[2010] CA (Bda) 4 Civ

The Court of Appeal for Bermuda

CIVIL APPEAL No. 11 of 2008

Between:

THOMAS MANDRED HOFER

Appellant

-V-

THE BERMUDA HOSPITALS BOARD

Respondent

Before: **Zacca, President**
Evans, JA
Stuart-Smith, JA

Date of Hearing: **Thursday & Friday, 4 & 5 March 2010**
Date of Judgment: **Thursday, 18 March 2010**

Appearances: Mr. L. Mussenden for the Appellant
Mr. A. Doughty for the Respondent

Judgment

Evans, J.A.

1. On 12 February 1994 the plaintiff Thomas Hofer was an in-patient at St. Brendan's, maintained by the defendant as a hospital for the mentally impaired. He was there for observation and treatment for a paranoid

psychiatric condition, having been admitted on a non-voluntary basis on the previous day.

2. Shortly after 1pm he sustained an injury which subsequently was diagnosed as a fractured spine. He was transferred to his native Germany on 24 April 1994 and we are told that he now suffers from quadriplegic incapacity and is in the care of the German State.

3. Proceedings were issued in Bermuda by Anna Hofer as his next friend on 14 January 1997. The defendants entered an appearance on 16 February 1998 and served their Defence on 28 July 1999.

4. On 22 April 2008 the defendants issued a Summons seeking dismissal of the action for want of prosecution. Bell J. heard submissions on 24 June 2008 and issued his Ruling two days later, on 26 June 2008. He made the Order sought by the defendants.

5. The reasons why the plaintiff' application for leave to appeal to this Court has not been heard until March 2010 are of some relevance to the present application, but it is not alleged that there has been 'inordinate and inexcusable delay' by the plaintiff since the Summons was issued. That allegation is made in respect of the period from January 1997 until 2008.

6. The Judge found that the delay was "unquestionably both inordinate and excessive" and that it was "inexcusable" (Ruling paras. 17-21). The latter finding related specifically to the five years from December 2002 until

early 2008. There is no appeal against these findings, and the relevant chronology can be stated shortly. It was set out in exhibit AD1 to Mr. Doughty' First Affidavit dated 17 April 2008, which counsel then acting for the plaintiff accepted was accurate (Affidavit para.7).

> *6 March 2001 Notice of Change of Attorney filed on behalf of the Defendant.*
>
> *30 July 2002 Notice of Intention to Proceed filed on behalf of Plaintiff.*
>
> *17 October 2002 Plaintiff's Summons issued seeking an interim payment by the Defendant. This was an attempt to obtain funds to have the plaintiff medically examined in Germany. The Defendant opposed any order being made and the Summons was abandoned (a hearing fixed for December was ineffective).*
>
> *18 March 2008 Notice of Intention to Proceed served on behalf of Defendants.*
>
> *[22 April 2008 Summons for striking-out Order issued.]*

7. During 2006 and 2007 certain letters were written by defendants' representatives to the plaintiff's, but they received no reply. On 3 October 2006 they wrote "as a follow-up to our correspondence of 24 September 2004…….As two years have passed, it is clear to us that you do not intend to move this matter forward. In light of this, we now confirm that your request for an interim payment of $5,000 be made on a without prejudice basis is denied. We accordingly advise that unless we have received a settlement proposal by the 1 November 2006, we shall apply to the Supreme Court of Bermuda to have your claim struck out for want of prosecution". On 5 July 2007, they wrote alleging that there was

inexcusable delay and that the death of one of the Defence witnesses, Mr. McQueen, meant that the delay had caused prejudice to the defendant. They said that they would commence proceedings to strike out the claim for want of prosecution unless the claim was withdrawn by 1 August 2007. As stated above, they gave Notice of Intention Proceed on18 March 2008.

The April 2008 Summons

8. The Application was supported by Mr. Doughty's First Affidavit dated 17 April 2008. He asked the court to rule that the defendant had been prejudiced by the plaintiff's delay on three grounds. First, that Mr. McQueen died in 2005. Secondly, that "the other witness to the accident, Mr. Alan Bentham, left the employment of the Defendant in 2004 at which time he emigrated to Canada and that the Defendant has no knowledge of his whereabouts." In connection with Mr. Bentham, he referred to the accompanying Affidavit by Ms. Miriam Casey, a Human Resource Manager employed by the defendant. Thirdly, he said –

