

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 92/2012

BETWEEN	JHAMIELLAH GORDON	APPELLANT
AND	JEVON PAUL DEVERE CHEVANNES	RESPONDENT

Written Submissions filed by Reitzin & Hernandez for the appellant

Written Submissions filed by Nunes Scholefield DeLeon & Co for the respondent

17 August 2012

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

IN CHAMBERS

PANTON P

[1] On 20 June 2012, Master Audre Lindo denied the appellant's application to call Dr Charmian Webb as an expert witness at the trial of an action brought against the respondent. The issue to be determined is the quantum of damages payable to the appellant who was injured in a motor vehicular accident caused by the respondent's negligence.

[2] It is agreed that in refusing the application the Master said:

"As it relates to Dr. Webb, based on the qualifications set out, she appears to be sufficiently qualified to be called an expert, however the reports which have been served do not indicate that Dr. Webb can provide independent assistance, which is independent and unbiased. As such, I do not think that Dr. Webb can be permitted to be an expert and for her reports to be put in as expert reports."

The Master has to be interpreted as saying that Dr Webb would be biased and would lack independence if she was called as a witness. However, there is no explanation provided by the Master for arriving at that conclusion, while at the same time stating that the doctor was qualified to be an expert.

Grounds of appeal

[3] Five grounds of appeal were filed by the appellant. They are as follows:

- i) The learned Master failed to appreciate that, in determining whether to grant permission to the appellant to call Dr. Webb and to put in her medical reports, the learned Master ought to have confined herself to those matters set out in rule 32.6(1) of which she was required to be satisfied in order to grant such permission, namely, the name of the proposed expert and the nature of her expertise.
- ii) The learned Master failed to appreciate that, having been satisfied of the matters set out in rule 32.6(1), the Master ought not to have had regard to the contents of Dr. Webb's reports themselves and that, in doing so, the learned Master was acting on a wrong principle and/or was taking into account irrelevant considerations.
- iii) In the event that it be held that the learned Master was entitled to have regard to the contents of Dr. Webb's

medical reports, the learned Master erred in holding that she could not be satisfied of Dr. Webb's independence and lack of bias as there was no evidence to the effect that Dr Webb not [sic] independent or was biased nor was there any or any sufficient indication thereof in Dr. Webb's reports.

- iv) There was no proper basis for holding that the learned Master could not be satisfied that Dr. Webb could give independent, unbiased assistance to the court.
- v) If it be held that there was a proper basis for the learned Master to doubt whether Dr. Webb could give independent, unbiased assistance to the court, the learned Master erred in refusing to grant permission to call Dr. Webb and to put in medical reports prepared by her since the proper course was to have granted permission thereby enabling the judge, on the hearing of the assessment of the appellant's damages, to determine, in the light of cross-examination of Dr. Webb, whether she was [sic] reason to find that she lacked independent and/or was biased and, if so, to have decided what weight to give Dr. Webb's evidence."

Expert Witness

[4] Part 32 of the Civil Procedure Rules deals with the evidence of an expert witness. Such evidence is to "be restricted to that which is reasonably required to resolve the proceedings justly" (32.2). The expert's duty is to "help the court impartially on the matters relevant to his or her expertise" and this duty overrides any obligations to the person instructing or paying (32.3).

[5] The Court's permission is required for a party to call an expert witness. (32.6(1)) In seeking permission, a party must name the expert and identify the nature of the

expert witness's expertise. However, no expert's evidence may be called or put in unless a report of the intended evidence has been served on the other party (32.6(3) & (4)). An expert witness must address his or her report to the court and not to the instructing party (32.12).

[6] "Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert witness uninfluenced as to form or content by the demands of the litigation" (32.4(1)). "An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within the expert witness's expertise" (32.4(2)).

Grounds (i) & (ii) – Did the Master err by looking at the reports?

