

Judgment 1/2005

**Angenent v Pring – Royal Court (Civil action file
717) – 4 January, 2005**

Personal injuries claim (see also Judgment 65/2004) – plaintiff’s application for order that the parties provide joint experts’ reports – no such provision in the Royal Court Civil Rules, 1989 – Guernsey and English authorities reviewed – held that the Court has no jurisdiction to make the order sought – variation of existing timetable for lodging of experts’ reports, if so advised, by the plaintiff and defendant respectively.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 4th day of January 2005 before Patrick John Talbot QC, Lieutenant Bailiff; sitting alone.

JENNIFER ANGENENT

Plaintiff

And

DAVID J PRING

Defendant

WHEREAS on 7th and 8th day of December 2004 the Lieutenant Bailiff considered an application dated 5th November 2004 by the Plaintiff seeking inter alia an order directing the parties to provide a joint report of the Plaintiff’s current state of health and future prospects from a Consultant Urologist and a Consultant Pain Management Specialist and heard thereon Advocates J.P. Greenfield and J. M. Wessels, Counsel for the Plaintiff and Defendant respectively the Lieutenant Bailiff this day gave judgment in the terms attached hereto and ORDERED that

- The Plaintiff should, if so advised, lodge reports from (i) an expert in the management of pain, and (ii) an expert in urology by Tuesday 1 February 2005.
- The Defendant should, if so advised, lodge reports from (i) an expert in the management of pain, and (ii) an expert in urology by Tuesday 8 March 2005.
- Without prejudice meetings, or without prejudice telephone conversations, between such experts should take place, in the absence of the parties’ lawyers, by Tuesday 5 April 2005, so as to

identify (i) the extent of the agreement between the experts, and (ii) the points of disagreement between the experts.

- A statement should be prepared for the Court by the experts showing (i) the extent of the agreement between the experts, and (ii) the points of disagreement between the experts.
- A draft duly indexed and paginated trial bundle (excluding reports from expert witnesses) should be agreed between the Advocates for the parties by Tuesday 3 May 2005.

S. M. D. ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY COURT

BETWEEN:

JENNIFER ANGENENT

Plaintiff

and

DAVID J PRING

Defendant

J U D G M E N T

of Patrick John Talbot QC, Lieutenant Bailiff

O N I S S U E O F

E X P E R T W I T N E S S E S ' R E P O R T S

4 January 2005

Background

1. This is an application by the Plaintiff for an order directing the parties to provide a joint report on the Plaintiff's current state of health and future prospects from a consultant urologist and a consultant pain management specialist. This relief was sought by the Plaintiff in paragraph 2 of her application dated 5 November 2004.

2. The background to the application is as follows. The action is a personal injuries claim by the Plaintiff against the Defendant, an orthopaedic surgeon, arising out of an operation performed by the Defendant upon the Plaintiff on or about 20 October 1999. The operation was, it seems, intended to expose and excise the L4/5 disc in the Plaintiff's spine but, in apparent error, (which is admitted for the purposes of the action,) the Defendant exposed and operated on the L3/4 inter-vertebral disc in the Plaintiff's spine, and not the L4/5 disc.
3. The Plaintiff claims substantial damages from the Defendant, and the trial of the issue of damages, (which will involve oral evidence from the Plaintiff and from expert medical witnesses called on both sides,) will take place in a period of two weeks commencing on 23 May 2005. I have been appointed by the Bailiff to be the presiding judge and I shall be sitting with Jurats.
4. By letter from his advocate, Advocate Jeremy Wessels, to the Plaintiff's advocate, Advocate John Greenfield, dated 25 October 2002, Mr Wessels confirmed that "liability is no longer in dispute although my client continues to reserve his position on causation and of course on quantum." This position is subject to a partial admission made in an expert's report served on behalf of the Defendant on part of the causation issues. The position is not entirely clear and I shall assume for present purposes that issues of both causation and quantum will arise at the full hearing on damages.
5. In correspondence passing between Advocates attempts have been made to agree a procedure under which joint experts can be appointed, but these attempts have not succeeded. Nevertheless, it seems from Advocate Greenfield's and Advocate Wessels' latest written submissions that the Plaintiff and the Defendant both contend that the Royal Court has jurisdiction to provide, either by direction given under rule 43(b) and (d) of The Royal Court Civil Rules 1989 ("the 1989 Rules") or under its inherent jurisdiction, for the parties to serve a report from a jointly appointed expert.
6. I shall deal with the question of the jurisdiction of the Court first.

The Rules

7. The 1989 Rules were made pursuant to an express power contained in section 64(1) of the Reform (Guernsey) Law 1948, which declared that the

“powers and functions of a legislative nature as regards the following matters, namely:-

...