> *16. Although witness statements were taken from employees of the Defendant at or about the time that the incident occurred in 1994, none of the witnesses who are still alive or remain in contact with the Defendant actually saw the event complained of, only the events leading up to and subsequent to the alleged incident. I furthermore ask the Court to find – based on the 14 years that have passed from the time of the incident to present- that the witness statements in our possession, although they may be able to assist the present witnesses in their powers of recall, will not assist the witnesses effectively during cross-examination as more than 14 years have passed since the alleged incident took place.*

9. The Affidavit filed by counsel then acting for plaintiff exhibited a Memorandum by Mrs. J. Dillas-Wright, then the Director of Nursing and Patient Services, recording a meeting held on that day. She recorded that "the reason for the meeting was to receive a verbal report from all staff concerned in the care of Mr. Hofer". Four persons were present, apart from herself, including Mr. Bentham and Mr. McQueen. One person, V. DeCouto was recorded as absent because he was "told wrong date". There is a detailed account of events from Mr. Hofer's arrival on February 11 until 3 pm on 13 February when he was transferred to King Edward Memorial Hospital. This confirms that Mr. Bentham was present when Mr. Hofer fell from his bed, Mr. McQueen was not in the room. There is no indication as to what Mr. V. DeCouto's involvement, if any, was.

10. The Affidavit also exhibited a Statement from Mr. McQueen dated 22 March 1994 described as "typed from written report" submitted by him.

11. Mr. Doughty's Second Affidavit conceded that Mr. McQueen did not actually witness Mr. Hofer's fall, but stated his belief that Mr. McQueen would have been a critical witness at the trial.

The Judge's Ruling

12. The Summons was heard on 24 June 2008 and the Ruling is dated 26 June 2008. The Judge correctly stated the applicable principles of law, taken from *Halsbury's Laws* (4th.ed. vol.37 para.448), as follows –

> *The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied: (1) that the default has been intentional and contumelious; or (2) that there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the Defendants……on an application to dismiss for want of prosecution the court will take into account all the circumstances of the case, including the nature of the delay and the extent to which it has prejudiced the defendant, as well as the conduct of the parties and their lawyers. (Judgment para.12)*

13. The judge also referred to the judgment of Kawaley J. in *Roberts and Hayward v. The Minister of Home Affairs* [2007] Bda.L.R.37 and the question whether the jurisdiction is affected by the amendment of the Rules of the Supreme Court (1985) to include the overriding objective of enabling the Court to deal with cases justly.

14. His findings in relation to prejudice were set out in paragraphs 22-29. His conclusion was-

> *29. While I would have preferred the position in relation to Mr. Bentham's whereabouts and availability to have been clearer, I am nevertheless satisfied that, in relation to him, the combination of the Board's present inability to locate him, the lack of a detailed witness statement from him and the effect that a lapse of more than 14 years will inevitably have on his memory, do give rise to a substantial risk that it will not now be possible to have a fair trial on the issues in the action, and cause prejudice to the Board thereby. I do not attach any great weight to the fact that Mr. McQueen*

> *has died since the accident, since he was not a witness to it. However, it does have to be recognised that Mr. McQueen's statement in relation to the accident is both unsigned and relatively brief. It is not the sort of detailed statement which one would have expected had Mr. McQueen been interviewed by an attorney. It is to be noted that there appears to be more detail in the report of the accident in the minutes than that appearing in Mr. McQueen's statement and while I would hold that sufficient level of prejudice exists on the basis that Mr. Bentham is not available to the Board, in my view the level of prejudice to the Board is increased by reason of Mr. McQueen's death.*

15. That paragraph makes clear what the learned judge's understanding was of the position with regard to Mr. Bentham and Mr. McQueen. It later emerged, however, that the situation was different from what he supposed. First, Mr. Bentham was traced to an address in Lancashire in the United Kingdom from where he wrote "I can confirm that I remain available to tender evidence in this case so I await your directions". Secondly, Mr. Doughty wrote to the Court on 14 July 2009 to correct the judge's misapprehension that no witness statements were taken from Mr. Bentham and Mr. McQueen. He referred to paragraph 16 of his First Affidavit (quoted above) and wrote –

> *In making this statement, we thought that it was clear to the Court that we did in fact have statements from both Messrs. Bentham and McQueen which were taken immediately after the incident. If that statement misled the Court in any way, that was not our intention.*

16. Mr. Doughty confirmed to us that the statements were taken by lawyers then acting for the Defendant and that legal privilege is being claimed for them. He recognised, however, that if the matter goes to trial and the

Defendants seek to rely on their evidence, the amended Rules of Court will require advance disclosure of witness statements (in Mr. Bentham's case, at least).

