
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : SWINDALE -v- BABIC [No 2] [2007] WASCA 262

CORAM : PULLIN JA
NEWNES AJA

HEARD : 21 NOVEMBER 2007

DELIVERED : 3 DECEMBER 2007

FILE NO/S : CACV 132 of 2007

BETWEEN : KENNETH GRIFFITHS SWINDALE
Appellant

AND

DINKO BABIC
Respondent

ON APPEAL FROM:

Jurisdiction : DISTRICT COURT OF WESTERN AUSTRALIA

Coram : GROVES DCJ

Citation : BABIC -v- SWINDALE [2007] WADC 166

File No : CIV 1862 of 2006

Catchwords:

Practice and procedure - Disclosure of medical evidence before trial - Failure to disclose medical evidence until shortly before trial for tactical reasons - Application at trial for leave to adduce the evidence - Exercise of discretion under O 36A r 2(5) - Failure to have regard to nature of evidence or prejudice to other side - Miscarriage of discretion

Practice and procedure - Appeal against interlocutory decision at trial before final judgment only in exceptional cases - Undesirability of adjourning trial to allow appeal on evidentiary ruling

Legislation:

Rules of the Supreme Court 1971 (WA), O 36A r 2(2), (5)

Result:

Appeal allowed

Application to adduce expert evidence remitted to trial judge for reconsideration

Category: B

Representation:

Counsel:

Appellant	:	Mr M H Zilko QC
Respondent	:	Mr D R Clyne

Solicitors:

Appellant	:	Williams Handcock
Respondent	:	Simon Walters

Case(s) referred to in judgment(s):

Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170
Babic v Swindale [2007] WADC 166
Boyes v Colins (2000) 23 WAR 123
Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 478
The State of Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146

- 1 **PULLIN JA:** I agree with Newnes AJA.
- 2 **NEWNES AJA:** This is an application for leave to appeal from an order of Groves DCJ in the District Court refusing the appellant (defendant) leave to rely on certain medical evidence in the trial of the respondent's (plaintiff's) claim for damages for personal injury. Pursuant to the order of Pullin JA of 26 October 2007, the application for leave to appeal was to be heard with the appeal.

The facts

- 3 The respondent was injured in a motor vehicle accident on 7 June 2005 when the vehicle he was driving was involved in a collision with a vehicle driven by the appellant. The respondent commenced an action for damages for personal injury in the District Court on 25 September 2006. A statement of claim was filed on 10 October 2006 and the appellant's defence was filed on 20 October 2006. By that defence, the appellant admitted that the collision was caused by his negligent driving, but denied that the respondent suffered injury or any loss or damage as a consequence of the accident.
- 4 The respondent entered the action for trial on 10 November 2006 and a pre-trial conference took place on 6 February 2007. The action was then referred to a listing conference on 2 April 2007, at which the action was set down for trial for four days commencing 11 September 2007.
- 5 The learned trial judge accepted that under O 36A of the *Rules of The Supreme Court 1971* (WA), as relevantly amended by the *District Court Rules 2005* (WA), if a party intended to rely on medical evidence at the trial it was required to disclose that evidence to the other party at least 14 days before the pre-trial conference. Under O 36, if a party intended to adduce, among other things, any video surveillance material it was required to disclose that at least 10 days before the trial.
- 6 In the course of the pre-trial proceedings, a number of medical reports were exchanged. The respondent's solicitors served, among others, reports from Mr Michael Lee, a neurosurgeon; Dr Andrew Harper, an occupational physician; Dr Nick De Felice, a psychiatrist; and Dr Aminda Singh, a general practitioner. The appellant served medical reports of Dr Richard Vaughan, a neurosurgeon; Mr Dibyenda Gope, an orthopaedic surgeon; and Dr John Rosenthal, an occupational physician, each of whom had examined the respondent for the purpose of providing their report.

