[2010] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS 195/2009, 73/2010 and 78/2010

BETWEEN	MONICA HARRIS	CLAIMANT/APPLICANT
AND	LAWSON H. ATKINS	1ST DEFENDANT
AND	MENTORS LTD	2ND DEFENDANT/1ST RESPONDENT
AND	BRIAN YOUNG	3RD DEFENDANT/2ND RESPONDENT
AND	HOWARD FOSTER	4TH DEFENDANT/3RD RESPONDENT
AND	ROBERT FOSTER	5TH DEFENDANT/4TH RESPONDENT
AND	ANTHONY RANDALL	6TH DEFENDANT

Patrick Foster QC and Miss Catherine Minto instructed by Nunes Scholefield Deleon & Co. for applicant

David Johnson instructed by Samuda & Johnson for 1st respondent

Stephen Shelton instructed by Myers Fletcher & Gordon for 2nd respondent

Mrs Denise Senior-Smith instructed by Mrs Pauline Brown-Rose for 3rd and 4th respondents

July 13; and 28 September 2010

IN CHAMBERS

HARRISON, JA

Introduction

[1] The applicant seeks permission to appeal a case management order made by Donald McIntosh, J. on 9 November 2009 whereby he refused to grant the applicant leave to rely on the medical report of her doctor without having to call him at the trial. He also refused to grant her permission to appeal this order.

Background to the Application

[2] The applicant was injured as a result of a four vehicle accident which occurred on 29 May 1998 along the Rock main road, Trelawny, in the vicinity of the Martha Brae Bridge. She alleges that whilst she was traveling as a passenger in the 1st defendant's Toyota Hiace bus, the said bus collided with another vehicle whereby she sustained injuries and suffered loss and damage as a result of the negligence. The applicant commenced her claim against the respondents in 2004.

[3] She was medically examined by three doctors; two in Jamaica and the other in the United States of America. The medical report prepared by Dr K. Boxhill of the Cornwall Regional Hospital, is dated 10 December 1998. It speaks of a fracture of the applicant's right ankle and states that the applicant's orthopedic follow up was "uncomplicated." Dr Ueker's medical report is dated 16 March 1999, and states that the applicant suffered a fractured right ankle and three inches shortening of the right leg. The medical report from Dr Colizza was prepared in March 2004 and was based on examination of the applicant in 2002 and 2003. He reported that there was advanced

degeneration and fusion of the applicant's right hip joint, with right tibial plafond and fibula fractures resulting in a two-inch limb length discrepancy. He also stated that there were tears in the lateral meniscus and medial meniscus of her right knee. He opined that the fusion of the right hip may have been the result of the motor-vehicle accident, or possibly some pre-existing condition. He further stated that the injuries which were diagnosed in October 2003 were directly as a result of the motor vehicle accident which occurred in 1998.

[4] King, J. held a case management conference on 30 January 2008, and he ordered inter alia, as follows:

> "1. The following doctors are certified as medical experts pursuant to Part 32.6 of the Civil Procedure Rules and their medical reports filed herein are certified as expert reports:
>
> 1. Dr. K. Boxhill - Consultant Resident
> 2. Dr. David Lambert - Family Physician
> 3. Dr. Wayne Colizza - MD Orthopaedic Surgeon
> 4. Dr. Ueker - Orthopedic Consultant.
>
> 2. That the Claimant be permitted to rely on the medical reports prepared by Dr. Boxhill, Dr. David Lambert, Dr.Ueker and Dr. Wayne Colizza and dated December 10, 1998, March 4, 1999, March 16, 1999 and March 14, 2004 and May 5, 2004 respectively at the trial of this matter, pursuant to Part 32.6 (1) of the Civil Procedure Rules, if agreed.
> ...
>
> 9. Pre Trial Review set for June 23, 2008 ...
>
> 10. Trial scheduled for three days on October 22, 23, and 24 2008."

[5] The trial did not take place in October 2008 so new trial dates were fixed for 25, 26 and 27 November 2009.

[6] On 15 June 2009, the applicant sought leave of the court to dispense with the attendance of Dr Colizza as a witness and to rely on his report at the trial. The applicant sought the following order:

> 1. That the claimant be permitted to tender the medical reports of the doctor at the Assessment of Damages herein without calling the doctor.