17. Mr. Bentham being available, and the reservation which the judge expressed regarding the lack of a detailed statement "which would have been expected had Mr. McQueen been interviewed by an attorney" having proved unfounded, the judge's reasons were reduced to two: "the effect that a lapse of more than 14 years will inevitably have on his memory", if Mr. Bentham were to give evidence now, and "the fact that Mr. McQueen has died since the accident", to which he did not attach "any great weight".

After the Ruling

18. Inevitably, perhaps, there was a further hearing before Bell J. on 9 October 2009. This took the form of applications by the plaintiff for leave to appeal from the judge's June Ruling, and for an extension of time within which to make that application, the latter being necessary because counsel for the plaintiff had made his application on 21 July 2009, after the period for appealing from an interlocutory ruling had expired (though within time, if the ruling was final; his mistake was pointed out to him by the learned Registrar). Counsel for the plaintiff filed a First Affidavit dated 26 September 2009 dealing, among other matters, with the history of his attempts to locate Mr. Bentham both before and after the June hearing.

19. Before that hearing, on 10 June 2008, counsel wrote to Mr. Bentham at an address he had for him at Leigh in Lancashire, but he had not received any reply. As the Judge records in paragraph 26 of his Ruling, "[counsel] had indicated in his affidavit that he had an address for Mr. Bentham, which by the time of the hearing Mr. Doughty had not sought. The address was given to Mr. Doughty at the hearing, as was a telephone number which [counsel] had, but which he said he had called without securing an answer. Although one might have expected that following [counsel's] evidence that he had an address from Mr. Bentham, the Board's attorneys would have sought that and endeavoured to trace him, as I understood the position {counsel for the plaintiff had tried to do so, without result]".

20. This passage contains an indication of some ambivalence in Mr. Doughty's position regarding the availability of Mr. Bentham. His evidence was that the defendants had no records of his whereabouts and that he himself was unable to trace him. (He informed this Court that he had made directory searches in Canada, but not in the United Kingdom.) The non-availability of Mr. Bentham as a witness was the primary ground on which it was claimed that the defendants were prejudiced by the delay. Therefore, as the judge said, "one might have expected that….the Board's attorneys would have sought" the address which plaintiff's attorney had (his affidavit was served 8 May 2008), but at no time did they do so. The ambivalence continued at the September hearing, as will appear below.

21. It appears, therefore, that it became clear at the June hearing that plaintiff's counsel had an address for Mr. Bentham, but attempts to contact him had not produced a result. However, counsel informed the judge that another route might be available, by telephoning a person in Bermuda who might be in contact with him. He wrote to the Court on the following day –

> *During the Hearing I indicated to the Court that efforts had been made by me to determine the whereabouts of Mr. Alan Bentham SN through the good offices of Dr. Henry Subair. Today I received positive information and I enclose the Fax received from Dr. Subair office. I gave an undertaking to the Defendant to share this information and I have copied him as well.*

The enclosed fax letter gave the address and telephone number of a Liverpool Hospital where Mr. Bentham works. Unfortunately, the letter to the Court was not received until 27 June 2008, after the judgment was handed down. It seems that neither party contacted the hospital. In the event, Mr. Bentham replied on 13 September to the letter which plaintiff's counsel had written to him on 10 June 2008, apparently to an old address.

22. Mr. Doughty confirmed to this Court that at the June hearing plaintiff's counsel gave the undertaking referred to in his letter on the following day, namely, that he would make a further attempt to obtain Mr. Bentham's address in the manner described, and share the results with Mr. Doughty.

23. These details are relevant because at the September hearing the defendants opposed the plaintiff's applications for an extension of time and for leave to appeal on the grounds *inter alia* that (1) counsel's mistaken belief that the judgment was final, not interlocutory, was not a sufficient reason for extending the time limit for an appeal, and (2) that the Court of Appeal could not be informed that Mr. Bentham in fact was available, because that would require fresh evidence from the plaintiff including, under the rule in *Ladd v. Marshall*, that the plaintiff and his attorneys had exercised all reasonable diligence to obtain the evidence before the June hearing, which, Mr. Doughty submitted, they had failed to do. In this context, he relied upon the duty placed upon both parties by the amended Rules of Court to assist the Court in achieving the Courts` overriding objective, which subsisted from at least January 2008.

