered, but I humbly suggest that an approach which does not include these issues increases the risk of an erroneous decision because the CPR incorporates the concept of proportionality. This means that the sanctions imposed must be calibrated to meet the breach in any particular case. Thus, persistent flouting of the court's orders in a given case may provoke the ultimate sanction of a striking out. On the other hand, an honest belief that there was compliance which turned out to be incorrect may lead to a costs sanction.

19. In addition to the concept of proportionality, it would seem to me that there is a more fundamental reason why the court must examine each case and determine the appropriate response in all the circumstances of the particular case. Section 20 (2) of the Constitution, guarantees a fundamental human right of access to an independent and impartial court to determine civil rights and obligations. This right is available to the industrious litigant as well as the sluggish, the difference being that the sluggish risks being ejected if he is consuming more than his fair share of resources. Thus a striking out, if not warranted by the case, will almost invariably amount to a breach of the litigant's

constitutional right to have his right or obligation determined by an independent and impartial court within a reasonable time. This explains why a striking out is always seen as severe and drastic remedy because it, in effect, boots the offending party out of court without a trial. It is against this background that Lord Woolf's judgment in ***Biguzzi v Rank Leisure plc*** [1999] 1 W.L.R. 1926 is to be read in the Commonwealth Caribbean where written constitutions, guaranteeing a right of access to the courts, are the norm. His Lordship emphasised that under the new rules the court is well armed with powers to prod the litigants forward and used appropriately, striking out may not be necessary. However, it should be noted that Lord Woolf did not say that a striking out could never be the appropriate response. Therefore this should not be taken as a return to the pre-CPR days when ignoring of time schedules was the order of the day, and neither should it be taken that the importance of having one's matter heard as an important aspect of the rule of law, means that sanctions will not be imposed. If it happens that striking out is appropriate, then the courts ought not to hesitate to act.

20. Turning now to this particular case in order to determine whether there was a breach in the specific areas mentioned by Mrs. Haughton Cardenas, I shall examine her complaint more closely. As has been pointed out above, the issues between the parties have been narrowed considerably. Learned counsel focused her attention on the size and location of the cannula. She was also concerned about the rate of infusion of dilantin as well as the treatment regime implemented by the health care team after it was observed that cyanosis had developed or was developing. It seems fair to say that the alleged acts of negligence involve only the health care team at the Savanna-la-mar hospital and not the Bustamante Hospital for Children.

21. I have examined the records disclosed and I need to make it clear that I am not deciding on the accuracy or otherwise of the disclosed records. While it is not entirely clear from patient's notes from the Savanna-la-mar hospital, what the size of the cannula was, and where it was located, there is, however, among the disclosed records, a letter dated May 30, 2001, from Dr. Ramadevi Nanga to the Chief Executive Officer of the hospital. He states that the "IV cannula was

secured to the dorso-lateral aspect of the left wrist and inj, Diazepam 2.5mg given IV slowly to stop the fits". This gives the location of a cannula but the issue for Mrs. Haughton Cardenas is whether this cannula was the one through which the dilantin was administered. There is some assistance to be gleaned from a letter from a Dr. A. K. Sajabi, dated July 1, 2001, to the Chief Executive Officer of the hospital, in which he states "through the available cannula, Dilantin was administered (slow push, at 50mg/min), totaling 200mg over four minutes." Dr. Sajabi had said earlier in the letter that the "cannula [was] located at the lateral most aspect of the left wrist."

22. These two letters would seem to suggest firstly, that the cannula was located on the lateral aspect of the left wrist and secondly, the rate of infusion was 50mg/min at a slow push. If this is so, then it would not be accurate to say that the defendants have not disclosed one of the matters of concern to the claimant albeit that it is not in the patient notes.

23. On the question of cyanosis, Dr. Sajabi in the same letter wrote "[t]he portion of the left hand of the patient, distal to the intravenous cannula was seen to be cyanosed and the cannula was immediately removed and an alternate intravenous access site was obtained at the right antecubital fossa." All this took place between 10:00 p.m. and 11:00 p.m., when it was said that the claimant arrived at the hospital. This letter would provide, it appears, subject to cross examination, some indication of when cyanosis developed.

24. There is a further letter of Dr. Dayanand Sawh, dated September 26, 2001, which indicates that Miss Roxborough was transferred to the Bustamante Hospital on May 5, 18 hours "after experiencing an adverse drug reaction to the administration of intravenous phenytoin for status epilepticus." The left hand was noted to be "discoloured, bluish-purple in colour and dusky, with early necrosis of the distal phalanges in all digits."

25. It appears that the narrow area of time relevant to Mrs. Haughton Cardenas is 9:55 pm on May 4, 2001, when the claimant was first seen

in Savanna-la-mar and 18 hours later when she arrived to the Bustamante Hospital.

26. Counsel for the claimant turned her attention from the Bustamante Hospital for Children's records and submitted that the records on her initial admission to that institution were not disclosed. It is true that McCalla J. (as she then was) ordered specific disclosure of all the medical records of the claimant, which must necessarily have included the records from the Bustamante Hospital for Children. This order was made before the issues were further refined during the course of Mrs. Haughton Cardenas' submissions. It is clear for her submissions that the records of direct and immediate relevance to this negligence claim are those at the Savanna-la-mar hospital since, as I understood her submission, all the acts being relied on to constitute the tort of negligence, occurred while the claimant was in the care of the Savanna-la-mar hospital. If this is so, then insisting on further disclosure from the Bustamante Hospital for Children seems to be a pointless exercise and will increase costs and there is no immediately apparent benefit. Counsel said she wanted to know the initial thoughts of the health care team at the Bustamante Hospital since that may shed light on what happened at Savanna-la-mar. I have examined the records from the Bustamante Hospital and it is the case that the records do not have what Mrs. Haughton Cardenas is interested in. Thus on the face of it, there is a breach of the order for specific disclosure. However, I am not of the view that this breach should trigger a striking out because the claim for negligence is not based on what happened at that hospital and I am not sure that further expenditure of money and time searching for those records is appropriate. I think that the time and resources would be better spent by securing, as best as possible, all the records from the Savanna-la-mar hospital and engaging an expert who is to provide an opinion on the treatment administered to the claimant.

27. What this application has reinforced, is the need for effective and active case management each time the case comes before the court so that the issues are clearly identified and refined. The process of refinement to get to the ultimate issues never stops. The fact that a case has been through a case management conference and a pre-trial

review does not mean that the case management powers in the CPR are no longer important. The quest to control costs, distill the real issues in dispute never ends until judgment is delivered. Thus even at this stage of the proceedings I am able to exercise case management powers and in so doing, taking full account of all the submissions made on behalf of the claimant, I cannot find that non-disclosure of all the records from the Bustamante Hospital for Children, in the context of this case, will have an adverse impact on the proceedings. The claimant is not accusing the medical staff at that hospital of negligence. This being so, the breach is not one which would derail the fairness of the trial. It also appears that the defendants have disclosed as best they can all the records from Savanna-la-mar.

Disposition

28. The application is dismissed.