(b) The making, variation, modification and revocation of Rules of Procedure in the Royal Court and any Division thereof ...;”

remained vested in the Royal Court.

8. When this power was exercised by the full Royal Court in making the 1989 Rules, no specific provision was made for the making of an order for the service of an expert’s report from an expert witness jointly appointed by the parties; *a fortiori*, there was no power granted to the Royal Court in the 1989 Rules under which the Court itself was empowered, in a suitable case, to make an order, of its own motion, for such a report to be provided.
9. The 1989 Rules provide, in Rule 43(b) and (d), as follows:

“The Court may by order give directions as to the hearing of any action or any question raised by the pleadings ... and may (without prejudice to the generality of the foregoing)-

(b) order that not more than a specified number of expert witnesses may be called;

(d) order that the manner in which such evidence is to be taken.”

10. In reaching my decision I have reminded myself of some well-established parts of the procedure of the Royal Court in civil proceedings. Under established Guernsey practice, unless the evidence of experts is wholly or partly agreed between the parties, (in which case the parties will agree suitable admissions to put before the Court,) the experts attend Court to give oral evidence. The Court, including the Jurats, (who will, in due course, decide all “live” questions of fact,) hears this evidence in open court – see my judgment in *Webber v Allied Dunbar Assurance plc* (2001) on other matters relating to experts’ reports. Cross-examination and re-examination follow the evidence-in-chief of the experts and the presiding Judge summarises the effect of the experts’ evidence in summing-up the case to the Jurats. The nature of the hearing is adversarial

and the Judge, where necessary, decides any questions of law, including questions on admissibility of parts of the evidence. What is clear, I believe, is that the powers of the Court to require any particular witness to attend court to give evidence are limited. Rule 49 deals with witness summonses and provides machinery for the attendance of witnesses summonsed to attend the Court, but generally the parties' Advocates will arrange for witnesses to attend Court. It is, I think, accepted practice now that, whereas lay witnesses all attend at the beginning of the trial to be sworn, exceptions are made for expert witnesses, doubtless for good reasons of cost-saving. Furthermore, it seems to me that, unless the parties agree otherwise, witnesses for one side cannot be interposed into the other side's case, as would often be the case in other jurisdictions where a single judge decides issues of fact. The Court does not interfere in the way in which either side might wish to call witnesses and does not "require" any party to call, or not to call, any witness, whether a lay witness or an expert witness. This does not, however, in any way limit the Judge's powers to exclude any inadmissible evidence, whether such evidence is excluded for being irrelevant or for any other proper reason.

Decision on Jurisdiction

11. The Civil Procedure Rules 1998 ("the CPR") introduced into English procedure a new rule, CPR 35.7, under which the courts in England and Wales may, in appropriate cases, make orders for reports to be presented to the Court by experts jointly appointed by at least two of the parties. It is clear that this rule introduced a brand-new procedure, which the English courts simply did not possess before the CPR came into force. In other words, the English courts could not order parties jointly to appoint expert witnesses until CPR 35.7 came into force on 26 April 1999.
12. The Royal Court does not have any rules relating to civil proceedings other than the 1989 Rules, (and any amendments thereto, which may, from time to time, be passed).
13. The question, therefore, arises whether I have any jurisdiction to make an order for the service of joint experts' reports. This question must, in my judgment, be dealt with by me, even though both Advocates argue that there is power in the Royal Court to make such an order— see paragraphs 13-16 of Advocate Greenfield's Further Submissions dated 13 December 2004 and paragraph 15 of Advocate Wessels' written submissions, also dated 13 December 2004.
14. It is correct to state that the Royal Court is "master of its own procedure" and it seems that both parties' Advocates argue that, despite the absence of a specific rule to this effect in the 1989

Rules, a Judge of the Royal Court has the power, or the jurisdiction, to make an order of the kind set out in paragraph 2 of the Plaintiff’s application dated 5 November 2004, if it is just and fair to do so. Where they differ is on the exercise, rather than the existence, of the jurisdiction.

15. In the well-known decision of the Court of Appeal of Guernsey in *Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited* (1982) the issue related to whether or not a party had the right to make an amendment of pleadings by entering an *exception de fonds* on the day fixed for trial. The Court of Appeal found that there was such a right and made other findings which are not material to this case. At page 6 of the judgment, the President, Mr. Leonard Hoffmann Q.C., (as he then was,) said:

“It seems to me that the correct approach to this matter is to bear in mind that the Ordinance of 1851 was part of a set of general rules made by the Court to regulate its procedure but that the Court remains master of its own procedure **and can allow a departure from those rules when justice requires this to be done ...**” [The highlighting is mine.]

