[2019] JMSC Civ 224

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2012 HCV 05573

BETWEEN	**AB (A Minor)** **(Who sues by her Mother and Next Friend)**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**DEFENDANT**

IN CHAMBERS

Miss Catherine Minto instructed by Messrs. Nunes, Scholefield, DeLeon & Company for the Claimant

Miss Tamara Dickens instructed by the Director of State Proceedings for the Defendant

Heard: October 14, 15, 16, November 26 and December 10, 2019

Negligence – Action upon the case – Limitation – Whether action statute-barred – Application to amend pleadings – Whether in interests of justice amendments should be allowed – Evidence – Expert witness – Application to rely upon expert evidence – Content of expert witness's report – Limitation of Actions Act, 1881, section 46, Limitation Act, 21 Ja. I, c. 16, sections 3 and 7, Civil Procedure Rules, 2002, rules 11.6(1), 20.1, 20.4, 20.6, 32.2, 32.3, 32.4(2), 32.6(1), 32.12 and 32.13(3)(a), (b) and (c)

A. NEMBHARD, J

INTRODUCTION

[1] By way of an oral application, the minor Claimant seeks the following relief: -

(1) That she be permitted to amend her statement of case;

(2) That Dr. Kai A.D. Morgan be certified or appointed an expert witness for the hearing of the Assessment of Damages; and

(3) That permission be granted for the final report of Dr. Kai A.D. Morgan, dated 20 April 2019 and filed on 9 July 2019, to be tendered in evidence at the hearing of the Assessment of Damages.

ISSUES

[2] The following issues arise for the Court's determination: -

(1) What is the proper interpretation to be applied to section 7 of the English Limitation of Actions Act, 1623?

(2) Whether the amendments indicated in the Further Amended Particulars of Claim, filed on 15 July 2019, are amendments that are being made after the expiration of a relevant limitation period?

(3) Whether the purported amendments indicated in the Further Amended Particulars of Claim, filed on 15 July 2019, amount to a "fresh claim", in that, new injuries are being pleaded for the first time?

(4) Is the Court properly to certify or appoint Dr. Kai A.D. Morgan as an expert witness for the hearing of the Assessment of Damages?

(5) Should permission properly be granted for the final report of Dr. Kai A.D. Morgan, dated 20 April 2019 and filed on 9 July 2019, to be tendered in evidence at the hearing of the Assessment of Damages?

THE LAW

The origins of trespass on the case

[3] It has been commonly supposed that the Statute of Westminster II set up a machinery for the issue of new writs by the Chancery, and that the best known product of that machinery was the writ of trespass on the case. The purpose of the Statute of Westminster II was to fill gaps in the common law by creating legal remedies for certain cases then unprovided for by common or statute law. This purpose was carried out by three types of provisions: first, by the provisions for the better enforcement of previously created statutory remedies, such as the writ of *cessavit* given by the Statute of Gloucester[1]; second, by the provision for entirely new remedies, such as the famous writ of *formedon*[2]; and third, by the provision for the formulation of similar writs for similar cases both at that time and in the future.

[4] By the latter part of the thirteenth century, the nature of the common law had been changed by the emergence of the formalized action of trespass from these hybrid *quare* actions and by the establishment of the King's courts as the controlling judiciary of the kingdom.

[5] Out of the *quare* actions, as actions for damages in general, emerged the specialized writ of trespass; but the writ of trespass granted redress for injury done by direct force, and did not apply to other types of injuries.

[6] The provisions of chapter 24 and the rest of the Statute of Westminster II were attempts to provide remedies for otherwise remediless plaintiffs. The *in consimili casu* clause was intended to authorize a petition to Parliament for variant forms of writs should the chancery clerks and the "wise men" of the realm fail to grant the necessary writs. These writs, however, were to be secured only for a "like

[1] Statute of Gloucester, 1278, 6 Edw. I, c. 4

[2] Statute of Westminster II, c. 1.

case falling under the same law and requiring a like remedy" to a writ already in existence. In the early actions of "special" trespass out of which "case" developed, not only is there no attempt to show a similarity between the facts in the case for which special trespass is brought and those for which an action of "general" trespass would lie. Invariably, the emphasis was on the dissimilarity.

