[2024] JMSC Civ 128

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV02579

BETWEEN	**GAVIN WARREN (BY NEXT FRIEND CHARMAINE NISBETH)**	**CLAIMANT**
AND	**THE MINISTER OF NATIONAL SECURITY**	**1ST DEFENDANT**
AND	**THE COMMISSIONER OF CORRECTIONS**	**2ND DEFENDANT**
AND	**THE SUPERINTENDENT OF ST CATHERINE ADULT CORRECTIONAL CENTRE**	**3RD DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**4TH DEFENDANT**

IN CHAMBERS

Mr John Clarke and Ms Kimberley Facey for the Claimant

Mr Matthew Gabbadon instructed by the Director of State Proceedings for the Defendants

Heard: October 10 & 22, 2024

Civil Procedure – Application to strike out amended statement of case – Parties to litigation must have mental capacity — Words "incapable of managing his or her own affairs" not defined in Mental Health Act or Civil Procedure Rules - Court may put matters right in keeping with the overriding objective – Order is retrospective to date of commencement of the claim– Amendment to pleadings overtakes original pleadings

CIVIL PROCEDURE RULES, RULE 23.3(1), (4)

WINT-BLAIR J

[1] On May 12, 2023, Wong-Small, J, ordered inter alia that Gavin Warren is incapable of managing his own affairs by reason of mental disorder within the meaning of the Mental Health Act. Mr. Warren is declared a patient under the Mental Health Act. Ms Nisbeth, his mother, is permitted to conduct legal proceedings in the name of Mr. Warren or on his behalf under the Mental Health Act and Ms Nisbeth is appointed the next friend of Mr. Warren under part 23 of the Civil Procedure Rules. Ms Nisbeth relied on the reports of Dr Geoffrey Walcott, Consultant Psychiatrist which are also before this court and not in dispute.

[2] Gavin Warren while an inmate was hit on the head with a stone by a fellow inmate at the Saint Catherine Adult Correctional Centre on November 13, 2018. Mr. Warren was rushed to the Saint Catherine prison medical facility then subsequently transferred to and admitted at the Spanish Town Hospital. From there he was transferred to the Kingston Public Hospital(KPH) where he was also admitted.

[3] On November 28, 2018 Mr. Warren was discharged from the KPH and escorted back to the prison. He completed his sentence on December 3, 2018 and was released.

[4] On June 25, 2019, Mr. Warren issued a claim form and particulars of claim seeking damages in negligence against the defendants and on October 25, 2019 he issued an amended claim form and particulars of claim with respect to the claim herein.

[5] On February 18, 2020 his medical evaluations commenced. On or about March 28, 2022, Dr Walcott prepared a medical report of even date headed fitness to plead report on Gavin Warren. This report stated that Mr Warren's mental status examinations and evaluations revealed that he did not show significant comprehension of the details of the legal proceedings or the implication of his decisions on the outcome. Mr. Warren was not able to instruct his attorney

appropriately with full understanding of the ramifications of his instructions and would not be able to give evidence on his behalf in the proceedings.

[6] Dr Walcott made those findings using the criteria of fitness to plead concerning Mr. Warren's ability to participate in the court proceedings or to instruct his attorney. Those findings were made even though Mr. Warren understood the basic premise of his legal matter.

[7] On October 10 2024, two applications were before this court. The first was an application for interim payments which was withdrawn by the claimant. The second was an application to strike out the amended claim and particulars of claim brought by the defendants. That second application proceeded to a hearing and it is that decision which is set out below.

[8] The fourth defendant challenges the amended statement of case filed on October 4, 2021 before the appointment of Ms Nisbeth as next friend. She has since filed a further amended claim form and particulars of claim on November 3, 2023.

[9] The fourth defendant's claim[1] sought the following orders:

1. Abridging time for the hearing of the application.
2. That the court has no jurisdiction to try the claim.
3. That the claim be struck out.
4. Costs to the defendant.
5. Such further and or other relief as the court deems just.

[10] The application was supported by the affidavits of Krista Leigh-Cole, attorney-at-law in the Chambers of the Attorney General. She deposed that on October 4,

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[1] September 23, 2024

2021, the claimant filed and issued an amended claim form and an amended particulars of claim to include medical reports dated January 22, 2021 and September 22, 2021 from Dr Geoffrey Walcott, Consultant Psychiatrist.

[11] On January 22 2021, Dr Walcott found that the claimant at his evaluation on February 18 2020, had periods of confusion and would not respond appropriately to questions asked repeatedly such as giving the month of the year. He had overt cognitive deficits with his attention and short-term memory which were indicative of impairment. At Mr. Warren's review on January 20 2021, Dr Walcott found that Mr. Warren's memory problems and confusion had gotten worse as he had gone to the market on occasion and had forgotten what items he was there to buy. Dr Walcott found that Mr Warren had difficulties travelling on his own and had gotten lost on occasion, including on the date of that review. Dr Walcott has diagnosed Mr. Warren as having major neurocognitive disorder due to traumatic brain injury and major depressive disorder recurrent episode moderate. The doctor found that Mr Warren's cognitive symptoms were very likely to be permanent due to the likely presence of white matter disease seen on an MRI scan which was indicative of permanent brain damage.

