



2023 JMSC Civ 199

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV 01216

BETWEEN	RAMONE VIRGO	CLAIMANT
AND	NARDIA JONES	DEFENDANT

Ms Treshia Griffiths instructed by Treshia Griffiths and Co Attorneys-at-law for the Claimant

Ms Faith Gordon instructed by Samuda and Johnson Attorneys-at-law for the Defendant

September 21, 2023

Trial – application for adjournment – whether the Case Management Conference Judge can sit as the trial Judge – Fast Track Court, the Docket System and the role of the Case Management Conference Judge

MOTT TULLOCH-REID, J

1. In this claim, the Claimant claims against the Defendant for damages arising out a motor vehicle accident which took place in December 2017. The allegation is that the Defendant negligently drove her motor vehicle so that it collided into the Claimant who was lawfully walking on the roadway. The Defendant disputes the Claimant's allegation, and her version is that it is the Claimant who walked into her car and so caused and/or contributed to his own injuries.
2. The Defence having been filed the parties engaged in an unsuccessful mediation process. They appeared before me on April 26, 2022, for a Case Management

Conference (“CMC”) but it had to be adjourned as the Claimant had an application to appoint expert among others which had not been served on the Defendant’s attorneys-at-law. The CMC was adjourned to January 18, 2023, for the hearing of the Claimant’s application.

3. The CMC orders included the setting of trial and pre-trial dates, orders for specific disclosure, and orders that counsel commonly describe as “the usual CMC orders”. Other orders included an order made by and with the consent of both parties appointing the doctors whose medical reports the Claimant intended to rely on, expert witnesses. The Defendant was also given the option of having the Claimant consult with a doctor of her choosing.
4. When the matter came up for Pre-Trial Review on the scheduled date, the Defendant’s attorneys-at-law indicated that they had an application for Dr Konrad Lawson to be appointed an expert witness. Ms Griffiths objected to Dr Lawson being so appointed and for the medical report he prepared being treated as an expert’s report because the requirements which had to be met pursuant to CPR 32.13(3) had not been met. An opportunity was given to the Defendant to file amended medical report that complied with the CPR requirements, but Ms Gordon declined the opportunity, so the Defendant’s application to appoint expert was heard and refused. Dr Konrad Lawson was ordered to court to be cross-examined and Dr Vijayendra was also ordered to appear to Court to be cross-examined.
5. Ms. Gordon, through a series of communication with the Court’s Registry staff on or about September 19, 2023, informed the Court that she would be seeking an adjournment as Dr. Lawson was unavailable to attend court as he was on the high seas. This reason seemed strange to me, as there would have been nothing preventing the Defendant from seeking permission for Dr. Lawson to appear by videolink to give his evidence. In these modern days in which technology is so far advanced, I believe that perhaps only small fishing canoes would not have internet

access aboard for indeed persons aboard cruise ships, submarines, yachts, and even small fishing vessels are able to access the internet quite easily.

6. The Court's position being made known to Ms. Gordon, an application that I recuse myself from the hearing of the trial on the basis that I had sat as the CMC judge was filed on September 20, 2023.
7. On the morning of the trial, Ms Gordon renewed her application on the basis that Dr Lawson was unavailable to be examined and cross-examined. She had heard from him that he would return to Jamaica in October 2023. I informed Ms Gordon that we could proceed to take the other evidence and then hear Dr Lawson by video conference at a later date. Ms Gordon did not form the view that my suggestion was workable. She then made her application that I recuse myself as trial judge as I had sat as the CMC judge and had dealt with contentious issues at the CMC.
8. She relied on CPR 27.7 in support of her position. CPR 27.7 provides that:

"The judge or master who conducts the case management conference may not try the claim except –

(a) administrative law proceedings under part 56;

(b) admiralty proceedings on the part 70;

(c) claims stride in the commercial division under part 71; or

(d) where all parties consent."

9. Ms. Griffiths agreed that I was curtailed in my ability to sit as the trial judge at the hearing by CPR 27.7 but indicated that the Defendant had only made the application for me to recuse myself on September 20, 2023 – a day before the trial, knowing full well that the list had been published from September 14, 2023 and that it would be difficult at this late stage to find another judge to hear the matter. She argued that the Defendant had had at least one week to raise an objection to

the matter being tried by me so that the matter could be placed before another judge. She argued further that as the Defendant had not raised any objection to me sitting as trial judge in the claim, that she had formed the view that there had been consent on his part.