[7] The fact that dissimilarity rather than similarity in the actual facts of the case was responsible for the use of the "special" writ of trespass was brought out in **Browne v Hawkins**.[3] Counsel for the defendant said that one should not combine *vi et armis*[4] and a recital of special matter in the same writ; the former, a direct injury, was a matter to be remedied by "general" trespass; the latter, a question of negligence, could be remedied only by an action upon the case.

The development of trespass on the case

[8] By a process of evolution and growth the action of "case" as "special" trespass branched away from the older action of trespass *vi et armis*. Thus, the action of trespass on the case began its career not as a new and distinct form of action but as a special type of the well-known action of trespass – a means developed by the courts to provide a remedy for injuries caused without direct force which were outside of the scope of trespass *vi et armis*.

[9] In the first case found among the printed judicial records of the fourteenth century in which the phrase *trespass sur le cas* occurs, a distinction appears to have been made between the "common" trespass and the writ in the case. This early action of *trespass sur le cas* was brought in 1367 against a miller for taking multure when the plaintiff claimed the right to have his grain ground toll-free. The report indicates a distinction made by both counsel and the court between a special writ of trespass *sur le cas* or *sur ma matter*, and a "general writ with force and arms" or a "common writ of trespass". The use of the words "general" and

[3] Y. B. Trin. 17 Edw. IV, f. 3, pl. 2 (1477) (action for defamation and threatened assault)

[4] "vi et armis" means with force and arms

"common" writ of trespass, in contrast to the form of the writ of trespass called by the reporter *sur le cas*, implies that the latter was a special form of the more usual writ of trespass.

[10] A similar distinction occurs in the case of **Waldon v Marshall**.[5] Williams de Waldon brought a "special writ according to the case" against John Marshall for negligently killing his horse while seeking to doctor it. Perhaps because the circumstances of the case differed from those in which trespass *vi et armis* would lie, Waldon brought a "special writ according to the case." When counsel for the defendant said that the plaintiff might "have a general writ of trespass, that he killed your horse," Belknap, for the plaintiff, replied: "A general writ we could not have had, because the horse was not killed by force". The writ was then adjudged good. There is a clear distinction between the writ actually brought and a general writ of trespass. Had Waldon lived two hundred years later his remedy against John Marshall would have been called trespass on the case. Here the writ was regarded by the reporter, and apparently by counsel, not as a new writ with a distinctive name, but as a variation of the established general writ of trespass *vi et armis* in the form of a "special writ according to the case."

[11] A case of the year 1375 presents a view of the "special" action of trespass which enables us to see how it had already separated to some extent from the parent action. "A writ of trespass upon his case" (*sur son cas)* was brought against a surgeon for maiming the plaintiff by negligent cure of his wounded hand which the defendant had undertaken to heal.[6] The defendant denied the undertaking and offered to wage his law as proof.

[12] That the defendant's offer of wager of law in this case was sustained by the opinion of all the court indicates that this action of *trespass sur son cas* was distinguished in their minds from the regular action of trespass. The mode of

---

[5] Y. B. Mich. 43 Edw. III, f. 33, pl. 38 (1370)

[6] Y. B. Hil. 48 Edw. III, f. 6, pl. 11 (1375)

proof for the latter action was and always had been by trial by jury, and wager of law would never have been allowed where there was a breach of the peace.

[13] Yet it would be incorrect to infer from this case that *trespass sur son cas* was an action entirely separate from trespass. A close relation between them was obviously present in the minds of the counsel and the court.

[14] Cases from the Year Books of the succeeding century show quite clearly that for many years the action which we know as "case" was in a transitional stage, in which it was known as the special form of the general action of trespass. In the action of trespass *quare clausum fregit* brought by one Thomas Frome in 1409, there was a statement of the situation in which the two types of trespass would lie.[7] The question was whether the plaintiff's writ of trespass *vi et armis* would lie where the property in the sheep concerned was in another.