The grounds on which the claimant sought the orders are as follows:

> 1. Pursuant to Part 32 of the Civil Procedure Rules.
>
> 2. Pursuant to section 31E of the Evidence Act.
>
> 3. The Claimant requires the medical doctor evidence to establish her claim.
>
> 4. The Claimant's doctor resides overseas and it is reasonably impracticable for him to attend.

[7] The affidavit in support which was filed 10 September 2009 and sworn to by Anna Harry, attorney-at-law of Nunes Scholefield DeLeon & Co., states inter alia as follows:

> " ...
>
> 5. That on March 25, 2008 we filed a Notice of Intention to tender hearsay statements pertaining to, inter alia, the Claimant's medical treatment and medical expenses at the trial without calling the makers of these documents and this Notice was served on the

Defendants. (N.B the medical reports are from: Dr. K. Boxhill, Cornwall Regional Hospital; Dr. David Lambert, Dr. Ueker and Dr. Wayne Colizza)

6. That the fourth and fifth Defendants have filed a Notice Objecting to the medical reports of Dr. Wayne A Colizza and medical expenses which were incurred by the Claimant in the United States of America and the Second and Third defendants have filed a Notice objecting to "ALL" the hearsay documents which the Claimant would be seeking to rely on at the trial ...

7. That the Second and Third Defendants' objection was not made in good faith, but was made to frustrate the Claimant ...

8. That my firm was advised by the Claimant... that the Claimant cannot financially afford to secure ALL the medical doctors at the trial, given the cost and hourly rates for the doctors to attend at trial.

9. That my firm was also advised by Dr. Wayne A Colizza that he would be unable to attend for the trial in Jamaica as this would cause considerable hardship to his medical practice ..."

[8] Donald McIntosh, J. made the following order on 9 November 2009:

"1. The Claimant's application is refused. The Court is of the view that it would be unjust and manifestly prejudicial to the Defendants to allow the report of Dr. Wayne Colizza to be tendered at the trial to commence on November 25, 2009 particularly when the Claimant knew from as far as back as April 2008 that the doctor would be required to give evidence in court. The Claimant ought to have known of her pecuniary situation or inability to afford the doctor and if so, the application should have been made at least before the Pre Trial Review.

2. Costs of today to the 2nd, 3rd, 4th and 5th Defendants.

3. Leave to appeal refused."

Application to the Court of Appeal

[9] The applicant renewed her application to the Court of Appeal and sought the following order:

> "That the applicant be granted leave to appeal the judgment of the Honourable Mr. Justice Donald McIntosh made on the 9th of November 2009."

[10] This application is made pursuant to rule 1.8 of the Court of Appeal Rules 2002 and the grounds in support state inter alia:

> "...
>
> 4. The Applicant has a real chance of success on the appeal. The Applicant intends to appeal the said decision on the following grounds:
>
> a. The Learned Judge erred as a matter of fact and/or law and/or wrongly exercised his discretion when he determined that the only relevant legal considerations and which were final and determinative of the issues and matter before Him were that:
>
> a. The application ought to have been made from "at least before the Pre-Trial Review"
>
> b. The Respondents would be prejudiced by the application.
>
> b. The Learned Judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in failing to carry out the necessary "balancing exercise" between the factors in favour of

Claimant and the factors in favour of the Respondent

c. The Learned Judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in finding that the Respondents would be prejudiced in the specific circumstances of this case where

(i) The Claimant had consented to be examined by the Respondents' experts, Dr. Grantel G. Dundas, Orthopaedic Surgeon

(ii) An appointment had been scheduled for the said medical examination

(iii) The Rules permit the Respondents to submit question to the Claimant's experts.

