



[2012] JMSC Civ 195

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005HCV02260

BETWEEN RICARDO WILKINS CLAIMANT/APPLICANT

**A N D POWTRONICS ELECTRICAL
INTEGRATED TECHNOLOGY LIMITED 1ST DEFENDANT/
RESPONDENT**

AND DONALD FERGUSON 2ND DEFENDANT/RESPONDENT

**AND JAMAICA PUBLIC SERVICE
COMPANY LIMITED 3RD DEFENDANT/RESPONDENT**

Mr. Ainsworth Campbell for the Claimant/Applicant

Mr. Patrick Foster QC and Ms. Ayana Thomas instructed by Nunes Schofield
DeLeon & Co. for the 1st Defendant/Respondent

November 30, December 10 and 12, 2012

**RULING ON NOTICE OF APPLICATION FOR COURT ORDERS FILED
NOVEMBER 26, 2012**

FRASER J

THE APPLICATION

[1] By Notice of Application dated the 23rd November 2012 and filed the 26th
November 2012 the claimant/applicant sought the following Orders:

1. That the Medical Reports of:
 - (i) Dr. E. Martin Clarke dated October 16, 2009;
 - (ii) Dr. Garfield Forbes dated March 25, 2011;
 - (iii) Dr. Amza Ali dated February 9, 2009;
 - (iv) Dr. Franklin Ottey dated December 15, 2009;
 - (v) Dr. Dwight Webster dated March 4, 2010 and March 13,
2011 respectively;

- (vi) Dr. Ivor Crandon dated September 13, 2010;
- (vii) Dr. Wendel Abel dated September 16, 2010;
- (viii) Dr. Trevor Golding (MRI) Report dated February 11, 2011;
- (ix) Dr. Tamika Haynes-Robinson dated March 1, 2011;
- (x) Dr. Owen Morgan dated May 13, 2011;

be admitted in evidence in the claim herein.

- 2. That the makers of the above-mentioned medical reports be admitted to testify as expert witnesses in the claim herein.
- 3. That the medical reports that were admitted in evidence on or about the 15th day of July 2011 be made to stand.

[2] The grounds on which the claimant/applicant sought the orders were:

- 1. The claimant needs to satisfy the requirements of the CPR;
- 2. It is necessary to validate the admissions of medical reports already tendered in evidence.

[3] Counsel for the claimant/applicant filed an affidavit in support of the application dated and filed November 26, 2012. In the affidavit of Ayana Thomas dated and filed December 7, 2012 on behalf of the 1st defendant/respondent, certification of the doctors as experts and the treatment of their reports as expert reports was opposed.

THE SUBMISSIONS

Mr. A. Campbell for the Claimant/Respondent

[4] Mr. Campbell for the claimant/applicant submitted that due to the efforts to have the matter heard speedily a Case Management Conference was never held. He therefore sought by this application to have the court make an order certifying the respective doctors as experts and to make the reports previously admitted by consent stand.

- [5] He further submitted that all the medical reports were addressed to the court and in the correct form therefore it was appropriate for the orders sought to be made.
- [6] Counsel contended that the issue of certification came to the forefront when counsel for the 1st defendant/respondent objected to Dr. Garfield Forbes being called to testify.
- [7] Counsel advanced that if the orders were not granted all the medical evidence received by the court to date would have to be “thrown out”. He submitted that the granting of the order would be in keeping with the overriding objective that cases be handled justly.

Mr. P. Foster QC for the 1st Defendant/Respondent

- [8] In respect of the application for orders that the medical reports be admitted and allowed to stand as evidence, counsel submitted that it having been confirmed by Mr. Conrad George who initially appeared for the defendants that the reports had been received in evidence by consent, there was no need for an order for the documents to “remain in evidence”. There was no need for an order to create a status for the documents which they already had. It would be up to the court to give them whatever weight the court thought appropriate. He submitted that, though not expert reports they formed opinion evidence in the case.
- [9] Counsel further submitted that the doctors who gave the reports in question should not at this stage be certified as experts. He contended that to do so would be contrary to the spirit and intendment of Part 32 of the Civil Procedure Rules (CPR) which contemplates in rule 32.6 that the doctor should first be certified and then prepare the report. The rules also provide for the expert to be asked questions by the opposing side and the responses received made part of the expert’s final report (See CPR rule 32.8).
- [10] He submitted that not only were the prescribed logical steps outlined in the CPR not followed, the reports were also misleading. Those reports speak to injuries sustained by the claimant on September 15, 2004 in the

absence of consideration of relevant injuries sustained by the claimant in 2009 as well as in 1997 or 1998. It was therefore inappropriate in the circumstances for those reports to be elevated from opinion evidence to expert reports; this as it was far more difficult for a court to disregard an expert report compared to opinion evidence given by a doctor. In counsel's view the court would be under a greater obligation to explain why it rejects expert evidence than opinion evidence that has not been certified as expert. Counsel continued that there was no advantage and no reason to have the reports certified after the fact. The court could still consider the opinion evidence and could be more flexible with that evidence, than if the doctors were now certified as experts under CPR Part 32.