[15] A similar distinction between the general writ of trespass and the writ "on the case" appears in the case of **Hugh G. v William T.** in 1442.[8]

[16] The Court, in deciding whether there had been any wrong in William's taking Hugh's child, discussed the following analogy: -

> *"FULTHORPE. J. …For in an action of trespass brought against me for a horse wrongfully taken and I say that he himself is seised of the horse … this is a good plea. And so was the rule before Hankford in the King's Bench, and the reason was this: that it would be against reason that he ought to receive damages for the whole horse, when he himself is seised of the horse, wherefore in such a case he would have a special action of trespass sur son cas supposing that his horse had been long detained. …"*

[7] Y. B. 11 Hen. IV, f. 23, pl. 46 (1409)

[8] Y. B. Mich. 21 Hen. VI. F. 14. pl. 29 (1442)

> *"PASTON, J. …But let us say that my horse was taken with force and afterwards the horse was returned to me [by the taker], I shall have a general action of trespass and not special as has been said."*

[17] It is impossible to read these cases without concluding that, to the late fourteenth and fifteenth century legal mind, there were two types of trespass: general trespass and special trespass. General trespass was synonymous with trespass *vi et armis*; and in its early days the form of the action of trespass which later became trespass on the case was "special" trespass. When the phrase "on the case" was used in connection with "special" trespass, it was a purely descriptive phrase that referred only to the nature of the writ – a writ "on the case" – and not to the action itself. This general descriptive meaning of the phrase continued after 1350.

[18] From the later fourteenth century on, therefore, the writ of special trespass, or trespass on the case, was well established as a variant form of the general writ of trespass. The one form of the action was even contrasted with the other by the difference in the writs. The form of the writ of trespass on the case was therefore defined as a writ of trespass that lacked the *vi et armis* and *contra pacem* phrases, and included a recital of the special matter. The transition was gradual. Beginning as an extraordinary remedy, the special action of trespass continued to be regarded as extraordinary, and was used rather infrequently for a century or so after its first appearance in any form in the Year Books.

[19] The persistent differentiation of the two actions of trespass as special and general may indicate that the special form was not a new statutory creation, but that it was an adaptation of the older and more usual action of trespass *vi et armis* to meet a situation to which *vi et armis*, even in its technical sense, would not apply because of the dissimilarity in the operative facts. It suggests that the

special action was the result of a process of gradual evolution out of the old established form of the action of trespass.[9]

The evolution of the tort of negligence

[20] In **Letang v Cooper**,[10] the Court was invited to go back to the old forms of actions and to decide the case in relation to them. Under the old law, whenever one man injured another by the direct and immediate application of force, the plaintiff could sue the defendant in trespass to the person, without alleging negligence.[11] Whereas, if the injury was only consequential, he had to sue in "case". The following illustration was given by Fortescue, J., in **Reynolds v Clarke**[12] in 1725:

> *"If a man throws a log into the highway and in that act it hits me, I may maintain trespass because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case because it is only prejudicial in consequence."*

[21] Lord Denning, M.R., in **Reynolds v Clarke** (supra), stated that nowadays, if a man carelessly throws a piece of wood from a house into a roadway, then whether it hits the plaintiff or he tumbles over it the next moment, the action would not be trespass or case, but simply negligence. He stated further that the distinction between trespass and 'case' is obsolete. We have a different sub-division altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according to whether the defendant did the injury intentionally or unintentionally. If one man applies force directly to another, the plaintiff has a

---

[9] "The Origins of the Action of Trespass on the Case", Elizabeth J. Dix, 1937 Volume 46, Issue 7, Yale Law Journal, 1142 at page 1176

[10] [1964] 2 All E.R. 929

[11] Leame v Bray, (1803), 3 East 593

[12] (1725), 1 Stra. 634 at p. 636

cause of action in assault and battery, or, trespass to the person. If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care.[13]

[22] Section 46 of the Jamaican Limitation of Actions Act, 1881 provides that the English Limitation Act of 1623, 21 James I, c.16 ("the Act of 1623") has been recognized and "is now esteemed, used, accepted and received as one of the statutes of this Island". (See also – **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society**[14]).