(iv) There was already a real likelihood that the trial date would be lost

d. The learned judge erred as a matter of law and/or wrongly exercised his discretion in that he failed to give any consideration to or failed to properly consider the clear purpose and intent of Rules 32.7 and 32.8 of Part 32 of the CPR, which requires that expert evidence should be given by a written report unless the court directs otherwise.

e. The Learned Judge erred as a matter of law and/or wrongly exercised his discretion in that the effect of his decision is that the Claimant would be required to call four (4) expert witnesses/medical doctors to give

evidence at the trial of this matter, and this without any proper consideration of whether prejudice would be caused to the Respondent by the expert evidence being given in written reports.

f. The learned judge erred as a matter of fact and/or law and/or wrongly exercised his discretion in failing to consider section 31E of the Evidence Act and in particular Section 31E (4) (c) in determining the application.

g. The learned judge erred as a matter of law and/or wrongly exercised his discretion in failing to accept the Applicant's submissions that once it is proved to the satisfaction of the court, that the expert is outside Jamaica and it is not reasonably practicable to secure his attendance at the trial for financial reasons, the court has no residual discretion to reject the application.

h. The learned judge erred as a matter of law and/or wrongly exercised his discretion in failing to accept the Applicant's submissions that in light of the wording of section 31E of the Evidence Act, an application of this nature may be made at the trial of this matter.

i. The Decision of the Learned Judge was unreasonable in light of the above grounds of appeal.

5. The Appeal raises issues which require adjudication by this Court namely:

1. What is the relationship between Parts 32.7 and 32.8 of the Civil Procedure

Rules and Section 31E (4) of the Evidence Act, and how is section 31E of the Evidence Act to be applied and interpreted in light of Part 32.7 and 32.8 of the Civil Procedure Rules?

2. Whether section 31E of the Evidence Act, is rendered nugatory by the Civil Procedure Rules.

3. What are the legal considerations in determining when an expert report should be calked at the trial to give evidence or to give evidence in the form of a written report."

[11] An affidavit sworn to by Catherine Minto, attorney-at-law, on 12 November 2009 was filed in support of the application.

The Submissions

[12] Mr Patrick Foster QC for the applicant argues that in essence there is substance in the proposed appeal and that there is a real chance of success in the appeal having regards to the proposed grounds of appeal filed.

[13] He submitted that the learned judge erred in the exercise of his discretion on three main grounds. First, the learned judge failed to carry out the necessary "balancing exercise" between the factors in favour of the claimant and those in favour of the defendants. Such an exercise, he said, ought to have been embarked upon, notwithstanding the learned judge's finding that the application was made late - see **Holmes v SGB Services Pic** [2001] EWCA Civ. 354. He submitted that there is no indication from the learned judge's reasons that he had considered the prejudice which

would be occasioned to the claimant by his refusal of the application. The claimant he said had deponed that she was unable to afford the costs to secure Dr Colizza at the trial, and therefore a refusal of the application would result in the claimant abandoning the expert report and opinion of Dr Colizza. He submitted that Dr Colizza had been treating the claimant since 2002, and was the only expert who had assessed the claimant's permanent disability rating arising from her injuries.

[14] Secondly, Mr Foster submitted that the learned judge failed to consider that the respondents had called upon the claimant to bring four doctors to the trial in this matter, and that there was no evidence that the respondents would be prejudiced by the reports being given in a written format. He argued that the judge had only considered the prejudice to the respondents but that prejudice, he said, was likely to be eroded by the fact that:

> "(i) The Claimant had consented to be examined by the Respondents' own experts Dr. Grantel G. Dundas, Orthopaedic Surgeon
>
> (ii) An appointment had been scheduled for the said medical examination
>
> (iii) Dr. Dundas is competent to comment on the expert opinion and conclusions of Dr. Collizza.
>
> (iv) There was already a real likelihood that the trial date would be lost given the date of the said examination
>
> (v) The Rules permit the Respondents to submit question to the Claimant's experts."

[15] Learned Queen's Counsel contended that these factors ought to have been considered by the learned judge as part of his investigation in order to strike a balance between the prejudices which would be occasioned to each party.

[16] It was also submitted by Mr Foster that the learned judge failed to consider that the clear intent and purpose of Parts 32.7 and 32.8 of the Civil Procedure Rules (CPR) was to obviate the time and expense usually occasioned by calling expert witnesses at the trial to give evidence. He submitted that the expert has a mandate to provide independent assistance and an unbiased opinion to the court on the matters within his expertise. He therefore submitted that the expert was not in an adversarial relationship with any party and should not as a matter of course be required to attend for cross-examination.

