Barrett v Northern Territory of Australia
[2017] NTSC 70

PARTIES:	MOLLIE BARRETT v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	123 of 2015 (21557436)
DELIVERED:	7 September 2017
HEARING DATES:	21 August 2017
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Summary judgment – Principles to be applied in summary judgment applications – Requirement that there be a real or serious question to be tried.

Practice and Procedure – Expert reports – Time for filing and service – Modification of the time fixed by the Supreme Court rules for filing and service by Practice Direction 6 of 2009 – Orders for filing and service made at a Case Management Conference is otherwise an abridgement of time pursuant to Rule 3.02.

Supreme Court Rules, rr 3.02, 23.01, 23.03, 33.08, 44.03.
Practice Direction 6 of 2009 – Trial Civil Procedure Reforms, paras 17, 18.

Monck v The Commonwealth of Australia [2017] NTSC 49.
Nibbs v Australian Broadcasting Corporation [2010] NTSC 52.
RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors [2019] NTSC 103.
Outback Civil Pty Ltd v Francis [2011] NTCA 3.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Connolly
Defendant:	Mr Crawley

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Barrett v Northern Territory of Australia
[2017] NTSC 70

No. 123 of 2015 (21557436)

BETWEEN:

Mollie Barrett
Plaintiff

AND:

Northern Territory of Australia
Defendant

CORAM: MASTER LUPPINO

REASONS

(Delivered 7 September 2017)

[1] The Defendant has applied by interlocutory summons for an order for summary judgment pursuant to Rule 23.03 of the Supreme Court Rules ("*SCR*").

[2] The relevant parts of Rule 23 of the *SCR* are:

> **23.01 Stay or judgment in proceeding**
>
> (1) Where a proceeding generally or a claim in a proceeding:
>
> (a) does not disclose a cause of action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the Court,

the Court may stay the proceeding generally or in relation to a claim or give judgment in the proceeding generally or in relation to a claim.

(2) Where the defence to a claim in a proceeding:

(a) does not disclose an answer;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the Court,

the Court may give judgment in the proceeding generally or in relation to the claim.

(3) Omitted.

23.03 Summary judgment for defendant

On application by a defendant who has filed an appearance, the Court at any time may give judgment for the defendant against the plaintiff if the defendant has a good defence on the merits.

[3] I discussed the law in respect of summary judgment applications most recently in *Monck v The Commonwealth of Australia*.[1] As I pointed out in that case there have been a number of relatively recent instances in the Northern Territory where the applicable principles have been discussed. There was a detailed examination of the authorities in *Nibbs v Australian Broadcasting Corporation*[2] ("*Nibbs*") and *RTA Pty Ltd & Ors v Brinko Pty Ltd & Ors.*[3] In *Nibbs*, I said that the test to be applied was whether there is a real or serious question to be tried. In *Outback Civil Pty Ltd v Francis*[4] ("*Outback Civil*") the Court of Appeal held that Rule 23.03 will only be

1 [2017] NTSC 49.
2 [2010] NTSC 52.
3 [2019] NTSC 103.
4 [2011] NTCA 3.

enlivened where the plaintiff's case is "*so clearly untenable that it could not possibly succeed*".[5]

[4] In the substantive proceedings the Plaintiff claims damages for injury alleged to arise as a result of the negligence of employed staff at Royal Darwin Hospital ("RDH") for which the Defendant is vicariously liable. The claimed breach of duty is in respect of the treatment given for an ankle injury. The specific allegation in the Plaintiff's Statement of Claim is that the Defendant failed to diagnose a ligamentous injury, failed to appropriately treat the Plaintiff's injury, in particular that it failed to appropriately treat an ankle sprain.

[5] The background facts are that the Plaintiff attended at RDH on 22 September 2012 after having injured her left ankle. Following examination, the Plaintiff's leg was immobilised by use of a below the knee back slab and she was discharged for subsequent review on 28 September 2012.

[6] Following a number of reviews, and while the immobilisation was maintained by one means or another, an MRI was performed and subsequently, on 5 December 2012, the Plaintiff was diagnosed with complex[6] regional pain syndrome.

[7] Success on the claim in negligence requires the Plaintiff to establish firstly that the Defendant owed the Plaintiff a duty of care; secondly, that there was

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5 [2011] NTCA 3 at para 10.

6 The words "chronic" and "complex" seem to be used interchangeably when referring to the condition.

a breach of the duty of care and lastly that the Plaintiff suffered loss as a consequence of the breach.

[8] The existence of the duty of care is admitted on the pleadings.