[23] In **Lance Melbourne v Christina Wan**,[15] the Court held that the provisions of the Act of 1623, as received in Jamaican law, did not specifically refer to the tort of negligence. However, the Jamaican Courts have, over the years, treated actions in negligence as actions upon the case to which the six-year limitation period was applicable. (See also – **Martins Tours Ltd. v Senta Gilmore**).[16]

The relevant statutory provisions

[24] Sections 3 and 7 of the Act of 1623 are relevant. They read as follows: -

"3 And be it further enacted, that all actions of trespass quare clausum fregit,[17] all actions of trespass, detinue, action sur trover,[18] and replevin[19] for taking away of goods and cattle, all

[13] Letang v Cooper [1964] 2 All E.R., per Lord Denning, M.R., at pages 931 I – 932 A

[14] [2010] JMCA Civ 7

[15] (1985), 22 J.L.R. 131

[16] (1969), 11 J.L.R. 254

[17] "Trespass quare clausum fregit" means "breaking a close". It is the species of the action of trespass that has for its object the recovery of damages for an unlawful entry upon another person's land. It is basically "an unlawful entry upon land", and the cause of action created therefrom.

[18] "Sur trover" concerns the Law of Conversion.

actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrears of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be filed or brought at any time after the end of this present session of Parliament, shall be commenced and filed within the time and limitation hereafter expressed, and not after (that is to say)

(2) *the said actions upon the case (other than slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass quare clausum fregit, within three years next after the end of this present session of Parliament, or within six years next after the cause of such action or suit, and not after;*

(3) *and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year after the end of the present session of Parliament, or within two years next after the words spoken, and not after;*

(4) *and the said actions upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after."*

"7 *Provided nevertheless, and be it further enacted, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debts, actions of trespass for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, feme covert,*

[19] "Replevin" is in relation to the recovery of property.

> *non-compos mentis, imprisoned or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full-age, discovert, or sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."*

Amendments to statements of case

[25] Part 20 of the Civil Procedure Rules, 2002 ("the CPR") makes provision for amendments to statements of case and allows a party to amend a statement of case at any time before the case management conference, without the court's permission, unless the amendment is one to which either rule 19.4 or 20.6 of the CPR applies[20].

[26] Rule 20.4 of the CPR allows for amendments to statements of case after a case management conference only with the court's permission.

[27] Rule 20.6 of the CPR allows parties, with the permission of the court, to amend their statement of case after the end of a relevant limitation period. The rule provides, however, that the amendment is to be granted to correct a mistake as to the name of a party where the mistake was genuine and is not one which would, in all the circumstances, cause reasonable doubt as to the identity of the party in question.

ANALYSIS

What is the proper interpretation to be applied to section 7 of the English Limitation of Actions Act, 1623?

[28] It is clear from a reading of the authorities that, in the late fourteenth and fifteenth centuries, there were two types of trespass: general trespass and special trespass. General trespass was synonymous with trespass *vi et armis*; and in its

[20] Rule 20.1 of the CPR

early days the form of the action of trespass which later became trespass on the case was "special" trespass. When the phrase "on the case" was used in connection with "special" trespass, it was a purely descriptive phrase that referred only to the nature of the writ – a writ "on the case".

[29] It is also clear from the authorities that the distinction between "trespass" and "case" is obsolete. If one man applies force directly to another, the plaintiff has a cause of action in assault and battery, or, trespass to the person. If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. The Jamaican courts have treated actions in negligence as actions upon the case, to which the six-year limitation period was applicable.

[30] It is against this background that the Court is to determine the proper interpretation to be applied to section 7 of the Act of 1623.

[31] The Act of 1623 prescribes no uniform period of limitation for all forms of action. A distinction was drawn between "actions upon the case" on the one hand and "actions of trespass, assault, battery, wounding and imprisonment" on the other hand. In respect of actions upon the case, the primary rule was that a six-year period of limitation is created. Actions upon the case was sub-divided into two groups, viz., "slander" and "other actions upon the case".