7 On 21 August 2007, the solicitors for the appellant wrote to the respondent's solicitors enclosing two DVDs containing seven periods of surveillance footage of the respondent, together with medical reports from Dr Rosenthal dated 11 September 2006 and 6 July 2007, and Dr Vaughan dated 31 October 2006, who had viewed the surveillance footage and who commented on their medical assessment of the respondent in the light of it. On 27 August 2007, the appellant's solicitors provided a report of Mr Gope dated 17 January 2007, in which Mr Gope also commented on his medical assessment of the respondent in the light of the surveillance footage shown to him.

8 It appears that there was no response from the respondent's solicitors to those letters or to the medical reports enclosed with them.

9 It appears from the dates of the medical reports that were served by the appellant in August 2007 that, apart from the report of Mr Gope of 17 January 2007, in each case they had been prepared at or shortly after an occasion on which the doctor concerned had examined the respondent. On each of those occasions the doctor had provided a medical report which did not refer to the surveillance footage. That report had been provided to the respondent's solicitors prior to the pre-trial conference. The medical reports commenting on the surveillance footage, however, had not. The latter reports were disclosed at the same time as the surveillance footage.

10 It was not in issue that the provision to the respondent's solicitors of the DVDs containing the surveillance footage in August 2007 was in accordance with O 36. Equally, it was not in issue that the medical reports commenting on that footage were served outside the time specified in O 36A for the service of medical reports.

11 We were not provided with a full transcript of the trial, which commenced on 11 September 2007, but we were informed by senior counsel for the appellant, without objection, that the video surveillance was used by the appellant's counsel in the cross-examination of the respondent and each of the medical practitioners called on behalf of the respondent. At least one of those practitioners, Mr Lee, had also provided a report, dated 29 August 2007, in which he commented on the surveillance footage. That report was tendered at trial as part of the respondent's case.

12 Immediately after the respondent had closed his case, his counsel sought a ruling from the learned trial judge on whether the appellant

should be entitled to put into evidence the medical evidence of Dr Rosenthal, Dr Vaughan and Mr Gope, so far as it related to the surveillance material. It was submitted on behalf of the respondent that for tactical reasons the appellant had failed to comply with O 36A in respect of those reports and that the appellant therefore required leave to rely on them, which leave should be refused.

13 In the course of argument, it was submitted by counsel for the appellant that the failure to provide the respondent's solicitors with copies of the reports within time was 'a legitimate tactic' and that 'the purpose of O 36A(4) will be defeated if [the appellant] were entitled withhold discovery of the video films and not withhold the reports on those video films'.

14 After hearing argument, the learned trial judge refused the appellant leave to rely on the medical reports: *Babic v Swindale* [2007] WADC 166.

15 Counsel for the appellant then informed the learned trial judge that leave would be sought to appeal against that decision. The learned trial judge agreed that in those circumstances the trial should be adjourned. That course was not opposed, or at least was not seriously opposed, by counsel for the respondent, on the basis that the appellant paid the respondent's costs of the adjournment.

Reasons of the trial judge

16 The learned trial judge concluded that, in the light of the decision of the Full Court in *Boyes v Colins* (2000) 23 WAR 123, the tactic of holding back medical reports of this nature until shortly before trial could not be regarded as a legitimate tactic, but that a 'cards on the table' approach in personal injury cases was to be favoured. His Honour referred to statements of Ipp J in that case regarding the potential for unfairness at trial and unfairness in regard to settlement negotiations if such evidence was not disclosed in accordance with the rules of court.

17 The learned trial judge considered that it was not to the point that the respondent may know from the content of earlier disclosed reports the opinion which the doctors in question will express, and is thus not taken by surprise by the opinions expressed in the belatedly disclosed reports. As the reports had been disclosed only on 21 August 2007 for a trial commencing on 11 September 2007, the learned trial judge considered that, 'given the significance of the issue', that was not 'a reasonable time before trial' as required by O 36A.

