



[2017] JMSC Civ. 91

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV00152

BETWEEN	GEORGE HUTCHINSON	CLAIMANT
AND	EVERETT O'SULLIVAN	DEFENDANT

Interlocutory application - Amendment to particulars of claim after end of relevant limitation period

Mr. Lemar Neale instructed by Bignall Law for the Claimant

Ms Arlene Williams instructed by Nunes, Scholefield, DeLeon & Co for the Defendant

Heard: 22nd and 25th May, 14th and 16th June, 2017

IN CHAMBERS

COR: V. HARRIS, J

[1] The issue to be resolved in this matter is whether the claimant's application to amend his particulars of claim, to include additional special damages, after the end of the relevant limitation period is to be allowed.

Background

[2] On January 10, 2013 the claimant filed a claim form seeking to recover damages for personal injuries as a result of a motor vehicle accident which he is alleging was caused by the negligence of the defendant and/or his servant or agent. The accident occurred on March 20, 2009.

[3] The claimant in his particulars of claim which was also filed on January 10, 2013 averred that the injury was a fractured phalanx to the little finger. It was also stated under a sub-heading entitled "Future Care" that the claimant "will require follow-up care, including physiotherapy, orthopaedic and further assessment" and that "as treatment is continuing the claim will be amended in the future to include further medical reports."

[4] He particularized his special damages as being:

(1) Medical report and visit: Dr. Vijayendra Jithendra	\$1,000.00
(2) Police Report	\$1,000.00
(3) Transportation	\$30,000.00
(4) Extra-Help 12 weeks at \$4,000.00 weekly	\$48,000.00
Subtotal	\$80,000.00

[5] On July 19, 2016 the claimant filed a notice of application for court orders seeking to amend his particulars of claim to include the following injuries:

- (1) sub-concussive blunt head injury with wounds to face/mouth, chronic headache, right peri-orbital oedema and ecchymosis and tooth pain;
- (2) comminuted fracture of the proximal phalanx of the right 5th finger;
- (3) chronic mechanical lower back pain with lower limb paraesthesiae;
- (4) chronic cervical strain/whiplash type injury;
- (5) multiple lacerations and abrasions to upper and lower limbs; and
- (6) sprain to left ankle.

[6] The application for the amendment is supported by an affidavit from the claimant's attorney-at-law, Mr. Vaughn O. Bignall.

- [7] The claimant wishes to rely on the medical report of Dr. George Lawson. Dr. Lawson saw the claimant on March 25, 2009, April 16, 2009, June 23, 2009 and August 27, 2009. However, his report is dated October 15, 2015 and was not filed on January 10, 2013 when the claim was commenced.
- [8] On May 25, 2017 when I heard the matter, the claimant was permitted to amend his particulars of claim, with the consent of the defendant, to include the injury described as “comminuted fracture of the proximal phalanx of the right 5th finger” in Dr. Lawson’s report. The court and parties were all agreed that this amendment was permissible at the end of the relevant limitation period because all that Dr. Lawson’s medical report was seeking to do, as it relates to this specific injury, was to provide better particulars or details about an injury that was pleaded during the limitation period.
- [9] The amendment to take account of the other injuries, however, was not permitted by me as I formed the view that the claimant was attempting to claim for entirely new injuries after the limitation period.
- [10] In coming to my decision I was guided by the cases of **Judith Godmar v Ciboney Group Limited** SCCA 144 of 2001, a decision of the Court of Appeal which was delivered on July 03, 2003 and **Peter Salmon v Master Blend Feeds Limited** Suit No C.L. 1999/S163, a judgment of Sykes J which was delivered on October 26, 2007.
- [11] What is now left to be determined is whether the court should permit the claimant to amend his particulars of claim to add further sums for special damages which are:
- (1) \$67,600.00 for visits made to Dr. Lawson and the cost of his medical report; and
 - (2) \$240,000.00 being loss of income at \$10,000.00 per week for 24 weeks.

[12] These two additional expenses would increase the claim for special damages from \$80,000.00 to \$387,600.00. The amendments are being applied for after the limitation period. It is perhaps important to indicate that the claimant did not plead special damages for loss of earnings during the limitation period. It is therefore, not surprising that learned counsel for the defendant has vigorously opposed the application.