[32] Section 7 of the Act of 1623 makes special provision for different classes of persons who are under a legal disability, to bring their actions outside of the limitation period but within a prescribed time after the removal of the disability. The disabilities referred to in the section are infancy, being a married woman, being of unsound mind, being in prison or being beyond the seas.

[33] Section 3 of the Act of 1623 makes a distinction between "all actions of trespass" and "actions upon the case". The provisions of section 7 of the Act of 1623 are enumerative and in them are set out the several causes of action in respect of

which the disabilities would have the effect of enlarging the time within which to file the specified actions. Section 7 makes specific reference to "any such action of trespass", "actions of trespass for assault, menace, battery, wounding, or imprisonment" and "actions upon the case for words". No reference is made to "actions upon the case" generally contained in the section. The maxim "*expressio unius exclusio alterius*" would therefore apply. (See – **Melbourne v Wan**[21]).

[34] It would therefore mean that the provisions of section 7 of the Act of 1623 would not apply to the cause of action as pleaded in the instant case, which has been pleaded as negligence (actions upon the case) and not as an action of trespass. The minor Claimant could not properly be permitted, at this stage, to change her cause of action as pleaded in order to pray in aid the benefit of the provisions of section 7 of the Act of 1623.

Whether the amendments indicated in the Further Amended Particulars of Claim, filed on 15 July 2019, are amendments that are being made after the expiration of a relevant limitation period?

[35] The minor Claimant purports to amend her statement of case to further particularize her injuries as follows: -

i. Deprivation of oxygen causing respiratory distress;

ii. Traumatic brain injury and damage as a result of deprivation of oxygen;

iii. Conduct Disorder and Neurodevelopment Disorder;

iv. Significantly underdeveloped cognitive function with cognitive delays;

v. Attention Deficit Hyperactive Disorder (ADHD);

vi. Developmental delay and emotional outbursts;

[21] (1985), 22 J.L.R. 131 at page 134 F-H

vii. Depression and negation behavioural patterns;

viii. Diminished self-confidence and negative views of herself with low self-image;

ix. Anxiety;

x. Quick to give up;

xi. Acting out behaviourally;

xii. Failing to understand rules, boundaries and expectations;

xiii. Lack of impulse control;

xiv. Short attention span;

xv. Poor emotional regulation;

xvi. Inadequate social skills; and

xvii. Difficulties with social judgment, assessment of risk, self-management behaviour, emotions or interpersonal relationships, motivation in school or work.

[36] Having found that the provisions of section 7 of the Act of 1623 would not apply to the cause of action as pleaded in the instant case, the relevant limitation period would be that of six (6) years from the date on which the cause of action accrued. The cause of action having accrued on 7 October 2009 (the date of the birth of the minor Claimant), the limitation period would have expired on 6 October 2015.

[37] It therefore means that the proposed amendments are ones that are being made after the expiration of a relevant limitation period. The issue for the Court's determination therefore then is whether the proposed amendments to the minor

Claimant's statement of case ought properly to be allowed after the expiration of the relevant limitation period and at this stage in the proceedings.

Whether the purported amendments indicated in the Further Amended Particulars of Claim, filed on 15 July 2019, amount to a "fresh claim", in that, new injuries are being pleaded for the first time?

[38] On this issue, the Court is guided by the pronouncement of Harrison, JA in **Gloria Moo Young and Another v Geoffrey Chong et al**[22]. There Harrison, JA stated that amendments to a statement of case may be granted, however late, when it is necessary to decide the real issues in controversy; when it will not create any prejudice to the other party and is not presenting a "new case" and when it is fair in all the circumstances of the case. (See also – **Judith Godmar v Ciboney Group Limited**[23] and **Peter Salmon v Master Blend Feeds Limited**[24]).