The September Ruling

24. The judge rejected the defendant's opposition to the application for an extension of time (ground (1) above). However, with regard to (2), he held "that the Court of Appeal would not allow evidence that Mr. Bentham would be available at the trial to be admitted on the hearing of the appeal" (paragraph 14). He also held that the fact that the Board held a detailed witness statement from Mr. Bentham did not alter his conclusion that the defendants would be prejudiced. He said-

> *Certainly I looked at the three matters mentioned in paragraph 29 of the ruling together, referring to a combination of the Board's inability to locate Mr. Bentham, the lack of a detailed witness statement, and the effect of a lapse of time of more than fourteen years on the witness's memory. If only the first and last of those matters were to have been relied on, I would have come*

> *to the same conclusion in relation to the risk that a fair trial of the issues would not now be possible, and would thereby prejudice the Board. I would expect that the Court of Appeal would take a similar view…..and it follows that and my view expressed above in relation to the admission of new evidence that I do not believe that this appeal has any real prospect of success.(Paragraph 15)*

25. That suggests that the judge regarded Mr. Bentham as a witness whom the Board would seek to call, hence the prejudice which he found. But there was still some ambivalence about the Board's position in that respect –

> *13. I should start with Mr. Bentham's whereabouts. Though it is perhaps strange that it was the Board who claimed to be prejudiced by their inability to locate him, the fact is that [counsel for plaintiff] was aware as early as 17 March that the Board was saying that it was unable to locate Mr. Bentham, and certainly by 17 April. Yet [counsel] did nothing until his affidavit of 8 May, and between that date and the hearing, more than six weeks later, it remained the case that Mr. Bentham had not been located.*

26. If it were material, we would observe that the judge made no reference to the fact that the Board's counsel had not asked plaintiff's counsel whether he had a contact address for Mr. Bentham, as he could have done at any time, nor was it made clear to him that the Board was not intending to call Mr. Bentham as a witness, even if he was available, because it anticipated that his evidence might be hostile and that he might be called as a witness for the plaintiff, who could be cross-examined.

Subsequent proceedings

27. On 4 June 2009 this Court granted the plaintiff's *ex parte* application that the application for leave to appeal be heard *inter partes* and for the hearing, if leave were granted, to be treated as the hearing of the appeal. "Intended Grounds of Appeal" were served within 14 days as ordered, on 18n June 2009, but the Defendants objected to further "Perfected Grounds" which were served on 17 July outside that period. That matter came before the Court of Appeal in November 2009 when the plaintiff sought an adjournment in order to apply for legal aid, and the defendant applied to have the appeal struck out on the ground that the plaintiff had not complied with certain Directions given by the Registrar regarding the Appeal, or seeking security for its costs. The Court granted the adjournment and refused the defendants` applications. By notice dated 8 December 2009 the Defendants sought leave to appeal to Her Majesty in Council from the Court's refusal to make the Orders they had sought, but that application was not proceeded with at the hearing of the appeal in March 2010.

The issues on the Appeal

28. These are, first, whether the Court should receive evidence, or be informed, that the position with regard to Mr. Bentham's availability is as it is now known to be, and secondly, whether the judge's order dismissing the action for want of prosecution should stand.

29. As regards the first, it was common ground at the September hearing that the judge should take account of the misapprehension which had influenced his June Ruling, regarding the fact that the Defendants do

have possession of detailed statements taken by their legal representatives shortly after the plaintiff's accident, from both Mr. Bentham and Mr. McQueen. That fact removed the only qualification he had expressed regarding his view that the death of Mr. McQueen was not "of any great weight". His September Ruling implicitly recognised this; there was no reference to Mr. McQueen in it. In these circumstances it would be surprising if he was unable to take account of the fact that Mr. Bentham had been traced and was known to be able and willing to give evidence.

30. That somewhat artificial position was urged upon him by Defendants on the ground that the up-to-date information was "fresh evidence" which the Court of Appeal should be expected to disallow. That depended on a finding that plaintiff's counsel had not exercised reasonable diligence to trace Mr. Bentham after the defendants alleged that they would be prejudiced by his non-availability at the trial and impliedly that he was a witness whom they would seek to call.

31. Those considerations, however, have been overtaken by what this Court has learned was the situation at the conclusion of the June 2008 hearing. Counsel for the plaintiff told the Court that he would make a further attempt by a different route and, by informing defendants' counsel, enable him to make further inquiries also. Plaintiff's counsel wrote to the Court on the following day, but unfortunately the letter was not received until after the judgment was given. In our judgment, in these circumstances plaintiff's counsel was led to believe that if further inquiries were made, the judge would take account of their results before

judgment was given. This meant that the admission of further evidence before the judge was impliedly authorised at the June hearing, and that the attempt to exclude it on *Ladd v. Marshall* grounds at the September hearing was misconceived.

32. We hold that neither the June Ruling nor the September Ruling took account of the facts that have now been proved, and that this Court is entitled and bound to exercise its own discretion as to whether the claim should be dismissed for want of prosecution, as the defendants maintain.