16. In *Laughton v Main*, Day DB, sitting in this Court on 14 January 2000 on appeal from the Court of Alderney, gave judgment on the question whether, in the absence of express rules of procedure, the Court of Alderney had an inherent power to order interrogatories and to require a defendant to answer a Notice to Admit Facts. Day DB found that the absence of any specific rule relating to interrogatories or notices to admit was not fatal to the application for such procedural steps to be allowed. At page 3 of his judgment Day DB said:

“... the central question is whether the Court, in the absence of any specifically enacted Rule, can in any particular case order certain procedures to be followed, so that, in effect, it can make and apply rules during the course of litigation. ...”

Deputy Bailiff Day found that the Court of Alderney had unlimited jurisdiction in civil matters and that it had the power to permit the raising of interrogatories and service of Notices to Admit Facts in proper cases.

17. Finally, I refer to the decision of the Court of Appeal of Guernsey in *Morton v Paint* (1996), where the Court of Appeal found that the Royal Court had the power, as it were, to develop the common law of Guernsey in advance of any statutory provision being passed by the States of Guernsey, and introduced into Guernsey law as a Law. The issue in the case related to the “ambulatory” nature of the evolution of the common law and the Court of Appeal, in effect,

decided to “bring the law of Guernsey into line with the statutory rule in England” relating to issues of occupiers’ liability “and not to allow a parting of the ways for the two jurisdictions ...”. The learned President, Sir Louis Blom-Cooper Q.C., held that such an adoption of English rules could be done judicially and that what the Court did in that case was an example of the evolutionary nature of the growth of the common law of Guernsey. Further explanation of the relevant principles is fully set out in the judgment of Southwell J.A.

18. Advocate Greenfield addressed me in relation to the Plaintiff’s application for an interim payment, on differences between the practice and procedure of the Royal Court of Guernsey and the Supreme Court in England and Wales - see my Judgment dated 30 December 2004. He argued

- that the decision in *Morton v Paint* was broad in principle,
- that historically the Royal Court had recognised that neither it, nor its rule-making body, namely, the full Royal Court, meet as often as their counterparts in England; and
- that the Royal Court had a more direct and “total” involvement in the making of its own rules than the Supreme Court Rules Committee.

He, therefore, contended that the Royal Court had a broad jurisdiction to make an interim payment order in an appropriate case without any need for specific rule-making or the passing of a Law introducing an interim payment procedure. Equally, he would, I expect, argue that the same approach should be taken in relation to reports from jointly-appointed experts, and further argue that the position was somewhat stronger in relation to such reports, since, in Rule 43, the 1989 Rules allow for the service of experts’ reports and the practice of the Royal Court in civil proceedings in personal injury actions is that the giving of directions for such expert evidence is almost universal.

19. What I have to decide, in the absence of a specific Law or of an express provision in the 1989 Rules to that effect, is whether there is an inherent power vested in me, as a Judge of the Royal Court, to make an order for the service of joint reports from joint experts appointed by the parties in these proceedings, ignoring for present purposes the merits of the Plaintiff’s case.

20. As a matter of starting principle, I turn to passages, which I have found persuasive, in the judgment of Smith J.A. in the decision of the Court of Appeal of Jersey in *Mayo Associates v*

Cantrade Private Bank Switzerland (CI) Limited [1998] JLR 173, and the well known dictum of Lord Morris in ***Connelly v DPP*** [1964] A.C. 1254, at page 1301, which is in the following terms,

“There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules in practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process.”

Reliance was also placed on revealing and persuasive passages in the much-cited, and commended, article by Sir Jack Jacob, *The Inherent Jurisdiction of the Court* (1970) 23 Current Legal Problems 27.

21. In ***Mayo*** Smith J.A. said, at page 188 & ff.:

“In our view, the vital clue to the nature of inherent jurisdiction in its procedural setting ... is necessity. The Court has a particular procedural power because it has to have it to be a Court in any meaningful sense. On this basis, the power to require the attendance of witnesses, whether to testify or to produce documents, the power to control abuse of the process or the Court, the power to dismiss claims for want of prosecution, the power to issue practice directions, the power to decide who may or may not appear before the Court, the power to correct errors in its own orders and many other powers may all be recognised as derived from a single pool, not of powers but of power drawn upon as necessity dictates. It will be observed that this approach is antithetical to a definition of inherent jurisdiction based simply on fairness or by reference to what is perceived in a particular situation to be just. If inherent jurisdiction exists to enable a Court to order that a thing be done, fairness and justice will obviously be factors to be taken into account when the Court is deciding whether or not to exercise its discretion to do so order; but the conclusion that it will be fair or just to order that a thing be done does not determine whether there was inherent jurisdiction to order it.”