[9] The Plaintiff's Statement of Claim pleads that at the various times that the Plaintiff was examined at RDH, her complaints were consistent with suffering a lateral ligamentous injury.[7] The Statement of Claim further pleads in paragraph 20, as the breach of duty by the Defendant:-

> Further, the Hospital:
>
> (a) failed to diagnose and appropriately treat the plaintiffs lateral ankle ligament injury when it ought to have been diagnosed and treated, and when it knew (or ought to have known) that the plaintiff's presentation from time to time was consistent with a lateral ligamentous injury;
>
> (b) failed to provide the plaintiff with appropriate treatment for a left ankle sprain.

[10] The basis for the Defendant's application is that there is no serious question to be tried on the available evidence. Procedural orders had been made in respect of the provision of expert evidence by the Plaintiff, initially at a Case Management Conference on 20 June 2016. That order was extended on two occasions such that the compliance due date was extended to 14 February 2017.

[11] The Plaintiff filed and served two reports of Dr Saxby in compliance with that order. The first report was dated 17 October 2016 and appears to have been available shortly before, or possibly just after, the first extension of the order. The second report was dated 13 February 2017. Both reports were

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7 Para 19(b).

filed on 14 February 2017 and I presume they were served on the Defendant at about that time.

[12] Although the Plaintiff had not indicated an intention to rely on any further reports by the time of the first mention of this application on 20 July 2017, before the matter was heard on 21 August 2017 the Plaintiff obtained a report from Professor Visser, a specialist pain medicine physician. Although that has only been provided in conjunction with the Plaintiff's submissions, no issue was taken in respect of that and the Defendant was content for the Plaintiff to be permitted to rely on that report also for the purposes of the current application.

[13] These proceedings are regulated by *Practice Direction 6 of 2009 – Trial Civil Procedure Reforms* ("*PD6*"). The order for provision of expert evidence on 20 June 2016 was made out a Case Management Conference conducted pursuant to *PD6*. Paragraph 17 of *PD6* provides:

> 17. At the case management conference, the Court will:
>
> 17.1 fix a trial date or a trial window, if that has not already been done;
>
> 17.2 make directions to ensure that the matter is ready for trial on that date or in that window;
>
> 17.3 scrutinise carefully the parties' respective pleadings to ensure that they properly identify, and only identify, the real issues of substance which are in dispute between the parties;
>
> 17.4 consider whether any claim or plea is appropriate for summary determination, strike out or determination as a preliminary issue;

17.5 resolve any other outstanding procedural issues between the parties or, if that is not possible, to make directions for their resolution;

17.6 consider whether any further case management conferences are likely to be required and if so to fix the date or dates for those conferences. The parties are to co-operate to avoid as far as possible multiple case management conferences in any one matter;

17.7 make such other orders as it considers appropriate to ensure that the matter is resolved by the Court justly, promptly, economically, and in proportion to the nature of the dispute.

[14] Orders for provision of evidence, whether for medical, expert evidence or otherwise, therefore fall within sub-paragraphs 17.2 and 17.7, in both cases in conjunction with sub-paragraph 17.1. In the case of medical reports, specific provision for service of those reports is also provided for in Rule 33.08(1) of the *SCR* which provides:-

33.08 Time for service

(1) A party must serve copies of all medical reports that the party is required to serve in accordance with these Rules at the time or times as directed by a Judge, the Master or the Registrar.

[15] An order fixing the due date for provision of medical reports made a Case Management Conference clearly serves as the fixing of a service time consistent with that Rule.

[16] Although the reports in this case are medical in nature, they are provided as expert's reports. Service of expert reports is provided for in Order 44 of the *SCR*. Rule 44.03(1)(a) provides:-

44.03 Service of statement of expert evidence

(1) A party who intends at a trial to adduce the evidence of a person as an expert witness shall:

(a) not later than the time fixed by a Judge, the Master or a Registrar at a listing hearing or directions hearing held under Order 48; or

(b) where no such time is fixed:

(i) 6 weeks before the day fixed for the trial; or

(ii) before a directions hearing under rule 48.34 to ensure that a proceeding is ready to proceed to trial,

whichever is the earlier,

serve on every other party a statement in accordance with subrule (2).

[17] Where *PD6* applies there is no listing hearing as provided for in Rule 44.03(1)(a). That is by reason of paragraph 18 of *PD6* providing that Rules 48.16 to 48.19 inclusive, which includes the rule relating to a listing hearing, have no force where *PD6* operates. As a Case Management Conference in *PD6* matters is in lieu of a listing hearing, Rule 44.03(1)(a) must be read as if the reference to a listing hearing in that Rule was a reference to a Case Management Conference.