The arguments in opposition

[13] Ms Williams has argued that since the items of special damages are being pleaded for the first time, “and like the issue of new pleading of injuries” the amendments are statute barred and ought not to be allowed.

[14] She relied on the cases of **Godmar** and **Peter Salmon** (supra) to support her submissions. She further submitted that both cases made it abundantly clear that amendments to injuries and special damages after the limitation period had expired should only be permitted if they had been pleaded prior to the limitation period and if the defendant was notified that they would be of a continuing nature.

[15] It was Ms Williams’ contention that the amendments that were being sought do not reflect the costs of further treatment for any of the injuries already pleaded and neither were those costs paid within the limitation period.

[16] There was no evidence presented, she stated, that the claimant continued to receive medical treatment after 2009 and/or after the filing of the claim in January 2013. As a result, the expenses that were being claimed would have, prior to the filing of the claim, been known to him and ought to have been pleaded at the time that the claim was filed.

The Law

- [17] Part 20 of the **Civil Procedure Rules** (CPR) makes provision for amendments to statements of case. It allows a party to amend their statement of case at any time before the case management conference without permission unless the amendment is one to which either rule 19.4 or 20.6 applies.
- [18] Given the matter under consideration rule 19.4 which makes special provisions for the changing of parties after the end of a relevant limitation period is not relevant.
- [19] Rule 20.6 allows parties, with the permission of the court, to amend their statement of case after the end of a relevant limitation period. However, that rule provides that the amendment is to be granted to correct a mistake as to the name of a party, but only in circumstances where the mistake was genuine, and not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question.
- [20] However, as will be seen from case law, amendments to statements of case after the limitation period are also allowed in certain other circumstances.
- [21] The issue of amendments to special damages after the limitation period arose in **Godmar**. Smith JA at page 23 of the judgment addressed the matter in this way:

It is my view having read the cases cited among others, that the limitation period does not apply to the claim for additional special damages. Such additional claims as Mr. Morrison, Q.C. submitted, are consistent with the ongoing treatment of the appellant in respect of the injuries pleaded in the amended Statement of Claim. Furthermore, these additional claims represent expenses incurred during the limitation period...

...they are merely additional expenses in respect of injuries already pleaded in the Statement of Claim and paid within the limitation period to substantially the same doctors and therapists already listed in the particulars of special damages...

- [22] At pages 24 and 25 of the same judgment Smith JA went to say:

In **Gloria Moo Young and Another v Geoffrey Chong et al** [SCCA No. 117/99 (unreported) delivered 23rd March 2000] Harrison, J.A. in addressing the question reiterated that amendments may be granted:

- 1) When it is necessary to decide the real issues in controversy, however late;
- 2) When it will not create any prejudice to the other party and is not presenting a “new case”; and
- 3) When it is fair in all the circumstances of the case...

...I have come to the conclusion that in the interests of justice leave to further amend the Statement of Claim to include the additional items of special damages should be granted. I have come to this conclusion because:

- 1) These additional items of special damages do not constitute a “fresh claim”.
- 2) The further amendment may be necessary for the purpose of determining the real question in controversy, that is to say, the quantum of damages.
- 2) [sic] The defendant/respondent will have adequate opportunity to investigate the additional items claimed.
- 3) The plaintiff/appellant may be ordered to make further discovery of documents.
- 4) The expenses claimed are capable of exact calculation thus it is possible for the defendant/respondent to come to a conclusion as to what would be a reasonable sum to pay into court to satisfy the claim and, if they are minded to increase the sum already paid into court.
- 5) The defendant/respondent may be adequately compensated in costs on such amendment.

[23] Sykes J in **Peter Salmon** analysed the decision in **Godmar** and made the following observation at paragraph 10 of the judgment:

*“In **Godmar**, the claimant applied to amend her statement of claim by adding further sums as special damages. She also wished to include a new claim for post traumatic stress disorder. Specifically Miss Godmar alleged that the post traumatic stress disorder was an additional injury attributable to the defendant’s negligence. The court allowed the additional special damages but disallowed the claim for post traumatic stress disorder. **The court held that the additional sums for special damages were merely the cost of further treatment for injuries pleaded during the limitation period whereas the claim for post traumatic stress was a claim for a new injury that was being made after the limitation period had passed.**”*

(Emphasis added)

[24] **Godmar** was decided under the old rules of court, the Judicature (Civil Procedure Code) Law. In **Peter Salmon** Sykes J examined the power of the

court to amend statements of case after the limitation period in the context of the CPR. He discussed rules 19.4 and Part 20 at paragraphs 15 to 24 of the judgment. He concluded that rule 20.4 gives the court the discretion to amend statements of case after the limitation period regardless of the provisions of rules 19.4 and 20.6. Rule 20.4, he stated, was “governed exclusively by the overriding objective.”