Ruling

33. The issue is whether the evidence establishes that, by reason of delay which is self-evidently inordinate and inexcusable, and rightly so found by the judge, there is a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants.

34. This makes it necessary to identify what the central issues are. The plaintiff's allegation in the Statement of Claim is that, whilst under the observation and supervision of the Defendants and/or nursing and/or supervising staff, he sustained a broken neck and a cut to his chin. The Particulars of Negligence begin "1. Whilst treating the Plaintiff, permitted allowed or caused him to sustain serious injury namely a broken C5 vertebra (neck) 2. Failed to manage administer or apply proper or any proper and lawful management of or restraint upon the Plaintiff whilst he was a patient in their care". The Statement of Defence gives a more detailed account of how the injury occurred –

> *14……..he was roused by nursing staff to prepare for an intended visit by friends of the Plaintiff. In the event, the Plaintiff was assisted in his preparation by a male nurse and whilst sitting up on the edge of his bed fell forward and hit his chin on the floor……*

35. It is now common ground that the male nurse was Mr. Bentham and that Mr. McQueen at the time of the accident was outside the room with the Plaintiff's friends.

36. A detailed report prepared by the Director of Nursing & Patient Services two days after the accident, after a meeting which received a verbal report from all staff concerned in the plaintiff's care (with one possible exception which it has not been alleged is material), together with an unsigned statement by Mr. McQueen, are in the possession of the Plaintiff and have been disclosed. Detailed statements by Mr. Bentham and Mr. McQueen, signed or unsigned, for which legal privilege is claimed, are in the possession of the Defendants.

37. The Defendants, it may be inferred, still have in their possession the records, reports and other documents which their legal representatives deemed relevant after the accident and when the Defence was served. One reason for substantial delay in serving the Defence was that they needed first to sight original X-ray records which had gone to Germany with the plaintiff.

38. Mr. Bentham is available and willing to give evidence. Mr. McQueen died in 2005. No other potential witnesses have been named by the

Defendants in support of their contention that they have been or will be prejudiced by the plaintiff's delay, or that a fair trial is now impossible.

39. The only remaining ground of those relied upon by the Judge is that Mr. Bentham's memory, and by extension, those of other witnesses who may be called, must have been affected by the passage of time since the accident, already more than 16 years (14 years at the time of the Ruling under appeal).

40. It is well established by the authorities, including decisions of the House of Lords and the Court of Appeal for England and Wales, that the fading memories of a witness or witnesses is a relevant factor in establishing that it is no longer possible for there to be a fair trial of the issues in the case, or that the Defendant has identified serious prejudice caused to him by the delay. In *Slade v. Adco Ltd.*[1996] P.I.Q.R.418 the Court of Appeal upheld, by a majority, the striking-out order made by the judge in a case where the defendant did not identify a specific witness or witnesses whose evidence would be less reliable as a result of the passage of time. Auld L.J. dissented on the ground that there must normally be some evidence or particular circumstances from which the likelihood of serious prejudice can be inferred (headnote). But the majority affirmed that "It is clear that in order to establish prejudice it is not enough merely to assert that in the nature of things memories will have dimmed with the passage of time" (headnote). The majority decision was that the Judge's decision betrayed no error of principle and thus was one with which the Court of Appeal should not interfere (Sir Iain Glidewell at 432) and that although the case was near the borderline there was sufficient material

before the Judge to entitle him to exercise his discretion as he did (Neill L.J. at 438). Whilst, therefore, the Court can be entitled to make the order on that ground, it does not follow that it should do so, when that is the only ground that the Defendants establish. It is always necessary for the Court to consider all the circumstances, including the nature of the issues in the particular case.

41. That, in my judgment, is an important factor in the present case. This was not a motor accident or similar case, where the recollections of bystanders or even the parties themselves may fade or become unreliable with the passage of time, though that risk is reduced if the evidence is recorded at or shortly after the event. Even in such cases, there has been some judicial discussion, and difference of opinion, as to whether the process is as pronounced after an initial period of, say, three years (see the citations in *Slade v. Adco Ltd.* passim). But here, the issue of liability turns on a specific event, of a horrifying nature (Mrs. Dillas Wright's report refers to the "horrible sound" made when the plaintiff fell to the floor), and the evidence of Mr. Bentham and Mr. McQueen in particular was recorded soon after the event when it was fresh in their minds.

42. In my judgment, the Defendants fail to establish in the present case that a fair trial of the issues is no longer possible, or that they have suffered serious prejudice by reason of the Plaintiff's delay.