- [11] Counsel further submitted that the difficulty with Dr. Forbes giving evidence was occasioned by the fact that he had never provided a report to the court or to anyone. All that was before the court were hospital records which contain his signature at the end of a form. That form could not be considered a medical report. He contended that what is required is for Dr. Forbes to be certified and then prepare a medical report in accordance with CPR Part 32 before he can testify. Counsel argued that the hospital records from which it had been sought to have Dr. Forbes testify did not reach the threshold of a medical report and that it should be noted that those records disclosed a number of comments purportedly made by Dr. Forbes, highlighting "issues" in relation to those very records he had signed.
- [12] In response to a query from the court, Mr. Foster QC submitted that it would be possible for the doctors to be certified as experts without the reports they had prepared being certified as expert reports. However the concern he expressed was that if the doctors were certified as experts it was likely that their reports would be retroactively seen as expert reports, and they might be called to testify about matters not contained in those reports. Such an approach he maintained would be unfairly prejudicial to the interests of the 1st defendant.

ANALYSIS AND RESOLUTION

[13] The case of ***Cherry Dixon-Hall v Jamaica Limited*** SCCA 26/2007 (November 21, 2008) provides great assistance in guiding the court to the appropriate decision on this application. In ***Cherry Dixon-Hall's*** case at the assessment of damages hearing, the medical report of one Dr. Williams was received in evidence by consent. However at the Case Management Conference which preceded that hearing, no order had been made certifying Dr. Williams as an expert. The Learned Trial Judge in her judgment concluded that as Dr. Williams had not been certified, the report would not be treated and assessed as expert opinion evidence but rather as evidence of fact. On appeal, the general questions of importance were identified by Harrison JA as first, *"...the approach which the court should adopt where there is agreement between the parties for the admission of agreed medical reports in respect of personal injuries; and second...whether the court should retrospectively refuse to admit the agreed medical reports for failure to comply with Part 32 of the Civil Procedure Rules 2002"*.

[14] It was held that the reports having been admitted by consent as medical reports, it was inconsistent and unfair to the appellant to hold that Dr. Williams was not an expert and that his reports were inadmissible. It was also noted that no issue had been raised regarding the medical competence of Dr. Williams. In all the circumstances of that case it was therefore further held that the Learned Trial Judge had fallen into error in ruling that the opinion evidence of Dr. Williams could not be received as expert evidence without the claimant's compliance with Part 32 of the CPR. There are also dicta from Harrison JA at page 39, paragraph 47 of his judgment indicating that based on the court's general powers of management the Learned Trial Judge *"ought to have given the claimant an opportunity to remedy any perceived defect in procedure rather than retrospectively imposing strict limitations and sanctions"*.

- [15] The Court of Appeal in **Cherry Dixon-Hall's** case also acknowledged the well established rule that it is open to a trial judge to accept or reject the opinion of an expert even in circumstances where that opinion is unchallenged. It was also restated that the evidence of an expert has to be viewed in the context of all the other evidence in the case.
- [16] In the instant application I agree with Mr. Foster QC that the reports having already been admitted in evidence by consent there is no need for the court to make an order giving the reports a status they already have.
- [17] However, unlike the situation in **Cherry Dixon-Hall**, counsel for the claimant/applicant has sought to remedy the defect in the procedure by now having the doctors certified as experts. When the procedure established in Part 32 is complied with, the certification precedes the generation of the report. In this case if the court grants the application of counsel with regard to certification, the generation of the report would have come before the certification. What is clear is that the certification of someone as an expert speaks to an acknowledgment of their appropriate training, experience and competence in a particular field. My reading of **Cherry Dixon-Hall's** case is that consenting to the reception of medical reports in evidence with no challenge to the competence of the doctor, signifies an acceptance that the person who prepared the report is an expert. (See in particular the judgment of Harris JA at page 60 paragraph 27). Therefore the reports being in evidence the doctors would *de facto* have to be treated as experts. Mr. Campbell's application seeks to make that acceptance and treatment *de jure*. It should also be noted that the report of each doctor received in evidence in the instant case, identifies the nature of that doctor's expertise in accordance with CPR rule 32.6 (3) and contains the required contents as prescribed by CPR rule 32.13.
- [18] In light of the reasoning in **Cherry Dixon-Hall**, I am not persuaded by the submissions of Mr. Foster QC on this point that designating the doctors as experts would elevate their reports to a level that would make it more

difficult to reject their reports or aspects of their reports than if there reports were mere opinion evidence. I disagree. In these circumstances I find the distinction between “expert reports” and “opinion evidence” to be one without a difference. The only thing that makes the opinion evidence of the doctors relevant is that they are experts in their respective fields. Their acknowledged expertise gives the court the right to accept their reports. The value of those reports however ultimately depends on a myriad of factors, including crucially the nature, accuracy and sufficiency of the information on which those reports are founded.

[19] I therefore will dispose of the application in the following manner:

1. Orders 1 and 3 sought are denied; these orders being unnecessary. The reports of all the doctors listed in the application with the exception of Dr. Garfield Forbes who has not submitted a report, are already properly in evidence and the status of those reports is not dependent on any further order of this court.
2. The reports of doctors E. Martin Clarke, Amza Ali, Franklin Ottey, Dwight Webster, Ivor Crandon, Wendel Abel, Trevor Golding, Tamika-Haynes-Robinson and Owen Morgan already having been received in evidence by consent, which reports were prepared in accordance with the requirements of the CPR rules 32.6 (3) and 32.13, the said doctors are hereby certified as experts pursuant to Part 32.6 of the CPR. Dr. Garfield Forbes is not certified as an expert, there being no report furnished by him admitted by consent, and there being no other material before the court identifying the nature of his expertise.