[17] Learned Queen's Counsel also submitted that the learned judge failed to give any consideration to section 31E (4) (c) of the Evidence Act. He submitted that in determining whether it is "reasonably practicable" for the applicant to secure the attendance of a witness who resides overseas at the trial, the court should consider: **the expense** in securing that witness - see **Ozzard - Low v Ozzard Low and Wonham** [1953] 2 AER 50. He submitted that in the instant case, the claimant is not merely exposed to the return journey for securing Dr Colizza at trial and his accommodation expenses while here in Jamaica, but his per diem cost of **US$8,000.00** for being away from his practise. This he said would amount to at least a three day cost of **US$24,000.00** as it would be imprudent to schedule any of the doctor's travel

on the day he is expected to give evidence. He therefore submitted that in view of (i) the doctor's stated inability to attend at the trial in Jamaica, as well as (ii) his cost to attend, the learned judge ought to have determined that it was not reasonably practicable for the claimant to secure Dr Colizza at the trial. He submitted that once it is proved to the satisfaction of the court, that the expert is outside Jamaica and it is not reasonably practicable to secure his attendance at the trial because of financial reasons, the learned judge had no residual discretion to disallow the application, and the report ought to have been allowed into evidence at the trial without more. [see **Ozzard - Low** case].

[18] Mr Foster QC finally submitted that the application underscores that there are legal issues which require adjudication by this Court, in particular:

> (a) What is the relationship between Parts 32.7 and 32.8 of the Civil Procedure Rules and Section 31E (4) of the Evidence Act. And, how is section 31E of the Evidence Act to be applied and interpreted in light of Parts 32.7 and 32.8 of the Civil Procedure Rules?
>
> (b) Whether section 31E of the Evidence Act, is rendered nugatory by the Civil Procedure Rules and;
>
> (c) What are the legal considerations in determining when an expert should be called at the trial to give evidence, in lieu of giving evidence in a written format.

[19] Mr. Stephen Shelton for the 2nd respondent submitted that in addition to any inconvenience and expense to the applicant, the judge could also have reasonably considered that the respondents were notified that the applicant intended to submit Dr

Colizza's written report into evidence in lieu of oral testimony late in the proceedings. He submitted that Dr Colizza's report was significantly different from the two medical reports prepared by the applicant's other expert in that it contained internal inconsistencies and alleged substantially more severe injuries than the other reports. He argued that Dr Colizza's report alleges significant injury to the applicant's ankle, knee and hip, whereas the two earlier reports alleged injury only to the applicant's knee. For these reasons, he submitted that the judge had properly determined that the witness should be brought to Court.

[20] With regards to section 31E of the Evidence Act (the Act), Mr Shelton submitted that in general, the procedural rules should not take precedence over substantive law. Here, rule 32.7(2) specifies that the admission of written expert evidence is subject to laws governing the admissibility of hearsay, including the Evidence Act. However, he submitted that in addition to the discretion given to the judge in section 31E, section 31L of the Act provides that "in any proceedings the court may exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value". He submitted that Dr Colizza's evidence was extremely prejudicial and that the probative value of his report was diminished by (1) the inconsistency with the other medical statements and (2) the internal inconsistencies in the document.

[21] Mr Shelton submitted that the learned judge had conducted a balancing exercise and it was within his discretion when he determined that the balance of circumstances required that Dr Colizza present himself in Court. Finally, he submitted that, based upon

the balance of factors, the learned judge could reasonably determine that according to principles of fairness and justice, and the other resources available to the applicant in Jamaica, the expense of bringing Dr Colizza to court in Jamaica is commensurate with the significant monetary damages that could be associated with the injuries he alleges in his report.

[22] Mr Johnson, for the 1st respondent, submitted that rule 32.7 of the CPR clearly recognizes that circumstances could exist where the overriding objective will only be advanced if the expert witness is called to give evidence at the trial. He argued that no agreement was arrived at between the parties for the applicant to rely on the said reports. He therefore submitted that the 1st respondent was under no obligation to put questions to the doctors. Consequently, he submitted that since there was no agreed medical report, expert witnesses must attend the trial for cross-examination.