43. I reach that conclusion without regard to two further matters which arose in the course of argument before us. First, Mr. Mussenden who now appears for the Plaintiff submitted that the claim raises issues regarding

the management and organisation of the hospital which can be dealt with fully, even without Mr. Bentham's evidence. But it is unclear to what extent those further allegations are covered by the existing pleadings, or whether leave is required or has been given for certain amendments which appear in the 'Amended Statement of Claim' that we have seen.

44. Secondly, Mr. Doughty explained to us why the Defendants' position with regard to calling Mr. Bentham as a witness was what I have described above as ambivalent. It seems that the Defendants are reluctant to call him, but they will do so if the plaintiff does not. If the appeal is allowed, it is unnecessary to say more about that.

45. I therefore would grant the application for leave to appeal, and allow the appeal.

Evans, J.A.

Zacca, P.

I have had the opportunity of reading the judgment of Evans, J.A. I agree with the decision and his reasons. I also would allow the appeal.

Zacca, President

Stuart- Smith, JA

1. I gratefully adopt the history of the litigation as set out in the judgment of Sir Anthony Evans, JA. It is apparent that apart from a period of some eighteen months between the entry of appearance by the defendant on the 16 February 1998 and service of the defence on the 28 July 1999, the entire delay in this case is the fault of the claimant's attorney. No Summons for Directions was ever issued, as it should have been shortly after the close of pleadings, and no effective step to progress the case to trial, and despite warnings by the defendant's attorney in 2006 and 2007 that if the matter was not pursued an application to strike out would be made.

2. The judge concluded that the delay here attributable to the claimant's attorney's conduct of the case was both inordinate and inexcusable. Mr. Mussenden, who appeared for the appellant in this Court, but not below, did not challenge this finding. I agree with it; in my view it was a scandalous and all more astonishing in the light of the defendant's warnings that if the matter was not progressed, an application to strike out for want of prosecution would be made.

3. Be it that as it may, it is now well established that mere delay, in the absence of contumelious conduct, and none as alleged here, is not sufficient to justify striking out. The delay must be such that there is a serious risk that a fair trial cannot be had or that the defendant has suffered serious prejudice as a result of the culpable delay.

Judge's findings as to prejudice

4. The judge expressed his conclusion on the question of prejudice and the risk that it would not be possible to have a fair trial in paragraph 29 as follows:

> *While I would have preferred the position in relation to Mr. Bentham's whereabouts and availability to have been clearer, I am nevertheless satisfied that, in relation to him, the combination of the Board's present inability to locate him, the lack of a detailed witness statement from him and the effect that a lapse of more than 14 years will inevitability have on his memory, do give rise to a substantial risk that it will not now be possible to have a fair trial of the issues in the action, and cause prejudice to the Board thereby. I do not attach any great weight to the fact that Mr. McQueen has died since the accident, since he was not a witness to it. However, it does have to be recognised that Mr. McQueen's statement in relation to the accident is both unsigned and relatively brief. It is not the sort of detailed statement which one would have expected had Mr. McQueen been interviewed by an attorney. It is to be noted that there appears to be more detail in the report of the accident in the minutes than that appearing in Mr. McQueen's statement and while I would hold that a sufficient level of prejudice exists on the basis that Mr. Bentham is not available to the Board, in my view the level of prejudice to the Board is increased by reason of Mr. McQueen's death.*

5. It appears to me that the judge in this paragraph was identifying four matters of prejudice:

   a) That the defendants had no detailed statement from Mr. Bentham;

   b) That the defendants were unable to locate Mr. Bentham;

c) That even if they could locate him and call him as a witness, the lapse of time of fourteen years would have inevitably affected his memory;

d) That Mr. McQueen had died in the period of culpable delay, having given only a relatively brief and unsigned statement.

The judge rightly did not consider that Mr. McQueen was such an important witness as Mr. Bentham, but he considered the level of prejudice attributable to the matters set out in paragraphs (a) to (c) was increased by Mr. McQueen's death.

6. It is unfortunate that the judge misunderstood the position with regard to the existence of Mr. Bentham's witness statement. The judge cannot in my view be criticized for concluding on the state of the evidence before him that the defendant was unable to locate Mr. Bentham and although Mr. Scott professed to be able to do so, he had not by then done so, although he had been aware since at least the middle of April 2008 that the defendant's were asserting that they had lost touch with him and were unable to locate him. So, when the matter came before Mr. Justice Bell in October 2008, the judge thought, rightly in my view, that the fact that Mr. Bentham's whereabouts had been identified and that he was willing to attend to give evidence was fresh evidence which would require an application to the Court of Appeal under the principles of *Ladd v Marshall* [1954] 1W LR 1489.