[18] In any case, and although it is not specifically provided for in *PD6*, in my view orders made for the provision of evidence at a Case Management Conference necessarily have the effect of abridging, pursuant to Rule 3.02, the time otherwise fixed by the *SCR* for the filing and service of expert reports. In my view therefore, for all these reasons the orders made on 20 June 2016 take precedence over the timeframe set by Rule 44.03(1)(b), at least absent a further order or leave.

[19] An analysis of the Plaintiff's expert evidence now follows to assess the Defendant's submission that there is insufficient evidence to enable the Plaintiff to establish breach of duty.

[20] The report of Dr Saxby dated 17 October 2016 was in evidence.[8] Relevantly that report shows that Dr Saxby was asked:-

> Are you able to comment on whether the evaluation of my client's left ankle sprain was consistent with the standard of care expected of a reasonably skilled and careful medical practitioner in 2012? Please provide reasons for your opinion.

[21] In answer Dr Saxby noted the initial treatment and the first discharge for subsequent review and said:-

> "This would indicate that this lady was initially assessed and treated appropriately in the emergency department as one would expect for a severe ankle (soft tissue) injury."

Dr Saxby then commented on events occurring in the subsequent reviews and went on to say:-

> "This lady's care does seem appropriate throughout the outpatient visits but because of her ongoing pain, on 22.11.12, she was further investigated with an MRI Scan which once again confirmed a lateral ligament injury (soft tissue injury) but no bony injury. Therefore, the care received would seem appropriate. The only concern is that when this lady was regularly reviewed and assessed, she did not show a great deal of improvement. The first sign of any abnormal course is on 5.12.12 and it was noted that this lady had hyper aesthesia and discolouration. This was not consistent with a lateral ligament injury but is more consistent with a diagnosis of complex regional pain syndrome. Therefore, I believe this lady's treatment and assessment appears to be appropriate during her episodes of care at the Darwin Hospital."

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[8] Annexure BW9 to the affidavit of Ben Wild made 6 July 2017.

[22] Dr Saxby repeatedly confirms throughout his report that he considered the treatment up to 5 December 2012, when the complex regional pain syndrome was diagnosed, was entirely appropriate.

[23] In answer to the question as to whether the actual treatment given caused or contributed to the onset of chronic regional pain syndrome, Dr Saxby wrote:-

> "CRPS [*chronic regional pain syndrome*] can occur following surgery or any type of trauma, and there is no easy way of diagnosing those at risk. I do not believe that this lady's treatment per se would have increased the likelihood of her developing chronic regional pain syndrome, but once she had developed the symptoms of CRPS, then she would have required active physiotherapy and rehab. As stated from the notes however, there does not appear to be any evidence of this in the hospital notes till the 5th December. Therefore, I believe this lady has been treated appropriately for ankle sprain up to the date of 5 December 2012. I do not believe that her treatment would predispose her to develop chronic regional pain syndrome. I believe this could have occurred regardless of how she was treated."

[24] This supports the Defendant's submission that the Plaintiff will be unable to prove a breach of duty of care. In answer the Plaintiff submits that on the currently available evidence there is scope for some favourable inferential findings to be made by the Court at trial. The Plaintiff's argument is that it is open to the Court to find, in the absence of an explanation from the Defendant, that the period of the immobilisation exceeding 3-4 weeks was not indicated. This appears to be prefaced on the basis that immobilisation in excess of that period resulted in the development of the of chronic regional pain syndrome, something which I do not consider to be established in any case.

[25] Further the Plaintiff submits that certain propositions[9] subsequently put to Dr Saxby based on medical literature, would support a finding by the Court that the usual period of immobilisation for a severe ankle sprain is less than 3-4 weeks. The Plaintiff submits that Dr Saxby did not specifically either agree or disagree with those propositions when they were put to him. Although I cannot see how that would assist the Plaintiff, in any case an analysis of Dr Saxby's second report, when taken in context, shows that the Plaintiff's submissions in that respect are baseless.

[26] In his second report, Dr Saxby was asked firstly whether the Plaintiff would have developed chronic regional pain syndrome in any case. He replied, inter alia "… *I do not believe that this lady's treatment per se would have increased her likelihood of developing chronic regional pain syndrome*."

[27] Secondly Dr Saxby was asked whether the Plaintiff probably developed chronic regional pain syndrome as a result of the treatment provided at RDH. His reply was, "*Once again, I don't believe it is possible to state that this lady developed CPRS because of her treatment*."

