Neutral Citation No. [2014] NIQB 25

Ref: **GIL9168**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **24/02/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MAREK BELKOVIC

Plaintiff;

-and-

DSG INTERNATIONAL PLC

First named defendant;

-and-

FIRST CHOICE SELECTION SERVICES

Second named defendant.

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GILLEN J

Introduction

[1] This is an appeal from the decision of Master Bell on 16 January 2004 when he stayed the plaintiff's action pending his attendance at medical examinations by Mr Yeates FRCS, consultant orthopaedic surgeon and Dr Fleming consultant psychiatrist on behalf of the defendant.

[2] The application is brought in the context of a claim for personal injuries, loss and damage by the plaintiff against the defendants arising out an accident at the first defendant's premises on 1 July 2005 when the plaintiff allegedly sustained a back injury. I pause to observe that during this hearing it emerged that the plaintiff's case is that the foundation of the claim is on a series of lifting incidents over a period of about two months and not a one off incident. I have made it clear that the statement of claim adverts to only one incident on 1 July 2005 and if the claim is to be widened

then it will be necessary to apply to amend the statement of claim to ensure that it faithfully recites the full nature of the plaintiff's claim.

[3] During the large number of reviews that have been carried out in this case, I have permitted the plaintiff's brother to act as a McKenzie Friend (MF) and, in the exceptional circumstances of this case, to allow him to represent the plaintiff in the presentation of his case.

Legal principles governing an application for a stay pending medical examination

[4] Ms Simpson, who presented this application with great skill on behalf of the defendants, and the MF drew my attention to a number of authorities on this issue including Hayhood v Ritchie [2005] NIQB 42, Murphy v Ford Motor Company 114 SOL.J. 886, Lane v Willis [1972] 1 AER 430, Prescott v Bulldog Tools Ltd [1981] 3 All ER 869, Hall v Avon Area Health Authority [1980] 1 WLR 481 and an Australian case of Ryan v Regent Enterprises Pty Ltd t/a Rifici.

[5] From these cases, several of which are fact specific, certain principles can be distilled.

- First, the court has an inherent jurisdiction to exercise its discretion to stay an action involving personal injuries if the plaintiff refuses to allow himself to be medically examined by the defendant medical experts. A defendant can later apply for dismissal for want of prosecution if the plaintiff does not submit to such medical examination after a reasonable time.

- The defendant must show that such an examination is necessary to prepare his case i.e. is reasonable and justified on the facts of the case. The defendant must show it was reasonably in the interests of justice so to order.

- The defendant cannot be restricted in his choice of doctor without very good reason.

- The defendant must disclose any medical evidence resulting from examination to the plaintiff not later than 21 days after receiving the report and before trial.

- The plaintiff must accede to such a request unless he has reasonable grounds for objecting to examination or to a particular doctor. An illustration is where there is strong evidence or a real risk of injury to the health of the plaintiff. There may even be situations where an objection to a particular doctor will be considered reasonable for example where a female plaintiff who had an injury which she would have preferred to have examined by a female doctor although in such cases this would obviously require an examination of the plaintiff's particular reasons for the objection.

- In certain circumstances a plaintiff may be able to insist upon the presence of a friend as a condition of attending an examination with the defendant's expert. In Hall's case, the Court of Appeal gave examples of where the attendance of a third party would be particularly appropriate such as if the plaintiff "were in a nervous state or confused by a serious head injury or if the defendant's nominated doctor had a reputation for a fierce examining manner." Such an application would have to be balanced against for example an instance where the defendant's expert indicated that having another person present would detract from the quality of his examination.

[6] The plaintiff of course has a right to personal liberty. Equally so the defendant has a right to defend himself in litigation as he thinks fit including the right to choose the witnesses he will call.

[7] The particular facts of cases where the discretion has to be exercised will be all important.

The defendant's case

The psychiatric evidence

[8] Ms Simpson made the following points:

- The plaintiff has only been examined by Dr Bunn on behalf of the plaintiff.

- The plaintiff's brother, the MF attended the examination and accordingly the defendant asserts there has never been an independent review of the plaintiff separate from his brother.

- Dr Fleming on behalf of the defendant has only prepared a desktop report to date without the benefit of examining the plaintiff.

- Dr Fleming has now indicated that it is necessary to have an independent psychiatric examination of the plaintiff including an independent appointment consulting with the plaintiff alone and not in the presence of any other individual (I assume that this is with the exception of an interpreter).

- Dr Fleming wishes to examine the plaintiff's demeanour and to reach his own conclusion on the psychiatric symptoms.

- There are on-going complaints from the plaintiff.

- No updated report has been served by the plaintiff.

- Dr Fleming is a respected clinician understanding his duties to the court.

The orthopaedic evidence

[9] Ms Simpson made the following points:

- Mr Yeates has to date prepared a report without the benefit of examining the plaintiff.

- The plaintiff has now alleged considerable on-going problems.

- The statement of claim had alleged in the statement of claim that the accident occurred as a result of a "one off" incident but it is now clear that the plaintiff is making the case that the injury occurred as a result of a number of lifting incidents contributing to the plaintiff's overall condition.

- Mr Yeates should be afforded the opportunity to carry out a physical examination and appraisal including for example movements of the plaintiff, straight leg raising etc. in order to satisfy him that the plaintiff's complaints are consistent with his physical findings.

- There have been inconsistencies as to the history pre-accident of the plaintiff's back pain and this needs to be explored.

The plaintiff's case

[10] In the course of extensive written documentation furnished to the court together with lengthy oral submissions, the MF made a number of contentions which I shall summarise in this way.