7. In refusing to grant an extension of time for appealing or for leave to appeal, the judge expressed the view that this Court would be unlikely to

be satisfied that the fact in question could not with the exercise of due diligence have been put before the Court in June 2008.

8. In opening his submissions in this Court, Mr. Mussenden did not appear to challenge this view of the judge. His argument was that Mr. Bentham was by no means a crucial witness and that the case was likely to turn on whether the defendant's had a proper procedure for dealing with a patient in the claimant's condition. And it was not until Mr. Doughty was well into the course of his submissions in reply, that Mr. Mussenden, perhaps encouraged by the observations from bench, made an application that the fresh evidence as to the known whereabouts of Mr. Bentham should be admitted.

9. I cannot agree with Mr. Mussenden's submission that Mr. Bentham was not am important witness; in my view he is likely to be a crucial witness. It seems to me unlikely that the real issue in the case will turn upon the nature of the defendant's procedures. No attempt seems to have been made by the claimant's advisers to obtain expert evidence criticizing such procedures, which must be essential to mount such a case, and allegations in the amended statement of claim lack any sort of particularity in this regard. The real issue seems to me to be:

   a) precisely how the accident happened; did the claimant accidently fall or did he deliberately throw himself to the floor?
   b) Whether it was reasonable that only one nurse, namely, Mr. Bentham, should be present at the critical time;
   c) This will depend on Mr. Bentham and Mr. McQueen's appreciation of the risk that the complainant might 1) accidently

overbalance and fall forward or 2) deliberately throw himself head first onto the floor, and if so, whether the presence of two nurses would have prevented this.

d) Whether in the time that Mr. Bentham was alone with the complainant he appreciated the risk referred to in (c) and if so whether there was anything he should have done about it and negligently failed to do to prevent the fall.

e) Whether Mr. Bentham or Mr. McQueen followed such procedures as may have been laid down.

10. I do not think that it is profitable at this stage to speculate whether Mr. Bentham would need to be called by the claimant to get his case on its feet. What I think is clear is that if he is not called by the claimant and the issues are or include those which I have identified in paragraph 9 the defendants will need to call him. This was the attitude adopted by Mr. Doughty.

11. Bell J was entitled to take a view when considering an application for leave to enlarge time for appealing or leave to appeal, as to this Court's likely reaction to an application to adduce fresh evidence; but he could not of course bind this Court in the exercise of its discretion to do so. Moreover I agree, for the reasons given by Sir Anthony Evans in his judgment, that we should admit the fresh evidence. The judge is to be commended upon the speed with which he produced his judgement. But it had the unfortunate result that the information which was conveyed to the Registrar on the 25 June 2008 that Mr. Bentham's address was known never reached the judge before he wrote and delivered his judgment.

12. Accordingly it now appears that two of the four matters before the judge which he took into account as amounting to prejudice were incorrect. Although it might appear from his ruling on the 9 October 2008 that Bell J might have well have come to the same conclusion on the basis of the prejudice remaining, I do not think that we can assume that this is so, and accordingly it is necessary for this Court to exercise its discretion on the basis of the evidence as it now stands.

13. I propose therefore to consider the two matters which are now primarily relied upon by Mr. Doughty as amounting to serious prejudice. First is the dimming of memories after fourteen years (now sixteen years and longer since the action is nowhere near ready for trial). This raises once again the question whether this is a matter which the Courts are entitled to take into account. In my judgment it is now clearly established that this is the type of case where the issues depend on oral testimony given many years after the event where the Court is entitled to infer that the passage of time is likely to have had a prejudicial effect on a witnesses' ability to give reliable evidence.

14. In *Benoit v London Borough of Hackney* [February 11, 1991 CA] in a judgment which I gave with which Nourse L.J. agreed, I said in my judgment:

> *In my judgment, in a case such as this which depends on the oral evidence of witnesses, based on their recollection many years after the events in question, with every year that passes their recollections become more uncertain. It is a common experience of judges, when*

> *trying stale claims, to hear witnesses say, 'it is all so long ago that I cannot remember', and who can blame them? Where prolonged culpable delay follows long delays in the service of proceedings, the court may readily infer that memories and reliability of witnesses has further deteriorated in that period of culpable delay*
> *…the quality of the evidence to be called on behalf of the plaintiff in this case is bound to be affected by the very long period of delay since this accident occurred.*

15. *In Hornagold v Fairclough Building Ltd* [1993] P.I.Q.R.400 at page 415 Glidewell LJ commented on this passage. He said