[28] Lastly Dr Saxby was asked to comment on whether the Plaintiff's chronic regional pain syndrome might (my emphasis) be causally related to her risk factors of "… *her sex, trauma and immobilisation*." His response was, "*These factors as you state are associated with the condition. That does not*

[9] Set out in a letter from the Plaintiff's solicitors to Dr Saxby dated 9 February 2017 being annexure BW10 to the affidavit of Ben Wild made 6 July 2017

mean they are causative of the condition, but these factors have been implicated as an association of this condition."

[29] Asking Dr Saxby to express an opinion on whether the Plaintiff's chronic regional pain syndrome might be causally connected to identified risk factors also does not assist the Plaintiff's case. I think Dr Saxby's position is clear. Nothing in his second report detracts from the opinion he expressed a number of times in his first report namely, that the treatment of the Plaintiff was appropriate. I cannot accept the Plaintiff's submissions in light of this. I do not see that Dr Saxby's second report advances the Plaintiff's position at all. At the very least, the basis by which the Court could make the favourable inferential finding is not established by that evidence.

[30] The Plaintiff also relies on Dr Saxby's report, specifically the terminology he uses, as an arguable basis for the Court to make favourable findings at trial. I do not agree that is the case. Terminology used by Dr Saxby indicates that he uses the terminology of "soft tissue injury", "ankle sprain" and "ligamentous injury" interchangeably such that on any reading of Dr Saxby's report, he confirms the correctness of the diagnosis made, and the appropriateness of the treatment given, by medical staff at RDH. That therefore would not assist the Plaintiff on the available evidence.

[31] I likewise do not consider that Professor Visser's report advances the Plaintiff's position. In answer to a specific question, he acknowledged that an ankle sprain <u>alone</u> (my emphasis) or in combination with a period of

immobilisation is a recognised cause of chronic regional pain syndrome. He went on to say:-

> "This case as described in the notes of your letter dated 18 July 2017 is a typical presentation for CPRS after an ankle injury associated with a period of immobilisation. Persisting pain, swelling, colour changes and hyperalgesia in the region of the injury as described in the notes between 22 September and 5 December 2017, (*sic*) are typical for a presentation of sub-acute CPRS (within the first 3M following an injury."

[32] This is at odds with the report of Dr Saxby as he reports that the notes reveal that hyperalgesia and discolouration were first observed on 5 December 2012 when the chronic regional pain syndrome was diagnosed.

[33] Professor Visser declined to express an opinion regarding whether the duration of immobilisation of the Plaintiff's ankle caused or contributed to the chronic regional pain syndrome as he said that was beyond his expertise.

[34] In essence therefore Professor Visser's report establishes only that chronic regional pain syndrome can result from an ankle sprain alone or in combination with immobilisation. He acknowledged that in most cases such as this, a period of immobilisation is required. His evidence falls well short of establishing that the Plaintiff's treatment was inappropriate.

[35] The Plaintiff also submitted that some favourable concessions going to proof of breach of duty might be secured in cross-examination of treating doctors. That clearly assumes that the Plaintiff's case proceeds to the point where the Defendant would be required to call evidence or that the treating doctors would be called. That submission seems to misunderstand where the onus of proof lies. There is no certainty that those doctors would be called. On the

evidence as it currently stands, if this matter proceeded to trial, I think it is unlikely that the Defendant would call any evidence. The Defendant has not obtained expert opinions to date as the Defendant does not consider there is any case to answer at this stage. I agree with that assessment. In that event it is unlikely that the matter would proceed, on the current state of the evidence, beyond the closure of the Plaintiff's case.

[36] In any case the Plaintiff's submission is pure speculation and has no regard to the principles to be applied on the current application. The application is to be decided on the available evidence. Speculation as to who may be called by the Defendant at trial or what their evidence might be falls well short of satisfying the requirements.

[37] I therefore reject all of the Plaintiff's submissions. I agree entirely with the Defendant's submissions that there is no real or serious question to be tried on the available evidence.

[38] Given the generous timeframes and extensions afforded to the Plaintiff to date in respect of providing expert evidence, at the conclusion of the hearing when the Plaintiff indicated that a further opportunity to provide supporting expert evidence was sought, I was not prepared to grant that outright. I did however indicate that I would be prepared to hear further from the Plaintiff on this application in the event that further evidence was obtained prior to publication of my decision. I gave the Plaintiff liberty to apply in that respect and reserved my decision.

[39] No further evidence having been provided and no further hearing having been requested pursuant to the liberty to apply, I now find for the Defendant on its application. I therefore dismiss the Plaintiff's claim.

[40] I will hear the parties as to costs.