[25] At paragraph 21 of the judgment he noted:

“The submission that the only amendments permitted after the end of the limitation period are those specifically mentioned in rules 19.4 and 20.6 ignores rule 20.4 in its current form. The submissions do not take account of the distinction made earlier between giving greater details of a claim made during the limitation period and claiming for an entirely new injury after the limitation period.”

[26] He further indicated that in interpreting and applying rule 20.4 the court should adopt a multi-dimensional approach because that was the requirement of rule 1.1 (2) that sets out the overriding objectives of the CPR.

Analysis

[27] I have gleaned the following principles from the **Godmar** and **Peter Salmon** cases:

- i) The question of amendment of pleadings is a matter for the discretion of the first instance judge.
- ii) Rule 20.4 of the CPR also gives the court the power to amend statements of case after the limitation period without the qualifications that are found in rules 19.4 and 20.6.
- iii) The court in interpreting and applying that rule must give effect to the overriding objective of the CPR which is to deal with cases justly and by taking a multi-dimensional (or liberal), as distinct from a narrow, approach.
- iv) Dealing with cases justly in an application of this nature, also incorporates the principles that an amendment may be allowed where it is necessary to decide

the real issues in controversy; it will not create any prejudice to the other party (such as presenting a new case) and is fair in the circumstances.

- v) There is a distinction between amendments to disclose greater details or particulars about an injury pleaded during the limitation period and making a claim for an injury that was not pleaded during the said period. The former may be allowed while the latter will not be.
- vi) The limitation period does not apply to a claim for additional special damages where they relate to the cost of ongoing or further treatment for any injury or injuries pleaded during the limitation period and where they represent expenses incurred and paid during the limitation period.

The cost of the visits to Dr. Lawson and his medical report

- [28] I have considered Ms Williams submission on this point and regrettably I am unable to agree with her. The claimant in his particular of claim did aver that in relation to the injury pleaded (the fractured phalanx to the little finger) that he would “require follow-up care, including physiotherapy, orthopaedic and further assessment” and that “as treatment is **continuing the claim will be amended in the future to include further medical reports.**” (Emphasis added)
- [29] This statement, in my view, would have put the defendant on notice that not only was the treatment of the claimant continuing but also that the claim would or could be amended in the future to include additional or further medical reports.
- [30] Additionally, the court has allowed the claimant to amend his particulars of claim to provide greater details of the injury that he initially pleaded. The claimant will seek to rely on the medical report of Dr. Lawson in relation to this amplification. He would have, no doubt, incurred costs for his visits to and the report of Dr. Lawson.
- [31] I am of the view that the amendment is necessary to decide one of the real issues in controversy, which is the quantum of damages. I am not of the belief

that it will create or cause any prejudice or injustice to the defendant because the claimant is not presenting a new case and the defendant was put on notice that the claim could be amended to include further medical reports. Finally, on this point, in light of the amendment that has already been granted (see paragraphs 8, 28 and 29) it is only fair, in all the circumstances of this case, to permit the claimant to amend his particulars of claim to include this item of special damages.

Loss of Earnings

- [32] This item of special damages was not pleaded when the claim commenced and the amendment to include it is being made for the first time after the limitation period has passed.
- [33] I observed in the **Godmar** case that the amendment for additional special damages relating to loss of earnings was allowed after the limitation period. However, that item of special damages was pleaded from the outset and although the amendment sought would “inflate the existing claim for loss of earnings” for the period pleaded, it was allowed. (Emphasis added)
- [34] Of some significance and relevance is that the proposed amendment would add claims for periods of time which predated the previous amendment. This meant that at the time that the previous application for amendment was made, Miss Godmar would have known about those additional sums for loss of earnings.
- [35] A similar argument was advanced by counsel for the defendant that when the claim was filed the claimant would have known, as he alleged, that he had lost income for twenty-four (24) weeks (this amounts to almost six (6) months) and ought to have made a claim for loss of earnings. It was also further submitted on behalf of the defendant that no reason has been proffered by the claimant and/or his attorneys-at-law for the failure to plead this item of special damages.