> *I do not read Stuart-Smith L.M. as saying that where a court has found inordinate and inexcusable delay prejudice to a defendant automatically follows. I understand him to have been saying that in a claim for damages for personal injuries, where the main issue depends upon evidence as to how the accident happened, and the events surrounding it, if the court knows that the defendants wished to call witnesses as to those matters, it would have little difficulty in inferring that as the result of inordinate and inexcusable delay after the issue of the writ, more than minimal prejudice to the defendants had arisen as the result of the inevitable dimming of the witnesses' memories. However, if the court is to draw an inference it must at least have evidence before it as to the nature of the evidence which the defendants seek to call on the issues in question, so that it can decide whether or not in the circumstances it is proper to draw such an inference.*

16. In *Roebuck v Mungovin* [1994] 2 A.C. 224, H.L., 234E, Lord Browne-Wilkinson said:

> *We were referred to…Hornagold v. Fairclough Builbing Ltd…where there was a difference of opinion as to whether in such a case it was necessary to adduce*

> *specific evidence that the prejudice flowed from the loss of memory in the later period. I have no doubt that such evidence is not necessary and that a judge can infer that any substantial delay at whatever period leads to a further loss of recollection. But even so the attempt to allocate prejudice to one rather than another period of delay is artificial and unsatisfactory.*

17. In *Slade v. Adco* [1996] P.I.Q.R. P page 418, the judge at first instance referred to what I had said in Benoit's case, he continued:

> *It is not here suggested on behalf of the defendants that there is a witness who would have been available but is no longer available, for example in the direct sense of his having died or becoming untraceable or in the indirect sense of his saying that he cannot remember much about it because of the delay. There is this long delay and I am prepared to infer, as the Court of Appeal has said could be inferred, that time itself has serious adverse effect on the memory.*

18. On appeal to the Court of Appeal the Court was divided as to whether this was a proper approach. Neill L.J. and Sir Iain Glidewell felt that it was and the Court should not interfere with the exercise of the judge's discretion. Auld L.J. disagreed. It should perhaps be noted that the period of delay in that case was very much less than the present case. Sir Iain Glidewell at page 432 said that he adhered to the view which he expressed in Hornagold's case.

19. Neill L.J. upheld the judge's decision. In addition he cited a passage from the judgment of Sir George Baker in *Hayward v. Thompson* [1982] 1 Q.B. 47 at page 69 G.

> *There are a few civil actions in which nothing new emerges in the course of the hearing." But even in the*

> *absence of some wholly new factor the cross examiner in a stale claim, when seeking, for example, to ask questions about the position of some control mechanism (in an industrial accident) or lines of visibility (in a traffic accident) may be faced with the understandable reply "It is all so long ago that I cannot remember.*

20. In my judgment the present is precisely the sort of case where these considerations arise and Bell J was right to find that even if Mr. Bentham was available to give evidence at trial, the reliability of his evidence was likely to be so affected by the extraordinary passage of time that a fair trial could not be had or the defendants would be seriously prejudiced. Of course I accept that Mr. Bentham is unlikely to forget the traumatic moment of the incident itself. And the fact that he can refresh his memory to some extent from his previous statement will not doubt afford some assistance. But if the issues are as I believe they are likely to be the peripheral matters bearing on the decision of Mr. Bentham and Mr. McQueen that the complainant could properly be left in the charge of one of them, and what matters were taken into consideration in assessing the risk of what occurred whether it was accidental or deliberate are relevant.

21. Moreover I consider that the defendants are seriously prejudiced by the death of Mr. McQueen. The judge thought that this was less serious than the inability, as he perceived it to be, to call Mr. Bentham. That is no doubt so, since Mr. Bentham was the only actual eye witness as to how the accident happened, assuming the claimant himself is unable to give evidence. Nevertheless, as I have sought to indicate I consider that Mr. McQueen was an important witness. He and Mr. Bentham were of equal status. Mr. McQueen must have been party to the decision that the

complainant should be left in the sole charge of Mr. Bentham at the material time and his appreciation of the risk, if any of doing so, would be highly relevant. The mere fact that he did not see the accident does not mean that he is not an important witness. Mr. Mussenden appeared to criticize the care afforded by the defendants after the accident. If so, Mr. McQueen it was who gave this aid to the injured man, and his conduct at this stage may well be material.

22. For these reasons I have come to the clear conclusion that if the Court is to exercise its discretion afresh, we should hold that the defendants have suffered serious prejudice through the inordinate unconscionable delay of the claimant's legal advisors and there is a serious risk that it is no longer possible to have a fair trial and therefore I would dismiss the appeal.

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Stuart-Smith, JA