[11] First, there is a danger to the plaintiff of a physical examination. The plaintiff allegedly has a back condition which will be exacerbated by a physical examination. The MF drew my attention to various extracts from a report of a neurosurgeon from Slovakia, Dr Nevkus, an examination of the plaintiff by doctors considering his disability for the purposes of State benefits, MRI reports and other medical reports. Relying on these he submitted that the plaintiff risks further injury by an examination.

[12] The MF alleges that the plaintiff has lost trust in medical experts in Northern Ireland. In particular it is alleged that medical experts in Northern Ireland have, when dealing with the plaintiff:

- Given false statements and information about the plaintiff's condition.

- Have concealed his real medical condition.

- Have provided inadequate treatment.

- In particular have caused him to have a bad experience with Dr Bunn who had been "disrespectful" and with Mr Eames, a consultant orthopaedic surgeon who was dealing with the plaintiff.

- Subjected the plaintiff to racial and abusive behaviour.

[13] The MF alleged that the plaintiff did not have a fair appeal in front of Master Bell because he did not have enough time to prepare the case and the Master had acted with a prejudicial attitude towards him. He also has made personal allegations of unprofessionalism, bullying and racism against the defendant's solicitor.

[14] In addition there already exists a plethora of records which show a consistent picture of the plaintiff's condition at the date of the accident and thereafter. There is accordingly no need to have the plaintiff physically examined because all the necessary information is there. In any event any further information necessary for the defendant's consultants could be obtained from a telephone conference, video conference or e-mail exchange.

[15] The defendants have had plenty of opportunity to carry out these examinations before now. Video conferencing, telephone conferencing or an exchange of emails should be sufficient to provide any further information to the medical experts on behalf of the plaintiff.

[16] The plaintiff is now going to rely on a neurosurgeon from Slovakia who has not examined the plaintiff and so no advantage will be yielded to the plaintiff if the defendants are not afforded a physical examination.

Conclusions

[17] Subject to one rider which I shall state below I consider that the Master came to the right decision in this case and I affirm the stay which he placed on this action pending the plaintiff undergoing the medical examinations sought. My reasons for so concluding are as follows.

[18] First, I am satisfied that the defendants have shown that this examination is necessary to prepare their case and is a reasonable and justifiable request. It is necessary to have a physical examination in light of the continuing allegations of pain and disability, the protracted nature of the conditions and the history given. This is the conventional approach in any event to most cases of this kind in this jurisdiction.

[19] To refuse a stay would be to prevent a just determination of the case because the defendants will not be able to rely on medical examinations which their doctors wish to have in order to arrive at their conclusions.

[20] There is clearly an issue for determination about the pre-accident history of this man and the extent of any symptoms he suffered pre and post-accident. Has there been previous pain prior to the accident because of his pre-existing back condition or, as was asserted in certain reports, did the plaintiff have no pain prior to the accident. The change of case to allege that the lifting incidents occurred over a period some weeks and not a one-off situation also requires a fresh look at matters.

[21] The parties can only be on an equal footing if each is given an equal chance to examine. The fact that the plaintiff now does not wish to avail of a report based on an examination must not deprive the other party of their opportunity to approach the case differently and have the plaintiff medically examined.

[22] No evidence has been produced before this court from any medical source stating that a medical examination will damage the plaintiff in any way. The MF has baldly asserted this to be the case without any positive evidence to this effect. On the contrary, it is clear that he has been examined by doctors assessing the degree of disability without mishap on several occasions in the autumn of 2013. In any event Mr Yeates is a consultant orthopaedic surgeon who through his qualifications and experience will be well aware of the nature of the alleged injuries of the plaintiff and the safe extent of any physical examination. Similarly Dr Fleming is an experienced psychiatrist well aware of any fragility in the psychiatric state of the plaintiff. It is for these doctors to decide what use if any that they make of the records in the course of the examination.

[23] Video conferencing/telephone conferencing/e-mail exchanges are no substitute for a face to face examination.

[24] I dismiss entirely the unfounded allegations made against the medical profession as a whole in Northern Ireland, Master Bell and the defendant's solicitor. On the evidence before me these allegations were groundless. I take this opportunity to remind the McKenzie Friend that whilst I have taken the exceptional step of allowing him to represent the plaintiff notwithstanding that he is not a lawyer because of my perception of the plaintiff's state of health and his language difficulties, I will not hesitate to revoke that concession if the MF exercises that right in a manner that is unreasonable, likely to impede the efficient administration of justice or bring the process into disrepute by virtue of baseless allegations.

[25] I therefore affirm the decision of the Master subject to this rider. Whilst I see no reason why, so long as he has an interpreter with him, Dr Fleming should not examine the plaintiff alone i.e. without the presence of the McKenzie Friend or anybody else, the position is different in the case of Mr Yeates. Because of his

physical complaints of pain I believe it is reasonable for him to have the support of the McKenzie Friend or some other suitable person if he wishes to have him present as well of course as an interpreter. However the McKenzie Friend will confine his presence solely to rendering assistance to the plaintiff to sit down, stand up, get on and off an examining couch etc. as requested by Mr Yeates. However it must be absolutely clear that other than the interpreter, whoever attends with the plaintiff will not be allowed to intervene in any part of the questioning or examination carried out by Mr Yeates. There must be no communication of any kind between the plaintiff and the person attending either by way of signal, words or other indication. Should such interference occur uninvited from Mr Yeates, then the consultant will be fully entitled to immediately terminate the examination and the action will be stayed until the further opportunity for uninterrupted examination is carried out.

[26] I reserve the costs of both the hearing before the Master and before me to the trial judge.