Disposition of the appeal

- 18 I should say at the outset that, in my view, the course which has been followed in this case of adjourning the trial part-heard to allow the question of the admissibility of the evidence to be determined is a course to be followed only in exceptional circumstances. It is rarely a necessary or appropriate course. It is clear that a party may challenge the correctness of a final judgment entered in a matter on the ground that some interlocutory decision which was relevant to the final result was wrong: *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 483, 497. To encourage the prosecution of appeals against interlocutory orders at trial before final judgment in the action would be to encourage the unnecessary fragmentation of proceedings, interfering with their orderly disposal and increasing costs: see *Gerlach v Clifton Bricks*. It would also be to encourage appeals in circumstances where the final judgment may have the effect of rendering the appeal unnecessary.
- 19 The High Court observed in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170, 177, unless a tight rein is kept on interference with the interlocutory orders of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, by a litigant with a long purse or a litigious disposition. Those observations apply, in my opinion, with particular force where the interlocutory order has been made in the course of a trial and it is sought to pursue an appeal against the order before final judgment in the action.
- 20 There are, however, clearly some circumstances in which an interlocutory decision will be treated as concluding an issue between the parties where it is appropriate that an appeal be brought immediately. There may also be cases where the nature of the interlocutory decision, or its possible effect, is such that it is appropriate to bring the appeal before final judgment in the action. But such cases will be rare. And it will be a most exceptional case where it is appropriate to bring an appeal in respect of a ruling on the admissibility of evidence before final judgment has been entered in the action.
- 21 With respect, I am not persuaded on the material before this court that this was one of those exceptional cases. Nevertheless, that course has been taken and in those circumstances it is appropriate that the application for leave to appeal be determined on its merits.

22 The requirement for expert medical evidence to be disclosed by a party who seeks to rely on it at trial is dealt with in O 36A of the *Rules of the Supreme Court*. Order 36A r 2(2) provides:

Unless the Court otherwise directs, a party must serve on the other parties, in accordance with this Rule, copies of all medical reports the substance of which that party intends to rely on at the trial or hearing.

23 Order 36A r 2(3) provides time limits within which all such medical reports must be served. Order 36A r 2(5) provides:

Except with leave of the Court, or pursuant to a direction of the Court, or where all other parties agree, no witness may give medical evidence at the trial or hearing of a cause or matter unless the substance of that evidence has been disclosed in writing to all other parties within the time limited by a direction under paragraph (4) or, where no such direction has been given, a reasonable time before trial.

24 In this case, no direction was given under O 36A r 2(4).

25 Although it was suggested that all medical reports should have been served before the pre-trial conference, the learned trial judge proceeded on the basis that they were required to be disclosed a reasonable time before trial. No issue was taken with his Honour's determination of the application on that basis.

26 It is plainly the case, as the learned trial judge observed, that a party to proceedings who intends to adduce expert evidence at trial is not entitled to ignore the rules of court, or directions of the court, dealing with the time limits by which expert evidence must be disclosed. The withholding of medical reports, contrary to the rules or an order of the court, for tactical reasons is not a permissible approach and a party who takes such an approach runs a grave risk that they will not be permitted to adduce the evidence at trial. If the interests of justice require that a medical report, or medical reports, be served otherwise than in the ordinary course, that must be the subject of an application to the court to obtain an order to that effect. Special circumstances would have to exist to justify an order for delayed service. The 'cards on the table approach' to litigation is based, among other things, on the need to avoid unfairness, including the unfairness that can arise where a witness is suddenly confronted with material of which they were previously unaware and is thereby deprived of a proper opportunity to provide a response to it. It also allows the parties to assess their case realistically for the purposes of considering settlement before trial. See generally the discussion in *Boyes v Colins* at [53] - [85].

27 On the other hand, the object of the courts is to decide the rights of the parties and not to punish them for mistakes made in the conduct of their cases by deciding otherwise than in accordance with their rights. The paramount consideration is the interests of justice: *The State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146. In the end, what must be determined is whether or not, having regard to all of the relevant circumstances, it is in the interests of justice that the appellant should be permitted to adduce the evidence.