[39] The Court has examined the proposed amendments to the Particulars of Injuries and Loss of Amenities as have been indicated in the Further Amended Particulars of Claim, filed on 15 July 2019. The Court has also compared and contrasted the proposed amendments with the injuries of the minor Claimant that were initially particularized in her pleadings, with a view to determining whether the amendments, as proposed, amount to a "new case" or a "fresh claim".

[40] The Court finds that the proposed amendments do not constitute a "new case" or a "fresh claim". "Respiratory distress" has always formed part of the injuries sustained by the minor Claimant, as a result of the negligence of the servants and/or agents of the Crown, as pleaded. The injury particularized at paragraph 35(i) above seeks to link that respiratory distress to the deprivation of oxygen that the minor Claimant allegedly experienced at birth. The medical records of the

[22] SCCA No. 117/99, judgment delivered on 23 March 2000

[23] SCCA 144/2001, judgment delivered on 3 July 2003

[24] Suit No. 1999/S163, judgment delivered on 26 October 2007

minor Claimant, as disclosed by the Defendant, on their face, seem to substantiate that injury. Another injury sustained by the minor Claimant was initially particularized as being “significantly reduced prospects of a happy and normal childhood”. In light of that, the Court finds that the proposed amendments, itemized at paragraph 35(iii) to (xvii) above, seek to particularize in greater detail the injuries sustained by the minor Claimant, as they have subsequently presented, as a result of the negligence of the servants and/or agents of the Crown, as pleaded. It is to be noted that Dr. Morgan does not purport to make any findings in relation to brain damage and expressly stated that there was no record of Traumatic Brain Injury. Consequently, the Court will not permit the proposed amendment itemized at paragraph 35(ii) above.

[41] The Court finds that the proposed amendments itemized at paragraph 35(i) and (iii) to (xvii) above may be necessary for the purpose of determining the real question in controversy between the parties, which is the quantum of damages; secondly, that the Defendant will have an adequate opportunity to investigate the claims made by virtue of the proposed amendments; thirdly, that the minor Claimant would have to be ordered to disclose the expert reports on which she intends to rely in support of the proposed amendments to her statement of case and lastly, that the Defendant may be compensated in costs on such an amendment.

[42] Nor can it be said that the proposed amendments, even at this late stage, would prejudice the Defendant. It is to be noted that the hearing of the Assessment of Damages in the instant case is scheduled for 12 and 13 April 2021. The Defendant would therefore be afforded an ample opportunity to assess any further and/or additional expert report(s) that may be disclosed, to engage her own expert witness(es), should she deem that necessary, and to put questions in writing to the minor Claimant’s expert witness(es).

[43] Furthermore, it is significant that the Ministry of Education, on its own volition, has conducted its own assessment of the minor Claimant’s cognitive

development and has, since 28 September 2019, placed her in a special needs facility, at the Ministry's expense.

[44] Consequently, in all of those circumstances, and, in the interests of justice, this Court is of the view that the minor Claimant ought properly to be allowed, even at this late stage, to amend her statement of case in terms of the particulars of injuries itemized at paragraph 35(i) and (iii) to (xvii) above.

Is the Court properly to certify or appoint Dr. Kai A.D. Morgan as an expert witness for the hearing of the Assessment of Damages?

[45] The role or function of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his sphere of expertise.[25] An expert witness can give opinion evidence that will be admissible provided that four common law conditions are satisfied:

(a) the matter must call for expertise, normally in matters of art, medicine or science, which are likely to be outside the experience and knowledge of the tribunal of fact;[26]

(b) the evidence must be helpful to the court in arriving at its conclusions;

(c) there must be a body of expertise in the area in question; and

(d) the particular witness must be suitably qualified as an expert in the particular field of knowledge.