[23] Mr Johnson submitted quite forcefully that the applicant could not properly pursue an application under the provisions of the Evidence (Amendment) Act to have the Medical Reports of Dr Wayne Colizza admitted into evidence at the trial for the following reasons:

(a) The Case Management Orders previously referred to herein are in the nature of Consent Orders and have not been set aside or varied by any subsequent Order.

(b) No application was made by the Applicant at the Pre-trial Review or otherwise, to set aside or vary the said Case Management Orders.

c) The application being pursued under the provisions of the Evidence (Amendment) Act therefore has the effect of indirectly challenging an Order regularly made by a Court of concurrent Jurisdiction.

d) In the event that the Order sought was granted, two (2) conflicting Orders would have existed in relation to the expert evidence of Dr. Colizza.

[24] Mr Johnson submitted that the words "reasonably practicably" in section 31E (4) (c) of the Evidence Act are to be given their- widest possible interpretation in view of section 31E (3) of the Act which preserves the right of the 1st and 2nd respondents to require the attendance of the person making the statement as a witness. The court he said, is to have regard to all surrounding factors such as the assessment of the applicant by Dr Colizza, four years post accident, without the benefit of previous medical reports prepared contemporaneously with the accident.

[25] Mr Johnson finally submitted that the required balancing exercise was carried out by McIntosh, J. who had all the relevant material before him, including the affidavit evidence filed on behalf of the respective parties. He also submitted that there would be prejudice to the 1st respondent in admitting the medical reports of Dr Colizza into evidence without him being called as a witness at the trial, which prejudice outweighed any corresponding prejudice to the applicant. The reasons for this he said are that:

> "Dr. Colizza examined the Applicant 4 years after the accident without the benefit of the previous medical reports which provided the Applicant's post accident condition and history. Dr. Colizza's report was at variance with the previous medical reports prepared by the other medical pracUtioners. There was a critical inconsistency in the findings made by Dr. Colizza in the report which he prepared."

[26] Mrs Senior-Smith for the 4th and 5th respondents has contended on their behalf that the learned judge had correctly addressed the timing of the application and the prejudicial effect of the application on the respondents. She submitted that the application before McIntosh, J. ought properly to have been made on 23 June 2008 when the pre-trial review was held. Furthermore, she submitted that notice was given to the applicant since the filing of the 4th and 5th respondents' Defence on 30 April 2004, that they would be objecting to the use of Dr Colizza's medical reports at the trial. A formal Notice of Objection was also filed on 22 April 2008, with regards to the tendering of the medical reports into evidence. She submitted that the applicant's application at this late stage offended the ethos of the rules.

[27] Counsel further submitted that the applicant first visited Dr. Colizza in excess of four years after the accident when she had sustained a profound fracture of the right tibial plafond and had disclosed previously that she had no other aliment before the accident. It was therefore Mrs Senior-Smith's view that since Dr Colizza has diagnosed that the applicant had a "near complete fusion of her right hip which may have been the result of chondrolysis as a result of the motor-vehicle accident or possibly some pre-existing condition, the nature of which is unclear", then the respondents ought to be given the opportunity to cross-examine Dr. Colizza at the trial.

[28] With respect to section 31E (4) (c) of the Evidence Act, Mrs Senior-Smith submitted that in assessing this provision, the court should first ascertain if the CPR provide an alternative to the attendance of the witness, especially taking into account

the reason expressed for his attendance not being reasonably practicable. In this case she said that the applicant's sole reason is financial. She submitted however, that the CPR provides cheaper alternatives. With this alternative, she submitted the applicant has no good grounds to rely on section 31E (4) (c) having not looked at this option and having not disclosed to the court the impracticality of same.

[29] Mrs Senior-Smith finally submitted that even if the court finds section 31E (4) (c) applicable, the court should take into account the provisions of section 31L of the Act which provides that a court in any proceeding may exclude evidence "if, in the opinion of the court, the prejudicial effect outweighs its probative value." She submitted that it was indisputable that the prejudicial effect of the evidence provided by Dr Colizza outweighed its probative value as there was the risk that greater weight may be attached to the evidence than is warranted.