[12] In the medical report dated September 22, 2021, Dr Walcott found that Mr Warren had worsened memory problems at the review on September 8, 2021; that he had confusion, was unable to maintain basic hygiene and had difficulty when he had to go outside of his home; further that Mr Warren was confused when asked about time and place and that he had cognitive deficits in short term memory and attention. A cognitive exam revealed that Mr Warren had deficits in attention and short-term memory and again Dr Walcott diagnosed Mr. Warren as having major neurocognitive disorder due to traumatic brain injury with major depressive disorder recurrent episode moderate.

[13] The diagnosis was that Mr Warren's cognitive symptoms had remained stable over time, which suggested they were permanent. Doctor Walcott found that Mr Warren

had a cognitive decline of 23.3% and that based on his cognitive deficit at one-year post-injury his level of functioning was not likely to significantly improve.

[14] It was the view of the affiant that Mr Warren was a patient at the time when he filed and issued the amended claim form and amended particulars of claim on October 4, 2021 as he was suffering from or was suspected to be suffering from a mental disorder within the meaning of the Mental Health Act. At the time Mr Warren did not have a next friend to conduct proceedings on his behalf. The filing and issuing of the amended claim form and amended particulars of claim at that time and in that circumstance was a breach of the process of the court rendering them a nullity and preventing the court from having jurisdiction to try the claim.

[15] The affidavit of Ms Kimberly Facey in support of the claimant attached the affidavit of Miss Charmaine Nisbeth, mother of Mr Warren. On June 9, 2022, she obtained an order of this court from Wong-Small, J as set out herein at paragraph [1], in claim number SU2022 FD it is not in dispute that she did so in reliance on the medical reports prepared by Dr Geoffrey Walcott.

[16] The question raised by the fourth defendant on this application is whether the claimant was a patient on October 4, 2021, within the meaning of the Mental Health Act and Civil Procedure Rules ("CPR.")

[17] The word "patient" is defined by rule 2.4:

> *"a person who by reason of mental disorder within the meaning of the Mental Health Act is incapable of managing his or her own affairs."*

[18] The definition of patient in rule 2.4 is similar to that found in Section 2 of the Mental Health Act which provides that:

> *"patient means a person who is suffering from or is suspected to be suffering from a mental disorder.*

[19] The term "mental disorder" is defined in Section 2 of the Mental Health Act as follows:

mental disorder means:

a) a substantial disorder of thought, perception, or orientation of memory which grossly impairs a person's behavior judgment capacity to recognize reality or ability to meet the demands of life which renders a person to be of unsound mind; or

b) mental retardation where search a condition is associated with abnormally aggressive or seriously irresponsible behavior

[20] The defendants rely on the case of **Sharon Pottinger v Keith Anderson**[2] in which Phillips JA gives the meaning of the term patient within the meaning of part 23 of the CPR and Section 2 of the Mental Health Act at paragraphs 42 and 43 of her judgment.

[21] In the highly instructive case of **Masterman-Lister v Brutton**[3] a decision of the Court of Appeal in the United Kingdom ("UK"), cited by the fourth defendant, the proceedings were properly instituted by the claimant's father as next friend. The claimant was an infant when he began the action, the issue was whether the claimant might be a patient for the purposes of CPR 21.1(2)(b) which reads:

> *"patient" means a person who, by reason of mental disorder within the meaning of the Mental Health Act, is incapable of managing and administering his own affairs."*

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[2] [2013] JMCA App 35

[3] [2002] EWCA Civ 1889

[22] There was no definition in the CPR of the UK or their Mental Health Act of the meaning of the words "incapable of managing and administering his own affairs."

[23] The definition of patient in the CPR of Jamaica is identical without the words "and administering" and adding the word "her" to read "his and her own affairs."[4] There is, similarly, no definition in our CPR or Mental Health Act of the meaning of the words "incapable of managing his or her own affairs."