[46] Part 32 of the CPR contains the following rules, inter alia, governing the use of expert witnesses in civil proceedings:

---

[25] Rule 32.4(2) of the CPR

[26] Cigarette Company of Jamaica Ltd v Commissioner of Taxpayer Audit and Assessment (2006) Supreme Court, Jamaica, Rev App no 1 of 2005 (unreported)

(a) expert evidence must be restricted to that which is reasonably required to resolve the issues that arise in the proceedings justly;[27]

(b) it is the duty of the expert witness to assist the court impartially on the matters relevant to his expertise; this duty overrides any obligations to the party by whom he is instructed or paid;[28] and

(c) no party may call an expert witness or put in an expert witness's report without the permission of the court, which should normally be given at a case management conference.[29]

[47] The Court observes from the report of Dr. Kai Morgan that she is a clinical psychologist with a Doctoral Degree in Clinical Psychology (Psy. D). She holds a Bachelor of Arts (B.A.) Degree and a Master of Science Degree in General Psychology (M.S.). She has worked at the University of the West Indies (UWI) for fifteen (15) years as a lecturer and as a Consultant in the Department of Community Health & Psychiatry. There can be no doubt that Dr. Morgan is suitably qualified to give expert evidence in relation to the injuries indicated at paragraph 35(iii) to (xvii) above.

[48] Learned Counsel Miss Tamara Dickens has however raised an objection to the appointment of Dr. Kai Morgan as an expert witness, on the basis that she is not qualified to give expert evidence in relation to the injuries pleaded as "deprivation of oxygen causing respiratory distress" and "traumatic brain injury and damage as a result of deprivation of oxygen". In response, learned Counsel Miss Catherine Minto submitted that, at this stage, the issue to be determined by the Court is that of the admissibility of Dr. Morgan's report and not one of the weight to be attached to the content thereof. She relied on the authorities of **Arden v**

[27] Rule 32.2 of the CPR

[28] Rule 32.3 of the CPR

[29] Rule 32.6 of the CPR

Malcolm[30], **New Falmouth Resorts Limited v International Hotels Jamaica Limited**[31]and **Eagle Merchant Bank of Jamaica Limited et al v Paul Chen-Young et aux**[32].

[49] In this regard, an examination of Dr. Morgan's report is instructive. In relation to the minor Claimant's injuries Dr. Morgan had this to say: -

> *"There may be many reasons for [the minor Claimant's] underdeveloped cognitive abilities, one of which is traumatic brain injury/damage. Infant brain damage is a serious condition that affects millions of babies each year. Although there is a myriad of causes, the end result usually means that the baby may experience long-term permanent neurological problems and a wide range of physical problems. Oxygen deprivation, physical trauma during birth are some of the causes outlined by (Birth Injury Guide, 2019) and ADHD, developmental delay and emotional outbursts are some outcomes related to brain damage. Noteworthy, [the minor Claimant's] birth had many complications but there was no record of Traumatic Brain Injury.* ***Recently reviewed hospital records reveal that there was significant oxygen deprivation at birth which typically has a correlation with cognitive delays, which [the minor Claimant] has. Thus, there is a possibility that this oxygen deprivation at birth negatively impacted her cognitive development, however it cannot be conclusively stated****."*

[50] The Court finds nothing objectionable about these statements made by Dr. Morgan. The Court notes that she does not purport to make any findings in relation to brain damage and expressly stated that there was no record of Traumatic Brain Injury. While Dr. Morgan indicates that there is a possibility that the deprivation of oxygen at birth had a negative impact on the cognitive

---

[30] [2007] EWHC 404

[31] [2011] JMCA Civ 10

[32] C.L. 1998/E 095, judgment delivered 19 May 2003

development of the minor Claimant, she does not purport to state so conclusively.

[51] The Court therefore finds that Dr. Kai A.D. Morgan can properly be appointed an expert witness, for the purpose of the hearing of the Assessment of Damages, in the instant case.

Should permission properly be granted for the final report of Dr. Kai A.D. Morgan, dated 20 April 2019 and filed on 9 July 2019, to be tendered in evidence at the hearing of the Assessment of Damages?

[52] Miss Dickens raised an objection to Dr. Morgan's report on the basis of its failure to comply with the requirement of rule 32.12 of the CPR that the expert witness's report be addressed to the court and not to any person from whom the expert witness has received instructions. Miss Dickens also observed that copies of any written instructions, supplemental instructions or a note of any oral instructions, that may have been given to Dr. Morgan, have not been attached to her report. This, it was submitted, is required by rule 32.13(3)(a), (b) and (c) of the CPR. Miss Dickens further observed that Dr. Morgan's report does not provide the certification required by rule 32.13(3)(c) of the CPR.