- [36] On this subject **Godmar** and the case at bar can be distinguished in two ways. Firstly, in the former case this matter was raised as an issue of *mala fides* which has not been expressly put forward by the defendant before me. Secondly, in **Godmar** counsel for the appellant provided an explanation for this concern, which the Court of Appeal accepted as “a blunder by the plaintiff/appellant and/or her counsel, which on the evidence was at the most due to negligence or carelessness.” (Emphasis added)
- [37] The claimant did not file an affidavit in support of the application for amendment. I have examined the only affidavit in support of the application which was given by Mr. Bignall. I have found that no explanation has been offered by counsel (and in the circumstances, by the claimant as well) for the failure to plead loss of earnings when the claim form and particulars of claim were filed on January 13, 2009. The same can be said of the failure to apply for an amendment during the limitation period.
- [38] I agree with Ms Williams that the claimant would have known at the time the claim was commenced that he would have lost almost six (6) months of income as a result of the accident. I would have expected that some sort of explanation would have been forthcoming from either the claimant or his counsel for this omission. This would have provided, at the very least, some basis on which I would have been able to determine if I should exercise my discretion to grant the amendment for this item of special damages.
- [39] In support of my position, I make the observation that in **Godmar** one of the authorities relied on by the court was **Nelson v Nelson and Slinger** (1958) 2 All ER 744. In that case the husband had filed a petition for divorce on the ground of the wife’s constructive desertion. The wife in her answer denied the desertion and alleged that it was the husband who had committed desertion, adultery and cruelty. She cross-prayed for the dissolution of the marriage on those grounds. The husband, who had expected that the divorce would have been uncontested, had been advised to rely on desertion only. He later made an application to

amend his petition to also charge cruelty against his wife. The Court of Appeal (England) allowed the amendment notwithstanding that the facts were within the husband's knowledge when the petition was filed. The court concluded that the amendment would not cause any injustice to the wife that could not be compensated by costs and that the husband had provided a satisfactory explanation for his failure to initially charge cruelty in his petition.

[40] I have considered the submissions and law on this aspect of the application and I bear in mind that "an amendment granted before trial (as this one would be) is usually viewed more liberally than one made during trial or at the end of trial." (Per Harrison JA in **Gloria Moo Young** (supra)) However, each case is to be decided on its own facts and an amendment is a matter in the discretion of the trial judge.

[41] In this case, the incident giving rise to the claim occurred on March 20, 2009. The claim was filed almost four (4) years later (in January 2013). At the time the claim was filed the claimant would have known that he had lost income for a period of twenty-four (24) weeks, yet he made no claim for loss of earnings and he did not apply for an amendment during the limitation period. Neither the claimant nor his counsel has sought to provide an explanation for this blatant blunder.

[42] The amount being claimed under this head of special damages is significant (\$240,000.00). It will have the effect of more than tripling the amount claimed initially for special damages. The amendment for loss of earnings is not consistent with the ongoing treatment of the claimant in respect of injuries pleaded in the particulars of claim. It is also not additional expenses incurred or paid during the limitation period in respect of injuries that were pleaded during that time. (See the observation of the Court of Appeal in **Godmar**).

[43] At no point in the proceedings until July 19, 2016 (the date of the application for amendment), was the defendant notified that he would have to meet a case that involved loss of earnings for almost half of a year. The defendant would be very

hard pressed at this late stage to adequately investigate this additional item of special damages that is now being claimed. It is my view that if I allow this amendment it could prejudice the defendant and result in an injustice to him. I have, therefore, concluded that it would not be fair, in all the circumstances of this case, to permit the claimant to amend his particulars of claim to include this head of special damages.

[44] I have also heard the parties on the issue of costs and I agree with counsel for the defendant that the cost of this application is to be given to the defendant.

Disposal

[45] The claimant is permitted to amend his particulars of claim to add the particulars of special damages, the claim for the visits to and the report of Dr. George Lawson in the amount of \$67,600.00.

[46] The claimant is to file and serve his amended particulars of claim on or before September 29, 2017.

[47] The claimant's application to amend his particulars of claim to include special damages for loss of earnings in the amount of \$240,000.00 is refused.

[48] Costs of this application to the defendant to be agreed or taxed.