[24] At paragraph 17 of Masterman-Lister, Kennedy, LJ said:

> *"It is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved, and that the burden of proof rests on those asserting incapacity. Mr Langstaff submitted that where, as in the present case, there is evidence that as a result of a head injury sustained in an accident the doctors who have been consulted agree that for a time the claimant was incapable of managing his property and affairs he can rely on the presumption of continuance. That I would not accept. Of course, if there is clear evidence of incapacity for a considerable period then the burden of proof may be more easily discharged, but it remains on whoever asserts incapacity."*

[25] Kennedy, LJ expressly concluded that rule 21.1 of the UK CPR did not contain a requirement for a judicial determination of the question of whether or not capacity exists. In his view, it was a matter for the Rules Committee. He said that it was for the court to investigate the issue of capacity as a matter of practice, whenever there was any reason to suspect that it is absent (e.g. significant head injury) at

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[4] "Patient" means a person who by reason of mental disorder within the meaning of the Mental Health Act is incapable of managing his or her own affairs.

the case management stage on the medical evidence, in order to be satisfied that incapacity exists.

[26] It is arguable that this is the position in Jamaica, given the near identical provision in our CPR. In the case at bar, there has been a judicial determination of the issue of incapacity and a court order now governs the proceedings.

[27] In the case of **White** v **Fell**,[5] the issue of incapacity arose in the context of limitation, Boreham, J said:

> "*The expression incapable of managing her own affairs and property must be construed in a common sense way as a whole. It does not call for proof of complete incapacity. On the other hand, it is not enough to prove that the plaintiff is now substantially less capable of managing her own affairs and property than she would have been had the accident not occurred. I have no doubt that the plaintiff is quite incapable of managing unaided a large sum of money such as the sort of sum that would be appropriate compensation for her injuries… The question is: is she capable of doing so? To have that capacity she requires first insight and understanding of the fact that she has a problem in respect of which she needs advice… Secondly, having identified the problem, it will be necessary for her to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and to advise her appropriately…Finally, she needs sufficient mental capacity to understand and to make decisions based upon or otherwise give effect to, such advice as she may receive."*

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[5] Unrep 12 November 1987 at p. 9-10

[28] The test in **White v Fell** was related to the individual plaintiff and her immediate problems, however, it was accepted by Lord Justice Kennedy in **McMaster- Lister** as the right approach.

[29] One of the objects to be achieved by striking out a claim is to stop the proceedings and prevent the further waste of resources on proceedings which the claimant has forfeited the right to have determined. This is not such a case.

[30] In the limitation case of **Leather v Kirby**,[6] cited in **Masterman-Lister**, Lord Denning MR found that the plaintiff had no insight at all into his mental state. He was incapable of instructing a solicitor properly. He was not capable of exercising any reasonable judgment on a possible settlement. The action should have been commenced by a next friend. Kennedy LJ said it was not, but that was put right at trial when at the suggestion of the trial judge a next friend was appointed."[7]

[31] Therefore, the position can be regularised retrospectively. Kennedy, LJ made this clear at [31]:

> *"Provided everyone has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position of. To do otherwise would be unjust and contrary to the overriding objective of the CPR, but in any given case the ultimate decision must depend on the particular facts. In the context of litigation rules as to capacity are designed to ensure that claimants and defendants who would otherwise be at a disadvantage are properly protected, and in some cases that parties to the litigation are not pestered by other parties who should be to some extent*

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[6] [1965] 2 All ER 441 at 444

[7] Para 22 of Masterman-Lister

restrained. However, finality in litigation is also important, and the rules as to capacity are not designed to provide a vehicle for reopening litigation which having apparently been properly conducted (whatever the wisdom of the individual decisions in relation to it) has for long been understood to be at an end."

[32] To my mind, this means that the orders of the learned judge appointing a next friend date back to the date on which the claim commenced if it were not amended.

[33] Finally, once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried.[8] The court will give due regard to the pleadings as they stand, the purpose of amendment being to determine the real question in controversy between the parties. The parties now include Ms Nisbeth.

[34] Lord Hodson said it this way[9]:

The defence in question is a pleading which is capable of amendment like any other pleading. Once it is amended, it takes its place on the record as a part of the pleadings setting out the issues upon which the action will be tried. (see ***Sneade v. Wotherton Barytes and Lead Mining Co.****[10] where Lord Collins M.R. said: "It appears to me that the writ as amended becomes for this purpose the original commencement of the action.")*

[35] I adopt the words of Kennedy, LJ as applicable to this application. Not only would it be unjust and contrary to the overriding objective of the CPR, but in any given

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[8] Warner v Sampson [1959] 1 Q.B. 297

[9] [1959] 1 Q.B. 297 at 321-322

[10] [1904] 1 K.B. 295

case the ultimate decision must depend on the particular facts. There has been no ventilation of the issues raised on the facts and law as set out in the claimant's statement of case. In light of the foregoing, I make the following orders.

[36] Orders

1. The time for the hearing of the application of the fourth defendant to strike out the amended claim and particulars of claim has been abridged.

2. The application of the fourth defendant to strike out the amended claim and particulars of claim is refused.

3. Costs to be costs in the claim.

4. Leave to appeal granted.

5. The application for a stay of proceedings is refused.

6. The fourth defendant's attorneys-at-law shall prepare, file and serve the orders made herein.