[53] By way of response, Miss Minto submitted that the purported procedural irregularities identified by Miss Dickens are capable of being remedied, and in fact have already been remedied by Dr. Morgan's final report, dated 20 April 2019 and filed on 9 July 2019. Miss Minto submitted further that the observations made by learned Counsel Miss Dickens should not form the bases on which the report is excluded, especially in light of the fact that the preliminary and final reports of Dr. Morgan, as well as all the instructions given to her, were disclosed to the Defendant by way of a Supplemental List of Documents, filed on 15 July 2019.

[54] The Court finds that the bases on which Dr. Morgan's report has been challenged have been overtaken or remedied by her final report, dated 20 April

2019 and filed on 9 July 2019. It is that final report that forms the subject matter of this application. The Court therefore finds that permission can properly be granted for the final report of Dr. Kai Morgan, dated 20 April 2019 and filed on 9 July 2019, to be tendered into evidence, at the hearing of the Assessment of Damages, without the need for her to attend for the purpose of cross-examination.

Other consideration

[55] Before parting with this matter the Court must also deal with a preliminary issue raised by Miss Dickens as to whether this application can properly be made orally. The Court is mindful of the provisions of rule 11.6(1) of the CPR which provides that the general rule is that an application must be in writing. An application may however be made orally, if permitted by a rule or practice direction or the court dispenses with the requirement for the application to be made in writing.

[56] In the circumstances of the instant case, the Court will dispense with the requirement for this application to be made in writing. The Court is satisfied that the rules of natural justice have been met. Notice of this application was first provided to the Defendant in June of 2019 and again in July of the same year. A copy of Dr. Morgan's preliminary and final reports were served on the Defendant in June and July of 2019, respectively. The Defendant was afforded an ample opportunity to respond to the application by way of affidavit evidence, had she deemed that to be necessary and to be heard in relation to each of the issues that arise on the application, including the opportunity to reduce those submissions in writing. The Defendant also had an ample opportunity to provide the Court with authorities in support of the different submissions advanced on her behalf.

CONCLUSION

[57] By way of summary, the Court finds that the provisions of section 7 of the Act of 1623 do not apply to the cause of action in the instant case, as pleaded. Secondly, in the interests of justice, the minor Claimant ought properly to be allowed to amend her statement of case, to better particularize the injuries she sustained, as they have subsequently presented, as a result of the negligence of the servants and/or agents of the Crown, as pleaded. Finally, Dr. Kai A.D. Morgan can properly be appointed an expert witness for the purpose of the hearing of the Assessment of Damages and permission can properly be granted for her final report, dated 20 April 2019 and filed on 9 July 2019, to be tendered in evidence, at the hearing of the Assessment of Damages, without the need for her to attend the hearing.

DISPOSITION

[58] It is hereby ordered that: -

(1) The Claimant is permitted to amend her statement of case in terms of the Further Amended Particulars of Claim, filed on 15 July 2019, with the exception of the injury pleaded at paragraph (v) of the Particulars of Injuries and Loss of Amenities which has been pleaded as “Traumatic brain injury and damage as a result of deprivation of oxygen”;

(2) Dr. Kai A.D. Morgan is appointed an expert witness for the purpose of the hearing of the Assessment of Damages;

(3) Permission is granted for the Claimant to tender into evidence the final report of Dr. Kai A.D. Morgan, dated 20 April 2019 and filed on 9 July 2019, at the hearing of the Assessment of Damages, without the need for her to attend the hearing;

(4) Subject to the provision of Written Submissions and Authorities on the issue of costs, which are to be filed and served on or before 24 January

2020, the costs of this Application are awarded to the Defendant and are to be taxed if not sooner agreed;

(5) Each party is granted leave to appeal;

(6) The Claimant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.