Analysis

10. CPR 27.7 says that the Judge or Master who conducts the CMC is not to hear the case. The word "*may*" is used but exceptions are noted. I have to agree with Ms Gordon that because of the exceptions noted even though the word "*may*" is used, it is to be interpreted as being mandatory. Perhaps the word "*shall*" would have been the better word in that context since it can be interpreted as being mandatory or discretionary depending on the context in which it is used.

11. When there is a discrepancy in the meaning of a statute or any legal document, we do not consider its literary meaning but rather its purposive meaning. What is the purpose of CPR 27.7? I am of the view that the drafters when formulating that rule, intended that a judge who conducted a case management conference that involved substantive issues should not hear the trial without the consent of the parties. Part 26 of the CPR speaks to the powers of the court at case management conference. It seems to me on a reading of Part 26, that in the majority of instances, the issues the court would consider at CMC if it were done properly would go to the substance of the claim. Applications to strike out cases or parts of them, applications for summary judgment or any other contested application should rightly be heard at the CMC. If that is the case, then it is my view that the court ought not to hear the matter but where the issues dealt with are merely procedural in nature, then there is no reason for the CMC Judge not to sit at the Trial or the Assessment of Damages. The rule is meant to guard against bias especially in circumstances where at the CMC the judge would have gone into the nitty gritty of the matter and may have formed an opinion on what the end result of the case should be having heard all the underlying issues before the actual Trial.

12. In this case, I cannot say I went into the nitty gritty of the matter. In fact, orders were made by and with the consent of the parties. The Defendant has an issue today because of the untidy way in which her application to appoint an expert witness was drafted as well as because her attorneys-at-law were not careful to comply with CPR 32 when drafting the application to appoint expert witness. They need time and when time is needed and not readily given, a drowning man will grasp at a straw.

13. Notwithstanding my views on the issue and how CPR 27.7 is to be interpreted, to prevent any further delays in this case and until there is some clarity on how CPR 27.7 is to be interpreted when considered in relation to the Docket System in particular, or generally, I will adjourn the matter and place it before another judge. The costs that will be awarded for today's adjournment, will not only be to assist the Claimant in recovering attorneys' fees paid for attending today's hearing and the costs he himself would have personally incurred for travelling to court today, but will also include a punitive element - one that punishes the Defendant for wasting the court's time, human and other resources.

14. It is not my view that sincere efforts were made to secure Doctor Lawson's attendance at court today, and this has led to the wasting of the court's time. Practice Direction No 16 of 2021 deals with the "Fast Track Scheme: Assessment of Damages and Trial of Simple Negligence Claims". The Practice Direction came into effect on September 16, 2021. Paragraph 2 of Part A provides that:

"Each Court will have its own List/Docket and the Judge assigned to the Court will have conduct of the assessment of damages and simple negligence trials on the List/Docket from the date of their entry into that court until the completion of the assessment or trial." (emphasis added)

15. Although Ms. Gordon would or should have been privy to the Practice Direction, she made an application for me to recuse myself from the Trial. She made this application at the Trial with the knowledge that fast track matters are dealt with in the Docket System and the same judge has the matter from the beginning to the end. Had she raised her objection earlier (perhaps at the CMC), then steps would have been taken by the Registry for another Judge to sit at the Trial today so that the matter could be dealt with today without any further delay. The culture of the Court's operation is changing and once trial dates are set, they are to be kept. Trial date certainty is the new mantra. The Defendant will therefore be penalized for today's adjournment with a cost order.

16. My orders are as follows:
 - a. The Trial is adjourned to December 7, 2023, at 10:00am before a judge alone in open court. If the Defendant is not ready to proceed on the adjourned date her statement of case will be struck out.

 - b. The Pre-Trial Review is to take place on October 18, 2023, at 9:30am for half an hour by video conference.

 - c. The Defendant is to pay the Claimant costs for today's adjournment in the amount of \$130,000 on or before October 17, 2023.

 - d. The Claimant's Attorneys-at-law are to file and serve the formal order.

T. Mott Tulloch-Reid
Puisne Judge