22. As I have already mentioned, it was necessary in England and Wales to introduce a new procedural code, the CPR, in order to provide a power under which the Courts can make orders for joint experts. This new power was one of the most controversial changes made to civil procedure in the CPR and it is quite clear that no inherent jurisdiction existed in England and Wales prior to the coming into force of the CPR under which a Master or Judge could make an order, whether with the consent of the parties or of his own motion, for the service of a report from an expert witness jointly appointed by the parties.

23. I am convinced that the position in Guernsey both before and after the coming into force of the CPR in England and Wales on 26 April 1999 must have remained the same. Further, I consider that, if the Royal Court were otherwise minded to require parties to give expert evidence by way of reports from jointly-appointed experts, it should refuse to accept that it has inherent jurisdiction to do so, since it should not, in my judgment, take any steps which could properly be interpreted as affecting, by procedural means, the substantive rights of the parties, namely, their separate rights to call, or not to call, any particular witnesses, whether lay witnesses or expert witnesses.
24. In my judgment, it is a substantive right of a party to civil proceedings before the Royal Court, absent any Law or Rules or Ordinance requiring him to act otherwise, to decide his own strategy, including the most important issue of whether or not to call particular witnesses. This is, to my mind, entirely consistent with the absence of any rule within the 1989 Rules permitting the Royal Court to order the parties to give expert evidence by reports from jointly-appointed experts. As was the case in England and Wales, I am convinced that an express Law, Rule or Ordinance would be required to change or remove this valuable, substantive right.
25. I, therefore, conclude that there is no jurisdiction in the Royal Court to make an order, either with or without the consent of the parties, for the service of a report from a jointly-appointed expert witness. Accordingly, I reject the Plaintiff's application for such a report, or for two such reports, to be ordered.

Decision on the Issue of Further Expert Evidence

26. In their written submissions both Advocates have also helpfully addressed the question whether or not, if I were to refuse to order a report from a jointly-appointed expert witness, I should, nevertheless, vary the Order for Directions dated 30 July 2004, which was made by consent. Under this Order the Plaintiff was required to lodge her expert reports by 3 September 2004 and the Defendant was required to lodge his expert reports by 11 February 2005.
27. It appears that the Plaintiff lodged her experts' reports on about 6 September 2004, including a report from Mr B.P. Gardner, a consultant surgeon in spinal injuries dated 30 September 2003. In his report Mr Gardner recommended a report from a consultant in pain management and also recommended a urology review. But, despite the fact that the Plaintiff's Advocate had raised these matters in correspondence with the Defendant's Advocate, which commenced in about

February 2004, no such report and no such review formed part of the reports lodged by the Plaintiff on 6 September 2004. It was only by letter dated 8 October 2004, *i.e.* more than a month after the date for lodging of her experts' reports, that the Plaintiff's Advocate raised with his opponent once again the question of a urology review.

28. In paragraph 25 of her affidavit dated 29 November 2004 the Plaintiff dealt shortly with her position relating to the proposed further reports.

29. Although the application is made rather late in the day, I have reached the conclusion that I should make an Order varying the consent Order dated 30 July 2004. I cannot escape the conclusion that it would seem unfair to the Plaintiff if I were to refuse to do so. In all the circumstances, I consider that it is just and fair that I should vary that Order in the following way, taking into account, as I have done, the need to preserve the trial date of 23 May–3 June 2005 and the need to allow the experts time to form their professional opinions and thereafter to discuss any differences between them (on a “without prejudice” basis) so as to limit, so far as may be possible, outstanding issues between them:

- The Plaintiff should, if so advised, lodge reports from (i) an expert in the management of pain, and (ii) an expert in urology by Tuesday 1 February 2005
- The Defendant should, if so advised, lodge reports from (i) an expert in the management of pain, and (ii) an expert in urology by Tuesday 8 March 2005
- Without prejudice meetings, or without prejudice telephone conversations, between such experts should take place, in the absence of the parties' lawyers, by Tuesday 5 April 2005, so as to identify (i) the extent of the agreement between the experts, and (ii) the points of disagreement between the experts.
- A statement should be prepared for the Court by the experts showing (i) the extent of the agreement between the experts, and (ii) the points of disagreement between the experts.
- A draft duly indexed and paginated trial bundle (excluding reports from expert witnesses) should be agreed between the Advocates for the parties by Tuesday 3 May 2005.

Patrick John Talbot QC
Lieutenant-Bailiff
4 January 2005