28 It is apparent from his reasons for judgment that the learned trial judge did not look at the medical reports on which the appellant sought to rely in connection with the surveillance material. His Honour was informed by counsel that in those medical reports the respective doctors expressed the opinion that the surveillance material simply confirmed the opinion in their earlier disclosed medical reports that there is nothing wrong with the respondent and he is exaggerating his symptoms.

29 The learned trial judge accepted that the respondent might not be taken by surprise by the evidence, but concluded that whether or not the respondent was taken by surprise was irrelevant.

30 His Honour made no finding that the respondent would suffer any specific prejudice if the evidence were admitted and, in the course of argument on the application, no such prejudice was adverted to by counsel for the respondent. The respondent had been able to obtain Mr Lee's report on the surveillance material and that report had been tendered at the trial as part of the respondent's case. It was not suggested that the respondent's solicitors had been unable to consult the respondent's other medical experts about the surveillance material. In fact, it appears from an affidavit of the appellant's solicitor, filed in support of the application for leave to appeal, that prior to trial several of the respondent's other medical witnesses - namely, Dr Singh, Dr Harper and Dr De Felice - had viewed the surveillance material and had provided reports on it which were put into evidence at trial by the respondent.

31 Nor was it suggested that the respondent had been misled into running his case at trial on the basis that no medical evidence on the surveillance material would be sought to be adduced by the appellant.

32 It appears, therefore, that the view of the learned trial judge that the reports had not been disclosed a reasonable time before trial was not based on the nature of the medical evidence sought to be adduced or on the basis that the respondent had been, or would now be, significantly

disadvantaged in the conduct of his case at trial. Rather, in refusing leave to the appellant to adduce the evidence his Honour simply had regard to what he called 'the significance of the issue' in the action; that is, it appears, the significance of the issue of the extent of the respondent's continuing disability, particularly as it related to his future capacity for work.

33 That, however, in my view, was not a matter that could be considered in isolation, as his Honour appeared to do. In my respectful opinion, it could only properly be considered in the context of any injustice that might be occasioned to the respondent if the appellant were permitted to adduce the evidence. In approaching the exercise of his discretion in the way he did, I consider that the learned trial judge erred.

34 The learned trial judge also appears to have considered that the late service of the medical reports worked an unfairness to the respondent in relation to settlement negotiations prior to trial. That, in my view, was not material to the issue before him. The issue before his Honour was whether the appellant should be entitled to adduce the evidence at trial. Any question of unfairness to the respondent in relation to earlier settlement negotiations, if made out, was a separate matter. It might ultimately be relevant, for instance, to how the costs of the action should be borne, but it was not a matter that fell for consideration on the application before him.

35 I should say that whether, in the light of the fact that prior to trial the respondent had voiced no objection to the late service of the medical reports and had led medical evidence at trial on the surveillance footage, it would work an injustice now to refuse the appellant leave to adduce the evidence of his own medical experts on that issue, was not a matter referred to by the learned trial judge and is not a matter on which I consider it is possible to comment on the material before us.

Conclusion

36 In my view, with respect, the exercise of the discretion of the learned trial judge miscarried. If the decision is not reversed, the appellant will be precluded from calling relevant medical evidence in circumstances where the issue of whether or not he should be permitted to do so has not received proper consideration. The decision of the learned trial judge should therefore be set aside.

37 I do not, however, consider it is possible on the limited material before us to determine whether the appellant should be granted leave to

rely on the evidence it seeks leave to adduce. That is a matter properly to be determined by the learned trial judge, who is in a better position to consider and weigh all of the relevant factors.

- 38 I would therefore grant leave to appeal, allow the appeal, set aside the order of the learned trial judge, and remit the appellant's application for leave to adduce the medical evidence to the learned trial judge for further consideration.