The Discussion

[30] Save for a few exceptions, which are not applicable in the present matter, a party who wishes to appeal an interlocutory judgment or order must obtain permission to appeal from the judge below or the Court of Appeal (section 11 (1) (f) of the Judicature (Appellate Jurisdiction) Act). This is the mechanism by which the court ensures that the only appeals that are brought to the court are those which it is appropriate to bring. The principal means by which this is done is by only granting permission to appeal where the court considers that the appeal would have a real

prospect of success or that there is some other compelling reason why the appeal should be heard - see Part 1.8(9) of the Court of Appeal Rules.

[31] It must also be borne in mind that an application seeking permission to appeal does not require an analysis of the grounds of the proposed appeal to ascertain whether the appeal will succeed; the court has only to decide whether there is a real prospect of success. A real chance of success has been decided by the authorities to mean a realistic as opposed to a fanciful prospect of success (see **Swain v Hilman** [2001] 1 All ER 91, which was applied by this Court, in **Paulette Bailey et al v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** SCCA No. 103/2004, delivered 25 May 2005).

[32] Although there is preference for written expert testimony under the CPR, those rules are substantially qualified to permit a judge to exercise his or her discretion to determine whether or not to require an expert to give evidence in person. [rule 32.7(1) of the CPR]. Of course one will also have to bear in mind the overriding objective of the CPR (as set out in rule 1.1). In **Holmes v SGB Services** 2001 WL 272948, Lord Buxton noted as follows:

> "in making a decision under the overriding objective the court has to balance all those considerations that are set out under that heading without giving one of them undue weight. It is essentially... a matter for the judge's management, and it would be wrong for [the Court of Appeal] to give, or judges to seek, any direction suggesting that one or other of those criteria was more or less important."

[33] The authorities have also clearly established that an order made at a case management conference should stand unless it can be shown that the learned judge erred in principle and exercised a discretion that he did not have.

[34] The learned judge in the instant matter did not set out his reasons for refusing the application in a written judgment but his order does contain a brief statement why he refused the application. He considered that it would be unjust and manifestly prejudicial to the respondents to allow the report of Dr Colizza to be tendered at the trial which was to commence on 25 November 2009, particularly when the applicant knew from as far back as April 2008 that the doctor would be required to give evidence in court. He further expressed the view that the application ought to have been made at least before the pretrial review.

[35] In my judgment, the point by the respondents that there is conflict between the findings of Dr Colizza and the other doctors who had examined the applicant quite earlier than he did, cannot be overlooked. Dr Colizza first examined the applicant in excess of four years since the accident and he spoke of injuries that were different and apparently more severe than those mentioned in the medical reports of Doctors Boxhill and Ueker. It was also Dr Colizza's view that the injuries could have been caused by the accident or by a pre-existing condition. Certainly, these are matters which would most certainly call for cross-examination of the doctor.

36. Given the factual situation disclosed in the affidavits and medical reports, the applicant, in my view, has not shown where the learned judge has improperly exercised

his discretion in refusing the application to have the medical report of Dr Colizza tendered and admitted in evidence at the trial. I do agree with the submissions of Mr Shelton where he said that the factors against admitting the statement in lieu of oral testimony included:

> "(1) the severity the injuries alleged in Dr. Collizas report when compared to the injuries alleged to the other medical reports the Applicant has submitted.
>
> (2) the fact that the Applicant has other medical reports available which she may submit into evidence.
>
> (3) the internal inconsistencies in the document which could prejudice the Respondent's defence, and
>
> (4) the fact that the Respondents were notified that the Applicant intended to submit the written report into evidence in lieu of oral testimony late in the proceedings."

[37] Despite the attractive submissions made on the applicant's behalf by Mr Foster QC, it has not been shown that the learned judge has improperly exercised his discretion in refusing the application made by the applicant. In my judgment, the learned judge was exercising the discretion afforded him by (1) the Civil Procedure Rules, (2) sections 31E and 31L of the Evidence Act. It has not been shown that the he has erred in principle or exercised a discretion which he did not have. There is merit indeed, in the submissions made on behalf of the respondents. In the circumstances, the application seeking permission to appeal is therefore refused. Costs are awarded against the applicant in favour of the first, second, third and fourth respondents; such costs to be agreed or taxed.

[38] In view of the decision arrived at in relation to the application seeking permission to appeal (Application No. 195/09) it will not be necessary to consider the applications seeking security for costs (Applications No. 73/10 and 78/10).