[7] The appellant has complained that the Master, by looking at the reports, has taken into account irrelevant considerations. According to the submission, the Master should have confined herself to the name of the proposed expert and the nature of her expertise. The respondent submitted that the Master was entitled to consider the reports which had already been served, and that there were indications on those reports that Dr Webb's evidence was not independent. The respondent further submitted that the Rules are silent as to the specific matters that the Court should consider in exercising its power to grant permission. The court, it was submitted, is at liberty to consider any matter which would be of assistance in determining whether the proposed expert evidence would be able to fulfil its ultimate purpose as specified in rule 32.

[8] I fail to see how the mere consideration of a report of a proposed expert witness would make a judicial decision to grant or not to grant permission an erroneous one. Generally speaking, it would seem to me that consideration of a report is more likely to be helpful rather than not. It may well be that although the witness qualifies as an expert, the material to be introduced into evidence is wholly irrelevant to the issues for determination at the trial. In such a situation, a party would be properly prevented from calling a witness who would merely be causing a lengthening of a trial, as well as, the incurring of unnecessary costs. In the instant case, the reports having been served, the Master cannot be faulted for looking at them. The Master, of course, had to bear in mind that she was not trying the issues in the case. However, a consideration of the reports might have been helpful in determining relevance and the appropriateness of granting or refusing permission. In the circumstances, grounds (i) & (ii) are without merit.

Grounds (iii) & (iv) – Was there evidence of lack of independence or bias on the part of Dr Webb?

[9] In concluding that Dr Webb was not in a position to provide independent and unbiased assistance to the trial court, the Master did not give a reason. It is my view that a conclusion of this nature ought not to be arrived at lightly in respect of a professional person. There ought to be hard evidence of bias and lack of an independent position for the Master, at a case management conference, to exclude a report of an expert where the expert is qualified and has indicated his or her appreciation of the duty that is owed to the court. Consequently, I found it necessary to get sight of the reports in order to see what may have caused the Master to conclude

as she did. I do not think the appeal can be properly dealt with otherwise. Seeing that the reports were not included in the record of appeal, I called for their submission. They were presented to me on 14 August 2012. I note that Dr Webb has prepared two reports – one dated 3 December 2010, and the other dated 6 October 2011. The former contains:

- a) An account of the accident;
- b) A summary of the findings of a medical examination done on the appellant at the Andrews Memorial Hospital; and
- c) The treatment prescribed by medical personnel at the said hospital.

[10] It is clear that the December 2010 report was not based on an examination done by Dr Webb. Rather, it was based on the examination and findings of others. In the circumstances, Dr Webb cannot be regarded as an expert witness in respect of this report which breaches the rule against hearsay.

[11] The report dated 6 October 2011 consists of two pages. On the first page, Dr Webb states that she examined the appellant on 5 October 2011 and she sets out her findings and recommendations. The second page presents an interesting picture in that it is in identical terms as that of page 2 of the report dated 3 December 2010. The second page also contains what appears to be an internal conflict with a statement on the first page. On the first page it is stated that the appellant had been working part time but would be doing so full time as of 10 October 2011. On the face of it, that suggests an improvement in her condition. However, on the second page the report

states that the appellant has had to discontinue her part time job as it requires lifting. This suggests that even part time work had become too much for the appellant. The significant point about this report, however, is not this apparent conflict. Rather, it is the fact that the second page is a reproduction of the contents of the December 2010 report which is entirely hearsay.

[12] There is no evidence of lack of independence or bias on the part of Dr Webb. To that extent, the Master erred in so concluding. However, in considering the reports that Dr Webb has prepared, it is obvious that her first report is wholly inadmissible whereas in the case of the report dated 6 October 2011, she may properly be called as an expert witness but only in respect of the contents of page 1. Her evidence must be restricted to the examination she said she conducted on the appellant on 5 October 2011, and her findings and assessment thereon.

[13] The appeal has therefore been partially successful. It is accordingly ordered as follows:

- i. The appeal is allowed in part.
- ii. The appellant is hereby granted permission to call Dr Charmian Webb as an expert witness limited to her examination of the appellant on 5 October 2011.
- iii. The assessment of damages is to proceed in the Supreme Court on a date to be fixed by the Registrar of the Supreme Court.
- iv. The respondent is to pay half costs of the appeal to be agreed or taxed.